IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/OR PROSECUTIONS

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"TN7" 170

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

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

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WILLEM SCHOON Ninth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

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

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

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

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PROFESSIONAL EXPERIENCE

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

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

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

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

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

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

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

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

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

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

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

CONFIRMATION

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

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

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("the TRC cases").

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

THE INDEPENDENCE OF THE NPA

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

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

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THE TRC CASES

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

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

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

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

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

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

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

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

Developments since 2005

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

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

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

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

26.3. The Department of Justice and Constitutional Development; and

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

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

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

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

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

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

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

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

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

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

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

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prosecute.

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

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

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

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

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

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

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

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

37. After this meeting, in early October 2006 I again sent letters to the various Directors General, Mr. Selebi and the DSO inviting them each to nominate a senior official to perform the functions set out in paragraph B6 of the Guidelines.

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

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

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

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

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

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

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

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

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

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

Developments from 2007

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

65. I explained that:

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

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

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

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

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revealing:

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

COMMISSIONER OF OATHS

Andrew Lehloyo Dorcky Mohohlo
Commissioner of Oaths
Practising Attorney
2nd Floor, Leadership House,40 Shortmarket Str
Greenmarket Square, Cape Town, 8001

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This reality cannot be avoided.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

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Adv Vusi Pikoli
National Director of Public Prosecutions
Private Bag X752
PRETORIA
0001

6 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

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

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

I trust that you find the above in order.

With warm regards

MRS B S MABANDLA
MINISTER

NATIONAL DIRECTOR
6/2/07
NATIONAL PROSECUTING AUTHORITY

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news24 archives
Breaking News First

Cops up for apartheid crimes

2007-02-07 07:15

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

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

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

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

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

Address to the nation

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

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

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

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

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

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

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

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

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

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

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

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

He did not want to comment on any particulars.

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

The victim has a say

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

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

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

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

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

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VPP 4

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

Sonja CarstensPretoria

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

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

Google translate:

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

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

VPP5 213

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

National Prosecuting Authority on Rapport article on A Ackermann

21 Aug 2007

Response to article in rapport
21 August 2007

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

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

Contact person:
Tlali Tlali
Cell: 082 333 3880

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28-AUG-2007 16:48 FROM DEPT OF JUSTICE TO 0123649329 VPP6 P.01/2

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

Our ref: 2/3/3
Enq: Adv. M Sibiya

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

Dear Adv Pikoli

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

1. I refer to the discussions in the above meeting of 23 August 2007.

2. You will recall that both you and the National Commissioner, Mr. J Selebi, provided the sub-committee with different facts on the Rapport article regarding an alleged forgery of certain NPA documents.

3. You further confirmed that you have instituted a thorough investigation into the alleged forgery. I was however not advised of this decision and the basis thereof.

4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his averment that indeed there is an investigation by the NPA on certain political office bearers.

5. It was suggested at the meeting then that it would be useful if you could respond to the allegation that there is an investigation as mentioned above.

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

I trust that you find the above in order.

Yours sincerely

MS B S MABANDLA, MP
Minister for Justice and Constitutional Development
Date: 28.08.07

28/8/07

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VPP7

Ref: NDPP/kp

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

29 August 2007

Dear Minister

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

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

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

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

4. I confirm and repeat the following:

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

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

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

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

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

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

Kind regards

Adv. VP Pikoli
National Director of Public Prosecutions
Date:

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IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/ OR PROSECUTIONS

AFFIDAVIT OF VUSUMZI PATRICK PIKOLI

I, the undersigned.

VUSUMZI PATRICK PIKOLI

do hereby make oath and state that:

1. I am an adult male advocate of the High Court of South Africa presently resident in Pretoria, South Africa. I am currently a Special Advisor to the Minister of Police.

2. The facts contained in this affidavit are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

3. I depose to this affidavit to assist the Judicial Commission of Inquiry into stopped TRC Investigations and/or Prosecutions ("**the Commission**") to address paragraphs 1 to 1.3.2 of the terms of reference of the Commission.

Professional Experience

4. Selected highlights from my career are set out below

4.1 I joined the military wing of the African National Congress in 1980 and remained a member of UMkhonto We Sizwe until it was officially disbanded by the African National Congress. I also worked for the ANC's legal and constitutional affairs department in exile.

4.2 Between 1994 and 1997 I was the Special Advisor to the then Minister of Justice, Mr. Abdullah Omar.

4.3 From 1997 to 1999, I was the Deputy-Director General of the Department of Justice, and between 1999 and 2005 I was the Director General of that

V.P

department.

4.4 On 1 February 2005 I was appointed the National Director of Public Prosecutions ("**NDPP**").

4.5 As a result of my decision to authorize the prosecution of the then National Commissioner of Police, Jackie Selebi. on corruption charges I was suspended from duty by then President, Mr. T. Mbeki on 23 September 2007.

4.6 My decision to pursue prosecutions of apartheid-era perpetrators who had not been amnestied by the Truth and Reconciliation Commission ("**TRC**") contributed to President Mbeki's decision to suspend me.

4.7 During 2008, the Ginwala Commission of Enquiry found that the Government had failed to demonstrate that I was not a fit and proper person to hold the position of NDPP.

4.8 I was conferred the International Association of Prosecutors Award in 2008.

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

4.10 Between 2012 and 2014 I was a commissioner on the Khayelitsha Commission, which investigated policing matters in Khayelitsha.

4.11 In December 2014 I was appointed as the Western Cape's first Police Ombudsman.

4.12 In 2018-2019, I was the Special Adviser to the Minister of the State Security Agency.

4.13 In 2019, I was appointed as Adjunct Professor at the Nelson Mandela School of Public Governance at the University of Cape Town.

4.14 In 2019-2020, I served as the Chief Legal, Risk and Compliance Officer at the South African Airways.

4.15 In 2020-2021, I was the Special Adviser to the Minister of Public Service and Administration.

V.P.

4.16 In 2021-2024, I was the Special Adviser to the Minister of Water Affairs.

4.17 I am a member of the Africa Board and a Senior Advisor to the Global Initiative against Transnational Organized Crime and a founding member of the International Association of Anti-Corruption Authorities.

4.18 I am a former trustee of the Constitutional Court Trust and a former member of the Magistrate's Commission.

4.19 I co-authored a book with Mandy Weiner: "My second initiation:The Memoir of Vusi Pikoli" which was published in 2013.The book features the Ginwala Commission, where I also write about the post- TRC prosecutions.

Confirmation of affidavits

5. I confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), insofar as it pertains to me ("**the Calata affidavit**"). A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 1 at paginated pages 1 - 842.

6. I also confirm the contents of my affidavit dated 6 May 2015 filed in the matter of *Thembisile Phumelele Nkadimeng v National Director of Public Prosecutions and Others*, Gauteng Division of the High Court, Pretoria, Case No: 36554/2015. A copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 2 at paginated pages 843 - 889. In this affidavit I set out details of interference by the executive in the work of the NPA in respect of the TRC cases.

7. I further confirm the contents of the founding affidavit of Thembi Nkadimeng (now Simelane) dated 18 May 2015 filed in the matter of *Thembisile Phumelele Nkadimeng v National Director of Public Prosecutions and Others*, Gauteng Division of the High Court, Pretoria, Case No: 36554/2015, insofar as it pertains to me. A copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 4 at paginated pages 908 - 1381.

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8. I annex hereto marked **VPP1** a copy of my in-camera affidavit dated 6 May 2015 which was filed in the aforesaid matter with case no. 36554/2015. In that affidavit I attached an "*internal secret memorandum*" addressed to the then Minister of Justice, Ms Bridgitte Mabandla, titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007.

Conclusion

9. I confirm that during my tenure as NDPP political interference seriously undermined the investigation and prosecution of the TRC cases. I regard the interference as deeply unlawful and unconstitutional.

05.11.2025

VUSUMZI PATRICK PIKOLI

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at PRETORIA on 5 NOVEMBER 2025, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS (EX OFFICIO)
MS AJANTA DHEDA
ATTORNEY OF THE HIGH COURT OF SOUTH AFRICA
SOUTH AFRICAN RESERVE BANK
370 HELEN JOSEPH STREET PRETORIA 0002
Date: 2025-11-05

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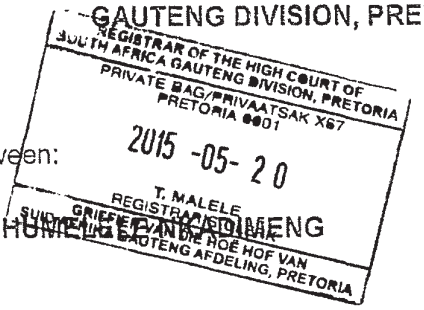
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



Case Number:

In the matter between:

THEMBISILE PHUMELELE DIMENG — Applicant

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — First Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE — Second Respondent

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES — Third Respondent

THE NATIONAL MINISTER OF POLICE — Fourth Respondent

WILLEM HELM COETZEE — Fifth Respondent

ANTON PRETORIUS — Sixth Respondent

FREDERICK BARNARD MONG — Seventh Respondent

MSEBENZI TIMOTHY RADEBE — Eighth Respondent

WILLEM SCHOON — Ninth Respondent

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IN CAMERA SUPPORTING AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa and a former National Director of Public Prosecutions. I have provided a supporting affidavit in these proceedings.

2. I refer to the memorandum mentioned in paragraph 51 of my supporting affidavit titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007. This memorandum is annexed hereto marked **"VPP1".** It was annexed to my affidavit before the Ginwala Commission marked as "TRC1".

3. As I had marked this memorandum as an "*internal secret memorandum*" I have not attached it to my open supporting affidavit. I have attached it this *in camera* affidavit which will be filed separately and which will not be made available to the public, unless this honorable Court authorizes such release.

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3.1. The issues and complaints raised in the memorandum have already been discussed in my affidavit filed before the Ginwala Commission, which has been part of the public record since 2008.

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

3.3. It ought to be released as it points to unlawful and unconstitutional conduct.

4. In this memorandum I pointed out that:

4.1. The problems are "*hindering and obstructing the NPA in fulfilling its constitutional mandate, namely, to institute criminal proceedings without fear, favour or prejudice*".

4.2. The SAPS and NIA had not made dedicated members available to the NPA to gather sufficient and admissible evidence in the TRC cases. This was one of the tasks that the "Task Team" was required to address.

4.3. There were differences in interpretation in relation to the role of the other state departments in relation to the prosecutorial decision-making process.

5. I concluded by stating that:

V.P. V.P. TP

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.

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.

Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

VUSUMZI PATRICK PIKOLI

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

COMMISSIONER OF OATHS

Andrew Lehlogo Barcky Mohobio
Commissioner of Oaths
Practising Attorney
2nd Floor, Leadership House,40 Shortmarket Str
Greenmarket Square, Cape Town, 8001

Copy 134

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

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

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

(a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;

(b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

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(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

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

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

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

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

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

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

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

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

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

2.2 Background relating to Amended Prosecution Policy

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

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

V.P. V.P. TP

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

2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament **and is binding on the prosecuting authority.**

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:[1]

(a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).

(b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.[2]

(c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.[3]

(d) It is important to note that the President made it clear that—

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

V.P. V.P. TP

(i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the **normal legal process**;

(ii) in order to reach a well-considered decision, **the NPA should work together with the Intelligence Agencies**, which include the NIA and the SAPS;

(iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be **in accordance with standard and normal execution of justice**;

(iv) such agreements should be in accordance with the NPA's **prosecution mandate**; and

(v) such agreements should be in accordance with **existing legislation**.

3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:

(a) The *dicta* of the Constitutional Court to the effect that **the NPA represents the community and is under an international obligation to prosecute crimes of apartheid.** (See ***The State v Wouter Basson CCT 30/03.)***.[4]

(b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

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

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

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

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

(i) The National Intelligence Agency.

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

(iii) The Department of Justice & Constitutional Development.

(iv) The Directorate of Special Operations.

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

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

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

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

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

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

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

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

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

(a) the terms of reference of the Task Team were explained and agreed to;

(b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

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

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

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

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

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

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

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

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

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

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

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

V.P. V.P. TP

- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made.". (Emphasis added)

4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.

5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy[5], the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

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

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5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the **"normal legal processes"** and **"prosecuting mandate"** of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

15-02-2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

23 September 2007

Dear Advocate Pikoli

As you are aware, the Prosecuting Authority forms an important part of our criminal justice machinery and, accordingly, our fight against crime.

This machinery to fight crime was further strengthened in 2000 when Parliament adopted legislation creating the Directorate of Special Operations (DSO), in the office of the National Director of Public Prosecutions.

In recognition of the particular threat posed by organised crime in the country, the DSO was specifically tasked to investigate and institute criminal proceedings relating to organised crime activities.

As a result of the importance of the Prosecuting Authority to the success of our fight against crime, I receive regular reports from government agencies and Ministries about the activities of the Authority.

Organised crime poses a serious threat to our national security. While I accept that the Prosecuting Authority has the discretion to enter into plea bargain and/or immunity arrangements with alleged offenders, the public interest must always be considered. Accordingly, in determining what is in the public interest, before exercising such discretion, the Prosecuting Authority must necessarily have regard to the totality of information available to the State.

Such plea bargaining and/or immunity arrangements cannot be done at the expense of our national security.

V. P.

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Clause 179(6) of the Constitution of the Republic of South Africa provides that the Cabinet member responsible for the administration of Justice must exercise final responsibility over the Prosecuting Authority. Accordingly, the Government, on whose behalf the Minister of Justice and Constitutional Affairs exercises this responsibility, must and does have an interest in ensuring that the Prosecuting Authority serves the public interest. In this regard, acting in terms of the dictates of the Constitution, the Minister of Justice and Constitutional Affairs informed me about some of the matters that the National Prosecution was seized with. Some government agencies also advised me of some of the activities relating to the same matters.

The information I have received shows that you have entertained the granting of immunity to members of organised crime syndicates in instances where the prosecution of such people would, in the Government's view, be in the public interest. In some of these matters there seems to be no reason why the Prosecuting Authority would not proceed against all persons implicated in the alleged offences.

I have evaluated the information at my disposal and have reached the conclusion that you, in your capacity as National Director of Public Prosecutions have failed to appreciate the nature and extent of the threat posed by members of organised crime syndicates to our national security. Such a lack of appreciation in itself amounts to a threat to our national security.

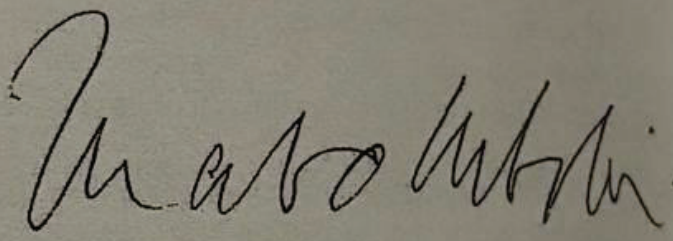
The Minister of Justice and Constitutional Affairs has also drawn my attention to the breakdown of relations between your office and hers due to several incidents, such as your testimony to the Khampepe Commission of Inquiry.

Accordingly, this letter serves to inform you that I, acting in terms of the provisions of section 12(6) of the National Prosecuting Authority Act (the Act), have decided to suspend you from office with immediate effect. You will continue to receive your full benefits during the period of suspension.

V.P.

Acting in terms of the same provisions of the Act, I have also decided to institute an enquiry into your fitness to hold the office of National Director of Public Prosecutions. The particulars relating to the enquiry will soon be communicated to you.

Yours sincerely



THABO MBEKI

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National Director of Public Prosecutions
Tshwane

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Adv. V. Pik
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Silverton
Pretoria

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Dear Adv.

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PARLIAMENTARY MONITORING GROUP

Justice Budget: input by National Prosecuting Authority and Specialist Units

Justice and Constitutional Development

10 June 2003

Meeting Summary

A summary of this committee meeting is not yet available.

Meeting report

JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
10 June 2003
JUSTICE BUDGET: INPUT BY NATIONAL PROSECUTING AUTHORITY AND SPECIALIST UNITS

Chairperson: Adv J de Lange (ANC)

Documents handed out:
National Prosecuting Authority of South Africa: Report to Parliament 2002/2003
Special Investigating Unit: Report to Parliament 2002/2003
Special Investigating Unit: Media Release (see Appendix 1)

SUMMARY
The National Prosecuting Authority stated it was showing considerable general improvement. Court productivity had improved and conviction rates were over 80% in most courts. Docket screening has been introduced to reduce withdrawal rates. Measures are being taken to improve court performance. The Specialist units (Asset Forfeiture, Scorpions, Sexual Offences and Community Affairs, Specialised Commercial Crime Unit, and the Witness Protection Programme) performed very well. The Rautenbach case raised issues around the effect of an appeal which had to be examined. Some TRC cases are ready to proceed, others await Court and Amnesty rulings. Although significant progress had been made, the NPA still had to face a number of issues.

The Chair of the Committee expressed concern at the low productivity rates of the High Courts, especially in view of its effect on women and children in sentencing case delays. The Committee discussed reducing overcrowding, improved management of the court system, and the need for the NPA to communicate with the public. The Chair stressed that the vast majority of NPA members worked extremely hard.

MINUTES
Briefing on NPA and Specialist Units other than SIU
Mr B Ngcuka (National Director of Public Prosecutions) briefed the Committee. He stated that the National Prosecuting Authority (NPA) had moved closer to their vision. Performance had improved; barriers to service delivery were identified and are being addressed. Court productivity had improved from two hours per day average sitting to three hours and thirty-nine minutes. The improvement was especially large in the district and regional courts. The Chief Justice had become personally involved and Justice Kriegler was looking into the matter. The improvement of eighteen minutes in the District courts was equivalent to establishing 53 new courts. Conviction rates continued to improve, with 83% of cases in the District Courts, 74% in the Regional Courts and 82% in the High Courts resulting in conviction. Saturday and Additional Courts had kept the backlog of cases under control.

To deal with the high number of withdrawals, the NPA was working with the SAPS. Cases were now screened before being placed on the roll. Notably, prosecutors visit Police Stations on Sundays to screen weekend arrest dockets - these were often simply arrests of weekend revellers and not viable for prosecution. Models of case flow management are being developed. Efficiency and efficacy is being improved with fast-tracking of cases where the accused will plead guilty, and decentralised decision-making and discretion.

The Specialist units (Asset Forfeiture Unit, Scorpions, Sexual Offences and Community Affairs, Specialised Commercial Crime Unit, and the Witness Protection Programme) performed very well. In 2002/3. the Asset Forfeiture Unit (AFU) made 147 seizures, with R120 million under restraint. 87 forfeitures had been initiated, with R73 million forfeited. R17 million was deposited in the Criminal Asset Recovery Account (CARA). Over its lifetime, half a billion rands worth of assets had been frozen. All performance measures are trending upwards. Winning the Mohammed Case had been significant since many Courts had refused to hear applications for seizure until the Constitutional Court had ruled on the matter. The AFU now had the backing of the Court's opinion. The Rautenbach case raised important issues. The judge ruled that Notice of Appeal does not reinstate the restraint order. This allowed Mr Rautenbach to remove his assets from the country. This should be looked at by the Legislature.

The Chair interjected, saying that the NPA should bring the matter to the Committee and they would look at it. He was shocked that a judge could allow this and not, at least, order that Mr Rautenbach's assets remain in the country until the matter was settled.

The Scorpions deal with national priority crimes. They employ a unique troika methodology, combining crime analysis, investigation and prosecution supported by technology. They were involved in a number of nationally-coordinated projects, such as investigations into: transnational drug-trafficking, human smuggling and trafficking and cross-departmental corruption. The Racketeering provisions of the Prevention of Organised Crime Act have been applied successfully. The Scorpions are increasing their focus on corrupt professionals. Their conviction rate was 85% for 2001 and 2002. Mr Ngcuka cited a number of successful cases.

The Specialised Commercial Crime Unit had great success and maintains a high conviction rate - 96.2% in Pretoria in 2002/3, 93.54% in Johannesburg in 2002/3. The SCCU was broadening its reach and the court imposed significant sentences. Mr Ngcuka cited a number of successful cases.

The Sexual Offences and Community Affairs Unit played a key role in protecting vulnerable members of society. The NPA wished to know why people committed these crimes and had been working with the Pretoria Technikon and Rhodes University, Grahamstown, to develop an offender profile. SOCA had added 11 courts in 2002, bringing the national total to 39. The Thuthuzela Care Centre (TCC) was created to provide special facilities for survivors of sexual offences. Cases drawn from the TCC had a conviction rate between 70% and 75%, with a turnaround time of six months rather than the standard nine to twelve months. The TCC model was being perfected and would be used in other hospitals around the country. It had been difficult to find Magistrates prepared to preside over such cases; they found it too traumatic. A six month rotation arrangement had been developed to deal with this. 69 of 80 maintenance prosecutor positions were filled and a review of the maintenance system is underway.

The Chair interjected expressing his concern at the diversions for young sexual offenders. Whilst he supported diversions, the programmes for sexual offenders are inadequate. He cited a ten week programme of two hours of lectures per week given to young rape offenders. This was not adequate. He asked for statistics on the number of rape cases and the conviction rates.

Mr Ngcuka replied that there was no agreement on this. He had no figures on the conviction rates for rape cases that went to court, other than those that went to the specialist courts.

The Chair replied that this is unacceptable. Prosecutors should keep track of such figures.

The NPA had taken over the function of witness protection in 2001. The Witness Protection Unit provides this service. The operating model was changed leading to a much improved service. No protected witnesses had been killed or harmed in 2002/2003. 375 witnesses were under protection, with another 360 family members. 105 of the family members were children, with 5 attending crèche and 30 attending school. The conviction rate for persons where protected witnesses testified was 77%.

The Chair interjected to ask about aftercare programmes for Witnesses in the Protection Programme.

Mr Ngcuka replied that this would require the involvement of Treasury. Currently, the programme did what it could, including trying to find people jobs and assisting with relocation.

The Joint Action Corruption Task Team (JACTT) was formed to investigate corruption in the Eastern Cape Provincial Departments. The JACTT assisted in part by providing investigators and prosecutors that were experienced in dealing with fraud. Significant progress was made with 104 arrests, 18 convictions, 10 imprisonment sentences, R4,2million worth of assets under seizure and the establishment of a dedicated Regional Court. High profile and complex cases will be pursued in phase 2.

Some cases emerging from the Truth and Reconciliation Commission are ready to proceed. In others the NPA awaits rulings from the Supreme Court of Appeal and from the reconvened TRC Amnesty Committee.

The Chair interjected to ask if any legislative change was needed to deal with TRC cases where immunity from prosecution was to be offered.

Mr Ngcuka replied that he could see no need for a change in legislation.

The NPA is working with the Road Accident Fund to boost law enforcement efforts and develop an integrated investigation and prosecution strategy. With SARS funding, the NPA is developing a specialist tax litigation capacity. Funding came from funds previously used to employ senior counsel to prosecute cases.

Lack of management skills was identified as a problem. 57 senior managers were sent on the Presidential Strategic Leadership and Development Programme. The impact of the programme is being assessed.

Implementation of the Employment Equity Policy is showing results. When the NPA was first constituted there were eleven attorneys general, all of whom were white males. Now women and black people were represented in the ranks of Directors of Public Prosecution. The process still had a way to go.

Although significant progress had been made, the NPA still had to face a number of issues. Prosecutors should know their contexts and thus the sorts of crime they would have to deal with, and were being given performance management contracts. They should not simply passively receive cases. Mr Ngcuka stated that he could not yet say if the legal system had been sufficiently transformed - that one could say that it is a South African system.

Special Investigating Unit (SIU): briefing

Mr W Hofmeyr (Deputy National Director of Public Prosecutions - Head: Special Investigative Unit) briefed the Committee on the SIU. The State spends a significant amount of money on forensics. The SIU could provide this service cost-effectively at only 30 to 40% of the cost in the private sector. It has shifted from a somewhat confrontational approach to working with Government to identify corruption in Departments. A ten point strategy was developed to revive the SIU: low morale had been dealt with, though the long term survival of the unit was not guaranteed. New cases were coming in, but there tended to be a long delay in getting proclamations. The SIU is seeking to build capacity through training so that it could rely less on recruiting people from other organisations. Representivity had been improved with 67% of staff from designated groups, 43% (48% if contract workers are included) of staff is black. The

SIU sought to ensure competitive salaries. Proper project management had been introduced to promote efficiency. Judgements had limited the effectiveness of the SIU - Adv W Trengrove SC briefed the SIU on legislative improvement. Cooperation with law enforcement agencies had been improved. The SIU is building its partnership with Government. Mr Hofmeyr cited several notable successes of the SIU, with R128 million (unaudited) saved through its actions.

The Chair interjected to ask how many investigations the SIU had conducted and how many were finalised.

Mr Hofmeyr replied that this information was in the detailed report.

Briefing on NPA finances
Ms M Sparg (CEO: Corporate Services) stated that in 2001/2, the first year of the NPA's budgetary independence, they had received an unqualified report from the Auditor General. The 2002/3 figures had been compiled and were being audited. She believed that the NPA was on track for another unqualified report. A saving of R20-30million was projected and had been achieved. This was within the 2% Treasury index. Funds saved went to offset Justice Department overspending. The NPA may handle procurement up to R5million, with a committee headed by a deputy director of public prosecutions to investigate wasteful expenditure.

The Auditor General had raised concerns about R523 thousand in unauthorised expenditure. This was expenditure inherited from the Department. It was virtually impossible for the Witness Protection Programme to use ordinary procurement procedures. The NPA was discussing having the necessary spending authority delegated to the WPP with the Tender Board.

The Chair responded that this gave him the impression that there was more stability in NPA finances and under-expenditure had been largely stopped.

Ms Sparg confirmed this.

The Chair asked how the NPA underspent.

Ms Sparg replied that vacancies and a longer than expected approval time for the new salary structure had led to the underspending.

Mr Ngcuka added that about 52 prosecutors had left the NPA for the Magistracy.

The Chair responded that such problems would get worse. As the Department gave up control of bodies, they lost the ability to harmonise them. Prosecutors will continue to leave the NPA if the Magistracy provides a better salary for the same qualification.

Discussion
Imam G Soloman (ANC) asked how the NPA recorded the value of confiscated drugs.

Mr Ngcuka replied that the NPA simply destroyed items, such as drugs, that it could not use or realise the value of. The value of such items was not recorded aside from these reports. At the Chair's suggestion, he said that the NPA would look into keeping records of such values.

A member asked about the Basson case.

Mr Ngcuka replied that they were studying the judgement. The judges had ducked the real question in the appeal. The problem with the case had to do with fairness. But the judges had ruled simply that the State may only appeal on matters of law, not on matters of fact. The central problem though was that the State did not receive a fair trial because the judge was biased. In their judgement the judges referred to a possible problem. They wondered how one would deal

with a situation where one found evidence that the judge had been bribed. There seemed to them no way to appeal even on this fact. The NPA is studying the judgement and getting legal opinion.

The Chair responded that the NPA should take the case to the Constitutional Court. There is a right to a fair trial. He would strongly support them in this. The fact that things had been done a certain way for 500 years was not enough. They should interpret round the Constitution. The Constitutional Court should pronounce on what is a fair trial for the State. He asked about procedural weaknesses that had been referred to.

Mr Ngcuka replied that there had been shortcomings in pagination and there were missing pages in some copies. They had all been technical issues, with nothing that related to the substance of the case. Even so, this should never have happened.

The Chair responded that the problem is that the public think that the matter was mishandled - they do not realise that it was a technical mistake. The NPA should inform the public.

A member asked about the ruling by the Cape High Court that the State had to pay the costs in a case that could not proceed.

Mr Ngcuka replied that the State had been ready to proceed in the case. Problems had arisen because the judge had been unavailable and had requested a certificate from the Director of Public Prosecutions authorising prosecution. This is not required in the High Court, only in lower Courts. The case was struck off the roll and the State ordered to pay costs. The judge had ruled based on a Section not in operation so it is not clear how the order was made. The case had been put back on the roll.

The Chair responded that, again, the NPA should make a public statement. It was ridiculous that a judge could make an order in terms of law that does not exist.

A member asked about the appointment of new magistrates.

Adv J Henning SC (Court Management) replied that he been told about the proposed appointments of forty magistrates. He had not yet received the list from the Magistrate's Commission.

The Chair asked if this meant that they had not identified the courts together.

Adv Henning replied that they had not.

The Chair expressed his exasperation.

Adv Henning noted that at times the Commission appointed Prosecutors that the NPA were happy to see leave.

The Chair stated that the problem was that the Commission were appointing the magistrates in area where the problems are not related to the number of magistrates. Areas with enormous infrastructure received most of the new magistrates. The appointments had not been done in a scientific way. The NPA should intervene if appointments were being made in the wrong areas.

Adv Henning noted that the NPA had been begging for a relief pool of magistrates.

Ms Camerer asked if the NPA and the Specialist Units were over-funded. They seemed the 'Rolls-Royces' of the Department.

Ms Sparg replied that the NPA is not over-funded. Some portions of the NPA are well-resourced but this is not the

reason for their success. Problems were due more to broader issues of management than funding.

The Chair added that specialised units inevitably take the best cases and have the best lawyers. It would be bad if they did not have the high success rates they had. The vast majority of prosecutors were in the lower courts. There was a measure of truth to Ms Camerer's point because the Scorpions, AFU were better staffed and so on. This is true all over the world.

Ms Camerer asked about the R210 million reported in the Sunday Times to be in CARA.

Mr Hofmeyer replied that this was not correct. The figures presented in the tables are annual figures. At the end of the previous financial year, there was R18 million in CARA. The amount now was about R27 million. All the money recovered by the SIU was victim money and so returned to the victim (the State) by court order.

Ms Camerer asked about the SIU expenditure being R5 million more than their budget.

Mr Hofmeyer explained that R3 million had been rolled over, so the overspend was partly due to this. Further, the Department of Correctional Services had given the SIU R2,5 million. At the end of the year, there was about R138 thousand in the SIU budget.

Ms F Chohan-Kota (ANC) stated that she was pleased that the NPA was looking at case management and improving court hours. This was a case of working smarter not harder. She referred the NPA officials to the way matters were handled in Port Elizabeth. They had instituted legal aid rolls - public defenders had been paired with prosecutors so that the court could run all day. Further, they had ghost rolls to allow the court to continue when a case collapsed, which would ordinary bring things to an end.

Mr Ngcuka replied that the NPA had been trying to come up with innovative ways to improve productivity. He would encourage the idea of assigning a public defender per court so that there would always be a legal representative present. He stated that courts needed a continuous roll so that they could move on to the next case as the previous one ended. Problems often related to people management. Appointing a new person often led to improvement. The NPA thus sought to foster dynamic leadership. There were a range of things that the NPA could do.

Ms Chohan-Kota stated that she had a problem with magistrates in sexual offences courts working for only six months when the prosecutors worked all year. Magistrate positions in sexual offences courts should be advertised as such and not as general magistracies.

Mr Ngcuka replied that there was a certain tension between the prosecution and judiciary, which is natural. However, this had led to claims that prosecutors vet magistrates, which they do not do. This meant though that the NPA had to be very careful how they dealt with magistracy issues. They had raised the idea of permanent appointments - the six month rotation was a compromise. NPA action on this was limited by assertions of judicial independence.

Ms Camerer asked what the conviction rate was. She stated that the report gave an impression of an 80% conviction rate but this was only of screened cases. She had heard about a million cases being withdrawn.

The Chair intervened to explain to the NPA officials that the figure Ms Camerer was quoting was an error on a slide at a previous presentation and that the presenter had said that the figure was incorrect at the time.

Ms Camerer stated that she wished to ask about withdrawals. To what extent are cases that are reported withdrawn? Research created the impression of an incredibly low conviction rate.

Mr L Landers (ANC) asked that the NPA send the national statistics on withdrawals to the committee.

Mr Ngcuka replied that he would give the figures on withdrawal to the Committee. He stated that the NPA had raised the issue in 2002. The NPA thought important that a decision be taken whether a person is to be prosecuted before they are arrested and placed on the roll. The sole purpose of arrest should be to prosecute the person. Many of the cases on the roll should not be there. Even in the case of the specialised units, only a third of the dockets had at least a *prima facie* case. He cited the example of weekend arrests of people in shebeens - it is not an offence to be in a shebeen, so these cases had to be withdrawn. The NPA had thus asked that prosecutors visit police stations on Sundays to check for such dockets. Conviction rates were based on cases that entered the system. It made no sense to base them on recorded cases since such a high proportion of them did not even amount to a *prima facie* case.

The Chair expressed his concern that the police had not 'bought into' this. He had heard that the SAPS have a policy that officers must meet monthly arrest quotas. The NPA should engage with them on this.

Ms Camerer asked what the NPA proposed to achieve a victim-centred approach. She noted that the victims charter and fund were both bogged down. Were there any firm ideas?

Adv T Majokweni (Head: Sexual Offences and Community Affairs Unit) replied that the NPA had been working with the Law Commission on the Victims' fund. They had had two meetings on the Bill and heard a number of proposals. The Bill is on its way to Parliament. A central question was how to manage victims of sexual abuse. The Thuthuzela Care Centre (TCC) had been established for this. The TCC ensured that processes are humane and respectful, and looks at issues of secondary victimisation. It practised total and holistic management of victims as persons, with counselling, examinations by sensitised role-players, ensuring that cases went to trial quickly. The system was designed around the victim's needs. The Victim's charter was in its final draft, in its final consultative stage, with the social cluster of Directors General. The charter would give guidelines for what victims could expect and what would be expected of them.

Mr S Swart (ACDP) asked for the NPA's comment on cases in Cape Town that had to go to the High Court for sentencing because of minimum sentencing rules, thus forcing victims to testify a second time.

The Chair asked that the NPA comment on the issue of minimum sentencing.

Adv Henning replied that ideally such cases should go before the High Court for trial as well as sentencing because the cycle is at times very long. It took up to 400 days from conviction to sentencing. The High Courts do not have the capacity for this.

The Chair responded that the Courts were the cause of the problem. He advised Adv Henning to try the cases in the High Courts.

Adv Henning replied that Judges claimed that they are not production units. If the cases were brought to the High Court, it would be a disaster.

The Chair replied that it had worked in the Eastern Cape - the High Court judges there had increased their rolls. He wondered what the problem is with Cape Town and Johannesburg. He advised Adv Henning to create a crisis in the Courts. The judges had decided that the do not like the law. This meant that women and children had to wait eighteen months for sentencing. Adv Henning should create a crisis where judges are being difficult. The Chair stated that he would consider a law requiring prosecution in the High Court to force Adv Henning's hand.

Adv Henning replied that he could get nowhere as long as the presiding officers did not see themselves as responsible for productivity.

The Chair responded that the judges had managed this on their own in some provinces. It is only Gauteng and the Western Cape where they proved a problem.

Adv Henning responded that the problem, to put things bluntly, is that judges regard themselves as little gods.

The Chair replied that Adv Henning should prove that he did not think that the judges are little gods - he should try the cases in their courts.

Adv Henning replied that the judges would find a way to avoid the cases.

The Chair replied that the judges should be told that they had let women and children wait sixteen to eighteen months for the sentencing hearings, so now the cases are being prosecuted in the High Courts. The Committee would fully support such action by the NPA; it would give effect to Government policy that women and children are a priority. Judges must be told to do their work.

Mr Ngcuka responded that the Chair should consider that this would double the roll of the High Court. The turnaround is already 600 days. He understood the Chair's position, but this would clog the system. He would see what could be done. Additional resources should be considered so that women and children did not suffer.

The Chair asked for a full report on each High Court - how long it took and how many cases were being called back.

Mr Swart asked what the NPA were doing to get awaiting trial prisoners out of jail.

The Chair suggested that the NPA assign a prosecutor to each prison for a fortnightly or monthly meeting to implement Section 63 and see who could be released.

Mr Ngcuka replied that he would look at the suggestion of associating a prosecutor with each prison. The NPA had to look at available resources. The NPA had decided to look into cases where people were unable to meet bail of less than R1000. Where appropriate, such people were released on their own recognisance. He had instructed that this process should continue. Magistrates fought the idea, claiming that prosecutors were interfering with their discretion. The police also object when arrested people are released. However, a substantial number of people had been released under this programme.

Ms N Mahlawe (ANC) asked how decisions were taken regarding the transfer of cases to various courts. In kwaZulu-Natal, she found a lot of overcrowding. Decisions taken at the top level appeared not to be known at lower levels.

Mr Ngcuka replied that all decisions were conveyed and circulars sent out. It is important that there is two-way communication. He asked that instances where policy was not being implemented be reported. There is a division in the NPA to deal with representations from the publis.

The Chair responded, asking if there was any internal monitoring system. The Committee had found people in Port Elizabeth that had been in prison awaiting trial since 1997.

Mr Ngcuka responded that the NPA monitored the rolls and looked into cases that had been on the roll of District Courts for more than six months, Regional Courts for more than twelve months, and High Courts for more than eighteen to twenty-four months. Delays were not always because of the prosecution.

The Chair responded that he was considering legislation requiring a report every three or six months on cases of awaiting-trial prisoners in prison for longer than a cut-off period, whose cases had not yet started. He asked if Mr Ngcuka could see any value in this.

Mr Ngcuka replied that they would find that the long turnaround cases are in the High Courts, where turnaround is two to three years.

A member raised the rejection of dockets. A member of the SAPS had said that there is a standing order that every docket had to be certified by the section head of the investigating department or the prosecutor could simply reject it.

Adv Henning stated that in theory SAPS practice is that the head of the investigating unit certifies the docket. In practice, this did not always happen. However, prosecutors could not pass responsibility to the investigating head. The NPA was having regular meetings with the SAPS and had asked that it return to the practice of certifying dockets before proceeding to court.

Mr Ngcuka added that the NPA had asked the SAPS to appoint officials as liaisons. They were working with the police to ensure this.

Mr Landers asked about the deployment of senior prosecutors to Pinetown to deal with the backlogs there. He had discovered that the bulk of Westville awaiting-trial children went through the Pinetown courts. Could Mr Ngcuka give the Committee and indication of progress in this?

Imam Solomon stated that he had accompanied someone to the maintenance court in Wynberg and had encountered chaos. He wanted to know where the maintenance prosecutors were and if there had been any improvement since their appointment.

Adv Majokweni replied that 55 had been appointed and that the remaining prosecutors to be appointed would be apointed in the next month. The NPA wanted to implement a system of appointments for maintenance cases so that people would know when to come to the courts. The prosecutors did not yet have all the powers envisaged for them in the Act. For example, they could not yet execute warrants and still had to use sheriffs for this.

The Chair asked why the High Courts were so unproductive, sitting for less than three and a half hours on average.

(Although this question was not directly answered, there was an extended exchange on the unproductive nature of the High Courts following the questions about delays for minimum sentencing.)

The Chair asked about aftercare in the Witness Protection Programme.

The Chair asked why such a small proportion of the cases brought to the Commercial Crimes Unit proceeded to court.

Mr Swart asked if there was a link between SIU investigations in the Department of Correctional Services and the Jali Commission.

Mr Hofmeyer replied that the SIU was working on material emerging from the Jali Commission. The Commission only has a mandate to investigate and make recommendations.

The Chair raised a possible problem with decentralisation: high profile cases would not be tried in the High Courts. Major criminals should be tried in the High Courts where they would not be able to intimidate people. It is important for the country to see that such cases are fast-tracked and dealt with at a high level.

Mr Swart asked about the delays the SIU experienced in receiving proclamations. Could the Committee assist?

Mr Hofmeyr replied that delays often resulted because the President is required to consult with the relevant Premier in provincial investigations. Whilst Premiers were usually accommodating when contacted, it was not uncommon for the necessary letters to lie on officials' desks unattended.

Imam Solomon asked if using civil forfeiture, by the SIU and AFU, was unique in the world. He asked how similar bodies elsewhere did their work.

Mr Hofmeyr replied that the SIU was fairly unique in that it was the only organisation that used civil law procedures and had powers of investigation and enforcement.

Imam Solomon asked why Mr Rautenbach was allowed to slip out of the country.

Mr L Mackenzie (NPA official) replied that the case had started in October 1999 and Mr Rautenbach had left the country by Christmas, shortly after the Sunday Times article. Application for his extradition would be brought in July

The Chair responded that Imam Solomon should probably address the question to Justice Rabie.

A member asked about the CARA account. Funds had been sitting in it for some time, with nothing done to ensure that they are distributed to aid fighting crime.

Mr Hofmeyr replied that there was legal uncertainty over whether the money could be paid out since it is in Treasury accounts. Thus it can only be disbursed in budgets. Treasury has agreed that disbursements may be made.

A member asked about the extent to which prosecutors in sexual offences cases had been prepared to deal with disabled witnesses. He cited a possible case of an intellectually impaired child who would easily become an incredible witness.

Adv Majokweni replied that the training for prosecutors included a module on dealing with people with learning difficulties or mental impairment.

A member asked if progress had been made in capturing senior criminals in drug cases.

Mr Mackenzie replied that thirty-six heads of criminal organisations involved in counterfeit goods had been arrested. At least ten of these were also involved in drug trafficking.

The Chair brought to the attention of the NPA African prosecutors and magistrates who experienced problems because they cannot speak Afrikaans. This appeared to be a particular problem in the Western Cape and Free State.

Mr Ngcuka responded that this is a problem. African prosecutors are not being appointed in the Western Cape because they cannot speak Afrikaans. The NPA would appoint translators to help them. The problem applied to judges too. A Judge has been appointed to come up with a policy on language in courts.

The Chair asked for the NPA's comment on Appeals.

Adv Henning replied that there had been an increase in the number of appeals. This was being handled with additional sessions, which some Court divisions sitting during the recess. There were initiatives to deal with the backlog. He believed that there would have to be a sifting process. He had received the draft Bill and comments would be sent to the Committee on 20 June.

The Chair responded that this would be too late.

Adv Henning responded that they had only received the Bill two weeks previously. He understood the requirement that appeals be argued orally would be softened, so that cases could be argued in papers submitted to judges.

The Chair stated that the NPA should be ready to defend the change, with evidence and statistics from periods of automatic appeal and periods with leave to appeal. He did not think that the NPA was ready to defend the alteration in the right of appeal. It should start preparing for when the challenge came.

The Chair asked if the plea-bargaining system was working. What systems were in place?

Mr Ngcuka replied that plea-bargaining had not taken off as expected. Only 68 cases had been finalised with plea-bargaining in 2002, most of these with the specialised units. It had helped though - a case that would have taken two years was finalised in a day. Directors of Public Prosecutions have been advised to use plea-bargaining and admission of guilt, especially in petty cases.

The Chair responded that the NPA should get the police involved - they could tell people they arrested about guilty pleas and plea bargaining.

Mr Ngcuka agreed that this would be a good idea.

The Chair raised his concern about unacceptable diversion programmes. Standards would be created in the Child Justice Bill, but in the meantime the NPA should develop standards.

Adv Majokweni replied that they needed to look at ways of standardising and accrediting diversion programmes. A committee was looking at this.

The Chair asked why the NPA no longer commented on Bills. He had had to telephone the NPA to ask for their view. It is vital that their voice is heard.

Mr Ngcuka replied that he was sorry that the Committee had not received the NPA's responses to the Bills. He would look into it. The NPA wanted the law changed so that the State could appeal on the facts as well as on the law. It is also time that the accused should disclose his/her defence. These matters should received priority attention.

The Chair responded that he thought the Bills addressing this were with the Department, though the Bill on disclosure might still be with the Commission. Neither Bill was on the Department's priority list.

Mr Ngcuka asked that this be looked into.

The Chair suggested that the NPA push for more prison courts. The court at St Alban's prison worked well.

Mr Ngcuka replied that they would be happy with more prison courts. However, magistrates said that they could not go to prisons because they had to sit in public.

The Chair found that there were no Saturday Courts in Port Elizabeth because the attorneys did not want to work on Saturdays. The Legal Aid Board was happy to work on Saturdays though, so this should be relooked with them.

Mr Ngcuka responded that, as far as he knew, it was the magistrates that had refused to work, so the Legal Aid Board's willingness to work might not help.

The Chair asked that Mr Ngcuka get back to him if it was the magistrates.

The Chair stated that the NPA should work to have more children committed to secure care facilities instead of prison. The children belong in welfare institutions. He cited secure care facilites in Johannesburg and Port Elizabeth with spare capacity who were resisting further placings. It would help if prosecutors argued for using secure care facilities.

The Chair presented a series of suggestions for improved court management based on the model adopted by the prosecutor in Port Elizabeth, for whom he had high praise. To avoid dockets going back and forth between the prosecutors and police, there should be an SAPS official working with prosecutors who outranks the investigators. The

official can then order investigators to do what the prosecution needs. Dockets should not be sent back to the police but be kept in the court buildings. Dockets would then be in the hands of prosecutors for some time before the hearing. 'Court nags' should be appointed to telephone to check that everything in the docket is in order before the case proceeds to court. Courts should have a permanent public defender for continuous legal aid rolls. Ghost rolls of legal aid cases should be set up to keep the courts running when the roll fell flat. Prosecution officials should establish which prisoners could not meet bail, for possible use of Section 63, and that wished to plead guilty. Coordinating forums should be established - comprising the head of prosecutions, the Judge President, and the head of Legal Aid - led by the Judge President. These forums could talk through problems. South Africa is still a young democracy, so conventions and mechanisms had not yet developed to facilitate smooth interfaces. The heads of the NPA, SAPS and Correctional Services should get together to draw up a protocol for this.

Mr Ngcuka responded that he agreed fully with the principle raised in the Chair's presentation based on the Port Elizabeth system. They had a problem though in that the senior police official was withdrawn. Regarding the coordinating forums, Directors of Public Prosecutions' performance contracts required that the state what they had done regarding dealing with coordination and liaison with stakeholders. He would be happy with drawing up protocols. The NPA was caught in the middle, between the police and the judiciary - such protocols could only assist them.

The Chair stated that the NPA should tell the public that 80%, or whatever the figure was, of cases reported could not proceed because they did not amount to even a *prima facie* case. The NPA should have press conferences. They should not wait for national figures to talk - speaking to the public should be decentralised.

Mr Ngcuka responded that the NPA had commissioned a study to find what they were doing wrong. One of the recommendations was that they should talk to the public more. It also advised that prosecutors should train with investigators.

The Chair responded that the NPA had a lot of good things to talk about and they should talk about them.

Final Comments

Mr Landers stated that Messrs Ngcuka and Hofmeyr would remember seizing the assets of a Mr Barnabus. The Court had ruled against the seizure because the law was new. The community, which is his constituency, had been asking him about Mr Barnabus. He had told them that the NPA is very thorough and they should wait. He was pleased that the NPA had now moved in on Mr Barnabus. The community is grateful since Mr Barnabus had ruined many lives. They now wanted him arrested and prosecuted.

Mr Swart stated that pre-trial services were working well in Port Elizabeth when the Committee visited. He noted that the police can now "give" fines of up to R2 500 for admission of guilt, and prosecutors and clerks R5 000 without involving a judge or magistrate. He added that he found the report good and the progress encouraging.

Imam Solomon stated that every year brought good stories and stressed the importance of public confidence. He had read in the Star that the DA Safety and Security spokesperson, using figures that were out of context and unjustified, had stated that South Africa has a weak criminal justice system, a criminal justice system in crisis. He asked if there is a crisis in the justice system and wonder what Mr Ngcuka thought of such comments.

A member stated that there tended to be a hangover from what was inherited. He applauded the broader review of the legal system in South Africa. Mr Ngcuka should continue with the process of interacting with role-players so that the legal system could respond to the South African situation.

Mr Ngcuka responded that the NPA had some problems with the pre-trial system implemented in Port Elizabeth in some areas. It had had to be withdrawn completely in some places. Regarding the charge that the criminal justice system was in crisis, he thought it would do to consider where things had come from. There had been bombs in Cape Town, political violence in kwaZulu-Natal, taxi violence and so on. There had been a serious crisis and no-one had the answers to how

to deal with it. Currently, there was no crime that one could say baffled the system in this way. Crime remained a problem, but there is no crisis. Whilst the rate was unacceptably high, crime could be beaten. He thanked the Committee for the resources, both financial and legal that the NPA had been given.

The Chair asked that the NPA send him the new salary scales. He stated that the Prosecuting Authority and specialised units were things of which we could be proud. There had been problems, but they had been exemplary in the way they have done things. He had no problem with people criticising the justice system, but some were making cheap politics out of people's pain. This would come back to 'bite' them. Using people's pain and suffering is terrible. 95% of courts work every single day. To say things were in crisis was to negate the hard work. Of course one got lazy court officials, just as one got lazy people in all other areas. However, the vast majority of people worked very hard.

The NPA must engage the public. If the public brought cases without evidence, they cannot expect that anything will be done. This was not to say that police officers that did not do their work should not be pursued mercilessly.

Politicians should be careful in the way they did these things. Information should be used responsibly, otherwise honest interaction becomes impossible. He asked that Mr Ngcuka let his staff know that as far as he (the Chair) was concerned the vast majority of them worked very hard under very difficult circumstances and he appreciated this. One should be supportive and not break down the systems when criticising.

Problem areas should be cleared out - many had got beyond working out who was to blame and should just be cleared out. The system could not afford having major centres that did not work because of egos. The NPA should identify good leaders and put them in major areas.

The NPA should be brave. They should take on the High Court. If they believed that judges are accountable, then they must make them accountable. Judges and courts should be respected, but foolishness must not be tolerated. He did not like treating the judiciary with kid gloves when it came to how much work they did. He thought that leadership was key in this. The NPA should engage the public and explain what was going on. They should stop being shy of things that they had done well.

The meeting was adjourned.

Appendix 1
Media Release
SIU BACK IN BUSINESS -

SAVES MILLIONS FOR STATE The Special Investigating Unit (SIU) is firmly back in business following the successes achieved during the past financial year.

Highlight of 2002/03

The highlight of the 2002/03 financial year was the recovery of R17 million in the investigation into corruption in the **Department of Correctional Services (DCS)**. SIU investigators found that doctors and DCS officials were colluding to defraud medical aid schemes by submitting false claims.
To date the SIU has recovered R17 million in the form of acknowledgements of debt from six doctors. In one case a doctor had defrauded R7,6 million from medical aid schemes. He has signed an AOD for this amount.
The SIU has worked with the DSO (Scorpions) and the police to ensure that those involved are criminally charged where warranted.
From the investigation it is clear that this is a widespread practice throughout the DCS and it is anticipated that even larger amounts will be recovered in the future.

Recoveries and savings to the state

Last year the SIU set itself targets to achieve:
R40 million in recoveries of cash; and
R60 million in savings (including prevention of loss) for the state.
It managed to exceed these targets by
recovering R37,5 million;
and saving R90,5 million.
Thus in total the SIU recovered or saved the state R128 million. (unaudited figures).
The most important cash recoveries were:
R17 million in the DCS investigation mentioned above; and
R14 million recovered during the ghost worker investigation in the Limpopo Province.
The most significant savings were:
R75,4 million by securing the assets belonging to Agri-Eco, a state controlled s21 company in the Free State Province; and
R14 million in the Namaqualand Housing Project. Contractors were forced to honour a contract to build houses after they had ceased all work when they received payment in advance.

Other action taken

The Limpopo license investigation resulted in the revoking of 1400 licenses. Another 1600 licenses are due for cancellation soon, while a further 7000 licenses have been identified as potentially irregularly issued.
In the Nontenja matter, a member of the SIU was actively involved in preparing the criminal case docket against Mr S Nontenja. Mr Nontenja had defrauded the Department of Justice of R19 million. As a result of the SIU's efforts, he was sentenced to 25 years in prison and his assets were forfeited.
The SIU has also worked closed with the SAPS, the DSO (Scorpions) and the Asset Forfeiture Unit (AFU).

Partnerships to fight corruption

During the past year the SIU developed particularly close working relationships with several state institutions to fight corruption, including:
DCS that agreed to help fund the establishment of a special project team in the SIU to focus exclusively on investigating corruption in prisons;
The Limpopo Department of Transport that is helping to fund the costs of the investigation into all licenses issued in the province between 1994 and 1999;
The KZN Department of Housing that is helping to fund the costs of the investigation into abuse of housing subsidies in the province; and
The Joint Anti-Corruption Task Team (JACT) established by law enforcement agencies to tackle corruption in the Eastern Cape. The SIU played a key role in providing the infrastructure for JACT, including office space and administrative support. Eight SIU members have been seconded to work full-time on JACT.

Capacity Building

During the past year the SIU experienced massive growth in its staff complement as a result of the filling of vacancies and the funding received from other state institutions.
The number of permanent staff has grown by 40% from 74 to 103 while the total staff complement (including contract workers) grew even more rapidly by 58% from 84 to 133.

Establishing a national presence

During the past year the SIU has established regional offices in Pretoria and Durban to ensure that it delivers a better service to state institutions in those areas. It is anticipated that further offices will be established in Cape Town and

Mpumalanga within the next year.

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AFRICA

VUSI PIKOLI &
MANDY WIENER

MY SECOND INITIATION

THE MEMOIR OF VUSI PIKOLI

'An account that is as bold, honest and truthful as it is painful and discomforting. Vusi Pikoli is a person of unquestionable integrity, for which South Africa will be eternally grateful.'
– BARNEY PITYANA

My Second Initiation

The Memoir of Vusi Pikoli

Vusi Pikoli
&
Mandy Wiener

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VP1

REPUBLIC OF SOUTH AFRICA

PRESIDENT

23 September 2007

Dear Advocate Pikoli

As you are aware, the Prosecuting Authority forms an important part of our criminal justice machinery and, accordingly, our fight against crime.

This machinery to fight crime was further strengthened in 2000 when Parliament adopted legislation creating the Directorate of Special Operations (DSO), in the office of the National Director of Public Prosecutions.

In recognition of the particular threat posed by organised crime in the country, the DSO was specifically tasked to investigate and institute criminal proceedings relating to organised crime activities.

As a result of the importance of the Prosecuting Authority to the success of our fight against crime, I receive regular reports from government agencies and Ministries about the activities of the Authority.

Organised crime poses a serious threat to our national security. While I accept that the Prosecuting Authority has the discretion to enter into plea bargain and/or immunity arrangements with alleged offenders, the public interest must always be considered. Accordingly, in determining what is in the public interest, before exercising such discretion, the Prosecuting Authority must necessarily have regard to the totality of information available to the State.

Such plea bargaining and/or immunity arrangements cannot be done at the expense of our national security.

VP 23

Clause 179(6) of the Constitution of the Republic of South Africa provides that the Cabinet member responsible for the administration of Justice must exercise final responsibility over the Prosecuting Authority. Accordingly, the Government, on whose behalf the Minister of Justice and Constitutional Affairs exercises this responsibility, must and does have an interest in ensuring that the Prosecuting Authority serves the public interest. In this regard, acting in terms of the dictates of the Constitution, the Minister of Justice and Constitutional Affairs informed me about some of the matters that the National Prosecution was seized with. Some government agencies also advised me of some of the activities relating to the same matters.

The information I have received shows that you have entertained the granting of immunity to members of organised crime syndicates in instances where the prosecution of such people would, in the Government's view, be in the public interest. In some of these matters there seems to be no reason why the Prosecuting Authority would not proceed against all persons implicated in the alleged offences.

I have evaluated the information at my disposal and have reached the conclusion that you, in your capacity as National Director of Public Prosecutions have failed to appreciate the nature and extent of the threat posed by members of organised crime syndicates to our national security. Such a lack of appreciation in itself amounts to a threat to our national security.

The Minister of Justice and Constitutional Affairs has also drawn my attention to the breakdown of relations between your office and hers due to several incidents, such as your testimony to the Khampepe Commission of Inquiry.

Accordingly, this letter serves to inform you that I, acting in terms of the provisions of section 12(6) of the National Prosecuting Authority Act (the Act), have decided to suspend you from office with immediate effect. You will continue to receive your full benefits during the period of suspension.

Acting in terms of the same provisions of the Act, I have also decided to institute an enquiry into your fitness to hold the office of National Director of Public Prosecutions. The particulars relating to the enquiry will soon be communicated to you.

Yours sincerely

THABO MBEKI

Advocate V Pikoli
National Director of Public Prosecutions
Tshwane

VP 12

MINISTER
JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

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Adv. V. Pikoli
National Director of Public Prosecutions
Silverton
Pretoria

BY HAND

Dear Adv. Pikoli

RE: INVESTIGATIONS INTO THE NATIONAL COMMISSIONER OF THE POLICE SERVICE.

The above matter refers.

I am advised that you have taken legal steps to effect the arrest of and the preference of charges against the National Commissioner of the police service. I presume that in making this decision, you have taken time to consider the seriousness and gravity of your intended course of action.

As you know, in terms of clause 179(6) of the Constitution, the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority. In addition, section 33(2) of the National Prosecuting Authority Act provides that the National Director of Public Prosecution shall at the request of the Minister of Justice, furnish the Minister with

V.P.

The controversial letter sent by the justice minister to my office (2007),

information with regard to any case, matter or subject dealt with by the National Director or a Director.

In light of the above and in order for me to exercise my responsibilities as required by the Constitution, I require all of the information on which you relied to take the legal steps to effect the arrest of and the preference of charges against the National Commissioner of the police service. This includes but is not limited to specific information or evidence indicating the direct involvement of the National Commissioner in any activity that constitutes a crime in terms of the laws of South Africa. In pursuing your intended course of action and any prosecution, the NPA must do so in the public interest notwithstanding a prima facie case. Such exercise of discretion requires that all factors be taken into account including the public interest. Therefore, I must be satisfied that indeed the public interest will be served should you go ahead with your intended course of action. Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against the National Commissioner of the police service, you shall not pursue the route that you have taken steps to pursue. You should therefore and with extreme urgency cause for me to be briefed thoroughly in this regard.

Please advise me at your earliest convenience when you I should expect to receive the necessary documentation.

I trust that you find the above in order.

Yours sincerely

Ms. B.S. Mabandla, MP
Minister of Justice and Constitutional Development.
Date 2017-09-18

Acknowledgements

I would like to thank the following people who have played an important role in my life and in the completion of this book:

- my wife Girly for standing by me through thick and thin and for insisting that I complete my LLB and LLM;
- my children for their understanding and accepting that we could not send them to private schools because we had to share the little we had with the extended family;
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- my uncles and aunts for their visits and prayers;
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- my co-author Mandy Wiener for her scrupulous attention to detail, her integrity and for her care in crafting my story.

All mistakes and errors remain my own.

Vusumzi Pikoli
September 2013

Index

'A painful, but revealing book about a man who was fired for doing the right thing. Vusi Pikoli is a hero of South Africa's new struggle.'

– ADRIAAN BASSON

As national director of public prosecutions from 2005 to 2007, Advocate Vusi Pikoli pursued criminal charges against the current president of South Africa, Jacob Zuma, and the convicted former national police commissioner, Jackie Selebi. It was his dogged determination to bring the country's top cop to account that ultimately saw Pikoli removed from office and the subject of a public inquiry into his suspension.

MY SECOND INITIATION traces Pikoli's journey from his first graduation to manhood in the hills of the Eastern Cape to his second life-shaping experience in the corridors of power in government.

Pikoli has a deeply ingrained loyalty to the Constitution of the country and a keenly developed sense of justice, cultivated on the politically aware streets and rugby fields of New Brighton township. He recounts how he fled with his ANC unit into exile and spent 10 years away from his home and his family, suffering the loss of a child and of a man he considered a brother.

He provides an insider's perspective on cases that have dominated discussion over the past decade from the Arms Deal and the Scorpions to the Brett Kebble murder, Travelgate, the Special Browse Mole Report and the Hoax E-mail Saga. Pikoli reveals how he grappled with the dilemma of prosecuting friends and comrades, how he navigated through repeated attempts at political interference and how he confronted one of his persecutors in a poignant face-to-face encounter.

VUSI PIKOLI was born in Port Elizabeth. He served as director-general in the department of justice and as the national director of public prosecutions. Pikoli is an admitted advocate and has been a card-carrying member of the ANC for over 30 years. This is his first book. **MANDY WIENER** is an award-winning journalist and best-selling author. She reports for Eyewitness News in Johannesburg and covered Vusi Pikoli's tenure in office, his suspension in 2007 and the testimony of the Ginwala Inquiry. Wiener's first book *Killing Kebble: An Underworld Exposed* has sold over 80 000 copies.

AUTOBIOGRAPHY
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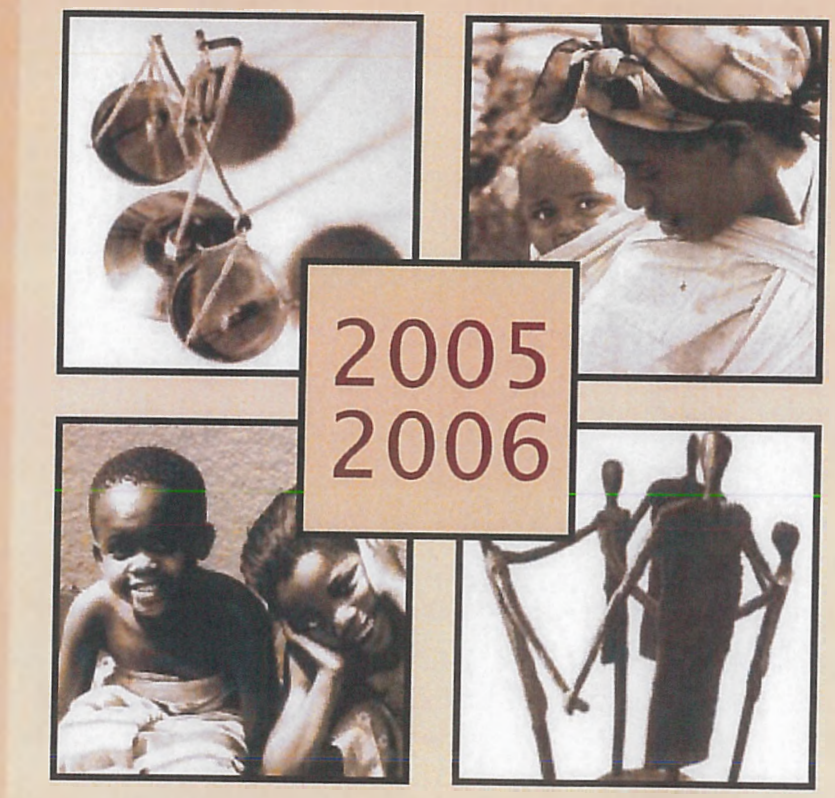
Annual Report

National Prosecuting Authority



Adv Vusumzi Patrick Pikoli
National Director of Public Prosecutions

"The objective of this drive, themed "Prosecutors without boundaries", is to strengthen co-operation to deal more effectively with trans-national crime"

The National Director and his delegation attended the Heads of Prosecuting Authorities Conference (HOPAC) during September 2005, where a paper was delivered on the Legal Liability of Prosecutors. This bi-annual conference was an ideal opportunity for Heads of Prosecuting Authorities to meet and share information on the running of their respective Prosecuting Services as well as to consider ways to ensure more effective co-operation in dealing with trans-national organised crime.

The National Director and a delegation of two senior members of the National Prosecution Service (NPS), attended the Second World Summit of Attorneys-General, Prosecutors-General and Chief Prosecutors in Dohar, Qatar in November 2005, where a paper was also delivered on behalf of South Africa. This gave the National Director and his delegation an opportunity to engage with their counterparts on matters of mutual concern, as well as to share best practice and experiences.

The National Director also hosted a meeting with a senior member of the International Criminal Court (ICC). This meeting dealt with the relationship between the NPA, South Africa and the ICC. A request has been made to send Prosecutors to the ICC to develop skills to prosecute crimes of human rights abuses. This issue is currently being dealt with.

Guidelines for the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994

In his statement to the National Houses of Parliament and the Nation on 15 April 2003 the President, among others, gave Government's response to the final Report of the Truth and Reconciliation Commission (TRC) regarding the handling of cases arising from conflicts of the past which were committed prior to 11 May 1994.

The essential features are the following:

- It was recognised that not all persons availed themselves of the TRC process for a variety of reasons ranging from undue influence to a deliberate rejection of the process.
- A continuation of the amnesty process cannot be considered as this would constitute a suspension of victims' rights and would fly in the face of the TRC process. The question as to the prosecution or not of persons who did not take part in the TRC process, is left in the hands of the prosecuting authority, as is normal practice.
- As part of the normal process and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth and who wish to enter into agreements that are standard in the normal execution of justice and are accommodated in our legislation.
- 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.

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NSSD: REPORT To Portfolio Committee: By Dr Silas Ramaite SC

- SCCU – ADV SC JORDAAN SC
- WPU – D ADAM
- SOCA – ADV T MAJOKWENI
- PCLU – ADV AR ACKERMANN SC

LC NGI

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PRIORITY CRIMES LITIGATION UNIT

ADV ANTON ACKERMANN SC

HEAD: PCLU

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PERFORMANCE AGAINST TARGETS: 2004 / 2005

1. TRC Prosecutions

- Audit of 300 cases on hand in NPA structures.
- Closure of 167 cases. No grounds for prosecution.
- Prosecutions instituted in *S v Terre'blanche, S v Blani and S v Nieuwoudt & 2 Others*.
- Further prosecutions put on hold in November 2004 pending the formulation of guidelines.
- Assistance provided to reconvene Motherwell amnesty hearing.
- Constitutional Court grants State leave to appeal in *S v Wouter Basson*.

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NIGI

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PERFORMANCE AGAINST TARGETS: 2005 / 2006

1. TRC Prosecutions

- Failure to finalise guidelines results in no further prosecutions being instituted.
- Late 2005 Constitutional Court sets aside TPD and SCA rulings in respect of jurisdiction for conspiracies for external crimes in *S v Wouter Basson*.

2. Missing Persons

- Remains of 23 victims located and exhumed. Forensic analysis in progress to confirm identities.
- Official hand-over of remains of five victims at special national ceremony.
- Financial assistance provided to families.
- Liaison with stakeholders *re* memorialisation.
- Partnership with Argentine forensic anthropology team.

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Office of the National Director of Public Prosecutions

The National Prosecuting Authority of South
Igunya Alakele Lebatsheletshi boMzantsi
Die Nasionale Vervolgingsgesag van Suid

6 October 2006

Victoria & Griffiths
Mxenge Building,
123 Westlake Avenue,
Weavind Park, Silverton

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Pretoria
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Tel: (012) 845-6000
www.npa.gov.za

Commissioner J. Selebi
National Commissioner of Police
SA Police Service Head Quarters
PRETORIA
0001

Fax: (012) 393 1530

Dear Commissioner Selebi

PROSECUTIONS OF CRIMES EMANATING FROM CONFLICTS OF THE PAST

1. As you are aware, the Prosecuting Policy with regard to criminal matters arising from conflicts of the past came into effect on 1 December 2005.
2. In terms of the said guidelines, all such prosecutions will be conducted by the Priority Crimes Litigation Unit (PCLU), which is located in my office.
3. I have appointed Dr Silas Ramaite to head and supervise the prosecution process of all TRC-related matters.
4. In terms of par B6 of the guidelines, the PCLU shall be assisted in the execution of its duties by a senior designated official of your department.
5. You are therefore kindly requested to nominate a senior official(s) to perform the above function.
6. You are further requested to make such official available to attend a meeting to be held in the Boardroom of the National Director of Public Prosecutions, VGM Building, 123 Westlake Avenue, Weavind Park on Thursday, 12 October 2006 at 14h00. **You are also kindly requested to attend this first meeting.**
7. Your assistance and cooperation in this regard will be highly appreciated.

Yours sincerely

09.10.2006
ADV V.P. PIKOLI
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

PERSOONLIKE ASSISTENT/E NASIONALE VERVOLGINGSGESAG
PERSOONLIKE ASSISTANT/E NATIONAL PROSECUTING AUTHORITY
12893
2006 -10- 10
E. GROVE

Meeting moved to
2006/10/10.

TRC COMMITTEE MEMBERS

NAME	DEPT.	CONTACT No.	EMAIL	
Anton Ackermann	NPA (PCLU)	012-845 6474	arackermann@npa.gov.za	
Mthunzi Mhaga	NPA (PCLU)	012-845 6398	mcmhaga@npa.gov.za	
Dr S Ramaite	NPA (NSSD)	012-845 6765	msramaite@npa.gov.za	Convenor
Marlyn Raswiswi	Justice	012-315 1730 0826600463		
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Brian Koopedi	NIA	012-4262602 0824168357	bkoopedi@nia.gov.za	
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		PRINCIPALS		
Adv Vusi Pikoli	NPA(NDPPP)	012-845 6758		
Kalyani Pillay	NPA	012-845 6749		
Loyiso Jafta	Presidency	012-300 5458		
M Simelane	DG justice	012-315 1730		
ME Manzini	NIA			

MINUTES OF TRC COMMITTEE MEETING 12 October 2006

Members Present:

1. Adv Vusi Pikoli	(NPA)
2. Adv Kalyani Pillay	(NPA)
3. Mr ME Manzini	(NIA)
4. Mr Loyiso Jafta	(PRESIDENCY)
5. Mr Simelane	(DG JUSTICE)
6. Dr Ramaite	(NPA & Convenor)
7. Adv Anton Ackermann	(NPA)
8. Comm. Philip Jacobs	(SAPS)
9. Mr Brian Koopedi	(NIA)
10. Mr NVE Ngidi	(DSO)
11. Mr AT Ngwengwe	(DSO)
12. Ms Yvonne Mabule	(NIA)
13. Ms Marlyn Raswiswi	(JUSTICE)
14. Mr Josias Lekalakala	(SAPS)
15. Mthunzi Mhaga	(NPA)

Apologies : none — National Commissioner.

1. Opening Remarks by the NDPP who gave a detailed background of the cases emanating from the conflict of the past with particular reference to TRC matters. He indicated that the establishment of the committee is derived from the policy guidelines which were approved by parliament in December 2005 on prosecution of all TRC matters. The NDPP had attended a meeting with DGs from SAPS, NIA, justice and a representative from the office of the Presidency where it was decided that a committee should be established. Cases in possession of PCLU and SAPS have to be identified and an update on their status is also required. SAPS has to provide investigating officers for all cases identified for prosecution. The NDPP emphasised the fact that he will decide on each prosecution and not the committee. The role of the committee will be to make recommendations to the NDPP on each case.
2. Mr Manzini indicated that these cases need to be prioritised and the process needs to be fast tracked.
3. Dr Ramaite indicated that there is a need for a task team of investigators to work on these cases.
4. The NDPP further indicated that Dr Ramaite is the convenor for the committee and the PCLU will report to Dr Ramaite directly.

The meeting was then closed after the NDPP asked the committee to meet after the meeting with the Principals.

Committee Meeting

Dr Ramaite requested PCLU and SAPS to compile an audit report of all cases in their possession and that the PCLU will take charge of investigations being assisted by SAPS. The committee will then deal with all cases including matters that have been closed by the PCLU. Mr Ngidi indicated that committee members will not be rubber stamper to decisions already made by the PCLU and he was supported by Mr Koopedi who said they are prepared to go through volumes of records in all cases.

Mthunzi was then mandated to arrange a suitable date for the next meeting. Indeed a date was arranged for the 25/10/2006 at the DSO boardroom.

"PCJ17"

INFORMATION NOTE

To: Divisional Commissioner: Detective Service
JF De Beer

REQUEST TO MAKE INVESTIGATORS AVAILABLE TO NATIONAL PROSECUTING AUTHORITY: OUTSTANDING TRC CASES

1. At the last meeting of the Sub-Committee appointed to deal with the outstanding TRC matters in accordance with the Cabinet's approved guidelines, it was recommended that a number of cases need to be brought to finality in terms of investigations.

2. The purpose of the investigation is to enable the relevant Committee to make a recommendation regarding possible prosecution to the NDPP, in accordance with the said guidelines.

3. A discussion was held with Advocate Nthunzi Mhaga of the Priority Crimes Litigation Unit (PCLU), who is also on the Committee in order to obtain guidance on where investigators are needed.

4. The relevant cases are:

4.1. PEBC0 3 case.

4.2. Cradock 4 case

Note: In both these cases, it was requested that a police official from Port Elizabeth, (Fanie Els) be appointed as he is already *au fait* with the cases.

4.3. S v Hantie Botha and Others CR Swart Sqaure CR 2004/9/97.

Note: It is requested that a detective from Durban be appointed to assist with the investigation.

4.4 S v Coetzee John Vorster Plain CR 1469/2/96.

Note: It is requested that a detective from Johannesburg be appointed to assist in this matter.

4.5 COSAS four (Krugersdorp)

NOTE: It is requested that a detective from the West Rand or Johannesburg be appointed to assist with this investigation.

4.6 Heidelberg Tavern and St James Massacre

NOTE: It is requested that Supt Barkhuizen or another Detective of the Western Cape be appointed to assist in this investigation.

4.7 Cala CAS 92/2/95

Bathandwa Ndondo.

NOTE: It is requested that a detective from Umtata be appointed to assist with the investigation.

4.8 Moss Monude case

NOTE: It is requested that a detective from Pretoria assist with this investigation.

5. It is recommended that detectives in the respective areas be identified and that their contact particulars be given to Advocate Mhaga, in order to make the necessary arrangements for the investigations to proceed.

6. Submitted for your consideration and the necessary action.

Asst. Commissioner
HEAD: LEGAL SUPPORT: CRIME OPERATIONS
PC JACOBS

Date:

PCJ 3110j

"PCJ18"

G.P.-S. 002-0222

SAP 21

SUID-AFRIKAANSE POLISIEDIENS

SOUTH AFRICAN POLICE SERVICE

Privaatsak/Private Bag X302

Verwysing Reference	
Navrae Enquiries	Asst. Comm. PC Jacobs
Telefoon Telephone	(012) 395 0066 ( )
Faksnommer Fax number	(012) 395 0156 ( )

DIVISIONAL COMMISSIONER
LEGAL SERVICES
HEAD OFFICE
PRETORIA
0001

2006-12-06

A. Provincial Commissioner: Eastern Cape

B. Provincial Commissioner: Western Cape

C. Provincial Commissioner: Gauteng

D. Provincial Commissioner: KwaZulu Natal

E. ..... Commander: Supt Noldadi

INVESTIGATING OFFICERS TO ASSIST IN FINALIZING CASES EMANATING FROM THE TRUTH AND RECONCILLIATION COMMISSION (TRC)

1. Following the approval of guidelines by Cabinet on the disposal of cases which emanated from the report of the TRC, certain investigations need to be finalized.

2. You are requested to make the following officers available as indicated from/against your Province. Interdepartmental Committee appointed to deal with these matters:

Supt Boshoff (Eastern Cape Province, Port Elizabeth)
Supt Barkhuizen (Western Cape Province)
Capt. Nodladi (Head Office)
Captain Zeeman (Gauteng Province)
Supt WC Olivier (Kwa Zulu Natal Province).

4. Kindly confirm the availability of these officers and provide their contact

particulars to this office, as soon as possible.

DIVISIONAL COMMISSIONER: DETECTIVE SERVICE
JF DE BEER

Date:

RCM 10

/Z56 forms

Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

P. O. Box 752,
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0001

VGM Building
Hartley St.
Weavind Park
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Pretoria
South Africa

Tel: (012) 845 6474

INTERNAL MEMORANDUM

TO: DR MS RAMAITE

CC: ADV VP PIKOLI

CC: ADV K PILLAY

FROM: ADV AR ACKERMANN SC

SUBJECT: 1. DETAILS OF TRC CASES CLOSED BY THE PCLU

2. REAPPOINTMENT OF SENIOR SUPERINTENDENT BRITZ

DATE: 30 OCTOBER 2006

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1. On 25 October 2006, the PCLU was requested by the "TRC Committee" to furnish more details regarding all the cases which the PCLU had declined to prosecute. The PCLU was also requested to furnish the background which led to the prosecution of one Blani.

2. <u>TRC CASES CLOSED</u>

2.1 <u>Death in detention Ahmed Timol</u>

2.1.1 This death in detention matter goes back to 1971.

2.1.2 The nephew of the deceased requested that an allegation that one of the police officers who had interrogated the deceased had confessed to a journalist be investigated.

2.1.3 The DSO traced and interviewed the journalist who denied the allegation. There was no other evidence to prove that the

deceased had definitely been murdered and all other crimes had prescribed.

2.1.4 The matter was therefore closed.

2.2 Death in detention of Steve Biko

2.2.1 Mr Ngcuka asked that this matter be investigated because of its high profile.

2.2.2 The DPP: Eastern Cape had recommended that no prosecution be instituted due to lack of evidence.

2.2.3 It was established that all the doctors who had treated the deceased were dead, except for the Chief State Pathologist, who, when consulted, conceded that he could not exclude that the injury to the deceased's head could have been accidentally caused.

2.2.4 The police officer in charge of the interrogation who was responsible for making the decisions as to whether the deceased should receive medical treatment himself died after he was denied amnesty by the TRC.

2.2.5 The evidence against the remaining police officers only established *culpable homicide* which had prescribed in 1997.

2.2.6 The NDPP made a press statement to the effect that no prosecution was possible. An NGO organization obtained the opinion of Adv Trengove who also concurred with the decision.

2.2.7 Subsequent to this decision, the police officer who transported the deceased to Pretoria also died.

2.3 Carl Niehaus

2.3.1 A member of public asked for a prosecution after the media published an interview with Carl Niehaus in which he alleged that he had been tortured during detention.

2.3.2 Mr Niehaus was consulted and did not desire prosecution.

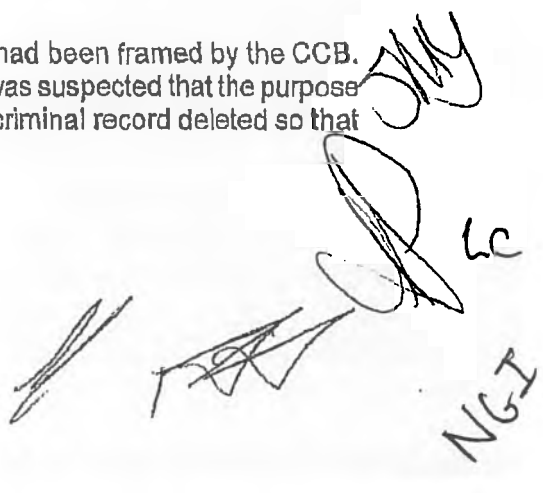
2.3.3 File closed.

2.4 Skoulides

2.4.1 Skoulides had been convicted of murder.

2.4.2 After his release from prison, his sister alleged that he had been framed by the CCB. There was no evidence to substantiate this claim and it was suspected that the purpose of the allegation was made so as to have the convict's criminal record deleted so that he could emigrate to Greece.

2.4.3 The file was closed.



2.5 Nelson Sithole

2.5.1 The deceased was a Cape Town activist. He was killed outside his home. No perpetrators were identified and arrested by SAPS.

2.5.2 His lawyer alleged that the perpetrators were known to SAPS.

2.5.3 The DSO interviewed the eyewitnesses, perused the SAPS docket and interviewed a convicted prisoner whom the lawyer claimed knew about the case. The prisoner denied all knowledge of it. The witnesses had not identified the attackers. SAPS were of the view that the deceased was the victim of a criminal gang which was terrorizing that area. An identification parade had been held to see if the victims could identify members of the gang who were in custody on other charges but with negative results.

2.5.4 File closed.

2.6 Pro Jack

2.6.1 A person was refused amnesty for the murder of a Western Cape activist.

2.6.2 The TRC asked that this matter be looked into.

2.6.3 The DSO investigated the matter and came to the same conclusion as the TRC's Amnesty Committee, to the effect that the amnesty applicant had lied in respect of each and every material aspect relating to the murder of the deceased. There was no acceptable evidence to prosecute him or any other person and the file was closed.

2.7 AM Zulu

2.7.1 A convicted prisoner was refused amnesty for his role in the killing of a number of people in the Table Mountain area.

2.7.2 The TRC: KZN recommended that this matter be looked into further.

2.7.3 The convicted prisoner was an unreliable witness in his amnesty application and there was no other acceptable evidence implicating the persons whom he alleged had taken part in the attack with him.

2.7.4 The file was therefore closed.

2.8 Bult

2.8.1 Representations were made to the NPS by Bult, who alleged that he had been assaulted by the police during the Apartheid Era.

2.8.2 His allegations were however not serious enough to warrant investigation by the TRC unit which had been mandated by the NDPP only to consider serious human rights

SMV LC NGT

abuses.

2.8.3 The file was therefore closed.

2.9 Castro Khumalo

2.9.1 The victims requested that a prosecution be instituted.

2.9.2 The deceased was a member of a group of activists who had been killed by the Security Branch.

2.9.3 The perpetrators had however all received amnesty, but the bodies of the deceased had not been traced.

2.9.4 The case was therefore referred to the Missing Persons' Task Team for further action.

2.10 Winnie Mandela

2.10.1 She was implicated in the kidnapping of a youth in Soweto.

2.10.2 These allegations had been investigated by a component of the D'Oliveira Investigation Unit. It was established that all the relevant witnesses had been extensively interviewed and all had been found to be unreliable. Various allegations as to the location of the body of the missing person had been followed up with negative results.

2.10.3 There was therefore no reliable evidence to institute a prosecution against Mrs Mandela. It was noted that she had been convicted on another charge. The allegations that she was involved in the murder of Dr Asvat were also investigated with negative results. The allegations of Falati, Cebenkulu and Richardson were also looked into and it was found that these three persons were thoroughly unreliable and had strong motives to falsely implicate Mrs Mandela.

2.10.4 The file was therefore closed.

2.11 Ermelo Black Cats

2.11.1 The D'Oliveira Investigation Unit had charged members of an IFP grouping called the Black Cats for various crimes committed in the Ermelo area.

2.11.2 The investigations had been put on hold pending the finalization of the TRC.

2.11.3 The main 204 witness was interviewed by the DSO and found to be thoroughly unreliable.

2.11.4 The TRC had refused to grant him amnesty and the DPP: KZN had also rejected similar allegations made by him relating to activities in KZN.

2.11.5 The witness also indicated that he would not testify unless he was released from prison

first. There was therefore no evidence to prosecute and the file was closed.

2.12 Chadwick

2.12.1 The accused was a UK citizen who absconded to the UK after being indicted for the murder of two suspected IFP supporters.

2.12.2 The DPP: Pretoria applied for his extradition which he resisted in the UK for a period of almost eight years.

2.12.3 When his final appeal against extradition was exhausted, the UK authorities requested an undertaking from the NPA that the evidence available was sufficient to ensure this conviction.

2.12.4 A key witness had retracted his statement and there were other evidential problems. The original extradition application had to be abandoned although a new witness had been found. The UK authorities indicated that a fresh extradition application would have to be lodged before extradition could be granted on his version. Given the fact that the accused had been in custody for several years, combined with the fact that there was medical evidence suggesting that he could have been insane at the time of the crimes, it was not considered worth bringing a fresh application.

2.12.5 The Acting NDPP confirmed this decision.

2.12.6 Interpol has been requested to establish whether there is truth to the rumours that the accused might try and return to South Africa. If he were to voluntarily come to South Africa, the extradition problems would not apply.

2.13 Anton Lubowski

2.13.1 The original TRC unit was looking into this matter which related to the murder of a Swapo leader in Namibia.

2.13.2 A South African Court would only have jurisdiction in the event of evidence of a conspiracy to murder the deceased formulated in South Africa.

2.13.3 All the available evidence was perused. The most likely candidate to have killed the deceased was an Irish citizen, Aitcheson, who was arrested in Namibia, but skipped bail.

2.13.4 There was no reliable evidence against any other parties and the file was closed.

2.14 Ciskei *coup d'etat*

2.14.1 The original TRC unit was looking into this matter.

2.14.2 It was established that although certain former Military Intelligence members had indicated their intention to apply for amnesty on the basis that the *coup* had been

orchestrated so as to ensure the murder of ANC supporters, they had withdrawn their applications.

2.14.3 The former Head of State of Ciskei had been prosecuted for ordering the killing of two alleged coup conspirators, but had been found not guilty by the Bisho High Court.

2.14.4 There was no other evidence available to justify a prosecution of any person and the file was closed.

2.15 General Basie Smit

2.15.1 Mr Ngcuka asked that this matter be looked into as a result of media attention.

2.15.2 The available evidence as gathered by the D'Oliveira unit was considered and found to be inadequate to base any prosecution for a human rights abuse. The suspect was a former Head of the Security Branch.

2.15.3 The file was therefore closed.

2.16 *S v Bongani Wana*

2.16.1 This matter relates to the murder of Zolile Sangoni, Zonwabele Mayapi and an MK cadre Gift Mgibe who were killed by Vlakplaas operatives in 1988 in Umtata.

2.16.2 Mr Wana had applied for amnesty but later withdrew his application.

2.16.3 After a careful perusal of the TRC transcript and consulting with all relevant potential witnesses it became clear that there was no sufficient evidence upon which prosecution of Mr Wana can be instituted.

2.16.4 The matter was then closed.

2.17 Representation by Mr SM Mavuya

2.17.1 Mr Mavuya claimed to have been an informer during 1984 and was applying for amnesty and requested protection from members of his community.

2.17.2 We however informed him that we have no such authority and that TRC committee has disbanded. His activity did not amount to any criminal offence thus we could not even consider it in terms of prosecution guidelines.

2.18 Representation by Mpho Masemola

2.18.1 This matter arose from a representation by Mr Masemola, a former ANC who claimed to have been arrested and subsequently tortured in 1985.

2.18.2 He also claimed that in 1991 members of the Counter Insurgency Unit shot at him during a march he had organised. We however informed him that in as far as the

torture in 1985 the matter has since prescribed and in respect of 1991 shooting there was no evidence to support his allegations as he bases his accusations on assumptions.

2.19. Representation by Mr N Dlamini

2.19.1 Mr Dlamini had made allegations against Swaziland police whom he claimed to have sold out some MK cadres during 1985 to 1986. Unfortunately he could not supply us with any proof apart from a newspaper article from Times of Swaziland which we did not receive.

2.19.2 Apart from lack of substance in his allegations the NPA does not have jurisdiction in crime committed in Swaziland. He could not indicate to us his interest in the matter when requested to do so.

2.20 Thabo Armando Sithole

2.20.1 The mother of Thabo requested the NPA to investigate death of his son who died in police custody after being arrested for robbery in 1976.

2.20.2 They received a report from Greytown police that he committed suicide by hanging himself.

2.20.3 The PCLU could not find any records of the inquest and the police in Greytown police station could not assist us as they could not find any records of Thabo though they remember that he was indeed detained there. The PCLU therefore decided to close the file as there was no further action contemplated.

2.21 Murder of Michael Mcetywa

2.21.1 The matter arises from a representation by Zolile Mcetywa who is the son of the deceased who was an ANC chairperson in Pongola and murdered in 1993.

2.21.2 A man called Mavuso is currently serving 25 years for the murder.

2.21.3 During his amnesty application which was refused, he implicated a number of IFP leaders.

2.21.4 The family of the deceased requested the PCLU to consider prosecution of the implicated IFP leaders.

2.21.5 After reading various documents and consulting with Mavuso it transpired that he is the only witness who can be used but he demanded that the NPA secures his release before he can testify against the IFP leaders.

2.21.6 Apart from his evidence there was nothing to corroborate him. We therefore closed the file as there was no further action contemplated.

SMY LC NGI

2.22 Smit murders

2.22.1 Perpetrators all deceased except one suspect who apparently lives in Australia.

2.22.2 Insufficient evidence to apply for extradition.

2.22.3 Matter closed.

2.23 Refusal of amnesty to the President and other high-ranking ANC officials

2.23.1 The TRC refused amnesty to the President and plus-minus 37 other high-ranking ANC members certain of whom held Ministerial positions or other key positions in Government.

2.23.2 The TRC found that they had not disclosed that they had committed specified crimes.

2.23.3 There was no evidence implicating them in criminal offences and the file was closed.

2.23.4 The NDPP, Mr Ngcuka, made a media statement to this effect as the DA was making an issue of the matter.

2.24 IFP Hit Squads (allegations of Luthuli, Mbambo, Mkhize and Hlongwane)

2.24.1 The DPP: KZN asked that this matter be looked into as a result of the controversy which the allegations had caused in the province.

2.24.2 Certain IFP supporters, e.g. Luthuli, Mbambo, Mkhize and Hlongwane had made various allegations against high-ranking IFP officials.

2.24.3 Luthuli had been used as a witness in one case, but the accused had been acquitted and Luthuli was found to be an unreliable witness by the Court.

2.24.4 A Deputy in the DPP's Office: KZN had considered all the allegations and had declined to prosecute as a result of the discrepancies between the versions of the accomplice witnesses.

2.24.5 After their release from prison, Mbambo and Mkhize were interviewed and indicated that they did not want to testify in any matters. Hlongwane had been refused amnesty and indicated that he was not prepared to testify unless released from prison. He had a poor reputation for reliability.

2.24.6 There were therefore no reliable grounds upon which the decision of the DPP: KZN not to prosecute could be reversed and the file was closed.

2.25 Bombing of Early Learning Centre and other Western Cape CCB activities

2.25.1 A request was received from the Legal Resources Centre in Cape Town requesting that CCB members who had been refused amnesty for the above case be prosecuted.

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2.25.2 It was established that the main perpetrators had either been granted indemnity under the Indemnity Act or in terms of section 204 of the Criminal Procedure Act, arising from their testimony in the Wouter Basson and Ferdi Barnard prosecutions.

2.25.3 The only persons who could be prosecuted were Ferdi Barnard and the whistle-blower who had assisted the victims.

2.25.4 In the case of Ferdi Barnard, he was serving a lengthy gaol sentence in C-max. Were he to be charged, he would have to be transferred to Cape Town, posing a burden on Correctional Services. Any sentence he would have received for this case would run concurrently with his current sentence. No useful purpose would therefore be achieved by prosecuting him.

2.25.5 The prosecution of the whistle-blower would undermine reconciliation.

2.26 Plus-minus 80 cases against members of the Liberation Movement

All these cases were investigated by SAPS and closed by Ackermann for a number of reasons, i.e. offences were not of a serious nature, amnesty had been granted to the perpetrators or the perpetrators could not be traced.

2.27 S v Blani

2.27.1 The two deceased were an elderly married couple who resided on the farm, Enhoek.

2.27.2 The accused was associated with an organization known as the "Addo Youth Congress".

2.27.3 At a certain stage the accused conspired with other members of the organization to attack the farm of the deceased.

2.27.4 On the night of 17 June 1985, the accused and his co-conspirators armed themselves and travelled to the farm of the deceased.

2.27.5 Upon arrival, the group cut the telephone connection to the farm and proceeded to the farmhouse.

2.27.6 The group then broke into the house despite attempts by the deceased to defend himself with a firearm.

2.27.7 Both deceased were assaulted and killed inside the house.

2.27.8 The group ransacked the house and removed certain items.

2.27.9 The Murder & Robbery Unit in Port Elizabeth originally investigated this matter.

2.27.10 The suspect was linked to the crime by fingerprint evidence.

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2.27.11 A warrant for his arrest was obtained but not executed, because he could not be traced. This warrant was never cancelled by SAPS.

2.27.12 As a result of Commissioner Fivaz's instruction of 7 November 1996, namely that all cases be referred to Dr D'Oliveira's Unit, the docket came into possession of Britz. The investigation diary of the docket confirms that on 16 July 2003, Director Nel received it for further investigation. Director Nel established that certain suspects were still outstanding on warrants and thereafter traced them. He thereafter furnished the Serious & Violent Crimes Unit in Port Elizabeth with copies of the witness statements with instructions to trace the suspects and witnesses.

2.27.13 In 2003, Britz referred the docket to the PCLU, requesting a prosecution of Blani on the basis that he had been traced by SAPS and had not applied for amnesty. This case is reflected as case No 266 in the SAPS register.

2.27.14 On 25 January 2005, the accused pleaded guilty and received a partially suspended term of imprisonment.

2.28 The reappointment of Senior Superintendent Britz

2.28.1 At its last meeting, the Committee was informed by Assistant Commissioner Jacobs that Senior Superintendent Britz would be reappointed to investigate the dockets in possession of SAPS.

2.28.2 I wish to express my concern at this. Britz was a former member of the Security Branch, who, prior to the PCLU being involved with TRC cases, assisted the DPP: Pretoria with cases involving the Liberation Movement.

2.28.3 Former Police Commissioner General van der Merwe had formed an organization entitled "*The Foundation for Equality before the Law*" which was intended to ensure that no further prosecutions of Security Branch members would take place.

2.28.4 When I and my staff were appointed to take over the TRC cases in the DPP Office: Pretoria, we gained the firm impression that Britz was not only very sympathetic towards this organization, but had regular contact with General van der Merwe.

2.28.5 In particular, Britz tried to persuade me and my Deputy on numerous occasions that there was a provable case of terrorism against President Mbeki arising from the landmine campaign. This was raised in the context that were Security Branch members to be prosecuted, the President would also have to be charged. It was clear that he was against prosecutions of Security Branch members. Despite his claims, he could never produce a docket implicating the President. At one stage, he informed me that the docket was with General van der Merwe and his legal advisor. This raises a very serious question as to how an official police docket could be retained by General van der Merwe, who was not entitled to possess police material after his retirement from SAPS.

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2.28.6 When the issue of prosecuting Security Branch members for the Pebco 3 incident was raised with their lawyer, he immediately indicated that he was preparing to submit a docket calling for the prosecution of the President. I can only draw the inference that sharing of information took place between Britz and Van der Merwe.

2.28.7 The issue of the prosecution of the President was raised at the highest level of Government and resulted in enquiries being conducted by Minister Maduna as well as members of the President's office. All parties were satisfied that the NPA had no intention of prosecuting the President. In fact, Mr Ngcuka had been provided with a report that no such case had been established in the TRC records.

2.28.8 This highly embarrassing incident caused Mr Ngcuka to instruct that Britz vacate the offices of the DPP and that all the relevant SAPS dockets be removed. Britz was subsequently relocated in the SAPS Crimes Against the State Unit. He requested the PCLU to provide written confirmation of the fact that the decision had been taken not to prosecute the President. When he received the letter, he tried to persuade the PCLU to reconsider its decision.

2.28.9 I therefore believe that Britz lacks the necessary objectivity to be of assistance to the Committee and that his reappointment may lead to further controversy as well as the potential leaking of information to General van der Merwe.

ADV AR ACKERMANN SC

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EXTRACTS FROM THE AFFIDAVIT OF ADVOCATE VUSUMZI PATRICK PIKOLI BEFORE THE GINWALA COMMISSION OF INQUIRY

shortly thereafter. The first time this alleged complaint was brought to my attention was in the original submission.

259. I am also surprised that the Minister has gone on oath to state that the NPA reflected in its annual report for 2006/2007 that a request was made to National Treasury for the separate listing of the NPA. It is clear from annexure "VP51" hereto that no such request for the listing of the NPA was made to National Treasury and I also attach as annexure **"VP52"**, a copy of the relevant extract from the NPA's annual report for 2006/7 from which it is clear that there is no reference to the listing of the NPA.

POST TRC LITIGATION

260. In this section I will deal with the allegations set out in paragraphs 114 to 124 of the Government's original submission as amplified by the Minister in paragraph 62 of her affidavit and in the affidavit of the DG (paragraphs 31 to 35) and the affidavit of Assistant Commissioner Jacobs. I have not considered there to be an "area of difference" between the Minister and me in regard to the handling of what is referred to as the post –TRC litigation. As will appear from what is stated below, the Minister was kept informed

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of relevant developments in regard to the process as it evolved and she provided her support as required from time to time. The only request for guidance not responded to was that flowing from the dispute relating to the implementation of the prosecution policy guidelines which arose between me and Mr Selebi and the Directors General of Justice and Constitutional Development and NIA. That request for guidance addressed to the Minister in February 2007 remained unanswered at the time of my suspension. I did not in any way regard the issues in respect of which guidance has been sought as any difference between the Minister and myself as she had not been involved in the matter at all.

261. I do not intend to restate my response to the Government's underlying contention that the effect of Section 179(6) of the Constitution is that the NDPP may not act without the concurrence of the Minister who:

> *"Exercises the final responsibility over the prosecuting authority"* (para 117 of the Government submission)

That proposition is dealt with fully earlier in this affidavit.

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262. A history of the problems encountered by the NPA in applying the ***"PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994"*** ("the Prosecution Policy") is set out in my memorandum to the Minister dated 15 February 2007 (annexure **TRC1**). This sets out my detailed analysis of the background which gave rise to the notion of inter-departmental collaboration in the form ultimately expressed in paragraph B6 of the Prosecution Policy – i.e. that the PCLU should be assisted in the execution of its duties (defined in B4 as overseeing investigations and instituting prosecutions) by a senior designated official from the following State departments or other components of the NPA:

262.1. The National Intelligence Agency;

262.2. The Detective Division of the South African Police Service;

262.3. The Department of Justice and Constitutional Development; and

262.4. The Directorate of Special Operations.

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263. It is not my intention to repeat the content of my memorandum in this affidavit and I ask that it be regarded as incorporated herein. I will expand on some aspects of the matter in the following paragraphs.

264. The foundation for the development of the Prosecution Policy is the statement by President Mbeki in April 2003 following receipt of the final TRC report. This is canvassed in paragraph 3 of TRC1. The President required that the prosecution of persons who did not take part in the TRC process was to be left in the hands of the NPA. As part of the "normal legal processes" the NPA, working with the National Intelligence Agency, was to be accessible to persons who were prepared to unearth the truth and who wished to enter into agreements that are standard in the normal execution of Justice and the prosecuting mandate, and are accommodated in existing legislation.

265. Prior to the adoption of the Prosecution Policy and in my then capacity as DG, I had chaired a Director-General's Forum which appointed a Task Team to report on a mechanism to give effect to the President's objectives. The matter is dealt with in paragraph 2 of TRC1. It is important to note that the recommendation of the

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establishment of an interdepartmental Task Team and of a two stage process including the requirement of a recommendation from such Task Team before the NDPP instituted any criminal proceedings in relevant matters was rejected. This was because of the view that such functions would be unconstitutional and against the concept of prosecutorial independence enshrined in Section 179 of the Constitution.

266. The rejection of this proposal led to the determination of the Prosecution Policy in agreement with the Minister and after consultation with the Directors of Public Prosecutions as required by the NPA Act. The policy was tabled in Parliament and became effective on 1 December 2005.

267. In January 2006 I wrote letters to Mr Selebi and the DGs of Justice and the NIA and to the DSO requesting them to nominate a senior official to assist the PCLU in accordance with the Prosecution Policy guidelines.

268. Almost from inception the process was bedevilled by the failure of SAPS to provide the necessary support to enable the PCLU to conduct its investigations. These difficulties are dealt with in

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paragraph 4 of TRC1.

269. I was advised by Mr Selebi that Advocate Ackermann should not participate in the process. The distrust between SAPS and Advocate Ackermann stemmed from allegations and counter-allegations in regard to the latter's supposed intention to launch criminal proceedings against the leadership of the ANC. These contentions had surfaced from time to time notwithstanding the issue of a press release by the NPA in 2004 confirming that a decision had been taken that no such prosecution would take place (annexure **TRC2**).

270. I informed Mr Selebi that Advocate Ackermann was the head of the PCLU by Presidential proclamation and that it was appointed not for SAPS to determine who should discharge the mandate given to the PCLU under the Guideline.

271. Faced with this lack of co-operation I sought the assistance of the Presidency in securing the collaboration necessary to apply the Prosecution Policy Guidelines.

272. In mid 2006 Reverend Chikane organised a meeting at the Presidency which was attended by himself, the DGs of Justice and

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NIA, Mr Selebi, the Secretary of the Defence Secretariat, Mr Jafta from the Presidency and I. This first meeting dealt in general terms with the question of developing a spirit of co-operation amongst the agencies as contemplated in the guideline process. Reverend Chikane supported the notion that there should be collaboration in assisting the NPA to fulfil its functions. At this meeting there was again a complaint by Mr Selebi in regard to Advocate Ackermann's involvement in the process. My recollection is that there was no discussion of the formation of a working committee at this meeting.

273. Some time later a meeting was convened at the home of Minister Skweyiya, the Minister of Social Development. The meeting was attended by the Ministers of Safety and Security and Defence, Minister Thoko Didiza (Acting Minister of Justice and Constitutional Development representing Minister Mabandla who was indisposed) and Mr Jafta. The meeting was called by Acting Minister Didiza and I was told that it related to the prosecution in the Chikane matter. It was originally suggested that Advocate Ackermann accompany me to the meeting but I elected to go on my own in order to establish what the concerns were.

274. It transpired at the meeting that:

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

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

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

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

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particularly in view of the requirement that I report to parliament on these matters. My recollection is that there was no discussion about the formation of a working group or Task Team at this meeting. The Minister of Defence appeared satisfied with my explanation that I would exercise the decision as to whether there was a prosecution or not. The Minister of Safety and Security appeared to continue to be worried about the involvement of Advocate Ackermann. I have no recollection of a particular position adopted by the Acting Minister of Justice.

276. It was following this meeting that a meeting took place at the office of the Presidency which is dealt with in paragraph 4.2 of my memo TRC1. My understanding and recollection of the meeting was that the role of the working group was that set out in paragraph 4.3 of TRC1 – i.e. the working committee or Task Team would not make recommendations on a decision as to whether to prosecute or not but would be responsible for ensuring that the NPA obtained the necessary information or such inputs as were appropriate from the various departments so as to assist and enable me to reach a well considered decision whether to institute proceedings or not. The Task Team would deal with all relevant matters identified by the PCLU and SAPS.

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277. I have no recollection whatsoever of any suggestion at this meeting of the establishment of a separate committee of DG's which would receive reports from the Task Team. Had there been any suggestion that the Task Team members would report back to the DG's who would in turn make recommendations to me in regard to the question of whether to prosecute or not, I would have objected to this as it would have amounted to falling back to the position originally suggested before the guidelines were established and which had been rejected by all parties as unconstitutional.

278. At this meeting I proposed that Dr Ramaite should chair the Task Team. I suggested this in order to deal with the complaints in regard to Advocate Ackermann's position and as a concession to get the Task Team working. The proposal was accepted by those at the meeting. Dr Ramaite is the Deputy National Director of Prosecutions to whom the PCLU reports.

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

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establishment of a working group was put to the Ministers. It was agreed that the proposed working committee would proceed. Once again I have no recollection of any suggestion of a separate committee of Directors General or that the Task Team would be reporting to such a committee.

280. After this meeting letters were again written to the various Directors General, Mr Selebi and the DSO in early October 2006 inviting them to nominate a senior official to perform the functions set out in paragraph B6 of the guidelines. (An example of such letter appears as annexure A to the affidavit of Assistant Commissioner Jacobs). The letters were in the same format as those sent out in January 2006 at the time of my first attempt to secure assistance. The letters were drafted for me and referred to the appointment of Dr Ramaite to *"head and supervise the prosecution processes of all TRC-related matters"*.

281. The Task Team met for the first team on 12 October 2006. The minutes of the meetings of what became referred to as the "Task Team on TRC cases" are annexed to the affidavit of Commissioner Jacobs save for the minutes of its meeting on 8 August 2007, a copy of which is annexure **TRC3** hereto. As is commented on by

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various parties, the minutes of these meetings are not a full record of all of the issues canvassed. As the minutes reflect I attended the opening session of the first meeting together with Ms Pillay, the Directors General of the NIA and Justice and Mr Jafta from the Presidency. The details of my address to the Task Team are set out in paragraph 4.3 of TRC1. I recollect dealing expressly with a question by a representative of the NIA who raised the issue of whether it was the function of the team to make recommendations on a decision whether to prosecute or not. I indicated clearly that the decision as to whether to launch a prosecution rested with me and not with the committee.

282. I have noted the terms of the final sentence of paragraph 1 of the minutes of this meeting stipulating that:

> *"The role of the committee will be to make recommendations to the NDPP on each case".*

It was indeed the responsibility of the Task Team to assist in the process of obtaining the requisite information or assistance from the various departments so as to enable me to reach a decision as to whether to prosecute or not. There was, however, definitely not any

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suggestion that a recommendation by the Task Team on whether to prosecute was a pre-requisite for any decision that I might take. To the extent that the terminology referring to the making of recommendations by the Task Team in this and other TRC related documentation is interpreted to support that contention this is both regrettable and wrong.

283. I did not participate further in the activities of the Task Team which was conducted under the chairmanship of Dr Ramaite. I received reports from time to time on their activities. It was certainly my understanding that the committee was functioning and securing the requisite co-operation from the other agencies which had previously been missing. I refer in this regard to the affidavit of Dr Ramaite.

284. In December 2006 Dr Ramaite reported to me in regard to the contention raised by Mr Selebi through Commissioner Jacobs that it was the function of the Task Team that it should make a final recommendation to a body identified as the "Committee of Directors General" which would in turn make recommendations to me. The developments in this regard are dealt with in paragraphs 4.4.1 to 4.6 of TRC1. In essence the proposal made by Mr Selebi

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

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

286. In the circumstances I informed Mr Selebi and the Directors General that there was this misunderstanding and I wrote my very detailed letter to the Minister on 15 February and requested her guidance. As at the date of my suspension I had received no response from the Minister. Pending such response the functioning of the Task Team was compromised by the uncertainty as to its mandate although it did meet again on 8 August as appears from the minutes being **TRC3** hereto.

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Reverend Chikane matter

287. The decision to prosecute those involved in the poisoning of Reverend Chikane became the central issue around which the dispute in regard to the functioning of the Task Team revolved. After I made the final decision to proceed with the prosecution on 25 January 2007 I prepared a report for the Minister which is dated 7 February but which was signed by me on 15 February 2007. A copy is annexure **TRC4**. I do not intend to repeat the content set out in that memorandum in this affidavit and I ask that it be regarded as incorporated herein. Once again I will expand on some aspects of the matter.

288. As appears from the history set out in paragraph 2 of TRC4, the decision to prosecute the three Security Branch members involved in the poisoning of Reverend Chikane (Otto, Smith and van Staden) was taken in November 2004, before my appointment as NDPP. Dr Ramaite SC, in his capacity as Acting National Director, however instructed that the matter hold over pending the development of the Prosecution Policy and the guidelines.

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289. When the Prosecution Policy became effective in December 2005 I reviewed the available evidence implicating the three suspects which was, in my opinion, clearly sufficient to justify a prosecution. I therefore gave the initial instruction to proceed with the prosecution in February 2006. In response to this notification the three suspects made representations to me in terms of the Guidelines in support of their contention that they should not be subject to prosecution. The position was reviewed by a team within the NPA under the leadership of Advocate Pretorius who reported to me that the representation did not comply with the requirements set out in the guidelines. After reviewing the report and the underlying documentation I wrote to the legal representative of the suspects in July 2006 informing him of my intention not to accede to the representations and to pursue the prosecution.

290. In response I received further representations contending that the suspects had received indemnity in respect of the threatened prosecution in terms of the original Indemnity Act of 1990. I caused an independent opinion to be obtained from senior counsel concerning the validity of this claim of indemnity. The opinion was received in November 2006.

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291. At its meeting on 25 October the Task Team had received an audit report on all cases in the possession of the PCLU. A copy of that report was forwarded to me by Dr Ramaite and this confirmed that in the prosecution of Otto and others my direction to Advocate Ackermann SC to proceed with the prosecution had been put on hold in early October pending receipt of an opinion from counsel.

292. The Chikane matter was discussed within the Task Team for the first time at its meeting on 6 November where Mr J Lekalakala of SAPS for the first time raised the contention that the recommendations of the Task Team are necessary because:

> *"The National Commissioner is of the view that Rev Chikane is not interested in prosecution of the matter. He suggested that contact has to be made with Rev Chikane to ascertain his attitude."*

The minutes record that:

> *"According to Adv Ackermann the complainant (Rev) indicated that he leaves the matter in the hands of the NPA. It was then decided that the latter's attitude be ascertained and the matter was therefore closed pending a feedback on*

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his attitude."

293. In early December I was informed of the renewed contention by Mr Selebi that Reverend Chikane had not been consulted.

294. Reverend Chikane had in fact been extensively consulted in relation to the proposed prosecution. I personally held a number of discussions with him during the course of the many meetings we held over an extended period. These were one on one meetings of which no particular record was kept. I did, however, discuss the decision to prosecute with him on several occasions. I was intimately involved in the establishment of the guidelines and was aware of the requirement that there should be a consultation with the victim before any prosecution proceeded.

295. Even before the guidelines had been published, I was aware of Reverend Chikane's general attitude towards the issue of a prosecution – namely that whilst he might have his own personal decisions in regard to whether he forgave the perpetrators or not, insofar as the application of the laws of the land was concerned, the matter must take its ordinary course. If a decision was made by the prosecuting authorities he would accept that.

296. After the guidelines were published I had various meetings with Reverend Chikane. These were mostly at his office at the Presidency save for a meeting held in my office in December 2006 which had been called to discuss some draft cabinet memos in regard to the implementation of the findings of the Khampepe Commission. Because the matter had been raised by Mr Selebi, I again discussed the prosecution with Reverend Chikane and updated him on the current status of the prosecution of Messrs Otto, Smith and van Staden. His attitude to me remained unchanged.

297. In December and after the developments in regard to this matter within the Task Team were reported to me I instructed Advocate Ackermann to once again visit Rev Chikane to confirm his position. I knew that Ackermann had discussed the matter with him as far back as 2004.

298. Towards the end of January 2007 Advocate Ackermann and Advocate Mhaga reported to me that they had met with Reverend Chikane on 22 January and that he had reaffirmed his consistent attitude – namely that he was not against a prosecution and that the matter should take its ordinary course. In the light of this

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confirmation I wrote to the legal representatives of Messrs Otto, Smith and van Staden on 25 January 2007 and informed them that the matter would now proceed and I instructed the PCLU to act accordingly.

299. As appears from TRC4 the decision at that time was to proceed against the three individuals against whom a prosecutable case had been established. As my report TRC4 indicates in paragraph 3 thereof, the former Minister of Police, Adriaan Vlok and the former head of SAPS, General van der Merwe, had both made representations to me as contemplated in the guidelines. In essence, they both admitted authorising the murder of Reverend Chikane and required of me not to prosecute them in the light of this disclosure. They would not make full disclosure in response to requests for information and I declined to accede to their request that they be given immunity from prosecution.

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

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prosecution had been set down for hearing on 17 August 2007 and that all accused had indicated their intention to plead guilty to a charge of attempting to kill Reverend Chikane by means of poisoning. It informed her of the fact that plea and sentencing agreements had been entered into. I signed this letter on 10 July 2007 and almost immediately thereafter I went off on compassionate leave because of the illness and the subsequent death of my mother. In my absence, on 17 July 2007, Dr Ramaite and Advocate Ackermann were summonsed to a meeting with the Minister and reported to her as described in Dr Ramaite's affidavit. At the time of that meeting the Minister did not appear to have read my letter dated 6 July.

303. Because of the allegations relating to the attitude of Reverend Chikane it is perhaps illustrative to attach an article written by him and published in the City Press on 18 August 2007 immediately following the court hearing (annexure **TRC5**). He records, inter alia,:

> *"Yet I believe the Vlok trial is of national importance for reasons other than my personal interests.*

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The outcome of the court process gives practical expression to the spirit of the 2005 NPA guidelines that regulate the handling of outstanding TRC–related matters. ... also significant is the outcome of the court in re-affirming the importance of dealing with TRC-related matters within the confines of the law.

Hopefully, the outcome of the court will serve to renew our collective trust in the integrity of our legal system, particularly in its proven capacity to handle sensitive and complicated political matters in an unbiased manner.

The evidence that NPA guidelines can facilitate a win-win outcome is there for all to see. One can only hope that the wisdom of working within the law is recognised widely.

The uniqueness of our jurisprudence – however imperfect – to deal with conflicts of the past is a marvel for most of the world. I suspect the manner in which we have handled the case related to Vlok and others will have important lessons inside and outside our country.

This, I hope, will further serve correctly to project ours as a

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country of people who have demonstrated that it is possible to make the law advance national unity and reconciliation."

The article stressed that Chikane is Director General in the Presidency and Secretary of the Cabinet but that he was writing in his personal capacity.

304. In summary the successful prosecution of the parties involved in the poisoning of Reverend Chikane:

304.1. Was initiated prior to my appointment as NDPP and thereafter pursued on my instructions and in complete conformity with the Prosecution Policy and guidelines including the receiving of representations from the accused person.

304.2. The requirement of the consultation with the victim was fully discharged over an extended period and, in particular, in personal discussions which I had with Reverend Chikane and in discussions with members of the PCLU conducted in accordance with my express instruction.

304.3. I enclose as **TRC6** a media statement released by me

following the conclusion of the proceedings and I adhere to the sentiments expressed in that.

KHAMPEPE COMMISSION

305. Government alleges that during the hearings of the Khampepe Commission of Enquiry ("Khampepe Commission") I made *"a false submission that the Ministerial Coordinating Committee ("MCC") established in terms of Section 31 of the NPA Act never met"*.

306. This complaint is not supported by affidavit and it is not clear who is alleging that I made a false submission to the Khampepe Commission. I do not recall that I made any such submission.

307. Pursuant to a letter written to Government's attorney, my attorneys were provided with copies of the transcripts of the evidence given at the Khampepe Commission. My attorneys have perused the transcripts and have been unable to find a reference to me saying that the MCC never met.

308. Consequently my attorneys requested, in writing (a copy of which is attached hereto as annexure **"VP53"**), the Minister to attach the relevant extracts from the transcripts that Government relies upon

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AFFIDAVIT

I the undersigned,

VUSUMZI PATRICK PIKOLI

do hereby make oath and state that:

INTRODUCTION

1. I am a duly admitted Advocate of the High Court of South Africa.

2. The facts herein contained are true and correct and are, unless otherwise stated or where the contrary appears from the context, within my personal knowledge.

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

always had a cordial relationship with the Minister and at no stage, before this meeting, did the Minister suggest that she could not trust me;

122.3. I refused to resign. I said that I had no reason to resign and that my resignation would not be in the interest of the rule of law and prosecutorial independence. I also said that if I resigned, I would be lying to the nation;

122.4. the Minister said *"Vusi this is all about integrity and one day I will talk"*. I could not understand what she was referring to;

122.5. the Minister also mentioned that she was uncomfortable about being in office at a time when she had to ask both my predecessor, Mr Ngcuka and then me to resign and she again apologised for her abusive tirade on the evening of 19 September 2007.

23 September 2007 Meeting with the President

123. I met with the President on 23 September 2007 at about 19h45. The President was aware of the Minister's request to me to resign

and I informed the President that I was not prepared to do so. The President advised me that he would suspend me if I did not resign. I confirmed that notwithstanding that, I was still not prepared to resign and the President then informed me that he would give me a letter confirming my suspension. I waited with the President while the letter of suspension was being prepared. During this time the President suggested that the factor that influenced his decision was the question of plea bargains and witness immunity. The President did not make any reference to the breakdown in my relationship with the Minister. A little while later, the preparation of the letter was completed, the President signed the letter and handed the same to me. My letter of suspension has already been attached as annexure "VP1".

124. In my letter of suspension, the President records that he suspended me because of the breakdown of the relationship between the Minister and me and because I entertained the granting of immunity to members of organised crime syndicates without appreciating the nature and extent of the threat posed by such criminals to national security. Apart from suggesting that one of the factors that contributed to the breakdown in the relationship with the Minister was my testimony at the Khampepe Commission,

no further detail was given of why the Minister contended that there was a breakdown in the relationship or why my actions threatened national security.

125. By virtue of what is set out above, I deny the Minister's allegations in paragraphs 130 to 132 of the original submissions and paragraphs 68 to 70 of her affidavit that:

125.1. no detailed reports were provided to her, prior to the obtaining of the warrants. Apart from the detailed briefings at the various meetings outlined above, it is clear from the memorandum dated 19 March 2007 that the Minister was told that we would be applying for the warrants. At no stage has the Minister denied receiving my memorandum of 19 March 2007. Over and above that, the Minister also received copies of my 7 May 2007 letter to the President, which again alluded to the fact that we intended applying for a search warrant. Furthermore the Minister was not only briefed by me but she was personally briefed by the investigation team on 25 June 2007;

125.2. I deny that I showed a lack of respect and appreciation for

made available to the public. I also urge Dr Ginwala to make Government's submissions and affidavits public.

_____

VUSUMZI PATRICK PIKOLI

I CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS DECLARATION AND INFORMED ME THAT SHE DOES NOT HAVE ANY OBJECTION TO TAKING THE OATH, THAT SHE CONSIDERS IT TO BE BINDING ON HER CONSCIENCE AND THAT THE DEPONENT UTTERED THE FOLLOWING WORDS *"I SWEAR THAT THE CONTENTS OF THIS DECLARATION ARE TRUE, SO HELP ME GOD"*. I CERTIFY FURTHER THAT THE PROVISIONS OF REGULATION R1258 OF THE 21ST JULY 1972 (AS AMENDED) HAVE BEEN COMPLIED WITH.

SIGNED AND SWORN TO BEFORE ME AT ON THE DAY OF 2008.

_____

COMMISSIONER OF OATHS

Constitution of the Republic of South Africa, 1996[12]

[Manner of reference to Act, previously 'Constitution of the Republic of South Africa, Act 108 of 1996', substituted by s. 1 (1) of Act 5 of 2005 (wef 27 June 2005).]

[ASSENTED TO 16 DECEMBER 1996]	[DATE OF COMMENCEMENT: 4 FEBRUARY 1997]
	(Unless otherwise indicated)

(English text signed by the President)

published in

GG 17678 of 18 December 1996

commencements

(see s. 243 of this Act)

provisions	date	refer to
whole Act, except provisions listed below	4 February 1997	Proc R6 in *GG* 17737 of 24 January 1997
s. 160 (1) *(b)*	30 June 1997	Proc R6 in *GG* 17737 of 24 January 1997
ss. 213–216, 218 and 226–230	1 January 1998	s. 243 (5) of this Act

as amended

by	with effect from	refer to
Constitution First Amendment Act of 1997	4 February 1997	s. 4 of the Constitution First Amendment Act of 1997
Constitution Second Amendment Act of 1998	7 October 1998	s. 6 of the Constitution Second Amendment Act of 1998
Constitution Third Amendment Act of 1998	30 October 1998	s. 3 of the Constitution Third Amendment Act of 1998
Constitution Fourth Amendment Act of 1999	19 March 1999	s. 3 of the Constitution Fourth Amendment Act of 1999
Constitution Fifth Amendment Act of 1999	19 March 1999	s. 3 of the Constitution Fifth Amendment Act of 1999
Constitution Sixth Amendment Act of 2001	21 November 2001	s. 21 of the Constitution Sixth Amendment Act of 2001
Constitution Seventh Amendment Act of 2001	26 April 2002	s. 11 of the Constitution Seventh Amendment Act of 2001; Proc R32 in *GG* 23364 of 26 April 2002
	1 December 2003	Proc 77 in *GG* 25792 of 1 December 2003
Constitution Eighth Amendment Act of 2002	20 June 2002	s. 3 of the Constitution Eighth Amendment Act of 2002
Constitution Ninth Amendment Act of 2002	20 June 2002	s. 4 of the Constitution Ninth Amendment Act of 2002
Constitution Tenth Amendment Act of 2003	20 March 2003	s. 10 of the Constitution Tenth Amendment Act of 2003; Proc R22 in *GG* 24698 of 20 March 2003
Constitution Eleventh Amendment Act of 2003	11 July 2003	s. 5 of the Constitution Eleventh Amendment Act of 2003; Proc R53 in *GG* 25206 of 11 July 2003
Constitution Twelfth Amendment Act of 2005	23 December 2005	s. 5 of the Constitution Twelfth Amendment Act of 2005

	1 March 2006	Proc R8 in *GG* 28568 of 27 February 2006
Citation of Constitutional Laws Act 5 of 2005	27 June 2005	s. 5 of Act 5 of 2005
Constitution Thirteenth Amendment Act of 2007	14 December 2007	s. 2 of the Constitution Thirteenth Amendment Act of 2007
Constitution Fourteenth Amendment Act of 2008	17 April 2009	s. 7 of the Constitution Fourteenth Amendment Act of 2008; Proc R21 in *GG* 32130 of 16 April 2009
Constitution Fifteenth Amendment Act of 2008	17 April 2009	s. 6 of the Constitution Fifteenth Amendment Act of 2008; Proc R22 in *GG* 32130 of 16 April 2009
Constitution Sixteenth Amendment Act of 2009	3 April 2009	s. 2 of the Constitution Sixteenth Amendment Act of 2009; Proc R20 in *GG* 32091 of 2 April 2009
South African Police Service Amendment Act 10 of 2012	14 September 2012	s. 22 of Act 10 of 2012; Proc 52 in *GG* 35695 of 14 September 2012
Constitution Seventeenth Amendment Act of 2012	23 August 2013	s. 11 of the Constitution Seventeenth Amendment Act of 2012; Proc R35 in *GG* 36774 of 22 August 2013

also amended

by	with effect from	refer to
Constitution Eighteenth Amendment Act 3 of 2023	a date to be proclaimed - see PENDLEX	s. 2 of Act 3 of 2023

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

CONTENTS

Preamble

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

1 Administration of this Act transferred to the Minister of Justice and Constitutional Development (Proc 26 in *GG* 22231 of 26 April 2001), the administration and the powers or functions transferred to the Minister of Justice and Correctional Services (Proc 47 in *GG* 37839 of 15 July 2014) and to the Minister of Justice and Constitutional Development (Proc 199 in *GG* 51368 of 11 October 2024)

2 This Act has been updated to include all available historical commencement details

CHAPTER 1
FOUNDING PROVISIONS (ss 1-6)

(5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1) *(h)* and *(i)*.

(6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

(7) If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.

[Sub-s. (7) added by s. 2 *(b)* of the Constitution Second Amendment Act of 1998 (wef 7 October 1998) and substituted by s. 16 *(c)* of the Constitution Sixth Amendment Act of 2001 (wef 21 November 2001).]

(8) The President and the persons who appoint, nominate or designate the members of the Commission in terms of subsection (1) *(c)*, *(e)*, *(f)* and *(g)*, may, in the same manner appoint, nominate or designate an alternate for each of those members, to serve on the Commission whenever the member concerned is temporarily unable to do so by reason of his or her incapacity or absence from the Republic or for any other sufficient reason.

[Sub-s. (8) added by s. 2 *(b)* of the Constitution Second Amendment Act of 1998 (wef 7 October 1998).]

179 Prosecuting authority

(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions-

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5) The National Director of Public Prosecutions-

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(iii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

180 Other matters concerning administration of justice

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including-

(a) training programmes for judicial officers;

(b) procedures for dealing with complaints about judicial officers; and

(c) the participation of people other than judicial officers in court decisions.

CHAPTER 9
STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY (ss 181-194)

181 Establishment and governing principles

(1) The following state institutions strengthen constitutional democracy in the Republic:

(a) The Public Protector.

(b) The South African Human Rights Commission.

[Para. *(b)* amended by s. 4 of the Constitution Second Amendment Act of 1998 (wef 7 October 1998).]

(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

(d) The Commission for Gender Equality.

(e) The Auditor-General.

(f) The Electoral Commission.

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of

National Prosecuting Authority Act 32 of 1998[1]

[ASSENTED TO 24 JUNE 1998]	[DATE OF COMMENCEMENT: 16 OCTOBER 1998]
	(Unless otherwise indicated)

(English text signed by the President)

published in

GG 19021 of 3 July 1998

commencements
(see s. 46 of this Act)

provisions	date	refer to
ss. 9, 10, 12 and 17	1 August 1998	Proc R77 in *GG* 19118 of 31 July 1998
ss. 1-8, 11, 13-16, 18-37 and 39-46	16 October 1998	Proc R103 in *GG* 19372 of 16 October 1998
s. 38	23 April 1999	Proc R46 in *GG* 19988 of 23 April 1999

as amended

by	with effect from	refer to
Judicial Matters Second Amendment Act 122 of 1998	1 April 1999	s. 16 of Act 122 of 1998; Proc R38 in *GG* 19913 of 1 April 1999
National Prosecuting Authority Amendment Act 61 of 2000	12 January 2001	s. 26 of Act 61 of 2000; Proc R3 in *GG* 21976 of 12 January 2001
Judicial Matters Amendment Act 42 of 2001	7 December 2001	s. 48 of Act 61 of 2001
Criminal Law (Sentencing) Amendment Act 38 of 2007	31 December 2007	s. 9 of Act 38 of 2007
National Prosecuting Authority Amendment Act 56 of 2008	6 July 2009	s. 84 of Act 56 of 2008; Proc 45 in *GG* 32380 of 3 July 2009
	20 February 2009	Proc R12 in *GG* 31930 of 19 February 2009
Judicial Matters Amendment Act 11 of 2012	2 October 2012	s. 11 of Act 11 of 2012
Judicial Matters Amendment Act 8 of 2017	2 August 2017	s. 43 (1) of Act 8 of 2017
Judicial Matters Amendment Act 12 of 2020	22 October 2020	s. 3 of Act 12 of 2020
Cybercrimes Act 19 of 2020	1 December 2021	s. 60 of Act 19 of 2020; Proc R42 in *GG* 45562 of 30 November 2021
Judicial Matters Amendment Act 15 of 2023	3 April 2024	s. 35 (1) of Act 15 of 2023
National Prosecuting Authority Amendment Act 10 of 2024	19 August 2024; 1 March 2026	s. 13 of Act 10 of 2024; Proc 173 in *GG* 51083 of 19 August 2024; Proc 7144 [sic] in *GG* 54174 of 19 February 2026

ACT

To regulate matters incidental to the establishment by the Constitution of the Republic of South Africa, 1996, of a single national prosecuting authority; and to provide for matters connected therewith.

Preamble

WHEREAS section 179 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provides for the establishment of a single national prosecuting authority in the Republic structured in terms of an Act of Parliament; the appointment by the President of a National Director of Public Prosecutions as head of the national prosecuting authority; the appointment of Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament;

AND WHEREAS the Constitution provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority;

AND WHEREAS the Constitution provides that national legislation must ensure that the Directors of Public Prosecutions are appropriately qualified and are responsible for prosecutions in specific jurisdictions;

AND WHEREAS the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice;

AND WHEREAS the Constitution provides that the National Director of Public Prosecutions must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy which must be observed in the prosecution process;

AND WHEREAS the Constitution provides that the National Director of Public Prosecutions may intervene in the prosecution process when policy directives are not being complied with, and may review a decision to prosecute or not to prosecute;

AND WHEREAS the Constitution provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings;

AND WHEREAS the Constitution provides that all other matters concerning the prosecuting authority must be determined by national legislation;

AND WHEREAS systemic corruption in society requires specialised, dedicated, multi-disciplinary measures to combat corruption;

[Para. 9 added by s. 1 of Act 10 of 2024 (wef 19 August 2024).]

AND TO ENSURE that the national prosecuting authority fulfils its constitutional mandate to provide, without limiting the investigative powers of the South African Police Service or the Directorate for Priority Crime Investigation, for-

- the establishment of the Investigating Directorate against Corruption, with investigative capacity, to prioritise and to investigate particularly serious criminal or unlawful conduct committed in serious, high-profile or complex corruption, commercial or financial crime; and
- the necessary infrastructure and resources to perform these functions,

[Para. 10 added by s. 1 of Act 10 of 2024 (wef 19 August 2024).]

.....

[Preamble substituted by s. 1 of Act 61 of 2000 (wef 12 January 2001) and amended by s. 14 of Act 56 of 2008 (wef 6 July 2009).]

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

INDEX

[Index inserted by s. 21 of Act 61 of 2000 (wef 12 January 2001) and amended by s. 12 of Act 10 of 2024 (wef 19 August 2024).]

CHAPTER 1
INTRODUCTORY PROVISIONS (s 1)

1 Definitions

In this Act, unless the context otherwise indicates-

'Constitution' means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);

'Deputy Director' means a Deputy Director of Public Prosecutions appointed under section 15 (1);

(b) Such an oath or affirmation shall-

(i) in the case of the *National Director*, or a *Deputy National Director*, *Director* or *Deputy Director*, be taken or made before the most senior available judge of the High Court within which area of jurisdiction the Office of the *National Director*, *Director* or *Deputy Director*, as the case may be, is situated; or

(ii) in the case of a *prosecutor*, be taken or made before the *Director* in whose Office the *prosecutor* concerned has been appointed or before the most senior judge or magistrate at the court where the *prosecutor* is stationed,

who shall at the bottom thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

33 Minister's final responsibility over prosecuting authority

(1) The *Minister* shall, for purposes of section 179 of the *Constitution*, *this Act* or any other law concerning the *prosecuting authority*, exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act*.

(2) To enable the *Minister* to exercise his or her final responsibility over the *prosecuting authority*, as contemplated in section 179 of the *Constitution*, the *National Director* shall, at the request of the *Minister*-

(a) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;

(b) provide the *Minister* with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;

(c) furnish the *Minister* with information with regard to the prosecution policy referred to in section 21 (1) *(a)*;

(d) furnish the *Minister* with information with regard to the policy directives referred to in section 21 (1) *(b)*;

(e) submit the reports contemplated in section 34 to the *Minister*; and

(f) arrange meetings between the *Minister* and members of the *prosecuting authority*.

34 Reports by Directors

(1) A Director must annually, not later than the first day of June, submit to the National Director a report on all his or her activities during the previous financial year.

[Sub-s. (1) substituted by s. 16 of Act 15 of 2023 (wef 3 April 2024).]

(2) The *National Director* may at any time request a *Director* to submit a report with regard to a specific activity relating to his or her powers, duties or functions.

(3) A *Director* may, at any time, submit a report to the *National Director* with regard to any matter relating to the *prosecuting authority*, if he or she deems it necessary.

35 Accountability to Parliament

(1) The *prosecuting authority* shall be accountable to Parliament in respect of its powers, functions and duties under *this Act*, including decisions regarding the institution of prosecutions.

(2) *(a)* The National Director must submit annually, not later than the first day of September, to the Minister a report referred to in section 22 (4) *(g)*, which report must be tabled in Parliament by the Minister within 14 days, if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

[Para. *(a)* substituted by s. 17 of Act 15 of 2023 (wef 3 April 2024).]

(b) The *National Director* may, at any time, submit a report to the *Minister* or Parliament with regard to any matter relating to the *prosecuting authority*, if he or she deems it necessary.

36 Expenditure of prosecuting authority

(1) The expenses incurred in connection with-

(a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the *prosecuting authority*; and

(b) the remuneration and other conditions of service of members of the *prosecuting authority*,

shall be defrayed out of monies appropriated by Parliament for that purpose.

(2) The Department of Justice must, in consultation with the *National Director*, prepare the necessary estimate of revenue and expenditure of the *prosecuting authority*.

(3) The Director-General: Justice shall, subject to the Public Finance Management Act, 1999 (Act 1 of 1999)-

(a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the *prosecuting authority*; and

(b) cause the necessary accounting and other related records to be kept.

[Sub-s. (3) substituted by s. 15 of Act 61 of 2000 (wef 12 January 2001) and by s. 10 *(a)* of Act 56 of 2008 (wef 6 July 2009).]

(3A) .....

[Sub-s. (3A) inserted by s. 15 of Act 61 of 2000 (wef 12 January 2001) and deleted by s. 10 *(b)* of Act 56 of 2008 (wef 6 July 2009).]

(4) The records referred to in subsection (3) *(b)* shall be audited by the Auditor-General.

[Sub-s. (4) substituted by s. 15 of Act 61 of 2000 (wef 12 January 2001) and by s. 10 *(c)* of Act 56 of 2008 (wef 6 July 2009).]

(5) The Director-General: Justice may, on the recommendation of the *National Director* and with the concurrence of the Minister of Finance, order that the expenses or any part of the expenses incurred by any person in the course of or in connection with an *investigation* contemplated in section 28 (1) be paid from State funds to that person.

[Sub-s. (5) added by s. 15 of Act 61 of 2000 (wef 12 January 2001) and substituted by s. 10 *(d)* of Act 56 of 2008 (wef 6 July 2009).]

37 Administrative staff

The administrative staff of-

(a) the *Office of the National Director*;

(b) the Offices of the *Directors*, including *Investigating Directorates*; and

(c) the Offices of *prosecutors* as determined by the *National Director*, in consultation with the *Director* concerned,

N-23

South African Police Service | Suid-Afrikaanse Polisiediens

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THE NATIONAL COMMISSIONER
DIE NASIONALE KOMMISSARIS

PRETORIA

0001

Advocate VP Pikoli
National Director of Public Prosecutions
Private Bag x 752
PRETORIA
0001

(By telefax No. 845-7291)

Dear Advocate Pikoli

OUTSTANDING TRC CASES

I have been briefed on the last meeting of the Task Team set up in terms of the Cabinet guidelines on outstanding Truth and Reconciliation Commission (TRC) matters.

It was brought to my attention that in *Sv Otto* (complainant Rev. F Chikane) a decision on prosecution was taken without consultation with the respective Departments.

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

I am also under the impression that there is no common understanding on the process to be followed.

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.

(6)

In my view a comprehensive report such as the one directed to the NPA, dated 24 November 2006, and revised on 29 November 2006, should be discussed by the Directors-General.

Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made.

I am of opinion that the Directors-General should meet as soon as possible to provide guidance on the procedures to be followed by the officials in the Task Team.

I am also of the opinion that the Chikane matter should be discussed, both in terms of the procedures followed, and the way forward.

I have requested the NPA to convene a meeting as soon as possible, and trust that you will be in agreement with that request.

With kind regards.

J. S. SELEBI
NATIONAL COMMISSIONER

NATIONAL COMMISSIONER
Date: 6/2/07

PCJ 3148

Office of the National Director of Public Prosecutions

The National Prosecuting Authority of South Africa
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Ref: NDPP / KP

Mr J.S. Selebi
National Commissioner
South African Police Service

Fax no.: (012) 393 - 1530

6 February 2007

PERSONLIKE ASSISTENT: NASIONALE KOMMISSARIS
PERSÖNLICHE ASSISTENTIN: NATIONAL KOMMISSARIN
2006 -02- 06
TEBOGO

Dear Commissioner Selebi

Re: OUTSTANDING TRC CASES

Your letter of 6 February 2007 refers.

I advise that it is clear that our understanding of the mandate of the task team, as well as the guidelines that Cabinet approved, are not the same. In the circumstances, this matter, as well as other issues that have emerged in the course of the NPA dealing with the TRC cases, are currently being taken up with the Minister of Justice and Constitutional Development.

Kind regards

ADV. V.P. PIKOLI
NATIONAL DIRECTOR OF PUBLIC PROSECUTION
DATE: 06.02.2007

10 Years of Freedom

Justice in our society, so that people can live in freedom and security

"Together beating the drum for service delivery"

PMG PARLIAMENTARY MONITORING GROUP

Special Investigations Unit, Asset Forfeiture Unit, Priority Crimes Litigation Unit Witness Protection Unit, Directorate of Spec

Justice and Correctional Services

03 May 2007

Meeting Summary

A summary of this committee meeting is not yet available

Meeting report

JUSTICE AND CONSTITUTIONAL DEVELOPMENT CONSTITUTIONAL COMMITTEE
3 May 2007
SPECIAL INVESTIGATIONS UNIT, ASSET FORFEITURE UNIT, PRIORITY CRIMES LITIGATION UNIT WITNESS PROTECTION UNIT, DIRECTORATE OF SPECIAL OPERATIONS: ANNUAL REPORTS & BUDGETS

Chairperson: Ms F Chohan-Khota (ANC)

Documents handed out:
Special Investigations Unit presentation
Seizing Criminal Assets to fight Crime: Asset Forfeiture Unit presentation
Priority Crimes Litigation Unit Report
Witness Protection Unit Report
Directorate of Special Operations Report (handed out 2 May)
Directorate of Special Operations presentation
Specialised Commercial Crime Unit presentation
Specialised Commercial Crime Unit

Audio Recording of the Meeting

SUMMARY
Various units of the National Prosecuting Authority briefed the Committee on their work in 2006 /2007

The Special Investigations Unit worked with departments to assist them in implementing better systems to deal effectively with the threats of corruption. The staff and project profiles were tabled and explained. Projects involving Departments of Social Development, Transport, Housing, Correctional Services and the Special Pensions Fund were detailed. Achievements included savings of R231 million, prevention of future losses of R1.8 billion, and cash recovery of R14 million. A completely clean audit report was achieved. It had excellent relationships with other departments and investigators. Challenges included the need for legislative amendments to deal with litigation, streal the proclamation process and coping with rapid growth.

The Asset Forfeiture Unit had largely exceeded its targets. It had placed R760 million under restraint. The Criminal Assets Recovery Account had received payments of about R120 million. Most of the funding was used to fight cr but other payouts assisted victims of crime. The Unit had obtained 34 judgements and several important principles had been affirmed. Some of the urgent matters were tabled and explained. Because the Unit did not do its own investigations or prosecutions it was vital to establish good relationships.
Questions by members related to the profile of the units, the vacancy rates, how money seized would be used, the reactive nature of the Units' work, the need to establish shelters for domestic violence in Northern Cape, the curr situation in regard to Special Pensions, disciplinary hearings against public servants committing fraud, and the need to keep the focus of departments funding the Special Investigations Unit.

The Priority Crimes Litigation Unit described its scope and function. The work of the Missing Persons Task Team was outlined. Prosecutions involving nuclear non proliferation, chemical and biological non proliferation and merce activities were tabled and explained. Challenges included the need for adequate and skilled staff, better office space and the need to address delays in Truth and Reconciliation Hearing prosecutions. Security issues were also cr

The Witness Protection Unit had a supplementary mandate to transform, redesign and modernise and set standards in relation to protection of witnesses and enhancement of criminal justice. It hoped to enhance confidence in th criminal justice system and the programme and to achieve effective administration and financial management, and an integrated law enforcement approach. Protection should be effective as a tool in combating crime. The achievements and performance for the current cycle were tabled. No witnesses were threatened, harmed or assassinated in the past six years and there had been only 3% voluntary walk-offs. The cycle time had dropped. There 90% conviction rate for the accused. It currently handled 229 witnesses and 268 related persons.

Questions were asked on the delays in prosecuting the Truth and Reconciliation (TRC) matters, the cost of protecting witnesses, whether the Units own staff were protected, the reasons why there would not be prosecutions in th Rashid matter, destruction of documents relating to disappearances, the reasons for voluntary walk-offs from the protection programme and the role played by South Africa internationally.

The Directorate of Special Operations (Scorpions) targeted criminals who organised and profited from crime. It used a multi disciplinary and success driven approach. Its key activities and impacts were tabled. The conviction rat above 80%. The value of assets placed under restraint was R550 million. R50 million had been directed to the victims of organised crime. Drugs valued at over R1 billion had been seized over the last year. Explanations and upd were given on some of the major cases being handled. Cybercrime and drug trafficking posed the largest threats. A dedicated administration was set up in October 2006. Challenges included the need to increase effectiveness in investigating and prosecuting organised crime, the need to work on creating jurisprudence on the Prevention of Organised Crime Act, and also to create law around the Monitoring Act. There was a need to match job demand wit expertise and to fill 825 posts in the financial year. The Directorate was currently standardising best practice and would be writing a practice manual, investigating appointing Internal Counsel, setting research-based measuremer indicators and establishing a training academy.

The Committee expressed its concerns with the insinuations that the Directorate was unable to prosecute senior politicians, which undermined the integrity of the Directorate, and enquired as to any undue pressure. Further conc were expressed at the focus on high profile cases, stressing the need also to prioritise low profile cases. Clarification was sought on single line jurisdiction, treatment of victims of crime, developments in the LeisureNet and Kebb matters, and in the Criminal Laws (Sexual Offences) Amendment Bill and Child Justice Bill.

MINUTES
Special Investigations Unit (SIU) Briefing
Mr Willie Hofmeyr, Head, Special Investigations Unit, outlined the mandate and functions of the SIU, which was set up to investigate corruption and maladministration, not necessarily involving criminal offences. The primary purp was to enable the State to recover money lost because of unlawful action. It was important both to address any direct financial loss, and to amend the systems to prevent future losses. SIU was increasingly involved in working w departments to assist them in implementing better systems. Dealing effectively with corruption was vital for departments, which faced combined threats of fraud, corruption and maladministration extending across several differen areas. This varied from opportunistic corruption or more organised exploitation of systemic gaps. Often the problems were detected only when there was an escalating loss. This was further compounded by the large number of c role players.

Effective steps to dealing with corruption therefore required integrated solutions, including forensic investigations, litigation, systemic improvements and removing corrupt officials. The SIU mandate allowed for integrated forensic solutions but it would also use other institutions.

One of the key challenges was to build sufficient capacity to deal with fraud, corruption and maladministration. There was still outsourcing to the private sector, but there was increased recognition that SIU could ensure effective, and delivered value for money. This was reflected in a significant increase in the budget from National Treasury (NT). The budget for the current year stood at R139.7 million. An important driver had been the money received fro departments who paid the SIU to conduct the investigations, and this was currently budgeted for R84.2 million. During the following three years the trend would be reversed as SIU should not become too dependent on this fundi budget would rise to R270 million by 2009/10.

The focus of the SIU had been to increase the number of people available to deal with investigations, and staff currently stood at 550. SIU had also expanded to have an effective national presence, other than in Northern Cape a North West Province.

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Mr Falek Davids, Deputy Head, SIU, presented the project profile of the SIU, noting that it had expanded significantly. Many investigations commenced on request of a particular department and across a broad range of frauduler activity. The investigations ranged from isolated and focused fraud to widespread systemic fraud. Provincial departments would also ask SIU to deal with corruption matters. At present there were 88 investigations ongoing, rangi one that could take only a few months to a major investigation involving 200 investigators that could take three years or more. There were 14 proclaimed investigations, which would require accessing of special powers. Forty we regionally based. They involved 19 departments.

Service level agreements had recently been completed with the North West Province, in terms of which a steering committee would be established to screen all forensic investigations. This was a model finding favour also in othe provinces.

Mr Davids then tabled a number of the projects. The investigation into the Department of Social Development was still the largest investigation, having commenced in 2005. SIU had recommended that over 21 000 public servant were receiving grants illegally, should be removed from the grant system. Around 60 000 irregular beneficiaries had been identified and a further 500 000 might require audit. Cash recoveries amounted to R26 million, actual savi R213 million, and preventative savings to R1.8 billion. 4 677 disciplinary hearings were prepared, and 2 215 of the 2 675 prosecutions had resulted in convictions.
The investigations had raised awareness of the problem, and this in turn led to strong deterrence. It was important that SIU had been able to identify systemic gaps and the Department had been quick to correct them.

SIU was also investigating the Department of Transport. Over 30 000 non-compliant licences had been identified. 55 Driving Licence Testing Centres (DLTCs) had been audited. A number of forged foreign conversions had also l identified. Challenges included systems and process gaps at the driving licence centres, accessing information on foreign licenses and the cumbersome process of cancellations.

The Special Pensions Fund investigation focused on unlawful payment of special pensions to disentitled beneficiaries and the conduct of some board members that may have contributed to the problem. SIU was currently auditir beneficiaries. Challenges here included lack of compliance with the provisions of the Special Pensions Act, political sensitivity and concerns over integrity of officials.

The ongoing investigation into the Department of Correctional Services had focused in the past on medical aid. The current focus was on procurement matters, pharmacy procurement and asset management. Seventeen matters cumulative value of around R1.1 billion were being investigated. SIU had achieved recovery of R6.9 million in one matter, five criminal referrals for collusion, and thirteen systemic recommendations had been made. SIU still requ new and wider proclamation over the investigation. Procurement was time consuming and complex and access to information was difficult.

SIU was also focusing on subsidy fraud in the Department of Housing. The Minister had asked for expansion into a national investigation. The focus areas would include abuse of the housing subsidy system, the non-delivery on contracts, conveyancing fraud and conduct by officials. The Department of Housing was funding 50 staff to investigate and SIU was funding 21 staff.

Mr Davids tabled and highlighted some of the high level achievements. The savings had been R231 million, and prevention of future loss amounted to R1.8 billion. Cash recoveries were at R14 million. The target for 2007/08 was billion.

Mr Davids was pleased to announce that SIU had achieved a completely clean Auditor General's report, and a strong management chain assured the objectives. The Organisational Development process had started late in 200€ project profile had expanded significantly, so it was important to build a unit more responsive to the different forensic challenges. Implementation of the targets would commence in June.

Mr Hofmeyr detailed the overall challenges. SIU had achieved rapid growth and had taken responsibility to ensure that all matters, although perhaps not strictly in the mandate, were taken forward. It had been successful in achie good relationships with the National Prosecuting Authority (NPA) and the South African Police Service (SAPS). The SIU might require some assistance from this Committee with the Special Pensions Investigation as there were sensitivities, and Mr Hofmeyr asked that any problems and complaints to be referred back to the SIU. Because of the huge scale of the Social Grants Investigation around R1 million social grants might be removed. There had be need to make some tough decisions and there were difficulties in recovering the cash from those who had received grants illegally. The process of recovery took substantial time and resources, and so SIU had had to make their rather to get people off the payment system, and only then to try to recover the cash.

SIU would be needing legislative amendments to deal with litigation issues. The proclamation process was still cumbersome and time consuming, and it could take six months to acquire a signed proclamation. The requirements Premier to sign a letter of consent for provincial investigations gave rise to many delays. SIU was investigating other possibilities.

Mr Hofmeyr concluded that SIU had had a good year and had achieved good successes while coping with the challenges of rapid growth. It had managed to lay the foundation for a more effective and larger SIU in future.

Asset Forfeiture Unit (AFU) Briefing
Mr Willie Hofmeyr, Head, AFU, stated that the Asset Forfeiture Unit had two overall objectives; to increase the volume of cases, and to do test cases and create legal precedents that allowed for the effective use of the law. It was important to get binding appeal court judgments to determine what the law meant.

The AFU had exceeded its targets over the last couple of years. In the last year it had taken on 253 new cases, and had completed 243 cases. Monetary seizures in this year resulted in R760 million being placed under restraint. value of completed cases was slightly below target. Targets had not been met to pay funds into the Criminal Assets Recovery Account (CARA), largely due to the application for leave to appeal in the Schalk matter.

One of the most important ongoing matters was the David King case, where the scale of litigation was huge, involving England, Wales, Guernsey and South Africa. Mr King had publicly declared his intention to drag out the case next ten years, and perhaps a mechanism needed to be found to try to get litigation ancillary to the criminal trial to be heard in the same forum. There did not seem to be an easy answer to the delays under the current system. Fi important matters were the Delport matter, involving Revenue Services and customs fraud of about R350 million, where R80 million had been placed under restraint, the largest figure so far in the AFU's history. The Schalk case ongoing.

The Criminal Assets Recovery Account (CARA) had received payments of about R120 million, and around R47 million could be paid out in the year. Most of the funds were used to fight crime, but other payouts assisted victims c crime.

In terms of developing the law, AFU had obtained 31 judgments in the High Court, which probably reflected the fact that the law was becoming more settled. There were two Constitutional Court judgments and four in the Supren Court of Appeal 81% of the cases had been successful. Mr Hofmeyr clarified that the litigation often went to ancillary issues. Overall the success rate in Supreme Court of Appeal was 67%. About 203 judgments had been given t There had been a significant change of attitude in the courts in the last four years and AFU had won far more cases, as the law became more settled and more effective. Both the Constitutional Court and the Supreme Court of A had affirmed several important principles.

The important judgments in the last year were tabled and the main principles established in each case were explained. There was still no definition of organised crime, and the Mohunram case might still cause difficulties. Other principles had been more clearly established.

Mr Hofmeyr noted that the SIU did not do its own investigations or prosecutions and it was therefore key to establish good relationships with other bodies. Around 90% of cases, representing about 30% of cases, emanated from and about 8%, representing 67% of value, from the Department of Special Operations (DSO/Scorpions). Other investigations had emanated from SARS, direct referrals from prosecutors in the National Prosecution Service (NPS Reserve Bank, Marine and Coastal Management and the Financial Intelligence Centre.

Challenges included the need to expand capacity sufficiently to deal with all the cases currently in court.
The budget would need to be expanded almost eight-fold.

Discussion
Mr L Joubert (DA) commented that the report was encouraging. He asked about the profile of the SIU.

Mr Hofmeyr said that vacancies were a problem, but not so much as in other units of the National Prosecuting Authority because departments would pay for funding of investigations. Finding the right skills was a challenge. Abou of staff were investigators and others included lawyers, accountants and analysts. SIU tried not to recruit too much from other law enforcement agencies. There was an ambitious training programme that would be training 120 tra SIU had managed to find a mechanism to speed up the process of recruitment, although this was still time consuming.

The Chairperson pointed out that one of SIU's focus areas was to train people in other departments and she asked for further details on this.

Mr Hofmeyr confirmed that SIU would, during the course of investigation, be able to isolate lack of systems and skills. Part of Operation Consolidate was to work with dysfunctional municipalities to train their staff and ensure that could do the jobs properly.

Mr Joubert asked for an explanation on how the money would be used in asset seizure, as in the last year R345 million had been seized but only about R20 million had gone to CARA.

Mr Hofmeyr explained that assets were first frozen, and then later forfeited. Many of the large cases were heavily litigated for years. About 1 100 cases had been initiated and about 800 finalised, but R700 million were assets fro year, which may only be forfeited years down the line. Around 550 million had been acquired. The court could order direct payments to victims, and the balance would then go to CARA. Around R120 million had been paid over to this year. Other money was in the pipeline but there were processes still to be followed before that would end up in CARA.

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Imam G Solomon (ANC) congratulated the Unit on its successes. He noted that the future savings were also past losses to the Government. He noted that many matters had only reached SIU when the corruption and fraud was entrenched, so that there had already been significant losses. He asked whether SIU was allowed to monitor or have spot checks over certain programmes where there was potential for large-scale corruption.

Mr Hofmeyr agreed that there were often huge losses in the past and SIU tried to help with them. Its role at the moment was mainly reactive. Where there were cooperation agreements with Departments, a more proactive role c played and it was possible to see where high risk areas lay. It had also spoken pro-actively to certain departments where SIU had a sense that there was a problem but it could not force departments to agree. The monitoring role more for the Auditor General (AG) to undertake. SIU was interested in firming up the relationship between AG, the Standing Committee on Public Accounts (SCOPA) and other law enforcement bodies.

Imam Solomon commented that there were no shelters for domestic violence in the Northern Cape.

Mr Hofmeyr noted that Thutuzela centres were budgeted for in the next few years in these areas.

Mr J Sibanyone (ANC) asked whether the loopholes in the Department of Transport had yet been closed.

Mr Davids replied that in four key areas there were constraints to service delivery, involving insufficient skills, resources and infrastructure problems, and methods and procedures creating a blockage in the system. SIU had recommended that minimum requirements should be established at 55 centres, and those centres not complying should be reviewed and their licence to operate reassessed. Some of the DLTCs would be investigated in the next months. The MEC for Transport in Western Cape was keen to pilot a process to look at blockages and change the processes. This would be a useful pilot to assess over the next few months.

Mr Hofmeyr added that the National Department of Transport could make guidelines but did not have operational control as provinces or municipalities ran the centres. The National Department could only close centres down as ultimate sanction, but had no capacity to enforce best practice.

Mr Sibanyone asked for an indication of the current situation in relation to special pensions. He asked whether the delays that had given rise to complaints were linked to the comments on the frauds.

Mr Hofmeyr said that the Board was currently being very cautious. 8 000 applications were submitted in December, just before the cut off date, and although these might have been legitimate claims that had somehow not been k In the last ten years, there were suspicions that many could be fraudulent. It was known that criminal syndicates were in possession of party stamps to endorse the applications. This was not directly the issue of SIU, but Special Pensions had asked for help with the initial screening.

Mr Davids added that because of the strict criteria many of the applications had not initially complied but SIU was not necessarily aware of widespread delays. He mentioned that there was provision under Section 7 that an appli previously turned down could be re-submitted if new evidence came to light. However, in resubmissions it frequently happened that the new evidence differed radically from that supporting the original request. Since the Special Pensions could involve one off cash payments of up to R1 million rand, the Special Pensions administration was cautious that all information must be thoroughly verified.

Mr L Landers (ANC) referred to the people who had fraudulently received benefits being removed from the system, as asked whether they were also removed from office as public servants. He asked if the SIU was satisfied with outcome of the disciplinary hearings. He felt it was undesirable to have public servants who had been convicted of fraud to be permitted still to stay in office and earn salaries, or to be re-employed as public servants in other partments.

Mr Hofmeyr said that departments were assisted with the disciplinary enquiry and investigators from the SIU could give evidence, and had also provided help in training presiding officers. However the Bargaining Council agreem required the departments to do the prosecution themselves, and not to import prosecutors or presiding officers. Removing incorrect grants and payments from the systems was of concern to many departments. Social grants wer major issue and the numbers were huge. Around 20 000 civil servants could face civil proceedings. Mr Hofmeyr stressed that not all cases involved fraud. Many people had initially been entitled to a grant but subsequently becar employed, and may not have been aware that they should have been removed from the system. There were a number of grey areas. The scale of the problems and the need to establish uniform principles had slowed the investi

The Chairperson noted that government was committed to fighting corruption and the presence of the SIU in itself was an important element of its success. The real success would be when correct systems were in pace when SI completed its work in departments. She suggested that during the next report it would be useful for SIU to highlight exiting policies, to note what had been monitored over the last few years, and to state whether it had found recu of the same issues, or development of other matters.

The Chairperson expressed her concern that pre investigations should maintain the same elements of cooperation. It was important not to undermine the good relationships and profile of the SIU.

The Chairperson also noted that SIU had stated that it relied on project funding from departments, and would like to reduce that reliance. She commented that the fact of departments putting money or resources into investigation an indication that they were committed to taking matters seriously, and commented that if they were not to pay there was a danger that they might lose focus and commitment. She hoped that discussions with Treasury would be in mind. Finally she congratulated the SIU on its completely clean Auditor General's report.

Priority Crimes Litigation Unit (PCLU) Briefing
Dr Silas Ramaite, Deputy National Director of Public Prosecutions, NPA reported that the PCLU was established in 2003 by Presidential Proclamation. It was not an investigative unit but relied for its investigations on SAPS and I gave guidance to investigators in the drafting of legal processes. Its cases were very complex and would not succeed without a multi disciplinary approach. It was actively involved with numerous stakeholders and mutual legal assistance and extradition. It engaged in proposing legislative amendments, conducted legal research and furnished legal opinions and provided assistance to directors of public prosecutions. The Missing Persons Task Team wa established to investigate disappearances between the 1960s and 1996. It was aligned with the Ministry of Justice's Truth and Reconciliation Commission (TRC) unit. Its strategic focus areas were investigative capacity, prosecut efficiency, engagement with stakeholders and research and training. It was intended to be a short-term process.

The prosecutions relating to nuclear non-proliferation, and chemical and biological non-proliferation were tabled and explained. Further cases involved mercenary activities. The Unit had also attended a conference on counter te in Namibia. Assistance had been provided to the Czech Republic relating to international arms smuggling, and another involving export of military vehicles to conflict regions in Africa. Matters investigated under the Statute of Ro were tabled and explained. Other matters involved civil litigation, and assistance to a foreign law enforcement agency on human trafficking. Research had been done and opinions had been given to the Director of Public Prosecu and there had been follow up on the TRC prosecutions. A number of exhumations had been carried out.

Major challenges included the need for adequate staff to attend to all cases, inadequate office space, and delays with TRC prosecutions. The PCLU was a small unit consisting of around six advocates. Staff challenges included eaching away of highly experienced prosecutors. Security issues were critical. Challenges still existed in respect to missing persons outside South Africa, and some cases had not been referred to the TRC. The Unit was operat ffectively, however, within the budgetary constraints, and was able to given attention to its work and to prioritise where necessary.

Witness Protection Unit (WPU) Briefing
Dr Silas Ramaite, Deputy National Director, Public Prosecutions reported that the Witness Protection Unit was mandated to act under the Witness Protection Act. Its supplementary mandate was to transform, redesign and mode and set standards in relation to protection of witnesses and enhancement of criminal justice.

The detailed role of the WPU was tabled but not discussed. Dr Ramaite reported that the strategic direction was to transform, redesign and modernise witness protection. Weaknesses in the past that led to endangering of witnes had been corrected. The Unit planned to enhance confidence. In the criminal justice system and the programme and to achieve effective administration and financial management, and an integrated law enforcement approach. T protection should be effective as a tool in combating crime. It also sought to reduce witness grievances, to reduce the numbers of witnesses leaving the programme, and to reduce the cycle times. The achievements and perform for the current cycle were tabled. There had been increased confidence in witness protection, and it was clear that witness protection had ensured the successful arrest, prosecution and conviction of a number of accused person WPU was setting the best world standards in the redesigning process and was acclaimed for its operating model as well as its forms.

Dr Ramaite noted that no witnesses were threatened, harmed or assassinated in the past six years. There had been significant reduction of grievances and there had been only 3% voluntary walk-offs. The cycle time had droppe two years due to phasing in of the After-care and resettlement strategy. There was a 90% conviction rate for those accused.

WPU had achieved clean audit reports over the past five years from the AG. Its protection was acknowledged as an effective tool and assistance had been given to a number of other African countries. There was a close relation with the International Criminal Court. WPU had a high level of training in cooperation with Justice College, and played a major role in developing international best practice guidelines. Advanced training on Witness Protection wa offered by Free State University.

The total number of persons on the programme was 229 witnesses and 268 related persons. The challenges were included in the presentation slides, but were not discussed.

Discussion
Mr Joubert asked what was causing the delay in prosecutions of the TRC and when these might be finalised.

Adv Anton Ackermann, Special Director: NPA, replied that in October 1998 the TRC had recommended prosecutions. A Human Rights division was established in the NPA to evaluate the cases and to prosecute. When the DSO created in January 2001 the Human Rights Division was disbanded, and its work was transferred to the DSO. Adv Ackermann, when joining the NPA, was given a mandate in March 2003 to declare priority crimes. All 400 TRC prosecutions had been immediately declared as priority crimes. In April 2003 the President had stated that there would be no further amnesty processes, and ruled that prosecutions would be instituted and that a number of agen

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must assist in the prosecutions. Adv Ackermann personally declined to prosecute 92 cases. Sixteen were identified for investigation and potential prosecution. On 9 November 2004 Adv Ackermann was stopped when trying to a three security policemen and charge them with poisoning of identified people. Dr Ramaite had instructed him not to proceed with the arrest, but rather to formulate guidelines how prosecutions should be conducted. This formulat took two years. In early 2006 the guidelines were approved. They did not make provision for a committee, but stated that in the execution of the prosecution duties other agencies must assist. A Task Team was established, and a number of meetings were held. Adv Ackermann commented that it was unfortunate that to date no meaningful results had been achieved from these meetings. The Annual Report of 2006 also noted on page 4 that not much had achieved, despite all the attempts to take this matter forward. He maintained that the PCLU was not the cause of the delays and he suggested that perhaps the National Director of Public Prosecutions should comment further.

Adv Vusi Pikoli, National Director of Public Prosecutions, added that this was a politically sensitive issue. The legal processes must solve the problem. Whenever there was an attempt to charge members of the former Police Ser there was political intervention, and effectively the NPA was being held to ransom by the former generals. On the other side the families of the victims were pressing for prosecution. The guidelines were not universally accepted a some NGOs, including Legal Resources Centre, wished to challenge the constitutionality of the guidelines. There were ongoing discussions as to how best to proceed. The President, in addressing parliament, indicated clearly th matters would be dealt with, and so this was an ongoing matter.

The Chairperson stated that she was aware of some efforts from the Department of Justice. She asked that Adv Pikoli provide the Committee with a full report on the events to date in writing, so that the Committee could try to as this clearly went beyond just the one case cited by Adv. Ackermann. It was undesirable that these problems should still be delaying matters.

Mr Joubert asked about the cost of protecting witnesses.

Mr Dawood Adam, Head, Witness Protection Unit, commented that witness protection was expensive. Each programme must be measured on its own merits and circumstances and different factors would impact. The cost of one witness being protected over a year had amounted to R145 000. The cost of protecting the Boeremag witnessas, without taking accommodation into account, had been in excess of R5 million. Factors taken into consideration co include salary replacement. Another case had required protection for 23 witnesses, involving accommodation in three safe houses.

Imam Solomon noted that the security seemed to focus only on the witnesses being protected and asked if protection was also given to officials of the NPA who were responsible for this Unit.

Mr Adam replied that unfortunately South Africa was not yet geared to protection of officials. International best practice and guidelines had suggested that corporate identity documents should be provided. Security was a challeng certain matters were under discussion to ensure that the covert status of the unit was maintained.

Mr Landers asked why the DPP had declined to prosecute in the Kalji Rashid matter.

Adv Ackermann responded that this was because the full High Court bench had ruled that the deportation was legal. He had studied the documents carefully and the matter had been discussed with the International Criminal Co including the implications of the Rome Statute. This was not necessarily done in every deportation matter, but now that the Court had ruled on the matter it was closed.

Mr Landers asked which departments had been problematic in assisting with the prosecution of TRC cases. He also commented that destruction of documents by SAPS, Municipalities, magistrates' courts and municipalities in re missing persons should be sanctioned.

dv Ackermann responded that all inquest dockets were to be destroyed after a certain time, and the destruction was following this principle. However, there had been a circular issued in 1994 to try to halt the destruction of evid

The Chairperson asked for specific information on problematic cases to be forwarded to the Committee, so that it could try to assist.

Adv C Johnson (ANC) asked why the voluntary walk-offs were happening and what was being done to prevent them.

Imam Solomon noted that the witnesses would be from diverse cultural and social backgrounds, and this made it important for the Unit to take cognisance of their special circumstances. He asked if the walk-offs had arisen as a of the difficulties in culture.

Mr Adam responded that around 80% of witnesses related to protection under section 204. Some had come into the programme but had changed their mind after giving statements, and disappeared. Some of the walk offs result individuals being traumatised by and not able to cope with removal from all support services. He agreed that there were diversity and cultural issues but every attempt was made to try to keep the witnesses in the programme. Wi the witnesses failed to keep to the terms of the programme, the appropriate steps were taken.

Adv Johnson asked if support was being given to TRC victims and families in going though the prosecutions.

Mr Adam replied that various NGOs were assisting with support to families.

Adv Johnson asked for what was happening in Rwanda.

Adv Ackermann replied that he had written an opinion on the matter and had expressed the view that it was not possible to prosecute in South Africa.

Imam Solomon noted that the achievements listed included cooperation to Netherlands, Germany and United Kingdom. He asked for specifics of what assistance was given.

Dr Ramaite said that South Africa had been instrumental in drafting guidelines, and stated that Europol relied on South Africa to assist in Africa in terms of legislation, operational models and training standards. South Africa was developing the PCLU to keep pace with the metamorphosis of organised crime, and would continuously monitor this. It had given support to Kenya, Mozambique, Angola and Namibia, and would be addressing them on how to e establish a unit.

The Chairperson asked that all investigations pending must be concluded expeditiously, which would be in the best interests of all concerned.

Directorate of Special Operations (DSO / Scorpions): Briefing

dvocate Leonard McCarthy, Head, Scorpions, stated that this had been a year of averages, balance and learning. The DSO was intended to target criminals who organised and profited from crime. It used a multi disciplinary an uccess driven approach to deal with cases more effectively. The strategy was to mark down the impact of, and to drive up the disruptive effect on organised crime.

The key activities and impacts were tabled. Adv McCarthy noted that the conviction rate was above 80%. The value of assets placed under restraint was R550 million, and there were 41 cases, from which R64 million was destin CARA. DSO had directed R50 million to the victims of organised crime. Drugs valued at over R1 billion had been seized over the last year. A comparative performance analysis was given over the last three years. Although the n of investigations had dropped, the conviction rate had been firm and assets under restraint had risen. 20% of cases finalised involved plea-bargaining, about 20% were medium-rated and the rest were massive cases. That must borne in mind when measuring the statistics. The Fidentia case should not have been allowed to happen; it showed a lack of checks and balances in the system. The Schaik and Yengeni appeals were major successes as they endorsed the strategy of the investigations.

In relation to the travel fraud, 37 of the 40 Members of Parliament had pleaded guilty. One charge had been withdrawn for humanitarian reasons and the other two were facing charges in the Regional Court. Adv McCarthy stated there had been rumours of involvement of 250 people, but the lists referred to only outlined the transactions used as part of the bigger investigations and did not pinpoint the transactions. There had been complaints by some tha Executive had been given a clean bill of health. Thorough investigations had been done and insufficient evidence was available to warrant prosecutions. He asked that the prosecutors now be given a proper chance to do their w

Adv McCarthy detailed some of the matters currently being handled by DSO. Mr Rautenbach was a fugitive of justice. The DSO was ready to prosecute on numerous charges and had applied for his extradition. The NDLC invest had shown how an intricate web of corruption involving seven countries could be created. This matter was still to be decided. In the Shaik cases none of the benefits or loans were reflected in local or foreign tax or disclosure rec and this was important as around the world prosecuting authorities were focusing more on disclosure records. In the Yield case, the prosecutors had been asked to write a report on how they had worked with mutual legal assista and to detail the excellent cooperation. The drug cases illustrated that the major drug dealers were outside South Africa, and that drug trafficking was the biggest organised crime threat in South Africa and around the world. Cybe was another huge threat, as evidenced by the recent scam targeting bank customers, which resulted in around 25% of all bank clients being persuaded to give their details to an international syndicate. The challenge for law enforcement was to use technology to trace the physical location of criminals. The DSO had managed to give measurable results. Details were also given in brief of the Kebble matter.

Adv McCarthy noted that several national and international partnerships and agreements were also in place. It was impossible for DSO to make impact unless it had sound relations with international agencies. The internal busin was tabled. There were currently 475 staff, of which 121 were unfunded until last year. 142 positions were created on 20 November, and the challenge would now lie in filling those positions. 825 positions should be filled by the e the financial year. Details were given of the gender and racial breakdown.

A dedicated administration for DSO was set up on 26 October 2006. Treasury had approved a separate bank account and estimate of national expenditure for DSO funds. The main spending drivers were compensation, goods a services and capital assets. 30% of the goods and services budget was spent on professional services, which basically involved forensic companies and lawyers. This was rather high but necessary in light of the capacity constra 40 staff had been lost during the course of the last year, and 36 new staff appointed, and the turnover of 8% was well within the norms.

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Challenges included the need to increase effectiveness in investigating and prosecuting organised crime the need to work on creating jurisprudence on the Prevention of Organised Crime Act, and also to create law around the Monitoring Act Not enough had yet been done to maximise international assistance A major challenge would lie in matching job demand with expertise Some of the solutions proposed included standardisation of best practice a writing a practice manual DSO would like to set up its own internal Counsel capacity Agent evidence drug smuggling racketeering and trials had been successfully worked on in the last year DSO hoped to be able to set resea based impact measurement indicators Adv McCarthy noted that the decision by Cabinet was in the process of implementation and he hoped that there would be a single line of command and the jurisdictional sanctity of Chapte should be retained The new posts would be filled and DSO would be establishing a training academy

Discussion
Mr Joubert asked out why DSO had chosen the name Red Cross for the drug-finding operation

Adv McCarthy replied that there was no special significance to the name Red Cross and investigators would often deliberately choose a name that was totally unrelated to the subject matter to preserve confidentiality This partic name came about as DSO wanted the people involved in drug trafficking to feel the effects of their actions

Adv Johnson referred to the newly created 146 posts and asked if these posts added to the civil litigation establishment

Mr Adnan Mopp Regional Head DSO replied that the civil litigation would be accommodated under the 142 posts and also under the 158 posts especially earmarked for this purpose

Mr Joubert was curious as to how Mr Kebble had operated and achieved what he had done before the investigations

Mr Mopp replied that the trial results were still awaited He noted that so far three main points could thus far be isolated the use of false brokerage notes how boardroom corruption could be constructed and lastly the lack of due diligence in certain areas of the corporate world in South Africa He added that a workshop audit had revealed tremendous vigour and positive attitude in the DSO which was clearly maturing well

Imam Solomon asked the DSO to further explain the meaning of the single line of jurisdiction

Mr Mopp replied that he did not want to pre-empt the position but presently the operational decisions were taken under one line of command This was a model that the world was adopting so the view in the DSO was supporting model

Imam Solomon noted that the mandate of the DSO appeared to target the high profile cases He did not agree with this approach since this implied that the problems of people in the communities were being marginalised He sa there were significant problems with gangs in townships

The Chairperson agreed that gangs in townships were not receiving sufficient profile or attention She was of the opinion that these should be prioritised as this would enable politicians to discuss the issues in an effort to better li all people Most importantly this would show that the institutions created by government were not only for high profile issues but also for those in the street

Adv McCarthy replied that DSO realised that in the Western Cape it had not yet come to grips with the management of organized crime but it had established and was trying to work in clusters that complemented the work being DSO did acknowledge that it had neglected a certain segment of the market and would address the gap He further said that the point Mr Solomon had raised was taken to heart This was work in progress and the next time DSC appeared before the Committee it should have some progress regarding the lower level offences

Imam Solomon asked if DSO policy towards victims of crimes matched the SIU policy of funding organisations that gave victim support

Mr Mopp replied that DSO did not fund organisations but would instead get an order for compensation under section 300 of the Criminal Procedure Act, and the money went to the victims

The Chairperson remarked that she was aware that there was an appeal pending in the LeisureNet issue and asked for details

Adv McCarthy replied that this matter was not finalised He could confirm that application had been made for leave to appeal which had been granted and the appeal would proceed on both conviction and sentence However th judge in the court a quo was still charged with an enquiry from the original matter The DSO would consider its position and was currently preparing on questions of law which it would request the Supreme Court to resolve Inclu money laundering charges as well as the sentencing issues

Mr Mopp added that the legal and operational grounds indicated that DSO would be perfectly entitled to call for an increase in the sentence

The Chairperson remarked that she was well aware of the comments about the Travelgate incident but expressed her disquiet at the insinuations that those high up in the ANC echelons were immune to prosecution and would n pursued She asked DSO whether the Directorate or any of the prosecutors were facing any pressure She remarked that this was an ideal forum to air any grievances or note anything untoward as the Committee would not prot party if DSO was unable to prosecute it would greatly undermine the integrity of the DSO which it had painstakingly worked to achieve

Adv McCarthy replied it would be useful to have an independent observer to write up how DSO functioned He said that the idea that he could influence all 500 people in the department was entirely ludicrous There had been no pressure applied He had allocated some of the best people on the Travelgate case and he himself had applied extra effort to it because of its great sensitivity as it involved members of the executive He added that he had appl twenty years of legal experience and had himself interviewed some of executive members in terms of the Section 28 of the NPA Act Parliament at first was squeamish but in the end was co-operative to the extent that he had b informed that in most countries in Europe this type of matter would never have been allowed to proceed to this advanced stage The tenacious personalities of the team the time and money invested meant that NPA would not s short of prosecuting a high level person simply because pressure had been exerted on the NPA Anyone making insinuations that there was further evidence or that certain people were being protected must bring this evidence forward The matter would proceed in court and he hoped that no delaying tactics would be used in the trial process

Adv Pikoli added that soon after his own appointment he realised the importance of the integrity of the DSO and how even small media stories could attack this integrity One story implied that Adv Pikoli was discussing the Jaco matter with the President and had been seen in whispered consultation with him On that very day Adv Pikoli was in fact en route to Chile The NPA would not be influenced by anyone and any members irrespective of their stat the ruling party or any party would be dealt with according to the law

The Chairperson remarked that the Committee's function was to hold the NPA accountable and where information was not satisfactory the Committee would levy criticism with a view to building and guiding NPA All Members ha keen interest in the issues being discussed The Committee wished it could interface with the units more

Adv Pikoli asked about the progress of the Criminal Laws (Sexual Offences) Amendment Bill which was of particular importance since the current definition of rape was problematic

The Chairperson replied that the Committee had prioritised this Bill but there had been a problem in relation to tagging which was currently under review The South African Law Reform Commission was working on legalising prostitution and there was evidence that there was a direct link between trafficking and prostitution She was not impressed by the substantial funding to organisations who should propose how to legalise sex workers without ma link already to the trafficking issue The models applied by other countries in legalizing sex workers could prove extremely useful tools and this would allow the funding to be used for other related issues

Adv Pikoli asked on the progress of the Child Justice Bill

The Chairperson replied that the problem with this Bill lay in implementation There was lack of capacity in terms of the social workers needed The Department of Justice did not have a problem but the Departments of Correctio Services and Social Development were facing resource problems She emphasised that it was not desirable to have a piece of legislation passed if it could not be implemented practically

The meeting was adjourned

LC
NGT

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SECRET

THIS DOCUMENT IS CLASSIFIED SECRET BECAUSE IT CONTAINS MATERIAL THAT MAY FORM PART OF CURRENT OR FUTURE CRIMINAL PROCEEDINGS

SUBMISSIONS OF GOVERNMENT TO THE ENQUIRY INTO THE FITNESS OF ADVOCATE VUSUMZI PIKOLI TO HOLD THE OFFICE OF NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

INTRODUCTION AND BACKGROUND

1. The President appointed Advocate Vusumzi Patrick Pikoli as National Director for Public Prosecutions on 21 January 2005. The appointment was with effect from 1 February 2005.

2. On 23 September 2007, the President, acting in terms of the provisions of section 12(6) of the National Prosecuting Authority Act (the NPA Act), suspended him from office, pending an enquiry into his fitness to hold office. Advocate Pikoli was advised of his suspension in a letter dated 23 September 2007, annexed hereto marked "A".

3. The result of an enquiry envisaged in section 12(6) of the NPA Act will assist the President in deciding whether to remove Advocate Pikoli from office or not.

4. On 3 October 2007 the President established the enquiry into the fitness of the National Director to hold office and appointed Dr Frene Ginwala to

conduct the enquiry. On the same day, the President adopted and published the terms of reference for the enquiry, annexed hereto marked "B".

5. In her media statement published on 4 October 2007, Dr Frene Ginwala invited the Government to make submissions to her detailing "the circumstances and events leading up to the suspension of Advocate Pikoli". Advocate Pikoli was also invited to make submissions to the Enquiry.

6. These submissions by the Government deal with the issues set out in the terms of reference. The structure of the submissions is as follows:

6.1 **Section A** : A discussion of the Constitutional and legal framework

6.2 **Section B** : The place of the prosecuting authority in our constitutional dispensation

6.3 **Section C** : The fitness of Advocate Pikoli to hold the office of National Director of Public Prosecutions.

SECTION A.

THE CONSTITUTIONAL AND LEGAL FRAMEWORK

7. In order to place these submissions in their appropriate context, it is necessary to have regard to the Constitutional and legislative framework applicable to this matter.

The Judicial Authority

8. Chapter 8 of the Constitution deals with the courts and the administration of justice. The Constitution vests the judicial authority of the Republic in the courts.

9. Section 165 of the Constitution provides as follows:

"(1)The judicial authority of the Republic is vested in the courts.
(2)The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) ...".

10 Section 166 of the Constitution proceeds to define the courts as follows;

"*The Courts are*
(a)the Constitutional Court;
(b)the Supreme Court of Appeal;
(c)the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
(d)the Magistrates' Courts; and
(e)any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts".

Prosecuting Authority

11. Section 179 of the Constitution of the Republic of South Africa provides as follows:

"Prosecuting Authority"

(1)There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2)The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3)National legislation must ensure that the Directors of Public Prosecutions–

(a)are appropriately qualified; and

(b)are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4)National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

(5)The National Director of Public Prosecutions –

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the

Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i)The accused person.

(ii) The complainant

(iii) Any other person or party whom the National Director considers to be relevant.

(6)The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7)All other matters concerning the prosecuting authority must be determined by national legislation".

Police Service

12. Section 199 of the Constitution provides for the establishment of a **single police service** in the Republic.

13. The objects of the police service are set out in the Constitution. These are "*to prevent, combat and* ***investigate*** *crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law*".

NATIONAL LEGISLATION

THE NATIONAL PROSECUTING AUTHORITY ACT, 32 OF 1998

14. Section 179(7) of the Constitution provides that all other matters concerning the prosecuting authority must be determined by national legislation. The said national legislation is the National Prosecuting Authority Act, 32 of 1998 (the NPA Act), as amended.

15. Section 10 of the NPA Act provides that the President must, in accordance with section 179 of the Constitution, appoint the National Director.

16. The term of office of the National Director is provided for in section 12, which provides, in part, that:

> *"(5) The National Director or a Deputy National Director shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).*
>
> *(6)(a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-*
>
> *(i) for misconduct*
>
> *(ii)...*
>
> *(iii) on account of incapacity to carry out his or her duties of office efficiently; or*
>
> *(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.*
>
> *(b)..."*

17. In terms of section 20 of the NPA Act, the power, to :

(a)"institute and conduct criminal proceedings on behalf of the State;

(b)carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c)discontinue criminal proceedings,

vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic".

18. Section 21 confirms the National Director's Constitutional powers to set prosecution policy with the concurrence of the Minister.

19. Section 31 of the NPA Act establishes a Ministerial Coordinating Committee. This section provides as follows:

"There is hereby established a committee, to be known as the Ministerial Coordinating Committee (hereinafter referred to as the Committee), which may determine-

(a) ...

(b) procedures to coordinate the activities of the Directorate of Special Operations and other relevant government institutions, including procedures for-

(i) the communication and transfer of information regarding matters falling within the operational

scope of the Directorate of Special Operations and such institutions; and

(ii) the transfer of investigations to or from the Directorate of Special Operations and such institutions.

(3) The Committee comprises-

(a) The Cabinet member responsible for-

(i) the administration of justice, who is the Chairperson thereof;

(ii) correctional services;

(iii) defence;

(iv) intelligence services;

(v) safety and security; and

(b) any other Cabinet member designated from time to time by the President.

SECTION B

THE PLACE OF THE PROSECUTING AUTHORITY IN OUR CONSTITUTIONAL DISPENSATION

20. This section of our submission addresses:

20.1 The Constitutional differences between the judicial and prosecuting authority.

20.2 The Constitutional and legal authority of and the relationship between the Minister and the National Prosecuting Authority as well as the Directorate of Special Operations.

The Constitutional differences between the judicial and prosecuting authority

21. The Constitution provides that the courts are "*independent and subject only to the Constitution and the law*".

22. There is no similar provision in the Constitution that provides that the prosecuting authority shall be "*independent and subject only to the Constitution and the law*".

23. Quite distinct from the provisions relating to the judiciary, the Constitution places the final responsibility over the prosecuting authority in the hands of the Cabinet member responsible for the administration of justice.

24. The Constitution enjoins the Courts to **apply** the Constitution and the law impartially and without fear, favour or prejudice, while the provisions relating to the prosecuting authority calls for national legislation to ensure that the prosecuting authority **exercises its functions** without fear, favour or prejudice.

25. The Constitution places the responsibility of the appointment of the head of the prosecuting authority with the President, as head of the national executive, as distinct from the procedure set out in respect of the appointment of judges.

26. On the practical side, the National Director is appointed by the President without undergoing any competitive process, subject only to the qualification requirements set out in section 9 of the NPA Act, namely that he or she must possess legal qualifications that would entitle him or her to practice in all the courts in the Republic, be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, and be a South African citizen.

27. The post of National Director is not advertised and no interviews are conducted before the appointment is made.

28. Prosecution policy cannot be determined without the concurrence of the Cabinet member responsible for the administration of justice. The prosecuting authority cannot, therefore, develop prosecution policy without the participation of Cabinet.

29. The Constitution provides also that the prosecuting authority has the power to institute criminal proceedings **on behalf of the state**; not on its own behalf.

30. It is precisely because the prosecuting authority acts on behalf of the state, that the Constitution does not extend the notions of independence and impartiality to it.

31. In providing that the final authority over the prosecuting authority lies with a Cabinet member, the Constitution places the prosecuting authority under the authority of the national executive.

The Constitutional and legislative authority of and the relationship between the Minister and the National Director

32. The Minister's exercise of final responsibility over the prosecuting authority is constitutionally entrenched in section 179(6). This oversight is reiterated in the governing legislation, the NPA Act. Section 33(1) confirms that the Minister shall for purposes of any law concerning the prosecuting authority, including the Constitution, exercise final responsibility over the authority.

33. The starting point is to determine what the Constitution envisaged by bestowing the power to exercise "final responsibility" on the Minister.

34. The courts have had occasion to consider the phrase 'responsibility' and, upon reference to the Oxford English Dictionary, concluded that an ordinary meaning of 'responsible' is 'answerable; accountable (to another for something); liable to be called to account' (Van Achterberg v Walters 1950 (3) SA 734 (T)). It is submitted that on the basis of the foregoing definition final responsibility in respect of the prosecuting authority must be taken to mean finally answerable and/or finally accountable and/or finally liable to be called upon to account for the performance of the

powers, duties and functions bestowed upon the prosecuting authority by the Constitution and the Act.

35. The Supreme Court of Namibia also had occasion to deal with issues relating to the concept of *"final responsibility"* as it relates to prosecution in the context of the Namibian Constitution. (Ex Parte Attorney-General, Namibia: In re: the Constitutional Relationship between the Attorney-General and the Prosecutor-general 1995(8) BCLR 1070 (NmS)). In deciding that matter, the court concluded that final responsibility refers to not only financial responsibility, but also the duty to account to the President, the Executive and the Legislature.

36. Both section 179(1) of the Constitution and section 33(1) of the NPA Act must be interpreted to place a duty on the National Director to account to the Minister. This means that the Minister must be able to exercise the ultimate responsibility for the prosecuting authority, including her duty to account to the President, the Executive and the Legislature for the performance of the powers, duties and functions by that authority.

37. The Constitution vests the executive authority of the Republic in the President. The President exercises this authority together with the other members of the Cabinet.

38. The Minister's duty towards the President in this context, as head of state and head of the national executive, is to ensure that the President is advised of all aspects of the administration of justice in the Republic. These include, without limiting the generality of the foregoing, the decisions of the National Director regarding the pursuit or discontinuation of investigations as well as the status of investigations conducted by the National Director. This duty is impacted upon by how the National Director reports to the Minister. It is submitted that any manner of reporting that compromises the Minister's ability to discharge her

obligations is in contravention of the provisions of both the Constitution and the Act.

39. It was always expected that the reports will be presented timeously and in advance of any major action to be executed by the NPA and with such particularity as would be necessary to enable the Minister to exercise her final responsibility in terms of the Constitution and the NPA Act. In addition, it would enable her to advise her Cabinet colleagues, especially those within the Justice Crime Prevention and Security cluster, should it be necessary. In most cases, it would be necessary for the Minister to advise the President. The reports therefore needed to be substantive.

40. The conceptual differences between the National Director and the Minister on the role of the NPA largely centred around the nature and extent of the independence of the NPA. This had a profound impact on how each viewed their respective responsibilities and each other's mandates. The view of the National Director was clearly that the NPA is an independent body in terms of the Constitution and therefore should function independent of government, to the extent of not being obliged to report to the Minister. The Minister, on the other hand, was and still is of the view that the Constitution does not provide for the NPA's independence as interpreted by the National Director. Rather, the NPA Act vests the power to institute and conduct criminal proceedings in the prosecuting authority; acting on behalf of the State.

41. The Constitution does not provide for the independence of the prosecuting authority as contended by the National Director. There is a reason for this. Prosecuting policies form a crucial part of any crime prevention strategy and any democratically elected government must have a say in the formulation of the prosecution policy. If the prosecuting authority was not accountable to the Executive, the Minister of Justice

and Constitutional Development ("the Minister"), being the Cabinet member responsible for the administration of justice and, consequently, exercising final responsibility over the prosecuting authority, would have no say in the formulation of the prosecution policy. This however is in stark contrast with the provisions of section 179(5) of the Constitution which requires the Minister's concurrence in the formulation of policy.

42. It is submitted that such a Constitutional requirement negates any view that it was, at any stage, envisaged that the NPA would be independent to the extent contended by the National Director. That is why the Constitution vests final responsibility over the prosecuting authority with the Minister.

43. The NPA Act has to be read in line with the Constitution.

44. The responsibility of the Minister to exercise final responsibility over the NPA is a constitutional responsibility. This entails the involvement in the formulation of policy and oversight over the sound administration of the NPA. Indeed in exercising this final responsibility, the Minister has ensured that the NPA has in place a Prosecuting Policy that informs how the National Director should lead the NPA in all prosecutions. The Prosecuting Policy is attached, For ease of reference, marked "C'

45. With regard to the sound administration as well as the financial management within the NPA, the Minister exercises final responsibility over the NPA as the Executing Authority (EA) in terms of the laws governing the Public Service.

46. In this regard, the Director General (DG) of the Department of Justice and Constitutional Development, as the Accounting Officer for the

Department of Justice and Constitutional Development and of the NPA exercises powers relating to the financial management of the NPA in terms of the PFMA.

47. To the extent that some of the delegated powers are currently delegated to the CEO of the NPA, the National Director, as the person responsible for the employees of the NPA, bears the responsibility to ensure that Public Service Regulations and the Public Finance Management Act ("the PFMA") are complied with by the NPA. The necessary reporting on these matters would need to be done in conjunction with the DG.

48. The National Director refused and/or neglected to comply with these obligations placed upon him. He has cited his independence as a basis for such refusal. He has failed to properly account to the DG, as accounting officer for the NPA, for the financial and administrative decisions that he took. The DG in turn, has been unable to account and report to the Minister who is the Executing Authority on these issues.

49. Consequently, the difference in the understanding of the roles, powers and functions of the National Director, the NPA and the DSO has created serious difficulties for the Minister as it has impeded her ability to exercise final responsibility over the NPA as required by the Constitution.

50. This in turn impacted on the discharge of her duty to her colleagues in the MCC and the JCPS Cluster as the collective responsible for the justice system. It further extended to the President of the Republic in that as a Member of Cabinet, The Minister has a responsibility to advise the President on all issues relating to the administration of Justice.

51. In order to carry out her responsibilities she requires all the necessary information to enable her to be sufficiently informed of the work being done by the NPA. This includes investigations of any case. The rationale for this is logical. There are consequences arising from the work of the NPA.

52. In some cases, it does become necessary for government to take into account the impact of the NPA work on society, national security and international relations, amongst others. Therefore, contrary to the views held by the National Director, requiring information on any aspect of the work of the NPA, does not amount to interference, but is a necessary element for the exercise of the Minister's final responsibility over the NPA as required by the Constitution and the Act.

THE PLACE OF AND RATIONALE FOR THE CREATION OF THE DIRECTORATE OF SPECIAL OPERATIONS.

53. The Constitution states that there is a single prosecuting authority in the Republic and sets out the component parts of such authority, being a National Director of Public Prosecutions, Directors of Public Prosecutions and prosecutors.

54. The NPA Act makes provision for the establishment of Investigating Directorates, with a limited investigative capacity. Of relevance to this submission is the Directorate for Special Operations ('the DSO), established by section 7 of the NPA Act. Section 7 provides as follows:

"(1) (a) There is hereby established in the Office of the National Director an Investigating Directorate, to be known as the Directorate of Special Operations, with the aim to-

(i) investigate, and to carry out any functions incidental to

investigations;

(ii) gather, keep and analyse information; and

(iii) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings, relating to-

(aa) offences or any criminal or unlawful activities committed in an organised fashion; or

(bb) such other offences or categories of offences as determined by the President by proclamation in the Gazette.

55. The rationale for the establishment of the DSO was to respond to challenges faced by the criminal justice system in the fight against national priority crimes. These challenges included the existence of corruption among certain officers in law enforcement agencies; the callous murder of police officers on duty; unsatisfactory standards of investigation which resulted in unacceptably low rates of conviction; and the general lack of an efficient co-ordinated attack on organised and syndicated crime by the investigation, intelligence and prosecution authorities.

56. The mandate of the DSO, as stated by, among others the former Minister of Justice and Constitutional Development, Minister Maduna, in a speech to parliament on 11 November 1999, is:

'... To complement and, in some respects, supplement the efforts of existing law enforcement agencies in fighting national priority crimes'.

57. In the above context, the government established the Directorate of Special Operations with a view to enhancing and sharpening its arsenal on organised crime, particularly, in part, due to the innovative manner in which this entity was going to function. Beyond the imperative of

coordinating with the other agencies of the state such as the police and intelligence services, the DSO adopted a prosecution led and intelligence driven approach to investigating, prosecuting and combating organised crime.

58. The DSO was not given an intelligence gathering mandate. It is therefore a functional imperative that it cooperates and works together with other law enforcement agencies that have such a mandate.

THE NATURE OF THE RELATIONSHIP BETWEEN NATIONAL DIRECTOR AND THE GOVERNMENT

59. In line with the Constitutional provision that places the final responsibility over the prosecuting authority with the Minister, the NPA Act provides in part, in section 33, that in order to enable the Minister to exercise this final responsibility, the National Director shall, at the request of the Minister, furnish her with information or a report with regard to "any case, matter or subject" dealt with by the National Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions.

60. The Minister acknowledges that the power to institute criminal proceedings vests with the prosecuting authority; which authority exercises such power, on behalf of the state, without fear, favour or prejudice.

61. Accordingly, the Minister, and indeed the Government, does not interfere with the National Director's decisions to investigate and prosecute any person.

62. Where other decisions taken by the National Director may threaten the national security of the Republic, the Minister has a Constitutional and legal obligation to raise such concerns with the National Director.

63. It must be so that, while the Minister can request information from the National Director, the accountability requirement also places a duty on the National Director to inform the Minister of any significant developments in his or her office. The Minister would otherwise not know what matters the National Director is investigating or intends to investigate.

64. In particular, the accountability requirement must include a duty to inform the Minister of any action to be initiated that may impact on other organs of state; or on the powers of the Minister or of the President.

65. The prosecution policy provides that the prosecuting authority must at all times act in the public interest.

66. In order to determine what would be in the public interest, the National Director must have regard to, inter alia, information that is held by other State institutions. For example, the prosecuting authority would not have access to detailed information about the extent and occurrence of particular types of crimes. Also, the authority would not know about issues such as the movement of members of crime syndicates globally as well as the significance thereof. Such information would invariably be in the hands of the South African intelligence services.

67. The intelligence services authorised by law are the National Intelligence Agency, the South African Secret Service, the SAPS Crime Intelligence Service, the intelligence division of the SANDF (Military Intelligence Service) and Financial Intelligence Centre.

68. Accordingly, in recognition of the need for the prosecuting authority to access detailed information held by State agencies, the National Director attends meetings of the Directors General of the Justice and Crime Prevention cluster. Further, he or she would, where necessary, participate in meetings of the Directors General of the National Security Council.

SECTION C

THE FITNESS OF ADVOCATE PIKOLI TO HOLD THE OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

69. Our submissions in this section address:

69.1 Whether Advocate Pikoli, in exercising his discretion to prosecute offenders, had sufficient regard to the nature and extent of the threat posed by organised crime to the national security of the Republic.

