



The National Prosecuting Authority of South Africa
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Die Nasionale Vervolgingsgesag van Suid-Afrika

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INTERNAL MEMORANDUM

TO: ADV M SIMELANE
NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS

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

SUBJECT: APPLICATION FOR CONDONATION FOR LEAVE TO
APPEAL TO THE SCA
NKADIMENG & OTHERS v NDPP & OTHERS

DATE: 13 JULY 2010

Dear Adv Simelane

1. PURPOSE

The purpose of this memorandum is to obtain your decision as to whether the State should seek to petition the SCA for leave to appeal in this matter.

2. BACKGROUND

2.1 The Court case relates to the prosecution policy in respect of cases arising from the TRC and in particular to provisions enabling perpetrators to make representations to the NDPP and thereby avoid prosecution.

2.2 The Applicants (victims in two TRC matters and NGO organizations) brought an application before the North Gauteng High Court to have these provisions declared unconstitutional on the basis that they constituted a continuation of the amnesty process after the TRC had dissolved.

- 2.3 Legodi J, who heard the application, declared the entire Guidelines unconstitutional and not merely the provisions complained about by the Applicants. In so doing, he also ruled that the State was obliged to prosecute in every case where there was evidence, which is contrary to the fundamental legal principle that the NPA has discretion whether or not to prosecute in individual matters.
- 2.4 An application for leave to appeal to the SCA against the judgment by the NDPP and Minister was dismissed on 4 May 2009. In terms of the SCA rules, a petition for leave to appeal should have been lodged on 1 June 2009.
- 2.5 In January 2010, you indicated that the petition should proceed. The Minister had directed that private counsel should be briefed and the DoJ&CD deemed it appropriate that the opinion of counsel should be obtained before proceeding with any petition.
- 2.6 On 13 July 2010, I was provided with a copy of counsel's opinion.

3. THE ISSUES

- 3.1 As far as the merits of the matter are concerned, counsel is of the view that Legodi J was wrong in finding that:
 - 3.1.1 There was an unqualified obligation to prosecute;
 - 3.1.2 A person who was facing criminal charges could not make representations as to why he should not be prosecuted;
 - 3.1.3 There was no protection in the policy to protect accused who do in fact make disclosures.
- 3.2 Counsel however did indicate that there was a possibility that the SCA might nevertheless still find that certain of the provisions of the Guidelines did in fact constitute a re-run of the TRC process and nevertheless still find those provisions unconstitutional.
- 3.3 As far as the issue of condonation is concerned, counsel has pointed out that a condonation application should have been lodged with the SCA on 1 June 2009. Consequently, any such application would at this moment in time be over a year late. In this regard counsel points out that condonation will only be granted if it is demonstrated that the interests of justice require it. Counsel concludes that it would not be possible to demonstrate this.

4. RECOMMENDATION

- 4.1 I have exercised oversight over the TRC cases since 2003 and have not only considered the opinion of counsel, but taken regard of all the issues relevant to such cases. I am of the opinion that an application for condonation would not be successful and would result in criticism of the Government.

- 4.2 An application for condonation would require not only affidavits from yourself and the Minister, but from Adv Mpshe SC, who was the Acting NDPP from the time that the application for leave to appeal was brought on 8 January 2009 until 14 November 2009.
- 4.3 As counsel has indicated, although Adv Mpshe SC originally favoured an appeal, he subsequently changed his mind and advised the Minister that no further effort should be made to appeal the decision. I have been advised that, in addition, the current Deputy Minister also changed his mind as to the merits of a further appeal. All these facts would have to be disclosed in the petition, which would clearly count against an argument that the interests of justice demand an appeal.
- 4.4 Counsel has also referred to the status of the TRC cases, because Adv Mpshe SC dealt with this issue in his memorandum to the Minister. In this regard, counsel is of the view that the nature of the cases would also not demonstrate that it is in the interests of justice that an appeal be pursued, which would further delay the finalization of the matters.
- 4.5 Having taken stock of the TRC cases, I agree with counsel that they do not make a case that it would be in the interests of justice for a further appeal. There are no cases on hand which have been put on hold, because perpetrators have applied not to be prosecuted as contemplated by the Guidelines. There is therefore no prejudice in this regard to any potential accused. In addition, the Guidelines contemplate representations in respect of cases where there is a *prima facie* case against the accused and but for the representations, a prosecution would be justified. In none of the matters on hand has a strong case been established against any implicated party and in respect of all matters, SAPF has been requested merely to try and establish what evidence is still available so that a decision whether or not to prosecute can be taken in the light of all the available evidence.
- 4.6 I cannot therefore find a proper factual basis to demonstrate the interests of justice requirement. Even if this requirement were satisfied, it would be difficult to persuade the SCA why, if this was the case, Government delayed for over a year in bringing the application. The Applicants would have to be served with the petition and would have the right to oppose it. There are therefore cost considerations, should it be unsuccessful.
- 4.7 As counsel has indicated, the concern is obviously that the Legodi judgment will be applied in ordinary criminal matters so as to prevent charges from being withdrawn as a result of representations. In this regard however, counsel points out that this is not a valid argument and that the correct position has properly been stated in the *NDPP v Zuma* matter, which was handed down after the Legodi judgment and is of higher authority being a SCA judgment. I agree with counsel's views on this issue.
- 4.8 A final factor which I submit should be considered is that even if the Guidelines were to be found constitutional, they would have to be amended and also it may well be that certain provisions contained therein are not desirable at this stage. The

Guidelines contemplated that the DPPs would hand over all cases to the PCLU, which would in turn assist the NDPP in making decisions whether or not to prosecute in each case. The Guidelines contemplated the PCLU being assisted by a representative from the DSO, SAPS, DoJ&CD and NIA.

- 4.8.1 The DSO has been abolished and the Guidelines would have to be amended so as to now include the DPCI, which has now been mandated to investigate all the TRC cases.
- 4.8.2 The reference to NIA, a covert intelligence agency, is also problematic. We have already received requests for access to information relating to decisions not to prosecute and it is only to be anticipated that in a high profile decision not to prosecute, such decision may be taken on review in terms of PAJA. In both instances, the issue of having to make available to the victims or other affected parties NIA material relevant to the decision, would arise and could lead to controversial legal challenges. There may well be merit in not including the intelligence agency in a public document.
- 4.8.3 The DPPs have been excluded from the decision-making process. In our handling of the *Pebco 3* matter last year, the DPP: Eastern Cape played a key role in the decision-making and engagements with the victims. I believe it important for the DPPs to be consulted and have a role in the decision-making in respect of the matters which we must dispose of. It would be desirable to amend the Guidelines so as to make provision for the DPPs.
- 4.9 In my view, it is not necessary to issue Guidelines in terms of Section 179 of the Constitution in order to address the concerns relating to TRC cases. In terms of Section 20(3)(b) of the NPA Act, you may remove the TRC cases from the DPPs' offices in order to make decisions whether or not to prosecute yourself. In terms of the General Guidelines, which have not been affected by the Legodi judgment, the NPA is not obliged to prosecute in every case, even if the evidence establishes a *prima facie* case. The Guidelines specifically make provision for representations and also specify a number of grounds, which a prosecution would not be justified, irrespective of the nature of the evidence. You also have a right to request any State department to assist in connection with the matters either on a standing or *ad hoc* basis. The DPCI has already agreed to investigate all the matters.
- 4.10 I therefore recommend that no further steps be taken to appeal the matter.

Kind regards

DR MS RAMAITE SC

COMMENTS

ADV M SIMELANE
NDPP
DATE: