

**NOTICE IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF  
INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN  
MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND  
RECONCILIATION COMMISSION CASES**

**TO: ADV NEL GERHARD**

**EMAIL: [nelsg@vodamail.co.za](mailto:nelsg@vodamail.co.za)**

**INTRODUCTION AND ESTABLISHMENT OF THE COMMISSION**

1. On 29 May 2025, the President of the Republic of South Africa issued Proclamation Notice No. 264 of 2025, establishing the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases ("the Commission").
2. The Commission was appointed in terms of section 84(2)(f) of the Constitution, 1996. The Honourable Madam Justice S. Khampepe serves as Chairperson, with the Honourable Mr Justice F. D. Kgomo and Adv A. Gabriel SC as members.
3. In terms of its mandate, the Commission is required to inquire into, make findings, report on, and make recommendations concerning allegations that, since 2003, efforts or attempts were made to influence, pressure, or otherwise improperly prevent the South African Police Service and/or the National Prosecuting Authority from investigating or prosecuting TRC cases. The Terms of Reference further require the Commission to determine whether officials within these institutions colluded in such efforts, and

Whether further action—including investigations, prosecutions, or the payment of constitutional damages—is warranted.

4. Among the parties identified as having a substantial interest in these proceedings are:
  - a. The applicants in the matter of L.B.M. Calata and 22 Others v Government of the Republic of South Africa and Others (Case No. 2025-005245, North Gauteng High Court, Pretoria); and
  - b. The families of victims in TRC cases who have a substantial interest in the matters under inquiry.
5. This notice is issued in terms of Rule 3.3 of the Rules of the Commission, read with the Regulations made under Government Notice R.278 of 2025.
6. The Commission's Evidence Leaders intend to present the evidence of one or more applicants in the Calata case, and any person who in the opinion of the Evidence Leaders possesses information that relates to the paragraph **Error! Reference source not found.** allegations against you and is relevant to the Commission's work.
7. The specific date and venue for the hearing at which such evidence will be presented will be communicated to you in due course.

#### **NOTICE IN TERMS OF RULE 3.3**

8. Below is an extract from the Calata matter founding affidavit, with corresponding paragraph numbering, implicates, or may implicate, you in allegations regarding efforts or attempts to halt or suppress the investigation or prosecution of TRC matters. Further details of the Calata proceedings, including the said affidavit, are available on the Commission's website at [www.trc-inquiry.org.za](http://www.trc-inquiry.org.za).

***"PARTICULARS OF IMPLICATION"***

*The Amnesty Task Team*



148. *A Director-General's Forum chaired by Adv Pikoli, the then Director General Team" (ATT).*

149. *The ATT was required to:*

149.1 *explore options for the NPA and the intelligence agencies to accommodate persons who still wish to disclose the truth about past conflicts.*

149.2 *consider a further process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.*

149.3 *advise whether legislative enactments were required.*

150. *The original terms of reference for the ATT (as attached to Macadam's affidavit (FA5) as annex RCM14 (at p863) were to consider and report on:*

150.1 *The criteria the NPA applies in deciding on current and impending prosecution of cases flowing from the conflict of the past.*

150.2 *The formulation of guidelines that will inform current, impending and future prosecution of cases flowing from the conflicts of the past.*

150.3 *Bearing in mind the abovementioned guidelines, whether legislative enactments were required.*

150.4 *Whether any of the two Bills that have already been formulated can be taken forward, while taking into account the views of the intelligence agencies.*

151. *The names of the two bills were not disclosed but presumably one of them was the Indemnity Bill (first 2 pages at RCM13 at p861). The views of the Intelligence Agencies were also not disclosed.*

152. *The ATT comprised the following members:*

152.1 *Deon Rudman (Chairperson): DOJ*

152.2 *Yvonne Mabule: National Intelligence Agency (NIA)*

152.3 *Vincent Mogotloane: NIA*

152.4 *Gerhard Nel: NPA*

152.5 *Lungisa Dyosi: NPA*

152.6 *Ray Lalla: SAPS*

152.7 *Joy Rathebe: Department of Defence (DOD)*

153. *The ATT was requested to submit its report to the Director General's Forum by close of business on 1 March 2004. The ATT met on 26 February 2004 and again on 1 March 2004.*

154. *The undated 2004 secret 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 case no 32709/07*

*[2008] ZAGPHC 422) (Nkadimeng 1) as annex TN42 at p431. It is annexed hereto marked FA24. The report set out the ATT's mandate, background, proposals and concerns.*

155. *The ATT Report noted that a further amnesty would face challenges because of constitutional issues but nonetheless the team still had to find ways to accommodate those perpetrators who did not take part in the TRC process.*

*In relation to its first task, the ATT recommended the creation of a Departmental Task Team comprising representatives from:*

155.1 *Department of Justice and Constitutional Development,*

155.2 *The Intelligence Agencies,*

155.3 *South African National Defence Force,*

155.4 *South African Police Service,*

155.5 *Correctional Services,*

155.6 *National Prosecuting Authority, 155.7 Office of the President.*

156. *The functions of the proposed Departmental Task Team would, inter alia, be*

*the following:*

156.1 *Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, it must consider the advisability of the institution of such criminal proceedings and make recommendations to the NDPP.*

156.2 *To consider applications received from convicted persons alleging that they had been convicted of political offences with a view to making recommendations for their parole or pardon, and in making such recommendations to consider various criteria. Aside from the TRC's amnesty criteria, other considerations included, *inter alia*:*

156.2.1 *Whether a prosecution "politically" reflects the aims of the TRC Act*

*and is not in conflict with the requirements of objectivity.*

156.2.2 *Various humanitarian concerns.*

156.2.3 *Whether a prosecution could lead to conflict and traumatisation of victims.*

156.2.4 *The perpetrator's sensitivity to the need for restitution.*

156.2.5 *The degree of remorse shown by the offender and his attitude towards reconciliation.*

156.2.6 *The degree of indoctrination to which the offender was subjected.*

156.2.7 *The extent to which to which the perpetrator carried out instructions.*

156.2.8 *Renunciation of violence and willingness to abide by the Constitution.*

156.3 *The Task Team noted that their proposals have various shortcomings,*

*including:*

*A possible negation of the constitutional rights of victims, the public at large and alleged offenders.*

156.3.1 *The possibility of the institution of private prosecutions.*

156.3.2 *The absence of any guarantee that alleged offenders will not be prosecuted, meaning that they might be reluctant to make full disclosure.*

156.3.3 *Public perception regarding the participation in a further amnesty Process by the security services as the public may regard them as perpetrators in past conflicts.*

157. *According to Pikoli in his affidavit in Nkadimeng 2, the recommendation of the Interdepartmental Task Team for 'a two-stage process', which would have required*

*its recommendation before the NDPP could prosecute was rejected. This was because it would have been a violation of the NDPP's prosecutorial independence enshrined in section 179 of the Constitution. Although the Task Team's role was meant to be advisory in nature it soon became apparent that the non-NPA members of the team saw their role as supervisory rather than advisory. Indeed, as will be seen below, the 'two-stage process' was reintroduced causing a crisis of conscience for Pikoli.*

158. *With regard to the ATT's second task, namely, to consider a further amnesty process, the team was of the view that the only way to address the concerns was to provide a further amnesty similar to that of the TRC process.*

158.1 *Some members argued against another amnesty, pointing out it would undermine the TRC process, while others supported a new amnesty to encourage more disclosures.*

158.2 *The ATT decided not to make a recommendation on the question of another amnesty but to leave it in the hands of government.*

158.3 *It attached a draft Indemnity Bill to the report (as annex B) in case government decided to proceed with a further amnesty. The annex was not attached to the report in the version disclosed in Nkadimeng 2. However, the first 2 pages of the draft bill were attached to Macadam's affidavit (FA5) as*

*RCM13 at p861. It would have provided for a rerun of the TRC's amnesty process.*

159. *With regard to the ATT's third task, namely, to advise on any legislative steps needed, it noted that its recommendations in relation to the first task do not require any legislation. However, it noted:*

*"Should Government, however, decide on a further amnesty process ..., 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."*

160. *Much of the ATT's report was accepted by government and implemented, as is evident by the 2005 amendments to the Prosecution Policy and the introduction by President Mbeki of a Special Dispensation for Political Pardons in 2007, to be discussed below.*

## *The Secret Further Report of the Amnesty Task Team*

161. *The secret Further Report of the ATT was disclosed by Macadam in his affidavit (FA5) as annex RCM15 at p864. Perhaps more than any other document, the Further Report reveals the real intent of those behind the Political interference. The report is undated, but it would have been generated in 2004 in the weeks or months following the submission of the ATT's first report to the Heads of Department Forum on 4 March 2004.*

162. *The report reveals that the Heads of Department Forum discussed the first*

*ATT Report with members of the Task Team, "whereafter they deliberated the Task Team's proposals and recommendations in camera". Following these deliberations, the Heads of Department Forum indicated that they preferred the Task Team's recommendations relating to the establishment of a Departmental Task Team (referred to as Option I). However, they requested the Task Team to further consider the following aspects:*

162.1 *In performing its functions, the proposed Inter-departmental Task Team (ITT) must make use of existing structures rather than parallel structures.*

162.2 *Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the NDPP decides not to prosecute; and investigate the possibility and desirability of legislation, if required.*

162.3 *The proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee.*

162.4 *It is important that the proposed Task Team, the Inter-Ministerial Committee and the NDPP, in performing their functions and reaching decisions, should take the national interest into account.*

162.5 *Advise the Forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court (ICC).*

162.6 *Advise the Forum on a timeline for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.*

163. *Perhaps most revealing was the Forum's instruction to the ATT to explore ways in which private prosecution and civil litigation could be eliminated where the NDPP decides not to prosecute, including the possibility of fresh legislation to achieve this end. This exposes the intent to come up with a means to guarantee maximum impunity for apartheid-era perpetrators.*

164. *The fear that victims and families could turn to the ICC, in the event that avenues for accountability in South Africa were completely closed, presented a real fear to the Forum.*

165. Equally chilling was the desire of the Forum for the ITT to “work under the direct supervision of an Inter-Ministerial Committee”.

165.1 If there was any doubt that the prosecution process in relation to the TRC cases was to be under the thumb of political overlords, it was dispelled by this requirement. This is in fact what transpired.

165.2 As will be discussed below, towards the end of 2006, the ITT was instructed that it must submit a final recommendation to a “Committee of Directors General” in respect of each TRC case, which in turn must advise the NDPP in respect of who to prosecute or not.

165.3 In addition, it emerged that at least by 2007, if not earlier, there was a “Cabinet Committee on Post TRC matters”, which was a subcommittee of the Justice, Crime Prevention and Security Cluster.

166. The proposal that all players in the process, including the NDPP, should “take the national interest into account” when making decisions in relation to the TRC cases was ‘shorthand’ for the expectation that all involved, particularly the NPA, would be expected to ‘do the right thing.’

166.1 Needless to say, no attempt was made to define what the national interest meant in this context, although I am advised that the ‘national interest’ is not necessarily the same as the ‘public interest’.

166.2 *The national interest constitutes the interests of the state, usually as defined by its government. Typically, politicians invoke the ‘national interest’ in seeking support for a particular course of action.*

166.3 *The public interest on the other hand typically refers to the collective interests of a community or society, in particular when steps are taken on behalf of disadvantaged, marginalised and vulnerable people; as well as the pursuit of objectives that benefit society as a whole, such as the protection of civil liberties.*

166.4 *I am advised that while the national and public interest may coincide, in this instance it does not. The shielding of perpetrators of serious crimes from scrutiny and justice may have served the narrow or expedient interests of the state at that time, but it hardly served the public interests of victim communities or society more generally.*

166.5 *It goes without saying that the national interests, as espoused by the ATT, were also diametrically opposed to the ‘interests of justice’.*

## *Response of the ATT*

167. *The ATT then met to work out how to take the Heads of Department Forum's directives forward. They consulted legal experts who advised that setting up the Departmental or ITT Team did not require legislation.*

167.1 *Only a Memorandum of Understanding would be needed, although all existing structures, such as the NPA, would have to "commit themselves and give their full support and cooperation" to the process.*

167.2 *It was apparent that for this to work, everybody would have to 'play the game'. As it turned out, they could count on almost everybody in all departments to 'play the game,' or at least 'look the other way'.*

167.3 *However, two key persons in the NPA, Pikoli and Ackermann, were not willing to bow to political instruction. The charade could not work without them playing along. As will be seen below, the former would be shown the door while the latter was sidelined.*

168. *According to the Further Report, the question of "eliminating private*

*prosecution[s] and civil litigation in cases of a no prosecution [ ] elicited much debate" within the ATT.*

168.1 *The ATT spoke to two State Law Advisers and obtained a legal opinion from Adv JH Bruwer, which was attached to the report, although it was not attached to the copy annexed to Macadam's affidavit. There appeared to be agreement that "legislation eliminating private*

*prosecution and civil litigation will at least affect a person's right to equality and the right of access to courts".*

168.2 *They also doubted that "the motivation for such legislation would meet the requirements of section 36 (the limitations clause) of the Constitution", which would be "seen as a further amnesty process."*

168.3 *The ATT drew the Heads of Department Forum's attention to an article in the Rapport of 7 March 2004 where Archbishop Desmond Tutu was quoted as saying that those who did not receive amnesty should face prosecution and any new initiative to stop prosecutions "would be seen as negating the amnesty process of the TRC."*

168.4 *The ATT advised that the only way to eliminate private prosecutions and civil litigation would be by way of legislation and a Constitutional amendment which “would not be desirable.”*

168.5 *It is interesting to note that in Nkadimeng 1, the Minister of Justice and the NPA argued that the Prosecution Policy amendments did not promote impunity because families and victims could still bring their own private prosecutions, even though they lacked investigative powers and the resources of the State. Judge Legodi, recognising the absurdity of this claim, noted in his judgment in Nkadimeng 1 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.”*

168.6 *It is not known if the State Law Advisors and Adv Bruwer were asked to provide an opinion on the constitutionality of the proposed amendments to the Prosecution Policy, which provided for an effective back door amnesty. Archbishop Desmond Tutu filed a supporting affidavit in the legal challenge to the new policy (in Nkadimeng 1), where he stated that the efforts of the State “represented a betrayal of all those who participated in good faith in the TRC process. It completely undermined the very basis of the South African TRC.” An unsigned copy of the Archbishop’s affidavit is annexed hereto marked FA25.*

169. *In relation to the proposed establishment of an Inter-Ministerial Committee it is recorded in the Further Report that “the Task Team supports this proposal.” The members of the ATT demonstrated their subservience in agreeing with the Heads of Department Forum. However, they were constrained to provide the views of the State Law Advisers who indicated that a further structure could prove cumbersome and “might be seen as an attempt by the Government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision.”*

