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

MEMORANDUM

TO: **MS BS MABANDLA, MP**
MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

FROM: **DR MS RAMAITE SC**
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SUBJECT: **PROCESS OF DEALING WITH TRC CASES BY THE NPA**

FILE REF.: **TRC/MIN/DNDPP**

DATE: **22 NOVEMBER 2007**

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to inform the Minister how TRC prosecution-related matters have been and are currently dealt with by the NPA.

2. BACKGROUND

2.1 After the closure of the Goldstone Commission in 1993/94, the Government of the day decided that its work relating to investigating human rights abuses involving conflicts of the past should continue under the supervision of the then Attorney General of Pretoria, Dr J D'Oliveira. Other matters not dealt with by the Commission were handled by the then Attorneys General.

2.2 With the appointment of Mr Ngcuka as the National Director of Public Prosecutions (the NDPP), certain of the cases dealt with by Dr D'Oliveira were transferred to his office while the other matters remained at the office of the Director of Public Prosecutions (DPP): Pretoria.

2.3 The NDPP decided that the institution of prosecutions had to be approved by himself, as did certain high profile decisions not to prosecute. The NDPP was assisted by a team of advocates in his office.

2.4 With the creation of the DSO in 2001, the NDPP transferred the cases in his office to it. The DSO appointed a team to assess the cases. This team reported to the Head of the DSO, who in turn would liaise with the NDPP.

2.5 No prosecutions were instituted because the TRC's final report and the President's response thereto were outstanding. However, decisions not to prosecute were made in respect of cases where decisions were required as a matter of urgency.

2.6 With the creation of the PCLU in March 2003, the NDPP assigned all TRC matters to it. This was after the TRC had tabled its final report and the President had mandated the NDPP to institute prosecutions, arising from the TRC process, where appropriate.

2.7 The PCLU was not an investigative agency and was therefore dependant on SAPS and the DSO for investigations. The PCLU reported monthly to a Deputy National Director and the NDPP approved all its decisions to institute TRC prosecutions as well as in certain high profile cases, certain decisions not to prosecute.

2.8 The DSO policy guidelines for prosecutions in these matters were accepted by the PCLU. In essence, these were to the effect that prosecutions should only be instituted for serious human rights abuses, based on reliable evidence while accepting that humanitarian factors and the interests of reconciliation could also be taken into consideration.

2.9 The PCLU conducted an audit of all existing cases and made decisions not to prosecute in a number of cases. The NDPP was informed of all the decisions not to prosecute in high profile matters and confirmed these decisions.

2.10 The audit process further identified a small number of cases warranting prosecution. These matters were brought to the attention of the NDPP and his Deputies and prosecutions were

instituted in certain matters. At a certain stage, the police dockets at the DPP: Pretoria office were returned to SAPS.

2.11 In November 2004, the Acting NDPP put on hold the institution of criminal proceedings against persons implicated in the poisoning of Rev Chikane. Shortly thereafter, it was decided to place all further prosecutions on hold, pending the formulation of guidelines for the prosecution of TRC cases.

3. RESUMPTION OF THE PROCESS

3.1 In December 2005, the guidelines for such prosecutions were approved.

3.2 *Inter alia*, in paragraph B6 of the guidelines it was specified that:

"The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments:

National Intelligence Agency
The Detective Division of South African Police Service
The Department of Justice & Constitutional Development
The Directorate of Special Operations"

3.3 The guidelines also specified that the NDPP was required to make all decisions relating to the institution of prosecutions himself upon the advice of the PCLU and that he should inform the Minister of all his decisions or intended decisions.

3.4 In order to give effect to paragraph B6 of the guidelines, the NDPP wrote to the Head of the DSO and the relevant Directors General, requesting them to appoint officials from their departments to assist the PCLU. However, not all the departments responded and consequently, the provisions in paragraph B6 could not be implemented.

3.5 As a result of a meeting held by the NDPP with other senior officials from other departments apparently at the Office of the Presidency, a decision was taken to appoint the representatives required by paragraph B6 of the guidelines. It was further decided to refer to this grouping as the "Task Team". I was appointed by the NDPP to chair the Task Team. The Task Team was officially established on 12 October 2006.

3.6 On 25 October 2006, the Task Team held its first meeting and thereafter has held regular meetings.

3.7 All the meetings were minuted. At the first meeting, the non-prosecutor members of the Task Team requested the PCLU to provide them with feedback on all matters previously dealt with.

3.8 After this was done, the Task Team recommended that the PCLU proceed with all the cases which it had identified for prosecution and investigation, which was done.

3.9 All matters requiring attention were placed before the Task Team by the PCLU, the issues relevant thereto were debated and decisions were taken as regards further courses of action to be taken.

3.10 Feedback was given on such matters at subsequent meetings.

3.11 I informed the NDPP of progress being made on the cases.

3.12 In addition, the NDPP, or in his absence, the Acting NDPP, informed the Minister of developments in either general - or specific cases when necessary or at her request.