69.2 Whether Advocate Pikoli, in taking decisions to grant immunity from prosecution or to negotiate and enter into plea bargains with persons who are allegedly involved in illegal activities which constitute organised crime, took due regard to the public and national security interests of the Republic, as contemplated in the Constitution, as well as prosecution policy.

69.3 Whether the relationship between Advocate Pikoli and the Minister has irretrievably broken down, thus seriously affecting the effective

administration of justice as generally understood and as specified in law and government policy.

The incidence of organised crime

70. Since the advent of democracy and freedom, South Africa increasingly became exposed to the activities and threats posed by organised criminal syndicates, including trans-national syndicates.

71. Over the years, the activities of these syndicates spanned areas such as: trafficking in illegal drugs and narcotics; the smuggling of illegal and counterfeit goods; the plundering of marine resources; the trafficking in stolen vehicles; the illegal smuggling of persons; trafficking in stolen and illegal firearms and ammunition; the execution of organised aggravated robberies, commonly referred to as cash in-transit heists; white collar crime and corruption; the fraudulent issuing of authentic national documents such as identity documents and passports; the illegal mining and trade in precious metals; stock theft; and crimes against the state.

72. As the spectrum of organised crime suggests, the syndicates involved have the potential to blunt economic growth; to materially undermine the constitutional order of the country, national security and national interests; to corrupt and erode the integrity and legitimacy of the agencies and functionaries of the state; to undermine service delivery; and to promote social disorder.

73. Over the years, the fight against organised crime has been a priority for government, and this required sustained and effective coordination between the relevant state agencies that have the respective legal mandates to deal with this phenomenon.

74. Among others, this would refer to the South African Police Service; the intelligence agencies: the South African Revenue Service; the Department of Home Affairs; the South African National Defence Force, particularly with respect to border control; the National Prosecuting Authority; and the Financial Intelligence Centre. Cooperation with other departments of the state is also important, for example, the Department of Public Service and Administration, the Public Service Commission and the Auditor General.

75. Coordination goes beyond the sharing of information and executing joint operations. It also refers to integrated priority setting mechanisms; coordinated liaison with foreign intelligence and law enforcement authorities; and pursuing integrated outcomes.

Plea bargains and immunity from prosecution and considerations of public and national interest

76. The Prosecution Policy provides:

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

2. *Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution."*

77. In terms of this policy, decisions whether to prosecute or not should not be taken lightly. Due regard should be had to the consequences of such a decision, as well as the need to maintain the confidence of the community in the prosecution system. This is important in order to ensure that public confidence in the criminal justice system is sustained.

78. There are a number of instances where decisions to prosecute or not as well as plea bargains entered into reflect a failure to take due consideration of prosecution policy, in particular the public interest. Examples of such instances are set out below.

79. The first matter relates to the prosecution of a number of alleged mercenaries in respect of the Equatorial Guinea *coup détat.*

80. During 2006, some of the persons who were arrested and tried in Zimbabwe in relation to the attempted coup in Equatorial Guinea were charged in South Africa under the provisions of the Regulation of Foreign Military Assistance Act.

81. These persons challenged the charges brought against them by instituting action against the President and a number of Government Departments. While this matter was before the courts, the NPA negotiated plea bargains with some suspects in that matter, despite opposition thereto by the South African Police Service.

82. The SAPS recommended as follows on a proposed plea-bargain with the accused, to the NPA: "...(a) plea bargain should not be easily considered in view of the political significance of the case, international considerations which may include that South Africa may be perceived to be "soft" on the mercenary issue, whilst it was being planned from South Africa, and the

pending litigation between the South African Government and the alleged mercenaries in the EG and Harare, who are now all represented by Griebenouw Attorneys. Dr Pretorius indicated that there are off-the record negotiations with Attorney Griebenouw regarding plea and sentence agreements in respect of the alleged mercenaries both in EG and Harare. These negotiations are in our view not desirable in view of the pending litigation between the Government and the alleged mercenaries in Harare. Regarding the proposed plea and sentence agreement with Crause Steyl, we are of the opinion that a trial would be more appropriate in the circumstances.".

83. The National Prosecuting Authority, however, went ahead and Harry Carlse, Lourens Horn and Crause Steyl were fined in total an amount of R 350 000 during 2007 in the Regional Court, for a crime which is regarded as an international crime tantamount to terrorism and condemned by the United Nations and the African Union. During February 2007, the people referred to in paragraph 82 above were used as State witnesses to testify in a prosecution against some of the other alleged mercenaries. This prosecution resulted in an acquittal of the accused, because the State witnesses testified that the Government of the Republic of South Africa was aware of and sanctioned the coup. The Court found that the State witnesses confirmed the version of the accused in this regard. The Regional Court Magistrate Peet Johnson remarked that: **"With this in mind, the court finds it extremely eerie that a decision was made to charge them".**

84. It is unthinkable that the Prosecution would not have been aware of what their witnesses would testify and the overall impression is that the prosecution served as a platform to question the Government's integrity, at best by implying that it knew beforehand of the coup, or at

worst that it sanctioned the coup. This prosecution, for which there was no real prospect of success, only served one purpose, namely to embarrass Government to the detriment of its national and international interests.

85. The message that it potentially sends out internationally is that South Africa will not take strong action against coup plotters intending to violently overthrow a foreign country.

86. The other example relates to the plea bargain arrangements negotiated by the NPA with the alleged killers of a prominent businessman, Mr Kebble.

87. In respect of the Kebble murder, the SAPS received valuable information that one of the suspects, namely Michael Schultz, was willing to talk to the police. His Attorney was identified and contacted by Divisional Commissioner de Beer. Arrangements were made that the Attorney would bring his client in the following day for an interview with the SAPS. Immediately thereafter Divisional Commissioner de Beer was contacted by the head of the DSO, Adv. McCarthy, whereafter a meeting was arranged between the police and the DSO. During the meeting Divisional Commissioner de Beer indicated that SAPS was in possession of valuable information that could solve the murder. Advocate Mc Carthy indicated that the DSO had progressed with the investigation and demanded that the SAPS docket be handed over to the DSO. Divisional Commissioner de Beer refused and requested the DSO to turn over the information to the SAPS, who had the mandate to investigate the matter. No consensus could be reached in this regard. Later that same evening Divisional Commissioner de Beer met with the Attorney and he was informed by the Attorney that his clients were

state witneses in the matter concerning the shooting of the late Brett Kebble and that as such they have filed statements with the Directorate of Special Operations. The Attorney's letter is attached hereto marked "D".

88. This was later confirmed in writing to the SAPS. The suspects were directly involved in the murder.

89. The other plea bargain case relates to a paedophile who molested a young boy in Alexander township. The manner in which the matter was dealt with resulted in him pleading guilty to a lesser offence and getting a fine and a suspended sentence. He immediately left the country and returned to Switzerland. Again in this case a plea bargain process was utilised not to obtain justice and ensure an efficient prosecution process, but to assist an offender "get off" lightly for a serious offence against a boy child.

90. Whilst the entering into and concluding of pleas bargain is an acceptable tool in criminal prosecutions, these tools are supposed to be used to aid the criminal prosecution process. The overall outcome to be achieved is the strengthening of the criminal justice system. Therefore, when pleas bargain are used as a mechanism to escape prosecution by simply providing information on other alleged lesser crimes, they begin to undermine law enforcement. The undermining of the process does not occur when the matter is before a judge or a magistrate, it begins when the prosecuting authority concerned agrees to negotiate the same. This is so because any discussion and negotiation of a plea bargain requires the suspect to reveal information about other potential suspects. In the eye of the public, such arrangements may, in some cases, have the

effect of undermining the administration of justice, as well as the public`s confidence in the prosecution system.

91. In the cases mentioned above, it is questionable whether the information obtained by the prosecution authority in exchange for another prosecution could not have been obtained by other means, including obtaining the information from the other law enforcement agencies. Using pleas bargain to avoid co-operation with other law enforcement agencies when information may be available, negatively affects the criminal justice system.

NATIONAL SECURITY

(a) Browse Report

92. The Browse report, a document that was compiled by officials of the DSO on the basis of information provided by its (the DSO) sources, outlined various conspiracies by a range of players – serving members of the SANDF ; Heads of State and/or government and the Deputy President of the ANC; to mention a few examples.

93. The National Director, upon receiving and processing the report, did not inform the Minister about its contents and the resultant possible threat to National Security.

94. Whereas the National Director stated that he had first received the report in March 2006, he shared it with the Directors General of SASS and NIA only in July 2006. Contrary to the National Director`s claims that he referred the Browse report to these agencies for verification and because the matters contained therein fall outside the legal mandate of

the DSO, the facts are that he advised the said DGs to establish, together with the DSO, an inter-departmental team to probe the allegations to their logical conclusion. In effect, he suggested that this matter, an intelligence operation, be carried ~~be carried with the~~ participation of the DSO.

95. This is supported by the recommendations at the end of the Browse report that the DSO should be mandated to investigate sedition.

96. The DGs: SASS and NIA, upon reading the report, advised the National Director that the report was false and malicious – this based on other intelligence and information available to their organisations.

97. It later was confirmed that some of the sources who provided the information that made up the Browse report were confirmed information peddlers whose reports almost always weave in some factual events, lies and malicious disinformation that is intended to ferment tension, instability and conflict. These are reports that are typical of STRATCOM type operations.

98. In this instance for example, serving senior officers of the SANDF could have been unjustly prejudiced and diplomatic relations between South Africa and several countries (and Heads of State/government) could have been compromised.

99. The issue, therefore, is that had the National Director informed the Minister and the DGs when he first received the report, the Browse report in its current form would not have existed. As it is, many of the people and governments implicated in the Browse report have had their integrity unduly compromised.

100. Indeed, the National Director ought to have referred the matter to the agencies of the state invested with the legal mandate to investigate such matters as soon as he received the report, in particular because the DSO is not legally mandated to inquire into matters relating to political intelligence.

(b) Malawian Investigation

101. The National Director facilitated that the NPA be involved in a matter affecting one of the countries in the region, Malawi. On or about June 2006 he held a meeting in the NPA offices, which meeting was attended by the NPA represented by the National Director and his delegation and the DG of Justice on the one hand, and the National Prosecutor of Malawi and his Advisor on the other.

102. The meeting related to assistance that the NPA could provide to the National Prosecutor of Malawi regarding an investigation that he was conducting into the alleged plot to assassinate the President of Malawi. The specific assistance required and which was offered by the National Director involved tracing certain identified individuals alleged to be involved in the said plot who had been located in South Africa. When it was mentioned at the meeting that this matter should be investigated by SASS as the relevant agency responsible for foreign intelligence, the National Director advised that the DSO was already involved in the matter assisting the National Prosecutor of Malawi.

103. The approach taken by the National Director was wrong in that the NPA, in particular the DSO, is not mandated to deal with issues of intelligence, including foreign intelligence. The matter ought to have been brought to the attention of the relevant agency immediately upon receipt. The

National Director, with his knowledge of the legal mandates of the intelligence structures was best placed to inform SASS and NIA of the matter but chose to do otherwise with full knowledge that this was not the correct thing to do.

104. The National Director failed to inform the Minister of the Malawi investigation. Further, had the National Director shared the information or referred the matter to both SASS and NIA, he and the Malawi authorities would at the time have been duly informed that such information was baseless.

INSTANCES OF THE BREAKDOWN OF THE RELATIONSHIP WITH THE MINISTER, WHICH ADVERSELY AFFECTS THE ADMINISTRATION OF JUSTICE AND GOVERNMENT POLICY.

The status of the Directorate of Special Prosecutions ("the DSO") and matters relating to the functioning thereof.

Historical context of the DSO re accountability of Minister

105. The rationale for the establishment of the DSO is outlined in Section B above. That rationale shall not be repeated but, to put the issues raised hereunder into context, it is necessary to provide a brief historical background to the framework for the line function and political responsibility regarding the DSO.

106. Historically, the DSO was intended to be a directorate within the office of the National Director, in respect of whom the Minister would have line function and political responsibility; and ultimately account to Parliament.

This was a policy position articulated in the processes preceding the DSO's establishment (as explained by Minister Maduna, in parliament on 11 November 2001). This policy position regarding the DSO's location within the office of the National Director was carried through legislatively by the section establishing it, namely section 7 of the Act. The corollary to that is the duty of the Minister to exercise final responsibility in its respect, as is the case regarding the prosecution authority.

107. As regards the financial accountability framework relating to the DSO, section 36 of the NPA Act provides for the appointment, by the Minister, of the Chief Executive Officer (CEO) of the DSO, who shall also be the accounting officer for the DSO.

108. While section 36 bestows on the accounting officer powers and functions relating to the financial management of the DSO on the CEO, it did not tamper with the Minister's line function and political authority in respect of the DSO. Consequently, the Minister exercises final responsibility envisaged in the Constitution in respect of the DSO in the same manner as she does in respect of the NPA.

The listing of the DSO in terms of the PFMA

109. The National Director submitted a memorandum to the Minister dated 28 March 2006 wherein he made a request for the Minister to approach the Minister of Finance to promote an amendment to the PFMA, 1999 (Act No. 1 of 1999) in terms of which the NPA and the DSO are listed respectively as a Constitutional Institution and a Public Entity.

110. The Minister responded to this memorandum, advising the National Director that the request was not approved and that the request raised a

policy issue which should be considered in the context of the Khampepe Commission recommendations;

111. On August 2006 the National Director submitted another memorandum in which he requested the Minister to promote the listing of the DSO for the same reasons advanced in the memorandum of March 2006. The main difference in this application was that the National Director argued that the DSO has its own accounting framework in terms of the NPA Act. In not approving the request, the Minister responded as follows; " this is a huge policy departure. It must be discussed in Cabinet." The Memorandum is annexed and marked "E".

112. Notwithstanding the attitude of the Minister as indicated above, the NPA reflected in its Annual Report for 2006/7 that a request had been made by the National Director directly to the National Treasury for the separate listing of the NPA and the DSO as, respectively, a Constitutional Institution and a Public Entity. He did not consult the Minister that he would make this direct application. The Minister only became aware of the application on reading the NPA Annual Report for the financial year 2006/07.

113. It is submitted that the conduct of the National Director to apply directly to the Minister of Finance for listing, knowing of the Minister's views on the matter and the procedure that would have to be followed in promoting such a request, amounts to a conscious and total disregard of the Minister's authority. As indicated by the Minister in her response to the memorandum of 7 August, the listing of the NPA and the DSO represents a shift in policy and the Minister's constitutional duty would have been to present proposals regarding the policy changes to Cabinet. In this regard and upon receipt of the Minister's response, the National

Director's responsibility was to prepare the necessary policy proposals for the Minister's consideration and presentation to Cabinet for approval. The National Director instead opted to directly approach the National Treasury for approval.

Post TRC litigation

114. Another area of difference between the Minister and the National Director relates to the post TRC litigation processes. Section 179 (5) of the Constitution requires that the National Director, in concurrence with the Minister responsible for the administration of justice, determine a prosecution policy and issue policy directives.

115. The Prosecution Policy and the Directives were adopted and came into operation on 1 December 2005. Part B of the Directives relates to the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. Section 4 of the Directives provides that that the Priority Crime Litigation Unit ("PCLU") in the office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters. Section 6 thereof stipulates that;

1. *"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:*

   a. *The National Intelligence Agency;*

   b. *The Detective Division of the South African Police Services;*

c. *The Department of Justice and Constitutional Development;*

d. *The Directorate of Special Operations."*

116. Further, section 11 of the Directives provides as follows;

> *"In accordance with section 179(6) of the Constitution, 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".*

117. 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.

118. The National Director complied with this provision of the Directives by establishing a Task Team representative of the departments referred to above. The Task Team was established to evaluate and make recommendations to the DGs and the National Director on all matters relating to the post TRC cases. The appointed officials would deliberate on the matters and report back to their principals, being Directors General of the institutions listed in section 6. The DGs would then advise the National Director and report to the Ministers.

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. This compromised the Task Team's ability properly to consider issues and make informed and appropriate reports to their principals. As a consequence, critical information relating to crimes arising from conflicts of the past was not presented to the Directors General represented in the task team.

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. This despite confirmation by the National Director in the meeting of 12 October 2006, that the committee will make recommendations to him on each case. Minutes of the meeting are annexed and marked "F".

121. The post TRC cases are of great importance to the government and the country, yet this is an area of dispute between the NPA and the other Departments in the JCPS Cluster. The effect of this disagreement is that the issues were not properly discussed within the JCPS Cluster, notwithstanding their profound potential impact on the national security of the Republic, and the objective of national reconciliation as set out in the interim Constitution and TRC Act.

122. An indication of the problem arose when the NPA concluded pleas bargain with Mr Van der Merwe and Others (the Vlok matter). This matter was not discussed in the committee as was intended, prior to the final decision by the National Director. The Minister was also not informed of the pleas bargain until after they were made. Any issue that could have been of assistance to the National Director could not be brought to his attention because a discussion of the matter did not take

place. This failure to discuss the matter resulted in national security issues not being reflected on in relation to the matter.

123. This was so notwithstanding a meeting of the relevant DGs with the National Director at which the DGs pleaded with the National Director that TRC matters be discussed thoroughly with the DGs of the National Security Council before the National Director made his final decision, so that he could be advised by the DGs on other issues that needed to be taken into account, including national security. The National Director had agreed on this approach but failed to ensure that it was honoured by the NPA. The Task Team on TRC cases was formed precisely for this purpose. By wanting to be advised by the DGs, the National Director failed to ensure that the Task Team reported to the DGs, resulting in the DGs not being able to convene a meeting with the National Director to discuss these matters.

124. As indicated in paragraph 123 above, section 11 of the Directives provides that the National Director should inform the Minister of all decisions taken or intended to be taken relating to the prosecution of offences emanating form conflicts of the past. The National Director failed to honour this directive by concluding plea bargaining agreements with Mr Van der Merwe and others before informing the Minister of these agreements. As a result there was no discussion with the Minister on these issues and in particular on the political and policy consequences of such agreements. Once again, the Minister was not able to discharge her final responsibility as required by the Constitution. On the other hand, the Task Team became dysfunctional and has been unable to deliver on its mandate.

Khampepe Commission testimony

125. During the hearings of the Khampepe Commission of Inquiry, the National Director, under oath, made a false submission that the Ministerial Coordinating Committee established in terms of section 31 of the NPA Act never met. This submission was alarming because when he was the Director General of Justice, the National Director had commendably caused the MCC to meet on a number of occasions.

Warrants of arrest, search and seizures without proper reporting to the Minister

126. In 2005, the DSO obtained warrants for searches and seizure at, among other places, the Union Buildings and Tuynhuys. This was done without the Minister being informed. The search and seizure at the President's offices in Pretoria and Cape Town was an extraordinary step.

127. The nature of the operation required that the National Director inform the Minister of his intended action. It was never required of the National Director to give specific details of the date and times when the operation would take place, but it was expected that he would advise the Minister that such action was being contemplated. The Minister first heard of the raid through the Director General in the Presidency and at a time when the raids were in progress.

128. Taking into consideration the fact that the Union Building is a National Key Point and is home to volumes of classified documents, including

Cabinet documents, the Minister had the responsibility of ensuring that the risks pertaining to such raids are minimised.

129. As it turned out, some of the people who conducted the searches were from a private security company and did not have appropriate security clearances. National security, including information security, was compromised, because during the search and seizure they had access to classified documentation.

130. Another matter relates to the National Commissioner. On the 11th September 2007 the National Director met the Minister to brief her on NPA work. As part of this briefing the National Director then mentioned that the NPA had, on 10 September 2007, obtained warrants of arrest for the National Commissioner of the Police Service and for the search and seizure at the various offices of the police service and at his home. No detailed reports were made available to the Minister prior to obtaining the said warrants and once again the Minister's ability to exercise final responsibility was compromised.

131. In addition, when the National Director met the Minister on 11 September 2007, he did not inform the Minister that he was preparing to obtain warrants of search and seizure of documents in this respect three days hence. This omission by the National Director when he clearly had an opportunity to do so, shows a lack of respect and appreciation for the Minister's responsibilities in terms of the Constitution and the NPA Act to exercise final responsibility over the NPA. These warrants for search and seizure were later obtained on the 14 September 2007 without the Minister's knowledge.

132. The Minister wrote to the National Director, seeking full particulars on the matter of the warrants issued against the National Commissioner. The attitude of the National Director was that he does not have to give the Minister full information on this matter.

133. The issue in this matter is that the Commissioner of Police is appointed by the President. Accordingly, the Minister had to advise the President if there were serious allegations against the National Commissioner, so that the President could decide on what steps, if any, to take in respect of the National Commissioner.

134. The information that the National Director provided to the Minister was not sufficient to enable the Minister to advise the President. Before the President can take action, for example by removing the National Commissioner, he needs to be satisfied that there is merit in the allegations made against the Commissioner.

135. The President could not take steps against the National Commissioner merely on the basis of allegations made by a confessed criminal and his associates, who themselves were negotiating immunity agreements with the NPA, and therefore had an interest in the matter. This is the reason why the Minister needed full information on this matter.

136. What compounded the issues was the fact that the National Director not only failed, on request, to provide full details to the Minister about the basis on which such warrants were obtained, but went to the point of suggesting that in requesting information regarding the warrants against the Commissioner of Police, the Minister could be obstructing the administration of justice.

137. While the Minister appreciates and accepts the responsibility of the National Director in respect of the work of the NPA, she was and still is under a duty to take all necessary steps to ensure that the actions of the NPA would not result in a threat to national security. The intended arrest of the National Commissioner required that all necessary steps be taken to ensure that the Ministers responsible for the JCPS were informed so that such measures as are necessary could be taken to ensure that the objectives of the NPA were met, for example to ensure that the police cooperate in the arrest of their head.

138. The National Director was at all times aware of the tension between the police service and the DSO. He was also aware that there was always a need to ensure the proper co-ordination of crime fighting efforts within the law enforcement agencies especially on the sharing of intelligence. The existing tension would clearly have been worsened by any action of one or other agency against the other. Therefore, irrespective of the merits of the need for the warrants obtained, it was imperative for the National Director to seek guidance from and the assistance of the Minister in dealing with this matter. Such assistance would have included measures designed to achieve the very same outcome sought by the National Director without undermining and threatening the security of officials, the public and of the State. The failure by the National Director to consult beforehand, disempowered the Minister from exercising final responsibility over the NPA.

The Agliotti investigation

139. The above approach by the National Director was further extended to his interaction with the Presidency. The National Director, in his report to The Presidency, had advised of the difficulties that NPA was having in

obtaining documents from the SAPS. The Presidency immediately engaged with the National Commissioner of Police and the National Director in order to ensure that the NPA obtained the documents it required. As part of this process, the President personally facilitated a meeting at which this matter was discussed and the NPA was assisted in that they were given sight of the documents required. It was only when the NPA wanted to remove the documents from the possession of the police without indicating the case for which same were relevant that the police declined to transfer the documents. Therefore, whilst the NPA does not have possession of all these documents, they do however have knowledge of what is contained in the relevant files. The access to the documents as facilitated by The Presidency was ensured to enable the NPA to perform its functions. At no stage at the time or soon thereafter did the National Director report to The President that there was a complete breakdown in this process and that he had therefore decided to obtain the warrants referred to. It came as a surprise that without notice or advice and notwithstanding the processes in place to assist the NPA, the National Director nevertheless went ahead and obtained the warrants. In particular:

140. The police had been investigating matters relating to drug trafficking and murder, which suggested the involvement of Mr Glen Agliotti.

141. During November 2006, the head of the DSO, Advocate McCarthy was given access to police files and other material relevant to this investigation, such as video recordings.

142. In the course of November and December 2007, both the National Director and the head of the DSO were, at different times, given access to inspect such police files as they requested.

143. This access to confidential police files, including files relating to informants, was given to the NPA purely to assist them, as explained by the head of the DSO, to prepare a report for the President.

144. On 27 February 2007 the police received a letter from the head of Special National Projects at the DSO, requesting that some of the documents be handed over to the DSO.

145. A disagreement ensued about whether the DSO could remove these documents from the custody of the police, without indicating the purpose to which they would be put. In any event, some of the documents were handed over to the DSO.

146. During or about March 2007 the Minister informed the President that the National Director had advised the Minister that his probe into the activities of Mr Agliotti had extended to an investigation of the National Commissioner.

147. The information given to the President was as follows:

147.1 The people who killed Mr Kebble had been identified by the police, and had subsequently offered to testify against a Mr Nassif; to the effect that he hired them to kill Mr Kebble.

147.2 Mr Nassif, in turn, had offered to testify to the effect that he was hired by Mr Agliotti to ensure the killing of Mr Kebble. Mr Nassif had also indicated that he has information on Mr Agliotti that implicated the latter in major illicit drug trafficking.

147.3 Mr Agliotti, in turn, offered to testify to the effect that he had given some consideration to the National Commissioner, in exchange for his assistance in these matters.

148. The President reiterated the view of the Government that the prosecution authority should be given access to such documents as they needed to investigate any alleged criminal activity even if it involved the National Commissioner. He assured the National Director of his readiness to assist him in this regard.

149. The President informed the National Director that it would be unwise and undesirable to have agencies of the state litigating against each other, where this was avoidable.

150. In particular, the two agencies involved, namely the NPA and the SAPS, are leading agencies in the fight against crime. Their public disagreement would serve to undermine confidence in the ability of the country successfully to eradicate crime.

151. The President also assured the National Director that he would have the cooperation of the government in the investigation of the National Commissioner.

152. During May 2007 the National Director advised the President that he was experiencing some problems accessing all the documents he wanted from the police in respect of this broader investigation; and would have to issue warrants.

153. It must be understood that at this stage the National Director had viewed the documents concerned, but needed to remove them from the custody of the police.

154. The President facilitated such access and asked the Director General in The Presidency to serve as a contact point in his office. Any problems that may arise were to be resolved with the assistance of The Presidency Director General.

155. The National Director ~~and the head of DSO~~ had access to the police documents on at least four occasions. The team from the DSO was given complete access to all the documents they sought.

156. While this process that was initiated by the President to assist the DSO was ongoing, the National Director, without informing the President, went ahead to obtain search and seizure warrants, as well as an arrest warrant, against the National Commissioner of Police.

157. At no stage was the President or The Presidency Director General informed that there had been a complete breakdown in the cooperation between the NPA and the police, which necessitated the issuing of warrants against the National Commissioner.

158. While the National Director is entitled to obtain warrants at any time, at his discretion, the National Commissioner is appointed by and is accountable to the President, as a result of which the President must be informed of his intended arrest in order to take appropriate decisions in regard to the office of the National Commissioner, for example whether to immediately suspend, dismiss or put him on leave, with or without benefits.

159. The National Director informed the President in September 2007 that Mr Agliotti is now a section 204 witness who would testify against the National Commissioner.

160. Section 204 of the Criminal Procedure Act makes provision for offenders to testify as state witnesses as against being granted immunity from prosecution.

161. The information available to the government, as well as information received from the National Director, suggests that Mr Glen Agliotti is implicated in major drug trafficking, as well as murder, and is sought by other countries in respect of other offences, but he was considered a candidate for immunity or a plea bargain.

CONCLUSION

These submissions seek to show the following:

162. Organised crime is a threat to national security. The activities of members of organised crime syndicates negates the Constitutional directive that national security must reflect the resolve of South Africans to live in peace and harmony and to be free from fear and want.

163. The office of the National Director of Public Prosecutions is an important part of the machinery to fight crime, in particular organised crime.

164. In taking decisions to prosecute or not to prosecute; to grant immunity from prosecution or to negotiate plea bargains with alleged offenders,

the National Director of Public Prosecutions must have regard to the public interest.

165. The public interest cannot be served by the negotiation of immunity and plea bargains and subsequent release of hardened criminals in exchange for their testimony against persons charged with lesser offences. At a minimum, all alleged offenders must be prosecuted.

166. Public interest cannot be served by releasing offenders who are involved in illicit drug trafficking, which trafficking has an immensely negative impact on many people in our country and the rest of the world, including the youth, in exchange for their testimony in respect of lesser offences.

167. The public interest is better served by all organs of state working together to fight crime.

168. Our submission, based on the information available to the government, is that had the National Director worked in a cooperative manner with other agencies of the state, he would have been able successfully to prosecute all the people involved in the Kebble murder. As it is, all the people implicated in the murder of Mr Kebble have been offered either section 204 or section 105A arrangements.

169. The relationship between the Minister and the National Director of Public prosecutions must have broken down irretrievably when the National Director of Public Prosecution suggests that the Minister who has oversight over him could be obstructing the administration of justice; when all that the Minister sought to do is exercise her Constitutional and legal oversight functions.

170. The Government cannot allow hardened criminals to use plea bargaining and immunity from prosecution arrangements to frustrate the fight against crime.

171. The actions of the National Director as set out above negatively affect the administration of justice, the fight against crime and the national security and interests of the Republic.

172. It is our submission that while Advocate Pikoli is indeed a respected lawyer, and had served the country well as Director General of Justice, he was unable to take appropriate decisions as National Director of Public Prosecutions. Accordingly, he is not a fit and proper person to hold that office.

MS B.S. MABANDLA, MP

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

THE ENQUIRY INTO THE FITNESS OF ADVOCATE VUSUMZI PIKOLI TO HOLD THE OFFICE OF NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AFFIDAVIT OF MINISTER B S MABANDLA

I, the undersigned,

BRIGITTE SYLVIA MABANDLA

Do hereby make oath and state that:

1. I am the Minister for Justice and Constitutional Development and a member of Cabinet of the Government of the Republic of South Africa.

2. The facts described in this affidavit fall within my personal knowledge, unless I state otherwise or the context makes it obvious that they do not. I

confirm that the facts are, to the best of my knowledge and belief, true and correct. Insofar as I make legal submissions in this affidavit, I do so on the advice of the government's legal representatives.

3. On 18 October 2007 I filed submission with the Enquiry into the fitness of Advocate Vusumzi Pikoli to hold office of National Director of Public Prosecutions, acting on behalf of the government of South Africa pursuant to a directive by the Chairperson of the enquiry, Dr Frene Ginwala.

4. On 18 December 2007 the secretary of the Enquiry, Mr Kasper Hahndiek addressed a letter to me informing me that apart from any other information I may wish to submit, elaboration on the assertions made in paragraphs 48, 49, 50, 51, 52, 58, 62, 63, 64, 69.2, 119, 120, 165 and 169 of the submission was required. On 9 January 2008 Mr Hahndiek addressed a further letter to the State Attorney wherein he advised that all the factual assertions made in the government submission have to be made under oath.

5. I depose to this affidavit therefore in compliance with the directions of the Secretary of the Enquiry. The structure of the affidavit will be as follows:

5.1. I reiterate the factual allegations which are within my personal knowledge made in the submission filed with the Enquiry ;

V.P.

5.2. to the extent necessary, I elaborate on the specific paragraphs referred to by the Enquiry;

5.3. However I will not provide elaboration in respect of the following paragraphs 50, 52, 58 and 64.

5.4. In order to link the assertions made in the submission with this affidavit and to comply with the request of the Secretary of the Enquiry for elaboration, I make cross references between the paragraphs in the submission and the corresponding paragraphs in this affidavit hereunder:

Submission Para	Affidavit Para
48 and 49	23
51	27, 28 and 29
52	30, 31, 32 , 33, 34 and 35
62 and 63	37,38, 39 and 40
69.2	44.2, 44.3 and 45
119 and 120	62
165	73,4 and 74
169	78

V.P.

6. In respect to the invitation to make further submissions, I wish to point out that I do not wish to make any further submission in this affidavit.

7. The Director-General of the Department of Justice and Constitutional Development ("the DG") will, in a separate supporting affidavit, respond to specific paragraphs relating to factual assertions that are within his personal knowledge and/or area of responsibility. The paragraphs to be dealt with by the DG will be identified herein.

8. Other factual assertions made in the original submission are based on reports made by other government departments. I will in this affidavit not deal with these submissions. The relevant government departments and/or persons in those departments who have knowledge of the facts made in the original submissions will file affidavits separately on or before the 31 January 2008 as directed by the Secretary of the Enquiry.

