

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

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DOCUMENTS FOR THE CROSS-EXAMINATION OF
ADV BULELANI NGCUKA**

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Post TRC developments

- 95 According to former TRC commissioners Adv Dumisa Ntsebeza SC (**Ntsebeza**) and Yasmin Sooka (**Sooka**), in October 1998, the TRC prepared a letter addressed to then National Director of Public Prosecutions, Bulelani Ngcuka (**Ngcuka**), which was accompanied by a list of cases which the Commission asked the NPA to investigate further with a view to prosecution. It is likely that the letter and list were transmitted to the NDPP on 27 or 28 October 1998, which was the date of the last full meeting of the Commission before it ceased its official activities. Unfortunately, a copy of the aforesaid letter and list cannot be located, but the NPA may have this correspondence on record. The confirmatory affidavits of Ntsebeza SC and Sooka are annexed hereto marked **FA6** and **FA7** respectively.
- 96 According to Ackermann, in 1998 the investigation dockets held by the D'Oliveira unit were transferred to the NPA.
- 96.1 In terms of a directive issued in 1999 by the then NDPP, the TRC related cases were transferred from the then Directorate of Special Operations (**DSO**), and from the various offices of the Directors of Public Prosecutions (**DPPs**) and the SAPS to the office of the NDPP.
- 96.2 A copy of Ackermann's affidavit dated 7 May 2015 (filed in support of Thembi Nkadimeng's application to compel a prosecutorial decision in the case of the murder of her sister, Nokuthula Simelane), is annexed hereto marked **FA8**. This application was brought in *Nkadimeng v NDPP and Others*, Gauteng Division under case no 35554/2015 (**Nkadimeng 2**). There was an earlier

application in which Thembi Nkadimeng was the lead applicant, which will be dealt with below.

- 97 In early 1999, a working group called the Human Rights Investigative Unit (**HRIU**) was established within the NPA by the then NDPP, Bulelani Ngcuka, on the initiative of the then Minister of Justice, Dullah Omar. The part-time head of the Unit was Adv Vincent Saldanha, and his deputy was former prosecutor, Adv Brink Ferreira. It was mandated to review, investigate and prosecute TRC cases in which perpetrators had been denied amnesty or in which perpetrators had not applied for amnesty.
- 98 During February 1999 a meeting took place between the TRC, represented by Commissioners Sooka and Ntsebeza, and the NPA. At this meeting, NDPP Bulelani Ngcuka introduced Adv Saldanha who had been appointed to lead the HRIU. The meeting discussed the process for identifying potential cases for prosecution.
- 99 On 8 or 9 March 1999, Sooka met with Adv Saldanha to discuss the report prepared by the TRC dated 7 March 1999 titled "Report for the Office of the National Director of Public Prosecutions," a copy of which is annexed hereto marked **FA9**.
- 99.1 This report indicated that the Commission had "*begun a process of establishing mechanisms for identifying potential cases.*" It added that the TRC had "*identified a range of categories and/ or issues around which we believe prosecutions can be considered*" and that there should be "*discussion around these categories to determine viability as well as prioritisation.*"
- 99.2 The report proposed categories and the types of gross human rights violations that should be investigated, including:
- 99.2.1 Torture;

- 99.2.2 Post-Caprivi hit squads;
- 99.2.3 Security force cover-ups;
- 99.2.4 Unlawful destruction of documents;
- 99.2.5 Gun-running;
- 99.2.6 Target identification and assassinations;
- 99.2.7 Cross-border raids;
- 99.2.8 Recipients of section 30 notices and persons who were the subject of section 29 investigative enquiries; and
- 99.2.9 Amnesty applicants who were denied amnesty.

99.3 The report also referred to cases identified by regional offices and attached preliminary work-in-progress lists from the KwaZulu Natal, Eastern Cape and Western Cape regions, copies of which are annexed here to marked **FA10**, **FA11** and **FA12** respectively.

100 On 11 March 1999, Sooka sent a letter to Adv Saldanha seeking feedback on the report "*regarding potential prosecutions*" and undertaking to take steps to procure the information he requested. A copy of this letter is annexed hereto marked **FA13**. The TRC commenced referring cases for potential prosecution to the NPA and also alerted them to sources of possible evidence in relation to the crimes.

101 The HRIU continued operations until 2000, however it instituted no prosecutions. In 2000, the dockets held by the HRIU were transferred to the DSO, more widely known as the Scorpions. A working group was established within the DSO to handle

the TRC cases known as the Special National Projects Unit (**SNPU**), which was headed by Macadam.

102 The NPA, per Adv CB Ferreira, addressed a letter dated 31 August 2000 (but date stamped 11 September 2000) to the TRC in relation to the cases that had been referred for further investigation. We are not in possession of this letter. However, the TRC's legal adviser and evidence leader, Adv PC Prior responded by way of an undated letter (presumably in September 2000) titled "*Human Rights Files and other Relevant Records*". In this letter Adv Prior acknowledged receipt of the NPA's letter and indicated that the TRC would respond in due course. Attached to Adv Prior's letter was a list of 226 TRC cases in table format. This list appears to have been compiled from the TRC Amnesty database. A copy of the letter and table are annexed hereto marked **FA14**.

103 Notwithstanding the above evidence confirming that various lists were handed over to the NPA by the TRC, on 17 September 2024, Adv Rodney de Kock, the Deputy NDPP, stated before a 'TRC matters update meeting' of the Justice and Constitutional Development Portfolio Committee that the NPA had gone through all available TRC information but stressed that no list of cases of perpetrators were referred to the NPA. A copy of the Parliamentary Monitoring Group summary of this meeting is annexed hereto marked **FA15**.

104 It appeared that the NPA devoted few resources to the SNPU. According to the author, Ole Bubenzer (**Bubenzer**) in his 2009 book, *Post-TRC Prosecutions in South Africa*, this was because the NPA was concerned that some cases would have to be withdrawn if amnesties were granted, since at that time the Amnesty Committee was still concluding its work. A copy of Bubenzer's confirmatory affidavit

is annexed hereto marked **FA16**. A copy of Bubenzer's book can be supplied on request.

105 However, according to Bubenzer, there were many cases in which amnesty had already been denied or not applied for, such as the case against former SAP General Izak Johannes "Krappies" Engelbrecht, in which an indictment had apparently been prepared by the D'Oliveira Unit. In 2016, the SAPS responded to an access to information request for a copy of the Engelbrecht docket stating that "*it could not be found*". A copy of the request is annexed hereto marked **FA17**. By 1999 the D'Oliveira Unit had reportedly already prepared about 20 charge sheets. None of these charge sheets would see the light of day in a court.

106 The SNPU operated until 2003, but like the HRIU, it too instituted no prosecutions. On 24 March 2003, the Priority Crimes Litigation Unit (**PCLU**) was created within the NPA by Presidential Proclamation. Under the same proclamation, Ackermann was appointed to head the unit. Macadam was transferred from the DSO to become the Deputy Director at the PCLU. Part of the PCLU's mandate was to deal with the TRC cases.

107 In May 2003, NDPP Ngcuka decided that all TRC-related cases in which amnesty had not been granted were '*priority crimes*' in terms of the PCLU proclamation. According to Ackermann, this resulted in more than 400 investigation dockets being transferred to the PCLU. Official duties commenced during July 2003.

108 'According to the NPA's Annual report 2002/2003, the PCLU instituted an audit of all available cases and registered some 459 cases that were handed over from the TRC, the D'Oliveira Unit and DPP offices. About 160 cases were excluded from

further consideration. Sixteen cases were prioritised for prosecution, of which three were prepared almost immediately for indictment.

109 Macadam, in his affidavit filed in the Rodrigues stay of prosecution case, recorded the steps he and Ackermann took to identify which of the TRC cases required attention:

109.1 All the DPPs were visited and invited to hand over TRC cases which they were not in a position to finalise themselves.

109.2 A meeting was held with the Divisional Head of the Detective Services of the SAPS who issued an instruction to his Provincial Heads to refer all outstanding TRC dockets to the PCLU.

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

109.4 Interviews were conducted with former members of the TRC and the D'Oliveira unit.

109.5 Ackermann and Macadam also entertained requests for investigations from victims and other members of civil society. This resulted in other cases being brought to their attention, including the Ahmed Timol matter.

110 The NDPP reported in a document titled "About PCLU" released on 23 March 2003 that the NPA is attending to the cases of some 500 persons who had been reported missing by the TRC. A copy of this document is annexed hereto marked **FA18**. A small Task Team evaluated the TRC Report to identify cases for investigation.

According to the NDPP's report approximately 150 cases were identified for immediate investigation.

111 However, before the PCLU could get going, the political interference intervened which prevented the unit from carrying out its mandate in respect of the TRC cases. The few cases the staff managed to get off the ground were the ones that had been previously investigated with largely complete dockets. As will be set out below it became difficult, if not impossible, for the unit to build new cases.

Lack of delivery

112 The NPA has been in possession of various lists of TRC cases from 1998. In 2003, the TRC cases were declared priority crimes by the then NDPP. Accordingly, it may be asked what the NPA and SAPS have delivered in the last 20 to 25 years. The record is a pitiful one.

113 In order not to unduly burden these papers the correspondence and underlying documentation referred to in this section have not been annexed but can be supplied on request.

114 Bubenzer noted that while *"the D'Oliveira Unit of the 1990s constituted a well-equipped team of experienced prosecutors and investigators with strong political support, support for TRC-related prosecutions after 1998 declined drastically."* Indeed, as will be seen below not only was political support withdrawn and the PCLU denied investigators, but withering political interference was to obstruct the cases from proceeding.

115 We are only aware of the following post-TRC developments in respect of matters that have been launched or concluded in court:

- 115.1 *S v Khwezi Ngoma and Others*, which involved four APLA cadres who attacked the Willowvale police station in 1994 resulting in the death of a policeman. The accused did not apply for amnesty. They made representation through their attorneys requesting a withdrawal of the charges, but it was rejected, and they entered into plea agreements and received suspended sentences.
- 115.2 In 2003, the late Eugene Terre' Blanche, former leader of the Afrikaner Weerstandsbeweging, (Afrikaner Resistance Movement), who had been charged with various acts of terrorism under the Internal Security Act entered into a plea agreement and was given a wholly suspended sentence.
- 115.3 In 2004, former SB officers Gideon Nieuwoudt, Johannes Martin van Zyl, and Johannes Koole were charged with the 1985 kidnapping and murder of three leading anti-apartheid activists, known as the PEBCO 3. This was the first and only case that the PCLU brought in respect of perpetrators who had been denied amnesty.
- 115.3.1 Nieuwoudt and van Zyl applied to court to review the decisions to refuse them amnesty. The review was delayed by some five years because of the failure or refusal of the DOJ to file answering papers. Nieuwoudt died in August 2005.
- 115.3.2 In 2009 the High Court ruled that an Amnesty Committee be convened to rehear the application of Van Zyl. Charges were then provisionally withdrawn against Van Zyl and Koole. Inexplicably, the DOJ never convened an Amnesty Committee and the NPA

never reinstated the cases against Van Zyl and Koole, who have both since died.

115.3.3 To date no steps have been taken against the surviving suspects, notwithstanding the urging of family members over many years. Only two remain alive, former Vlakplaas members Gerhardus Cornelius Beeslaar, who is nearly 87 years old and Joseph Tshepo Mamasela who is in his 70s.

115.4 In 2005, Buyile Roni Blani, an ANC supporter, who had been charged in 1985 for his role in the mob killing of two people, but who had fled the country, entered into a plea and sentence agreement and was sentenced to five years imprisonment, four of which were suspended.

115.5 *S v Aron Tyani & Another*, which related to the murder of Stembele Zokwe, an MK cadre, in 1988 by the Transkei Security Police. The accused were convicted and sentenced to terms of imprisonment in 2005.

115.6 During 2007, and in defiance of political instructions, the PCLU went ahead with an attempted murder case against former Police Minister, Adriaan Vlok, former Commissioner of Police, General Johann van der Merwe, Major-General Christoffel Smith, Colonels Gert Otto and Johannes 'Manie' van Staden for the 1989 poisoning of Rev. Frank Chikane. On 17 August 2007, this resulted in a plea and sentence agreement being confirmed with wholly suspended sentences. This was one of the factors that precipitated the suspension of the then NDPP, Adv Vusumzi Patrick Pikoli (**Pikoli**), on 23 September 2007, as well as the removal of Ackermann from involvement in the TRC cases.

115.7 In 2015, following the filing of a High Court application by Thembi Nkadimeng to compel a prosecutorial decision in *Nkadimeng 2*, an indictment was issued in 2016 against four former SB members for the kidnapping and the murder of MK operative, Nokuthula Simelane. Two of the accused have since died and one, Willem Helm Johannes Coetzee, claims to be mentally unfit to stand trial. Coetzee's trialability inquiry has been ongoing for more than two years and holding up the trial, some eight years after the indictment was issued.

115.8 Between 2017 and 2023 five apartheid-era inquests were reopened, four of which were at the instance and pressing of the families. These were the inquests into the deaths in SB detention of Ahmed Timol, Neil Aggett, Hoosen Haffejee and Imam Haron. In all these cases, the families' legal representatives had to threaten the NPA and/or the Minister of Justice with legal action in order to get the inquests reopened. Correspondence in this regard can be supplied on request. The inquest courts in all four cases recommended that the NPA pursue perjury and other charges against several former SB officers. To date, with the exception of the late Jao Rodrigues, none have been charged.

115.9 Following the reopened inquest into the death of Ahmed Timol in 2017, which had been spearheaded by the Timol family and their representatives, former police officer Jao Rodrigues was charged with murder in 2018. Rodrigues died in September 2021 before he could stand trial.

115.10 In 2020 family members of the COSAS 4 filed an application with the Krugersdorp Magistrate's Court seeking an order for the disinterment and

forensic examination of the bodies. This prompted the NPA to act and in 2021 kidnapping and murder charges were preferred against two former SB and Vlakplaas members.

- 115.10.1 Crimes against humanity charges were subsequently added to the indictment, the very first time that such charges had been pursued in South Africa. Various challenges, as well Stalingrad type parallel civil litigation launched by the accused, have delayed the start of the trial. In 2022, at the prompting and intervention by the families, the High Court ordered the SAPS to pay the reasonable legal costs of accused no. 2, Christiaan Rorich.
- 115.10.2 The application by accused no. 1, Tlhamedi Ephrahim Mfalapitsa, to overturn the refusal to grant him amnesty was dismissed by Judge Stuart Wilson on 11 November 2024. Between 18 and 21 November 2024 the trial court heard the objection of the accused to the crimes against humanity charges. Judgment was reserved and the trial was postponed to 14 April 2025.
- 115.11 In July 2023 the inquest proceedings into the 1982 death in detention of Ernest Moabi Dipale at John Vorster Square were concluded. The court found that Dipale did not commit suicide, but that the SB was responsible for his death. The court identified SB officers Nicholas Johannes Deetlefs and Joe Mamasela as key suspects whose involvement should be further investigated. Deetlefs died in September 2023.
- 115.12 In August 2022 murder charges were preferred against three former police officers, Johan Marais, Leon Louis Van Den Berg and Abram Hercules

Engelbrecht, for the 1987 murder of student activist, Caiphus Nyoka. This followed a long struggle by the Nyoka family for justice.

115.12.1 On 9 October 2020, the family's attorneys, Webber Wentzel, placed the Deputy NDPP and the Head of the SAPS' Directorate for Priority Crimes Investigation (**DPCI**) on terms, demanding that the DPCI finalise its investigations and the NPA make a prosecutorial decision, failing which the High Court would be approached for an appropriate order.

115.12.2 A fourth police officer, Pieter Egbert Stander, was indicted in 2024. One of the accused, Johan Marais, pleaded guilty on 12 November 2024. The remaining three co-accused appeared before the Gauteng High Court sitting at Benoni at the start of the trial on 18 November 2024. The trial was postponed to 2 December 2024 when one of the accused terminated his counsel's brief.

115.12.3 On 5 December 2024, Judge Mahomed Ismail ruled that evidence led at the 1988 inquest (GO 112/1988) was "provisionally admissible", holding that not allowing the state to lead that evidence would be "tantamount to suppressing crucial and vital evidence."

115.12.4 The trial was postponed to 12 May 2025.

115.13 In November 2023, former "A" team gang member Wesley Madonsela was sentenced by the Durban Regional Court to 10 years imprisonment for

murdering 17-year-old United Democratic Front activist Sipehelele Nxumalo in 1989.

