REPRESENTATIONS OF LUKHANYO CALATA TO THE COMMISSION OF INQUIRY INTO STATE CAPTURE:

CAPTURE OF THE CRIMINAL JUSTICE SYSTEM IN RELATON TO THE TRC CASES

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INTRODUCTION

1. My full name is Lukhanyo Bruce Matthews Calata. I am an adult male journalist, author and filmmaker born on 18 November 1981. I am currently employed as the Programme Editor at Open News in Cape Town.

2. The purpose of these representations is to formally request the Judicial Commission of Inquiry into Allegations of State of Capture, Corruption and Fraud in the Public Sector including Organs of State (also referred to as "**the State Capture Commission**" or "**the Commission**") to investigate the political interference which resulted in the suppression of virtually all the 300 cases referred by the Truth & Reconciliation Commission ("**TRC**") to the National Prosecuting Authority ("**NPA**").

3. I make these representations on behalf of my mother, Nomonde Liza Calata, and my sisters, Dorothy Calata-Dombo and Tumani Pauline Calata. My father was the late Fort Calata, who together with Matthew Goniwe, Sicelo Stanely Mhlauli and Sparrow Thomas Mkhonto ("**The Cradock Four**") were brutally murdered by apartheid era security personnel near Port Elizabeth on 27 June 1985.[1]

4. I also make these representations on behalf of other victims of apartheid era crimes. These include:

   4.1. Thembi Nkadimeng, the sister of Nokuthula Simelane who was abducted tortured and murdered by the Security Branch ("**SB**") in 1983

   4.2. Imtiaz Cajee, nephew of Ahmed Timol who was tortured and murdered by the SB at John Vorster Square in 1971.

   4.3. Lasch Mabelane, brother of Mathews Mabelane who was tortured and killed while in SB detention at John Vorster Square in 1977.

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1 Lukhanyo and Abigail Calata, *My Father Died for This*, Tafelberg, 2018

4.4. Jill Burger, sister of Neil Aggett, who was tortured and killed by the SB in John Vorster Square in 1982;

4.5. Fatima Haron-Masoet and Muhammed Haron, daughter and son of Imam Haron who was tortured and killed in SB detention in Cape Town in 1969;

4.6. Sarah Lall, sister of Dr Hoosen Haffajee, who was tortured and killed at the Brighton Police Station in Durban in 1977.

5. Details of these cases and many others can be supplied on request. To the extent necessary the said family members and I stand ready to testify before the State Capture Commission. We have been struggling for justice and closure over several decades. Our struggles are symbolic of those waged by countless other families. The sacrifices made by our loved ones laid the basis for South Africa's democracy with its enshrined freedoms. We have all been deeply betrayed by the new South Africa.

6. Common to all these cases, and virtually all the 300 cases referred by the Truth & Reconciliation Commission ("**TRC**") to the National Prosecuting Authority ("**NPA**"), is that they were all deliberately suppressed, and the perpetrators shielded from justice. This was the result of political interference from the highest levels of government which was brought to bear on the NPA and the South African Police Service ("**SAPS**").

7. This interference amounted to state capture since powerful forces in society were able to impose their will on institutions meant to uphold the rule of law in order to guarantee total impunity for perpetrators of some of the most serious crimes ever committed in South Africa.

8. Our request for an inquiry is endorsed by several former commissioners and committee members of the TRC and civil society organisations who stand ready to cooperate with the Commission. On 5 February 2019 they called on

the President to offer an apology to victims and appoint a commission of inquiry into the political interference.[2] They include:

8.1. Desmond & Leah Tutu Legacy Foundation on behalf of Archbishop Emeritus Desmond Mpilo Tutu
8.2. Dumisa Ntsebeza SC
8.3. Yasmin Sooka
8.4. Mary Burton
8.5. Glenda Wildschut
8.6. Dr Fazel Randera
8.7. Richard Lyster
8.8. Revd Bongani Finca
8.9. Denzil Potgieter SC
8.10. Prof Piet Meiring.
8.11. Dr Wendy Orr
8.12. Dr Russell Ally
8.13. Foundation for Human Rights
8.14. Centre for the Study of Violence and Reconciliation
8.15. Khulumani Victims Support Group
8.16. Institute for Justice and Reconciliation
8.17. Human Rights Media Centre
8.18. Ahmed Timol Family Trust
8.19. South African History Archives

OVERVIEW

9. The historic compromises made during South Africa's negotiations demanded that justice be pursued for serious apartheid-era crimes, such as torture, kidnapping and murder. This was encapsulated in the postscript to the

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2 *'No justice for apartheid victims' – Apologise and appoint inquiry, TRC members tell Ramaphosa*, City Press, 2019-02-06, available at: https://city-press.news24.com/News/no-justice-for-apartheid-victims-apologise-and-appoint-inquiry-trc-members-tell-ramaphosa-20190206

kidnapping and murder. This was encapsulated in the postscript to the Constitution of the Republic of South Africa Act 200 of 1993 ("**the Interim Constitution**") and subsequently in the Promotion of National Unity and Reconciliation Act 34 of 1995 ("**the TRC Act**").

10. The constitutional and statutory design of the amnesty process specifically envisaged that criminal investigations, and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or failed to apply for amnesty. This lay at the heart of the compact struck with victims. The compact required the State to take all reasonable steps to pursue justice where perpetrators were not amnestied.

11. The TRC's Final Report released on 21 March 2003 stressed that the amnesty should not be seen as promoting impunity. The TRC highlighted the imperative of "*a bold prosecution policy*" in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.[3] Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. We did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those refused amnesty. Sadly, this has not happened.

Political interference

12. Post the TRC, the story of post-apartheid justice in South Africa is a shameful story of terrible neglect. Both the SAPS and the NPA colluded with political forces to ensure the deliberate suppression of the bulk of apartheid era cases. Even though the TRC had handed over a list of several hundred cases to the NPA with the recommendation that they be investigated further, virtually all of them were abandoned. All these cases involved gross human rights violations in which amnesty was either denied or not applied for ("**the TRC cases**").

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[3] Vol 6, Section 5, Ch 1 at para 24

13. The reasons for the inaction on the TRC cases were exposed in the 2015 legal proceedings launched by Thembi Nkadimeng (Executive Mayor of Polokwane) who sought to compel the NPA to make a prosecutorial decision in the 1983 murder of her sister, Nokuthula Simelane, by Security Branch officers.[4] This application disclosed evidence of gross political interference in the operations of the NPA, as per the supporting affidavits of former National Director of Public Prosecutions ("**NDPP**"), Adv Vusi Pikoli ("**Pikoli**") and Anton Ackermann SC ("**Ackermann**"), former Special Director of Public Prosecutions in the Office of the NDPP and former head of the Priority Crimes Litigation Unit ("**PCLU**"). The aforesaid NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases.

14. A secret Amnesty Task Team was established in 2004 to address "*the absence of any guarantee that alleged offenders will not be prosecuted*",[5] which resulted in amendments to the NPA's Prosecution Policy to allow for a backdoor amnesty as well the launch of President Mbeki's Special Dispensation on Political Pardons. Both initiatives had to be stopped in the courts. [6]

15. The Nkadimeng case disclosed a memorandum addressed by Pikoli to the then Justice Minister, Bridgett Mabandla, in which Pikoli concludes that there had been improper interference in relation to the TRC cases and that he had been obstructed from taking them forward. He complained that such interference impinged upon his conscience and his oath of office. [7]

16. The consequences of such interference on the families of victims of apartheid era crimes have been devastating. By way of example, when Imtiaz Cajee approached the NPA in 2003 to investigate the death in detention of Ahmed

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4 *Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others*, Gauteng Division Case Number 35554/2015

5 Undated Secret Report: Amnesty Task Team.

6 *Nkadimeng v National Director of Public Prosecutions* [2008] ZAGPHC 422; *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC).

7 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: *INTERPRETATION* OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 (classified secret).

Timol no investigation took place. The NPA pretended that the matter had been investigated when in fact it was not.[8] Had it been investigated the main perpetrators could have been held to account, since the last suspect only died in 2012. This amounted to a travesty of justice. Indeed, the NPA had to be threatened with litigation to have the Timol inquest reopened in 2017.[9]

17. Pikoli and Ackermann stated in their aforesaid affidavits that it was no coincidence that there had not been a single prosecution of any TRC matter since September 2007. The indictment in the Nokuthula Simelane case in 2016 was only issued because of the litigation launched in the abovementioned Nkadimeng case. The Simelane and Timol families had to conduct the investigations themselves (with the assistance of a private investigator) and rely on the services of pro bono lawyers in order to make these modest advances.

18. Emboldened by the outcome of the reopened Timol Inquest, human rights activists placed 20 more cases (including the Cradock 4 and Pebco 3 murders) before the NPA and the Hawks in January 2018. Although the Hawks appointed investigating officers it was subsequently discovered that the officers leading the investigations were former SB or associated with the SB. The most senior investigator had been implicated in the torture of a political detainee in the late 1980s. This detainee, together with his wife, were subsequently shot dead by the SB, after he sued the SAP for damages. Although the two officers have since been removed from these investigations following complaints, it is hardly surprising that no progress has been made in any of these 20 cases. As recently as 2018 it was still business as usual with the TRC cases ultimately controlled by forces from the past.

19. We note with alarm that the real decision makers behind the atrocities committed by the erstwhile SB have not been investigated and prosecuted. Individuals, such as Eugene de Kock and those recently indicted in the

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8 "*History suppressed: What didn't get revealed at the Timol inquest*" by Kevin Bloom published in the Daily Maverick on 22 September 2017

9 Para 114 and sub-paras read with annexes IC21 – 24 of the answering affidavit of Imtiaz Cajee, *Rodrigues v NDPP & Others*, Case No.: 76755/18, Gauteng Division.

Nokuthula Simelane case, were mere foot soldiers. While junior officers must face justice, they acted at the behest of the generals and politicians who remain shielded from accountability. The failure to pursue those most responsible speaks volumes about the captured state of our criminal justice system.

Need for an inquiry

20. In our view it can be safely concluded that the SAPS and the NPA became captured by political forces in respect of the TRC cases. The few prosecutors with the courage to stand up to the political interference were either removed from their positions or frozen out from these cases. The rest acquiesced and ensured that the TRC cases never saw the light of day.

21. We contend that the manipulation of the criminal justice system to protect individuals from prosecution serves an ulterior and illegal purpose, interferes with the independence of the NPA and amounts to gross subversion of the rule of law. Indeed, those behind the suppression of these cases may very well have been involved in a conspiracy to obstruct or defeat the course of justice, which is a very serious crime in South African law.

22. In the application brought by Joao Rodrigues to permanently stay the prosecution against him for his role in the murder of Timol, the NPA, in papers filed on 4 February 2019, admitted to the political interference described above.[10]

23. We accordingly request the State Capture Commission to:

    23.1. Investigate the political interference described in these representations;

    23.2. identify those responsible, within and outside the NPA and SAPS, for suppressing the TRC cases;

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[10] Jao Rodrigues v NDPP & Ors Case No. 76755/18 Gauteng Division

23.3. Determine whether such persons have acted unlawfully, committed any crimes and what steps, if any, should be taken against them; and

23.4. Make recommendations to prevent such manipulation of the criminal justice system taking place in the future. [11]

THE TRC PROCESS AND THE FAILURE TO PROSECUTE

24. I am advised that there is nothing in the constitutional and statutory design of the TRC process which contemplated the extension of the rights of perpetrators to further leniency or indemnity from prosecution. Indeed, it was specifically envisaged that criminal investigations and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or had failed to apply for amnesty.

25. An examination of the postscript to the *Constitution of the Republic of South Africa Act* 200 of 1993 ("**the Interim Constitution**") reveals no direct or inferred suggestion that the TRC process would open the door to further opportunities for perpetrators to escape justice outside of the TRC's amnesty's provisions.

26. South Africa's ground-breaking transition required a severe limitation of the fundamental rights of the victims of human rights violations. This was justified by the pressing need to promote national unity and reconciliation and to cross the historic bridge between the past of a deeply divided society to a future founded on democracy and peaceful co-existence.

27. The principles set out in the postscript were reflected in the design of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("**the TRC Act**"). Perpetrators who were granted amnesty received amnesty or immunity from criminal prosecution and immunity from civil law actions. Conversely, those perpetrators who were refused amnesty or who chose not to approach the TRC were meant to face criminal prosecutions.

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[11] See also paragraph 50 below.

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28. South Africa's truth and reconciliation design as encapsulated in the postscript to the Interim Constitution and the TRC Act necessitated the sacrifice of the fundamental rights of victims to advance national unity and reconciliation. In so doing the State entered into a compact with victims. This compact required the State to take all reasonable steps to prosecute deserving cases in respect of offenders who were not amnestied. It is with great sadness that I must note that the State has done little to meet its legal and moral obligations.

29. The failure to investigate and prosecute those who were denied amnesty or who spurned the process represents a deep betrayal of all those who participated in good faith in the TRC process. It completely undermines the very basis of South Africa's historic transition. The failure stands as a betrayal of victims who have been waiting for the criminal justice process to take its course and has added considerably to their trauma. Indeed, the policy or approach to allow perpetrators to escape justice adds insult to the suffering endured by victims.

30. Above all, the failure stands as a betrayal of all South Africans who embraced the spirit of truth and reconciliation in order to move beyond the bitterness of the past. The failure is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in dealing with crimes of the past.

SUPPRESSION OF THE POLITICAL CASES

31. I learned through the case of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07) ("**the Nkadimeng case**") that something sinister was going on at this time. This case brought by Thembi Nkadimeng, the sister of the slain heroine, Nokuthula Simelane, and the widows of the Cradock Four (including my mother) set aside the amendments to the NPA's Prosecution Policy (made in terms of section 179(5)(a) and (b) of the Constitution), which provided for a backdoor amnesty for political offenders.

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31.1. During the Nkadimeng case the NDPP was forced to disclose a secret 2004 government report titled "*Report of the Amnesty Task Team*". It was revealed that on 23 February 2004, the government's Director-General's Forum appointed a secret "Amnesty Task Team" ("**ATT**") to address "*the absence of any guarantee that alleged offenders will not be prosecuted*". Its report explored ways of avoiding the state's responsibilities to prosecute offenders denied amnesty by the TRC or who had not applied for amnesty. A copy of the aforesaid report is annexed hereto marked "**LC1**". (The annexes to this report have not been attached but can be supplied on request).

31.2. On the recommendation of the ATT, the NPA was required to amend its prosecution policy to facilitate impunity for apartheid era criminals. In striking down the amendments to the Prosecution Policy as "absurd" and unconstitutional. Judge Legodi held that:

> *"...crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted."* (*Nkadimeng & Ors v National Director of Public Prosecutions* [2008] ZAGPHC 422)

31.3. Also, on the recommendation of the ATT, former President Mbeki introduced a political pardons program to further accommodate perpetrators. Civil society organisations had to approach the High Court urgently to stop these pardons being issued in the absence of any inputs by victims and others (*CSVR & Others v President of the Republic of South Africa & Others,* Case no. 15320/09, North Gauteng High Court). The Constitutional Court confirmed that it was irrational and a violation of the rule of law to exclude victims from the process (*Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC)).

31.4. Notwithstanding the ruling of Judge Legodi in the Nkadimeng case the family of Nokuthula Simelane and the widows of the Cradock Four are still

waiting for justice. Out of sheer frustration the family of Nokuthula Simelane was forced to file an application before the Gauteng Division of the High Court in Pretoria in the matter of *Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others*, Case Number 35554/2015 on 20 May 2015. In this application Nkadimeng sought orders compelling the SAPS to finalize their investigations and an order compelling the NDPP to make a prosecutorial decision or refer the case to an inquest. A copy of the notice of motion is annexed hereto marked "**LC2**". (The full papers can be supplied on request).

32. This application disclosed evidence of gross political interference in the operations of the NPA, as per the supporting affidavits of Pikoli and Ackermann and explained how the political cases from the past were deliberately suppressed. The aforesaid NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases. Copies of the affidavits of Pikoli and Ackermann are annexed hereto marked "**LC3**" and "**LC4**".

33. Under apartheid the police, in particular the SB, could not have been expected to investigate themselves. Indeed, it would be safe to assume that all murders and crimes carried out by the SB, probably without exception, were covered up. Moreover, prosecutors and magistrates routinely did the bidding of the SB or simply turned a blind eye to the atrocities.

34. In the post-TRC period the NPA and its officials dealing with the TRC cases became subjected to severe political interference. Such pressures served to shape the approach or policy of the NPA and the SAPS in relation to these cases. This policy or approach is evidenced by various steps aimed at ensuring political control over prosecutorial decisions dealing with the TRC cases, as reflected in the documents described below:

34.1. The 2004 secret government report, titled "*Report: Amnesty Task Team*", which was disclosed during the proceedings in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD

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case no 32709/07), which made proposals, most of which were accepted, to guarantee impunity for apartheid-era perpetrators (annex "**LC1**").

34.2. An affidavit made by Adv. Pikoli, filed in *T P Nkadimeng v National Director of Public Prosecutions & Others*, (Case No.: 3554/2015, Gauteng Division), in which he sets out how the independence of his office was seriously compromised (annex "**LC3**"). Pikoli details how he was subjected to withering pressure from political forces, including the then Minister of Justice, Mrs. B S Mabandla, and the then Commissioner of the SAPS, the late Jackie Selebi, to abandon the TRC cases. When he ultimately decided to proceed with one case (the attempted murder of the Rev. Frank Chikane by the SB) he was suspended by President Mbeki on 23 September 2007. (The Chikane matter led to a soft plea bargain with former Minister Adriaan Vlok, former Commissioner Johann van der Merwe and others on 17 August 2007).

34.3. A secret memorandum addressed by Pikoli to Minister Mabandla titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 annexed hereto marked "**LC5.**" In this memorandum Pikoli concludes that there had been improper interference in relation to the TRC cases and that he had been obstructed from taking them forward. He complained that such interference impinged upon his conscience and his oath of office.

34.4. An affidavit made by Adv. Ackermann SC which was also filed in the aforesaid Nkadimeng case (annex "**LC4.**"). In this affidavit Ackermann explains in detail how he was stopped from pursuing the investigation and prosecution of the TRC cases. He recounts that following the suspension of Pikoli in September 2007 he was summoned to the office of Adv. Mokotedi Mpshe, then acting NDPP, who advised him that he was relieved of his duties in relation to the TRC cases with immediate effect.

35. The indictment in the Nokuthula Simelane case in 2016 was only issued because of the litigation launched in the abovementioned Nkadimeng case in which an order was sought compelling the NDPP to make a prosecutorial decision or refer the case to an inquest.

36. It is of great significance that in those proceedings ((Case No.: 3554/2015, Gauteng Division) the NPA and SAPS never filed an answering affidavit. They never went on the public record to dispute the averments of the political suppression of the TRC cases, notwithstanding the considerable publicity that the case attracted. As an example of the publicity, I annex hereto a newspaper article dated 31 May 2015 authored by Mr Zenzile Khoisan in the Weekend Argus marked "**LC6**". Those proceedings were held in abeyance following the issuing of indictments against four SB officers who were accused of murdering Nokuthula Simelane.

37. I submit that the manipulation of the criminal justice system to protect individuals from prosecution serves an ulterior and illegal purpose, constitutes bad faith, is irrational, interferes with the independence of the NPA and amounts to gross subversion of the rule of law. Perpetrators, such as the murderers of my father, have directly benefitted from such unlawfulness since the closure of the TRC.

NPA BELATEDLY ADMITS THE POLITICAL INTERFERENCE

38. On 4 February 2019, in the application by Rodrigues for a permanent stay of prosecution, the NPA belatedly filed a supplementary answering affidavit, along with an accompanying affidavit deposed to by State Adv Chris Macadam.[12] The Macadam affidavit admitted that the Timol case and the other TRC cases were stopped and he provided details and evidence to illustrate the obstruction. The

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12 NPA SAA, pp 750 – 919, Jao Rodrigues v NDPP & Ors Case No. 76755/18 Gauteng Division

supplementary affidavit of State Adv J P Pretorius SC is annexed hereto marked "**LC7**" and Macadam's affidavit is annexed as "**LC8**".

39. This was the very first time that the NPA had admitted the political interference and its unlawfulness. In particular, the supplementary affidavit stated:

39.1. "*[I]t is clear that the prosecution was delayed as a result of political interference by others.*" [13]

39.2. "*The first respondent does not deny that the executive branch of the State took what one can describe as political steps to manage the conduct of criminal investigations and possible prosecution of the perpetrators of the political murders such as that of Mr. Timol.*"[14]

39.3. "*The contents of both Pikoli and Ackermann's affidavits give this Court an opportunity to reaffirm the constitutional independence of the National Prosecuting Authority of this country and send a clear message that political office bearers should stop interfering with prosecutorial decisions unless otherwise authorized to do so by law*". [15]

39.4. "*What one sees in Pikoli and Ackermann's affidavits is that the political interference and political pressure brought to bear upon the highest office of the National Prosecuting Authority* ***was far from being authorized by law***."[16] (Emphasis added).

39.5. "*I do not deny that the National Prosecuting Authority was subjected to political interference and political pressure not to immediately prosecute cases such as the present.*"[17]

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13 NPA SAA, pp 752 – 753 para 2.3.

14 NPA SAA, p 756 para 2.11.

15 NPA SAA, p 766 para 2.28.

16 NPA SAA, p 766 para 2.29.

17 NPA SAA, p 766 para 2.29.

39.6. "*I agree with what the Fourth Respondent says … that the manipulation of the criminal justice system to protect individuals from criminal prosecution serves an ulterior and illegal purpose and that it constitutes bad faith, it is irrational, it interferes with the independence of the National Prosecuting Authority and amounts to a gross subversion of the rule of law. …*"[18]

NPA's attempt to escape responsibility

40. In the *Rodrigues* matter the NPA attempted to explain its acquiescence with the political interference by claiming that it was not responsible for the suppression of the TRC cases, which was imposed upon it:[19]

> *"[T]he only conclusion to arrive at is that the delay in prosecuting the applicant was not as a result of the first respondent's [the NPA's] own doing or its malice - it was as a result of the political interference and the 'severe political constraints' to which the first respondent [the NPA] was subjected."*[20]

41. This is an astonishing claim to make in the light of the prevailing law:

41.1. Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the state. In other words, no other person or body may make decisions whether to prosecute or not.[21]

41.2. Section 179(4) of the Constitution enjoins the prosecuting authority to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement.

41.3. Section 32(1)(a) the **National Prosecuting Authority Act 32 of 1998** ("**the NPA Act**") requires that:

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18 NPA SAA, p 766 para 2.30.

19 NPA SAA, p 756 paras 2.11 – 2.13.

20 NPA SAA, p 756 para 2.12.

21 See also s 20(1) of the National Prosecuting Authority Act 32 of 1998

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> "A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law."

41.4. Section 32(1)(b) of the NPA Act requires that:

> "Subject to the Constitution and this Act, **no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority** or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions." *(Emphasis added)*

41.5. Section 32(2)(a) of the NPA Act requires prosecutors to take an oath or make an affirmation that they will:

> "...uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the *Republic* without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law'.

41.6. Section 32(2)(b) of the NPA Act requires that in the case of the *National Director*, or a *Deputy National Director, Director* or *Deputy Director*, the oath be taken before the most senior available judge of the High Court within which area of jurisdiction the officer is situated.

