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SECRET INTERNAL MEMORANDUM	
TO	MS BS MABANDLA, MP MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
FROM	ADV VP PIKOLI NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES
REF NO.	3/2P (PCLU)
DATE	15 FEBRUARY 2007

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

- (a) Inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;
- (b) Inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

- The Department of Justice and Constitutional Development
- The Intelligence Agencies (NIA)
- The South African National Defence Force
- The South African Police Service (SAPS)
- Correctional Services
- The National Prosecuting Authority
- Office of the President

Task Team comprising members of the following Departments or institutions:

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental

2.1.2 In its deliberations, the Task Team took cognisance of the fact that in terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution and the National Director has full discretion on whether a particular prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

2.1.1 On 23 February 2004, a Director-General's Forum, under the chairpersonship of the former Director-General: Justice and Constitutional Development (Adv Vusi Pikoli) appointed a Task Team to consider and report on, "the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past".

2.1 Background relating to initial proposals

2. BACKGROUND INFORMATION

(b) propose a way forward.

2.1.4 It was proposed that the functions of the proposed Task Team should, among others, be the following:

"(a) Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.

(b) To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—

(i) the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;

(ii) the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision." (Emphasis added)

2.2 Background relating to Amended Prosecution Policy

2.2.1 As the Minister is aware, the abovementioned recommendations were not implemented, since many held the view that the proposed functions of the Task Team could be unconstitutional in view of the provisions of section 179 of the Constitution. Subsequently, Government decided that it was important to deal with these matters on a uniform basis in terms of a specifically defined prosecutorial policy and directives.

2.2.2 Therefore, it was proposed that the National Director, with the concurrence of the Minister, should issue amended Prosecutorial Policy and Directives in terms of section 179(5)(a) of the Constitution, read with section 21 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), and that such

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¹ Attached hereto as Annexure "A".
² See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.
³ See paragraph A.1(c) and (d) of Appendix A.

- 3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:¹
- (a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).
 - (b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.²
 - (c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.³
 - (d) It is important to note that the President made it clear that —
- 2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament and is binding on the prosecuting authority.
3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY
- Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

- 3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:
- (a) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson CCT 30/03.*)⁴
 - (b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).
 - (c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.
 - (d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.
- (i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the normal legal process;
 - (ii) in order to reach a well-considered decision, the NPA should work together with the Intelligence Agencies, which include the NIA and the SAPS;
 - (iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be in accordance with standard and normal execution of justice;
 - (iv) such agreements should be in accordance with the NPA's prosecution mandate; and
 - (v) such agreements should be in accordance with existing legislation.

4.1 Since the coming into operation of the Amended Prosecution Policy, the NPA has experienced various problems relating to the implementation thereof. These problems are hindering and obstructing the NPA in fulfilling its constitutional

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

3.4 From the above, it is clear that in relation to the relevant offences—

(a) the decision whether to prosecute or not vests in the prosecuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;

(b) such decision must be exercised in accordance with the Constitution and existing legislation;

(c) the above-mentioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

3.3 In respect of procedural arrangements, which must be adhered to in the prosecution process, the Amended Prosecution Policy provides, among others, in particular that—

(a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;

(b) the PCLU "shall be assisted in the execution of its duties" by a senior designated official from the following State departments or other components of the NPA:

(i) The National Intelligence Agency.

(ii) The Detective Division of the South African Police Service.

(iii) The Department of Justice & Constitutional Development.

(iv) The Directorate of Special Operations.

mandate, namely, to institute criminal proceedings without fear, favour or prejudice. On the one hand, the NPA is experiencing problems investigating cases to ascertain whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, since the SAPS and NIA had not made dedicated members available to assist the NPA in this regard. This was subsequently dealt with by the setting up of a "Task Team". On the other, the NPA is now experiencing problems relating to the interpretation of the role of the other State Departments in the process. As indicated hereunder, it seems as if the SAPS and NIA hold the view that the proposals relating to the original proposed Task Team (that were rejected by Government), must be implemented and that such Task Team should play a role in the decision-making process.

4.2

During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the above-mentioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jaffa of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.

4.3

Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—

- (a) the terms of reference of the Task Team were explained and agreed to;
- (b) it was agreed that Dr Silas Ramatse (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

Furthermore, on an issue raised by the representative of NIA, the National Director was explicit in explaining that the mandate of the Task Team would not entail making any recommendations on a decision whether to prosecute or not to prosecute and that the National Director would not be dependent on receiving such a recommendation before he could make a decision. The Task Team should be responsible for overseeing that the NPA obtain the necessary information or to give inputs so as to assist and enable the National Director to reach a well-considered decision whether to institute criminal proceedings or not. Furthermore, the Task Team should deal with all relevant matters identified by the PCLU and the SAPS.

4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked "B" from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as Annexures "C" and "D", respectively)

4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.

4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

indicates that he had a discussion with his representative on the Task Team and he received a copy of the National Commissioner's letter. He concurs with the views of the National Commissioner.

4.5

In the first instance, it is important to note that as far as the NPA is concerned, this Task Team was not set up in terms of the Amended Prosecution Policy, which include the guidelines on TRC matters, but in terms of internal agreement between the relevant stakeholders. Furthermore, the NPA is not aware of any agreement or arrangement in terms of which the Task Team must submit a report to a Committee of Directors-General and which Committee must advise the NPA regarding prosecution decisions. Reading the e-mail of Dr Jacobs and the letter of the National Commissioner in context, it seems as if the above process is a proposal by the National Commissioner and not an agreement reached by the Task Team. For example, Dr Jacobs points out that—

- the National Commissioner is of the opinion that it must be established what disclosures were made....";

- "the National Commissioner is of the opinion that such process need to be followed in each case...."

In the same vein, the National Commissioner writes as follows:

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken."

- "In my view a comprehensive report...should be discussed by the Directors-General".

⁵ See paragraph B.6 of Appendix A.

- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made." (Emphasis added)
- 4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.
- 5. CONCLUSION AND WAY FORWARD
- 5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy⁵, the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

Adv VP Pikoli
National Director of
Public Prosecutions
15.02.2007

- 5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.
- 5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.
- 5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.