4. BREAKDOWN OF ALL MATTERS DEALT WITH BY PCLU SINCE ITS CREATION IN 2003

4.1 Matters finalized

4.1.1 The PCLU focused on matters which had been reported to it either by the Directors of Public Prosecution, SAPS, members of the public and in limited cases, human rights organizations.

4.1.2 The PCLU closed a large number of matters on the basis that the investigations established that there were no grounds upon which a prosecution could be instituted. Reasons for such closure included the lack of sufficient or admissible evidence, the lack of truthful evidence, the fact that the potential accused had already received indemnity either in terms of the indemnity/amnesty legislation or in terms of the Criminal Procedure Act and the unavailability of the potential accused.

4.1.3 The PCLU however instituted prosecutions in a small number of cases which had been identified to it either by SAPS or the Directors of Public Prosecutions or victims and which met the criteria of the DSO guidelines. All of these matters were disposed of by way of plea and sentence agreements, except for one matter which went to trial and

another matter which is still pending because the accused had challenged the validity of the refusal of amnesty by the TRC.

4.1.4 In respect of all these matters, the decisions were discussed with the NDPP, DNDPP and affected DPP's.

4.2 Current matters

4.2.1 Matters continue to be referred to the PCLU from the same parties referred to in par 4.1.1. Since these matters all relate to human rights abuses relating to the conflicts of the past, the NPA is legally obliged to cause such matters to be investigated and to give proper feedback to the complainants.

4.2.2 The above process has led to a small number of cases being identified as warranting further investigations with the aim of determining whether there are in fact sufficient grounds to prosecute. These matters are dealt with in terms of the TRC guidelines. Certain of these matters have been closed for the same reasons as in par 4.1.2 The other matters are still under investigation and decisions as to whether or not to prosecute still have to be taken.

4.2.3 In respect of these matters the decision whether or not to prosecute is taken with care because it may have profound consequences for victims, witnesses, accused and their families. Furthermore in deciding to institute criminal proceedings against an accused, the prosecutors assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.

4.2.4 In terms of the prosecution policy once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.

When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors including:

- ***The nature and seriousness of the offence***
- ***The interest of the victims and the broader community***

- ***The circumstances of the offender namely:*** *his personal circumstances, willingness to co-operate with the authorities, as well as mitigating and aggravating factors.*

4.3 Allegations against the ANC leadership

4.3.1 Prior to the establishment of the PCLU, SAPS had compiled a series of dockets relating to the armed struggle of the Liberation Movements. In consultation with the DPP: Pretoria, SAPS had appointed two retired police officers to manage these dockets.

4.3.2 Although the suspects who had been implicated as being directly complicit with the offences contained in the dockets had been granted amnesty, the two police officers were of the view that a prosecution could be instituted against the ANC leadership, which had adopted the armed struggle. In this regard, they relied on the refusal of amnesty to 37 high-ranking office bearers in the ANC by the TRC. For reasons unknown to the NPA, they were of the view that the prosecution should be linked to a landmine campaign.

4.3.3 These two officers brought this matter to the attention of the PCLU after it was established. They were however unable to furnish the PCLU with any docket containing any evidence against the ANC leadership.

4.3.4 At the same time the PCLU gave notice to the lawyer acting for the former Security Forces that it intended to prosecute individual Security Force members for their role in the assassinations of members of the Liberation Movements. The lawyer responded by stating that the Security Forces had compiled a docket against the ANC leadership which would be used to obtain a private prosecution in the event of any Security Force member being prosecuted by the NPA.

4.3.5 Due to these concerns, the then NDPP, Mr Ngcuka, instructed the PCLU to examine the available case material in order to establish whether there was in fact any basis for such allegations. After the PCLU furnished Mr Ngcuka with a report to the effect that there was no legal basis upon which a criminal investigation could be instituted against the ANC leadership, Mr Ngcuka released a statement confirming that there were no grounds upon which the ANC leadership could be prosecuted. This was done in May 2004.

4.3.6 Because there was no basis upon which to investigate the ANC leadership, Mr Ngcuka furthermore directed that all the police dockets relating to the Liberation Movements be removed from the DPP: Pretoria office by SAPS. This was done under the supervision of the then Director General: DOJ&CD.

4.3.7 Since May 2004, the NPA and in particular the PCLU has regarded this matter as being finalized and has conducted no further investigations into such matter. The fact that this matter has been finalized was reported to the Minister and other key role players at appropriate stages.

4.3.8 When the media speculated as to the prosecution of former Minister Vlok and former Police Commissioner Van der Merwe in relation to the poisoning of Rev Chikane, an organization called "AfriForum" publicly called upon the NDPP to either abandon this prosecution or to prosecute the ANC leadership in respect of the landmine campaign.

4.3.9 The NDPP informed AfriForum that the matter had already been closed by Mr Ngcuka in 2004 and that there were no grounds upon which he could overturn the decision of his predecessor.