41.7. Section 41(1) of the NPA Act stipulates that any person who contravenes s 32(1)*(b)* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

42. Every constitutional and statutory duty and obligation mentioned above was violated by the NPA and its senior staff members involved in the abandoning of the TRC cases. Although the NPA enjoyed exclusive authority to institute criminal proceedings, on its own version, it allowed others to impose their will on the authority to stop prosecutions that otherwise would have been pursued.

42.1. In so doing the NPA and its responsible officials violated s 179(2) of the Constitution and ss 32(1)(a) and (b) of the NPA Act.[22]

42.2. The responsible officials also violated their oaths of office in terms of 32(2) of the NPA Act and are liable for criminal sanction in terms of s 41(1) of the said Act.

43. In allowing others to effectively take their decisions the responsible members of the NPA failed to act impartially and perform their powers and duties in good faith and without fear, favour or prejudice. In acquiescing to the demands of others the officials involved acted partially and displayed no courage.

43.1. Their actions, or inaction, brazenly favoured political elites and perpetrators of apartheid era crimes and severely prejudiced the interests of victims, their families and communities.[23]

43.2. Accordingly, the NPA and the responsible officials violated s 179(4) of the Constitution and ss 32(1)(a) and 32(2) of the NPA Act.

44. The NPA, and its responsible officials, permitted other organs of state, alternatively members or employees of organs of state and/ or other persons to improperly interfere, hinder or obstruct the authority in carrying out its powers and duties and functions.

44.1. In so doing s 32(1)((b) of the NPA Act was violated and its responsible officials are accordingly liable for criminal sanction in terms of s 41(1) of the said Act.

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22 The NPA's Prosecution Policy also requires at p 2 – 3 that the NPA must "*exercise its prosecutorial functions **independently***". (Emphasis added); and that prosecutorial decisions be made independently (p 12). These requirements were also violated.

23 In this regard note the requirement laid down in the NPA's Prosecution Policy at p 5:

"*The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole.*"

44.2. These violations, in turn, amounted to a violation of the rule of law itself, enshrined as a founding value in section 1(c) of our constitution.[24] They also amount a betrayal of the constitutional compact of truth, reconciliation and justice that our democracy was predicated upon, and which sought to provide the closure and healing that our nation required to move beyond our past, as enshrined in the preamble of the Constitution.

COLLUSION BY THE NPA IN SUPRESSING TRC CASES

45. Notwithstanding the admission of political interference in its operations, the NPA denies colluding with political forces to suppress apartheid-era cases.[25] The contradictions in the supplementary affidavit of J P Pretorius and the detail set out in the affidavit of R C Macadam speak volumes.

46. Macadam's affidavit is particularly instructive, and he is to be commended for making available relevant facts that explains the post-TRC delay. It is however most regrettable that Macadam chose only to speak up towards the end of 2018, on the eve of a new NDPP assuming office. Had he acted earlier much damage to the administration of justice could have been prevented.

47. The following passages in Macadam's affidavit reveal the inglorious roles of the NPA, Directorate of Special Operations ("**DSO**") and SAPS:

47.1. After submitting a report on 15 May 2003 to the NDPP and the DSO setting out the TRC cases which had been identified for investigation, including the Timol case:

> *"Ackerman and I met with DSO Special Director Adv MG Ledwaba (Ledwaba) to arrange for the DSO to conduct the investigations specified in Annexure RCM2.* ***The meeting was unpleasant as Ledwaba made it clear in no uncertain terms that the DSO***

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[24] Section 1(c) of the Constitution provides that "*The Republic of South Africa is one, sovereign, democratic state founded on the following values… Supremacy of the constitution and the rule of law.*"

[25] NPA SAA, p 767 para 2.33.

> ***would not investigate any TRC matters*** *and that these should all be referred to SAPS."*[26] *(Emphasis added)*

47.2. Ackerman and Macadam then met with Commissioner De Beer, the Divisional Head of the Detective Service of SAPS, and requested the SAPS to take over the investigations. Subsequently in September 2003, De Beer advised in writing that the TRC cases was the responsibility of the DSO not the SAPS; and the SAPS would only investigate if instructed by the President.[27]

47.3. Attempts by Ackermann and Macadam to persuade Ledwaba to reconsider his refusal to investigate the TRC cases fell on deaf ears.[28] A letter was addressed to Ledwaba "*appealing to him to appoint investigating officers and pointing out that, in the absence thereof, the PCLU would not be able to deliver on its mandate*".[29] According to Macadam:

> *"The DSO however did not appoint investigators as requested and* ***consequently none of the TRC matters requiring investigation could be taken further.***"[30] *(Emphasis added)*

47.4. Macadam recalls Ackermann advising him that he intended prosecuting three former Security Branch members for their role in the attempted murder of Reverend Frank Chikane by poisoning. This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary. However, he was instructed by the then acting NDPP not to arrest and prosecute the suspects.[31]

47.5. Macadam confirms that a moratorium was placed on all TRC investigations and prosecutions are placed on hold (not that any were being investigated)

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26 Annexure SA1, NPA SAA, p 797 para 19. See also letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision (Annex RCM3 pp 812 – 813).

27 *Id*, p 797 para 19. See letter of De Beer (Annex RCM4 pp 814 – 815).

28 *Id*, p 798 para 22. See letter of Ackermann to Ledwaba (Annex RCM5 pp 816 – 818).

29 *Id*.

30 *Id*, p 798 para 23.

31 *Id*, pp 798 – 799 paras 26 – 27.

pending the adoption of guidelines to deal with this class of cases.[32] He advised that he and Ackermann were of the view that the guidelines (amendments to the Prosecution Policy) "*were unconstitutional in that they made provision for the NDPP not to prosecute perpetrators if they met the criteria for granting amnesty as had been applied by the TRC*".[33]

47.6. When Macadam represented the NPA on the 'inter-departmental task team' set up to deal with the TRC cases:

> *"I noticed that the task team was* ***predominantly comprised of members of the intelligence community who were more intent on cross-examining me as to why matters should be investigated*** *rather than addressing the issue of all the outstanding cases."*[34] (Emphasis added)

47.7. Macadam confirms that, aside from one query, there was no investigation in the Timol case.[35]

47.8. Macadam refers to various documents he discovered in December 2017 including:

47.8.1. A second draft Indemnity Bill authorising the President to grant indemnity to persons committing politically motivated crimes.[36]

47.8.2. The terms of reference of the ATT dealing with criteria which the NPA applies to TRC cases, the formulation of Guidelines and whether legislative enactments are necessary, and it concludes by deferring to the views of the intelligence agencies.[37]

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32 *Id*, p 799 para 27.

33 *Id*, p 799 para 28.

34 *Id*, p 799 para 30.

35 *Id*, p 802 para 44. This is in stark contrast to Macadam's Sworn Affidavit before the Reopened Inquest (dated 15 August 2017, exhibit Q1) where he gave the impression that there had been an investigation and made no mention that his request for an investigation had been firmly refused. See also: AA, pp 493 – 494, paras 61 – 63; pp 536 – 537, paras 142.4 – 143, read with annex IC 3.

36 *Id*, p 803 para 46.1, annex RCM13 pp 859 – 860.

37 *Id*, p 803 para 46.2, annex RCM14 p 861.

47.8.3. A further report of the ATT *inter alia* looking into whether private prosecutions and civil litigation could be eliminated where a decision not to prosecute is taken and whether a person aggrieved with a decision not to prosecute may approach the International Criminal Court (ICC).[38]

47.8.4. A letter dated 8 February 2007 addressed *to* Pikoli by the then Minister of Justice expressing her concern that the NPA was proceeding with TRC prosecutions as she was under the impression that the NPA would not.[39]

47.8.5. A secret memorandum addressed by Pikoli to the Minister of Justice by Pikoli objecting to the interference with the TRC matters by other Government departments and concluding that he is "*obstructed from carrying out my functions*".[40]

47.9. Macadam concludes that "*[t]hese documents speak for themselves and go a long way in explaining why from 2003 the PCLU constantly struggled to have TRC cases investigated.*"[41]

48. While pressure was brought to bear on the NPA. its officials were under a clear legal duty to reject such improper interference and obstruction. With a few exceptions, the leadership of the NPA did the bidding of the politicians and acquiesced with the political meddling in its work. Not only was the NPA required to reject such interference it was required under law to stop such unlawfulness by:

48.1. Investigating, and where necessary, prosecuting those unlawfully interfering with the criminal justice process and obstructing the course of justice;[42]

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38 *Id*, p 803 para 46.3, annex RCM15 pp 862 – 865.

39 *Id*, p 803 para 46.4, annex RCM16 p 866.

40 *Id*, p 803 para 46.5, annex RCM17 pp 867 – 877.

41 *Id*, p 803 para 47.

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48.2. Taking steps to restrain and stop such interference, if needs be through seeking an appropriate restraining and/ or declaratory order from the High Court, and if necessary from the Constitutional Court;

48.3. Exposing the interference by bringing it to the attention of Parliament's Portfolio Committee on Justice.

49. None of the above steps were taken by the NPA's leadership. In the absence of such steps there is only one conclusion to draw from the common cause facts: the NPA agreed or effectively agreed not to pursue justice in the TRC cases. This amounts to a conspiracy to suppress justice.

CONCLUSION

50. The NPA's responsible officials permitted other organs of State, alternatively members or employees of organs of state and/ or other persons to improperly interfere, hinder or obstruct the Authority in carrying out its powers and duties and functions. The actions of the responsible officials, both within the NPA and SAPS, as well as the then Ministers of Justice and Police, and indeed the government itself, warrant investigation into whether their conduct:

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[42] Aside from the criminal liability arising from s 41(1) of the NPA Act, soliciting a prosecutor by unlawful means not to prosecute constitutes the crime of obstruction the course of justice (*S v Burger* 1975 (2) SA 601 (C) at 607) ; See *R.* v *Field* (1964) 3 All E. R. 270 at 271, 281 (quoted by Baker R in *S v Burger* 1975 (2) SA 601 (C) at 616): "*Held: A conspiracy to obstruct the course of justice was different from, and might be far more reprehensible than, a conspiracy to obstruct the police in the execution of their duty...*" and may amount to "*a grave crime*". Where a person, knowing that police investigations are based on a suspicion that a crime may have been committed, obstructs the police in their investigations, it is no defence to claim that he did not foresee the possibility of a prosecution (*S v Greenstein* 1977 (3) SA 220 (RA) at 224). The crime of obstructing the course of justice may be committed by means of mere *omissio*, such as where an official refrains from passing material information to a law enforcement officer (*S v Gaba* 1981 3 SA 745 (O)).

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50.1. amounts to the crime of defeating or obstructing the course of justice in that these officials took active steps to supress the TRC cases in the face of a legal obligation to do otherwise;[43]

50.2. amounts to the crime of corruption, particularly as framed in section 9(2) of the Prevention and Combating of Corrupt Activities Act, 12 of 2005; and

50.3. where relevant officials are officers of the court, whether such officials are fit to serve as such in light of their conduct.

51. To date the Ministers of Justice and Police, and indeed the government itself, maintain their silence, or continue to deny that they violated their constitutional and statutory obligations. No expression of regret, remorse or apology has been offered by any of these role-players for their deep betrayal of victims of past atrocities.

52. The history of the abandonment of the TRC cases is a shameful story of great neglect. The decisions to block justice in such serious cases over decades point to a grand design on the part of the authorities to allow perpetrators of the past to avoid a reckoning with the truth and escape justice.

53. It is our submission that the suppression of justice in some of the worst crimes perpetrated in South Africa represents a gross abuse of power. If we are to prevent such abuses in the future, we need to understand how our criminal justice system became captive to unscrupulous forces in our new democratic order.

LUKHANYO CALATA

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[43] *S v Burger* 1975 (2) SA 601 (C); *Bazzard* 1992 (1) SACR 302 (NC);

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Signed at Johannesburg on this the 15th day of April 2019.

SECRET

'LC1'

REPORT
AMNESTY TASK TEAM

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Secret

REPORT: AMNESTY TASK TEAM

1. Background

1.1 A Director-General's Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed a Task Team to consider and report on the following:

"1. Consideration of 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. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.

3. Bearing the above-mentioned in mind, whether legislative enactments are required.".

1.2 The Task Team comprises the following members:

Deon Rudman (Chairperson):		Department of Justice and Constitutional Development
Yvonne Mabule	:	National Intelligence Agency
Vincent Mogotloane	:	National Intelligence Agency
Gerhard Nel	:	National Prosecuting Authority
Lungisa Dyosi	:	National Prosecuting Authority
Ray Lalla	:	South African Police Service
Joy Rathebe	:	Department of Defence

1.3 The Task Team was requested to submit its report to the Director-General's Forum by close of business on 1 March 2004. The Task Team met for the first time on 26 February 2004 and again on 1 March

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2004. Commissioner Ray Lalla could unfortunately not attend the first meeting. He did, however, submit his proposals to the Task Team for its consideration.

2. Terms of reference

2.1 At the outset the Task Team discussed its terms of reference in detail. It came to the conclusion that it had to perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003. The President provided the following guidelines:

(a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.

(b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process. Among these are—

- individuals who were misled by their leadership to treat the process with disdain;
- others who calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel;
- others who expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases, which did not happen.

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(c) "Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.".

(d) "We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.".

(e) "However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.".

(f) "This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.".

(g) "It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity.".

(h) "This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.".

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(i) "Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.".

(j) "Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.".

(k) "The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.".

2.2 Paragraph 1 of the Task Team's terms of reference relates directly to the abovementioned framework determined by the President. Paragraphs 2 and 3 were added to the Task Team's terms of reference in order to enable it to pursue alternative routes in order to address the concerns expressed by the President should the Task Team deem it necessary.

3. Discussion

3.1 In its deliberations the Task Team also took cognisance of the following factors:

(a) In terms of section 179(1) and (2) of the Constitution the National Prosecuting Authority (NPA) is an independent constitutional institution and the National Director of Public Prosecutions (NDPP) has full discretion on whether a particular

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prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement

(b) Any recommendations relating to the granting or refusing of amnesty should be in line with the TRC process which was constitutionally entrenched as a trade-off between the individual's right to seek justice in a court of law, on the one hand, and the imperatives of reconciliation and reparation, on the other.

3.2 Ad paragraph 1 of terms of reference

3.2.1 In order to give effect to the "arrangements" contemplated in the President's statement as reflected in paragraph 1 of the Task Team's terms of reference, it is recommended that a Departmental Task Team be appointed comprising members of the following Departments or institutions:

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

3.2.2 The functions of the proposed Task Team should 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

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(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.

(c) To–

- receive information or representations from victims, perpetrators, legal representatives or any other person or institution regarding any specific matter;
- gather intelligence information;
- investigate the matter;
- consult victims.

(d) To consider the following factors when carrying out its mandate:

(i) The general criteria governing a decision to prosecute as determined by the NDPP in the Policy Manual attached hereto as Annexure "A".

(ii) The following specific criteria:

- Whether the alleged offence is associated with a political objective committed in the course of the conflicts of the past.

- Whether a prosecution can be instituted on the strength of adequate evidence.
- Whether the case, geographically and politically, reflects the aims and objectives set out in the Promotion of National Unity and Reconciliation, 1995(Act 34 of 1995), and is not in conflict with the requirements of objectivity in prosecutions specified in the Constitution.
- Whether the offence in question is serious.
- Whether the ill health of or other humanitarian consideration relating to the accused may justify the non-prosecution of the case.
- Whether the prosecution will lead to the traumatisation of victims and conflicts in areas where reconciliation has already taken place.
- The degree of co-operation on the part of the alleged offender.
- The credibility of the alleged offender.
- The alleged offender's sensitivity to the need for restitution.
- The alleged offender's further endeavours to expose possible further clandestine operations during the past years of conflict.
- The degree of remorse shown by the alleged offender and his or her attitude towards reconciliation.
- The degree of indoctrination to which the alleged offender was subjected.
- The extent to which the alleged offender carried out instructions or perceived instructions.
- The disclosure of organisations/individuals, if any, under whose instructions the alleged offender operated.

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- The alleged offender's role during the TRC process – co-operation, full disclosure and assisting the process in general (if relevant).
- Renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender.
- Whether the alleged offender fully disclosed the alleged offences.
- The views of the NPA.
- If the accused is in custody, the views of the presiding judge or magistrate.
- Any other criteria for deciding whether a political offence was committed as set out in the TRC Act.
- Any further criteria, which the Task Team might deem necessary.

(e) To consider—

(i) the provisions of section 105A of the Criminal Procedure Act, 1977(Act 51 of 1977), relating to plea and sentence agreements and the directives issued by the NDPP in terms of section 105A(11) of the said Act;

(ii) the provisions of sections 7 of the Criminal Procedure Act relating to the issuing of a *nolle prosequi* certificate and the right of a private person to institute criminal proceedings in terms of the section 8 of the said Act;

(iii) the provisions of section 18 of the Criminal Procedure Act relating to the lapsing of the right to institute a prosecution for any offence after the expiration of a period of 20 years from the time when the offence was committed, other than the offences of murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child-stealing; rape; or the crime of genocide, crimes

DM TP

against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;

(iv) the possibility of diversion in the case of juvenile offenders;

(v) possible arrangements settling the matter out of court;

(vi) the provisions of section 204(2) of the Criminal Procedure Act relating to the discharge of the alleged offender from prosecution for the alleged offence if such offender testified as a state witness and answered all questions frankly and honestly.

3.2.3 If the above proposals are acceptable, it is recommended that the President announces the proposed process and invites full participation by those who may benefit from the process.

3.2.4 The Task Team realises that the proposed process will have the following shortcomings/concerns:

(a) A possible negation of the constitutional rights of victims, the public at large and alleged offenders

(b) The possibility of the institution of private prosecutions.

(c) The absence of any guarantee that alleged offenders will not be prosecuted. This might mean that they will be reluctant to approach the Task Team and make full disclosure. The concerns relating to persons who have disappeared, the arms caches that have not yet been discovered and the Kwazulu-Natal problem will not be solved.

(d) Public perception regarding the participation in a further amnesty process by the security services as the public may regard them as perpetrators in the conflicts of the past.

3.3 Ad paragraph 2 of terms of reference

3.3.1 The Task Team is of the view that the only way to address the above concerns adequately would be to provide for a further amnesty process similar to that of the TRC process. This possibility elicited much debate within the Task Team. On the one hand, there were those who rejected this possibility out of hand. They argued that such a process would undermine and discredit the TRC process, further undermine the reconciliation process and not necessarily achieve the desired objectives. They argued that there is no reason why offenders who previously refused to participate in the TRC process will now all of a sudden decide otherwise. Some members of the Task Team, however, placed emphasis on the need to create a further effective opportunity for full disclosure in order to address the concerns referred to in paragraph 3.2.4(c) above. They argued that a substantial number of those individuals who were in the past misled by their leadership and others who expected their political leadership to provide the overall context against which they could present their cases, may make use of a further amnesty process.

3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft Indemnity Bill is attached as Annexure "B" for consideration.

3.4 Ad paragraph 3 of terms of reference

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The recommendations under paragraph 1 of the terms of reference do not require any legislation. Should Government, however, decide on a further amnesty process as discussed in paragraph 3.3, legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court.

Dm TP

'LC2'

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 35554/2015

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

WILLEM SCHOON Ninth Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT on a date and at a time to be arranged with the Registrar, the applicants intend to apply to this Honourable Court for an order in the following terms:

1. The rules relating to forms and service are dispensed with and the application is heard in terms of shortened time periods.

2. Compelling the first and third respondents to take the necessary steps, within 30 days of the granting of this order, to refer the kidnapping torture disappearance and murder of NOKUTHULA AURELIA SIMELANE ("the deceased") (Priority Investigation: JV Plein: 1469/02/1996) in 1983 to a formal inquest before the High Court in terms of sections 5 and 6 of the Inquests Act 58 of 1959 in the interests of the proper administration of justice and in order to prevent a failure of justice

3. Declaring that:

3.1 the prolonged delay by the first and second respondents in investigating the kidnapping, torture, disappearance and murder of the deceased in 1983;

3.2 the ongoing failure or refusal of the first respondent to take a decision whether to prosecute or not to prosecute the known suspects (a prosecutorial decision); or,

3.3 the ongoing failure or refusal of the first respondent to refer the abovenamed case to a formal judicial inquest.

is a gross violation of my rights to human dignity and equality, and is inconsistent with the rights to life, freedom and security of the person, the rule of law and South Africa's international law obligations to uphold the right to justice and to investigate, prosecute and punish violations of human rights.

4 Declaring that the conduct referred to in paragraphs 3.1 and 3.2 above is inconsistent with the provisions of the South African Police Service Act 68 of 1995, the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"), the Prosecution Policy issued in terms of s 179(5) of the Constitution, and the Policy Directives issued in terms

of s 21 of the NPA Act and serves to defeat the purposes of said laws, policy and directives in that it prevents the family of the deceased from reaching closure and substantially impairs the prospects of justice being served.

5. Declaring that the conduct referred to in paragraph 3.3 above is inconsistent with the provisions of the Inquests Act 58 of 1959 ("the Act") and serves to defeat the purpose of the Act in that it prevents the family of the deceased from reaching closure and substantially erodes the confidence of the public that deaths from unnatural causes will receive attention and be properly investigated

6. Alternatively to prayer 2 above reviewing and setting aside the refusal to take the decisions referred to in paragraphs 3.2 and 3.3 as unconstitutional and invalid; and compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief, *alternatively* compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.

7. *Alternatively* to prayers 2 and 6 above:

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7.1 Reviewing and setting aside the failure or refusal to take the decisions referred to in paragraphs 3.2 and 3.3 above in terms of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA")

7.2 Compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; *alternatively* compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.

8. Ordering the public release of the memorandum titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 addressed by the then National Director of Public Prosecutions to the then Minister of Justice and Constitutional Development

9. Ordering the first to fourth respondents to pay the costs of this application and that such of the other respondents who may oppose the matter to pay the applicant's costs.

10. Granting the applicant further and/or alternative relief.

KINDLY TAKE NOTICE FURTHER that the affidavits of the **Applicant, Sizakele Ernestina Simelane, Antonio Lungelo Simelane, Junior Mzwandile Nkosinathi Simelane, Frank Dutton, Vusi Pikoli, Anton Ackermann, Dumisa Ntsebeza, and Alexander Boraine** and the annexures thereto will be used in support of this application.

KINDLY TAKE NOTICE FURTHER that the *in camera* founding affidavit of the **Applicant** and the *in camera* supporting affidavit of **Vusi Pikoli** and the annexures thereto will be used in support of this application The former affidavit is to be served only on the first respondent (the National Director of Public Prosecutions) and the latter affidavit is to be served only on the first and third respondents (the Minister of Justice and Correctional Services). The aforesaid affidavits are to be held by the Registrar of this honourable Court as part of an *in camera* record and only to be released to the other respondents or the public on the order of this honourable Court.

TAKE NOTICE FURTHER THAT the Applicant has appointed the **LEGAL**

RESOURCES CENTRE as its attorneys of record at whose address the Applicant will accept service of all process in these proceedings

TAKE NOTICE FUTHER THAT that should you intend opposing this application you are required:

a) to notify the Applicant's attorneys in writing within 15 (fifteen) court days of service of this application on you;

b) within 30 (thirty) court days after having given such notice to oppose this application to deliver your answering affidavits, if any; and further that you are required to appoint in such notification an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings

If no such notice of intention to oppose is given the application will be made to the above Honourable Court as soon as counsel for the Applicant may be heard.

DATED AT JOHANNESBURG ON THIS 19th **DAY OF** May **2015.**

LEGAL RESOURCES CENTRE

Applicants' Attorneys
15th Floor Bram Fischer Towers
20 Albert Street
Marshalltown
Tel. 011 836 9831
Fax: 011 836 8680
Ref: 1100514J/CVDL
C/O GILFILLAN DU PLESSIS
Democracy Centre,
357 Visagie Street
Pretoria.
Ref: J56

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT, PRETORIA

AND TO:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent
c/o The State Attorney
SALU Building
316 Thabo Sehume Street
Pretoria
GAUTENG

SERVICE PER SHERIFF

THE NATIONAL COMMISIONER OF POLICE

Second Respondent
Wachthuis, 7th Floor
229 Pretorius Street — SERVICE PER SHERIFF
Pretoria
GAUTENG

THE MINISTER OF JUSTICE
Third Respondent
c/o The State Attorney
SALU Building
316 Thabo Sehume Street
Pretoria — SERVICE PER SHERIFF
GAUTENG

THE NATIONAL MINISTER OF POLICE
Fourth Respondent
Wachthuis, 7th Floor
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Pretoria
GAUTENG

WILLEM HELM COETZEE — SERVICE PER SHERIFF
Fifth Respondent
28 Augusta

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ANTON PRETORIUS
Sixth Respondent
20 Duneden
152 Malcolm Road — SERVICE PER SHERIFF
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GAUTENG

FREDERICK B MONG
Seventh Respondent
12 Pecan Place
831 Mortimer Avenue — SERVICE PER SHERIFF
Mayville
Pretoria
0084
GAUTENG

MSEBENZI TIMOTHY RADEBE
Eight Respondent
8 Roma Street
Carenvale — SERVICE PER SHERIFF
Honeyhills
1724

GAUTENG

alternatively

36 Stumke Street
Witpoortjie
Roodepoort
1724
GAUTENG

WILLEM SCHOON
Ninth Respondent
689 Verecunda Street
Dorandia Ext 2
0182
GAUTENG

SERVICE PER SHERIFF

'LC3'
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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

TPN

WILLEM SCHOON Ninth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa and a former National Director of Public Prosecutions.

2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

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by the then President, Mr. T. Mbeki on 23 September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the Truth and Reconciliation Commission ("TRC") contributed to the decision of President Mbeki to suspend me. The President suspended me from office in terms of section 12(6) of the NPA Act and ordered an Enquiry into my fitness to hold office as the NDPP.

9. During 2008, a commission of enquiry into my fitness to hold office, led Dr. F. Ginwala, found that the Government had failed to substantiate the reasons for my suspension and that I was a fit and proper person to hold the position of National Director of Public Prosecutions. She further recommended that I be restored to the office of the NDPP. Notwithstanding this finding and recommendation, acting President Mr. K Motlhlanthe dismissed me from my post. In 2009 I obtained an order from the High Court restraining President Zuma from appointing a successor to my position. Later that year I accepted a monetary out-of-court settlement from the government.

10. Between 2010 and 2012 I was a partner at SizweNtsalubaGobodo and the director of its Forensic Investigations department.

11. Between 2012 and 2014 I served as a commissioner of the Khayelitsha

PROFESSIONAL EXPERIENCE

4. Prior to 1990 I was a member of Umkhonto weSizwe and I worked for the ANC's legal and constitutional affairs department in exile.

5. Between 1991 and 1994 I worked as a legal adviser with the Munich Reinsurance Company of Africa Limited Group. From 1994 until 1997 I was the Special Advisor to the then Minister of Justice, Mr. Abdullah Omar. My specific mandate was to help restructure the Department of Justice. At the time, there were eleven departments countrywide and I was tasked with amalgamating those departments into one central department.

6. From 1997 to 1999, I served as Deputy-Director General of the Department of Justice. In 1999, I was appointed Director General of the Department of Justice and Constitutional Development and worked in that role until 2005.

7. On 1 February 2005, I was appointed the National Director of Public Prosecutions ("NDPP") by the President in terms of Section 10 of the National Prosecuting Authority Act 32 of 1998 ("NPA Act") as read with Section 179 of the Constitution. My appointment was for a 10 year term as contemplated in Section 12(1) of the NPA Act.

8. As a result of my decision to authorize the prosecution of a former commissioner of police on corruption charges I was suspended from duty

Commission, which investigated allegations of police inefficiency in Khayelitsha as well as allegations of a breakdown in relations between the community of Khayelitsha and the Police. In December 2014 I was appointed as the Western Cape's first police ombudsman.

12. I am a former trustee of the Constitutional Court Trust, a former member of the Magistrate's Commission and a founding member of the International Association of Anti-Corruption Authorities. I am currently an independent director on the board of Cricket South Africa, where I chair the social and ethics committee. Amongst my awards, I was conferred the International Association of Prosecutors Award in 2008.

CONFIRMATION

13. I confirm the contents of the founding affidavit of Thembisile Phumelele Nkadimeng ("the applicant") and the supporting affidavit of Anton Ackermann SC ("Ackermann"), insofar as they relate to me.

14. In particular, I confirm the contents of the applicant's affidavit under the heading "Political constraints". I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including the kidnapping, assault and murder of Nokuthula Aurelia Simelane, ("Nokuthula") in the case: Priority investigation: JV Plein: 1469/02/1996

("the TRC cases").

15. In this affidavit I set out evidence that reflects such political interference. I also set out the serious impact that such interference had on the pursuit of the TRC cases by the National Prosecuting Authority (NPA).

THE INDEPENDENCE OF THE NPA

16. The Office of the NDPP was created on 1 August 1998 in terms of section 179 (1) of the Constitution. The NDPP is the head of the NPA, and manages the directors of public prosecutions, investigating directors, special directors, and other members of the prosecuting authority either appointed or assigned. During my tenure I was duty bound to carry out the responsibilities set out in the NPA Act as well as the Constitution of the Republic of South Africa.

17. As NDPP I strongly believed in the independence of the NPA. I maintained that prosecutors were required to conduct themselves independently, objectively and professionally in making decisions whether to prosecute or not. This view is underscored by section 179(4) of the Constitution and section 32 of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act) which both impose a duty on prosecutors to act "*without fear, favour or prejudice*". These provisions provide both a constitutional and statutory guarantee of independence to the NPA.

THE TRC CASES

18. In April 2003 President Mbeki received the final TRC report. The President announced in Parliament that the prosecution of persons who did not take part in the TRC process was to be left in the hands of the NPA as part of the "*normal legal processes*". He also said that those perpetrators who were prepared to unearth the truth would be welcome to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in existing legislation. Former President Mbeki's statement to the national houses of Parliament dated 15 April 2003 is annexed hereto marked "VPP1". Regrettably what was to follow in relation to the TRC cases was anything but the "*normal legal processes*."

19. In my former capacity as Director General ("DG") of the Department of Justice and Constitutional Development ("DoJ") I had previously been involved in the formulation of a policy to deal with the TRC cases, which were regarded as politically sensitive. On 23 February 2004, I had chaired a Director-General's Forum which appointed a Task Team to report on a mechanism to give effect to the President's objectives.

20. It is important to note that the recommendation of the Task Team of a two stage process which would have required a recommendation from an inter-departmental task team before the NDPP could institute any criminal proceedings in the political cases was rejected. This was because such a process would have been a violation of prosecutorial independence enshrined in Section 179 of the Constitution.

21. Some of these developments have been highlighted in the extracts from my affidavit filed before the Ginwala Commission in May 2008, which have been annexed to the founding affidavit. For the sake of completeness I highlight some of these facts in this affidavit.

22. In relation to the steps taken by the NPA with regard to the TRC cases prior to my appointment as NDPP on 1 February 2005 I refer to the affidavit of Anton Ackermann SC filed evenly herewith. On my appointment as NDPP, the Priority Crimes Litigation Unit (PCLU), a sub-unit within the NPA, had already been tasked with handling the TRC cases. The PCLU was headed by Special Director Advocate Anton Ackermann.

23. The decision to prosecute those implicated in the attempted murder, through poisoning, of former church leader and head of the South African Council of Churches, the Reverend Frank Chikane, on 23 April 1989 at the then Jan Smuts Airport, Kempton Park ("the Chikane matter), saw the

unravelling of the attempts by the NPA to hold apartheid-era perpetrators accountable for their crimes.

24. The initial decision to prosecute three Security Branch members, former Colonel C L Smith, and former Captains G J L H Otto and H J Van Staden, was taken prior to my appointment as NDPP. This decision was taken in November 2004 by Dr. Silas Ramaite SC in his capacity as Acting National Director of Public Prosecutions. However, he instructed that this matter, and all other TRC cases, be held over pending the development of the guidelines to deal with the TRC cases that were to be incorporated into the Prosecution Policy.

Developments since 2005

25. Following the approval by the Minister of Justice, and after consultation with the Directors of Public Prosecutions as required by the NPA Act, the amendments to the Prosecution Policy were tabled in Parliament and became effective on 1 December 2005. The amendments to the Prosecution Policy were titled: "*PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994*" ("the Prosecution Policy Guidelines" or "the Guidelines"). A copy of the said amendments is annexed to the founding affidavit marked "**TN30**".

26. In terms of paragraph B6 of the amended Prosecution Policy it was stipulated that that the PCLU should be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

26.1. The National Intelligence Agency ("NIA");

26.2. The Detective Division of the South African Police Service ("SAPS");

26.3. The Department of Justice and Constitutional Development; and

26.4. The Directorate of Special Operations ("DSO").

27. When the Prosecution Policy became effective in December 2005 I reviewed the available evidence implicating the three suspects in the Chikane matter, which, in my opinion, was clearly sufficient to justify a prosecution. None had applied for amnesty for this offence. I therefore gave the initial instruction to proceed with the prosecution in February 2006.

28. In response to the said notification the three suspects made representations to me in terms of the Guidelines in support of their contention that they should not be subject to prosecution. These representations were reviewed by a team within the NPA under the

leadership of Advocate T. Pretorius who reported to me that the representations did not comply with the requirements set out in the Guidelines, insofar as the suspects declined to disclose the full truth. After reviewing the report and the underlying documentation I wrote to the legal representative of the suspects in July 2006 informing him of my intention not to accede to the representations and to pursue the prosecution.

29. Meanwhile in early 2006 I had approached the then Commissioner of Police, the DG of Justice, and the heads of the NIA and the DSO (also known as 'the Scorpions') requesting them to nominate senior officials to assist the PCLU in accordance with the Prosecution Policy guidelines. Unfortunately the SAPS and the NIA never provided the PCLU with the necessary support to conduct its investigations adequately.

30. In early 2006, then Commissioner of Police, Mr. J Selebi, objected to Advocate Ackermann's participation claiming that Ackermann intended to prosecute the leadership of the ANC. This is notwithstanding the formal denial by the NPA that no such plans were in place. I advised Mr. Selebi that Ackermann was appointed as the head of the PCLU under Presidential proclamation and it was not for the SAPS to determine who should discharge the mandate given to the PCLU.

31. I then approached the Presidency in order to secure the necessary

collaboration of the parties to apply the Prosecution Policy Guidelines. A meeting was arranged in mid-2006 by Reverend Frank Chikane, the then Director General in the Presidency The meeting was attended by himself, the DGs of Justice and the NIA, Mr. Selebi, the Secretary of the Defence Secretariat, Mr. Jafta from the Presidency and I. Mr. Selebi again complained about Advocate Ackermann's involvement in the process.

32. Later in 2006 I was summoned to a meeting which was convened at the home of Minister Skweyiya, the then Minister of Social Development. The meeting was attended by the Ministers of Safety and Security and Defence, Minister Thoko Didiza (Acting Minister of Justice and Constitutional Development representing Minister Mabandla who was indisposed) and Mr. Jafta. The meeting was called by Acting Minister Didiza and I was advised that it related to the prosecution in the Chikane matter.

33. At this meeting it became clear that there was a fear that cases like the Chikane matter could open the door to prosecutions of ANC members. I quote hereunder from my affidavit filed before the Ginwala Commission as to what transpired at this meeting:

> *"The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann's involvement in the process and the issue of whether it was Advocate Ackermann or me who was behind the decision to*

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prosecute.

The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.

The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.

I explained to the Ministers that the decision to proceed with the prosecution rested with me as did all other decisions in regard to post-TRC prosecutions being considered by the PCLU. I assured them that no prosecution would be undertaken without my specific direction and reiterated my concern about the delay in the process particularly in view of the requirement that I report to parliament on these matters.

. .The Minister of Defence appeared satisfied with my explanation that I would exercise the decision as to whether there was a prosecution or not. The Minister of Safety and Security appeared to continue to be worried about the involvement of Advocate Ackermann. I have no recollection of a particular position adopted by the Acting Minister of Justice."

34. Also in 2006 a further meeting took place at the office of the Presidency. My recollection of this meeting is that it was decided that the working committee or Task Team would not make recommendations on a decision

as to whether to prosecute or not, but would be responsible for ensuring that I received all the necessary inputs and information from the various departments so as to assist me to make a well-considered decision.

35. At this meeting I proposed that Dr Silas Ramaite, the Deputy National Director of Prosecutions, should chair the Task Team. I suggested this in order to counter the complaints in regard to Advocate Ackermann and to get the Task Team working. The proposal was accepted.

36. Subsequent to this meeting there was a further meeting of Ministers in the security cluster at the office of the Minister of Safety and Security. This was attended by the Minister for Safety and Security, the Minister of Social Development, Acting Minister Didiza, Mr. Selebi, various DGs and Mr. Jafta. The proposal for the establishment of a working group was put to the Ministers and accepted.

37. After this meeting, in early October 2006 I again sent letters to the various Directors General, Mr. Selebi and the DSO inviting them each to nominate a senior official to perform the functions set out in paragraph 86 of the Guidelines.

38. The Task Team met for the first time on 12 October 2006. I attended the opening session of the first meeting together with Ms Kalyani Pillay (my

adviser), the Directors General of the NIA and Justice and Mr. Jafta from the Presidency. Aside from this meeting, I did not participate further in the activities of the Task Team. I received reports from time to time on their activities. These reports led me to believe that the committee was functioning and securing the requisite co-operation from the other agencies which had previously been missing.

39. Meanwhile I had received further representations from the suspects in the Chikane matter contending that they had received indemnity in respect of the threatened prosecution in terms of the original Indemnity Act of 1990. I sought an independent opinion from senior counsel concerning the validity of this claim of indemnity. The opinion was received in November 2006 and concluded that the claimed indemnities were no bar to prosecution and that the said law had been repealed in 1995.

40. Dr Silas Ramaite reported to me that at the Task Team meeting on 25 October 2006 had received an audit report from Advocate Ackermann on all cases in the possession of the PCLU. Dr. Ramaite reported to me further that the Chikane matter was discussed by Task Team for the first time at its meeting on 6 November 2006. Mr. J Lekalakala of the SAPS stated that the National Commissioner believed that Rev. Chikane was not interested in a prosecution. Advocate Ackermann however indicated that Rev. Chikane had left the matter in the hands of the NPA.

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41. In early December 2006 I was informed by Dr Ramaite of the renewed contention by Mr. Selebi that Reverend Chikane had not been consulted. Reverend Chikane had in fact been extensively consulted in relation to the proposed prosecution. I personally held discussions with him during the course of interactions during 2006 and 2007. I also met with him separately. Reverend Chikane's advised me that while he may have forgiven his perpetrators, insofar as the application of the laws of the land was concerned, the matter must take its ordinary course. If a decision was made by the prosecuting authorities he would accept that.

42. Although I knew that Ackermann had discussed the matter with Rev. Chikane as far back as 2004, in December 2006 I instructed Advocate Ackermann to once again visit Rev Chikane to confirm his position.

43. However towards the end of 2006 it became clear to me that powerful elements within government structures were determined to impose their will on my prosecutorial decisions. In this regard I quote from my affidavit filed before the Ginwala Commission:

> *"In December 2006 Dr Ramaite reported to me in regard to the contention raised by Mr. Selebi through Commissioner Jacobs that it was the function of the Task Team that it should make a final recommendation to a body identified as the "Committee of Directors*

General" which would in turn make recommendations to me. In essence the proposal made by Mr. Selebi and subsequently supported by the Directors General of Justice and NIA amounted to a reversion to a two stage process in which my decision on any prosecution would be dependent upon a prior recommendation by an intervening committee of directors general which would be subject to the same constitutional challenge as had led to the rejection of this proposal in 2004.

It became clear to me that there was a material misunderstanding in regard to the role of the Task Team and that unless this was resolved, I would not be able to carry out my functions within the contemplation of the relevant legislation and as envisaged by the Government."

Developments from 2007

44. In early 2007, as a result of the differences in approach that had developed between the NPA and the SAPS, NIA and DoJ I informed Mr Selebi and the Directors General that there was a serious misunderstanding. I resolved to approach the Minister of Justice and request her guidance. Pending such response the functioning of the Task Team was compromised by the uncertainty and it held no further meetings until 8 August 2007.

45. Towards the end of January 2007 Advocate Ackermann and Advocate Mthunzi Mhaga (also of the PCLU) reported to me that they had met with

Reverend Chikane on 22 January 2007 and that he had reaffirmed his attitude, namely that he was not against a prosecution and that the matter should take its ordinary course. In the light of this confirmation I wrote to the legal representatives of Messrs. Otto, Smith and van Staden on 25 January 2007 and informed them that the matter would now proceed and I instructed the PCLU to act accordingly.

46. Around this time, the former Minister of Police, Adriaan Vlok and the former Commissioner of Police, General Johann van der Merwe, had both made representations to me as contemplated in the Guidelines. They both admitted to authorising the murder of Reverend Chikane and requested me not to prosecute them in the light of this disclosure. However, they declined to make full disclosure in response to requests for information. I accordingly declined to accede to their request that they be given immunity from prosecution in terms of the Guidelines.

47. On 6 February 2007 I had a meeting with the Minister of Justice and Constitutional Development, Mrs. B S Mabandla. During this meeting it appears that she had gained the impression that I had agreed not to pursue the TRC cases. On 8 February 2007, she addressed a letter to me titled "TRC MATTERS", a copy of which is annexed hereto marked "VPP2" in which she stated the following:

"I must advise you at the outset that the media articles alleging that

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the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not go ahead with prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty."

48. An example of one of the articles in the press is from the Beeld newspaper titled "*Cops up for apartheid crimes*" which was published on 7 February 2007. A copy of this article is annexed hereto marked "**VPP3**".

49. I am at a loss to explain how the Minister reached such a conclusion. Her letter disclosed an assumption that the TRC matters will not be prosecuted. I found this to be a disturbing development as it appeared that at a political level there was an expectation that I would not prosecute the TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear, favour or prejudice.

50. It is most likely that I would have clarified my position with the Minister, either through a meeting or a telephone discussion. I would have confirmed to the Minister that it was not my intention to drop the TRC cases.

51. I decided to prepare a detailed memorandum for the Minister to set out the history behind the policy to the TRC cases and to inform the Minister of the

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problems experienced in implementing this policy. This memorandum is titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007. This memorandum was annexed to my affidavit before the Ginwala Commission marked as "TRC1".

52. In this memorandum I concluded that there had been improper interference in relation to the TRC cases and that I had been obstructed from taking them forward. I complained that such interference impinged upon my conscience and my oath of office. I indicated that I was unable to deal with these cases in terms of the normal legal processes and sought guidance on the way forward.

53. As I had marked this memorandum as an "*internal secret memorandum*" I have not attached it to this affidavit. I have attached it to an *in camera* affidavit which will be filed separately and which will not be made available to the public, unless this honorable Court authorizes such release. In this regard I make the following submissions:

53.1. The issues and complaints raised in the memorandum have already been discussed in the body of my affidavit filed before the Ginwala Commission, which has been part of the public record

since 7 May 2008, and which was also part of the court record in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07).

53.2. In my view, there is nothing in the memorandum that implicates or impairs national security.

53.3. Since the memorandum points to unlawful and unconstitutional conduct it would in the public interest for this memorandum to be released

53.4. The public interest in the disclosure of the memorandum far outweighs any possible contemplated harm, inconvenience or embarrassment.

54. I never received any response from the Minister to this memorandum. Given the serious issues I was raising in the memorandum, and given that the NPA Act criminalizes obstruction of the work of the prosecuting authority, I would have expected an immediate response from the Minister. The failure or refusal of the Minister to respond to my memorandum suggested to me that she preferred for the deadlock between the NPA and the SAPS, NIA and DoJ to remain in place.

55. During the course of the next few months the legal representative of Messrs. Otto, Smith and van Staden, Vlok and van der Merwe, held detailed negotiations with Advocate Ackermann and members of the PCLU in regard to a plea and sentencing agreement.

56. The negotiation of the plea and sentencing agreements with the five accused was an extended process and was only concluded in early July 2007. On 10 July 2007 I sent a memorandum to the Minister informing her of the fact that the prosecution had been set down for hearing on 17 August 2007 and that all accused had indicated their intention to plead guilty to a charge of attempting to murder Reverend Chikane by means of poisoning. The memorandum informed her of the fact that plea and sentencing agreements had been entered into. To the best of my recollection the Minister did not respond to this memorandum.

57. On or about 10 July 2007 I went off on compassionate leave because of the illness and subsequent death of my mother. In my absence, on 17 July 2007, Dr Ramaite and Advocate Ackermann were summoned to a meeting with the Minister and reported to her on these developments.

58. In August 2007, those implicated in the Chikane case pleaded guilty to the charges in exchange for suspended sentences as per Section 105A of the Criminal Procedure Act, 1977. Vlok and Van der Merwe were sentenced to

ten years in prison suspended for five years, while the other three received five year prison sentences, suspended for five years

59. I would have preferred a full prosecution in this case because Adriaan Vlok and Johan van der Merwe only made limited disclosure. They largely confined their disclosure to facts that were already in the public domain. They declined to disclose detailed information in relation to the compiling of the hit list and who was behind such compilation. They did not reveal the other names on the list; the *modus operandi* of the other hits or the identities of the other masterminds and perpetrators.

60. A full prosecution in the Chikane case would have produced greater truth and accountability. However there was strong political resistance to this prosecution and the pursuit of the other political cases. It was clear to me that the government, and in particular the then Minister of Justice, did not want the NPA to prosecute those implicated in the Chikane case. This was due to their fear of opening the door to prosecutions of ANC members, including government officials. Moreover I could not rely on the police to investigate this case, and the other political cases, thoroughly. Therefore, a plea and sentence bargain was in my view the most appropriate compromise in the circumstances.

61. Shortly after the plea and sentence agreement had been confirmed in court

a newspaper article appeared in the Rapport newspaper of 19 August 2007 in which it was claimed that the NPA was preparing to prosecute ANC leaders. The claim was made on the basis of a fabricated document. A copy of this newspaper article is annexed hereto marked "VPP4". The NPA responded to this article by way of a press statement dated 21 August 2007 in which the allegations made in the Rapport article were denied. A copy of this press statement is annexed hereto marked "VPP5".

62. After the newspaper article was published, I was summoned to a meeting of the of the subcommittee of the Justice, Crime Prevention and Security (JCPS) Cabinet Committee on Post TRC matters, which was held on 23 August 2007. This meeting was attended by several cabinet ministers, directors-general and Mr. Selebi. Cabinet Ministers included the Minister for National Intelligence Services, Mr. Ronnie Kasrils, Minister Mabandla, Minister Skweyiya amongst others.

63. During the meeting, Mr. Selebi said to me that the '*gloves are now off*' and that he was '*declaring war*' on me. In response I told him: "*for once in your life can you tell the truth and shame the devil*".