- 115.14 In relation to the 1987 enforced disappearances of Ntombikayise Kubheka and Musawakhe "Sbho" Phewa an inquest was opened during 2022 but did not proceed; and in November 2023 the DPP KwaZulu-Natal decided to pursue a prosecution of four persons: Hendrik Johannes Petrus Botha, Salmon Johannes Gerhardus Du Preez, Martinus Dawid Ras Jnr and Jakob Albert Coetzer. On 12 November 2024, Lawrence Gerald Wasserman was also charged with murder and all five accused appeared before the Umlazi Magistrate's Court, when the matter was postponed 28 January 2025. Four days later, it was reported that Wasserman had died while traveling on a plane between Durban and Johannesburg on 16 November 2024.
- 115.15 In January 2024, the NPA indicted four former SB officers for the 1985 murder of Jameson Ngoloyi Mngomezulu. The officers indicted are: Gerhardus Stephanus Schoon, Paul Jacobus van Dyk, Frederick Johannes Louw and Douw Gerbrandt Willemse. No further developments have been released by the NPA, and this case also appears to have stalled.
- 115.16 In May 2024, then Justice Minister, Ronald Lamola, authorised the reopening of the inquests into the deaths of Chief Albert Luthuli, Griffiths Mxenge and Booi Mantyi, but there appear to be no further developments in these matters. A statement released by the ANC dated 19 October 2024

appeared to indicate that a judge had been appointed to preside over the Mxenge inquest before the KwaZulu Natal High Court.

115.17 In 2023, the NPA indicated to the legal representatives for the families and survivors of the 1993 Highgate Massacre that an inquest will be held. The inquest is set down for hearing from 27 January to 7 February 2025 at the High Court in East London.

115.18 On 1 March 2024, the NPA advised the lawyers for the Turner family that they had requested the Minister of Justice to reopen the inquest into the 1978 murder of Dr Rick Turner in Durban. However, since then all efforts to secure dates for the inquest and a progress report on the investigation have proved fruitless.

115.19 On 7 November 2024, the NPA confirmed in writing that the Minister of Justice had approved the reopening of the inquest into the death of Ramatua Nicholas "Boiki" Tihapi. In March 1986, Tihapi, an activist from Ikageng near Potchefstroom, disappeared from the Jouberton police station, while in a seriously injured state and was never seen again. On 13 December 2024, the Minister of Justice requested the Judge President of the North-West Division to designate a judge to preside over the reopened inquest.

116 The record of delivery is dismal. It amounts to five concluded reopened inquests (between 2017 and 2023), four plea and sentence agreements (all occurred between 16 and 21 years ago) and two concluded criminal trials, one some 18 years ago of Transkei police officials, and the other in 2023 resulting in the conviction and imprisonment of a gang member. There are only five criminal cases before the

courts and all have been the subject of delays, in one matter, for some eight years. In the Nyoka matter, one of the accused has entered a guilty plea. The NPA has released different figures in relation to pending court cases and closed cases, but to date it has not disclosed the names of these cases.

117 According to a presentation made by the NPA to the Portfolio Committee on Justice and Constitutional Development on 17 September 2024, 30 matters had been finalised, but the NPA only disclosed the finalised Aggett, Dipale, Haffejee and Haron inquests. It also made reference to the finalised inquest of Zama Sokhulu, without providing any details.

117.1 In relation to 'matters on the criminal roll' the presentation referred to the COSAS 4, Nokuthula Simelane and Nyoka cases, as well as *S v Botha and Others* (connected to the Khubeka case) and *S v Schoon and Others* (connected to the Mngomezulu case) which were both remanded to November 2024 and described cryptically as "state attorney - legal representation". Under the heading of "Indictments" the NPA refers to three unnamed "*indictments to be served pending verification of addresses of perpetrators*".

117.2 Under the heading 'Notable Inquests' 15 matters are mentioned, but most appear to be stalled. In six cases, judges have apparently not been appointed, five are described as "*shortage of capacity*". One (Cradock 4) was described as a "*challenge with representation*". Only the Mthunsi Njakazi inquest had commenced, while the Oupa Madondo and Highgate Hotel cases were scheduled for November 2024 and January 2025 respectively. The presentation also claimed that memoranda for 10

unnamed inquests were underway. Slides 27 to 32 of this presentation are annexed hereto marked **FA19**.

118 In comparison, other similarly placed countries where truth commissions recommended prosecutions have achieved considerably more, such as the case of Chile:

118.1 Since 1998, Chile's courts have resolved hundreds of cases of dictatorship-era killings, disappearances, and torture, and sent dozens of perpetrators to jail.

118.2 As of July 2023, Chile's Supreme Court had handed down verdicts in more than 530 cases for dictatorship-era crimes against humanity. Another 2,000 cases were still under investigation or awaiting resolution before lower courts.

118.3 Some 234 former regime agents have been imprisoned for their crimes, with dozens more – 57 in 2023 alone – escaping justice only through the '*biological impunity*' provided by death.

118.4 Between October 2022 and October 2023, 67 Supreme Court criminal verdicts were handed down, including the conviction and sentencing to jail of 59 former secret police agents. A copy of the article: Cath Collins, *Chile's 'Pinochet Cases' at 25: an ongoing sea change*, Justiceinfo.net, 16 October 2023 is annexed hereto marked **FA20**.

119 In Argentina, as at the end of 2021, the Office of the Prosecutor for Crimes Against Humanity had investigated 3,525 people for crimes against humanity, of whom 1,044 were convicted (as part of 264 sentences handed down). In Peru, following

the winding up of the truth commission, as at the end of 2019, prosecutors had secured 44 convictions for conflict related crimes. Source materials for these examples can be supplied on request.

120 The main reason for South Africa's woeful performance has been the political interference that effectively suppressed the pursuit of apartheid-era crimes within a few years of the closure of the TRC. The history of the political interference is set out below.

THE POLITICAL INTERFERENCE

121 In May 2021 during an interview in an *Al Jazeera* documentary titled "*My Father Died For This*", ANC legal adviser Krish Naidoo claimed that the Cradock Four case, as with the other TRC cases, "*simply fell through the cracks.*" His statement was deeply insulting to our intelligence. A copy of this documentary can be made available on request.

122 In fact, the TRC cases were deliberately suppressed following a plan or arrangement hatched at the highest levels of government and across multiple departments. This is the real explanation for the delay. The interference stands as a deep betrayal of those who laid down their lives for freedom in South Africa, including my father and other fallen comrades.

123 In this section of the affidavit, unless otherwise stated, all factual references are drawn from the affidavits of Advocates Christopher Macadam (FA5), Anton Ackermann (FA8) and Vusumzi (Vusi) Pikoli (FA22).

Opening the door to political interference

124 On 12 March 2003, the TRC Report's final volume (vol 6) was released. On 15 April 2003, President Mbeki made a statement to the National Houses of Parliament and the Nation on the Occasion of the Tabling of the Report of the TRC a copy of which is annexed hereto marked **FA21**. In relation to criminal accountability and the TRC's follow-up process President Mbeki stated:

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

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

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

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

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

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

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

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

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."

125 According to Adv Pikoli, who was the NDPP between February 2005 and September 2007, what followed Mbeki's speech in relation to the TRC cases "*was anything but the 'normal legal processes.'*" A copy of Pikoli's affidavit that was filed in *Nkadimeng 2 (TN7* at pp 170 – 216) is annexed hereto marked **FA22**.

126 It appears that the seeds of the political interference were laid in the deliberations that led to the strategies that are reflected in Mbeki's speech.

126.1 While Mbeki appeared to disavow another amnesty because of its constitutional implications, he nonetheless made it clear that certain arrangements would have to be made to accommodate the many perpetrators who did not take part in the TRC process.

- 126.2 He indicated that while the NPA would be permitted to continue with its normal work, it would nonetheless be required to work with "*our intelligence agencies*" to enable those who still wish to speak the truth "*to enter into arrangements that are standard in the normal execution of justice*".
- 126.3 Mbeki stressed that individuals who still wished to seek justice or take up any human rights violation grievance could approach the courts. He noted the relevant departments were examining the modalities as well as whether any fresh legislation was needed.
- 127 Mbeki signalled that in relation to the TRC cases it was not going to be business as usual. Unlike other cases involving serious crimes such as murder, the TRC cases were going to be treated differently. Perpetrators in these cases would be offered some form of leniency or alternatives to criminal prosecution. Family members could play a role in these "*legal arrangements*" and if still aggrieved could approach the courts, presumably to pursue private prosecutions or some form of civil litigation against the perpetrators.
- 128 Mbeki was articulating government policy that effectively said that the pursuit of justice in the TRC cases was not to be prioritised and that special arrangements were going to be put into place. His reference to the involvement of the "*intelligence agencies*" was a portend of what was to follow, in which such agencies came to impose their will on prosecutorial decisions.

Closing down of the TRC Cases

- 129 Following Mbeki's speech, those wielding power and influence wasted little time in closing down the TRC Cases. Within a few weeks of the speech, attempts by PCLU

prosecutors to commence investigations were blocked when they were refused investigative support by both the DSO and SAPS.

130 As mentioned above, the PCLU was engaged in identifying key TRC cases for further investigation, and they were entertaining requests from family members. One of the requests made to Macadam was from Imtiaz Cajee, nephew of Ahmed Timol who died in security detention in 1971. On 5 May 2003, Macadam sent a letter to Andrew Leask, the Chief Investigating Officer at the DSO (**Leask**) asking him to investigate the Timol case. A copy of this letter is attached to Macadam's aforesaid affidavit (**FA5**) as annex RCM1 (at p807).

131 On 15 May 2003, Macadam submitted a report to the NDPP, the Head of the DSO and the head of DSO operations setting out the TRC cases which had been identified for investigation, which included the Timol case. A copy of this report is attached to Macadam's affidavit (**FA5**) as annex RCM2 (at p809).

131.1 According to Macadam the following cases were being prepared for prosecution:

131.1.1 The murder of four policemen in the Motherwell Bombing. The targets in this investigation were members of the Port Elizabeth SB and the Vlakplaas Unit, including Major General Nick van Rensburg.

131.1.2 The prosecution of Major General Nick van Rensburg for ordering the killing of askari Brian Ngqulunga.

131.1.3 The prosecution of the SB members responsible for kidnapping the PEBCO 3 from the Port Elizabeth Airport in 1985.

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131.1.4 The prosecution of AZAPO leader George Wauchope for murder and other charges.

131.1.5 The prosecution of Phillip Powell for possessing hand grenades and other illegal weapons in April 1994.

131.1.6 The prosecution of JM Ngcobo and others for the concealment and possession of an arms cache at the Nqutu Bunker in May 1999.

131.1.7 The prosecution of the CCB members responsible for the bombing of the Early Learning Centre in Athlone.

131.2 The next category of cases was titled "POTENTIAL FURTHER PROSECUTIONS ARISING FROM THE ABOVE" and included:

131.2.1 The murder of the PEBCO 3. It was noted that a kidnapping prosecution could encourage one or more suspects to speak about the murders for a "lesser sentence".

131.2.2 The murder of the Cradock Four. It was noted that the same suspects behind these murders were also involved in the Motherwell and PEBCO 3 killings, and that prosecutions in those killings could encourage suspects to come forward in the Cradock Four case in order to secure a "lesser sentence".

131.3 The next category of cases was titled "NEW CASES BEING EVALUATED FOR PROSECUTION PURPOSES" and included:

131.3.1 The murder of the COSAS 4.

- 131.3.2 The murder of askari Adriano 'Strongman' Bambo, who was allegedly murdered by the SB to prevent him disclosing details about the murder of Nokuthula Simelane and others.
- 131.3.3 The murder of a detainee on the East Rand by Willem Helm Johannes 'Timol' Coetzee.
- 131.3.4 The murder of askari Dan Mabolo.
- 131.3.5 Allegations by an IFP sentenced prisoner to have knowledge of murders in the East Rand from 1988.
- 131.3.6 447 dockets relating to APLA handed over by SAPS Crimes Against the State Unit.
- 131.3.7 Six to eight dockets linking the AWB to pre-election bombings previously dealt with by Adv Fick.
- 131.4 The next category of cases was titled "HIGH INTEREST CASES WHICH REQUIRE ATTENTION IRRESPECTIVE OF THE NATURE OF AVAILABLE EVIDENCE" and included:
- 131.4.1 The murder of Victoria Mxenge.
- 131.4.2 The kidnapping, torture and murder of Ntombikayise Khubeka.
- 131.4.3 The kidnapping, torture and murder of Nokuthula Simelane
- 131.4.4 The decision by the DPP (Pretoria) not to prosecute SAP General Krappies Engelbrecht.
- 131.4.5 The un-investigated allegations against SAP General Bassie Smit.

131.4.6 The Ciskei coup d'etat.

131.4.7 The Transkei coup d'etat.

131.4.8 The pre-election train violence in Gauteng.

131.4.9 The murder of Reggie Hadebe.

131.4.10 The murder of Dulcie September.

131.4.11 The refusal of amnesty to 37 high ranking ANC officials.

131.4.12 The decision by the DPP KwaZulu Natal not to prosecute IFP hit squads.

131.5 Other categories were titled "*CASES IN THE PROCESS OF BEING CLOSED*", "*ASSISTANCE TO OTHER AGENCIES*" and "*REPARATIONS RELATED ACTIVITIES*". Another category dealt with cases that had been put on hold pending the appeal in the Basson case in relation to jurisdiction for conspiracy to commit crimes outside South Africa. These cases included:

131.5.1 The murder of Anton Lubowski.

131.5.2 The Lesotho Raid (also known as the Maseru Raid).

131.5.3 The Botswana Raid (also known as the Gaborone Raid).

131.5.4 The Swaziland Raid.

131.6 Macadam concluded his letter with certain "Policy Considerations":

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131.6.1 Prosecutions not to be conducted on a piece meal basis except where special circumstances demand (e.g. witness on point of death, accused about to leave South Africa or engaged in current criminal activities).

131.6.2 Once all the cases earmarked for prosecution have been investigated, a presentation will be given to the NDPP in order for him to confirm the prosecution strategy.

131.6.3 Thereafter prosecutions will be instituted. After convictions have been obtained attention will be given to cases which currently have evidence since convictions may act as incentive for perpetrators to come forward.

132 If only a fraction of the cases listed in Macadam's report had been resolved in the early 2000s it would have brought significant closure for the concerned families and given considerable impetus for the finalisation of the balance of cases.

133 The minutes of the Justice Portfolio Committee meeting on 10 June 2003 in respect of the NPA reflected:

"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." (emphasis added)

134 At the DSO, it was Special Director Adv MG 'Geoph' Ledwaba (**Ledwaba**) who made decisions on the opening of new investigations. Accordingly, Ackermann and Macadam met with Ledwaba to ask the DSO to conduct investigations referred to in

the aforesaid report. Ledwaba was firm in his refusal to take on the TRC cases. In his affidavit, Macadam noted the following about that meeting:

"The meeting was unpleasant as Ledwaba **made it clear in no uncertain terms that the DSO would not investigate any TRC matters** and that these should all be referred to SAPS." (emphasis added)

135 A copy of a letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision is annexed to Macadam's affidavit (FA5) as annex RCM3 (at p814). In this letter he instructed Leask as follows:

"TRC cases

I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used. Notwithstanding the above decision Adv Tongwane must finalize the Black Cats and Winnie Mandela cases. Due to the fact that NDPP has requested a speedy finalization of the two matters this must be done before 30 July 2003. I have also transferred the two researchers to the PCLU. It may be necessary for your investigators to introduce certain witnesses with whom they have dealt to the SAPS investigators, and you are accordingly authorized to conduct the necessary handovers."

136 This refusal of the DSO to investigate the TRC cases was a remarkable decision, given that the DSO had previously been seized with the TRC cases and just weeks earlier the NDPP had declared the TRC cases to be "*priority crimes*".

The President must decide

137 It is reflected in Macadam's affidavit that he and Ackermann then met with Commissioner Johannes De Beer, the Divisional Head of the Detective Service of the SAPS (**De Beer**) and requested the SAPS to take over the investigations.

137.1 On 26 September 2003, De Beer replied to Ackermann informing him that the request had been discussed with the National Commissioner of the

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SAPS, Jacob "Jackie" Sello Selebi (**Selebi**). In his letter De Beer advised that the SAPS would not provide investigators for the TRC cases.

137.2 He indicated that the investigation of the TRC matters was a DSO responsibility and the NDPP would need to approach the President for a decision as to which agency should conduct the investigations. A copy of this letter is attached to Macadam's affidavit (**FA5**) as annex RCM4 (at p816).

137.3 According to Macadam, NDPP Bulelani Ngcuka never approached the President.

138 De Beer explained as follows in his letter:

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

From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking. Your letter only states that: "In March 2002, consideration was given to the issue of a Presidential proclamation, but problems were encountered in this regard. You are aware of the fact that the capacity created for the D 'Oliveira Committee is presently with the DSO.