170. *The ATT cast further ignominy on itself when in response to the proposal that the “national interest should be the paramount objective,” it responded in servile fashion: “the Task Team wholeheartedly agrees with this viewpoint of the Forum.” The ATT was more than happy to open the door to the imposition of the dominant political views onto prosecutorial decisions.*

171. *In relation to the involvement of the ICC, the ATT relied on the advice of Adv Bruwer who concluded that it was “not inconceivable that a complainant who is prohibited [...] from instituting a private prosecution in the national court may approach the International Criminal Court for relief.”*

172. *In relation to the question of setting a timeline for the Departmental Task Team to complete its work, the ATT declined to propose a timeline*

*but proposed that “the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into account the extent to which its objectives are achieved.” Perhaps the ATT realised it should leave this decision in the hands of the office holder who was really calling the shots. In doing so, the ATT confirmed loudly and clearly that the question of the TRC cases was now firmly in the hands of those in political control.*

#### *Moratorium on investigating and prosecuting the TRC cases*

173. *It eventually emerged that between 2003 and 2004 an effective moratorium was placed on the investigation and prosecution of the TRC cases. When complainants such as Thembi Nkademeng, sister of the late Nokuthula Simelane (who had been abducted, tortured and murdered by the SB) approached the PCLU they were told by prosecutors that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. Until this new ‘policy’ was issued, an effective moratorium on pursuing the TRC cases was in place. (In this regard see the foundling affidavit of Thembi Nkademeng filed in Nkademeng 2. This affidavit is voluminous, but a copy can be supplied on request).*

174. *It is not known who authorised the halting of investigations, but since it involved suspending work on a large number of serious crimes, mostly involving murder, it is highly likely that the authority must have come from*

*the very top. In addition, the heads of the NPA, DSO and SAPS must all have acquiesced in this decision, together with the cabinet ministers overseeing those departments.*

175. *The moratorium was confirmed in a letter from Acting NDPP, Dr MS Ramaite SC (Ramaite), dated 31 January 2013 to Nkadimeng, a copy of which is annexed hereto marked FA26 in which he stated:*

*"It is correct that the TRC cases were temporarily put on hold pending the formulation of guidelines. This was because it was deemed important that special considerations applied to these cases."*

176. *Before the imposition of the moratorium the views of the victims and families were not sought. Those most impacted by this massive suspension of the rule of law were not notified in advance or given an opportunity to make representations. They were kept in the dark, and only learned of it after the fact, when they pressed the PCLU for answers.*

177. *No time limit was placed on the moratorium. No announcement was made of it in any press statement, nor was it mentioned in any annual report in advance of its imposition, or indeed at the time it was imposed. As far as we are aware, no prior written authorisation was ever issued to authorise the suspension of the cases. It was apparently meant to last until the so-called guidelines were finalised, for which no date had been*

set. *In effect, hundreds of murder cases were placed on ice indefinitely on the strength of unwritten arrangements.*

178. *I am advised that imposing this moratorium on the pursuit of the TRC cases was a deeply unlawful move by the authorities. There was no legal basis to single out these cases for different treatment to other serious crimes. Indeed, the abandoning of these matters pending future guidelines was particularly egregious since several of the crimes prescribed in this period (such as assault GBH) and, as pointed out by Ackermann, witnesses and suspects were dying.*

179. *It turned out the guidelines were amendments to the NPA's Prosecution Policy, which were only issued in December 2005. This meant that the moratorium was in place for between two and three years. As will be seen below, the issuing of the guidelines did not result in the reopening of investigations into the TRC cases. Indeed, the clampdown only tightened.*

#### *Direct intervention to stop prosecutions*

180. *NDPP Ngcuka resigned in July 2004 and Ramaite was appointed as the Acting*

*National Director of Public Prosecutions.*

181. Ackermann, in defiance of the moratorium, pursued certain cases during 2004 in which investigations had already been finalised. These were the Blani and PEBCO 3 matters referred to above.

182. Ackermann also decided to prosecute three former SB members for their role in the 1989 poisoning of Reverend Frank Chikane, the former head of the South African Council of Churches. This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary.

182.1. Basson was formerly the head of South Africa's secret chemical and biological warfare project. 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.

182.2. According to Ackermann in his affidavit in Nkadimeng 2 (TN8 at pp 218 – 235 at para 17) (**FA8**), on the morning of 11 November 2004, the police were on the verge of effecting the arrests of three suspects. On the same morning Ackermann received a phone call from the late Jan Wagener (**Wagener**), the attorney for the suspects. Wagener told Ackermann that he would receive a phone call from a

*senior official in the Ministry of Justice, and that he would be told that the case against his clients must be placed on hold.*

182.3. *Shortly thereafter Ackermann received a phone call from an official in the then Ministry of Justice. He was informed by the said official that a decision had been taken that the Chikane matter should be placed on hold pending the development of guidelines to deal with the TRC cases. Ackermann refused to follow this order and told the official that only the NDPP could give him such an instruction. The official told him that he would shortly receive a phone call from Adv Ramaite, the Acting NDPP.*