64. Those at the meeting demanded answers from me about TRC prosecutions. They were also particularly concerned that I was instituting an investigation into certain members of the South African Police Service.

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This was in relation to my investigation into who was behind the fabrication of the letter purportedly written by Ackermann SC. Minister Mabandla told me to stop this investigation as we could not be seen to be taking each other to court. I advised the Minister that I would not stop the investigation.

65. I explained that:

65.1. the NPA was bound by law to continue with prosecutions of individuals who did not apply for or who were refused amnesty.

65.2. the NPA was actively preparing for those prosecutions and that we should not be stopped from doing our job.

65.3. it was my role as the NDPP to decide who would be charged.

66. On 28 August 2007 I received a faxed letter from the Minister of Justice, Ms. B S Mabandla. A copy of this letter is annexed hereto marked "VPP6". She referred to the meeting held on 23 August 2007. She noted that the National Commissioner of Police and I had different views on the Rapport article regarding the alleged forgery of certain NPA documents. She noted that I had initiated an investigation into the alleged forgery but she complained that she had not been advised of this decision or the basis thereof. Paragraphs 4 and 5 of the Minister's letter are particularly

revealing:

> *4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that **indeed there is an investigation by the NPA on certain political office bearers**.*
>
> *5. It was suggested at the meeting then that it would be useful if you could **respond to the allegation that there is an investigation** as mentioned above.* (Emphasis added).

67. The Minister's letter was further indication of the view held at ministerial level that I should not enjoy actual discretion to make prosecutorial decisions in relation to the so-called political cases arising from the conflicts of the past.

68. I responded to the Minister's letter by way of a letter dated 29 August 2007, a copy of which is annexed hereto marked "VPP7". My copy of this letter is not on an NPA letterhead, but I confirm that the contents thereof were transmitted to the Minister.

69. In this letter I referred to the 23 August 2007 meeting:

> *"...which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members."*

70. I confirmed that there was no investigation by the NPA "*against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police*".

71. In relation to paragraph 4 of the Minister's letter I noted that it is:

> "*....clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored.*"

72. I reminded the Minister that my predecessor had satisfied himself that there was no basis for the leadership of the ANC to be investigated and he had then briefed the then Minister of Justice, as well as the President. I also advised the Minister that all the dockets relating to the TRC cases, which had been stored at the Office of the Director of Public Prosecutions (DPP) in Pretoria, had been handed over to the SAPS in early and mid-2004. In my capacity as then DG of Justice I was actually present in the office of the DPP when representatives from the SAPS collected the said dockets.

73. I concluded my letter by requesting an urgent meeting with the Minister and myself and my Deputies. I also requested an opportunity to appear before the National Security Council "*to give a true account of this issue*".

74. The Minister did not respond to my requests and these meetings never

took place. On 23 September 2007 I was suspended from office by President Mbeki. Shortly after my suspension I learned that Advocate Ackermann had been relieved of his duties in relation to the TRC cases

CONCLUSION

75. I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of any TRC matter since my suspension and the removal of the TRC cases from Advocate Ackermann.

76. The political interference or meddling that I have set out in this affidavit is deeply offensive to the rule of law and any notion of independent prosecutions under the Constitution. It explains why the TRC cases have not been pursued It also explains why the disappearance and murder of Nokuthula Simelane was never investigated with any vigour and why the pleas of her family and her representatives were ignored.

VUSUMZI PATRICK PIKOLI

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I hereby certify that the deponent has acknowledge that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Cape Town on this the 6th day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with

COMMISSIONER OF OATHS

Andrew Lehloyo Dorcky Mohoblo
Commissioner of Oaths
Practising Attorney
2nd Floor, Leadership House 3 Sh[illegible]
Greenmarket Square, Cape Town

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STATEMENT BY PRESIDENT THABO MBEKI TO THE NATIONAL HOUSES OF PARLIAMENT AND THE NATION, ON THE OCCASION OF THE TABLING OF THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION: CAPE TOWN, APRIL 15, 2003.

Madame Speaker and Deputy Speaker;
Chairperson and Deputy Chairperson of the Council of Provinces;
Deputy President;
Chief Justice and Members of the Judiciary;
Former Members of the Truth and Reconciliation Commission;
Ministers and Deputy Ministers;
Distinguished Premiers;
Honoured Traditional Leaders;
Leaders of the Chapter Nine Institutions;
Honourable Leaders of our Political Parties;
Your Excellencies, Ambassadors and High Commissioners;
Honourable Members;
Distinguished Guests;
Fellow South Africans:

We have convened today as the elected representatives of the people of South Africa to reflect on the work of the Truth and Reconciliation Commission, to examine its Recommendations and to find answers, in practical terms, to the question - where to from here!

We wish to acknowledge the presence of Commissioners of the erstwhile TRC, who took time off their busy schedules to join us in commending the Report to our national parliament.

I am confident that I speak on behalf of all Honourable Members when I say to these Commissioners, and through them, to Archbishop Desmond Tutu and the other Commissioners not present here today, that South Africa sincerely appreciates the work that they have done. Our thanks also go to the staff of the Commission and all who contributed to the success of the work of the TRC, which we are justified to celebrate today.

They did everything humanly possible to realise the objectives of a process novel in its conception, harrowing in its execution and, in many respects, thankless in balancing expectation and reality. Our assessment of the TRC's success cannot therefore be based on whether it has brought contrition and forgiveness, or whether at the end of its work, it handed us a united and reconciled society. For this was not its mandate. What the TRC set out to do, and has undoubtedly achieved, is to offer us the signposts in the Long March to these ideals.

What it was required to do and has accomplished, was to flag the dangers that can beset a state not premised on popular legitimacy and the confidence of its citizens, and the ills that would befall any society founded on prejudice and a belief in a "master race".

The extent to which the TRC could identify and pursue priority cases; its ability to bring to its hearings all relevant actors; the attention that it could pay to civil society's role in buttressing an illegitimate and illegal state; and the TRC's investigative capacity to pursue difficult issues with regard to which the actors had decided to spurn its call for co-operation – all these weaknesses were those of society and not the TRC as such.

And, we make bold to say that all these complexities make the product of the work of the TRC that much more outstanding and impressive.

The pain and the agony that characterised the conflict among South Africans over the decades, so vividly relived in many hearings of the Commission, planted the seed of hope – of a future bright in its humanity and its sense of caring

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It is a future whose realisation gave life to the passion for the liberation of our people, of Oliver Tambo and Chris Hani, the tenth anniversary of whose passing away we mark this month. This includes others such as Robert Mangaliso Sobukwe and Steve Bantu Biko, who passed away 25 years ago this year and last year respectively. They joined and have since been joined by many other patriots to whom freedom meant life itself.

We are indebted to all of them; and we shall work to ensure that their memory lives on in the minds of generations to come, inspired by our common determination that never again should one South African oppress another!

At a critical moment in our history, as a people, we came to the conclusion that we must, together, end the killing. We took a deliberate decision that a violent conflict was neither in the interest of our country nor would it solve our problems.

Together, we decided that in the search for a solution to our problems, nobody should be demonised or excluded. We agreed that everybody should become part of the solution, whatever they might have done and represented in the past. This related both to negotiating the future of our country and working to build the new South Africa we had all negotiated

We agreed that we would not have any war crimes tribunals or take to the road of revenge and retribution.

When Chris Hani, a great hero of our people was murdered, even as our country was still governed by a white minority regime, we who represented the oppressed majority, said let those who remained in positions of authority in our country carry out their responsibility to bring those who had murdered him to book. We called on our people neither to take the law into their hands nor to mete out blind vengeance against those they knew as the beneficiaries of apartheid oppression.

We imposed a heavy burden particularly on the millions who had been the victims of this oppression to let bygones be bygones. We said to them – do not covet the material wealth of those who benefited from your oppression and exploitation, even as you remain poor.

We walked among their ranks saying that none among them should predicate a better future for themselves on the basis of the impoverishment of those who had prospered at their expense. We said to them that on the day of liberation, there would be no looting. There would be celebrations and no chaos.
We said that as the majority, we had a responsibility to make our day of liberation an unforgettable moment of joy, with none condemned to remember it forever as a day of bitter tears.

We said to our people that they should honour the traditions they had built and entrenched over centuries, never to hate people because of their colour or race, always to value all human beings, and never to turn their backs on the deeply-entrenched sentiment informed by the spirit of ubuntu, to forgive, understanding that the harm done yesterday cannot be undone today by a resolve to harm another.

We reminded the masses of our people of the values their movement for national liberation had upheld throughout a turbulent century, of everything they had done to defend both this movement and its values, of their obligation never to betray this noble heritage. Our people heeded all these calls

By reason of the generosity and the big hearts of the masses of our people, all of us have been able to sleep in peace, knowing that there will be no riots in our streets. Because these conscious masses know what they are about, the Truth and Reconciliation Commission was able to do its work enjoying the cooperation of those who for ages had upheld the vision of a united humanity, in which each would be one's brother and sister. These are an heroic people whose greatest reward is the liberation of their country.

Of them, the TRC says: "Others did not wish to be portrayed as a 'victim'. Indeed, many said expressly that they regarded themselves instead as soldiers who had voluntarily paid the price of their struggle...Many have expressed reservations about the very notion of a 'victim', a term which is felt to denote a certain passivity and helplessness...Military operatives of the liberation movements generally did not report violations they experienced to the Commission, although many who were arrested experienced severe torture. This is in all likelihood a result of their reluctance to be seen as 'victims', as opposed to combatants fighting for a moral cause for which they were prepared to suffer such violations. The same can be said for most prominent political activists and leadership figures... The Commission did not, for example, receive a single Human Rights Violation statement from any of the Rivonia trialists."

Some of these, who had to go through the torture chambers of the apartheid regime to bring us our liberty, are with us in this chamber today. There are others who sit on the balcony as visitors who lost their loved ones whom they pride as liberators, and others who also suffered from repression.

Surely, all of us must feel a sense of humility in the face of such selfless heroism and attachment to principle and morality, the assertion of the nobility of the human spirit that would be demeaned, denied and degraded by any suggestion that these heroes and heroines are but mere 'victims', who must receive a cash reward for being simply and deeply human.

I know there are some in this House who do not understand the meaning of what I have just said. They think I have said what I have said to avoid the payment of reparations to those whom the TRC has identified as 'victims', within the meaning of the law

Indeed, the TRC itself makes the gratuitous comment (para 16, p 163, Vol 6) that: "Today, when the government is spending so substantial a portion of its budget on submarines and other military equipment, it is unconvincing to argue that it is too financially strapped to meet this minimal (reparations) commitment."

Apart from anything else, the government has never presented such an argument. It is difficult to understand why the Commission decided to make such a statement.

Elsewhere in Vol 6, the Rev Frank Chikane, Director General in the Presidency and former General Secretary of the South African Council of Churches, is falsely reported as having made a presentation to the Amnesty Committee, which he never did.

He is then said to have told this Committee that he had participated in killing people. We do not understand how this grave and insulting falsification found its way into the Report of the TRC. We are pleased to report that Archbishop Tutu has written to Rev Chikane to apologise for this inexplicable account.

The poet, Mongane Wally Serote teaches us: 'to every birth its blood'. And so, today we acknowledge the pain that attended the struggle to give birth to the new life that South Africa has started to enjoy. In this era of increased geopolitical tension, we dare celebrate as South Africans that we found home-grown solutions that set us on a course of reconstruction and development, nation-building, reconciliation and peace among ourselves.

At this time, when great uncertainty about the future of our common world envelops the globe, we dare stand on mountain-tops to proclaim our humble contribution to the efforts of humanity to build a stable, humane and safer South Africa, and by extension, a more stable, more humane and safer world.
Honourable Members;

If we should find correct answers to the question, where to from here, we will need to remind ourselves of the objectives of the TRC from its very inception, so aptly captured in the preamble to the Promotion of National Unity and Reconciliation Act:

"...the Constitution of the Republic of South Africa, 1993 provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race , class, belief or sex;
"...the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;
"...it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future;
"...the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".

I am certain that we are all at one that the pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation among the people of South Africa and the reconstruction of our society.

These are the larger and fundamental objectives that should inform all of us as we work to give birth to the new South Africa. The occasion of the receipt of the Report of the TRC should give us an opportunity to reflect on these matters.

Both singly and collectively, we should answer the question how far we have progressed in the last nine years towards the achievement of the goals of national unity, national reconciliation and national reconstruction. Both singly and collectively, we have to answer the question, what have we contributed to the realisation of these goals.

These larger questions, which stand at the heart of what our country will be, did not fall within the mandate of the Truth and Reconciliation Commission. The TRC was therefore but an important contributor to the achievement of the larger whole, occupying an important sector within the larger process of the building of a new South Africa.

As stated in the Act, the TRC had to help us to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights occurred, and to make the findings known in order to prevent a repetition of such acts in future.

It had to help us to promote understanding and avoid vengeance, to extend reparation to those who had been harmed and discourage retaliation, to rely on the spirit of ubuntu as a deterrent against victimisation.
The TRC has done its work as was required. As stipulated in the TRC Act, we are here to make various recommendations to our national parliament, arising out of the work of the TRC.

As the Honourable Members are aware, there is a specific requirement in the law that parliament should consider and take decisions on matters relating particularly to reparations. It would then be the task of the Executive to implement these decisions.

The law also provides that the national legislature may also make recommendations to the Executive on other matters arising out of the TRC process, as it may deem fit.

Let us now turn to some of the major specific details that the TRC enjoins us to address.

The first of these is the matter of reparations.
First of all, an integrated and comprehensive response to the TRC Report should be about the continuing challenge of reconstruction and development: deepening democracy and the culture of human rights, ensuring good governance and transparency, intensifying economic growth and social programmes, improving citizens' safety and security and contributing to the building of a humane and just world order.

The TRC also argues for systematic programmes to project the symbolism of struggle and the ideal of freedom. This relates to such matters as academic and informal records of history, remaking of cultural and art forms, erecting symbols and monuments that exalt the freedom struggle, including new geographic and place names. The government accepts these recommendations.

Special emphasis will continue to be paid to rehabilitation of communities that were subjected to intense acts of violence and destruction. Experience gained with the projects in Katorus in Gauteng and Moumalanga in KwaZulu/Natal demonstrates that great progress can be made in partnership between communities and government.

Further, with regard to specific cases of individual victims identified by the TRC Act, government has put in place and will intensify programmes pertaining to medical benefits, educational assistance and provision of housing and so on. From time to time, Ministers have elaborated and will continue to expatiate on the implementation of these and other related programmes.

The TRC has reported that about 22 000 individuals or surviving families appeared before the Commission. Of these, about 19 000 required urgent reparations, and virtually all of them, where the necessary information was available, were attended to as proposed by the TRC with regard to interim reparations.

With regard to final reparations, government will provide a once off grant of R30 000 to those individuals or survivors designated by the TRC. This is over and above other material commitments that we have already mentioned.

We intend to process these payments as a matter of urgency, during the current financial year. Combined with community reparations, and assistance through opportunities and services we have referred to earlier, we hope that these disbursements will help acknowledge the suffering that these individuals experienced, and offer some relief.

We do so with some apprehension, for as the TRC itself has underlined, no one can attach monetary value to life and suffering. Nor can an argument be sustained that the efforts of millions of South Africans to liberate themselves, were for monetary gain. We are convinced that, to the millions who spared neither life nor limb in struggle, there is no bigger prize than freedom itself, and a continuing struggle to build a better life for all.

The second of the specific details in the TRC recommendations pertains to the issue of amnesty. A critical trade-off contained in the TRC process was between "normal" judicial processes on the one hand, and establishment of the truth, reparations and amnesty on the other.

Besides the imperatives of managing the transition, an important consideration that had to be addressed when the TRC was set up, was the extent to which the new democratic state could pursue legal cases against perpetrators of human rights violations, given the resources that would have to be allocated to this, the complexities of establishing the facts beyond reasonable doubt, the time it would take to deal with all the cases, as well as the bitterness and instability that such a process would wreak on society.

The balance that the TRC Act struck among these competing demands was reflected in the national consensus around provision of amnesty – in instances where perpetrators had provided the true facts about particular incidents – and restorative justice which would be effected in the form of reparations. Given that a significant number of people did not apply for amnesty, what approach does government place before the national legislature and the nation on this matter?

Let us start off by reiterating that there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past,

but also in the creation of a new ethos within our society

Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases; and this was not to be.

This reality cannot be avoided.

Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.

We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.

However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.

It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity.

This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.

Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.

Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.

We shall also endeavour to explain South Africa's approach on these matters to sister-governments across the world. Our response to any judicial matters from these countries will be handled in this spirit and through the legal system. In this regard, we wish to reiterate our call to governments that continue to do so, that the maltreatment of former anti-apartheid fighters, based on the legal definitions of an illegal regime characterised by the United Nations as a crime against humanity, should cease.

In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be party to such litigation.

In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation.

While Government recognises the right of citizens to institute legal action, its own approach is informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society. Accordingly, we do not believe that it would be correct for us to impose the once-off wealth tax on corporations proposed by the TRC.

Consultations are continuing with the business community to examine additional ways in which they can contribute to the task of the reconstruction and development of our society, proceeding from the premise that this is in their own self-interest. In addition to intensifying work with regard to such tasks as poverty eradication, and programmes such as Black Economic Empowerment, encouraging better individual corporate social responsibility projects, implementation of equity legislation and the Skills Training Levy, we intend to improve the work of the Business Trust.

In this context, we must emphasise that our response to the TRC has to be integrated within the totality of the enormous effort in which we are engaged, to ensure the fundamental social transformation of our country. This requires that at all times, we attain the necessary balance among the various goals we have to pursue.

The TRC also recommends that what it describes as the beneficiaries of apartheid should also make contributions to a reparation fund. The government believes that all South Africans should make such contributions. In the pursuit of the goal of a non-racial society, in which all South Africans would be inspired by a common patriotism, we believe that we should begin to learn to work together, uniting to address the common national challenges, such as responding to the consequences of the gross violations of human rights of which the TRC was seized.

In this regard, I am certain that members of our government will be among the first to make their contributions to the reparation fund, despite the fact that they stood on one side of the barricades as we engaged in struggle to end the apartheid system.

Many in our country have called for a National Day of Prayer and Traditional Sacrifice to pay tribute to those who sacrificed their lives and suffered during the difficult period of oppression and repression whose legacy remains with us. The government accepts this suggestion and will consult as widely as possible to determine the date and form of such prayer and traditional sacrifice. This is consistent with and would be an appropriate response to the proposals made by the TRC for conferences to heal the memory and honour those who were executed.

We shall also continue to work in partnership with countries of the sub-continent, jointly to take part in the massive reconstruction and development effort that SADC has identified as critical to building a better life for all. The peoples of Southern Africa, including the majority in South Africa endured untold privations and were subjected to destabilisation and destruction of property and infrastructure. They all deserve the speeding up of programmes of integration, reconstruction and development that governments of the region have agreed upon.

Madame Speaker;
The Truth and Reconciliation Commission has made many detailed observations and recommendations on structures and systems, which will be dealt with by relevant Ministers and Departments.

For the purpose of reparations, the government has already established the President's Fund, which is now operational, and has, as we earlier indicated, successfully dealt with the matter of urgent reparations. Like the TRC, we do hope that citizens from all sectors will find it within themselves to

make a contribution to this Fund. Most of the resources that have been allocated for individual and community reparations that we referred to above will be sourced from this Fund, over and above the normal work of the relevant Departments.

We concur with the TRC that intensive work should be undertaken on the matter of monuments as well as geographic and place names. A Trust with the requisite infrastructure, headed by Mongane Wally Serote has been set up to implement the main project in this regard, which is the construction of the Freedom Park whose constituent parts are the Memorial, the Garden of Remembrance and the Museum. This should start by the tenth anniversary of freedom in 2004.

The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.

The Department of Justice and Constitutional Development will monitor the implementation of all these programmes, and it will report to Cabinet on an on-going basis.

What we have identified today, arising out of the report of the TRC, forms part of the panoply of programmes that define the first steps in a journey that has truly begun. South African society is changing for the better. The tide has turned and the people's contract for a better tomorrow is taking shape.
The goals we defined for ourselves a decade ago, as we adopted the Interim Constitution, to pursue national unity, to secure peace and the well-being of all South African citizens, to achieve national reconciliation and the reconstruction of our society, have not fully been realised, despite the progress we have made

The situation we face demands that none of us should succumb to the false comfort that now we live in a normal society that has overcome the legacy of the past, and which permits us to consider our social tasks as mere business as usual.

Rather, it demands that we continue to be inspired by the determination and vision that enabled us to achieve the transition from apartheid rule to a democratic order in the manner that we did. It demands that we act together as one people to address what are truly national tasks.

We have to ask ourselves and honestly answer simple questions.
Have we succeeded to create a non-racial society! The answer to this question is no!
Have we succeeded to build a non-sexist society! The answer to that question is no!
Have we succeeded to eradicate poverty! Once more the answer to that question is no!
Have we succeeded fully to address the needs of the most vulnerable in our society, the children, the youth, people with disabilities and the elderly! Once again the answer to this question is no!

Without all this, it is impossible for us to claim that we have met our goals of national reconciliation and reconstruction and development. It is not possible for us to make the assertion that we have secured the well-being of all South African citizens.

The road we have travelled and the advances we have made convey the firm message that we are moving towards the accomplishment of the objectives we set ourselves. They tell us that, in the end, however long the road we still have to travel, we will win.

In the larger sense, we were all victims of the system of apartheid, both black and white. Some among us suffered because of oppression, exploitation, repression and exclusion. Others among us suffered because we were imprisoned behind prison walls of fear, paralysed by inhuman beliefs in our racial superiority, and called upon to despise and abuse other human beings. Those who do such things cannot but diminish their own humanity.

To be true to ourselves as human beings demands that we act together to overcome the legacy of this common and terrible past. It demands that we do indeed enter into a people's contract for a better tomorrow.

Together we must confront the challenge of steering through a complex transition that demands that we manage the historical fault-lines, without papering over the cracks, moved by a new and common patriotism.

It says to all of us that we must honour those who shed their blood so that we can sit together in this Chamber by doing all the things that will make it possible for us to say, this South Africa that we have rebuilt together, truly belongs to all who live in it.

I am honoured to commend the Report of the Truth and Reconciliation Commission to our National Houses of Parliament and the nation.

Thank you.

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MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
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Adv Vusi Pikoli
National Director of Public Prosecutions
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PRETORIA
0001

8 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

Our discussion in the above matter on Tuesday 6 February 2007 refers.

I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not be going ahead with the prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty.

I trust that you find the above in order.

With warm regards

MRS B S MABANDLA
MINISTER

NATIONAL DIRECTOR
9/2/07
NATIONAL PROSECUTING AUTHORITY

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Breaking News, First.

Cops up for apartheid crimes

2007-02-07 07:15

Jan-Jan Joubert and Willem Jordaan

Cape Town - The national prosecuting authority (NPA) has informed three security policemen that they are to be prosecuted for apartheid crimes.

These will be the first prosecutions since the Truth and Reconciliation Commission (TRC).

The case is related to attempts to poison the Rev Frank Chikane, who is now the director-general of the presidency.

Beeld has the names of the three security police officers and has established that they have been informed by their legal representative that the NPA intends to go ahead with prosecutions.

The move paves the way for prosecution of former minister of law and order Adriaan Vlok and former chief of police General Johan van der Merwe, who are both fully aware of, and prepared for, what will follow, according to sources.

Address to the nation

The NPA did not want to confirm or deny that the prosecutions were to begin.