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

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

You are therefor requested to approach the President on the matter, where after we can take the matter further, if necessary." (emphasis added)

139 It is notable that the SAPS regarded the TRC cases as a political issue. It is also noteworthy that the only state entities authorised to conduct official criminal investigations in South Africa both refused to touch the TRC cases. It is highly unlikely that their decisions were spontaneous or mere coincidences. It is apparent that by May 2003 both the SAPS and the NPA were reluctant to take on the TRC cases, and in all probability had been told not to do so from a political level.

140 The fact that the NPA was told to contact the President reflected that the question of investigating the TRC cases was now a purely political one, and a sensitive one at that. It appeared that only the head of state could make that decision, regardless of what the law and Constitution said about investigative authority.

141 It is remarkable that NDPP Ngcuka did not contact the President for a decision on this question. The failure to do so probably suggests that approaching the President was seen as a futile exercise.

No investigations

142 Thereafter Ackermann and Macadam made a last-ditch attempt to persuade Special Director Ledwaba at the DSO to reconsider his decision not to investigate the TRC cases. Ackermann sent Ledwaba a letter (styled as an "Internal Memorandum") dated 11 November 2003 appealing him to appoint investigating officers. It was

pointed out in the letter that "*if the DSO did not provide investigators the PCLU would not be able to deliver on its mandate.*" Both the NDPP and Head of the DSO were copied on the letter, a copy of which is attached to Macadam's affidavit (FA5) as annex RCM5 (at p818). This letter is reproduced below:

"1. In the light of current developments, I am constrained to document the history of the above saga.

- i) In 2001 the NDPP decided that the DSO was responsible for the investigation and prosecution of the above cases. Both Advocates Sonn and McCarthy made a number of public statements creating an impression that the DSO was making a sincere effort to do justice to the cases. In addition, Advocate Sonn gave the President a full briefing on the matter.
- ii) In 2002 the SNPU was established in order to investigate the cases.
- iii) In 2003 and in response to the TRC's final report, the President placed the responsibility for the investigation and prosecution of TRC matter on the NDPP.
- iv) In May 2003 I gave the NDPP and his Deputies a full briefing on all TRC, cases identified for prosecution.

My prosecution strategy was endorsed and Advocate McCarthy indicated that there would be no problem in having the cases declared in terms of Section 28 of the NPA Act. The NDPP briefed the Minister and Justice Portfolio Committee accordingly.

- v) Shortly thereafter and in the same month you were presented with applications in terms of Section 28 relating to the cases.
- vi) In July 2003 you verbally informed me that you were not prepared to sign the declarations and were withdrawing the DSO from the further investigation of the cases. A letter to this effect was given to the CIO Leask by you. (Copy attached)
- vii) In response thereto I requested Commissioner De Beer to appoint the police to take over the investigations. After a series of meetings with him, he approached the National Commissioner who indicated that the police would only investigate upon written instruction of the President (Copy of De Beer's letter is attached). His primary reason was that the SAPS had transferred all their members with appropriate

experience to the DSO in order to capacitate it to conduct these investigations.

- viii) After receipt of De Beer's letter, I made several unsuccessful attempts to contact you to discuss the matter. Eventually I had to report the matter to Dr Ramaite.
- ix) On 3 November 2003 you informed me that you would sign the declarations in terms of Section 28(1)(b) and would appoint SSI De Lange to conduct the necessary investigations.
- x) On 6 November 2003 Dr Ramaite informed Adv Macadam that he had discussed the matter with Adv McCarthy who indicated that the DSO would investigate.
- xi) On 10 November 2003, Adv Macadam presented you with Section 28(i)(b) declarations.

You informed him:

- a) That you are not prepared to sign any declarations
 - b) De Lange would not be appointed despite the fact that it was explained to you that he was part of the initial investigation and familiar with all the witnesses and the facts of the cases.
 - c) That during the course of 10 November 2003 another Investigator will be appointed.
 - d) The President should not be approached to involve SAPS.
2. As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted.

There are certain cases which could have been prosecuted which have prescribed. There is both National and International pressure to institute prosecutions (e.g. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the *bona fides* of the National Prosecuting Authority into serious dispute and do irreplaceable damage.

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

- 143 Ackermann's heartfelt plea fell on deaf ears. Ledwaba was not moved to act, even though he was advised that the NPA was under local and international pressure, and cases were prescribing. Ackermann's warning that the failure to proceed with the TRC cases would bring the NPA into disrepute, and do irreparable harm to its image, was precisely what happened.
- 144 The DSO persisted in its refusal to appoint investigators, as did the SAPS. According to Macadam this effectively brought an end to the TRC cases as it meant that no new investigations of the TRC matters could be opened.
- 145 The TRC cases were effectively closed down before the end of 2003, before the PCLU could commence real case work. The few cases taken forward subsequently were those in which investigation dockets had already been completed.
- 146 On 25 February 2004 Macadam wrote to Imtiaz Cajee, nephew of Timol, advising him of "*negative results*" of the investigation that had purportedly been launched, a copy of which is annexed here to marked **FA23** (also annexed to Macadam's affidavit as RCM9 at p834).
- 146.1 Macadam did not disclose to Cajee that the investigations into the Timol case and the other TRC cases were blocked before they could even start. The only 'investigation' carried out was the canvassing of an aspect with the late Ivor Powell, a Cape Town based journalist. This singular activity did not constitute an investigation.
- 146.2 Even if only the most basic investigation had been carried out, key suspects who were still alive could have been held to account. The lead SB

interrogators who tortured and murdered Timol, Captains JZ Van Niekerk and JH Gloy died on 31 October 2006 and 30 July 2012 respectively; while Maj Gen CA Buys, (Head of the SAP CID) who led the cover-up, died on 25 February 2007.

- 146.3 The NPA had some nine years to act before the last key suspect died. Not only did it not take any action but on 29 November 2006, the NPA in an internal report, titled: "*Report of the Progress made by the Task Team on TRC Cases*", attached to Macadam's (FA5) affidavit as annex RCM10 (at p835), confirmed that it had closed the Timol case:

"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.

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.

The matter was therefore closed."

- 146.4 The above entry was misleading as it did not disclose that no investigation officer was ever appointed, and no other steps were taken apart from contacting the journalist. It was also misleading to suggest that "*no other evidence*" was available since there had been no investigation. In 2017, some 11 years later, the family's legal team was able to assemble sufficient evidence to persuade an Inquest Court that the SB had murdered Timol. However, by then all key perpetrators had died.

- 147 The refusal by both the SAPS and the DSO to investigate some of the most serious crimes committed in South Africa deeply violated their legal and constitutional obligations.

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The Amnesty Task Team

148 A Director-General's Forum chaired by Adv Pikoli, the then Director General of the DOJ, met on 23 February 2004 to consider how to give effect to the President's objectives set out in his speech the year before. Essentially this involved how to deal with the TRC cases, which Pikoli described in his affidavit, as being "*politically sensitive*" (TN7 at pp 170 – 216 in *Nkadimeng 2*). The Forum appointed a Task Team to report on a mechanism to give effect to the President's objectives. This task team was known as the "Amnesty Task Team" (**ATT**).

149 The ATT was required to:

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

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

149.3 advise whether legislative enactments were required.

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

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

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

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- 150.3 Bearing in mind the abovementioned guidelines, whether legislative enactments were required.
- 150.4 Whether any of the two Bills that have already been formulated can be taken forward, while taking into account the views of the intelligence agencies.
- 151 The names of the two bills were not disclosed but presumably one of them was the Indemnity Bill (first 2 pages at RCM13 at p861). The views of the Intelligence Agencies were also not disclosed.
- 152 The ATT comprised the following members:
- 152.1 Deon Rudman (Chairperson): DOJ
- 152.2 Yvonne Mabule: National Intelligence Agency (**NIA**)
- 152.3 Vincent Mogotloane: NIA
- 152.4 Gerhard Nel: NPA
- 152.5 Lungisa Dyosi: NPA
- 152.6 Ray Lalla: SAPS
- 152.7 Joy Rathebe: Department of Defence (**DOD**)
- 153 The ATT was requested to submit its report to the Director General's Forum by close of business on 1 March 2004. The ATT met on 26 February 2004 and again on 1 March 2004.
- 154 The undated 2004 secret report, titled "*Report: Amnesty Task Team*", which was disclosed during the proceedings in the matter of Nkadimeng & Others v The

National Director of Public Prosecutions & Others (TPD case no 32709/07 [2008] ZAGPHC 422) (Nkadimeng 1) as annex TN42 at p431. It is annexed hereto marked **FA24**. The report set out the ATT's mandate, background, proposals and concerns.

155 The ATT Report noted that a further amnesty would face challenges because of constitutional issues but nonetheless the team still had to find ways to accommodate those perpetrators who did not take part in the TRC process. In relation to its first task, the ATT recommended the creation of a Departmental Task Team comprising representatives from:

155.1 Department of Justice and Constitutional Development,

155.2 The Intelligence Agencies,

155.3 South African National Defence Force,

155.4 South African Police Service,

155.5 Correctional Services,

155.6 National Prosecuting Authority,

155.7 Office of the President.

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

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

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

156.2.1 Whether a prosecution "politically" reflects the aims of the TRC Act and is not in conflict with the requirements of objectivity.

156.2.2 Various humanitarian concerns.

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

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

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

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

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

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

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

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

156.3.2 The possibility of the institution of private prosecutions.

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

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

157 According to Pikoli in his affidavit in *Nkadimeng 2*, the recommendation of the Interdepartmental Task Team for 'a two-stage process', which would have required its recommendation before the NDPP could prosecute was rejected. This was because it would have been a violation of the NDPP's prosecutorial independence enshrined in section 179 of the Constitution. Although the Task Team's role was meant to be advisory in nature it soon became apparent that the non-NPA members of the team saw their role as supervisory rather than advisory. Indeed, as will be seen below, the 'two-stage process' was reintroduced causing a crisis of conscience for Pikoli.

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

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

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

158.3 It attached a draft Indemnity Bill to the report (as annex B) in case government decided to proceed with a further amnesty. The annex was not attached to the report in the version disclosed in *Nkadimeng 2*. However, the first 2 pages of the draft bill were attached to Macadam's affidavit (FA5) as RCM13 at p861. It would have provided for a rerun of the TRC's amnesty process.

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

"Should Government, however, decide on a further amnesty process ..., legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court."

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

The Secret Further Report of the Amnesty Task Team

161 The secret Further Report of the ATT was disclosed by Macadam in his affidavit (FA5) as annex RCM15 at p864. Perhaps more than any other document, the Further Report reveals the real intent of those behind the political interference. The

report is undated, but it would have been generated in 2004 in the weeks or months following the submission of the ATT's first report to the Heads of Department Forum on 4 March 2004.

162 The report reveals that the Heads of Department Forum discussed the first ATT Report with members of the Task Team, "*whereafter they deliberated the Task Team's proposals and recommendations in camera*". Following these deliberations, the Heads of Department Forum indicated that they preferred the Task Team's recommendations relating to the establishment of a Departmental Task Team (referred to as Option 1). However, they requested the Task Team to further consider the following aspects:

- 162.1 In performing its functions, the proposed Inter-departmental Task Team (ITT) must make use of existing structures rather than parallel structures.
- 162.2 Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the NDPP decides not to prosecute; and investigate the possibility and desirability of legislation, if required.
- 162.3 The proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee.
- 162.4 It is important that the proposed Task Team, the Inter-Ministerial Committee and the NDPP, in performing their functions and reaching decisions, should take the national interest into account.
- 162.5 Advise the Forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court (ICC).

- 162.6 Advise the Forum on a timeline for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.
- 163 Perhaps most revealing was the Forum's instruction to the ATT to explore ways in which private prosecution and civil litigation could be eliminated where the NDPP decides not to prosecute, including the possibility of fresh legislation to achieve this end. This exposes the intent to come up with a means to guarantee maximum impunity for apartheid-era perpetrators.
- 164 The fear that victims and families could turn to the ICC, in the event that avenues for accountability in South Africa were completely closed, presented a real fear to the Forum.
- 165 Equally chilling was the desire of the Forum for the ITT to "*work under the direct supervision of an Inter-Ministerial Committee*".
- 165.1 If there was any doubt that the prosecution process in relation to the TRC cases was to be under the thumb of political overlords, it was dispelled by this requirement. This is in fact what transpired.
- 165.2 As will be discussed below, towards the end of 2006, the ITT was instructed that it must submit a final recommendation to a "*Committee of Directors General*" in respect of each TRC case, which in turn must advise the NDPP in respect of who to prosecute or not.
- 165.3 In addition, it emerged that at least by 2007, if not earlier, there was a "*Cabinet Committee on Post TRC matters*", which was a subcommittee of the Justice, Crime Prevention and Security Cluster.

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

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

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

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

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

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

Response of the ATT

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

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

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

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

168 According to the Further Report, the question of "*eliminating private prosecution[s] and civil litigation in cases of a no prosecution [] elicited much debate*" within the ATT.

168.1 The ATT spoke to two State Law Advisers and obtained a legal opinion from Adv JH Bruwer, which was attached to the report, although it was not attached to the copy annexed to Macadam's affidavit. There appeared to be agreement that "*legislation eliminating private prosecution and civil litigation will at least affect a person's right to equality and the right of access to courts*".

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- 168.2 They also doubted that "*the motivation for such legislation would meet the requirements of section 36 (the limitations clause) of the Constitution*", which would be "*seen as a further amnesty process.*"
- 168.3 The ATT drew the Heads of Department Forum's attention to an article in the *Rapport* of 7 March 2004 where Archbishop Desmond Tutu was quoted as saying that those who did not receive amnesty should face prosecution and any new initiative to stop prosecutions "*would be seen as negating the amnesty process of the TRC.*"
- 168.4 The ATT advised that the only way to eliminate private prosecutions and civil litigation would be by way of legislation and a Constitutional amendment which "*would not be desirable.*"
- 168.5 It is interesting to note that in *Nkadimeng 1*, the Minister of Justice and the NPA argued that the Prosecution Policy amendments did not promote impunity because families and victims could still bring their own private prosecutions, even though they lacked investigative powers and the resources of the State. Judge Legodi, recognising the absurdity of this claim, noted in his judgment in *Nkadimeng 1* that "*crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted.*"
- 168.6 It is not known if the State Law Advisors and Adv Bruwer were asked to provide an opinion on the constitutionality of the proposed amendments to the Prosecution Policy, which provided for an effective back door amnesty. Archbishop Desmond Tutu filed a supporting affidavit in the legal challenge to the new policy (in *Nkadimeng 1*), where he stated that the efforts of the

State "represented a betrayal of all those who participated in good faith in the TRC process. It completely undermined the very basis of the South African TRC." An unsigned copy of the Archbishop's affidavit is annexed hereto marked **FA25**.

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

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

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

172 In relation to the question of setting a timeline for the Departmental Task Team to complete its work, the ATT declined to propose a timeline but proposed that "*the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into*

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account the extent to which its objectives are achieved." Perhaps the ATT realised it should leave this decision in the hands of the office holder who was really calling the shots. In doing so, the ATT confirmed loudly and clearly that the question of the TRC cases was now firmly in the hands of those in political control.

Moratorium on investigating and prosecuting the TRC cases

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

174 It is not known who authorised the halting of investigations, but since it involved suspending work on a large number of serious crimes, mostly involving murder, it is highly likely that the authority must have come from the very top. In addition, the heads of the NPA, DSO and SAPS must all have acquiesced in this decision, together with the cabinet ministers overseeing those departments.

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

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

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

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

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

179 It turned out the guidelines were amendments to the NPA's Prosecution Policy, which were only issued in December 2005. This meant that the moratorium was in place for between two and three years. As will be seen below, the issuing of the

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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.

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.

Chapter Two

Prosecution of Political Crimes After the TRC

This chapter documents the prosecutions arising out of and/or connected with the TRC that have been initiated since the conclusion of its work. The chapter will also describe the various special units within the prosecutorial service, which were established for this purpose. The analysis will embrace all proceedings concerning crimes that were committed during the time period relevant for the Amnesty Committee's mandate from 1960 to 1994 and which potentially also fall within its legal mandate. Such crimes were, thus, at least politically motivated and connected with the apartheid conflict. The discussion therefore focuses on two types of crimes: those for which amnesty has been applied but was refused or those for which amnesty was not applied at all. Although the issue of post-TRC prosecutions in fact became more salient after the Amnesty Committee finished its work in 2001, the focus will be on all trials that were instituted after the deadline for amnesty applications had lapsed in 1997.

The first four documented cases concern proceedings that were conducted and initiated by the regional prosecution authorities independent of any central or special units in Pretoria. The following four cases, starting with the Terre'Blanche case, contain descriptions of prosecutions that were instituted and conducted by the special Priority Crimes Litigation Unit. Both sets of cases will be presented in chronological order.