182.4. *A few minutes later Ramaite called Ackermann and instructed him not to proceed with the arrests. Ramaite also ordered Ackermann to immediately halt work on all TRC cases. Ackermann indicated in his affidavit that it could be safely assumed that the Acting NDPP was instructed at a political level to suspend these cases.*

183. *According to an interview conducted by the author Ole Bubenzer with Wagener in Pretoria on 8 May 2006 (reflected at page 130 of Bubenzer's book), when Wagener was advised that the arrests were going to be effected, he immediately intervened politically and put great pressure on the government to stop the proceedings. Wagener claimed that*

*authorisation to suspend the arrests came from President Mbeki “in an extraordinarily swift move”.*

184. *Macadam in his affidavit (FA5) confirmed that Ackermann advised him that a moratorium on the investigation and prosecution of the TRC cases had been put in place.*

185. *All TRC related investigations and prosecutions were halted and no TRC case proceeded between November 2004 and August 2007. Another two and a half years were wasted.*

#### *Amendments to the Prosecution Policy*

186. *On 1 February 2005, Pikoli was appointed NDPP by the President. His appointment was for a 10-year term as contemplated in section 12(1) of the NPA Act.*

187. *In line with the recommendations of the ATT, guidelines were drawn up with the aim of incorporating them as amendments to the Prosecution Policy. Ackermann consulted with Gerhard Nel, senior prosecutor in the DSO, who played a leading role in formulating the proposed amendments.*

188. *According to Ackermann, the PCLU drew up two legal opinions assessing the constitutionality of the proposed amendments to the*

*Prosecution Policy and submitted these 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, Ackermann voiced his opposition to the proposed amendments.*

189. *Macadam shared the view that the proposed amendments were*

*unconstitutional in that they permitted the NPA not to prosecute perpetrators if they met the criteria for granting amnesty as had been applied by the TRC.*

190. *During 2005, Ackermann again met with representatives of the family of Nokuthula Simelane who requested him to proceed with various charges against certain suspects and to pursue certain lines of inquiry. The FHR, on behalf of the Simelane family, presented the PCLU with a memorandum dated 18 August 2005 setting out the basis for the proposed charges. Ackermann again advised them that his hands were tied pending the new guidelines.*

191. *No victim, family or organisation representing their interests was consulted during the drawing up of the amendments to the Prosecution Policy. However, during an interview with the author Ole Bubenzer on 8 May 2006, Wagener, who acted for several of the perpetrators, said that*

*representatives of the former security police were consulted informally on a very occasional basis (reflected at page 132 of Bubenzer's book).*

192. *Following the approval by the Minister of Justice, and after consultation with the Directors of Public Prosecutions as required by section 179(5) of the Constitution and section 21 of the NPA Act, amendments to the Prosecution Policy were tabled in Parliament and became effective on 1 December 2005. The amendments were largely based on the recommendations crafted by the ATT. According to the minutes of the Justice Portfolio Committee on 17 January 2006, it was Gerhard Nel who addressed the meeting on behalf of the NPA introducing the amendments to the NPA's prosecution policy.*

193. *The amendments were contained in Appendix A to the Prosecution Policy and 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 Amendments or the Guidelines or the amended Prosecuting Policy), a copy of which is annexed hereto marked FA27.*

194. *The amendments were introduced as having been formulated "in view of" the "essential features" of the response of the President on behalf*

*of government to the TRC's final report to the joint sitting of Parliament on 15 April 2003.*

*Ironically, the policy claimed that it was giving due weight to, inter alia:*

*194.1 The human rights culture which underscores the Constitution, and the status accorded to victims in terms of the TRC.*

*194.2 The constitutional right to life and the non-prescriptivity of the crime of murder.*

*194.3 The fact that the TRC's amnesty did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused.*

*194.4 The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.*

*194.5 The NPA represents the community and is under an international obligation to prosecute crimes of apartheid.*

*194.6 The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice.*

194.7 *The equality provisions of the Constitution.*

194.8 *Government did not intend to mandate the NDPP to perpetuate the TRC amnesty process.*

195. *While the amendments to the policy professed to be pursuing various noble objects, including not perpetuating the TRC amnesty – the maintenance of impunity was what was intended, and is what transpired in practice.*



196. *Part B of the policy set out the “procedural arrangements” for those wanting to make representations to the NDPP in respect of their crimes arising from conflicts of the past and which were committed before 11 May 1994. These included inter alia:*

196.1 *Representations to the NDPP must include full disclosure in relation to the crime for which the applicant seeks a decision not to prosecute.*

196.2 *Regional DPPs had to immediately transfer all their cases to the Office of the NDPP.*

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

196.3.1 *The National Intelligence Agency.*

196.3.2 *The Detective Division of the South African Police Service.*

196.3.3 *The DOJ.*

196.3.4 *The DSO.*

196.4 *The NDPP must approve all decisions to investigate or prosecute or not.*

196.5 *The NDPP may obtain the views of any private or public person or institution, or intelligence agencies and the Commissioner of the SAPS, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.*

196.6 *The NDPP must inform the Minister of Justice in advance of all decisions*

*he intends taking in respect of matters relating to conflicts of the past.*

196.7 *The NDPP must speak with the Minister of Justice before making public statements on any matter arising from the conflicts of the past.*

196.8 *All state agencies are requested not to use any information disclosed by perpetrators in these procedures in any subsequent criminal trial against such persons.*

197. *Part B was aimed at ensuring a tight grip on the TRC cases. The NPA's work and decisions on these matters would be under the close scrutiny of groups such as the NIA, DOJ and SAPS. The NDPP had to speak with the Minister*

*of Justice before taking any decisions in relation to the cases or making any public statements in connection with them.*

198. *Part C of the policy set out the criteria that had to be applied when making decisions to prosecute cases from conflicts of the past. A decision not to prosecute could be made on the back of several factors which included:*

198.1 *Whether the applicant has made full disclosure relating to his crime.*

198.2 *Whether the crime was "associated with a political objective committed in the course of conflicts of the past" and was "proportional" to the political objective in question, which were a replica of the TRC's amnesty criteria.*

198.3 *The degree of the applicant's co-operation and the personal*

*circumstances of the applicant, including:*

198.3.1 *whether the ill-health of or other humanitarian considerations*

*justified non-prosecution of the case;*

198.3.2 *the offender's sensitivity to the need for restitution;*

198.3.3 *the degree of remorse shown and his attitude towards*

*reconciliation;*

198.3.4 *renunciation of violence and willingness to abide by the Constitution; and*

198.3.5 *degree of indoctrination to which the offender was subjected.*

198.4 *The extent to which prosecution or non-prosecution facilitate or undermine “nation-building through transformation, reconciliation, development and reconstruction within and of our society”.*

198.5 *Whether the prosecution may lead to conflict or further traumatisation of victims.*

198.6 *Any further criteria, which might be deemed necessary.*

199. *The Part C criteria not only provided for a rerun of the TRC’s amnesty criteria behind closed doors but also opened the door to practically any excuse not to prosecute. These included whether a prosecution might undermine*

*reconciliation and whether a perpetrator was subjected to indoctrination, which was imposed on all who grew up in Apartheid South Africa. The amendments pretty much guaranteed the perpetuation of impunity, especially if the NDPP in place was willing to play along.*

200. *Once the amendments came into force, Ackermann again expressed his*

*opposition to them as he felt that they violated the constitutional rights of the complainants and constituted unwarranted interference in the*

*prosecutorial independence of the NPA. He complained to various officials in the NPA, including the NDPP, that the guidelines were aimed solely at accommodating perpetrators and providing them with avenues to escape justice.*

### ***Developments post the amendments to the Prosecution Policy***

201. *Once the new guidelines had been issued in terms of the Prosecution Policy amendments, this should have brought an end to the so-called moratorium imposed on the TRC cases. This was not to be. The clampdown continued, with renewed vigour.*

202. *In the NPA Annual Report of 2005/06, Pikoli indicated that he was “sad to report” that “not much has been achieved” with regard to the TRC cases, despite all their attempts to take them forward:*

*“Following Government’s response to the final Report of the TRC, and because it is important for the prosecuting authority to deal with these matters on a uniform basis in terms of specifically defined criteria, the National Director, with the concurrence of the Minister for Justice and Constitutional Development and after consultation with the various Directors of Public Prosecutions issued prosecution policy and policy directives in terms of section 179(5)(a) and (b) of the Constitution regarding the handling of such cases arising from*

*conflicts of the past. This prosecution policy and policy directives, which must be observed in the prosecution process, were tabled in Parliament towards the end of 2005 and came into operation on 1 December 2005. During January and February 2006, the NPA briefed the Portfolio Committee on Justice and Constitutional Development and the Committee on Security and Constitutional Affairs of the National Council of Provinces regarding the contents of these directives. I am sad to report, as at the time of writing this report, that not much has been achieved in this regard despite all the attempts that have been made in taking this matter forward.” (Bold added)*

203. Significantly, the annual report also confirmed that the TRC cases had been

“placed on hold” pending the approval of the prosecution guidelines:

*“In late 2004, the Acting National Director requested that prosecutions for TRC cases be placed on hold pending the formulation and approval of prosecution guidelines relating to these matters. The guidelines were only finally approved in early 2006. The PCLU, as a result of complaints by various persons,*

*identified at least 15 cases which warrant further investigations in order to determine whether prosecutions are justified. On an ongoing basis, the PCLU receives requests from victims to look into cases where amnesty has been refused or not applied for. Where these matters can be followed up without further investigations and where no prosecutions are warranted, they are disposed of. Seven such matters have been dealt with in this manner. In 2006, the Directors of Prosecution: Mthatha and Pretoria seconded two Senior State Advocates to the PCLU to assist with these matters.” (Bold added)*

204. *Copies of the relevant pages of this annual report are annexed hereto marked FA28. A copy of the full report can be made available on request.*

205. *While the annual report confirmed on a post facto basis that the suspension or moratorium on the TRC cases was imposed in late 2004, in reality it was already in place during 2003, as set out above.*

206. *Interestingly the decision to halt the TRC cases was styled as a “request” by the Acting NDPP. It was not disclosed who this request was directed to.*

207. *With the exception of the Frank Chikane attempted murder case, which did not require further investigation, the PCLU was unable to pursue any other TRC cases.*

208. *According to Ackermann, the SAPS and DSO persisted in their refusal to provide investigators. It also proved difficult to even convene meetings of the*

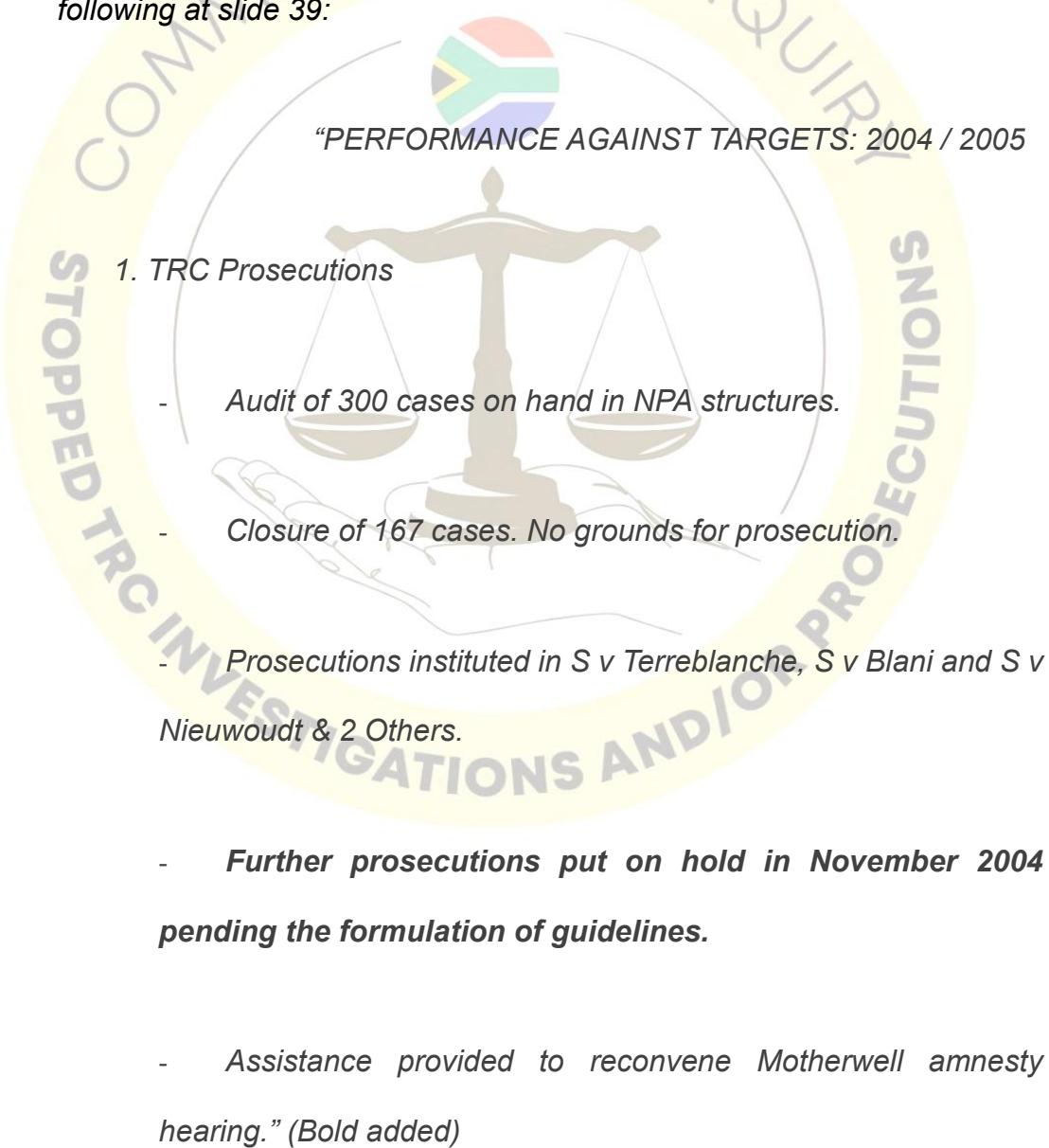
*ITT (referred to in Part B of the amendments) who were “meant to advise the PCLU on what cases to pursue.” Pikoli had hoped that the ITT, particularly the SAPS and the NIA would provide investigative and intelligence support for these cases, however, this support was “never provided.”*

209. *Once the guidelines were issued in December 2005, Ackermann wished to proceed with the five cases he had identified that had good prosecution prospects and the 11 cases which required substantial investigation. These cases were identified as “major priorities” for the PCLU for the 2006 – 2007 period. In addition, during 2006 he was getting more requests from victims’ families for further investigations in their cases.*

210. *According to Pikoli, once the Prosecution Policy amendments became effective in December 2005, he reviewed the available evidence implicating the three suspects in the Chikane attempted murder case,*