In political circles, speculation is rife that the planned prosecutions could open a hornet's nest in the week of President Thabo Mbeki's address to the nation.

The question of prosecuting apartheid-era crimes is politically loaded, as some believe that they're necessary to conclude the TRC process, while others feel they could destroy reconciliation.

It appears that members of the latter group could use high-level political pressure to try to prevent prosecutions.

In terms of policy and the constitution, the decision to prosecute lies with the national director of prosecutions, advocate Vusi Pikoli, and not with the government.

Questions already have been asked in high circles about the equanimity of the NPA, and if well-known African National Congress figures who did not get amnesty, would be prosecuted.

One of the ANC members whose amnesty application was turned down was Thabo Mbeki, who applied with a number of other ANC members.

Vlok was in the news recently when he washed Chikane's feet to atone for the attempt to poison him while he was general secretary of the South African Council of Churches.

The three security policemen were connected to the same plot to kill Chikane.

Vlok's step was lauded last year by Mbeki, who added that South Africans should learn to listen more closely to each other across the boundaries of apartheid.

Vlok did not want to respond to rumours that he could be prosecuted. Van der Merwe also remained silent.

Jonlin Wagener, legal representative of the three security policemen, said the NPA informed him of their decision at the end of last month.

He did not want to comment on any particulars.

The latest events follow the tabling in parliament last January of a new prosecution policy on apartheid crimes, among other things.

The victim has a say

It includes a clause that gives the NPA discretion on whether or not to prosecute, if it is not in "the national interest".

One of the factors that must be taken into account is whether the apartheid victim wants the prosecution to go ahead.

In Chikane's case, he has indicated that he is not interested in prosecution, but that he wants full disclosure on the attempt on his life.

He has also indicated that the government is not interested in time-consuming prosecutions.

The NPA has indicated, nevertheless, that prosecution will go ahead.

Beeld

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VPP 4

Dossiere oor leiers se vergrype lê al jare in kluis ANC-lêers 'verdwyn'

Sonja CarstensPretoria

Die polisie het nog niks gedoen om meer bewyse en getuienis te kry vir die moontlike vervolging van 37 destydse leiers van die ANC aan wie amnestie vir apartheidsmisdade geweier is nie.
Rapport het die afgelope week uit onberispelike bronne verneem die polisiedossiere wat twee afgetrede polisielede vroeër saamgestel het, is al jare toegesluit by die hoofkantoor van die polisie se speurdienste. Die bronne se name word op versoek verswyg weens die sensitiewe poste wat hulle beklee.
Volgens die bronne is geen verdere ondersoekwerk na die inligting in die dossiere gedoen nie.
Die dossiere is vroeër verwyder uit 'n kluis in die kantore van die direkteur van openbare vervolgings (DOV) in Pretoria waar adv. Paul Fick, SC, hoof van die vervolgingspan wat die vermeende Boeremaglede aankla, die hoof was van 'n span wat verder ondersoek ingestel het met die oog op moontlike vervolging.
Die nasionale vervolgingsgesag (NV) het die ondersoeke jare gelede weggeneem van Fick. Hy wou die afgelope week glad nie op vrae reageer nie.
Rapport verneem sedert dit uit Fick se kantoor verwyder is, is dit toevertrou aan 'n span by die NV wat dit verder moes ondersoek, maar wat weinig aan die ondersoeke gedoen het.
Hierna is adv. Anton Ackermann, SC, in Junie 2003 aangestel as hoof van 'n eenheid wat onder meer misdade teen die staat moes ondersoek. Ackermann was die aanklaer in die Vlok-Van der Merwe-verhoor.
Genl. Johan van der Merwe, voormalige polisiehoof, het Vrydag gesê "oorgenoeg getuienis" bestaan teen die ANC-leierskorps oor hul betrokkenheid by die landmynontp'offing in 1995 waarin verskeie lede van die Van Eck- en De Necker-gesin gesterf het.
In Junie 2004 het mnr. Sipho Ngwema, destydse woordvoerder van die NV, gesê nie een van die 37 leiers, onder wie pres. Thabo Mbeki, mnr. Jacob Zuma, komm. Jackie Selebi, polisiehoof, mnr. Linda Mti, vorige kommissaris van korrektiewe dienste, en min. Essop Pahad kan vervolg word nie omdat "daar eenvoudig nie genoeg getuienis is om 'n klagstaat op te stel nie".
Ngwema het destyds gesê die NV weet nie wié het wát gedoen of wie die opdragte gegee het nie. "Indien die NV dit met die getuienis tot sy beskikking sou doen, is dit net so goed die vervolger besluit oudpres. PW Botha of oudpres. FW de Klerk moet teregstaan weens voorvalle in die apartheidsjare waarvoor niemand anders verantwoordelikheid aanvaar het nie," was Ngwema se woorde.
Mnr. Dirk van Eck het reeds aangedui hy is gereed om 'n klag in te dien teen ANC-leiers wat nie amnestie ontvang het nie vir die aanval wat meer as die helfte van sy gesin uitgewis het.
Die politieke omstredenheid oor vervolgings vir misdade uit die verlede sal uitbrei as die NV 'n vervolging instel teen genl. Basie Smit, 'n voormalige hoof van die polisie se speur- en veiligheidstak. Een van die klousules in Vlok en Van der Merwe se pleitooreenkoms dwing hulle om in 'n moontlike verhoor teen Smit te getuig.
Rapport verneem Ackermann het vroeër skriftelik opdrag gegee dat die polisie nog getuienis in die ondersoeke na die ANC-leiers moet versamel met die oog op moontlike vervolging. Maar die afgelope week het die polisie geweier om te sê of die opdrag nagekom is en wat die vordering daarmee is.
Dir. Sally de Beer, Selebi se woordvoerder, het navrae na dir. Phuti Setati, woordvoerder van nasionale speurdiens, verwys.
"Die polisie wil sy kommentaar oor die saak voorbehou," het Setati gesê.

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scarstenss@rapport.co.za
) Vlok en Van der Merwe vra Mbeki en De Klerk om in te gryp – bl. 14

Google translate:

Dossiers on leaders' abuses lay for years in safe ANC files' disappear '
Sonja CarstensPretoria

The police have done nothing to get more evidence and testimony for the possible prosecution of 37 former leaders of the ANC who amnesty for apartheid crimes were refused.
Report this week from impeccable sources learned that the police dockets that two retired police officers have made earlier, for years locked up at the headquarters of the police's detective services
The sources' names are withheld at the request because of the sensitive positions that they hold
According to the sources, no further investigation into the information taken in the case files.
The dossiers were earlier removed from a safe in the office of the Director of Public Prosecutions (DPP) in Pretoria Advocate. Paul Fick, SC, head of the prosecution team who accuse the alleged Boer force members, the head of a team that further investigation instituted with a view to possible prosecution.
The National Prosecuting Authority (NPA) has taken the examinations years ago Fick. He wanted the past week did not respond at all to questions.
Butchery since it was removed from Fick's office, it was entrusted to a team at the NA that it had investigated further, but that did little to investigations.
After this, Adv. Anton Ackermann, SC, was appointed in June 2003 as head of a unit that had investigated include crimes against the state Ackermann was the prosecutor in the Vlok Van der Merwe trial.
Gen. Johan van der Merwe, a former police chief, said Friday "ample evidence" exists against the ANC leadership over their involvement in the landmine explosion in 1995 in which several members of the Van Eck- and the Necker family died.
In June 2004, Mr. Sipho Ngwema former spokesperson of the NPA, said none of the 37 leaders, including President. Thabo Mbeki, Mr. Jacob Zuma, Comm. Jackie Selebi, the police chief, Mr. Linde Mti, former commissioner of correctional services, and more. Essop Pahad can be prosecuted because "there is simply not enough evidence for an indictment to prepare,".
Ngwema said then that the NPA do not know who has what or who did not give the orders
"If the SA would do this with the evidence at its disposal, it is as well the prosecutor decides former president. PW Botha or former president. FW de Klerk arraigned because of incidents in the apartheid years for which no one has accepted responsibility, "was Ngwema's words.
Mr. Dirk van Eck has indicated he is ready to file a complaint against ANC leaders not yet received amnesty for the attack that wiped out more than half of his family.
The political controversy over prosecutions for crimes of the past will expand as the NPA a prosecution against Gen. institute. Basie Smit, a former head of the police detective and security branch One of the clauses of Vlok and Van der Merwe's plea agreement forcing them into a possible trial to testify against Smith.
Butchery Ackermann had earlier instructed in writing that the police have evidence in the investigation of the ANC leaders have gathered with a view to possible prosecution. But last week, the police refused to say whether the assignment is carried out and the progress it.
Dir. Sally de Beer, Selebi's spokesperson, referred questions to Dir. Phuti RAF spokesman national detective refers.
"The police want his comments on the case reserved," the RAF said
scarstenss@rapport.co.za
) Vlok and Van der Merwe asked Mbeki and De Klerk to intervene - p. 14

VPPD 213

http://www.gov.za/national-prosecuting-authority-rapport-article-ackermann

National Prosecuting Authority on Rapport article on A Ackermann

21 Aug 2007

Response to article in rapport
21 August 2007

With reference to the statements attributed to Anton Ackermann SC in the rapport of 19 August 2007, the National Prosecuting Authority (NPA) wishes to place on record the following:

* In May 2004, Bulelani Ngcuka, the then National Director of Public Prosecutions, declined to prosecute the African National Congress (ANC) leadership in connection with the conflicts of the past. A press statement confirming this was released on 15 May 2004.
* Since that press release the National Prosecuting Authority and in particular Ackermann has not directed any further investigation into this matter.
* Subsequent to the media report by the Rapport on 19 August 2007, and on request by the National Prosecuting Authority, the South African Police Service (SAPS) provided a copy of letter purporting to be written by Ackermann on 26 June 2006, to the National Prosecuting Authority. The NPA regards this letter as a forgery and has authorised an immediate investigation into the matter.

Contact person:
Tlali Tlali
Cell: 082 333 3880

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29-AUG-2007 16:48 FROM DEPT OF JUSTICE TO 0128243329 VPP6 P.01/2

MINISTRY
JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA
Private Bag X 276, Pretoria, 0001, Tel: (012) 315 1111, Fax: (012) 315 1740
Private Bag X 276, Cape Town, 8000, Tel: (021) 467 1700, Fax: (021) 467 1750

Our ref: 2/3/0
Enq: Adv. M Sibeko

Adv V P Pikoli
National Director of Public Prosecutions
Office of the National Director of Public Prosecutions
Private Bag X 752
PRETORIA
0001

Dear Adv Pikoli

MEETING OF THE SUB COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

1. I refer to the discussions in the above meeting of 23 August 2007.
2. You will recall that both you and the National Commissioner, Mr. J Selebi, provided the sub-committee with different facts on the Rapport article regarding an alleged forgery of certain NPA documents.
3. You further confirmed that you have instituted a thorough investigation into the alleged forgery. I was however not advised of this decision and the basis thereof.
4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that indeed there is an investigation by the NPA on certain political office bearers.
5. It was suggested at the meeting then that it would be useful if you could respond to the allegation that there is an investigation as mentioned above.

Your urgent response would be highly appreciated. Any information that could shed light to the issues will also be welcome.

I trust that you find the above in order.

Yours sincerely

MS B S MASANDLA, MP
Minister for Justice and Constitutional Development
Date: 29.08.07

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VPP7

Ref: NDPP/kp

Minister B. Mabandla
Minister of Justice and Constitutional Development
Momentum Building
cnr Prinsloo and Pretorius Streets
PRETORIA

29 August 2007

Dear Minister

MEETING OF THE SUB-COMMITTEE OF THE JCPS CABINET COMMITTEE ON POST TRC MATTERS

1. I refer to your fax of 28 August 2007.

2. I refer to the meeting of the sub-committee of 23 August 2007, which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members.

3. I confirm that I stand by what I said about the National Commissioner of Police and the South African Police Service (SAPS).

4. I confirm and repeat the following:

4.1 That I have instructed that an investigation be carried out in respect of the forgery of the memo by Adv. Ackermann SC.

4.2 As borne by the attached annexure and the numerous communications to the Minister, there is no investigation by the NPA or any of its officials against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police. I give the

Minister the assurance that no investigations or decisions to prosecute in these matters are done without my express authorization as per the prosecution guidelines as they pertain to the post TRC matters.

5. While I am not certain as to what the meaning of paragraph 4 of your letter is, it is, however, clear that my account of the position as it relates to the NPA s handling of the post TRC matters has been completely ignored

6. Arising from allegations made by two police officers, as well as a threat by a lawyer representing former Security Branch members who were facing prosecution, my predecessor had the material relating to the ANC leadership perused and satisfied himself that there was no basis for the leadership to be investigated. He also briefed your predecessor, as well as members of the Office of the Presidency to this effect. In my presence and in my capacity as the then Director General of the Department of Justice & Constitutional Development, all the police dockets stored at the Office of the Director of Prosecutions: Pretoria were handed over to the police. These events all took place in early and mid-2004. I confirm as well that the Minister was made aware of all these facts as far back as December 2004 and I am surprised that this issue is now resurfacing

7. In view of all that is transpiring now, I request an urgent meeting with the Minister, my Deputies and myself. Further, I request an opportunity to appear before the National Security Council to give a true account of this issue.

Kind regards

Adv. VP Pikoli
National Director of Public Prosecutions
Date:

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'LC4'

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent

WILLEM SCHOON Ninth Respondent

AFFIDAVIT

I, the undersigned

ANTON ROSSOUW ACKERMANN

state under oath as follows:

INTRODUCTION

1. I am a senior counsel, a former Special Director of Public Prosecutions in the Office of the National Director of Public Prosecutions (the first respondent in this matter, hereinafter referred to as the "first respondent" or the "NDPP"). I am currently retired.

2. In terms of section 13(1)(c) of the National Prosecuting Act No. 32 of 1998 ("the Act") I was appointed by President T M Mbeki, under a Presidential Proclamation dated 24 March 2003, to head the Priority Crimes Litigation Unit ("PCLU"). A copy of this proclamation is annexed to the founding affidavit marked **"TN28"**. I served as head of the PCLU between 2003 and 31 March 2013. I retired from the National Prosecuting Authority on 31 March 2013.

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3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct. As I have not studied all the relevant official documentation I stand to be corrected on certain details, such as dates.

4. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

EXPERIENCE

5. I have worked as a prosecutor for more than 40 years. I have prosecuted several high profile cases in South Africa. I set out hereunder an outline of my professional career:

5.1. Joined the Department of Justice in 1970.

5.2 Graduated from the University of Potchefstroom with the degrees of B Juris and LLB in 1975.

5.3. Admitted as an advocate in 1976.

5.4. Served with the office of the Attorney-General in Pietermaritzburg between 1977 and 1989.

5.5. Appointed Deputy Attorney General: Transvaal in 1989 and served in this post until 2003.

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5.6. Senior Counsel status was conferred on me in 1993.

5.7. Appointed head of the Priority Crimes Litigation Unit (PCLU) in March 2003.

5.8. I retired in 2013.

CONFIRMATION

6. I confirm the contents of the founding affidavit of Thembisile Phumelele Nkadimeng ("the applicant") and the supporting affidavit of Vusumzi Patrick Pikoli insofar as they relate to me.

7. Although I was not specifically aware of an official policy or decision to stop, obstruct or hold back the investigation and possible prosecution of the cases recommended for prosecution by the Truth and Reconciliation Commission ("TRC"), including the kidnapping, assault and murder of Nokuthula Aurelia Simelane ("Nokuthula") in the case: Priority Investigation. JV Plein: 1469/02/1996, I can confirm that I was effectively stopped from pursuing the investigation and prosecution of the so-called political cases arising from South Africa's past ("the TRC cases").

8. In this affidavit I set out my experiences in trying to pursue the prosecution of the TRC cases and how I was effectively stopped from carrying out this work.

BACKGROUND

9. If my memory serves me correctly, in 1998 the investigation dockets held by the Unit headed up by Transvaal Attorney General Dr. Jan D'Oliveira Unit were transferred to the National Prosecuting Authority ("NPA"). In terms of a directive issued in 1999 by the then National Director of Public Prosecutions ("NDPP"), the TRC related cases were transferred from the then Directorate of Special Operations ("DSO"), and from the various offices of the Directors of Public Prosecutions ("DPP") and the South African Police Service ("SAPS") to the office of the NDPP.

10. In 1999, a working group called the Human Rights Investigative Unit ("HRIU") was established within the NPA by the then National Director of Public Prosecutions ("NDPP"), Bulelani Ngcuka, on the initiative of the then Minister of Justice, Dullah Omar. The head of the Unit was Vincent Saldanha. It was mandated to review, investigate and prosecute cases in which perpetrators had been denied amnesty or in which perpetrators had not applied for amnesty. The HRIU continued operations until 2000, however it instituted no prosecutions.

11. In 2000, the dockets held by the HRIU were transferred to the Directorate of

Special Operations ("DSO"), more widely known as the Scorpions. An entity was established within the DSO to handle the TRC cases known as the Special National Projects Unit ("SNPU"), which was headed by Advocate Chris Macadam. The SNPU operated until 2003, but it too instituted no prosecutions.

12. On 24 March 2003 I was appointed to head up the newly established PCLU. The mandate of the PCLU is to manage and direct investigations and prosecutions in relation to various priority crimes, including serious national and international crimes, such as terrorism, sabotage, high treason, sedition, foreign military crimes and other priority crimes as determined by the NDPP.

13. On 15 April 2003, the TRC Report was tabled before Parliament by President Thabo Mbeki who directed that the NDPP must institute prosecutions where appropriate.

14. In May 2003 the then NDPP, Advocate Bulelani Ngcuka, made a determination that all TRC-related cases, in which amnesty had been denied or not applied for, were '*priority crimes*' in terms of the proclamation. This resulted in more than 400 investigation dockets being transferred to my office. Advocate Chris Macadam, attached to my office, and I conducted the initial audit and identified 21 cases as worthy of further investigation.

15. During 2004 and 2005 the PCLU identified 16 cases for further investigation and

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possible prosecution. The Simelane case was one of the cases earmarked for further investigation.

16. In relation to post-TRC prosecutions conducted by the PCLU, only the following cases have been instituted: S v Terre'blanche, S v Blani and S v Nieuwoudt & 2 Others.

16.1. In 2003, the late Eugene Terre' Blanche, former leader of the Afrikaner Weerstandsbeweging, (Afrikaner Resistance Movement), who had been charged with various acts of terrorism during the 1990s, entered into a 'plea agreement' with the PCLU in terms of 105A of the Criminal Procedure Act. Terre' Blanche pleaded guilty to five counts of terrorism in contravention of the Internal Security Act and was sentenced to six years of imprisonment, which was wholly suspended. He had not applied for amnesty. This was the first TRC related case taken up by the PCLU.

16.2. During 2004 I came across the docket of Buyile Ron' Blani, an ANC member, who was implicated in the mob killing of two people in 1985. Blani was charged with the killings in 1985 but managed to flee to Angola where he remained in exile until his return in 1992. He did not apply for amnesty. Since the evidence was clear and compelling and the case was already fully investigated I instructed that it should proceed. Blani was arrested and granted bail. On 25 April 2005, following a plea and sentence agreement, he was convicted on all charges and sentenced to five years imprisonment,

four of which were suspended for five years.

16.3. In 2004, Gideon Nieuwoudt (who died in 2005), Johannes Martin van Zyl, and Johannes Koole were each charged with abduction, assault and murder of the 3 anti-apartheid activists, known as the PEBCO 3.

16.3.1. This was the first case that the PCLU brought in respect of perpetrators who had been denied amnesty. Their applications for amnesty had been denied in 1999.

16.3.2. Shortly after their bail hearings in 2004, Nieuwoudt and van Zyl applied to court to review the decisions to refuse them amnesty. The review was delayed by some 5 years because of the failure of the Department of Justice to file its answering papers. Eventually in 2009 the High Court ruled that an Amnesty Committee be convened to rehear the application of van Zyl.

16.3.3. The case against the three former security policemen was provisionally withdrawn in 2009. The NPA submitted to the High Court that the prosecution could not proceed while there was an amnesty proceeding pending. The Department of Justice filed an affidavit recommending the provisional withdrawal of the criminal charges against the surviving Johannes Koole, and Martin Van Zyl,

who was seriously ill. The Amnesty Committee was never reconvened and the case against Van Zyl and Koole was never reinstated.

17. On the morning of 11 November 2004 the police was on the verge of effecting the arrests of three former officers of the Security Police on charges which related to the attempted murder of the Rev. Frank Chikane, the former head of the South African Council of Churches in 1989 by poisoning. The three former policemen were former Major-General Christoffel Smith, Colonels Gert Otto and Johannes 'Manie' van Staden. None had applied for amnesty for this crime.

17.1. On the same morning I received a phone call from Jan Wagenaar, the attorney for the abovenamed suspects. He told me that I would receive a phone call from the Ministry of Justice and I would be advised that the case against his clients must be placed on hold.

17.2. Shortly thereafter I received a phone call from an official in the then Ministry of Justice. I was informed by the said official that a decision had been taken that the Chikane matter should be put on hold pending the development of guidelines to deal with the TRC cases. I told him that that only the NDPP could give me such an instruction.

17.3. A few minutes later the NDPP contacted me and instructed me not to

proceed with the arrests. I believe that it can be safely assumed that the NDPP was instructed at a political level to suspend these cases.

18. All TRC related investigations and prosecutions were accordingly placed on hold pending the formulation of guidelines in relation to the so-called political cases of the past. These were to be incorporated as amendments to the Prosecution Policy (hereinafter referred to as "the amendments" or "the guidelines"). I was instructed by the NDPP to stop working on all the TRC cases.

19. At least two legal opinions were prepared by my office regarding the constitutionality of the proposed amendments to the Prosecution Policy and submitted to the NDPP. The opinions pointed out that the amendments amounted to a rerun of the TRC's amnesty process and would not survive constitutional scrutiny. At a number of meetings I voiced my opposition to the proposed amendments. I recall that I had numerous consultations with Gerard Nel, the legal adviser to the NDPP, who was playing a leading role in formulating the proposed amendments.

20. This suspension of prosecutions amounted to an effective moratorium on the pursuit of TRC related cases

21. During 2005 I met with representatives of the Simelane family. They raised a number of requests, including that the PCLU should:

21.1. Investigate with a view to prosecuting Detective Inspector Msebenzi Timothy Radebe, who played a role in the abduction and the torture of Simelane both at Norwood and Northham and who did not apply for amnesty.

21.2. Investigate with a view to bringing defeating the ends of justice charges against Coetzee and Pretorius for intimidating the late Sergeant Lengene into making a false statement and for attempting to coach Norman Mkhonza into making a false statement.

21.3. Follow up on the results of the examination of the micro cassette tape containing the conversation between Scotch, Pretorius and Coetzee; and follow up on the request for lists of unidentified bodies received by police mortuaries between 1980 and 1996.

21.4. Investigate the circumstances of the deaths of two key witnesses, Sergeant Mathibe and Sergeant Lengene.

22. I was not able to assist with these requests as at that stage my hands were tied with the effective moratorium in place pending the issuing of the new Prosecution Policy.

23. In December 2005 the amendments to the Prosecution Policy were issued. These

amendments permitted the granting of effective indemnities to perpetrators in TRC related cases who did not make use of the erstwhile amnesty process.

23.1. The NDPP was authorised to apply the same amnesty criteria used by the TRC but could also decline to prosecute on other open-ended criteria such as the perpetrator's demonstration of remorse, level of indoctrination sustained, attitude towards reconciliation and/ or his willingness to abide by the Constitution.