DR MS RAMAITE SC
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE:

NOTED

MS BS MABANDLA, MP
MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT
DATE:

ACKERMANN

POST TRC LITIGATION

1. Ad para 117

1.1. The Minister in paragraph 117 of her submission states the following:

"It is submitted that the Directives take cognisance of the import of section 179 of the Constitution which ***requires close collaboration*** *with the Minister of Justice and Constitutional Development, who exercises the final responsibility over the prosecuting authority, as well as with her department."* (our emphasis)

1.2. This statement is incorrect.

1.3. Nowhere in section 179 of the Constitution is mention made of the words 'close collaboration' or indeed any collaboration.

1.4. Collins Dictionary defines the term collaboration as "*... the act of working together to produce a piece of work.*"

1.5. On the contrary, the essence of Section 179 stresses the independence of the National Prosecuting Authority, to wit: *"that the prosecuting authority exercises its functions without fear, favour or prejudice."*

1.6. In terms of Section B.11 of the Amended Prosecution Policy, *"... the NDPP* ***must inform*** *the Minister for Justice & Constitutional Development* ***of all decisions taken or intended to be taken*** *in respect of this prosecuting policy relating to conflicts of the past."* (our emphasis)

1.7. From this it is clear that the Policy Directives specify that the NDPP merely needs to *inform* the Minister of relevant or intended decisions. Any suggestion of a process of collaboration would fly in the face of the independence of the NPA entrenched in the Constitution.

2. Ad Para 118

2.1. In Paragraph 118 of the Minister's submission she stipulates that

"The National Director complied with ***this provision of the Directives*** *by establishing a Task Team representative of the departments referred to above...."* (our emphasis)

2.2. This statement too is incorrect.

2.3. The Amended Prosecution Policy does not make any provision for the establishment of a Task Team. No mention is made anywhere in the Policy of such an entity. The Task Team in fact emerged from an internal agreement between stakeholders.

2.4. Rather, paragraph B.6. of the Amended Prosecution Policy provides that:

"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 Dept of Justice & Constitutional Development
(iv) The Directorate of Special Operations"

2.5. From the above it is clear that in relation to the relevant offences:

2.5.1. 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.

2.5.2. Such decision must be exercised in accordance with the Constitution and existing legislation.

2.5.3. 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.

2.6. It must also be noted that in terms of Section B.9. of the Amended Prosecution Policy, the NDPP *"**may** obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service ....."* (our emphasis)

2.7. There is **no** obligation or requirement in the Amended Prosecution Policy for the NDPP to consult with any entity except the victim.

2.8. The Minister further states in para 118:

"The Task Team was established to evaluate and make recommendations to the DGs and the National Director on all matters on all matters relating to the post TRC cases."

2.8.1. The Amended Prosecution Policy does not make provision for such a process or the involvement of the DGs.

3. Ad Para 119

3.1. In paragraph 119 of the Minister's submission, she states inter alia that

"Shortly after its establishment it became clear that the Task Team was not

operating as efficiently and effectively ***as envisaged by the Directives.***" (our emphasis)

3.2. This statement is grossly misleading.

3.3. Again, as explained above, the Amended Prosecution Policy which was created in terms of the Constitution does not make mention of a Task Team and thus do not prescribe the **operation** thereof. Hence, the Minister's above assertion is senseless.

3.4. In Paragraph 119 the Minister further states that *"Members of the Task Team from outside the NPA were continuously frustrated by the officials of the NPA, who denied them access to files in respect of cases under consideration, but elected to provide the members with summaries of cases."*

3.5. The functioning of the Task Team will be discussed in detail by Advocates Mhaga and Macadam.

3.6. It is not clear which Task Team members are being referred to or in which cases they were denied access to files. This is a very broad and vague assertion which is certainly not reflected in the contents of the minutes of the Task Team. A perusal of the minutes will bear this out.

3.7. The members of the Task Team were requested ad nauseum to furnish the PCLU (Adv Mhaga) with their inputs pertaining to all matters which may have a bearing or effect on the cases under discussion (Minutes of Task Team dated 16 November 2006, 4 December 2006, and 29 January 2007). (Annexures A4, A5, and A6)

4. <u>Ad Para 120</u>

(The NDPP will have to respond to the first sentence in this paragraph.)

4.1. The Minister indicates in para 120 that the NPA *"proceeded to* ***evaluate these matters without the participation of other members of the Task Team"***.

4.2. This is simply not the truth, as reflected by all the Minutes of the Task Team.

4.3. For instance, and relevant to the Chikane matter, at the Task Team meeting of 6 November 2006, NIA representative Mr Koopedi proposed that the PCLU should proceed with the prosecutable matters reflected in the PCLU report dated 24 October 2006 (See this report marked Annexure A2(b)). His proposal was accepted by all Task Team members present (Annexure A3).

4.2. The only objection raised was from the SAPS representative who indicated that the National Commissioner of SAPS was of the view that Rev Chikane was not interested in prosecution of the matter. Factually this was not correct. Rev Chikane had been consulted and he indicated that he left the matter in the hands of the NPA. Notwithstanding the above assurance, Rev Chikane was

thereafter again consulted by Messrs Pikoli, Mhaga and Ackermann who again confirmed this position.

IMPORTANCE OF POST-TRC PROSECUTIONS

5. <u>Ad Para 121:</u>

5.1. The Minister is correct to state in her submission in paragraph 121 that *"The **post TRC cases are of great importance** to the government and the country...."*

5.2. The Report of the Truth and Reconciliation Commission made the following recommendation regarding post TRC prosecutions:

"Where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists than an individual has committed a gross human rights violation." (TRC Report, Vol 5, Ch 8: Recommendations (p 309))

5.3. This recommendation was endorsed by President Mbeki in Parliament on 15 April 2003 when he stated as follows:

*"Let us start off by reiterating that **there shall be no general amnesty**. ..... 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**."(our emphasis)*

5.4. The NPA has been under pressure from many quarters including civil society, NGOs and victim organisations to pursue prosecutions and has received requests and representations regarding specific cases. Further, there have been articles and editorial pieces in the media which supported the call for such prosecutions. There was widespread dissatisfaction at the slow pace of progress in this regard which could amount, in the view of these groups, to a *de facto* further amnesty. (Annexures B1 – B13)

5.5. Their sense of urgency and dissatisfaction was understandable given that the TRC's first recommendations regarding prosecutions were issued in 1998, nearly ten years ago, and that a further four years have passed since the President mandated the NPA to implement this TRC recommendation. The development of the Policy Directives themselves took a further year to be developed and finalised.

5.6. It is therefore obvious that the question of post TRC prosecutions was a matter requiring no further delay.

5.7. Further, South Africa has an international obligation to prosecute gross human rights violations and crimes against humanity. This was echoed in the State vs Basson (CCT 30/03) where the Constitutional Court said that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid.

5.8. It is also clear from the Amended Prosecution Policy that

(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.

5.9. 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.

5.10. Given the importance and urgency of instituting post TRC prosecutions and in light of the pressure by the community, I was startled to receive a letter dated 8 February 2007 from the Minister herself indicating her belief that NPA would not be going ahead with post TRC prosecutions. (Annexure C1)

5.11. I also received communication from the National Commissioner of SAPS dated 6 February 2007 which indicated his belief that it should be the Directors General of the relevant departments who should discuss the cases before a prosecution decision is made. The National Commissioner states: *"My understanding was that the officials designated on the Task Team by the Directors-General will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker on prosecutions."* He further states *"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."* (Annexure C2, including my reply Annexure C3)

5.12. However, the minutes of the TRC Committee meeting of 12 October 2006 does not make any mention of the role of Directors-General.

5.13. As a result, I wrote a detailed memorandum to the Minister dated 15 February 2007 outlining

(a) the background relating to the Amended Prosecuting Policy,
(b) the important features of the Amended Prosecuting Policy, and

(c) problems relating to the implementation of this policy.

5.14. I concluded by expressing the view that

"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. There, and in view of the fact the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter." (Annexure D)

5.15. I did not receive any response to this 15 February 2007 memorandum.

5.16. On 19 July 2007, the Minister was notified that no response to my 15 February 2007 memorandum had been received. (Annexure E) Again no response was received.

5.17. Given the absence of any reply or guidance to my 15 February 2007 memorandum , I have since that date proceeded with post TRC matters including the Chikane matter strictly in terms of the Amended Prosecution Policy.

NATIONAL SECURITY ISSUES

6. Ad Paragraphs 121, 122, and 123

6.1. In a number of paragraphs the Minister makes mention of ***"national security issues not being reflected on"***.

6.2. On more than one occasion the members of the Task Team were requested to furnish the PCLU *"with any information they might have on these cases fro (sic) a security point of view"* (Minutes of the Meeting of Task Team 16 November 2006 and Minutes of 4 December 2006).(Refer to previous Annexures A4 and A5)

ALLLEGED FAILURE TO KEEP MINISTER INFORMED OF TRC LITIGATION, AND SPECIFICALLY THE CHIKANE MATTER

7. <u>Ad Paras 122 and 124</u>

The Amended Prosecution Policy stipulates that *"..... the National Director must inform the Minister for Justice and Constitutional Development of* ***all decisions taken or intended to be taken*** *in respect of this prosecuting policy relating to conflicts of the past."*

7.1. Report Given In December 2004

7.1.1. On the 9 (or 14?) December 2004 the Acting NDPP Dr Ramaite furnished the Minister with an extensive report dealing with the management and prosecution status of the cases emanating from the TRC process by the NPA. (See Annexure F)
IT MUST BE ESTABLISHED WHICH ONE WAS SUBMITTED TO THE MINISTER. BOTH ARE SIGNED. THEY HAVE MINOR DIFFERENCES!

7.1.2. Paragraph 9.9. in this report notified the Minister of the intention to prosecute in the Chikane matter as follows: *"The decision of the Acting NDPP as to when the accused will be arrested and the prosecution instituted is awaited."*

7.1.3. Thus, more than a year prior to the Amended Prosecution Policy being approved, the Minister was apprised of the intended prosecution. This is in accordance with the spirit of the provisions of section 11 of the Amended Prosecution Policy which were subsequently approved in December 2005.

7.1.4. Subsequently the Minister was informed on a number of occasions verbally and in writing of the decision to prosecute in this matter. These notifications are covered below.

7.2. Ministerial Authorisation for Chikane Investigations: May 2005

7.2.1. On 16 May 2005, the Minister authorized Adv Ackermann to undertake an official journey to the United States of America for the sole and specific purpose of consultations, investigations and the gathering of further evidence regarding the attempted murder of Rev Chikane. (See Annexure G, dated 20 April 2005)

7.2.2. The memorandum submitted to the Minister (Annexure G) outlined the case in detail and, further, attached a copy of the intended indictment as Annexure B to that memorandum.

7.3. Notification to Minister of Institution of Prosecutions in Chikane Matter: 7 February 2007

7.3.1. On 7 February 2007, the Minister was informed about my decision to prosecute in the Chikane matter. (See Annexure H). In this report the Minister was once again informed regarding the following:

7.3.1.1. The background which led to my decision to prosecute in the Chikane matter.

7.3.1.2. The motivation to prosecute in the Chikane matter
7.3.1.3. Opinions expressed by civil society and human rights organizations on the lack of TRC prosecutions taking place and concerns regarding the Directives which created 'a second amnesty process.'

7.3.2. The Minister did not respond to this notification of the decision to prosecute.

7.3.3. The only objection to the Chikane prosecution was made by the SAPS legal representative, Adv Jacobs, who stated that National Commissioner Selebi said that Rev Chikane did not want a prosecution. However, both myself and Adv Ackermann had numerous communications and visits with Rev Chikane and were abreast of his views, which were that he would leave the matter to the NPA to decide. This matter was discussed at length during Task Team meetings.

7.4. Notification to the Minister of Trial Date and Venue for Chikane Matter and Plea and Sentence Agreement: 6 July 2007

7.4.1. On 6 July 2007 I informed the Minister about the trial date in the Pretoria High Court and the proposed plea and sentence agreement (Annexure I).

7.5. Meeting with Minister: 17 August 2007

7.5.1. While in Port Elizabeth attending to a death in my family, I was informed by Dr Ramaite that he and Adv Ackermann were summoned by the Minister to attend a meeting with herself and her Director-General, Adv Simelane, that same day. I am informed by Adv Ackermann that the following transpired.

7.5.2. The Minister indicated that despite having been on leave for the last week, she had been continuing to work and gestured towards her two heavy briefcases that she had brought with her. She then stated that she is the political head and should be informed of all TRC-related prosecutions. She stated that she had not been informed of the pending Chikane trial. Dr Ramaite then produced a copy of the letter dated 6 July 2007 (as per paragraph 4 above), which had been received by her department on 19 July 2007.

7.5.3. The Minister then enquired from Adv Simelane whether this letter had been received. Adv Simelane called her Secretary into the room. The Secretary then opened one of the above-mentioned briefcases and produced an envelope which indeed contained the letter. No further discussion was held on the Chikane matter thereafter.

7.6. Progress Report to Minister: 19 July 2007

POST TRC LITIGATION

1. Although a number of complaints have been individually bulleted, the crux of this matter is whether the NDPP is estopped from making decisions to prosecute on TRC matters, unless such decisions are preceded by full discussions with the Minister and various Directors General.

2. The answer to this issue lies in the consideration of the applicable legislation, namely:

   2.1 Section 179 of Act No 108 of 1996 (the Constitution);

   2.2 The National Prosecuting Authority Act, No 32 of 1998 (the NPA Act);

   2.3 The Amended Prosecution Policy, issued in terms of the NPA Act, which commenced on 1 December 2005 (the TRC guidelines).

3. THE CONSTITUTION

   3.1 Section 179(4) not only requires the NPA to exercise its functions without fear, favour or prejudice, but also that national legislation must give effect thereto.

   3.2 Section 179(2) places the right to institute prosecutions solely with the NPA.

   3.3 Section 179(5)(d) deals with the right of the NDPP to review a prosecutorial decision. Implicit in the wording of the section is that although he may receive representations from various persons, the decision is his own.

   3.4 Section 179(6) places the final responsibility over the NPA with the relevant Cabinet Minister.

   3.5 Section 92(3)(a) requires all Ministers to act in accordance with the Constitution. Consequently, the Minister is obliged to give effect to Section 179(4) *supra*.

4. THE NPA ACT

   4.1 The preamble recognises the independence conferred in terms of Section 179(4) *supra* and Section 20 recognises the exclusive right of the NPA to institute prosecutions.