1. *Special Units for Post-TRC Prosecutions*

In 1998 the work of the team headed by Jan D'Oliveira came to an end. In the course of that year the prosecution authorities were completely restructured. A new centralised National Prosecution

Authority (hereinafter NPA), headed by a National Director of Public Prosecutions (hereinafter NDPP), was established in Pretoria.¹ The first NDPP was Bulelani Ngcuka who was succeeded in early 2005 by Vusi Pikoli.² D'Oliveira became one of the deputy NDPP and was no longer involved with prosecutions related to the apartheid conflict.³ In September 1999 most of the members of his unit were integrated into the newly established Directorate of Special Operations (hereinafter DSO),⁴ the so-called "Scorpions", which was in urgent need of skilled investigators and prosecutors.⁵ However, the question remained, what should happen with the TRC-related cases with which the D'Oliveira Unit had been dealing.

1.1 *The Human Rights Investigative Unit*

In early 1999 a working group called the Human Rights Investigative Unit was established within the NPA on the initiative of then Minister of Justice Dullah Omar. The unit's mandate was to review, investigate and possibly prosecute all cases falling within the ambit of the TRC Act for which amnesty had been refused or was not applied,⁶ thus, to continue the work of Jan D'Oliveira.

¹ See for a comprehensive study of the NPA: M. Schönteich *Lawyers for the people* (2001).

² Ngcuka resigned as a result of political conflicts over the prosecution of former Deputy President Jacob Zuma. Pikoli was suspended in September 2007 for political reasons and replaced by Mokotedi Mpshe.

³ Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).

⁴ The DSO was an Investigating Directorate according to section 7 of the National Prosecuting Authority Act 32 of 1998 (hereinafter NPA Act) (for the capacities of the DSO see Chapter 5 of the NPA Act). It was the only prosecutorial entity capable of conducting its own investigations. According to section 7(1A) of the NPA Act the President may appoint two further Investigating Directorates, which as yet has not happened. Meanwhile the DSO has been disbanded on the initiative of the ANC. Most likely this happened for political reasons, since the DSO successfully targeted a number of high profile ANC leaders for corruption. See *End of the road for Scorpions* SAPA, Oct 10, 2008.

⁵ V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 214.

⁶ Interview with Vincent Saldanha in Cape Town (April 26, 2006).

The unit was headed by Vincent Saldanha; and his deputy was former Witwatersrand prosecutor Brink Ferreira.⁷ According to Saldanha, four lawyers worked basically on a full or part time basis for the unit.⁸ He sensed intense political support for his work, especially from the Department of Justice, led by Dullah Omar. Distinctions were not to be made between perpetrators of the political groups.⁹ The composition of the unit further reflected, according to Saldanha, an approach that was extremely human rights- and victims-orientated. He himself comes from the human rights sector and was involved in a number of TRC hearings as an attorney for victims.¹⁰ Some of the other members of the unit had prior work experience with the TRC or with human rights non-governmental organisations (hereinafter NGO).¹¹ The drafting of personnel from outside the ordinary prosecution structures also guaranteed for a high degree of independence.¹²

In November 1999 all dockets concerning criminal cases were moved from the D'Oliveira Unit to the Human Rights Investigative Unit.¹³ Furthermore, some prosecution dockets from the regional NPA offices concerning TRC-related cases as well as all relevant dockets from the TRC were gathered at the latter unit. Although the dockets often concerned ongoing investigations, which in some cases had reached a very advanced stage, there was strangely no consultation or cooperation between D'Oliveira and the Saldanha team.¹⁴

It was intended that Saldanha would head the unit for a short period. After the conclusion of his secondment from his primary place of work, the Legal Resources Centre in Cape Town, he left the unit, having

⁷ V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 213.

⁸ According to Nerlich it was initially intended to assign three deputy directors and five senior state advocates to the unit (*ibid.*).

⁹ Interview with Vincent Saldanha in Cape Town (April 26, 2006).

¹⁰ V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 213.

¹¹ *Ibid.*

¹² Interview with Vincent Saldanha in Cape Town (April 26, 2006). However, the unit had to appoint police to conduct investigations and had to appoint NPA prosecutors once a case was ready for indictment.

¹³ V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 213.

¹⁴ Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).

served for only one year. Until then all investigations were still ongoing and no charges had been laid.¹⁵ Among the cases under scrutiny some were very high profile, such as the case of the torture and killing of Steve Biko.¹⁶ Moreover, a number of persons from the upper echelons of the former security apparatus were among those under the scrutiny of the unit.¹⁷ The rationale behind the fact that nobody was charged lay, according to Saldanha, with the complexities of such high profile cases, which required meticulous preparation and the fact that a great number of cases were still handled by the Amnesty Committee. Once Saldanha's tenure lapsed, the unit's work only continued for a brief time. The setup of the unit was probably not ideal. Saldanha worked only on a part-time basis for the unit and lacked experience as a prosecutor.

However, thereafter the responsibility for TRC cases was again allocated to a working group within the DSO, the so-called Special National Projects Unit headed by Advocate Chris Macadam.¹⁸ It is doubtful whether any significant and/or ongoing work was done on the issues during that time as it was probably only Macadam who worked on post-TRC prosecutions on a part time basis.¹⁹ Again, no court proceedings were instituted. TRC cases apparently did not enjoy high priority at that time. Macadam asserts that, again, it was the ongoing amnesty proceedings that acted as the main barrier to progressing with prosecutions.²⁰

Whereas the D'Oliveira Unit had been well-staffed and well-equipped, the resources allocated to post-TRC prosecutions after 1998 were absolutely minimal, which naturally contributed to their slow progress.²¹

¹⁵ Interview with Vincent Saldanha in Cape Town (April 26, 2006).

¹⁶ See text accompanying *infra* Chapter 4 note 166.

¹⁷ Interview with Vincent Saldanha in Cape Town (April 26, 2006).

¹⁸ Interview with Torie Pretorius and others in Pretoria (May 2, 2006). Macadam had previously also worked for the TRC as head of the Commission's witness protection programme.

¹⁹ Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

²⁰ Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

²¹ Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

The NPA did not want to commit resources to cases which might eventually collapse due to amnesty applications being granted to those under investigation.²² Yet it seems probable that there were also a significant number of potential cases for which amnesty had not been applied or that the D'Oliveira team had already prepared, such as the investigations against General Krappies Engelbrecht, the former commander of Eugene de Kock.²³ By 1999 the D'Oliveira Unit had allegedly already prepared about 20 charge sheets.²⁴

According to Macadam, the NPA wanted to await the presentation of the last volumes of the TRC Report. This could not, however, have constituted an obstacle in a legal sense, especially considering the clear recommendations the TRC had already made with regards to criminal accountability in 1998. However, the NPA tried to avoid interfering with the President's response to the TRC Report with respect to policy approaches to tackle TRC-related crimes, including the possible pardoning of certain perpetrators.²⁵ This and the lack of resources could explain why, although the Amnesty Committee's work ended in May 2001, still by 2003, when the last TRC Report volumes were published, criminal proceedings had yet to be instituted. Moreover, the structures put in place for post-TRC prosecutions were not ideal, as was especially the case when matters were placed with the DSO,²⁶ which was primarily an elite unit for the investigation and prosecution of serious economic crimes, corruption, organised crime and terrorism.²⁷

In conclusion it must be stated that the work on post-TRC prosecutions within the central NPA office between 1998 and 2003 was insignificant.

²² Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

²³ See V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 154–55.

²⁴ *Ibid.*, 154.

²⁵ Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

²⁶ Interview with Madeleine Fullard in Pretoria (May 4, 2006).

²⁷ M. Schönleich *Lawyers for the people* (2001) 64.

1.2 *The Priority Crimes Litigation Unit*

The pace of developments did indeed pick up, however, after the last two volumes of the TRC Report²⁸ had been tabled in Parliament on 15 April 2003. President Mbeki stated in a speech before Parliament on this occasion that it was in the hands of the NDPP to pursue any cases arising from the TRC that he considered prosecutable as is normal practice in criminal justice.²⁹ This apparently provided the clarification the NPA had awaited to proceed on TRC cases.

One month prior to this statement the responsibility for TRC prosecutions had been transferred again. On 24 March 2003, three days after the final Report volumes had been presented to the President, Advocate Anton Ackermann was appointed Special Director of Public Prosecution³⁰ and head of the newly founded Priority Crimes Litigation Unit (hereinafter PCLU).³¹ According to the respective presidential proclamation, the PCLU is responsible for managing and directing the investigation and prosecution of crimes dealt with in the Implementation of the Rome Statute of the International Criminal Court Act no 27 of 2002, serious national and international crimes, including acts of terrorism and sabotage, high treason, sedition, mercenary activities and other priority crimes to be determined by the NDPP.³² No mention is made of post-TRC prosecutions. However, at the inception of the PCLU the NDPP declared all crimes relating to the TRC for which

²⁸ *TRC Report*, vols 6 and 7. See also section 44 of the TRC Act.

²⁹ Statement by President Mbeki to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (April 15, 2003).

³⁰ According to section 13(1)(c) of the NPA Act the President may appoint Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain special functions.

³¹ Proclamation by the President of the Republic of South Africa of 24 March 2003 (No. 46 of 2003).

³² *Ibid.* The PCLU is also responsible for prosecutions relating to the non-proliferation of weapons of mass destruction (nuclear, chemical and biological) and regulations of conventional military arms (National Prosecuting Authority, *Annual report 2005/2006*).

amnesty had not been granted as priority crimes in the context of the proclamation, which made the PCLU the agency responsible for dealing with such crimes.³³ In fact, TRC matters initially made up the main proportion of the unit's work.

In mid-2006 the PCLU effectively consisted of six prosecutors: its head Anton Ackermann, his deputy Torie Pretorius, Chris Macadam, who was previously responsible for TRC matters in the DSO, Shawn Abrahams, Susan Bukau and the then newly appointed Mtunzi Mhaga, who had previously been involved in two TRC-related trials in the Eastern Cape.³⁴ The composition of the unit shows a high degree of continuity. Ackermann and Pretorius had worked under D'Oliveira. Prior to that Pretorius had worked for the Goldstone commission.³⁵ As already stated, Macadam had been involved with TRC cases before 2003 and had gathered experience by working for the TRC.

When Ackermann took over matters, he instituted an audit of all available cases. The result was that some 459 cases³⁶ could be registered from the material, contained in dockets concerning the cases handed over from the TRC or the D'Oliveira Unit. About 160 cases were immediately deemed not to warrant further proceedings. Only about 16 cases were identified as worthy of pursuing prosecution.³⁷ At least three were prepared almost immediately for indictment.³⁸ It would, however, be totally unrealistic to expect all of the hundreds of cases, especially those submitted by the TRC, to warrant criminal proceedings.³⁹ The list handed over by the TRC does not significantly contribute to the work of the PCLU in general, as most cases had already been known to the D'Oliveira Unit.⁴⁰ By the end of 2006 the PCLU was

³³ E-mail from Anton Ackermann (Oct 18, 2005).

³⁴ Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

³⁵ V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 123.

³⁶ National Prosecution Authority, *Annual report 2002/2003*.

³⁷ Interview with Anton Ackermann in Pretoria (May 11, 2006).

³⁸ *Ibid.*

³⁹ Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).

⁴⁰ Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

working on 16 cases in total, five of which were considered to be of high priority and had been prepared to an advanced stage.⁴¹

As far as the general approach to post-TRC cases is concerned, the PCLU focuses first on cases in which amnesty has been denied, since it is generally easier to identify a case worthy for prosecution. The PCLU's secondary focus is cases where amnesty was not applied at all.⁴² Cases that involve the use of egregious violence and which resulted in the death of more than one person are naturally of higher priority than those which, for instance, were only directed at non-human entities, such as sabotage attacks of the liberation movement.⁴³ However, according to its senior members, the PCLU attempts to ignore as much as possible political implications and to resist distinguishing between the political groups of liberation movement and apartheid state forces. The approach taken is strictly dependent on the availability of evidence and the egregiousness of the crime, regardless of political affiliation of the perpetrator.⁴⁴

Besides this, there is also a working group within the NPA which works on the exhumation of missing persons who were killed during the struggle against apartheid and secretly buried. The primary aim of the exhumation work is to return the remains to the victims' relatives. It is not driven by criminal investigations but occasionally new information can come to light that is relevant for prosecutions.⁴⁵

⁴¹ E-mail from Anton Ackermann (June 19, 2006). It is unclear what happened to the above mentioned 20 indictments allegedly prepared already in 1999 or in how far those overlap with the 16 cases.

⁴² Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

⁴³ Interview with Anton Ackermann in Pretoria (May 11, 2006).

⁴⁴ Interview with Torie Pretorius and others in Pretoria (May 2, 2006); Interview with Anton Ackermann in Pretoria (May 11, 2006).

⁴⁵ Interview with Madeleine Fullard in Pretoria (May 4, 2006). Valuable information was uncovered in the case concerning the death of Ntombi Khubeka, who was a member of MK. In 1987 she was arrested by the security police in Natal and beaten during her interrogation. The policemen at their amnesty hearing claimed that she had suddenly died of a heart attack. However, when her remains were discovered

The biggest obstacle facing the PCLU is the severe lack of resources.⁴⁶ Apart from TRC matters, the unit is responsible for a range of other issues. As such, cases pertaining to the illegal trafficking of nuclear material and knowledge by South Africans took up a particularly large proportion of the unit's resources in recent times. Until the end of 2006, TRC matters took up on average only about 30 to 50 per cent of the unit's work.⁴⁷ Considering the already small number of prosecutors in the PCLU, this proportion is rather modest. Furthermore, the minimal resources devoted to the unit's investigative work is a major problem. Some cases had already been fully investigated, others needed more investigation. The D'Oliveira team included about 20 carefully selected, highly skilled and experienced police investigators, who were not suspected of sympathising with their former colleagues accused of political crimes.⁴⁸ Whereas this unit could thus conduct investigations independent of the police, the PCLU has to rely on the assignment of investigators and the conduct of investigations by the South African Police Service (hereinafter SAPS) or the meanwhile disbanded DSO.⁴⁹ The gathering of evidence concerning TRC cases is especially

and exhumed, a bullet hole in her temple was detected which, of course, exposed the police testimony presented as false (See *TRC Report*, vol. 6, s. 4, chap. 2).

⁴⁶ Interview with Anton Ackermann in Pretoria (May 11, 2006); Interview with Torie Pretorius and others in Pretoria (May 2, 2006). See also N Rousseau 'Prosecutions' in E. Doxtader (ed.) *Provoking questions* (2005) 37 at 47.

⁴⁷ Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

⁴⁸ V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 123; Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

⁴⁹ Interview with Torie Pretorius and others in Pretoria (May 2, 2006). Traditionally investigations, which are basically the independent responsibility of the police, and prosecutions are quite strictly separated (M. Schönsteich *Lawyers for the people* (2001) 41). Only with the establishment of the NPA was this traditional separation eased since with the DSO investigative powers were permanently introduced to the NPA. Furthermore, with the NPA Act prosecutors were granted greater influence on investigations. According to section 24(4)(c) of the NPA Act, a Director of Public Prosecutions, such as Ackermann, may in some bounds direct the responsible investigator who is according to section 24(7) of the NPA Act obliged to follow requests. It is also interesting to note that the first steps towards a combination of investigation and prosecution capacities occurred at the investigation of apartheid

demanding of investigators. The crimes often happened secretly without independent witnesses and were covered up meticulously. Thus, as was the case with the D'Oliveira team, the PCLU relies to a great extent on state witnesses in order to bring cases before the courts.⁵⁰ Again, incriminating evidence has to be compiled in order to urge the conspirators to cooperate.

Such circumstances and the political implications of TRC cases place special demands on the skills, commitment and experience of investigators. In contrast to the abilities of the investigators working for the D'Oliveira team, the PCLU has major problems recruiting such investigators.⁵¹ Although it was intended for the DSO to provide the PCLU with investigators, the DSO declined to cooperate.⁵² Thus, the unit has to rely on the police, who are obliged to cooperate. However, a request to the police of early 2004 to assign investigators on an ongoing basis was not followed.⁵³ The investigators, who were assigned to

crimes through the D'Oliveira team and the Investigative Task Unit in Natal which was necessitated by the during the 1990s still largely untransformed police service (*V. Nerlich Apartheidkriminalität vor Gericht* (2002) 123).

⁵⁰ Interview with Anton Ackermann in Pretoria (May 11, 2006). According to section 204 of the Criminal Procedure Act no 51 of 1977 arrangements can be made for participants in a crime to testify on behalf of the state against their accomplices to secure a conviction. If the state witness testifies frankly and honestly in the opinion of the court, he may be discharged from criminal liability for the offence in question. According to Ackermann, Pretorius and D'Oliveira evidence gathered by the TRC in comparison is not helpful and plays no significant part in the work of the PCLU. See also *V. Nerlich Apartheidkriminalität vor Gericht* (2002) 327 and 244.