23.2. These criteria would entitle the NDPP to decline to prosecute, even where there was adequate evidence to justify a prosecution in a serious case such as kidnapping or murder.

23.3. The PCLU was expected to act under the advisement of a multi-departmental committee which included the National Intelligence Agency and the South African Police Service. The entire process would be carried out behind closed doors.

24. As mentioned above, I was opposed to the amendments to the Prosecution Policy as I felt they violated the constitutional rights of the complainants and constituted unwarranted interference in the prosecutorial independence of the NPA. I again expressed my dissatisfaction with various officials, including the NDPP. In my view the amendments or guidelines were aimed solely at accommodating

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perpetrators and providing them with another avenue to escape justice.

25. Once the guidelines were issued in December 2005 I wanted to proceed with the 5 cases I had identified with good prosecution prospects and the 11 cases which required further investigation. These were identified as "*major priorities*" for the PCLU for the 2006 – 07 period. Moreover a press statement issued by the NDPP during 2006 led to additional requests from victims for further investigations in their cases. However, with the exception of the Chikane matter, during the course of 2006 and 2007, the PCLU was unable to pursue any of the TRC cases for various reasons. These included a lack of investigative capacity as well as difficulties encountered in convening the multi-departmental committee that was meant to advise the PCLU on what cases to pursue.

26. In March 2006 I again met with the representatives of the Simelane family. I had to advise them that I was unable to take the investigation forward as there were no investigators attached to the PCLU. Requests I had made to the SAPS and the DSO for competent and experiences investigators, in this matter and the other TRC cases, had fallen on deaf ears. The said representatives also supplied me with a legal opinion which recommended that those involved in the torture of Ms. Simelane be charged with torture, as a crime against humanity or war crime, in terms of customary international law, since such crimes never prescribe.

27. As a result of this meeting the said representatives wrote to the then NDPP, Adv.

Pikoli, requesting him to reach out to the SAPS and the DSO in order to secure competent investigators for the PCLU as a matter of urgency. These efforts were not successful. In subsequent interactions I advised the said representatives to pursue an inquest rather than a prosecution. I did so because I realized that there was no prospect of a serious investigation or prosecution taking place in the political context that prevailed at the time.

28. During 2006 the then NDPP, Adv Pikoli, appointed a team to review the representations made by the suspects in the Chikane matter who were seeking an indemnity under the amendments to the Prosecution Policy. The team was chaired by Dr. T. Pretorius. I refused to participate in this review as I regarded the said amendments as unconstitutional. After several months the review team concluded that no indemnities should be granted as the full truth had not been disclosed.

29. During 2007 the PCLU eventually returned to the Chikane attempted murder case and in June 2007 the three suspects together with Adriaan Vlok, former Minister of Police, and Johan van der Merwe, former Commissioner of Police were charged with one count of attempted murder, alternatively conspiracy to murder Chikane. A plea and sentence agreement was agreed upon which the Court confirmed during August 2007. In terms of the plea and sentence agreement the accused all pleaded guilty to the charge of attempted murder. Vlok and van der Merwe were sentenced to ten years imprisonment, wholly suspended for five

years on the condition that they are not convicted of a similar crime. Otto, Smith and van Staden were sentenced to five years imprisonment, wholly suspended for five years on the condition that that they are not convicted of a similar crime.

30. This case ought to have opened the door to the prosecution of General Basie Smit, who succeeded Van der Merwe as Commander of the Security Branch in October 1988, as well as other senior officers of the both the SAPS and the former South African Defence Force (SADF). However no further cases were pursued which can be attributed to political interference in the work of the NPA.

31. In 2008 the High Court in Pretoria (*Nkadimeng & Others v The National Director of Public Prosecutions & Others*, TPD case no 32709/07) struck down the amendments to the Prosecution Policy as unconstitutional. The Court found that the amendments were a "*copy-cat*" of the TRC amnesty process; that many of the criteria were not relevant in deciding whether or not to prosecute; and that they were moreover "*a recipe for conflict and absurdity*".

POLITICAL INTERFERENCE

32. The first act of political interference which effectively stopped the work of the PCLU into the TRC cases was the suspension of such cases during 2004 pending the issuing of the new prosecution guidelines. This introduced the effective moratorium I referred to above.

33. Once the guidelines had been issued, and the multi-departmental working committee (subsequently referred to as the Task Team) was established in 2006, it became clear that the SAPS and NIA representatives believed they were part of the prosecutorial decision making process.

33.1. On 6 December 2006, the PCLU received a letter from the head of the SAPS Legal Support section, Major General P C Jacobs, representing the view of the National Commissioner, which indicated that before any prosecutorial decision was made in respect of the TRC cases, the Task Team must submit a final recommendation to a Committee of Directors General in respect of each case, which in turn must advise the NDPP in respect of who to prosecute or not.

33.2. In respect of the interactions between the NDPP and other government departments and officials, I refer to the affidavit of Adv Pikoli, which is filed evenly herewith.

34. The NDPP objected to this approach on the basis that it would constitute an unwarranted interference in the work of the NPA. The NDPP would be obliged to wait for the process to be completed and to receive a recommendation before he could make a decision, even where there were reasonable prospects of a successful prosecution.

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35. During 2007 an office note, purportedly written by me in 2006, was circulated in certain government circles in which it was reflected that I was investigating criminal charges against 37 ANC leaders, including the then President, Thabo Mbeki. This office note was a fabrication. I had written this office note in 2003 but the date of the note had been adjusted to give the false impression that it had been compiled in 2006. I believe it was aimed at discrediting me and ultimately stopping the investigations into the TRC cases. I am firmly of the view that the then National Commissioner, the late Mr. J Selebi, played a conspicuous role in claiming that I was pursuing the said leaders.

36 During this time I was informed by Adv. Pikoli that the then Director-General of the Department of Justice, Menze Simelane, had approached him and raised concerns about my handling of the prosecution of the TRC cases. He asked the NDPP to relieve me of my duties in this regard which the NDPP declined to do. The NDPP advised me that senior people in the government wanted to fire me because I was still pursuing the TRC cases.

37. Adv. Vusi Pikoli was suspended from his duties as NDPP in September 2007. Shortly after his suspension I was summoned to the office of Adv. Mokotedi Mpshe, then acting NDPP. Adv. Mpshe advised me that I was relieved of my duties in relation to the TRC cases with immediate effect. I have no doubt that Adv. Mpshe received a political instruction to remove me from these cases. I

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advised Adv. Mpshe that removing me from the TRC cases would not make the cases go away.

38. At the time, I believed that if I was being removed from the TRC cases, then nobody else would be permitted to pursue the cases boldly and fearlessly. It is no coincidence that there has not been a single further prosecution since I was relieved of my duties in this regard.

CONCLUSION

39. There is little doubt in my mind that the investigation and prosecution of the TRC cases have been effectively stopped by machinations that took place at a level above that of the NPA. Such interference serves to explain why the Simelane matter, as well the bulk of the TRC cases, have not been seriously investigated or prosecuted.

40. In so doing the rule of law has been undermined and a deep injustice has been committed against the family of the late Nokuthula Simelane, as well as the families of other victims of apartheid era crimes.

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A R ACKERMANN

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at PRETORIA on this the 07TH day of MAY 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

I certify that the DEPONENT has acknowledged that he/she knows and understands the contents of this affidavit, that he/she does not have an objection to taking the oath, and that he/she considers it to be binding on his/her conscience, and which was sworn to and signed before me and that the administering oath complied with the regulations contained in Government Gazette No R 1258 of 21 July 1972 as amended

Full Names

Date

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LC5

COPY

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

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

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(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

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."*.

2.1.2 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.

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental Task Team comprising members of the following Departments or institutions:

- 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

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

Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

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

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—

[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.

(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.

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.

[4] See paragraph A.2 (h) to (k) of Appendix A.

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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.

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 abovementioned 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.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

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

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 abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta 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 Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

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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".

- '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 Policy[5], 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.

[5] See paragraph B.6 of Appendix A.

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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.

16-02-2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

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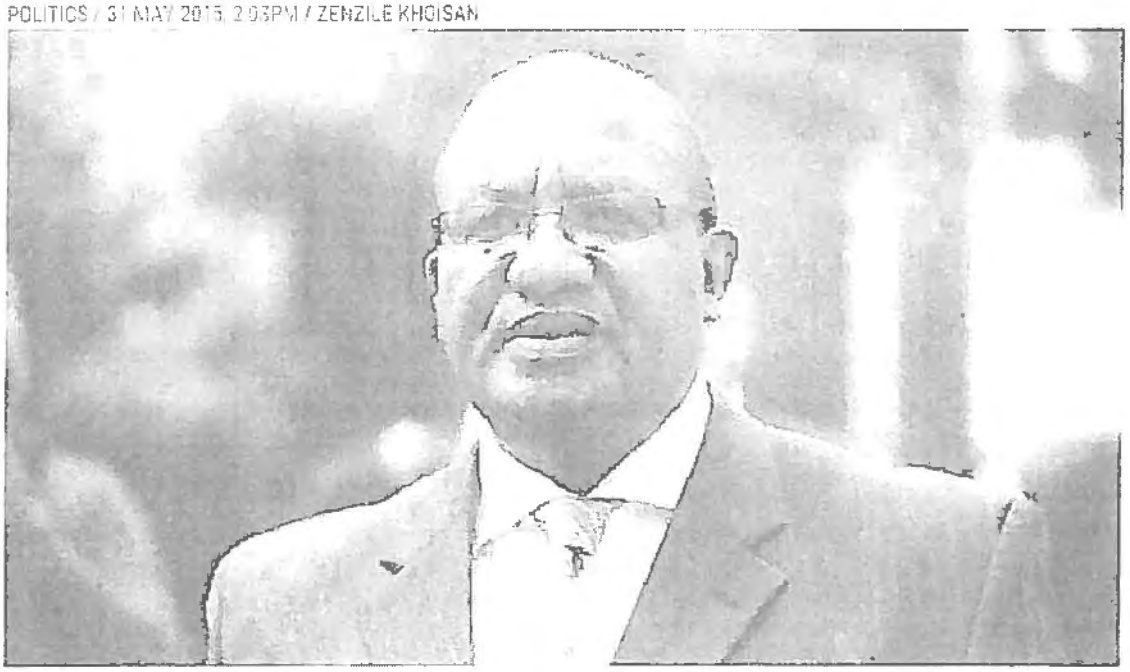
'Government interference let killers off hook'

POLITICS / 31 MAY 2015, 2:03PM / ZENZILE KHOISAN



Former National Director of Public Prosecutions Vusi Pikoli. Picture: Chris Collingridge

Cape Town - The shocking admission by former National Director of Public Prosecutions Vusi Pikoli that "powerful elements within government were determined to impose their will" on his prosecutorial decisions, effectively giving some of apartheid's most brazen killers a get-out-of-jail-free card, has led to calls for the government to explain what some have termed "a total betrayal of the people's trust."

Pikoli's affidavit was issued in support of a matter before the High Court in Gauteng involving the 1983 abduction and disappearance of 23-year-old Nokuthula Simelane, whose family is demanding the prosecution of the apartheid security policemen who did not receive amnesty for torturing her for five weeks on a North West farm and then refusing to disclose where they had disposed of her body.

The matter of Simelane is one of 300 cases which the Truth and Reconciliation Commission (TRC) asked the prosecuting authority to follow up, and the family, which has searched for her remains for more than three decades, is demanding action.

In supporting the family's action Pikoli stated: "I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including the kidnapping, assault and murder of Nokuthula Aurelia Simelane in the case: Priority Investigation: JV Plein 1469/02/1996."

"In this affidavit I set out evidence that reflects such political interference. I also set out the serious impact that such interference had on the pursuit of the TRC cases by the National Prosecuting Authority."

While directing blame for failure to prosecute on senior government officials, the affidavit also opens a particularly contentious can of worms for the ruling ANC – that it feared the NPA would target senior ANC officials for crimes committed before 1994. It also states that the reason Pikoli was relieved of his duties is because he wanted to prosecute perpetrators responsible for gross violations of human rights during apartheid.

In Pikoli's explanation of why the NPA, on his watch, failed to institute prosecution of the cases recommended by the TRC, he details memos, meetings and communications with top government figures such as former Justice Minister Bridgette Mabandla, former Social Development Minister Zola Skweyiya, former Intelligence Minister Ronnie Kasrils and the late former police chief Jackie Selebi who, he claims, interfered with his mandate to act "without fear, favour or prejudice."

Pikoli cites efforts by the NPA to prosecute security police members implicated in the 1989 attempts to kill Frank Chikane as an example of the manner in which his office was undermined.

"The decision to prosecute those implicated in the attempted murder, through poisoning, of head of the South African Council of Churches Reverend Frank Chikane at the then Jan Smuts Airport,saw the unraveling of the attempts by the NPA to hold apartheid-era perpetrators accountable for their crimes."

According to Pikoli, this effectively derailed the prosecution of three security branch members.

This is supported by an affidavit by Anton Ackermann, the former head of the NPA Priority Crimes Litigation Unit, which had been assigned TRC cases for investigation and prosecution.

"On the morning of November 11, 2004 the police were on the verge of arresting three former officers of the security police on charges which related to the attempted murder of Rev Frank Chikane by poisoning. The three former officers were Major General Christoffel Smith and colonels Gert Otto and Johannes Manie van Staden. None had applied for amnesty.

"On the same morning I received a call from Jan Wagenaar, the attorney representing the suspects. He told me that I would receive a call from the ministry of justice and would be advised that the case against his clients must be placed on hold."

Ackerman states that he subsequently received calls from the Department of Justice and the National Directorate of Public Prosecutions instructing that he not proceed with the arrests. "I believe that it can safely be assumed that the NDPP was instructed at a political level to suspend these cases."

The former Priority Crimes Litigation Unit head added that he had little doubt that "the investigation and the prosecution of TRC cases have been effectively stopped by machinations at a level above that of the NPA. Such interference explains why the Simelane matter, as well as the bulk of TRC cases have not been seriously investigated or prosecuted.

"In doing so the rule of law has been undermined and a deep injustice has been committed against the family of the late Nokuthula Simelane, as well as the families of other victims of apartheid era crimes," he concluded.

Reacting to Pikoli's claims of political interference in the NPA's attempts to hold apartheid killers accountable, former TRC chief investigator Dumisa Ntsebeza, who was part of many delegations which met with the NDPP, labelled Pikoli a "latter day convert to principle, who has finally summoned up enough courage to come out with the truth".

Ntsebeza said "Pikoli should have done the honourable thing at the time, resigned his post and exposed the attempts to undermine Section 179 of the constitution which defines the work of the National Director of Public Prosecutions."

Majorie Jobson, head of the Khulumani victims support group, said she had been very disappointed with Pikoli's inability to act in the interests of apartheid-era rights violations victims. Succumbing to political pressure by the prosecutions body "was a massive betrayal of the people's trust," Jobson said.

Weekend Argus

'LC7'

IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

In the matter between: **Case No.: 2018/76755**

JOAO RODRIGUES **APPLICANT**

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **FIRST RESPONDENT**

MINISTER OF JUSTICE **SECOND RESPONDENT**

MINISTER OF POLICE **THIRD RESPONDENT**

IMITIAZ AHMED CAJEE **FOURTH RESPONDENT**

FIRST RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

JACOBUS PETRUS PRETORIUS

do hereby make oath and state as set out below.

1 INTRODUCTION

1.1 I am an adult and I am employed by the National Prosecuting Authority, herein represented by the first respondent. I have already deposed to the first respondent's answering affidavit and remain duly authorized to place the evidence contained herein before the Court on behalf of the first respondent.

1.2 Unless the context indicates otherwise, the contents of this supplementary answering affidavit fall within my knowledge and they are true and correct. In some respects, my knowledge of the contents hereof is derived from the documents to which I also refer herein. I believe that the contents of such documents are true and correct when regard is had to the source of such documents.

1.3 The purpose of this supplementary answering affidavit is to deal with the contents of the fourth respondent's answering affidavit and supplementary affidavit.

1.4 I have considered the fourth respondent's answering affidavit and I reply thereto below to the extent that it is necessary to show that the first respondent is not responsible for the delays in prosecuting the applicant and that the delays complained of do not justify the relief which the applicant seeks.

1.5 I have also considered the contents of the fourth respondent's supplementary affidavit in which is attached an uncertified transcript of what purports to be an interview conducted with a radio station. This supplementary affidavit is irrelevant and serves no purpose in these proceedings and was filed with an intention to paint the National Prosecuting Authority and the South African Police in a negative light. I do not admit the authenticity of the transcript attached to this supplementary affidavit and I am not going to respond thereto.

2 THE DELAYS

2.1 The fourth respondent filed an answering affidavit to oppose the relief which the applicant seeks in this application. This affidavit, however, reads like a supporting affidavit intended to boost the applicant's case and I have no doubt that the applicant will rely on it to support his case.

2.2 In such answering affidavit, the fourth respondent also seeks to tell the Court what caused the delays in instituting the criminal proceedings which are sought to be stayed permanently by the applicant. The only issue which the first respondent takes with the fourth respondent's approach is that he seeks to blame the National Prosecuting Authority and the first respondent for such delays.

2.3 I strongly deny that the first respondent is responsible for the delays upon which the fourth respondent seeks to rely. Even on the evidence upon

which the fourth respondent relies, it is clear that the prosecution was delayed as a result of political interference by others.

2.4 Even if it may be found that the first respondent is responsible for the delays, which I deny, the delays and the first respondent's conduct is not of such a nature that it justifies the permanent stay of the criminal proceedings when regard is had to the following:

2.4.1 the nature of the criminal offence with which the applicant is charged;

2.4.2 the circumstances under which Mr. Timol died;

2.4.3 the fact that the fourth respondent himself says that the National Prosecuting Authority was subjected to severe political pressure not to take urgent steps to prosecute people such as the applicant;

2.4.4 the fact that the interests of justice require the Court to refuse the permanent stay sought by the applicant; and

2.4.5 the fact that the National Prosecuting Authority and its Priority Crimes Litigation Unit which was responsible for the prosecution of TRC matters since 2003 always wanted to have these cases investigated and prosecuted.

2.5 It is not entirely clear from the fourth respondent's answering affidavit as to what he seeks to achieve by blaming the first respondent when on the

other hand, he says that the first respondent was prevented from prosecuting by political office bearers.

2.6 Mr. Timol died in October 1971. An inquest which was conducted thereafter did not result in any criminal prosecution.

2.7 In paragraph 82 of his answering affidavit, the fourth respondent seems to accept that the circumstances around Mr. Timol's murder were covered up by the then government of the Republic of South Africa between 1971 and 1994 and that this cover up "*naturally explains*" the inaction during that period.

2.8 It is surprising that the fourth respondent does not take issue with the people responsible for the cover-up and does not seek any punishment against them. He, however, seeks to lobby for an inquiry to be conducted in relation to certain officials of the first respondent, which officials he accepts were subjected to severe political constraints and interference. It would appear from his answering affidavit that this is indeed his sole motive of seeking to blame the first respondent for the delays in prosecuting the applicant even though at the end he says that the delays in prosecuting the applicant do not justify the granting of the permanent stay relief which the applicant seeks in this application.

2.9 It is common cause that Mr. Timol's murder was politically motivated and it is for this reason a political crime. The fourth respondent also describes it

as such in paragraph 84 of his answering affidavit. It is also common cause that Mr. Timol's murder is not the only political crime for which the perpetrators have not been prosecuted.

2.10 When regard is had to the nature of the crime, it should not be surprising that the government of the day may have taken steps to find a political solution to the political murders which were perpetrated by agents of the pre-1994 government. It is irrelevant as to what one calls such steps. The fourth respondent calls them political interference with the National Prosecuting Authority. He describes the position as follows in paragraph 84 of his answering affidavit:

"*84 In the post-TRC period the NPA and its officials dealing with my uncle's case, as well as other so-called political crimes from the past, became subjected to severe political constraints. Such pressures served to shape the approach or policy of the NPA and the SAPS in relation to the so-called political cases (also referred to as the "TRC cases"). Indeed, it is my submission that such political pressure made it extremely difficult, if not impossible, for them to carry out their responsibilities under law. This in turn rendered their conduct, in relation to Timol's case and other so-called political cases, questionable, if not unlawful. It also explains the inordinate delay in re-opening the inquest into my uncle's death and, now, prosecuting the accused.*" (Own emphasis).

2.11 The first respondent does not deny that the executive branch of the State took what one can describe as political steps to manage the conduct of criminal investigations and possible prosecution of the perpetrators of the political murders such as that of Mr. Timol. When regard is had to what advocates Pikoli, Ackermann and Macadam say in their affidavits confirming political interference with the first respondent's prosecutorial decision-making processes, it is clear that it is in fact not the first respondent who stalled the investigations and prosecution of cases such as the present. For this reason, no purpose would be served by throwing stones at the first respondent.

2.12 When regard is had to what the fourth respondent says in paragraph 84, the only conclusion to arrive at is that the delay in prosecuting the applicant was not as a result of the first respondent's own doing or its malice – it was as a result of the political interference and the "*severe political constraints*" to which the first respondent was subjected.

2.13 The fourth respondent relies on certain incidents which he says constitute evidence of political interference. None of these incidents were created by the first respondent. On the fourth respondent's own version, "*the NPA and its officials dealing with my uncle's case ... became subjected to severe political constraints ...*" There is no doubt that the National Prosecuting Authority and its officials could not have subjected themselves to the "*severe political constraints*" referred to by the fourth respondent.

2.14 It is necessary for me to comment on each of the instances upon which the fourth respondent relies to demonstrate that the first respondent is not the author thereof.

The secret government report

2.15 This is a report of the Amnesty Task Team. This task team was appointed by the Director-General's forum on 23 February 2004. The Director-General's forum was not created by the first respondent. It was chaired by the Director-General of the Department of Justice and Constitutional Development. This Director-General must have chaired this forum on the instructions of his superiors. The National Prosecuting Authority was represented thereat by Gerhard Nel and Lungisa Dyosi who were not members of the National Prosecuting Authority's Priority Crimes Litigation Unit responsible for the prosecution of cases such as the present.

2.15.1 The task team was required to consider and report on, amongst others, the following:

> "2. *Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.*"

2.15.2 The report clearly indicates that the democratic government, at its highest level, intended to give people such as the applicant, who did

not participate in the TRC process, another opportunity to apply for amnesty. For this reason, the task team considered that it had to "*perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the tabling of the report of the Truth and Reconciliation Commission on 15 April 2003.*"

2.15.3 The report further states that the President provided, amongst others, the following guidelines:

"*(a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.*

(b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process." (Own emphasis).

2.15.4 Paragraph 3.3 of the report shows that consideration was given to establishing "*a further amnesty process similar to that of the TRC process.*" This, however, was rejected by the task team with the following provision:

"*3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft indemnity Bill is attached as Annexure "B" for consideration.*"

2.16 It is clear from the report upon which the fourth respondent relies that:

2.16.1 The functions of the aforesaid task team were not determined by the first respondent.

2.16.2 The government, through the President at the time expressed its willingness to establish a second amnesty process similar to that of the TRC clearly in order to give people such as the applicant an opportunity to fully disclose their participation "*during the conflicts of the past.*"

2.16.3 To the extent that the work of the Amnesty Task Team contributed to a delay in the applicant's prosecution, the blame for that does not find a place to sit in front of the first respondent's door steps. In the premises, the report of the Amnesty Task Team upon which the fourth respondent seeks to rely does not in any way establish any wrongdoing on the part of the first respondent.