4.2 Section 22 gives the NDPP the overall authority for all prosecuting powers in terms of the Act and the Constitution.

4.3 Section 21 requires that all prosecution policies have the concurrence of the Minister.

4.4 Section 22 contains various subsections which deal with the interaction between the Minister and the NDPP. Section 22(4)(a)(iii) provides that the NDPP may advise the Minister on all matters relating to the administration of justice and Section 22(4)(i) provides that he may make recommendations to the Minister on similar matters. Other provisions only require that the NDPP consult with the Minister. The only mandatory provision is contained in Section 22(5), which relates to a structure whereby complaints against the NPA may be lodged. Section 22(9) gives the NDPP the right to institute prosecutions in his own right.

4.5 Section 33 is the only section dealing with the Minister's final responsibility in terms of Section 179(6) *supra* and goes no further than giving the Minister a discretion to request the NDPP to provide her with reasons for decisions and to request reports and information on matters.

4.6 Section 35 deals with the NPA's accountability to Parliament and does not go beyond the tabling of reports by the Minister.

5. "TRC GUIDELINES"

5.1 The preamble to the guidelines confirms that they were tabled before Parliament by the Minister and consequently, it may be inferred that the guidelines have her blessing as is reinforced in part "A.3(c)" thereof.

5.2 In part "A.2(i)", the constitutional independence conferred in Section 179(4) is recognised.

5.3 In part "A.4", the NPA is given a general discretion as regards making a decision not to prosecute and where such prosecution would not be in the public interest. Although various factors are bulleted, no reference is made to national security.

5.4 In part "B.7", the NDPP is required to approve all decisions regarding both investigations and prosecutions, but in terms of part

"B.4", the PCLU, located in his office, is responsible for overseeing investigations and instituting prosecutions. In terms of part "B.6", the PCLU shall be assisted by representatives of various State Departments.

5.5 In terms of part "B.9", the NDPP may obtain the views of various individuals and State Departments before making a decision.

5.6 In terms of part "B.11", the NDPP must inform the Minister of all decisions taken or intended to be taken.

5.7 Part "C" in detail specifies the criteria to be considered by the NDPP when making a decision to prosecute or not and again no reference is made to national security.

6. In the light of the above provisions, neither the Minister nor any other person may participate in the decision whether or not to prosecute.

7. The individual complaints are dealt with as follows:

7.1 "114": The guidelines have been adopted and implemented with the Minister's concurrence.

7.2 "115": The structure referred to in part "B.6" has been established. Adv Pikoli played a key role in communicating with the Directors General of the various State Departments to secure their participation. His letters to the relevant Directors General are available.

7.3 "116": Prior to the appointment of Adv Pikoli, in December 2004, the Acting NDPP had provided the Minister with a very detailed memorandum, dealing with the status of TRC matters. Upon his appointment, Adv Pikoli submitted appropriate memoranda to the Minister on general or specific TRC matters as and when necessary. In addition, he submitted annual reports to Parliament via the Minister, dealing inter alia with TRC matters.

7.4 "117": The NDPP is required to do no more than comply with Sections 22, 33 and 35 of the NPA Act and part "B.11" of the guidelines. The memoranda referred to in par 7.3 *supra* provide adequate proof of such

compliance. We only have two written letters from the Minister complying with the provisions of Section 33 of the NPA Act. In her letter of 8 February 2007, she requests Adv Pikoli to clarify whether he is proceeding with prosecutions or not. In her letter of ... August/September 2007 (?), she requests him to clarify whether there is a current investigation against office bearers of the ANC. Adv Pikoli compiled a prompt and comprehensive written response to each query.

7.5 "118": The guidelines make no provision for a task team providing such functions nor for the Directors General advising the NDPP and reporting to the Ministers. Such a structure would be in conflict with the provisions of part "B.6", read with parts "B.4" and "B.7" of the guidelines. Section 179(5)(a) of the Constitution requires that the prosecution process must be conducted in accordance with prosecution policy. Such a structure would therefore be unconstitutional and would enable an affected party to challenge any decision made on the basis of such a structure. Such a structure would also constitute an inroad into the constitutional independence of the NPA's decision-making process referred to in Section 179(4) and would therefore be unconstitutional also on this basis.

7.6 "119": It is not true that the task team was not operating as efficiently and effectively as envisaged by the directives. The directives require simply that the task team assist the PCLU with overviewing investigations and instituting prosecutions so as to enable the NDPP to make decisions whether or not to prosecute or to investigate. The task team first requested to be appraised of all decisions already taken before considering current matters. This obviously led to current matters being put on hold until the feedback process had been completed. The poisoning of Rev Chikane matter required clarification as to whether in fact Rev Chikane desired a prosecution or not. The Pebco 3 prosecution could not proceed until the DOJCD made the necessary arrangements for the compiling of the record of the review of the judgment

of the Amnesty Committee denying amnesty to the accused and further, that the review was heard by the High Court. Investigators had to be appointed in respect of current matters.