⁵¹ Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

⁵² *Ibid.*

⁵³ *Ibid.* It has to be borne in mind that the SAPS also suffers from a major lack of resources and availability of skilled investigators. The focus of the SAPS is clearly on tackling the high present-day crime rate. It is thus not willing to assign resources for cases which mostly took place more than 20 years ago. (Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006)). Added to this power struggles between police commissioner Jackie Selebi and the NDPP, which came to a head at the prosecution of former deputy President Jacob Zuma, tainted the relationship between the SAPS and the NPA (Interview with Torie Pretorius and others in Pretoria (May 2, 2006)).

investigate certain matters, often lacked the necessary skill, determination and experience.⁵⁴ Compared to this problem, a possible lack of development and change in the police service or the reluctance of certain officers to investigate their former colleagues no longer plays an influential role.⁵⁵

From early 2006 all post-TRC prosecutions were concentrated at the PCLU and the regional prosecutors are obliged to refer such cases to the NPA in Pretoria. A centralised prosecution certainly has the advantage of enabling the achievement of consistent progress. Moreover, it certainly makes sense to concentrate the experience in prosecuting TRC-related cases in one central unit. The advantages of centralised prosecutions were highlighted by the D'Oliveira team and also by the prosecution of systematic crimes committed by the socialist regime in the former German Democratic Republic (hereinafter GDR).⁵⁶

2. *The Wouter Basson Case*

On 4 October 1999 the trial of Dr. Wouter Basson was opened at the High Court of Pretoria.⁵⁷ Basson was the leader of South Africa's secret programme on chemical and biological warfare also referred to as "Project Coast".⁵⁸ Project Coast was established by the SADF in the early 1980s initially with the intention of providing the country with the defensive capacity to react to chemical and biological warfare attacks.⁵⁹ Especially due to the activities of Basson, the project became increasingly involved in criminal activities in relation to the countering of opposition efforts against apartheid in Namibia, South Africa and various other countries.

⁵⁴ Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

⁵⁵ *Ibid.*

⁵⁶ K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 233–34.

⁵⁷ V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 167.

⁵⁸ *TRC Report*, vol. 2, chap. 6 C, paras. 1–2.

⁵⁹ *Ibid.*, para. 40.

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG

Applicant

And

NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS

First Respondent

THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE

Second Respondent

THE MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES

Third Respondent

THE NATIONAL MINISTER OF POLICE

Fourth Respondent

WILLEM HELM COETZEE

Fifth Respondent

ANTON PRETORIUS

Sixth Respondent

FREDERICK BARNARD MONG

Seventh Respondent

MSEBENZI TIMOTHY RADEBE

Eighth Respondent

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WILLEM SCHOON

Ninth Respondent

AFFIDAVIT

I, the undersigned

ANTON ROSSOUW ACKERMANN

state under oath as follows:

INTRODUCTION

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

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

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3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct. As I have not studied all the relevant official documentation I stand to be corrected on certain details, such as dates.
4. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

EXPERIENCE

5. I have worked as a prosecutor for more than 40 years. I have prosecuted several high profile cases in South Africa. I set out hereunder an outline of my professional career:
 - 5.1. Joined the Department of Justice in 1970.
 - 5.2. Graduated from the University of Potchefstroom with the degrees of B Juris and LLB in 1975.
 - 5.3. Admitted as an advocate in 1976.
 - 5.4. Served with the office of the Attorney-General in Pietermaritzburg between 1977 and 1989.
 - 5.5. Appointed Deputy Attorney General: Transvaal in 1989 and served in this post until 2003.

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BACKGROUND

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

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

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

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

12. *On 24 March 2003 I was appointed to head up the newly established PCLU. The mandate of the PCLU is to manage and direct investigations and prosecutions in relation to various priority crimes, including serious national and international crimes, such as terrorism, sabotage, high treason, sedition, foreign military crimes and other priority crimes as determined by the NDPP.*
13. *On 15 April 2003, the TRC Report was tabled before Parliament by President Thabo Mbeki who directed that the NDPP must institute prosecutions where appropriate.*
14. *In May 2003 the then NDPP, Advocate Bulelani Ngcuka, made a determination that all TRC-related cases, in which amnesty had been denied or not applied for, were 'priority crimes' in terms of the proclamation. This resulted in more than 400 investigation dockets being transferred to my office. Advocate Chris Macadam, attached to my office, and I conducted the initial audit and identified 21 cases as worthy of further investigation.*
15. *During 2004 and 2005 the PCLU identified 16 cases for further investigation and*

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

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

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

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

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four of which were suspended for five years.

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

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

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

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

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

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

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

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

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

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

18. All TRC related investigations and prosecutions were accordingly placed on hold pending the formulation of guidelines in relation to the so-called political cases of the past. These were to be incorporated as amendments to the Prosecution Policy (hereinafter referred to as "the amendments" or "the guidelines"). I was instructed by the NDPP to stop working on all the TRC cases.
19. At least two legal opinions were prepared by my office regarding the constitutionality of the proposed amendments to the Prosecution Policy and submitted to the NDPP. The opinions pointed out that the amendments amounted to a rerun of the TRC's amnesty process and would not survive constitutional scrutiny. At a number of meetings I voiced my opposition to the proposed amendments. I recall that I had numerous consultations with Gerard Nel, the legal adviser to the NDPP, who was playing a leading role in formulating the proposed amendments.
20. This suspension of prosecutions amounted to an effective moratorium on the pursuit of TRC related cases.
21. During 2005 I met with representatives of the Simelane family. They raised a number of requests, including that the PCLU should:

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- 21.1. Investigate with a view to prosecuting Detective Inspector Msebenzi Timothy Radebe, who played a role in the abduction and the torture of Simelane both at Norwood and Northham and who did not apply for amnesty.
- 21.2. Investigate with a view to bringing defeating the ends of justice charges against Coetzee and Pretorius for intimidating the late Sergeant Lengene into making a false statement and for attempting to coach Norman Mkhonza into making a false statement.
- 21.3. Follow up on the results of the examination of the micro cassette tape containing the conversation between Scotch, Pretorius and Coetzee; and follow up on the request for lists of unidentified bodies received by police mortuaries between 1980 and 1996.
- 21.4. Investigate the circumstances of the deaths of two key witnesses, Sergeant Mathibe and Sergeant Lengene.
22. I was not able to assist with these requests as at that stage my hands were tied with the effective moratorium in place pending the issuing of the new Prosecution Policy.
23. In December 2005 the amendments to the Prosecution Policy were issued. These

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

- 23.1. The NDPP was authorised to apply the same amnesty criteria used by the TRC but could also decline to prosecute on other open-ended criteria such as the perpetrator's demonstration of remorse, level of indoctrination sustained, attitude towards reconciliation and/ or his willingness to abide by the Constitution.
- 23.2. These criteria would entitle the NDPP to decline to prosecute, even where there was adequate evidence to justify a prosecution in a serious case such as kidnapping or murder.
- 23.3. The PCLU was expected to act under the advisement of a multi-departmental committee which included the National Intelligence Agency and the South African Police Service. The entire process would be carried out behind closed doors.
24. As mentioned above, I was opposed to the amendments to the Prosecution Policy as I felt they violated the constitutional rights of the complainants and constituted unwarranted interference in the prosecutorial independence of the NPA. I again expressed my dissatisfaction with various officials, including the NDPP. In my view the amendments or guidelines were aimed solely at accommodating

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perpetrators and providing them with another avenue to escape justice.

25. Once the guidelines were issued in December 2005 I wanted to proceed with the 5 cases I had identified with good prosecution prospects and the 11 cases which required further investigation. These were identified as "*major priorities*" for the PCLU for the 2006 – 07 period. Moreover a press statement issued by the NDPP during 2006 led to additional requests from victims for further investigations in their cases. However, with the exception of the Chikane matter, during the course of 2006 and 2007, the PCLU was unable to pursue any of the TRC cases for various reasons. These included a lack of investigative capacity as well as difficulties encountered in convening the multi-departmental committee that was meant to advise the PCLU on what cases to pursue.
26. In March 2006 I again met with the representatives of the Simelane family. I had to advise them that I was unable to take the investigation forward as there were no investigators attached to the PCLU. Requests I had made to the SAPS and the DSO for competent and experienced investigators, in this matter and the other TRC cases, had fallen on deaf ears. The said representatives also supplied me with a legal opinion which recommended that those involved in the torture of Ms. Simelane be charged with torture, as a crime against humanity or war crime, in terms of customary international law, since such crimes never prescribe.
27. As a result of this meeting the said representatives wrote to the then NDPP, Adv.

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

28. During 2006 the then NDPP, Adv Pikoli, appointed a team to review the representations made by the suspects in the Chikane matter who were seeking an indemnity under the amendments to the Prosecution Policy. The team was chaired by Dr. T. Pretorius. I refused to participate in this review as I regarded the said amendments as unconstitutional. After several months the review team concluded that no indemnities should be granted as the full truth had not been disclosed.
29. During 2007 the PCLU eventually returned to the Chikane attempted murder case and in June 2007 the three suspects, together with Adriaan Vlok, former Minister of Police, and Johan van der Merwe, former Commissioner of Police were charged with one count of attempted murder, alternatively conspiracy to murder Chikane. A plea and sentence agreement was agreed upon which the Court confirmed during August 2007. In terms of the plea and sentence agreement the accused all pleaded guilty to the charge of attempted murder. Vlok and van der Merwe were sentenced to ten years imprisonment, wholly suspended for five

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

30. This case ought to have opened the door to the prosecution of General Basie Smit, who succeeded Van der Merwe as Commander of the Security Branch in October 1988, as well as other senior officers of the both the SAPS and the former South African Defence Force (SADF). However no further cases were pursued which can be attributed to political interference in the work of the NPA.
31. In 2008 the High Court in Pretoria (*Nkadimeng & Others v The National Director of Public Prosecutions & Others*, TPD case no 32709/07) struck down the amendments to the Prosecution Policy as unconstitutional. The Court found that the amendments were a "copy-cat" of the TRC amnesty process; that many of the criteria were not relevant in deciding whether or not to prosecute; and that they were moreover "a recipe for conflict and absurdity".

POLITICAL INTERFERENCE

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

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

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

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

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

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35. During 2007 an office note, purportedly written by me in 2006, was circulated in certain government circles in which it was reflected that I was investigating criminal charges against 37 ANC leaders, including the then President, Thabo Mbeki. This office note was a fabrication. I had written this office note in 2003 but the date of the note had been adjusted to give the false impression that it had been compiled in 2006. I believe it was aimed at discrediting me and ultimately stopping the investigations into the TRC cases. I am firmly of the view that the then National Commissioner, the late Mr. J Selebi, played a conspicuous role in claiming that I was pursuing the said leaders.
36. During this time I was informed by Adv. Pikoli that the then Director-General of the Department of Justice, Menze Simelane, had approached him and raised concerns about my handling of the prosecution of the TRC cases. He asked the NDPP to relieve me of my duties in this regard, which the NDPP declined to do. The NDPP advised me that senior people in the government wanted to fire me because I was still pursuing the TRC cases.
37. Adv. Vusi Pikoli was suspended from his duties as NDPP in September 2007. Shortly after his suspension I was summoned to the office of Adv. Mokotedi Mpshe, then acting NDPP. Adv. Mpshe advised me that I was relieved of my duties in relation to the TRC cases with immediate effect. I have no doubt that Adv. Mpshe received a political instruction to remove me from these cases. I

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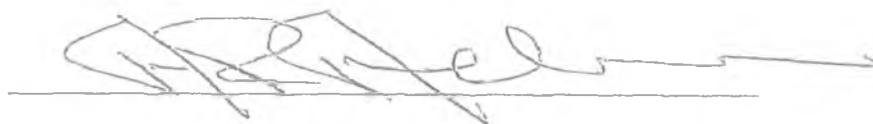
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advised Adv. Mpshe that removing me from the TRC cases would not make the cases go away.

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

CONCLUSION

39. There is little doubt in my mind that the investigation and prosecution of the TRC cases have been effectively stopped by machinations that took place at a level above that of the NPA. Such interference serves to explain why the Simelane matter, as well the bulk of the TRC cases, have not been seriously investigated or prosecuted.
40. In so doing the rule of law has been undermined and a deep injustice has been committed against the family of the late Nokuthula Simelane, as well as the families of other victims of apartheid era crimes.



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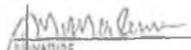
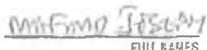
A R ACKERMANN

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



 COMMISSIONER OF OATHS

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

 
 SIGNATURE FULL NAMES
 Commissioner of Oaths
 Date: 07/05/2015 Office: Republic of South Africa
 Place: WOODSTOCK District: WOODSTOCK POST OFFICE

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

AFFIDAVIT OF ANTON ROSSOUW ACKERMANN

I, the undersigned

ANTON ROSSOUW ACKERMANN

state under oath as follows:

Introduction

1. I am an adult male, a senior counsel, and a former Special Director of Public Prosecutions in the Office of the National Director of Public Prosecutions ("**NDPP**"). I am currently retired and residing in the Western Cape.
2. In terms of section 13(1)(c) of the National Prosecuting Act No. 32 of 1998 ("**the Act**"), I was appointed by President TM Mbeki, under a Presidential Proclamation dated 24 March 2003, to head the Priority Crimes Litigation Unit ("**PCLU**"), located at the head office of the National Prosecuting Authority ("**NPA**"). I served as head of the PCLU from 2003 to 2013, when I retired.
3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.



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4. 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.

Confirmation of affidavits

5. I confirm the contents of my affidavit dated 7 May 2015 which was attached as a supporting affidavit in the matter of *Nkadimeng v NDPP and Others* (Gauteng Division, Case No. 36554/2015). I will rely on the full contents of this affidavit to address the aforesaid paragraphs of the terms of reference. A copy of this affidavit was supplied by Webber Wentzel attorneys¹ to the Commission on 10 October 2025 in divider (bundle) 3 at paginated pages 890 - 907.
6. I also 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.
- 6.1 In respect of paragraph 33.1 of my aforesaid affidavit and paragraph 234 of the Calata affidavit I point out that the letter from the SAPS Legal Support Section Maj Gen P C Jacobs was probably addressed to the NDPP not the Priority Crimes Litigation Unit ("**PCLU**").
- 6.2 I also point out that in respect of paragraph 216 and the first line of paragraph 217 of the Calata affidavit the Senior Superintendent Britz

¹ Attorneys for the 22 families and the Foundation for Human Rights.


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referred to therein is "Hennie Britz" and not "Karel Johannes 'Suiker' Britz".

Reliance on Macadam affidavit and annexes

7. I align myself with the contents of the affidavit of Raymond Christopher Macadam ("**Macadam**") filed in the Joao Rodrigues stay of prosecution case in *Rodrigues v NDPP & Others* (Case No. 76755/18, Gauteng Division). I will rely on the contents of this affidavit, together with the documents attached to that affidavit, to address the aforesaid terms of reference. A copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in bundle 1 at paginated pages 276 - 359.

Provision of new documents

8. I attach to this affidavit two documents that are not currently part of the record provided by Webber Wenzel attorneys on 10 October 2025.
 - 8.1 A letter dated 16 March 2004 I addressed to Raymond Lalla, the Divisional Commissioner of SAPS Crime Intelligence ("**Lalla**"), annexed hereto marked "A".
 - 8.2 An internal memorandum dated 27 September 2007 I addressed to DSO Head, Adv Leonard McCarthy ("**McCarthy**") titled "Project Gnome".
9. In the letter to Lalla, I expressed my displeasure at him secretly videotaping a confidential meeting I held with him on 25 August 2003, in respect of the TRC cases. In that meeting I voiced my frustration and disgust with the refusal of the DSO to take on the TRC cases. That videotape was then handed over to

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NDPP Ngcuka, Deputy NDPP Ramaite and DSO Head McCarthy. I was then called into a meeting with them and confronted with the video recording.

10. The internal memorandum sent to McCarthy on 27 September 2007 dealt with the investigation into the fabricated note I referred to in my 2015 affidavit from paragraph 35 (bundle 1, paginated page 905).² In this memorandum I explained to McCarthy why the note was definitely forged.

Request to locate documents / evidence

11. I respectfully request the Commission to secure or subpoena the following documents and items of evidence:

11.1 From the Department and Ministry of Justice:

11.1.1 Minutes and records of the following bodies:

11.1.1.1 Special Cabinet Committee on the Post TRC cases / Subcommittee of the Justice, Crime Prevention and Security (JCPS) Cabinet Committee on Post TRC matters.