The appointment of advocate Vusi Pikoli as the National Director of Public Prosecutions

V.P.

9. Advocate Pikoli was appointed as the National Director of Public Prosecutions ("the National Director") on 21 January 2005. His appointment became effective on 1 February 2005.

10. The National Director was appointed on the basis of his experience, He had previously been a Director General in the Department of Justice and Constitutional Development, a position he held for 5 years, from 1 December 1999 to 30 January 2005. In this position he was actively involved in the Security Cluster and had a deep understanding of the challenges facing the cluster in respect of crime prevention and the administration of justice. During his tenure as the Director General, he served as the chairperson of the Directors General of the Security Cluster, a formation of Directors General of the Ministries of Justice and Constitutional Development, Correctional Services, Defence, Intelligence Services and Safety and Security. I believed that he had the requisite knowledge to effectively manage the NPA, that he would enhance cooperation within the cluster and thus promote greater efficiency within the criminal justice system.

11. It is against this background that I recommended to the President that he be appointed to the position of National Director of Public Prosecutions.

V.P.

12. My expectation was that, given his experience as coordinator of the security cluster DGs, he would bring greater coherence, cooperation and efficiency in the operations of the cluster. However, the National director has failed to do so and has in fact compounded the difficulties that exist between the NPA and the other security agencies

THE PLACE OF THE PROSECUTING AUTHORITY IN OUR CONSTITUTIONAL DISPENSATION

13. The Constitution vests the executive authority of the Republic in the President. The President exercises this authority together with the other members of the Cabinet.

14. As stated in the original submission my duty towards the President in this context is to ensure that the President is advised of all aspects of the administration of justice in the Republic. These include, without limiting the generality of the foregoing, the decisions of the National Director regarding the pursuit or discontinuation of investigations as well as the status of investigations and prosecutions conducted by the National Director. The key role of the NPA in crime fighting includes the conduct of prosecutions through the National Prosecution Service. This duty is impacted upon by how the National Director reports to me. It is submitted that any manner of reporting that compromises my ability to discharge my obligations is in

V.P.

(6)

contravention of the provisions of both the Constitution and the National Prosecuting Authority Act, 32 of 1998 ("the NPA Act").

15. It was always expected that reports will be presented to me timeously and in advance of any major action to be executed by the NPA and with such particularity as would be necessary to enable me to exercise my final responsibility in terms of the Constitution and the NPA Act. These reports are meant to enable me to advise my Cabinet colleagues when necessary, especially those within the Justice Crime Prevention and Security cluster. In most cases, it would be necessary for me to advise the President. The reports therefore needed to be substantive.

16. The National Director and I had conceptual differences which centred largely around the nature and extent of the independence of the NPA. This had a profound impact on how each viewed their respective responsibilities and mandates. I have had extensive discussions with the National Director regarding his understanding of our working relationship and his responsibilities. The National Director is of the view that he needed greater administrative and operational distance from me as the relevant Minister.

17. He believed that he did not require any input or guidance from me on any matter and that he only needed to inform me of his activities. I, on the other hand, was and still am of the view that the Constitution does not provide for such administrative and operational independence. By way of illustration,

V.R.

the National Director did not believe that he needed to conclude a performance agreement with me. I requested him on a number of occasions to prepare and submit to me a draft performance agreement for discussion and signature and he has to date failed to do so.

18. The Constitution does not provide for the independence of the prosecuting authority as contended for by the National Director. There is a reason for this. Prosecuting policies form a crucial part of any crime prevention strategy and any democratically elected government must have a say in the formulation of the prosecution policy. If the prosecuting authority was not accountable to the executive, I, as the Minister for Justice and Constitutional Development ("the Minister"), being the Cabinet member responsible for the administration of justice and, consequently, exercising final responsibility over the prosecuting authority, would have no say in the formulation of the prosecution policy. This however would be in stark contrast with the provisions of section 179(5) of the Constitution which requires my concurrence in the formulation of policy.

19. My constitutional responsibility is to exercise final responsibility over the NPA. This entails the involvement in the formulation of policy and oversight over the sound administration of the NPA

20. With regard to the sound administration as well as the financial management within the NPA, I exercise final responsibility over the NPA as the executing authority in terms of the laws governing the Public Service.

21. In this regard, the Director-General as the Accounting Officer for the Department of Justice and Constitutional Development and of the NPA exercises powers relating to the financial management of the NPA in terms of the Public Finance Management Act 1 of 1999 ("the PFMA).

22. To the extent that some of the delegated powers are currently delegated to the CEO of the NPA, the National Director, as the person responsible for the employees of the NPA, bears the responsibility to ensure that Public Service Regulations and the PFMA are complied with by the NPA. The necessary reporting on these matters would need to be done in conjunction with the DG.

23. The National Director refused and/or neglected to comply with obligations placed upon him by the NPA Act and the PFMA to properly account to the DG, as accounting officer for the NPA, for the financial and administrative decisions that he took in regard to the activities of the NPA.. He has cited his independence as a basis for such refusal. He has failed to ensure, by his conduct and uncooperative stance, that the DG complied with his obligations as the accounting officer of the NPA. As a consequence the

V.P.

DG has in turn, been unable to account and report to me as the Executing Authority on these issues. The Secretary of the Enquiry has called for further elaboration on the allegations made in this paragraph. I refer to the supporting affidavit of Adv Menzi Simelane, the DG, annexed hereto and marked **"BM1".** I ask that such affidavit be read as if incorporated herein. I also attach marked **"BM2"** copies of minutes of an Exco meeting of 24 August 2007, chaired by myself between the department and the NPA at which many of these issues were also discussed.

24. Consequently, the difference in the understanding of the roles, powers and functions of the National Director, the NPA including the Directorate of Special Operations ("the DSO) has created serious difficulties for me as it has impeded my ability to exercise final responsibility over the NPA as required by the Constitution.

25. This in turn impacted on the discharge of my duty to my colleagues in the Ministerial Coordinating Committee and the Justice Crime Prevention and Security cluster ("JCPS cluster") as the collective responsible for the justice system. It further extended to my reporting duties to the President of the Republic in that as a Member of Cabinet, I have a responsibility to advise the President on all issues relating to the administration of Justice.

V.P.

26. The Secretary of the Enquiry has requested elaboration of the allegations made in the above paragraph. I, with respect, submit that these allegations are conclusions that have been drawn and which are based on the failure by the National Director to report sufficiently and adequately to me, and as set out above and in the affidavit of the DG.

27. In order to carry out my responsibilities I require all the necessary information to enable me to be sufficiently informed of the work being done by the NPA. This includes investigations of any case. The rationale for this is logical. There are consequences arising from the work of the NPA. The Secretary has requested elaboration on these allegations.

27.1. I refer to paragraphs 126 to 128 paragraphs and 130 to 138 of the original submission. I submit that the allegations made therein support the conclusions drawn in this paragraph.

27.2. The Director-General of the Presidency will file a separate affidavit dealing with the factual assertions contained in paragraph 129.

28. It is noteworthy that the NPA Act places responsibility on the National Director report to me in order to enable me to fulfil my own constitutional obligations. Section 22 of the NPA Act provides, in material part as follows;

"22. Powers, duties and functions of National Director-

(1)...

(2)...

(3...

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to the National Director by section 179 or any other provision of the Constitution, this Act or any other law, the National Director, as the head of the prosecuting authority-

(a) with a view to exercising his or her powers in terms of subsection (2), may-

(i)...

(ii)...

V.P.

(iii) advise the Minister on all matters relating to the administration of criminal justice.

(g) shall prepare a comprehensive report in respect of the operations of the prosecuting authority, which shall include reporting on-

(i) the activities of the National Director, Deputy National Directors, Directors and the prosecuting authority as a whole".

29. The failure by the National Director to inform me of all the important investigations that have a national impact on national security and stability shows, in my view, a lack of judgement and appreciation of national security concerns on his part.

30. In some cases, it does become necessary for government to take into account the impact of the NPA work on society, national security and international relations, amongst others. Therefore, contrary to the views held by the National Director, requiring information on any aspect of the work of the NPA, does not amount to interference, but is a necessary

V.P.

element for the exercise of my final responsibility over the NPA as required by the Constitution and the NPA Act.

31. The Secretary has called for further elaboration on what is stated in the above paragraph. The work of the NPA has the potential to impact on issues such as national security. The manner in which some of the post TRC cases were handled is a case in point. Decisions pertaining thereto have serious political implications. Therefore, the failure by the National Director to take into account the national policy on reconciliation may, apart from creating political instability, impact negatively on national security.

32. I point out that section 33 of the Act obliges the National Director to furnish me with information as and when I request it from him. The section provides that:

> *(1) The Minister shall for purposes of section 179 of the Constitution, this Act or any other law concerning the prosecuting authority, exercise final responsibility over the prosecuting authority in accordance with the provisions of this Act.*
>
> *(2) To enable the Minister to exercise his or her final responsibility over the prosecuting authority, as contemplated in section 179 of*

V.P.

the Constitution, the National Director shall, at the request of the Minister-

(a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director or a Director in the exercise of their powers, the carrying out of their duties and the performance of their functions;

(b) provide the Minister with reasons for any decision taken by a Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;

(c) furnish the Minister with information with regard to the prosecution policy referred to in section 21(1) (a);

(d) furnish the Minister with information with regard to policy directives referred to in section 21(1) (b);

(e) submit the reports contemplated in section 34 to the Minister; and

(f) arrange meetings between the Minister and members of the prosecuting authority.

33. It is evident from the wording of section 33 of the NPA Act that I can only exercise this final responsibility by requiring the National Director to provide me with reports about the decisions taken by him and the reasons for such decisions. This I submit does not amount to interference by me with the work of the National Director.

34. I acknowledge that the power to institute criminal proceedings vests with the prosecuting authority; which authority exercises such power, on behalf of the State and in the public interest, without fear, favour or prejudice.

35. Accordingly, I, and indeed the Government, do not interfere with the National Director's decisions to investigate and prosecute any person.

36. Where other decisions taken by the National Director may threaten the national security of the Republic, I have a constitutional and legal obligation to raise such concerns with the National Director.

37. The Secretary of the Enquiry has sought elaboration in regard to the assertions contained in this paragraph. In response thereto I wish to state that as alluded to above, I am constitutionally obliged to raise with the

V.P.

National Director matters that have a national security impact. I refer by way of illustration to the post TRC cases. These cases have the potential of adversely affecting national reconciliation and security. It is therefore incumbent upon me to raise concerns about these cases and seek information, as I am entitled to, from the National Director in respect thereof.

38. It must be so that, while I can request information from the National Director, the accountability requirement also places a duty on the National Director to inform me of any significant developments in his or her office. I would otherwise not know what matters the National Director is investigating or intends to investigate. In response to the Secretary's request for elaboration on assertions made in this paragraph as well as paragraph 64 of the original submission, I refer to what I have stated above in elaboration in this regard.

39. The accountability requirement must include a duty to inform me of any action to be initiated that may impact on other organs of State; or on my powers or those of the President.

40. The prosecution policy provides that the prosecuting authority must at all times act on behalf of the State and in the public interest.

V.P.

41. In order to determine what would be in the public interest, the National Director must have regard to, *inter alia*, information that is held by other State institutions. For example, the prosecuting authority would not have access to detailed information about the extent and occurrence of particular types of crimes. Also, the authority would not know about issues such as the movement of members of crime syndicates globally as well as the significance thereof. Such information would invariably be in the hands of the South African intelligence services.

42. The intelligence services authorised by law are the National Intelligence Agency, the South African Secret Service, the SAPS Crime Intelligence Service, the intelligence division of the SANDF (Military Intelligence Service) and Financial Intelligence Centre.

43. Accordingly, in recognition of the need for the prosecuting authority to be part of the crime fighting machinery of government and also to have access to detailed information held by State agencies, the National Director attends meetings of the Directors General of the Justice and Crime Prevention cluster. Further, he would, where necessary, participate in meetings of the Directors General of the National Security Council.

THE FITNESS OF ADVOCATE PIKOLI TO HOLD THE OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

44. My submissions in this section address:

44.1. Whether Advocate Pikoli, in exercising his discretion to prosecute offenders, had sufficient regard to the nature and extent of the threat posed by organised crime to the national security of the Republic;

44.2. Whether the National Director in taking decisions, alternatively concurring in the grant of immunity from prosecution or to negotiate, alternatively to approve the entering into plea and sentence agreements with persons who are allegedly involved in criminal activities which constitute organised crime, took due regard to the public and national security interests of the Republic, as contemplated in the Constitution, as well as prosecution policy;

44.3. The Secretary of the Enquiry has requested elaboration on the contents of this paragraph. This sub-paragraph was an introductory paragraph setting out what will be dealt with under section C of the submission. It explained that one of the issues that would be dealt with in this sub-paragraph was the issue of plea bargains. The sub-paragraph was then elaborated upon in the succeeding paragraphs 79 to 91 of the original submissions.

V.P.

15. The relevant decisions of the National Director with regards to the plea and sentence agreements are considered and evaluated in the original submission and it is contented that he failed to have due regard to the public and national security of the country. This issue will be dealt with more fully in other affidavits that will be filed on behalf of government.

The incidence of organised crime; plea and sentence agreements; immunity from prosecution and considerations of public and national interest

46. I set out in the submission under the above topic the South Africans increasing activities and threats posed by organised criminal syndicate, including trans-national syndicates.

47. The submission gives an overview of the plea and sentence agreements entered into by the NPA with, amongst others, Glen Agliotti and Mr Nassif. I have already indicated that the relevant government officials will give the factual contexts to the plea bargains that were entered into.

48. In all these cases referred to, it is questionable whether the information obtained by the prosecution authority in exchange for another prosecution could not have been obtained by other means, including obtaining the

information from the other law enforcement agencies. Using plea and sentence agreements to avoid co-operation with other law enforcement agencies when information may be available, negatively affects the criminal justice system.

49. I acknowledge that the National Director is constitutionally entrusted with the power and discretion to decide, and indeed, enter into plea and sentence agreements. My concern regards the judgement he exercises when making these decisions. The decisions show a lack of judgement on his part.

50. The relevant government departments, agencies and persons will file the necessary affidavits dealing with the factual assertions contained under the headings set out above.

Browse Report

51. The relevant government departments, agencies and persons will file the necessary affidavits dealing with the factual assertions contained under these contained under this heading.

Malawian Investigation

V.P.

52. The relevant government departments, agencies and persons will file the necessary affidavits dealing with the factual assertions contained under these contained under this heading.

INSTANCES OF THE BREAKDOWN OF THE RELATIONSHIP WITH THE MINISTER, WHICH ADVERSELY AFFECTS THE ADMINISTRATION OF JUSTICE AND GOVERNMENT POLICY.

The status of the Directorate of Special Prosecutions ("the DSO") and matters relating to the functioning thereof.

53. The rationale for the establishment of the DSO is outlined in Section B of the submission.

54. The financial accountability framework relating to the DSO, section 36 of the NPA Act provides for the appointment, by me, of the Chief Executive Officer (CEO) of the DSO, who shall also be the accounting officer for the DSO.

55. While section 36 of the NPA Act bestows on the accounting officer powers and functions relating to the financial management of the DSO on the CEO, it did not detract from my responsibility and political authority in respect of the DSO. Consequently, I exercise final responsibility envisaged in the

Constitution in respect of the DSO in the same manner as I do in respect of the NPA.

The listing of the DSO in terms of the PFMA

56. The National Director submitted a memorandum to me dated 28 March 2006 wherein he made a request for me to approach the Minister of Finance to promote an amendment to the PFMA, 1999 (Act No. 1 of 1999) in terms of which the NPA and the DSO would be as a Constitutional Institution and a Public Entity respectively.

57. I responded to this memorandum, advising the National Director that the request was not approved and that the request raised a policy shift which would significantly impact on the justice system and would therefore require to be considered by both Cabinet and Parliament.

58. On August 2006 the National Director submitted another memorandum in which he requested me to promote the listing of the DSO for the same reasons advanced in the memorandum of March 2006. The main difference in this application was that the National Director argued that the DSO has its own accounting framework in terms of the NPA Act. In not approving the

V.P

request, I responded as follows; "this is a huge policy departure. It must be discussed in Cabinet." The Memorandum is annexed and marked "E".

59. Notwithstanding my attitude as indicated above, the NPA reflected in its Annual Report for 2006/7 that a request had been made by the National Director directly to the National Treasury for the separate listing of the NPA and the DSO as a Constitutional Institution and a Public Entity respectively. He did not consult me nor did he inform me that he would make this direct application. I only became aware of the application on reading the NPA Annual Report for the financial year 2006/07.

60. As I indicated in my response to the memorandum of 7 August 2007, the listing of the NPA and the DSO represents a shift in policy and my constitutional duty would have been to present proposals regarding the policy changes to Cabinet. In this regard and upon receipt of my response, the National Director's responsibility was to prepare the necessary policy proposals for my consideration and presentation to Cabinet for approval. The National Director instead opted to directly approach the National Treasury for approval.

61. I submit that the conduct of the National Director of applying directly to the Minister of Finance for listing, knowing full well my views on the matter and

V.P- JS

the procedure that would have to be followed in promoting such a request, amounts to a conscious and total disregard of my authority.

Post TRC litigation

62. Another area of difference between the National Director and I relates to the post TRC litigation processes. I refer to the supplementary affidavit of the Director-General of the department where the issues pertaining thereto and the failure of the National Director to ensure the efficient and effective operation of the Task team are dealt with in detail. I request that such assertions be read as if incorporated herein. I wish to point out however that reports made to me by the national Director on these issues were of such quality that it was impossible for me to advise Cabinet and Parliament thereon, in particular on the basis for the plea and sentence agreements and immunity from prosecution entered into and what public and national interest were taken into consideration in the conclusion of such agreements.

Warrants of arrest, search and seizures without proper reporting to the Minister

63. In 2005, the DSO obtained warrants for searches and seizure at, among other places, the Union Buildings and Tuynhuys. This was done without

informing me. The search and seizure at the President's offices in Pretoria and Cape Town was an extraordinary step.

64. The nature of the operation required that the National Director inform me of his intended action. I first heard of the raid through the Director General in the Presidency and at a time when the raids were already in progress.

65. Taking into consideration the fact that the Union Building is a National Key Point and is home to volumes of classified documents, including Cabinet documents, I had the responsibility of ensuring that the risks pertaining to such raids are minimised.

66. As it turned out, there was a standoff between the people who conducted the search and some officials at the Union Buildings. The officials of the Presidency were unwilling to release some classified documents into the hands of people whose clearance levels they did not know. I could not intervene, even if it were to assists the DSO, because I did not know about the searches.

67. Subsequent to the searches, I learnt that some of the people who conducted the searches were from a private security company and did not have appropriate security clearances. National security, including information security, was compromised, because during the search and seizure they had access to classified documentation.

68. Another matter relates to the National Commissioner of the Police Service. On 11 September 2007 the National Director met with me to brief me on NPA work. As part of this briefing the National Director then mentioned that the NPA had, on 10 September 2007, obtained warrants of arrest for the National Commissioner of the Police Service and for the search and seizure at the various offices of the police service and at his home. Reports had been made to me about the Selebi investigation. However, the national Director failed to inform me that the investigation necessitated the seeking of warrants. In order to search police headquarters, including police intelligence offices, the NPA would require the cooperation of the government and I would have had to facilitate such cooperation. once again my ability to exercise final responsibility was compromised.

69. In addition, when the National Director met with me on 11 September 2007, he did not inform me that he was preparing to obtain warrants of search and seizure of documents in this respect three days hence. This omission by the National Director when he clearly had an opportunity to do so, shows a lack of respect and appreciation for my responsibilities in terms of the Constitution and the NPA Act to exercise final responsibility over the NPA. These warrants for search and seizure were later obtained on the 14 September 2007 without my knowledge.

V.P.

70. I wrote to the National Director, seeking full particulars on the matter of the warrants issued against the National Commissioner. The attitude of the National Director was that he does not have to give me full information on this matter.

The Agliotti investigation

71. The DG in the Presidency will deal with the Agliotti investigation in his affidavit.

CONCLUSION

72. In conclusion I make the following concluding submissions:

72.1. Organised crime is a threat to national security. The activities of members of organised crime syndicates negates the Constitutional directive that national security must reflect the resolve of South Africans to live in peace and harmony and to be free from fear and want.

72.2. The office of the National Director of Public Prosecutions is, together with other law enforcement agencies, an important part of the machinery to fight crime, in particular organised crime.

72.3. In taking decisions, alternatively concurring in the grant of immunity from prosecution or to negotiate, alternatively to approve the entering into plea and sentence agreements with persons who are allegedly involved in criminal activities which constitute organised crime,, the National Director of Public Prosecutions must have regard to the public interest.

72.4. The public interest cannot be served by the negotiation of immunity and plea bargains and subsequent release of hardened criminals in exchange for their testimony against persons charged with lesser offences. At a minimum, all alleged offenders must be prosecuted.

73. The Secretary has asked for elaboration of this paragraph. The relevant government departments, agencies and persons will file the necessary affidavits dealing with the factual assertions contained under these contained under this heading.

74. Public interest cannot be served by releasing offenders who are involved in illicit drug trafficking, which trafficking has an immensely negative impact on many people in our country and the rest of the world, including the youth, in exchange for their testimony in respect of lesser offences.

75. The public interest is better served by all organs of state working together to fight crime. The national Director was appointed on the basis that he

V.P.

understood this imperative and would be able to bridge and heal the difficult relationship that existed between the different agencies and the NPA. However, the National Director worked in an uncooperative manner with other agencies if the State.

76. The relationship between me and the National Director of Public prosecutions must have broken down irretrievably when the National Director of Public Prosecution suggests that I as the Minister who has oversight over him could be obstructing the administration of justice; when all that I sought to do is exercise my Constitutional and legal oversight functions. The Secretary has sought elaboration of this paragraph. I have explained above that the national director and I had conceptual differences about his powers and functions as set out in the Constitution and the NPA Act. In the various engagements between us we could not bridge these differences and this has led to the breakdown between us.

77. The actions of the National Director as set out above negatively affect the administration of justice, the fight against crime.

DEPONENT

V.P.

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN TO BEFORE ME AT Pretoria ON THE 16th DAY OF January 2008, THE REGULATIONS CONTAINED IN GOVERNMENT NOTICE NO. R 1258 OF 21 JULY 1972, AS AMENDED, AND GOVERNMENT NOTICE NO. R1648 OF 19 AUGUST 1977, AS AMENDED, HAVING BEEN COMPLIED WITH.

COMMISSIONER OF OATHS

SEGOPOTJE SHEILA MPHAHLELE
Commissioner of Oaths / Practising Attorney
1901 SALU Building
255 Schoeman Street
Pretoria, 0002

V.P.

REPORT OF THE ENQUIRY INTO THE FITNESS OF ADVOCATE VP PIKOLI TO HOLD THE OFFICE OF NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

NOVEMBER 2008

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POST - TRC CASES

209 The Government complains that Adv Pikoli's handling of the post-Truth and Reconciliation Commission (TRC) cases did not show the sensitivity to the victims and an appreciation of the public interest issues that are mandated by the Prosecution Policy. It is alleged that the NPA concluded plea bargains with Mr Van der Merwe and others (the Vlok matter) without discussing them with the task team or informing the Minister, *"notwithstanding potential impact on national security"*.

210 The evidence tendered in this regard was that of the DG: Presidency who testified about being poisoned by the security operatives of the apartheid regime. In substance the DG: Presidency expressed his outrage about the way in which the plea and sentence agreements were concluded with the former Minister Vlok and the other co-accused. The complaint is that the DG: Presidency expected that that process should have as its purpose the revealing of "the whole truth" about the clandestine poisoning and how the institutions of state were used to stifle resistance against the repressive and racist regime of the past

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order. However the prosecutorial guidelines do not provide for revealing the 'whole truth' as a requirement for prosecuting these cases.

211 The law relating to the plea and sentence agreements and the prosecution policy regarding the post-TRC matters does not have as its object revealing "the whole truth". What the law provides for is that the victims of the offence for which a plea and sentence agreement is to be concluded must be consulted by the prosecuting authority. On the evidence, the DG: Presidency was indeed consulted before the plea and sentence agreements were concluded. There were concerns articulated by the DG: Presidency about the nature of the consultation but for the purposes of this report it is unnecessary to deal with those save to say that he found the demeanour of the prosecutor insensitive to his plight as a victim in that case. This complaint also touches very closely on the constitutional guarantee of independence of the NPA to prosecute or not to prosecute, and to do so without fear, favour or prejudice.

212 Adv Pikoli says that the role of the inter-departmental task team was to provide information and advise the NPA, and that the NPA retained

responsibility for all prosecutorial decisions. He further states that he kept the Minister fully briefed of progress with the post-TRC matters, and wrote to the Minister requesting her assistance in clarifying the role of the task team. He did not receive any response from the Minister to this request. He states that despite representations from Vlok and Van der Merwe, he refused to grant them immunity from prosecution and proceeded to charge them. The prosecution resulted in a plea and sentence agreement with the accused.

213 Moreover Government has not pursued this complaint. In closing argument before the enquiry it was stated on behalf of Government that: *"The TRC and Khampepe we have not gone into. We have not pursued the TRC complaint and the Khampepe complaint"*. As a result it is my considered opinion that Government has not made out a case that Adv Pikoli is not fit for office by reason of this complaint.

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REPORT OF THE ENQUIRY INTO THE FITNESS OF ADVOCATE VP PIKOLI TO HOLD THE OFFICE OF NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

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to allow for a fair, equitable and impartial enquiry. I also proposed that the process should be transparent and open subject only to any prevailing interests of national security as may arise. The final Rules and Timeframes were then circulated to the parties on 11 December 2007, and to the media.

26 The Rules provided inter alia that submissions:

26.1 Should include statements on oath by persons who are able to depose to any factual allegations made in the submissions; and

26.2 Should be separated into sections for those parts which are deemed Confidential, Secret or Classified, and the basis for such classification.

27 Government had classified its original submission dated 18 October 2007 as "secret" without providing the basis on which such classification was determined. By letter of 7 February 2008, Government conceded that all documents filed in its submissions were unclassified except for the affidavit by the Director General of the National Intelligence Agency (NIA) which was classified as "Top Secret".

28 The Rules made further provision that after receipt of the submissions, the Chairperson was authorised to

exhaust all measures reasonable to resolve their disputes before litigating with one another, must be respected and adhered to.

VIII. Most of the complaints directed against Adv Pikoli relate to events that took place a long time before his suspension. It is the responsibility of the Minister to ensure that any transgressions are addressed at the time. This would avoid festering misunderstanding and a recurrence of the same violations.

DR F N GINWALA

4 November 2008

ENQUIRY INTO THE

NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS

2 JULY 2008

CHAIRPERSON:	**DR F GINWALA**
MEMBERS:	**ADV I SEMENYA SC** **MR D GIHWALA** **MR K HAHNDIEK** **MR L NAIDOO**
ON BEHALF OF THE DEPARTMENT:	**ADV KD MOROKA SC** **ADV S NTHAI SC** **ADV H SHOZI** **ADV M SELLO**
ON BEHALF OF ADV V PIKOLI:	**ADV W TRENGOVE SC** **ADV T BRUINDERS SC** **ADV MAKOLA**
WITNESS:	**ADV VP PIKOLI**

ALPHA TRANSCRIPTION SERVICES CC

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some water?

ADV PIKOLI: Yes I am fine.

ADV TRENGOVE: Did she go on at any time to explain what she meant when she said to you it's all about trust, or there has been a breakdown of trust?

ADV PIKOLI: No she did not. She did not explain herself further.

ADV TRENGOVE: Did you believe that there had been a breakdown of trust between the two of you?

ADV PIKOLI: No.

ADV TRENGOVE: Did you in fact in that meeting experience any lack of trust between the two of you?

ADV PIKOLI: No.

ADV TRENGOVE: Was there anything else during that meeting, or was that it?

ADV PIKOLI: Well after that meeting I had to prepare to have a meeting with the president. So we parted.

ADV TRENGOVE: Your meeting with the president was arranged for quarter to 8 that night?

ADV PIKOLI: That is correct.

ADV TRENGOVE: Who attended the meeting?

ADV PIKOLI: It was Rev Chikane and the president.

ADV TRENGOVE: Could you tell us what happened?

ADV PIKOLI: When I got into the meeting with the president and Rev Chikane, perhaps let me, if I am allowed to, go back to the meeting of the 23rd with the minister. The earlier meeting with the minister.

ADV TRENGOVE: The meeting that afternoon, the Sunday afternoon, with the minister?

ADV PIKOLI: The Sunday afternoon meeting. In

response to the minister, I had said that I am not prepared to resign for two reasons. (1) because of the rule of law and the independence of the prosecutors. And furthermore I indicated to her that I would be lying to the nation if I were to resign. Because on being asked I would have to say that I have resigned voluntarily, when in fact this would have been imposed on me by somebody else, to resign.

I said for those reasons I am not going to resign. So now when I met the president later that evening, the president informed me that the minister has already briefed her on my discussions with her. That is my earlier discussions with the minister and that I have refused to resign. I confirm that to the president. I said: Yes Mr President, I refused to resign. And I told the president why I refused to resign. I gave the president the same reasons that I gave to the minister. One on the rule of law and the independence of the prosecutors and also that I will be lying to the nation, if I were to resign because I will have to make it out as if it was a voluntary decision.

The president then said to me: Vusi this is all about interpretation. There's life after this. Do you think if I were to give you a letter of suspension, you wouldn't change you mind. I said: No Mr President, I will accept your decision to suspend me, if that's your intention. And then the letter was prepared in my presence, the letter of suspension. I remained with the president in the room, whilst Rev Chikane was organising the letter to be ready for signature by the president and then I asked the president: Mr President can you please tell me why are you suspending me? The president said: Vusi it's all about interpretations

and also it's all about the plea bargains.

ADV TRENGOVE: Could you just repeat that. I lost the first sentence. The president said?

ADV PIKOLI: Well the president said: Vusi this is all about interpretation and also about the plea bargains and you entertaining the possibility of granting immunities to criminals. My response to the president was that: Mr President I think you are rather on thin ice, because these issues that you are raising, touch on the core competence of the NPA. We left it at that. And then the Rev Chikane brought the letter, the president signed the letter. It was put in an envelope and I was given the letter and then I left the residence.

ADV TRENGOVE: Will you have a look at the letter please. It is VP1. He says on the first page, in about the fifth paragraph:

> "Organised crime poses a serious threat to our national security. While I accept that the Prosecuting Authority has the discretion to enter into plea bargain and/or immunity arrangements with alleged offenders, the public interest must always be considered. Accordingly in determining what is in the public interest before exercising such discretion, the Prosecuting Authority must necessarily have regard to the totality of information available to the state."

Do you have any quibble with that paragraph?

ADV PIKOLI: Yes I do have. I can never imagine anything more in the public interest than investigating the Chief of Police, when the allegations of him being in the books or in the payroll of organised crime. I don't think

there is anything more in the public interest than ensuring that you fully investigate those serious allegations and if satisfied that there is a case to be met, to charge the National Commissioner.

ADV TRENGOVE: The president said:

> "Such plea bargaining and/or immunity arrangements cannot be done at the expense of our National Security."

Did you believe that you had entered into plea bargain or immunity arrangements at the expense of National Security?

ADV PIKOLI: No.

ADV TRENGOVE: Over the page he recited some provisions of law and then in the second paragraph said the following:

> "The information I have received shows that you have entertained the granting of immunity to members of organised crime syndicates in instances where the prosecution of such people would, in the government's view, be in the public interest. In some of these matters there seems to be no reason why the Prosecuting Authority would not proceed against all persons implicated in the alleged offences. I have evaluated the information at my disposal and I have reached the conclusion that you in your capacity as National Director of Public Prosecutions have failed to appreciate the nature and extent of the threat posed by members of organised crime syndicates to our National Security. Such a lack of appreciation in itself amounts to a threat to our National Security."

Now firstly what did you understand to what was the president talking about? Which immunity arrangements did

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2 JULY 2008

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