It is also not true that the non-NPA task team members "*were continually frustrated by the officials of the NPA, who denied them access to files ...*" At no stage was such a request made, nor was it refused. Attached are the minutes of all the meetings of the task team, which confirm that no such issue was ever raised or debated. At the commencement of the task team, the Head of the PCLU invited any member requiring to view the original material to visit his office. At the December 2006 meeting, the PCLU informed the task team of the existence of large quantities of TRC material and requested assistance in compiling a data base, which would enable access thereto. The DSO representative indicated that the DSO's Crime Analysis Division would compile such a data base. Once the material was however inspected, it was established that the DSO lacked the necessary resources. The matter was then taken up further with the Document Centre of the NPA, but again, due to resource constraints, a data base could not be compiled. At the meeting during August 2007, NIA indicated that it had established a research project to assist the task team. The PCLU quested that NIA compile the data base and arrange for members of NIA to examine the material. The NIA members however requested that an inventory be compiled before the data base could be constructed. In his letter of September 2007, NIA's Deputy Director General tabled a proposal as to how the data base could be compiled and on 1 October 2007, the PCLU responded favourably. The minutes of the meeting of August 2007 and the correspondence between Adv Macadam and Mr Richer are attached.

The issue of summaries arose only in the context of outlining the matters already disposed of. Attached are the two reports, compiled by the PCLU, the second of which contained additional information as requested by the task team. SAPS responded in a

similar way by submitting summaries of dockets in its possession. As are confirmed in the minutes of the task team's meeting, at no stage was it alleged that the task team was unable to make reports to the principals and that the Directors General were denied critical information. Any task team requiring information for such purpose could have requested it.

7.7 "120": It is not true that the NPA evaluated matters without the participation of other members of the task team. The minutes of the meetings confirm that all matters under consideration by the NPA were tabled and debated. When the matter of the poisoning of Rev Chikane was raised, SAPS advised that the National Commissioner had been informed by Rev Chikane that he did not desire a prosecution. This led to the matter being taken up with Rev Chikane by Adv Pikoli and members of the PCLU. The minutes of August 2007 confirm that the task team was given full feedback on the Chikane matter and that the only issue raised was one by NIA, namely whether the Reverend had been informed of how the matter was to be disposed of. The minutes of August 2007 also confirm how the PCLU recommended that its own efforts be integrated with those of SAPS on certain matters.

7.8 "121": The views of Government are reflected in the address to Parliament by the President on 15 April 2003, as well as in the guidelines. The minutes of the task team meetings confirm that these views were taken into account in all matters dealt with. In particular, the minutes of August 2007 establish that the PCLU put all matters relevant to the Chikane matter before the task team for debate and that no concerns relating to the national security of the Republic were raised. The memoranda submitted to the Minister since December 2004 did deal with the issues of TRC matters in the context of relevant concerns. These concerns included:

- the adverse consequences of delays in conducting investigations and instituting prosecutions;

- attempts by the group supporting former security forces to intimidate Government into not prosecuting on the basis that this would lead to counter charges against office bearers of the ANC;

- the negative media publicity generated by human rights organisations, which claimed that Government had no desire to institute prosecutions; and

- the possible constitutional challenges to the guidelines by virtue of the fact that certain provisions may be interpreted as providing for a further amnesty process.

7.9 "122": At the time of the prosecution of Wouter Basson, the NPA had evidence of other persons involved in the poisoning of Rev Chikane. In April 2003, the President ruled out all further amnesties for TRC cases. The Constitutional Court in the Wouter Basson appeal ruled that South Africa was under international obligations to prosecute such matters. In November 2004, the PCLU attempted to arrest and charge three police officers for their role in the poisoning of Rev Chikane. The Acting NDPP put a stop to this process. However, in the memorandum of December 2004, the Minister was advised by the Acting NDPP that a decision would be taken to reinstitute proceedings against the accused and that a prosecution would ultimately be inevitable. On 16 May 2005, the Minister approved the prosecutor undertaking an official trip to the USA to obtain evidence for the prosecution after she had received a memorandum from Adv Pikoli, dealing fully with the matter. The Minister was provided with a copy of the draft indictment. On 7 February 2007, Adv Pikoli compiled a memo to the Minister in which he in detail explained why he had decided to prosecute in the case. The matter was placed before the task team and the only issue raised was whether in fact Rev Chikane desired a prosecution, which was followed up and reported on. We are not in possession of any written communication from the Minister either before or after the establishment of

the task team, dealing with the Chikane matter and specifically whether there were any concerns which needed to be addressed before the NDPP made a decision on the matter. In terms of the legislation referred to *supra*, the NDPP is under no legal duty to consult the Minister prior to making a decision. Specifically, part "B.11" of the guidelines only require that he inform the Minister of decisions taken or intended to be taken which he has done. On 6 July 2007, Adv Pikoli informed the Minister of the fact that the matter would be dealt with in the Pretoria High Court on 17 August 2007 by way of a plea bargain. This led to a meeting between the Minister, the Acting NDPP and prosecutor concerning the matter. This was an ideal opportunity for the Minister to raise any concerns relating to national security. On 19 July 2007, the Acting NDPP compiled a memo to the Minister, again dealing with the Chikane matter. The matter was also fully discussed with the task team at the meeting in August 2007. Although in July 2007, the NDPP had in principle approved of a plea bargain in the matter, the agreement was only signed on 17 August 2007 when by consent, the accused presented themselves to Court. The Minister, Directors General and members of the task team could at any stage, prior to 17 August 2007, have approached the NDPP to put the matter on hold, so as to address any concerns regarding national security which they may have had, but did not do so.