11.1.1.2 Committee of Directors General, in respect of their deliberations on the TRC cases.

11.1.1.3 The Amnesty Task Team.

11.1.1.4 The Inter-departmental Task Team on the TRC cases.

11.2 From the NPA:

² See also paragraph 260 of the Calata affidavit.



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- 11.2.1 A copy of the fabricated note referred to in paragraph 10 above.
- 11.2.2 Relevant documents, including reports and correspondence, from the person commissioned to investigate the hacking of my computer in respect of the fabricated note.
- 11.2.3 Report on the costs expended for the services of the investigator.
- 11.3 From the SAPS:
- 11.3.1 The original fabricated note that was allegedly in the possession of the DSO.
- 11.3.2 The videotape made by Raymond Lalla of the meeting with me, Torie Pretorius and Chris Macadam on 25 August 2003.

Allegations of Imtiaz Cajee

12. I was sent an undated Notice in terms of Rule 3.3 with various allegations made by Imtiaz Cajee arising from his affidavit dated 30 September 2025.

Paragraph 47: No concerted effort

13. In respect of Cajee's allegation in paragraph 47, I point out that I was only appointed as head of the PCLU on 24 March 2003 and the then NDPP declared the TRC cases to be priority crimes in May 2023. I was not personally involved in the Ahmed Timol case, which was being handled by Adv Chris Macadam, but it was one of the TRC cases falling within our mandate.
14. Extensive efforts to secure investigators for the TRC cases were made from early May 2003 shortly after their designation as priority crimes, as set out in

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the Macadam and Calata affidavits. As stated in the aforesaid affidavits both the Directorate for Special Investigations (“**DSO**” or “**Scorpions**”) and the South African Police (“**SAPS**”) declined to investigate the TRC cases.

15. This effectively blocked the investigation of the TRC cases for several years and severely undermined the prospects of justice in those cases, including the Timol case.
16. I deny that I placed the burden of investigating the Timol case onto Cajee, but I accept that in the absence of investigations by the DSO / SAPS, families, including the Timol family, felt obliged to carry out their own investigations.

Paragraphs 195 - 6: Failure to create mechanism and to approach the President

Paragraph 207: Allegation of no interference

Paragraphs 208-9: Alleged failure to resist

17. I agree that government failed to take steps to investigate the TRC cases. I also agree that the President should have been approached.
18. As I was not the NDPP it was not within my prerogative or power to contact the President.
19. However, after DSO Special Director Adv MG ‘Geoph’ Ledwaba (“**Ledwaba**”) refused to sign the section 28(1)(b)³ notices in respect of the TRC cases, I recall that I approached either Adv Leonard McCarthy, then head of the DSO, or Adv Bulelani Ngcuka, then NDPP, or Adv Silas Ramaite, then Deputy NDPP to expedite the signing of the said notices.

³ Inquiries by Investigating Director in terms of the National Prosecuting Act 32 of 1998.

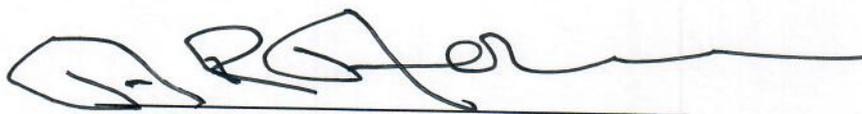
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20. Regrettably, the said notices were not authorised, notwithstanding my efforts. I did not have the power to take the matter further than that.
21. Within the NPA I raised my concern about the obstruction of the TRC cases. I refused to take part in the amendments to the Prosecution Policy, which I regarded as unconstitutional.
22. On 3 May 2007, NDPP Pikoli and I appeared before the Justice Portfolio Committee in Parliament. I advised that the lack of progress in the TRC cases was not the fault of the PCLU. Pikoli advised the Commission that "*there was politically sensitive issue*", and that "*whenever there was an attempt to charge the former police there was a political intervention and that effectively the NPA was being held to ransom by the former generals.*"⁴
23. From around 2006 I advised families and lawyers that we were struggling to get investigators for the TRC cases and suggested they should pursue inquests rather than prosecutions.
24. I agree with the views of the Full Court in the Rodrigues matter that the NPA should have asserted its authority and independence and resisted the political interference.
25. Because of my opposition to the interference in the TRC cases I was relieved of my duties in respect of these cases in September 2007, and it is also one of the reasons why Pikoli was suspended as NDPP.
26. To the extent that Cajee alleges that there was no interference in the work of prosecutors in the TRC cases, I deny such a claim.

⁴ See para 250 of the Calata affidavit.

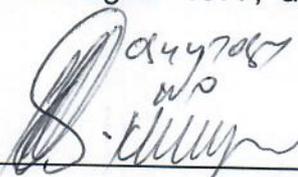
A handwritten signature in black ink, appearing to be 'S.M.', is located in the bottom right corner of the page. The signature is stylized and somewhat illegible.

27. To the extent that Cajee describes me as an old order prosecutor acting in the interests of the former regime, I point out that I always prosecuted without fear or prejudice, regardless of the nature of the case. I was the lead prosecutor in the prosecution of former apartheid security operatives: Eugene de Kock, Wouter Basson and Ferdi Barnard, amongst others.
28. In this regard I annex hereto marked "C" a note I received from George Bizos SC in relation to my role at the inquest of Jabu Vilakazi, in which he also appeared.



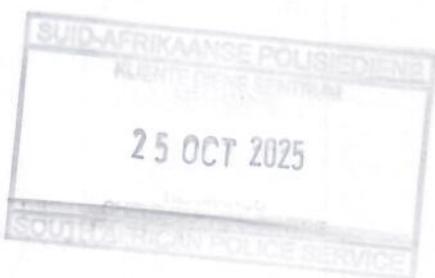
ANTON ROSSOUW ACKERMANN

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 Hermanus on 25 October 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

Full names: Siphindile Mkhaw Khuy
 Business address: 61 Main Road
 Designation: Warrant officer
 Capacity:



P O Box 10036
MORELETA PLAZA
0167
16 March 2004

Commissioner Lalla
The Divisional Commissioner
Crime Intelligence
Private Bag X302
PRETORIA
0001

Dear Commissioner Lalla,

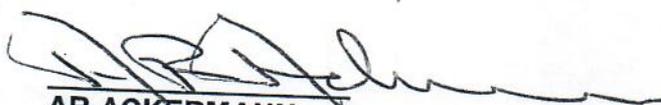
With reference to your clandestine audio and visual monitoring of our confidential discussion on 25 August 2003, I wish to convey my utmost disgust at such underhanded conduct.

It is accepted practice amongst professionals, when it is desirable that a meeting be recorded that it be done openly.

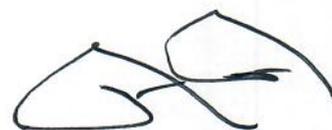
The purpose of my meeting with you was to further the interest of justice. You came highly recommended to me by Macadam and Pretorius as a sincere and trustful colleague. Obviously they made a grave error of judgement.

Unfortunately because of this experience I am left with the firm impression that the only difference between your division and the old security regime is the change in surnames. (See the attached documents indicating previous attempts "to get rid of me"). Only time will tell if you have succeeded and whether the end justify the means.

In closing I wish to echo the answer by Oscar Wilde during his cross-examination: "Don't you have any decency?"



AR ACKERMANN
HEAD: PCLU


SW

/Z56 forms

Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

P. O. Box 752,
PRETORIA
0001

VGM Building
Hartley St.
Weavind Park
0001
Pretoria
South Africa

Tel: (012) 845 6474

Cell: 082 495 4599

INTERNAL MEMORANDUM

TO : ADV LEONARD McCARTHY
DIRECTORATE OF SPECIAL OPERATIONS

FROM : ADV AR ACKERMANN
PRIORITY CRIMES LITIGATION UNIT

DATE : 27 SEPTEMBER 2007

SUBJECT : PROJECT GNOME

Dear Leonard

1. I shall be brief.
2. I am adamant and 100% sure that the figure "6" as reflected in the handwriting expert's document, FDC 0095/07 (Annexure "E") is not in my handwriting.
3. I am of the view that you do not need a handwriting expert to establish that fact.
4. Furthermore, it is important to note that the handwriting expert made no such finding and merely remarked:

"...with no alteration to the last figure '6'."
5. Within minutes after I had received the said memorandum from Commissioner Jacobs, I phoned him and informed him that the memorandum was forged and requested him to furnish me with the original. To date, I have not had sight of the original.
6. It is incomprehensible that somebody will post-date by three



S.W.A.

- years the year on a document. To pre-date the year during the months of January or February is quite common.
7. I have never, on any occasion, written to Dr Ramaite in Afrikaans.
 8. The crucial question is whether any person in SAPS had a motive or reason to produce a document, emanating from the NPA, to the effect that the NPA was still investigating ANC office bearers during 2006.
 9. If no such motive exists, I must accept that the *gravamen* of the disputed document falls away.
 10. Kindly find attached hereto a letter from the Minister to Adv Pikoli.
 11. I am very interested to know which documents the National Commissioner "... produced to support his argument that indeed there is an investigation by the NPA on certain political office bearers."
 12. If the disputed document is relied on by the National Commissioner to prove that there is indeed an investigation by the NPA on ANC office bearers, then this will contradict the explanation given by Commissioners de Beer and Jacobs to the effect that since 2003, SAPS were fully aware that the disputed document had been compiled in 2003 and that an incorrect date had been inserted on it.
 13. I will not bore you with the numerous improbabilities which exist.
 14. Adv Macadam stated in his report, addressed to you and others, that I had informed him on 25 August 2007 that the disputed report had been discussed between the NDPP and the National Commissioner. That is not correct. Macadam further stated that the NDPP had informed me that the disputed report had been shown to various Ministers. That is also not correct. The NDPP and I surmised that the disputed report had probably been the document shown to the Ministers in the light of the National Commissioner's assertion that he had written proof that I was still investigating the ANC leadership. The Minister's letter sheds more light on this matter.

Regards



AR ACKERMANN



SUN

GEORGE BIZOS S.C.

Office Address:
4th Floor, Elizabeth House
18 Pritchard Street
Johannesburg 2001
Tel: (011) 836-9831
Fax: (011) 834-4273

Postal Address:
P O Box 9495, Johannesburg
2000

Your Ref:

Our Ref: George Bizos/JK

14 January 1998

TO WHOM IT MAY CONCERN:

During 1976 - 1977 I appeared at a formal inquest in the Magistrate's Court, Johannesburg on behalf of the family of Jabu Vilakazi who was killed by members of the South African Police. The prosecutor who led the evidence was Mr A R Ackermann now senior counsel in the office of the Attorney-General in Pretoria. It was contended by us on behalf of the family that members of the Brixton Murder and Robbery Unit arrested the late Vilakazi, took him for a so-called pointing out and then shot him in cold blood and that their story that they did so because he tried to escape was a fabrication. It was customary during that period for prosecutors to defend the police irrespective of the weight of evidence against them. To our surprise, Mr Ackermann's objectivity was demonstrated by submitting that the members of the Brixton Murder and Robbery Unit were criminally responsible for the death of the deceased. In my view, this was a breath of fresh air and gave one hope that despite the pressures that must have existed on a comparatively junior member of the profession, he courageously and correctly submitted what he believed to be in accordance with his oath of office. We were not alone in that belief. The Magistrate made a positive finding in accordance with Mr Ackermann's and our submissions. I have always singled him out as the outstanding exception amongst those who thought that protecting the police was more important than serving justice. Although we have lost touch, I am reliably informed that he has continued to behave in an objective and proper manner throughout his professional career. I am pleased to place on record what has been in my mind for so long.

George Bizos

[Signature]
S W

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

CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES

Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS OF SOUTH AFRICA**

First Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Respondent

THE MINISTER OF POLICE

Third Respondent

SUPPORTING AFFIDAVIT ON BEHALF OF FIRST RESPONDENT

I, the undersigned,

RAYMOND CHRISTOPHER MACADAM,

do hereby make oath and state that:

1.

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

2.

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

2

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

3.

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

4.

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

5.

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

6.

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

7.

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

8.

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

9.



LC
NGI

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

10.

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

11.

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

12.

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

13.

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

- 13.1 All the DPPs were visited and invited to handover any TRC cases which they were not in a position to finalise themselves.
- 13.2 We met with the Divisional Head of the Detective Services of the South African Police Services (SAPS) who issued an instruction to his Provincial Heads to refer all outstanding TRC dockets to the PCLU.
- 13.3 Two former TRC researchers were appointed to trawl the TRC archives in order to identify cases warranting attention.
- 13.4 Interviews were conducted with former members of the TRC and D'Oliveira units.

14.

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

15.

LC
NGI

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

16.

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

17.

On 15 May 2003 I submitted a report setting out the cases which had been identified as a result of the outreach programme described above. The **Timol**-case was identified as a matter which required investigation. This report was addressed to the NDPP, the Head of the DSO and his Head of Operations as well as Ackerman. It is attached as **Annexure RCM2**.

18.

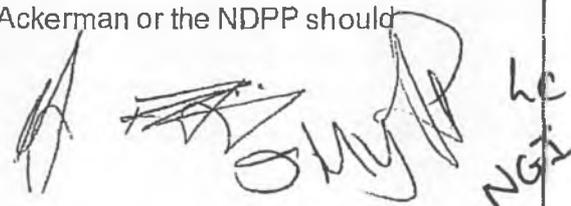
In terms of the DSO's legislative mandate it was for the Special Director of the DSO and not the Head of the DSO to issue declarations to investigate certain matters. At that stage the Special Director was Adv MG Ledwaba (Ledwaba).

19.

Ackerman and I met with Ledwaba to arrange for the DSO to conduct the investigations specified in **Annexure RCM2**. The meeting was unpleasant as Ledwaba made it clear in no uncertain terms that the DSO would not investigate any TRC matters and that these should all be referred to SAPS. A copy of a letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision is attached hereto as **Annexure RCM3**.

20.

As a result of the decision by Ledwaba Ackerman and I met with Commissioner De Beer (De Beer), the Divisional Head of the Detective Service of SAPS, and requested SAPS to take over the investigations. On 26 September 2003 De Beer replied to Ackerman informing him that the request had been discussed with the National Commissioner (Selebi). The letter was further to the effect that the investigation of the matters was a DSO responsibility and that if it was required that SAPS in fact investigate then either Ackerman or the NDPP should



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approach the President and ask him to confirm which agency should conduct the investigations. A copy of the letter is attached hereto as **Annexure RCM4**.

21.

I can confirm that neither the NDPP nor Ackerman approached the President as recommended.

22.

Ackerman and I however made a number of attempts aimed at persuading Ledwaba to reconsider his decision not to investigate. These are set out in a copy of a letter written to Ledwaba by Ackerman dated 11 November 2003 appealing to him to appoint investigating officers and pointing out that, in the absence thereof, the PCLU would not be able to deliver on its mandate. Both the NDPP and Head: DSO were copied in the letter which is attached as **Annexure RCM5**. The NDPP shortly thereafter resigned and Dr Ramaite SC was appointed as the Acting National Director of Public Prosecutions (ANDPP).

23.

The DSO however did not appoint investigators as requested and consequently none of the TRC matters requiring investigation could be taken further.

24.

In 2004 I was assigned a case relating to an international nuclear weapons syndicate which required my attention on a full-time basis until late 2007.

25.

I therefore no longer continued to deal with TRC matters but Ackerman regularly discussed these cases with me.

26.

At a certain stage Ackerman informed me that he intended prosecuting three former Security Branch members for their role in the poisoning of Reverend Frank Chikane. This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary. He indicated that he had contacted the suspects' attorney to arrange for them to appear in court.

27.



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Shortly thereafter he informed me that the ANDPP had put the prosecution on hold pending the formulation of special TRC Guidelines. He further indicated that there was now a moratorium on the investigation and prosecution of TRC cases pending the adoption of the Guidelines.

28.

Neither Ackerman nor myself were involved in the drafting of these Guidelines. At a certain stage Ackerman showed me a copy of the Guidelines. We were both of the view that they were unconstitutional in that they made provision for the NDPP not to prosecute perpetrators if they met the criteria for granting amnesty as had been applied by the TRC.

29.

Subsequently an application was brought by members of civil society in the High Court sitting in Pretoria which resulted in the Guidelines being declared unconstitutional for that reason.

30.

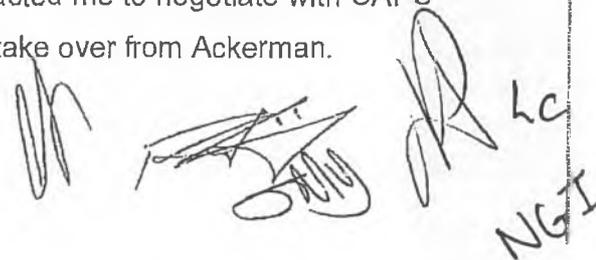
Adv Pikoli (Pikoli) was appointed as the NDPP. I was informed by Ackerman that Pikoli had set up an inter-departmental task team which would advise Pikoli on making decisions in TRC matters. Ackerman and Ramaite were the NPA representatives in the task team. On one or two occasions I stood in for Ackerman in meetings of the task team when he was not available. I noticed that the task team was predominantly comprised of members of the intelligence community who were more intent on cross-examining me as to why matters should be investigated rather than addressing the issue of all the outstanding cases.

31.

At a certain stage Pikoli was suspended and fired despite the Commission which enquired into his fitness to hold office in fact finding that he was competent to be the NDPP. Adv Mpshe SC (Mpshe) was then appointed as the ANDPP.

32.

If memory serves me correct in early 2009 Mpshe summoned me to his office and showed me a letter written by SAPS indicating that it was withdrawing from the task team. This would mean that again TRC matters would not be investigated because at that stage a decision had already been taken to disband the DSO. Mpshe instructed me to negotiate with SAPS to agree to investigate the matters which he said I should take over from Ackerman.

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287

7

33.

Ackerman informed me that he had already disposed of a number of matters which had not required investigation and gave me a list of small number of cases (I estimate no more than ten (10)) which I had to attend to. The **Timol**-case was not one which he had indicated should be investigated.

34.

I attach as **Annexure RCM6** a trail of emails between myself and various role-players showing my efforts to try and have these matters investigated. I initially had a series of meetings with Rayman Lalla, the then Divisional Head of the Detective Service of SAPS. He however informed me that the National Commissioner had decided that the cases had to be investigated by the Directorate Priority Crimes Investigation (DPCI). I therefore made a number of unsuccessful attempts to secure a meeting with Commissioner Dramat, Head: DPCI.

35.

Ultimately I met with Assistant Commissioner Lebeya (Lebeya) on 26 November 2009 where the issue of conducting investigations was positively discussed resulting in me writing a letter on 18 January 2010, attached hereto as **Annexure RCM7**.

36.

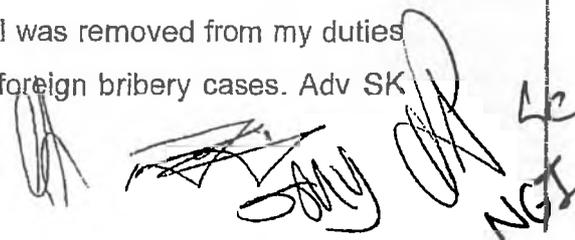
As a result thereof Senior Superintendent Bester was appointed to oversee the investigations of the ten (10) cases I had identified.

37.

Adv Menzi Simelane (Simelane) was appointed as the NDPP and he instructed me to guide a series of serious corruption investigations being conducted by the DPCI in the Northern Cape. He thereafter appointed me to represent the NPA in two (2) civil matters where decisions not to investigate / prosecute international crimes were being challenged. I was thereafter seized with a number of cases where complaints had been made calling for the arrests of current or former Heads of State for war crimes or crimes against humanity. This made it very difficult for me to focus on the ten (10) TRC matters. I did however increase the number of investigations due to representations being received in new matters.

38.

When Mr Nxasana (Nxasana) was appointed as the NDPP I was removed from my duties in the PCLU in order to act as a dedicated prosecutor for foreign bribery cases. Adv SK



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Abrahams (Abrahams), then a Senior State Advocate, was appointed to take the TRC matters over from me.

39.

In June 2015 Abrahams was appointed the NDPP and the issue as to whether I should continue as the dedicated foreign bribery prosecutor arose. I had meetings with him in which I indicated that if he did not wish me to continue with that responsibility I would again be willing to do TRC matters. He however informed me that he was thinking of taking all TRC cases away from the PCLU and did not make a decision on terminating my appointment as the foreign bribery prosecutor.

40.

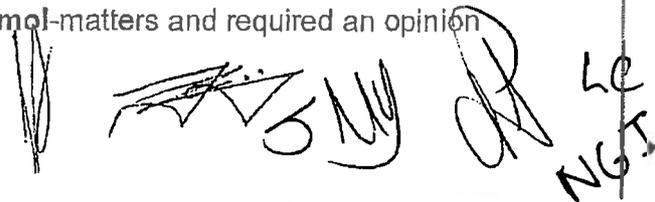
Due to the fact that another business unit of the NPA had instructed the DPCI to take all the foreign bribery files away from me I could no longer work on those matters. The TRC cases had however become important due to complaints about delays in finalising certain matters. I therefore decided to again give attention to the matters. One of the matters which I had decided should be investigated was the **Aggett**-matter which also related to a death in detention. At that stage the **Timol**-matter was receiving attention in the media and I recall specifically a TV interview with Adv Bizos SC (Bizos) in which he alleged that **Mr Timol** had been murdered. I therefore considered it appropriate to request the DPCI to re-open the matter and gave various instructions (dealt with hereunder) regarding the further investigation of the case.

41.

Adv Johnson (Johnson) who was at that stage acting as the Head of the PCLU informed me and a Senior State Advocate who was assisting me with the cases that we should not continue to work with TRC cases as they were going to be removed from the PCLU. I was however concerned that this would result again in the cases being neglected resulting in me drafting a Memorandum in January 2016 requesting the NDPP to confirm whether the TRC cases would be dealt with by the PCLU or the DPPs. I did not receive a reply to this Memorandum and at this stage cannot locate my copy thereof.

42.

On 4 February 2016 I was approached by Dr Pretorius SC (Pretorius) who had then taken over from Johnson as the Head of the PCLU. He informed me that a request had been received to re-open the inquests in the **Aggett**- and **Timol**-matters and required an opinion

 Several handwritten signatures and initials are present at the bottom of the page. From left to right, there is a vertical signature, a signature that appears to be 'S.M.', a signature that appears to be 'A.P.', and the initials 'L.C.' and 'N.G.T.' written vertically.

from me. I attached as **Annexure RCM8** a copy of my opinion of even date in which I expressed the opinion that both matters should be fully investigated and that consideration to re-opening inquests should only be given once a decision whether or not to prosecute had been taken. I emphasise para 12 of my opinion in which I indicated that it was imperative that the NDPP should decide whether TRC cases should remain with the PCLU or not.

43.

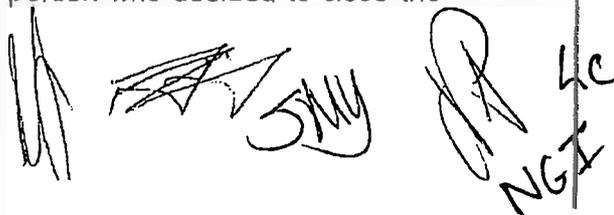
Subsequently I was informed by Pretorius that a decision had been taken to re-open the **Timol**-inquest. While the inquest was in progress Pretorius gave me a copy of a letter which I had written on 25 February 2004 to Mr Cajee, the nephew of **Mr Timol**. This letter is attached hereto as **Annexure RCM9**. He also showed me a report addressed by Ackerman to *inter alia* Ramaite and Pikoli dated 30 October 2006. I attach this report hereto as **Annexure RCM10**. He requested me to provide him with an affidavit responding thereto. I attach as **Annexure RCM11** a copy of the affidavit which I subsequently signed and which was commissioned. I have not attached the annexures referred to therein as they have either been attached elsewhere in this affidavit or are no longer relevant for the purpose of this application.

44.

At the time of deposing to this affidavit I was not in possession of **Annexure RCM1**. At this stage when I have now had sight of both this document and **RCM9** I recall that **RCM9** was written after both the DSO and SAPS had refused to investigate TRC cases. If memory serves me correct Leask had informed me that as a result of the decision taken by Ledwaba that the DSO would not investigate TRC cases he was unable to comply with my original request for investigations. Since he was however traveling to Cape Town on other investigations he contacted Ivor Powell and questioned him regarding the confession apparently made by the Applicant in this matter. The allegation was however denied by Powell and Mr Cajee was informed accordingly. I did not hear anything further from Mr Cajee and was shortly thereafter assigned other work.

45.

In order to depose to this affidavit I tried to locate such TRC files as may still be available resulting in me finding a report of 24 October 2006 addressed by Ackerman to Ramaite which is attached hereto as **Annexure RCM12**. This report identifies the advocates dealing with various TRC matters and reflects that I was not the person who decided to close the **Timol**-matter.



Handwritten signatures and initials at the bottom right of the page, including the letters 'NGI' and 'LC'.

46.

In December 2017 I was contacted by the NDPP's Office Manager who requested me to collect certain of Pikoli's documents which he had found in a strongroom. I collected the documents from him and perused the contents. The documents included the following:

- 46.1 A second draft of an Indemnity Bill making provision for the President to grant indemnity to persons committing politically motivated crimes from 1 March 1960 (**Annexure RCM13**).
- 46.2 The terms of reference of the Amnesty Task Team dealing with the criteria which the NPA applies relating to TRC cases, the formulation of Guidelines and whether legislative enactments are necessary. The document (**Annexure RCM14**) concludes by referring to the views of the intelligence agencies.
- 46.3 The further report of the Amnesty Task Team (**Annexure RCM15**) *inter alia* looking into whether private prosecution and civil litigation can be eliminated where a decision not to prosecute is taken and whether a person aggrieved with a decision not to prosecute can approach the International Criminal Court (ICC).
- 46.4 A letter dated 8 February 2007 (**Annexure RCM16**) addressed to Pikoli by the then Minister of Justice expressing her concern that the NPA was proceeding with TRC prosecutions as she was under the impression that the NPA would not.
- 46.5 A Memorandum (**Annexure RCM17**) addressed to the Minister by Pikoli setting out in considerable detail what he construed to be interference with the dealing of TRC matters by other Government departments and concluding:

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

47.

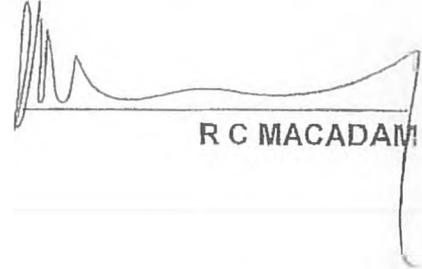
These documents speak for themselves and go a long way in explaining why from 2003 the PCLU constantly struggled to have TRC cases investigated. The first three documents appear to have been authored by the Justice Department during the period when a moratorium was placed on TRC cases pending the formulation of Guidelines. The last two documents were authored by or addressed to Pikoli.

48.

NGI

On the limited occasions when I was seized with TRC matters I always believed that such matters including the **Timol**-matter should be properly investigated so that decisions whether or not to prosecute could be taken.

I know and understand the contents of this statement.
I have no objection to taking the prescribed oath.
I consider the prescribed oath to be binding on my conscience.


R C MACADAM

Date: **1 November 2018**
Time: **09:15**
Place: **PRETORIA**

I certify that the deponent has acknowledged that he knows and understands the contents of this declaration, which was sworn to before me and the deponent's signature was placed thereon in my presence

at **PRETORIA** on **1 NOVEMBER 2018** at **09:20**


_____: (RANK)
COMMISSIONER OF OATHS

Full names: **ALBERTUS MARTHINUS MATHYS FLYNN**

Rank: **COLONEL**

Address: **218 VISAGIE STREET, PRETORIA**
Ex Officio: **SA Police Service**




NGI

er/timol



SCORPIONS

P. O. Box 752,
PRETORIA
0001

VGM Building
Hartley St.
Weavind Park
0001
Pretoria
South Africa

Tel: (012) 845 6431
Cell: 082 498 6033

Office of the Head
Special National Projects
Directorate of Special Operations
HEADQUARTERS

INTERNAL MEMORANDUM

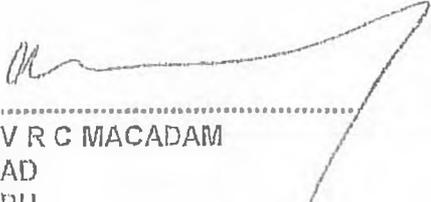
TO: DEPUTY HEAD
 CC: CIO A G LEASK
 FROM: HEAD SNPU
 DATE: 5 MAY 2003 REF: A/INV/5/03 TRC
 RE: INQUEST: AHMED TIMOL

*CPM do both
5/5/03*

1. On 2 May 2003 I was requested to investigate the above matter by the deceased's nephew Imtiaz Timol (082 445 2086) after he had been referred to my office by Minister Pahad in the President's Office.
2. The following documentation has been made available:
 - (i) Extract from George Bizoz's Book;
 - (ii) Article by Ivor Powell;
 - (iii) TRC hearing; and
 - (iv) Details of the SAPS members involved in the interrogation.
3. Imtiaz further informed me that:
 - (i) the inquest record has been destroyed;
 - (ii) he has the contact details of a fellow detainee now in England who can assist;
 - (iii) he has photographs of the body of the deceased; and
 - (iv) Ivor Powell informed him that Sgt Rodriguez had told his daughter what had really happened.

JMU
[Signature]
 NCI

4. The following investigation focus areas are identified:
- (i) George Bizoz must be interviewed to establish whether he has the post mortem report and any other information;
 - (ii) Ivor Powell (DSO Cpt) must be interviewed re 3(iv);
 - (iii) Researchers to establish whether there is any additional TRC material and whether the policeman involved after linked to any other human rights abuses;
 - (iv) the other detainee will have to be interviewed; and
 - (v) once all the evidence has been obtained the Chief State Pathologist will have to be requested for an opinion on the injuries and the claim that the witness fell from a 10 storey building.



.....
ADV R C MACADAM
HEAD
SNPU



2
hc
NGI

sl/ audit trc cases

**SCORPIONS**

P. O. Box 752,
SILVERTON
0001

VGM Building
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Weavind Park
0001
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Tel: (012) 845 6431

Cell: 082 498 6033

Office of the Head
Special National Projects
Directorate of Special Operations
HEADQUARTERS

INTERNAL MEMORANDUM

TO: NDPP REF: TRC GENERAL

CC: HEAD DSO
HEAD OPERATIONS
ADV ACKERMANN

FROM: HEAD SNPU

DATE: 15 MAY 2003

RE: AUDIT OF TRC CASES

A. CASES BEING PREPARED FOR PROSECUTIONS:**1. MOTHERWELL BOMBING****(a) Leg One**

The accused were all refused amnesty. On review however the High Court ordered that their applications be reheard because the TRC failed to lead evidence. Investigations conducted by my office indicate that the accused supplied a false motive for killing the deceased. Evidence will be made available to the TRC so that amnesty can be refused on a proper basis. This will open the way for legs two and three.

[Handwritten signatures and initials]

NGI

(b) Leg Two

The three accused convicted in the 1996 prosecution were granted leave to appeal against their convictions to the SCA. I have taken over the argument of the appeal from the DPP Eastern Cape due to the fact that the prosecutor has retired.

(c) Leg Three

The prosecution of SAP General van Rensburg for ordering the killing of the Motherwell Four.

2. **BRIAN NGULUNGA**

The prosecution of SAP General van Rensburg for ordering the killing of Brian Ngulunga.

3. **PEBCO 3**

The prosecution of the Security Branch members responsible for the kidnapping of the deceased at Port Elizabeth Airport.

4. **WAUGHOPE**

Prosecution of AZAPO leader George Wauchope for murder and other related charges. I am awaiting the Minister's response to representations by the accused that he not be prosecuted.

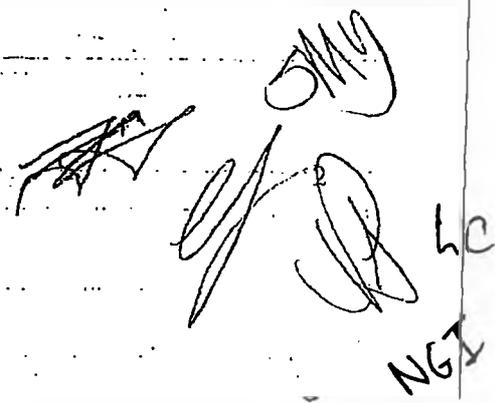
5. **POWELL**

The prosecution of Phillip Powell for possessing hand grenades in April 1994. The matter is with the NDPP.

6. **NQUTU ARMS CACHE**

The prosecution of J. M. Nqobobo and others for the concealment of the weapons found in the Nqutu Bunker in May 1999.

7. The prosecution of the CCB members responsible for the bombing of the Early Learning Centre (it must however be established that the accused did not receive indemnity in terms of the Indemnity Act of 1990).

Handwritten signatures and initials, including the letters 'NGI' and 'LC'.