*which, in his opinion warranted prosecution. None had applied for amnesty, so he gave the initial instruction to proceed with the prosecution in February 2006.*

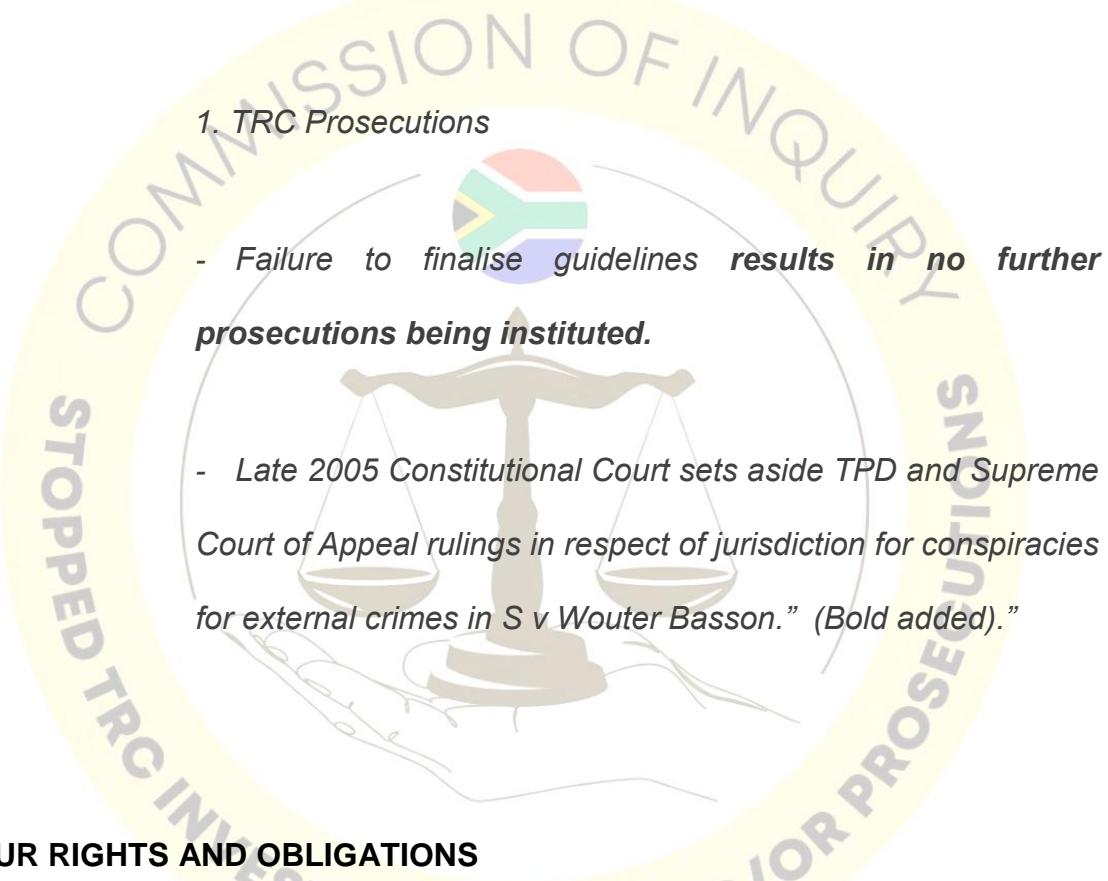
211. *The NPA made a presentation to the Justice Portfolio Committee on 8 March 2006, a copy of which is annexed hereto marked FA29. In relation to its performance in respect of the TRC prosecutions it disclosed the following at slide 39:*



212. *In the same presentation dealing with performance targets for the year*

*2005/06 the following was noted at slide 43:*

*"PERFORMANCE AGAINST TARGETS: 2005 / 2006*



#### **YOUR RIGHTS AND OBLIGATIONS**

9. You are entitled to attend the hearing at which the evidence relating to the above allegations, and any other that may be led against you, is presented.

You may be represented by a legal practitioner of your choice.

10. Rule 3.4 requires that, within fourteen (14) calendar days of this notice, you submit a statement in the form of an affidavit responding to the allegations.

Your affidavit must specify which parts of the evidence are disputed or denied, and set out the grounds for such dispute or denial.

11. If you wish to—

- a. give evidence yourself;
- b. call any witness in your defence; or
- c. cross-examine the witness whose evidence implicates you,

you must apply in writing to the Commission for leave to do so within fourteen (14) calendar days of this notice, accompanied by your affidavit.

12. You may also apply for leave to make written and/or oral submissions regarding the findings or conclusions that the Chairperson should draw from the evidence relating to you.

#### **COMMUNICATION WITH THE COMMISSION**

13. All correspondence, applications, and affidavits must be directed to: The Secretary of the Commission [secretary@trc-inquiry.org.za](mailto:secretary@trc-inquiry.org.za).

**DATED at SCI BONO DISCOVERY CENTRE Johannesburg on this 19<sup>th</sup> day of November 2025.**

For and on behalf of the Evidence Leaders to the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of TRC Cases.