7.10 "123": In terms of the legislation referred to *supra*, the NDPP is required to make decisions whether or not to prosecute without fear, favour or prejudice. A prerequisite that he hold thorough discussions with Directors General would constitute an inroad into this constitutional independence and give the accused the right to challenge the validity of the decision to prosecute. Since 2004, it has been public knowledge that the NPA intended prosecuting in the Chikane matter and both the Directors General and the task team were at liberty to approach the NDPP at any stage to draw his attention to matters including national security. As stated above, the task team was

not established to provide a structure whereby the Directors General could influence the NDPP's decisions and furthermore, that such a structure would be unconstitutional. In his memo to the Minister, dated 15 February 2007, Adv Pikoli raised his concern about this issue and requested guidance. He did not receive a reply and in his memo, dated 19 July 2007, the Acting NDPP informed the Minister that her reply to this issue was still awaited. Again, there was no response. Adv Pikoli once more, with negative results, raised the issue in his memo of 27 August 2007. The minutes of the task team reflect that the non-NPA members on occasions made reference to their principals, but the same minutes also confirm that arrangements were made for such inputs to be received.

7.11 "124": As stated above, Adv Pikoli and/or the Acting NDPP did inform the Minister of all decisions taken or intended to be taken. As further indicated above, the Minister had ample opportunity to raise any concerns before the matter was finalised in court. It is noteworthy that the preceding paragraphs deal with the plea bargain in the context of national security, but in this paragraph, the issue now changes to one of political – and policy consequences. Political considerations may constitute an inroad into the constitutional independence of the NPA. The Minister discharges her final responsibility in terms of Section 33 of the NPA Act by calling for the NDPP to give reasons for his decisions. We have no record of any such request. As stated above, Section 33 does not provide for the Minister having to approve the decisions of the NDPP before they are taken. For obvious reasons, this would be unconstitutional.

It is not true that the task team has become dysfunctional and unable to deliver on its mandate. The minutes of August 2007, as well as the correspondence between Richer and Macadam show that the work is being taken forward as contemplated by the guidelines and in accordance with sound prosecution and investigation practices.

POST TRC LITIGATION

119.Shortly after its establishment it became clear that the Task Team was not operating as efficiently and effectively as envisaged by the Directives. Members of the Task Team from outside the NPA were continuously frustrated by the officials of the NPA, who denied them access to files in respect of cases under consideration, but elected to provide the members with summaries of cases.

1. The statement relating to inefficiency of the Task team is indicative of a person who is uninformed of the activities of the Task Team. The Minister should be aware that progress reports on all work done by the Task team were compiled and submitted to the National Director and the Minister.
2. All those reports contained common views of all members of the Task Team working as a unity. The NPA, in particular the National Director cannot be blamed if members did not give feed back to their principals.
3. If the Task Team was inefficient, how is it possible for it to make recommendations on more than 20 cases listed in the audit report with investigators appointed on about four provinces. This statement is therefore meant to mislead the Chairperson of the inquiry because it is baseless and lacks substance. All the members of the Task Team have copies of progress reports which they contributed in drafting them.
4. It is also disturbingly inaccurate to state that members were continuously frustrated by being denied access to TRC files. I wish to state that Adv Ackermann SC has on more than one occasion invited all members of the Task Team interested in viewing all case dockets to do so but none of them availed themselves for such an exercise. It should also be mentioned that Dr Ramaite who is the convenor of the Task Team was never at any stage during meetings informed of PCLU's refusal for members to peruse files relating to TRC cases.
5. The process was made easy by PCLU and SAPS supplying members with copies of audit reports on all cases in their possession. It is worth mentioning that the Minister was represented in the Task Team by Miss Marlyn Raswiswi. She never made any indication that she was being frustrated in any manner by the NPA officials nor did she make any request for information relating to TRC cases. She never conveyed any complaints or concerns from her Principal or the Minister on the work done by the Task Team.
6. On the allegation that the NPA elected to provide members with summaries of these cases, Adv Ackermann SC indicated that PCLU will bring all the dockets to the boardroom for the Task Team to go through them. It is then that some members felt that summaries will suffice. Thus recommendations were made by all members based on the information provided to them by PCLU and SAPS. It was prudent on all members to seek further information if they were not satisfied with any aspect relating to any matter.

120. These concerns were raised with the National Director. Effectively, the NPA proceeded to evaluate these matters without the participation of other members of the Task Team.

1. It has already been stated above that two progress reports were prepared by the Task Team with recommendations on more than 20 cases for the National Director and Minister. Copies are annexed and marked "A" and "B". All members of the Task Team contributed to the compiling of the said reports and are in possession thereof and I find it rather absurd to claim that evaluation was done without their participation.

14/11/06

Refer them to the minutes