2.16.4 At best, the government of the Republic of South Africa could be criticized for having entertained the thought of establishing another amnesty process similar to that of the TRC process – but that is as far as that criticism can go. There is absolutely no evidence placed before the Court to suggest that the entertainment of such a thought was malicious and not at all in the interests of justice and the interests of the community as a whole. The time taken entertaining that thought and giving effect to it clearly contributed to the delay in prosecuting the applicant – but that was not the first respondent's doing.

The affidavit of Adv. Vusi Pikoli

2.17 The fourth respondent says that the contents of the affidavit of Adv. Pikoli constitutes evidence of some of the "*various steps aimed at ensuring political control over prosecutorial decisions dealing with the TRC cases.*"

2.18 Pikoli was appointed as the National Director of Public Prosecutions on 1 February 2005. This is the highest position within the National Prosecuting Authority. Prior to that, he was the Director-General of the Department of Justice and Constitutional Development. His affidavit, however, does not say much about the role he played on the Amnesty Task Team. It also does not say anything about the origin of the task team and why it was necessary to set it up.

2.19 In paragraph 85.2 of his answering affidavit, the fourth respondent says that Pikoli's affidavit "*sets out how the independence of his office was seriously compromised*" and "*how he was subjected to withering pressure from political forces, including the then Minister of Justice, Mrs. BS Mabandla, and the then Commissioner of the SAPS, the late Jackie Selebi, to abandon the TRC cases.*"

2.20 I must say upfront that I do not dispute the contents of Pikoli's affidavit upon which the fourth respondent relies. The contents of such affidavit, however, do not constitute a basis to grant the permanent stay which the applicant seeks in this application and further show that the first respondent did not abandon the intention to prosecute people such as the applicant.

2.21 It is important that I highlight some of the contents of Pikoli's affidavit which clearly indicate that the first respondent and its officials were indeed, as alleged by the fourth respondent, subjected to severe political constraints as a result of which, on the fourth respondent's version, it was "*extremely difficult, if not impossible, for them to carry out their responsibilities under law.*"

2.21.1 In paragraph 8 of his affidavit, Pikoli says that:

> "*8. As a result of my decision to authorize the prosecution of a former commissioner of police on corruption charges I was suspended from duty by the then President, Mr. T Mbeki on 23*

September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the truth and reconciliation commission ... contributed to the decision of President Mbeki to suspend me.. " (Own emphasis).

2.21.2 It is clear from the above quoted paragraph 8 of Pikoli's affidavit that he did take a "*decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty*" by the Truth and Reconciliation Commission. Pikoli suspects that this decision also influenced President Mbeki to suspend him. Accordingly, not only was there political interference in the work of the highest office of the National Prosecuting Authority, but there was also action taken against the highest office of the National Prosecuting Authority for taking prosecutorial decisions.

2.21.3 In paragraph 14 of his affidavit, Pikoli says the following:

"*14. ... I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, ...*" (Own emphasis).

2.21.4 Pikoli also deals with what is referred to therein as the TRC cases. He says that decisions to prosecute certain members of the Security

Branch of the South African Police Service were taken by then Acting National Director of Public Prosecutions. After such decisions were taken, it was decided that the matters would be "*held over pending the development of the guidelines to deal with the TRC cases that were to be incorporated into the Prosecution Policy.*"

2.21.5 The contents of paragraph 33 of Pikoli's affidavit reveals what could have been the motivation against prosecuting people such as the applicant at the time. Therein, Pikoli suggests that the prosecution of "*cases like the Chikane matter could open the door to prosecutions of ANC members*" and that such prosecution could then "*give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.*"

2.21.6 In paragraph 52 of his affidavit, Pikoli refers to a memorandum which he wrote to the then Minister of Justice complaining about political interference in the work of the first respondent. Therein, Pikoli says that:

"*52. In this memorandum I concluded that there had been improper interference in relation to the TRC caces and that I had been obstructed from taking them forward. I complained that such interference impinged upon my conscience and my oath of office. I indicated that I was unable to deal with these cases in*

terms of the normal legal processes and sought guidance on the way forward." (Own emphasis).

2.21.7 The contents of the above quoted paragraph, which the fourth respondent accepts as true and correct and reflective of the correct legal position, clearly indicates that the highest office of the National Prosecuting Authority had reached a point where it "*was unable to deal with these cases in terms of the normal legal processes*" and deemed it necessary to seek "*guidance on the way forward.*" According to Pikoli, such guidance was never received. In paragraph 54 of his affidavit, Pikoli concludes that:

"*The failure or refusal of the Minister to respond to my memorandum suggested to me that she preferred for the deadlock between the NPA and the SAPS, NIA and DoJ to remain in place.*"

2.21.8 In paragraph 60 of his affidavit, Pikoli again gives light to the reluctance from the political level to prosecute cases such as the present. Therein, he says that there was a "*fear of opening the door to prosecutions of ANC members, including government officials.*"

2.22 All that is contained in Pikoli's affidavit, upon which the fourth respondent relies to create an impression that the first respondent is responsible for the delays, clearly indicates that the highest office of the National Prosecuting

Authority was subjected to political interference and political pressure not to prosecute cases such as the applicant's case.

2.23 There is nothing in Pikoli's affidavit that could be interpreted to suggest that the first respondent was remiss or negligent in handling what is referred to in Pikoli's affidavit as the TRC cases, which include the applicant's case.

2.24 In the premises, on the fourth respondent's version, the delays in prosecuting the applicant were occasioned by political interference and political pressure and not by the first respondent itself. In the premises, there is no room to blame the first respondent for the delays or to use the delays to justify the permanent stay of prosecution.

The affidavit of Adv. Anton Ackermann

2.25 The affidavit of Adv. Anton Ackermann does not take the matter any further.

2.26 In his affidavit, Ackermann confirms that cases such as the prosecution of the applicant were not prosecuted due to political pressure and political interference as stated in Pikoli's affidavit.

2.27 I do not deny what Ackermann says in his affidavit but I do state that the contents of Ackermann's affidavit do not justify the granting of the permanent stay of prosecution which the applicant seeks in this application.

2.28 The contents of both Pikoli and Ackermann's affidavits give this Court an opportunity to reaffirm the constitutional independence of the National Prosecuting Authority of this country and send a clear message that political office bearers should stop interfering with prosecutorial decisions unless otherwise authorized to do so by law.

2.29 What one sees in Pikoli and Ackermann's affidavits is that the political interference and political pressure brought to bear upon the highest office of the National Prosecuting Authority was far from being authorized by law. This being the case, there can be no rational basis to use such unlawful political interference and political pressure to justify the permanent stay of criminal prosecution which the applicant seeks in this application.

2.30 I agree with what the fourth respondent says in paragraph 88 of his answering affidavit that the manipulation of the criminal justice system to protect individuals from criminal prosecution serves an ulterior and illegal purpose and that it constitutes bad faith, it is irrational, it interferes with the independence of the National Prosecuting Authority and amounts to a gross subversion of the rule of law. This, however, does not justify the granting of the permanent stay of criminal prosecution which the applicant seeks in this application.

2.31 It is important that I again highlight that the fourth respondent does not say that the "*manipulation of the criminal justice system to protect individuals from prosecution*" was perpetrated by the first respondent and its officials.

Insofar as it is not the fourth respondent's version that the manipulation of the criminal justice system was perpetrated by the first respondent and its officials, there can be no basis to use that against the first respondent to justify the granting of the relief which the applicant seeks in this application.

2.32 The relief which the applicant seeks in this application is so drastic that it cannot be granted simply on the basis of the manipulation of the criminal justice system or by what the fourth respondent says amounts to political interference or severe political constraints.

2.33 In the light of the contents of Pikoli and Ackermann's affidavits and the correspondence attached thereto, there can be no merit in the fourth respondent's suggestion in paragraph 97 of his answering affidavit that "*the SAPS and the NPA colluded with political forces to ensure the deliberate suppression of the bulk of apartheid-era cases.*" It is important to draw the Court's attention to the fact that the fourth respondent does not even tell the Court as to when this alleged collusion with political forces occurred. The fourth respondent is called upon to produce evidence of this alleged collusion or to formally withdraw such allegation.

2.34 In any event, the suggestion that the SAPS colluded with the National Prosecuting Authority is completely inconsistent with the contents of Pikoli and Ackermann's affidavits. The two affidavits clearly tell the Court as to why cases such as the applicant's case were not immediately prosecuted

and they do not include the alleged collusion between the SAPS and the National Prosecuting Authority.

2.35 It is not correct that the National Prosecuting Authority has decided to shield "*itself from embarrassment as well as violations of its obligations and duties under the Constitution*" as alleged in paragraph 142.3 of the fourth respondent's answering affidavit. The correct position is simply that the applicant did not in his founding affidavit call upon the first respondent to deal with the issues which the fourth respondent somehow suggests the first respondent ought to have dealt with in answering the applicant's founding affidavit. It is the fourth respondent which has now raised the issues which I have now answered in this supplementary answering affidavit.

2.36 In paragraph 142.1 of his answering affidavit, the fourth respondent contends that "*the period leading up to the decision to institute criminal proceedings cannot be ignored.*" There is no legal basis for this. The fourth respondent contends, in paragraph 142.3, that "*what transpired during this time-period must be explained by the NPA.*" I deny this. The applicant, however, does not rely on this point.

2.36.1 In support of the above contention, the fourth respondent seeks to rely on paragraph 3(C) of the Prosecution Policy.

2.36.2 Paragraph 3 of the Prosecution Policy deals with the role of a prosecutor. Paragraph 3(C) deals with prosecution in the public interest and seeks to provide guidance to prosecutorial decision-making process in relation to prosecution of cases in the public interest.

2.36.3 In relevant parts, paragraph 3(C) of the Prosecution Policy upon which the fourth respondent relies for his contention that the first respondent must provide an explanation for the time period leading up to the institution of criminal charges against the applicant provides that when a prosecutor considers whether or not it will be in the public interest to prosecute, the prosecutor must consider all relevant factors including, amongst others, whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused person in the delay.

2.36.4 It is important that I draw to the Court's attention the fact that the very same paragraph states that:

"*The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.*"

2.36.5 At all material times relevant to this case, the first respondent has always been aware of the long period of time which has passed between the date when the crime was committed and the date on which criminal proceedings were instituted against the applicant. For this reason, it cannot be suggested that the first respondent did not take into account the delay between the date on which the crime was committed and the date on which criminal proceedings were instituted against the applicant.

2.36.6 When regard is had to the nature and seriousness of the offence; the manner in which Mr. Timol was killed; the pain which Mr. Timol must have suffered; and the fact that the applicant has not admitted guilt and has not shown repentance the delay between the date on which the crime was committed and the date on which the prosecution was instituted justify the dismissal of this application. All of these factors, together with the fact that the delay in prosecuting the applicant was not deliberately caused by the first respondent, it is not in the interests of justice to grant the permanent stay relief which the applicant seeks in this application.

2.37 I deny the fourth respondent's insinuation in paragraph 142.6 that Chris Macadam did not act properly when the investigation of this matter was entrusted to him. In this regard, I attach hereto as SA1, Chris Macadam's affidavit in which he sets out in detail, and supported by documentary

evidence, his role during the relevant periods in the investigation of this matter.

2.38 When regard is had to the contents of Chris Macadam's affidavit, it is clear that he did all he could under the political environment which prevailed at the time which, as the fourth respondent himself has indicated in his answering affidavit, was clearly not in favour of prosecuting cases such as the present. For this reason, the insinuation against Chris Macadam is wholly misplaced. [Chris Macadam's affidavit attached hereto as SA1 is the very same affidavit referred to in my main answering affidavit but was not attached thereto].

2.39 In the light of the interest which the fourth respondent has shown in Macadam, it is necessary that I draw the court's attention, and indeed the fourth respondent's attention to some of the contents of Macadam's affidavit and the annexures thereto.

2.40 Macadam is a senior advocate of this court and has, since 2003 served as the Senior Deputy Director of Public Prosecutions in the National Prosecuting Authorities Priority Crimes Litigation Unit. This unit has always been located within the office of the National Director of Public Prosecutions.

2.41 In paragraph 12 of his affidavit, Macadam says that the then National Director of Public Prosecutions took a decision, shortly after the

establishment of the Priority Crimes Litigation Unit, that such unit "*should take over the TRC cases which had not been finalized either by the DPP or by the defunct TRC unit.*" This is a clear indication that right from the beginning, the National Prosecuting Authority intended to investigate and prosecute cases such as the present.

2.42 In paragraphs 15 and 17, Macadam indicates that Mr Timol's case was identified as one which required further investigation and this is confirmed in annexure RCM2 to his affidavit.

2.43 In an internal memorandum dated 15 July 2003 Advocate Ledwaba of the then Directorate of Special Operations (then known as The Scorpions) which was mandated to investigate cases such as the present advised Macadam and others, amongst others, as follows:

"(i) *TRC Cases*

I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used."

2.44 Pursuant to Ledwaba's aforesaid decision, Macadam and Ackermann did the right thing by commencing engagement with the SAPS after which

Commissioner J F De Beer of the SAPS addressed a letter dated 26 September 2003 to Ackerman in, amongst others, the following terms:

"As agreed at our meeting, I have discussed your request for the assistance of the South African Police Service, to investigate cases emanating from the TRC processes, with the National Commissioner. It is evident from your letter that the investigation and prosecution of these cases were referred to the National Director of Public Prosecutions, by the President. Our understanding was that this referral was politically inspired. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefore understandable that you first endeavoured to have these cases investigated by the Directorate for Special Operations (DSO).

From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking ...

In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seemed to be common cause that the initial understanding was that the DSO would have investigated it, the opinion is held that you, or the National Director should approach the President, and confirm the instruction of the President on who he wants to investigate these cases.

If the President indicates that the South African Police Service should be involved in the investigations, the instruction should be obtained in writing. Upon receipt of such instruction, the South African Police Service shall of course assist, and the terms of reference, as well as issues such as logistics, number of investigators, command, can be discussed, as well as other relevant issues." (Own emphasis).

2.45 The above-quoted letter clearly signaled the beginning of difficulties in investigating and prosecuting cases such as the present. In order to avoid delays and being entangled in bureaucracy, Macadam and Ackermann attempted to persuade Ledwaba to reconsider his decision not to investigate cases such as the present. Their frustrations are well documented in annexure RCM5 attached Macadam's affidavit – being an internal memorandum dated 11 November 2003. Therein, they set out their frustrations and concluded as follows:

"2. *As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted. There are certain cases which could have been prosecuted which have prescribed. There is both national and international pressure to institute prosecutions (eg. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability*

of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the bona fides of the National Prosecuting Authority into serious [disrepute] and do irreparable damage.

Since I do not have any investigative capacity, I am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases and to sign the declarations in terms of section 28(1)(b). This chapter in our country's history must be closed without further delay."

2.46 Despite Ackermann and Macadam's pleas, the then Directorate for Special Operations did not appoint investigators as requested and cases such as the present were not further investigated. To make matters worse, in 2004, Macadam was assigned a case which required his full-time attention until late 2007 and was then not involved in the investigation and possible prosecution of TRC cases.

2.47 No serious investigation of cases such as the present took place and the reasons for this are clearly apparent from Macadam's affidavit. In paragraph 40 of his affidavit, Macadam says that he requested the Directorate for Priority Crimes Investigations to re-open the investigation of Mr Timol's case.

2.48 After having done all of the above, Macadam was informed by Advocate Johnson, the then head of the Priority Crimes Litigation Unit *"that we should not continue to work with TRC cases as they were going to be removed from the PCLU."* (Own emphasis).

2.49 Attached to Macadam's affidavit as RCM16 is a letter dated 8 February 2007 from then Minister of Justice Ms Mabandla to then National Director of Public Prosecutions, Pikoli. In this letter, the then Minister expressed her concern that she read media articles suggesting that the National Prosecuting Authority was going ahead with prosecutions of cases such as the present. The then Minister said, amongst others, the following:

"I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions, you briefly mentioned to me that the NPA will not be going ahead with the prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty."

2.50 The contents of the then Minister's letter clearly indicates that government at the highest level was of the view that the first respondent knew that cases such as the present were not going to be investigated and prosecuted. In addition, the letter also suggests that Pikoli had advised the Minister that *"the NPA will not be going ahead with the prosecutions."*

2.51 In a memorandum dated 15 February 2007 from Pikoli to then Minister of Justice, Pikoli, amongst others, expressed his frustrations arising from political interference with the National Prosecuting Authority's prosecutorial decision-making processes. The upshot of Pikoli's frustrations is set out in paragraph 5.2 of this memorandum, wherein he said:

"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. (Own emphasis).

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." (Own emphasis).

2.52 Insofar as this particular matter is concerned, the political position about the prosecution of cases such as the present did not change until the re-opening of the inquest into the death of Mr Timol. As we now know, the matter was investigated after the 2017 inquest judgment was released and the first respondent then took a decision to prosecute the applicant herein.

2.53 When regard is had to the contents of Macadam's affidavit, there can be no rational basis to suggest that he acted in a cavalier and uncaring manner. The facts set out in his affidavit, confirmed by way of a confirmatory affidavit by Pikoli, clearly indicate that the political interference with the first respondent's prosecutorial decision-making processes did not only start in 2007 when Pikoli was suspended from his position as National Director of Public Prosecutions for what he says, amongst others, deciding to prosecute cases such as the present.

2.54 It is important to draw the court's special attention to paragraph 5.4 of Pikoli's memorandum to the Minister quoted above. Therein, and based on the prevailing political environment at the time, Pikoli took the view that *"these TRC matters"* could not be proceeded with *"in accordance with the 'normal legal processes' and 'prosecuting mandate'"* of the National Prosecuting Authority. Having taken this view, Pikoli then called for the Government to provide direction as far as the investigations and prosecutions of the TRC matters was concerned. Pikoli correctly called for this direction from the State *"in view of the fact that the NPA prosecutes on behalf of the State."* When regard is had to Pikoli's, Ackermann's, and

Macadam's affidavits, it is clear why Pikoli called for this direction from the State – simply because the State had clearly expressed its reluctance to prosecute cases such as the present and its desire to establish a second amnesty process for people such as the applicant.

2.55 The above being the case, this court cannot perpetuate the injustice to which Mr Timol was subjected by granting an order in terms of which the applicant's prosecution is stayed permanently. Mr Timol was subjected to injustice by the apartheid government and its security agents and cannot again be subjected to injustice by this government, for which he died.

I now turn to respond to some of the paragraphs of the fourth respondent's answering affidavit in which negative and incorrect statements are made about the first respondent.

3 AD PARAGRAPHS 64 AND 65

Ad paragraph 64

3.1 I deny that the National Prosecuting Authority acted in a cavalier and uncaring manner.

3.2 The fourth respondent's suggestion that the approach of the National Prosecuting Authority was cavalier and uncaring is not supported by any admissible evidence placed before the Court. Such a suggestion can easily

be disposed of by reference to the contents of Macadam's affidavit to which I have referred above.

Ad paragraph 65

3.3 The contents of paragraph 65.1 do not justify the criticism levelled against the first respondent. This is so due to the fact that the Amnesty Task Team referred to therein was not created by the first respondent. As I have demonstrated above, the Amnesty Task Team was created by the government, in particular, by the highest level of government. Rightly or wrongly, the Amnesty Task Team was clearly created to find ways to give people such as the applicant herein an opportunity to apply for amnesty in respect of their participation in what is referred to in the Amnesty Task Team's report as "*conflicts of the past.*"

3.4 The contents of paragraph 65.2 are not entirely correct. It is not correct that the amendment to the prosecution policy was intended "*to facilitate impunity for apartheid-era criminals.*" A simple reading of the report of the Amnesty Task Team clearly shows that it was not the intention of government to grant people such as the applicant blanket amnesty. There were stringent requirements with which they had to comply.

3.5 Pikoli's affidavit shows that it is not correct that government intended "*to facilitate impunity for apartheid-era criminals*" where he refers to instances where he refused to accept representations not to prosecute people such as

the applicant. The people referred to in Pikoli's affidavit, whose representations not to be prosecuted he refused, would have been granted amnesty easily if government's intention was indeed "*to facilitate impunity for apartheid-era criminals*" as suggested in paragraph 65.2.

3.6 The contents of paragraph 65.3 are not in dispute and do not justify the relief which the applicant seeks in this application and clearly show that it was former President Mbeki who "*introduced a political pardons program to further accommodate perpetrators*" and not the first respondent.

3.7 The contents of paragraph 65.4 are not in dispute.

3.8 The contents of paragraph 65.5 must necessarily bring an end to any criticism levelled against the first respondent by the fourth respondent. In paragraph 65.5, the fourth respondent says that the "*NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases*" which cases included the case of Mr. Timol. On this version, there could not have been collusion between the police and the National Prosecuting Authority.

4 AD PARAGRAPHS 82 TO 94

Ad paragraph 82

4.1 The cover-up of political crimes referred to in paragraph 82 which the fourth respondent says it "*naturally explains the inaction between 1971 and*

1994" is not different from the political interference which resulted in cases such as the present not being prosecuted immediately. For this reason, there is no basis to blame the first respondent and the National Prosecuting Authority for the delays in prosecuting this case.

Ad paragraph 83

4.2 There is no basis to suspect that the first respondent did not explain the delay as a result of an ulterior or improper motive. The position is simply that the applicant did not in his founding affidavit make out a case which required an explanation for the delay in the manner in which the fourth respondent has done in his answering affidavit.

4.3 It is clear from the applicant's founding affidavit that the applicant did not have much information on the basis of which he could criticize and blame the first respondent for the delays in the manner done by the fourth respondent in his answering affidavit. In fact, the fourth respondent's answering affidavit reads like a supporting affidavit on behalf of the applicant.

Ad paragraph 84

4.4 I have already dealt with the contents of paragraph 84 elsewhere above in this supplementary answering affidavit.

Ad paragraph 85

4.5 I have already dealt with the contents of paragraph 85 elsewhere above in this supplementary answering affidavit.

Ad paragraph 86

4.6 The statements and conclusions attributed to Pikoli and Ackermann in paragraph 86 are not in dispute.

Ad paragraph 87

4.7 I fail to understand the purpose of the contents of paragraph 87 because the fourth respondent is fully aware that the first respondent herein did not oppose the application referred to therein. Insofar as the first respondent did not oppose the application referred to in paragraph 87, it was not necessary for it to file an answering affidavit. The applicant's legal representatives are clearly aware of this.

4.8 The contents of paragraph 87 are clearly intended to create unnecessary sensation and negative atmosphere against the first respondent and the SAPS because a false impression is created that they were supposed to file answering affidavits but neglected to do so (even though they did not oppose the application).

4.9 The alleged "*considerable publicity that the case attracted*" did not on its own justify the filing of answering affidavits in circumstances where the first respondent and the SAPS decided not to oppose the application in issue.

Ad paragraph 88

4.10 I have already dealt with the contents of paragraph 88 elsewhere above in this supplementary answering affidavit.

Ad paragraph 89

4.11 I draw the Court's attention to the fourth respondent's conclusion that "*the real reason for the delay in investigating and prosecuting apartheid-era perpetrators like Rodrigues in the democratic-era*" is the "*manipulation of the criminal justice system to protect individuals from prosecution*" referred to in paragraph 88 and the political interference with the independence of the National Prosecuting Authority – none of which was done by the first respondent. On the fourth respondent's own version, it is the first respondent who was politically interfered with.

Ad paragraph 90

4.12 I admit that the unlawful interference with the first respondent's duties and the manipulation of the criminal justice system referred to in the fourth respondent's answering affidavit is not sufficient to justify the granting of a

permanent stay of the prosecution instituted against the applicant. There is no reason why the fourth respondent relies on the unlawful interference with the first respondent only to say it does not justify the relief sought.

Ad paragraph 91

4.13 The contents of paragraph 91 are admitted.

Ad paragraphs 92 and 93

4.14 The contents of paragraphs 92 and 93 are not in dispute.

4.15 It is not in the interests of justice to grant the relief which the applicant seeks on the basis of what the fourth respondent says was an unlawful manipulation of the criminal justice system and unlawful political interference with the first respondent's prosecutorial decision-making processes.

Ad paragraph 94

4.16 In paragraph 94 of his answering affidavit, the fourth respondent seeks to suggest that the National Prosecuting Authority and the South African Police Service are not doing anything about the possible prosecution of cases such as the present. I deny this.

4.17 The cases to which the fourth respondent refers are 9 deaths cases and 11 cases relating to the murder, kidnapping and torture of political activists. These cases include the so-called Cradock 4 and Pebco 3 murders and were placed before the Directorate for Priority Crimes Investigations and the National Prosecuting Authority in January 2018. I deny that "*absolutely no progress has been made in any of these 20 cases.*"

4.17.1 One of the above cases relates to the death of Hoosen Haffejee. In this case, the second respondent has approved the re-opening of the inquest into this death and the fourth respondent is fully aware that this matter is under investigation as it is apparent from the letter attached hereto as **SA2**.

4.17.2 Since the aforesaid cases where allocated to the Directorate for Priority Crimes Investigations and the National Prosecuting Authority, all the required support and resources have been provided to investigate and to then prosecute these matters.

4.17.3 A task team of 15 police officers has been constituted and each case has been allocated at least two investigators. This task team consists of members of the Crimes Against the State unit of the South African Police Service.

4.17.4 Progress meetings have been held on these cases and the fourth respondent and the fourth respondent's investigator, Frank Dutton have attended some of these meetings.

4.17.5 I am also aware that the fourth respondent's investigator, Frank Dutton, has interacted with Captain Chantelle Simpson of the South African Police Service on these matters and the fourth respondent must be fully aware of such interactions but creates a wrong impression that nothing has been done. This wrong impression is deliberately created in order to portray the National Prosecuting Authority and the South African Police Service in a negative light – which does not serve any purpose in proceedings such as the present.

4.17.6 I deny that two former members of the old South African Police's Security Branch were appointed "*to lead these investigations*." It serves no purpose for the fourth respondent to accuse the South African Police Service and the National Prosecuting Authority and their officials without producing any evidence to support such accusation.

4.18 For the reasons stated above, the contents of paragraph 94 do not advance the fourth respondent's case, they are in any event irrelevant and ought to be rejected.

5 AD PARAGRAPHS 97 TO 99

Ad paragraph 97

5.1 I deny that the SAPS and the National Prosecuting Authority colluded with political forces to ensure the deliberate suppression of apartheid-era cases.

5.2 The fourth respondent's suggestion that the SAPS and the National Prosecuting Authority colluded with political forces is not supported by any admissible evidence placed before the Court. Of importance, this suggestion is inconsistent with some of the evidence upon which the fourth respondent relies which the fourth respondent himself has placed before the Court.

5.3 Elsewhere in his answering affidavit, the fourth respondent makes it clear that there was political interference and political pressure brought to bear upon the National Prosecuting Authority. This being the case, one fails to understand as to on what factual basis the fourth respondent can begin to speculate, let alone suggest, that the National Prosecuting Authority "*colluded with political forces.*" Such a suggestion, if accepted, would mean that Pikoli and Ackerman on whose affidavits the applicant heavily relies, are guilty of the collusion referred to in paragraph 97.

Ad paragraph 98

5.4 I do not deny that the National Prosecuting Authority was subjected to political interference and political pressure not to immediately prosecute cases such as the present. Incidentally, this also happened during the time that Pikoli was the National Director of Public Prosecutions.

Ad paragraphs 99 and 100

5.5 The contents of paragraph 99 are not in dispute.

5.6 The contents of paragraph 100 are not in dispute.

6 AD PARAGRAPHS 140 TO 148

Ad paragraph 141

6.1 The contents of paragraph 141 do not take the matter any further.

6.2 In paragraph 141 of his answering affidavit, the fourth respondent is responding to paragraphs 1.1 to 2.2.4 of the first respondent's answering affidavit to the applicant's founding affidavit. There is no basis to criticize the first respondent because the applicant's founding affidavit did not call the first respondent to provide an explanation for what the fourth respondent refers to as "*the near total inaction of the NPA*."

Ad paragraph 142

6.3 I have already dealt with the contents of paragraph 142 elsewhere above in this supplementary answering affidavit.

Ad paragraph 143

6.4 The contents of paragraph 143 clearly reveal the fourth respondent's motive in painting the first respondent in a negative light. The motive is to obtain answers to the criticism levelled against the first respondent which the fourth respondent would then use to call "*for an inquiry into those prosecutors and police who failed in their duties to uphold the rule of law.*" This is clearly wrong.

6.5 The contents of the affidavits filed in this application for purposes of opposing the relief which the applicant seeks in this application were clearly not intended to defend the first respondent and "*those prosecutors and police*" who allegedly failed in their duties to uphold the rule of law. For this reason, it would be wrong to create an impression that such affidavits also constitute a defence against an allegation that "*those prosecutors and police*" failed in their duties to uphold the rule of law.

6.6 For the avoidance of any doubt, I expressly state that the purpose of this affidavit and the other affidavits filed on behalf of the first respondent in this application are not intended to be an answer and shall not be used as an

answer to the unfounded allegation that "*those prosecutors and police*" have failed in their duties to uphold the rule of law.

Ad paragraph 144

6.7 The contents of paragraph 144 do not require a further response from the first respondent.

Ad paragraph 145

6.8 The contents of paragraph 145 do not justify the relief which the applicant seeks in this application and it is not clear to me as to why the fourth respondent chose to include them in his answering affidavit, the purpose of which is, so I thought, to oppose the relief which the applicant seeks.

Ad paragraph 146

6.9 The affidavit of the investigating officer, Captain FN Mathipa is attached herewith as **SA3 (i)** and the unopposed bail application as **SA 3 (ii)**.

Ad paragraph 147

6.10 The contents of paragraph 147 do not require a further response from the first respondent other than to state that the fourth respondent himself has already told the Court of the reasons why this case was not investigated and prosecuted earlier than now. It accordingly does not serve a purpose to repeat the same contentions differently.

Ad paragraph 148

6.11 The affidavit of Macadam referred to in my main answering affidavit is the one now attached hereto as SA1.

6.12 I stand by what is stated in my main answering affidavit.

6.13 In conclusion, I state that the contents of the fourth respondent's answering affidavit do not justify any of the criticism levelled against the third respondent and the National Prosecuting Authority and also do not justify the granting of the permanent stay of prosecution relief which is sought by the applicant in this application.

6.14 In the premises, I persist that the application for a permanent stay of the criminal prosecution instituted against the applicant ought to be dismissed with costs including the costs consequent upon the employment of two counsel.

WHEREFORE, I pray that it may please the Court to dismiss the application with costs including the costs consequent upon the employment of two counsel.

JACOBUS PETRUS PRETORIUS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on the 4th day of February 2019, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

Ally J. Murray Captain

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

OFFICE:

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent

SUPPORTING AFFIDAVIT ON BEHALF OF FIRST RESPONDENT

I, the undersigned,

RAYMOND CHRISTOPHER MACADAM,

do hereby make oath and state that:

1.

I am an adult male employed by the National Prosecuting Authority (NPA). I am an admitted advocate and since 2003 to date serve as a Senior Deputy Director of Public Prosecutions in the Priority Crimes Litigation Unit (PCLU) located in the Office of the National Director of Public Prosecutions (NDPP) (First Respondent).

2.

I depose to this affidavit solely to comment on the averment made by the Applicant that the NDPP acted improperly in not dealing with the matter which forms the scope of this application in either 1996 or 2003 (the **Timol**-case). I was not involved in making the decision

to institute the current criminal proceedings against the Applicant and the processes which flowed therefrom.

3.

It is necessary to provide certain background information to give context to my account.

4.

The Truth and Reconciliation Commission (TRC) was established to ascertain the fullest extent of politically motivated human rights' abuses committed between 1 March 1960 and early May 1994. I shall refer to these crimes as TRC cases. The TRC was mandated to grant amnesty to perpetrators who made a full disclosure of their involvement in human rights' violations.

5.

TRC cases were originally dealt with by the Attorneys-General in the Provinces and Self-Governing Territories.

6.

A further development was however the appointment of a Commission of Enquiry headed by Judge Richard Goldstone to investigate some of the most serious cases.

7.

When the Commission dissolved Dr Jan D'Oliveira SC, the then Attorney-General Transvaal, was appointed to head up a team to continue with the work of the Commission and to facilitate the institution of prosecutions.

8.

When the **NPA Act 32 of 1998** came into effect in October 1998 an NDPP (Mr BT Ngcuka) was appointed and the Attorneys-General became Directors of Public Prosecution (DPPs). The DPPs were seized with certain matters, many of which were put on hold pending applications for amnesty lodged by the accused with the TRC. When the TRC released a report calling for the prosecution of persons who had either been refused or not applied for amnesty provided that there was sufficient evidence, Ngcuka set up a TRC unit in his Office to deal with TRC cases not being already dealt with by the DPPs.

9.

This unit however dissolved because the amnesty process had not been concluded and therefore it was unclear which cases should be considered for prosecution. Furthermore it also lacked an investigative capacity.

10.

The unit headed by Dr D'Oliveira had ceased to function once the **NPA Act** came into effect.

11.

In March 2003 the PCLU was established by **Presidential Proclamation** as a Special Directorate in the Office of the NDPP. The **Proclamation** authorised the NDPP to refer priority crimes to the PCLU. Adv AR Ackerman SC (Ackerman) was appointed as Special Director and I was transferred from a component of the Directorate of Special Operations (DSO) to serve as one of his Deputies.

12.

Shortly after the establishment of the unit Ngcuka summoned Ackerman and I to his Office and informed us that he had decided that the PCLU should take over the TRC cases which had not been finalised either by the DPPs or by the defunct TRC unit. He further advised that the DSO would conduct any investigations which may be necessary. The DSO was a special NPA investigative unit established by virtue of an amendment to the **NPA Act**.

13.

In order to establish what cases required attention Ackerman and I took the following steps:

13.1 All the DPPs were visited and invited to handover any TRC cases which they were not in a position to finalise themselves.

13.2 We met with the Divisional Head of the Detective Services of the South African Police Services (SAPS) who issued an instruction to his Provincial Heads to refer all outstanding TRC dockets to the PCLU.

13.3 Two former TRC researchers were appointed to trawl the TRC archives in order to identify cases warranting attention.

13.4 Interviews were conducted with former members of the TRC and D'Oliveira units.

14.

This exercise did not result in the **Timol**-case being identified as one which warranted further attention.

15.

Ackerman and I however also entertained requests for investigations from victims and other members of civil society. This resulted in the **Timol**-matter being brought to my attention by a member of his family.

16.

This led to me on 5 May 2003 requesting a Chief Investigating Officer (Leask) of the DSO to conduct investigations into the matter. I attach herewith as **Annexure RCM1** a copy of my letter to Leask setting out the information which had been brought to my attention and outlining what investigative steps should be taken.

17.

On 15 May 2003 I submitted a report setting out the cases which had been identified as a result of the outreach programme described above. The **Timol**-case was identified as a matter which required investigation. This report was addressed to the NDPP, the Head of the DSO and his Head of Operations as well as Ackerman. It is attached as **Annexure RCM2**.

18.

In terms of the DSO's legislative mandate it was for the Special Director of the DSO and not the Head of the DSO to issue declarations to investigate certain matters. At that stage the Special Director was Adv MG Ledwaba (Ledwaba).

19.

Ackerman and I met with Ledwaba to arrange for the DSO to conduct the investigations specified in **Annexure RCM2**. The meeting was unpleasant as Ledwaba made it clear in no uncertain terms that the DSO would not investigate any TRC matters and that these should all be referred to SAPS. A copy of a letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision is attached hereto as **Annexure RCM3**.

20.

As a result of the decision by Ledwaba Ackerman and I met with Commissioner De Beer (De Beer), the Divisional Head of the Detective Service of SAPS, and requested SAPS to take over the investigations. On 26 September 2003 De Beer replied to Ackerman informing him that the request had been discussed with the National Commissioner (Selebi). The letter was further to the effect that the investigation of the matters was a DSO responsibility and that if it was required that SAPS in fact investigate then either Ackerman or the NDPP should

approach the President and ask him to confirm which agency should conduct the investigations. A copy of the letter is attached hereto as **Annexure RCM4.**

21.

I can confirm that neither the NDPP nor Ackerman approached the President as recommended.

22.

Ackerman and I however made a number of attempts aimed at persuading Ledwaba to reconsider his decision not to investigate. These are set out in a copy of a letter written to Ledwaba by Ackerman dated 11 November 2003 appealing to him to appoint investigating officers and pointing out that, in the absence thereof, the PCLU would not be able to deliver on its mandate. Both the NDPP and Head: DSO were copied in the letter which is attached as **Annexure RCM5**. The NDPP shortly thereafter resigned and Dr Ramaite SC was appointed as the Acting National Director of Public Prosecutions (ANDPP).

23.

The DSO however did not appoint investigators as requested and consequently none of the TRC matters requiring investigation could be taken further.

24.

In 2004 I was assigned a case relating to an international nuclear weapons syndicate which required my attention on a full-time basis until late 2007.

25.

I therefore no longer continued to deal with TRC matters but Ackerman regularly discussed these cases with me.

26.

At a certain stage Ackerman informed me that he intended prosecuting three former Security Branch members for their role in the poisoning of Reverend Frank Chikane. This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary. He indicated that he had contacted the suspects' attorney to arrange for them to appear in court.

27.

Shortly thereafter he informed me that the ANDPP had put the prosecution on hold pending the formulation of special TRC Guidelines. He further indicated that there was now a moratorium on the investigation and prosecution of TRC cases pending the adoption of the Guidelines.

28.

Neither Ackerman nor myself were involved in the drafting of these Guidelines. At a certain stage Ackerman showed me a copy of the Guidelines. We were both of the view that they were unconstitutional in that they made provision for the NDPP not to prosecute perpetrators if they met the criteria for granting amnesty as had been applied by the TRC.

29.

Subsequently an application was brought by members of civil society in the High Court sitting in Pretoria which resulted in the Guidelines being declared unconstitutional for that reason.

30.

Adv Pikoli (Pikoli) was appointed as the NDPP. I was informed by Ackerman that Pikoli had set up an inter-departmental task team which would advise Pikoli on making decisions in TRC matters. Ackerman and Ramaite were the NPA representatives in the task team. On one or two occasions I stood in for Ackerman in meetings of the task team when he was not available. I noticed that the task team was predominantly comprised of members of the intelligence community who were more intent on cross-examining me as to why matters should be investigated rather than addressing the issue of all the outstanding cases.

31.

At a certain stage Pikoli was suspended and fired despite the Commission which enquired into his fitness to hold office in fact finding that he was competent to be the NDPP. Adv Mpshe SC (Mpshe) was then appointed as the ANDPP.

32.

If memory serves me correct in early 2009 Mpshe summoned me to his office and showed me a letter written by SAPS indicating that it was withdrawing from the task team. This would mean that again TRC matters would not be investigated because at that stage a decision had already been taken to disband the DSO. Mpshe instructed me to negotiate with SAPS to agree to investigate the matters which he said I should take over from Ackerman.

33.

Ackerman informed me that he had already disposed of a number of matters which had not required investigation and gave me a list of small number of cases (I estimate no more than ten (10)) which I had to attend to. The Timol-case was not one which he had indicated should be investigated.

34.

I attach as **Annexure RCM6** a trail of emails between myself and various role-players showing my efforts to try and have these matters investigated. I initially had a series of meetings with Rayman Lalla, the then Divisional Head of the Detective Service of SAPS. He however informed me that the National Commissioner had decided that the cases had to be investigated by the Directorate Priority Crimes Investigation (DPCI). I therefore made a number of unsuccessful attempts to secure a meeting with Commissioner Dramat, Head: DPCI.

35.

Ultimately I met with Assistant Commissioner Lebeya (Lebeya) on 26 November 2009 where the issue of conducting investigations was positively discussed resulting in me writing a letter on 18 January 2010, attached hereto as **Annexure RCM7**.

36.

As a result thereof Senior Superintendent Bester was appointed to oversee the investigations of the ten (10) cases I had identified.

37.

Adv Menzi Simelane (Simelane) was appointed as the NDPP and he instructed me to guide a series of serious corruption investigations being conducted by the DPCI in the Northern Cape. He thereafter appointed me to represent the NPA in two (2) civil matters where decisions not to investigate / prosecute international crimes were being challenged. I was thereafter seized with a number of cases where complaints had been made calling for the arrests of current or former Heads of State for war crimes or crimes against humanity. This made it very difficult for me to focus on the ten (10) TRC matters. I did however increase the number of investigations due to representations being received in new matters.

38.

When Mr Nxasana (Nxasana) was appointed as the NDPP I was removed from my duties in the PCLU in order to act as a dedicated prosecutor for foreign bribery cases. Adv SK

Abrahams (Abrahams), then a Senior State Advocate, was appointed to take the TRC matters over from me.

39.

In June 2015 Abrahams was appointed the NDPP and the issue as to whether I should continue as the dedicated foreign bribery prosecutor arose. I had meetings with him in which I indicated that if he did not wish me to continue with that responsibility I would again be willing to do TRC matters. He however informed me that he was thinking of taking all TRC cases away from the PCLU and did not make a decision on terminating my appointment as the foreign bribery prosecutor.

40.

Due to the fact that another business unit of the NPA had instructed the DPCI to take all the foreign bribery files away from me I could no longer work on those matters. The TRC cases had however become important due to complaints about delays in finalising certain matters. I therefore decided to again give attention to the matters. One of the matters which I had decided should be investigated was the **Aggett**-matter which also related to a death in detention. At that stage the **Timol**-matter was receiving attention in the media and I recall specifically a TV interview with Adv Bizos SC (Bizos) in which he alleged that **Mr Timol** had been murdered. I therefore considered it appropriate to request the DPCI to re-open the matter and gave various instructions (dealt with hereunder) regarding the further investigation of the case.

41.

Adv Johnson (Johnson) who was at that stage acting as the Head of the PCLU informed me and a Senior State Advocate who was assisting me with the cases that we should not continue to work with TRC cases as they were going to be removed from the PCLU. I was however concerned that this would result again in the cases being neglected resulting in me drafting a Memorandum in January 2016 requesting the NDPP to confirm whether the TRC cases would be dealt with by the PCLU or the DPPs. I did not receive a reply to this Memorandum and at this stage cannot locate my copy thereof.

42.

On 4 February 2016 I was approached by Dr Pretorius SC (Pretorius) who had then taken over from Johnson as the Head of the PCLU. He informed me that a request had been received to re-open the inquests in the **Aggett**- and **Timol**-matters and required an opinion

from me. I attached as **Annexure RCM8** a copy of my opinion of even date in which I expressed the opinion that both matters should be fully investigated and that consideration to re-opening inquests should only be given once a decision whether or not to prosecute had been taken. I emphasise para 12 of my opinion in which I indicated that it was imperative that the NDPP should decide whether TRC cases should remain with the PCLU or not.

43.

Subsequently I was informed by Pretorius that a decision had been taken to re-open the **Timol**-inquest. While the inquest was in progress Pretorius gave me a copy of a letter which I had written on 25 February 2004 to Mr Cajee, the nephew of **Mr Timol**. This letter is attached hereto as **Annexure RCM9**. He also showed me a report addressed by Ackerman to *inter alia* Ramaite and Pikoli dated 30 October 2006. I attach this report hereto as **Annexure RCM10**. He requested me to provide him with an affidavit responding thereto. I attach as **Annexure RCM11** a copy of the affidavit which I subsequently signed and which was commissioned. I have not attached the annexures referred to therein as they have either been attached elsewhere in this affidavit or are no longer relevant for the purpose of this application.

44.

At the time of deposing to this affidavit I was not in possession of **Annexure RCM1**. At this stage when I have now had sight of both this document and **RCM9** I recall that **RCM9** was written after both the DSO and SAPS had refused to investigate TRC cases. If memory serves me correct Leask had informed me that as a result of the decision taken by Ledwaba that the DSO would not investigate TRC cases he was unable to comply with my original request for investigations. Since he was however traveling to Cape Town on other investigations he contacted Ivor Powell and questioned him regarding the confession apparently made by the Applicant in this matter. The allegation was however denied by Powell and Mr Cajee was informed accordingly. I did not hear anything further from Mr Cajee and was shortly thereafter assigned other work.

45.

In order to depose to this affidavit I tried to locate such TRC files as may still be available resulting in me finding a report of 24 October 2006 addressed by Ackerman to Ramaite which is attached hereto as **Annexure RCM12**. This report identifies the advocates dealing with various TRC matters and reflects that I was not the person who decided to close the **Timol**-matter.

46.

In December 2017 I was contacted by the NDPP's Office Manager who requested me to collect certain of Pikoli's documents which he had found in a strongroom. I collected the documents from him and perused the contents. The documents included the following:

46.1 A second draft of an Indemnity Bill making provision for the President to grant indemnity to persons committing politically motivated crimes from 1 March 1960 (**Annexure RCM13**).

46.2 The terms of reference of the Amnesty Task Team dealing with the criteria which the NPA applies relating to TRC cases, the formulation of Guidelines and whether legislative enactments are necessary. The document (**Annexure RCM14**) concludes by referring to the views of the intelligence agencies.

46.3 The further report of the Amnesty Task Team (**Annexure RCM15**) *inter alia* looking into whether private prosecution and civil litigation can be eliminated where a decision not to prosecute is taken and whether a person aggrieved with a decision not to prosecute can approach the International Criminal Court (ICC).

46.4 A letter dated 8 February 2007 (**Annexure RCM16**) addressed to Pikoli by the then Minister of Justice expressing her concern that the NPA was proceeding with TRC prosecutions as she was under the impression that the NPA would not.

46.5 A Memorandum (**Annexure RCM17**) addressed to the Minister by Pikoli setting out in considerable detail what he construed to be interference with the dealing of TRC matters by other Government departments and concluding:

> "***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.***"

47.

These documents speak for themselves and go a long way in explaining why from 2003 the PCLU constantly struggled to have TRC cases investigated. The first three documents appear to have been authored by the Justice Department during the period when a moratorium was placed on TRC cases pending the formulation of Guidelines. The last two documents were authored by or addressed to Pikoli.

48.

On the limited occasions when I was seized with TRC matters I always believed that such matters including the **Timol**-matter should be properly investigated so that decisions whether or not to prosecute could be taken.

I know and understand the contents of this statement.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience.

R C MACADAM

Date: **1 November 2018**
Time: **09:15**
Place: **PRETORIA**

I certify that the deponent has acknowledged that he knows and understands the contents of this declaration, which was sworn to before me and the deponent's signature was placed thereon in my presence

at **PRETORIA** on **1 NOVEMBER 2018** at **09:20**

_____: (RANK)
COMMISSIONER OF OATHS

Full names:	ALBERTUS MARTHINUS MATHYS FLYNN
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