B. POTENTIAL FURTHER PROSECUTIONS ARISING FROM THE ABOVE

1. Murder of the PEBCO 3

There is currently no reliable evidence on the murder charge. If the accused are however convicted of kidnapping it is likely that at least one of them may supply information as to the killings in order to obtain a lesser sentence.

2. Gradock 4

There is no reliable evidence on this case. The TRC however established that the crime was committed by the same people who were involved in the Motherwell and PEBCO 3 cases. The successful prosecution of these cases could lead to some of the perpetrators coming forward also to obtain lesser sentences.

C. NEW CASES BEING EVALUATED FOR PROSECUTION PURPOSES

1. Murder of the COSAS 4

2. Murder of Askari Strongman Sambo

3. Murder of detainee on the East Rand by "Timol" Goetzee

4. Murder of Askari Dan Maboto

5. Allegations by IFP sentenced prisoner to have knowledge of murders in the East Rand from 1988

6. 447 dockets relating to APLA handed over by SAPS Crimes Against the State Unit

7. 6-8 dockets linking AWB to Pre election bombings previously dealt with by Advocate Fick

D. HIGH INTEREST CASES WHICH REQUIRE ATTENTION IRRESPECTIVE OF THE NATURE OF AVAILABLE EVIDENCE

1. Murder of Victoria Mxenge

2. Kidnapping, torture and murder of Ntombi Khubeka

3. Kidnapping, torture and murder of Nokutulu Simelane

4. Decision by DPP Pretoria not to prosecute SAP General Engelbrecht

5. Uninvestigated allegations against SAP General Bassie Smit

6. Ciskei Coup De AT

7. Transkei Coup De AT

Handwritten signatures and initials are present in the bottom right corner of the page, including a large signature, the initials 'JLM', and the text 'LC NGI'.

8. Pre Election Train Violence in Gauteng
9. Murder of Reggie Hadebe
10. Murder of Dulcie September
11. Refusal of Amnesty to 37 High Ranking ANC officials
12. Decision by DPP KZN not to prosecute IFP hit squads

E. REPRESENTATIONS TO INVESTIGATE SPECIFIC CASES

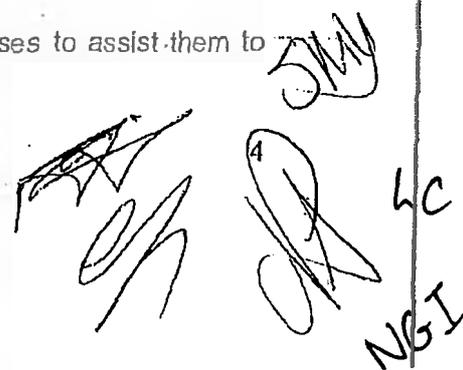
1. Death in detention Ahmed Timol
2. Murder of UDF activist Nelson Sithole
3. Murder of Pro Jack
4. Murder of IFP families in Table Mountain by A. M. Zulu
5. Murder of ANC supporter Batondo
6. False Conviction of Skouldies
7. Assault on A. Bult
8. Vlakplaas member Piet Snyders
9. Murder of Castro Khumalo

F. CASES IN THE PROCESS OF BEING CLOSED

1. Assault on Carl Niehaus- complainant does not desire a prosecution
2. APLA murder Mphahlela attacks on police stations: lack of reliable evidence
3. Mphahlela murder charges- lack of admissible evidence against him
4. Winnie Mandela- lack of reliable evidence
5. Steve Biko- crime prescribed in 1997
6. Smit Murders- perpetrators deceased
7. Ermelo Black Cats- lack of reliable evidence
8. IFP Murders Chadwick- accused in a mental institution in the United Kingdom

G. ASSISTANCE TO OTHER AGENCIES

1. Police Intelligence supplied with a breakdown of AWB amnesty hearings to assist in profiling of persons currently involved in Right Wing Activities
2. TRC supplied with material relating to IFP human rights abuses to assist them to oppose IFP application to have findings against it set aside



 Handwritten signatures and initials, including "SM" and "NGI".

H. REPARATIONS RELATED ACTIVITIES

1. Exhumation of bodies of Mamelodi 10
2. Reparations of remains of victims in the Kwaggasnek incident in Lesotho
3. Representations by members of the public to locate their missing relatives
4. Partnership with SA Disappearance Foundation

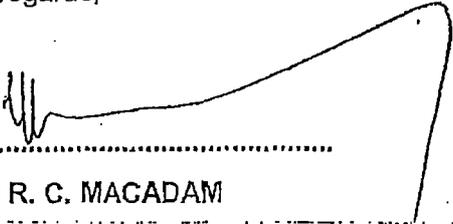
I. INVESTIGATION PUT ON HOLD PENDING THE APPEAL IN THE BASSON CASE RELATING TO JURISDICTION FOR CONSPIRACY TO COMMIT CRIMES OUTSIDE THE RSA

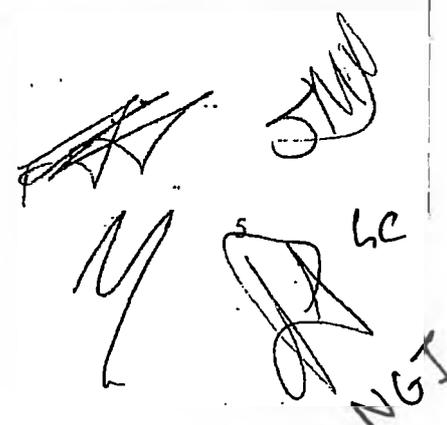
1. Murder of Anton Lubauwski
2. Lesotho Raid
3. Botswana Raid
4. Swaziland Raid

J. POLICY CONSIDERATIONS

1. Prosecutions not to be conducted on a piecemeal basis except where special circumstances (e.g. witness on point of death, accused about to leave RSA or engaged in current criminal activities)
2. Once all the cases earmarked for prosecution have been investigated a presentation will be given to the NDPP in order for him to confirm the prosecution strategy. Thereafter prosecutions will be instituted
3. After convictions have been obtained attention will be given to cases which currently had evidence since convictions may act as incentive for perpetrators to come forward

Kind regards,


ADV. R. C. MAGADAM
HEAD
SNPU


NGI

Investigations

P. O. Box 752,
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Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

INTERNAL MEMORANDUM

TO : CIO Leask
FROM : Adv M G Ledwaba
DATE : 15 JULY 2003

SUBJECT : SNPU INVESTIGATIONS

1. Due to the recent creation of the PCLU it has become necessary to re-define the mandate and operations of the SNPU as follows:

(i) TRC cases

I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used. Notwithstanding the above decision Adv **TONGWANE** must finalize the Black Cats and Winnie Mandela cases. Due to the fact that NDPP has requested a speedy finalization of the two matters this must be done before 30 July 2003. I have also transferred the two researchers to the PCLU. It may be necessary for your investigators to introduce certain witnesses with whom they have dealt to the SAPS investigators and you are accordingly authorized to conduct the necessary handovers.

(ii) Operation Sunflower

Advocate **MACADAM** will continue to oversee the disruptive action with the Consumer Council with your assistance. Once the SAPS report is received and evaluated, I will make a decision on the final disposal of the case.

[Handwritten signatures and initials]
NGI

(iii) **Operation Black Widow**

Adv TONGWANE must oversee the finalization of the investigation and conduct the prosecutions which may arise.

(iv) **Operation Final Curtain**

SAPS must continue with the investigations under the direction of the prosecutor arranged by Adv ACKERMANN. You may give limited assistance to SAPS and the prosecutor on specific aspects when necessary.

(v) **Foreign Mercenaries**

Adv PRETORIUS has been delegated to assess all cases currently being investigated by both SAPS and the DSO. (I have communicated separately to the Regional Head Gauteng in this regard). I will make a decision as to the involvement of the DSO in such investigations once I have received a report from Adv ACKERMANN.

Adv M G Ledwaba
HEAD : OPERATIONS

/tp

Handwritten signatures and initials in the bottom right corner. There are several scribbles and signatures, including one that appears to be 'AMY' and another that looks like 'he'. At the bottom right, there are the initials 'NGP'.

301

29/09/2003 11:03 27123392193

DIV COMM DET SERVICE

PAGE 01/02

RCM 4

01-5-002-0111

SAP 21

SUID-AFRIKAANSE POLISIEDIENS



SOUTH AFRICAN POLICE SERVICE

Privaatsake/Private Bag X302

Verwysing Reference	3/9/91(93)
Navrae Enquiries	Div Comm De Beer
Telefoon Telephone	(012) 393 2191
Faksnommer Fax number	{ 012 } 393 2193

Afdelingskommissaris/Divisional
Commissioner
Speurdiens / Detective Service
Hoofkantoor / Head Office
PRETORIA
0001

2003-09-26

Advocate AR Ackermann, SC
Special Director
Head: Priority Crimes Litigation Unit
National Prosecuting Authority
Church Square
PRETORIA
0001

Dear Advocate Ackermann

INVESTIGATION OF TRC CASES

Your letter dated 20 August 2003, as well as the preceding discussion between ourselves, have reference.

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

From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking. Your letter only states that: "In March 2002, consideration was given to the issue of a Presidential proclamation, but problems were encountered in this regard."

You are aware of the fact that the capacity created for the D'Oliveira Committee is presently with the DSO.

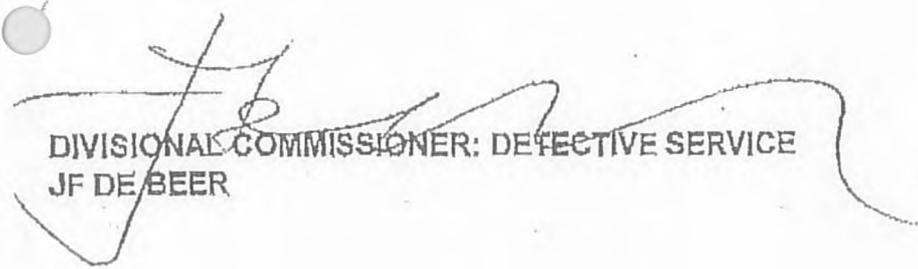
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In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seem to be common cause that the initial understanding was that the DSO would have investigated it, the opinion is held that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

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

You are therefor requested to approach the President on the matter, where after we can take the matter further, if necessary.

Kind regards.


DIVISIONAL COMMISSIONER: DETECTIVE SERVICE
JF DE BEER


lc
NGI

er/memo

Office of the Head
Priority Crimes Litigation Unit
HEADQUARTERS

INTERNAL MEMORANDUM

TO: ADV GEOPH LEDWABA

CC: 1. NDPP
2. DR S RAMAITE SC
3. ADV LF MCCARTHY SC

FROM: ADV A R ACKERMANN SC

SUBJECT: INVESTIGATION OF TRC CASES BY THE DSO

DATE: 11 NOVEMBER 2003

P. O. Box 1511
SILVERTON
PRETORIA
0127

VGM Building
123 Westlake Str
Weavind Park
0184

Tel: (012) 845 6431
Fax: (012) 845 7224



Dear Geoph

1. In the light of current developments, I am constrained to document the history of the above saga.
 - i) In 2001 the NDPP decided that the DSO was responsible for the investigation and prosecution of the above cases. Both Advocates Sonn and McCarthy made a number of public statements creating an impression that the DSO was making a sincere effort to do justice to the cases. In addition Advocate Sonn gave the President a full briefing on the matter.
 - ii) In 2002 the SNPU was established in order to investigate the cases.
 - iii) In 2003 and in response to the TRC's final report, the President placed the responsibility for the investigation and prosecution of TRC matter on the NDPP
 - iv) In May 2003 I gave the NDPP and his Deputies a full briefing on all TRC cases identified for prosecution.

JMY
lc
NG

My prosecution strategy was endorsed and Advocate McCarthy indicated that there would be no problem in having the cases declared in terms of Section 28 of the NPA Act. The NDPP briefed the Minister and Justice Portfolio Committee accordingly.

- v) Shortly thereafter and in the same month you were presented with applications in terms of Section 28 relating to the cases.
- vi) In July 2003 you verbally informed me that you were not prepared to sign the declarations and were withdrawing the DSO from the further investigation of the cases. A letter to this effect was given to the CIO Leask by you. (Copy attached)
- vii) In response thereto I requested Commissioner De Beer to appoint the police to take over the investigations. After a series of meetings with him, he approached the National Commissioner who indicated that the police would only investigate upon written instruction of the President (Copy of De Beer's letter is attached). His primary reason was that the SAPS had transferred all their members with appropriate experience to the DSO in order to capacitate it to conduct these investigations.
- viii) After receipt of De Beer's letter, I made several unsuccessful attempts to contact you to discuss the matter. Eventually I had to report the matter to Dr Ramaite.
- ix) On 3 November 2003 you informed me that you would sign the declarations in terms of Section 28(1)(b) and would appoint SSI De Lange to conduct the necessary investigations.
- x) On 6 November 2003 Dr Ramaite informed Adv Macadam that he had discussed the matter with Adv McCarthy who indicated that the DSO would investigate.
- xi) On 10 November 2003, Adv Macadam presented you with Section 28(i)(b) declarations. You informed him:
 - a) That you are not prepared to sign any declarations
 - b) De Lange would not be appointed despite the fact that it was explained to you that he was part of the initial investigation and familiar with all the witnesses and the facts of the cases.
 - c) That during the course of 10 November 2003 another investigator will be appointed.
 - d) The President should not be approached to involve SAPS

2. As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted. There are certain cases which could have been prosecuted which have prescribed. There is both National and International pressure to institute prosecutions (e.g. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the *bona fides* of the National Prosecuting Authority into serious dispute and do irreparable damage

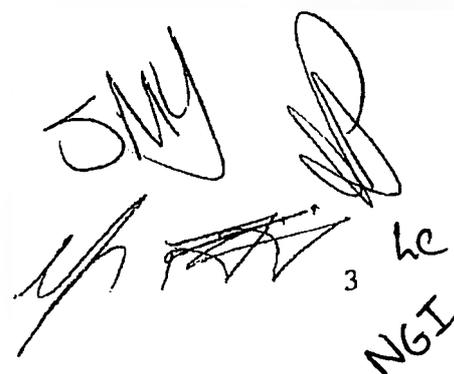
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Since I do not have any investigative capacity, I am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases and to sign the declarations in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

Kind regards



ADV AR ASKERMANN SC
SPECIAL DIRECTOR
HEAD: PCLU



SMY
3 he
NGI

Helena Zwart (H)

From: Sibongile Mzinyathi
Sent: 20 May 2009 07:50 AM
To: Willie Hofmeyr (WA); Helena Zwart (H); Aubrey T. Mngwengwe
Cc: Mokotedi Joseph Mpshe; Silas Ramaite; Anton R. Ackerman
Subject: RE: Investigators for TRC cases

Thanda

This is for your information/attention.

Kind regards

S Mzinyathi

From: Willie Hofmeyr (WA)
Sent: 19 May 2009 08:56 PM
To: Helena Zwart (H)
Cc: Mokotedi Joseph Mpshe; Silas Ramaite; Anton R. Ackerman; Sibongile Mzinyathi
Subject: RE: Investigators for TRC cases

Hi

It sounds like a good idea, but let me do some consultation in the DSO on the issue.

Regards

Willie

From: Helena Zwart (H)
Sent: Mon, 18 May 09 13:23
To: Willie Hofmeyr (WA)
Cc: Mokotedi Joseph Mpshe; Silas Ramaite; Anton R. Ackerman
Subject: Investigators for TRC cases

Dear Willie

I met this morning with Commissioner Lalla concerning the appointment of SAPS investigators to investigate the TRC cases where victims have asked the NPA to look at prosecutions. We have been taking quite a beating due to the fact that nothing has been done on these matters for a number of years and in fact, in certain cases, the victims are threatening us with *mandamus* applications. In this regard, Commissioner Lalla asked me to provide him with the names of three/four investigators who had the necessary experience. We are only looking at a small number of cases, plus-minus nine. Obviously, no progress at all will be made if the investigators do not have previous knowledge of the relevant Apartheid security structures and role players therein.

The only persons I could think of off-hand, were CSI Marlon and three/four of his KZN DSO investigators, who were previously involved with the Goldstone Commission and ITU. All these persons have indicated their willingness to transfer to SAPS. Commissioner Lalla indicated that the TRC investigations would constitute a special tasking and the investigators would be permitted to finalise these cases before taking on other commitments. He also indicated that he would pay the costs of the investigations from his budget. This would ensure that they could deal with these matters irrespective of whether they are located in DPCI or any other police structure. He asked me to communicate directly with you on this issue.

Kind regards

Chris Macadam

Handwritten signatures and initials: "JMY", "CR", "40", "NGT".

From: Bezuidenhout Colla - Superintendent [mailto:BezuidenhoutColla@saps.org.za]
Sent: 07 July 2009 08:56 AM
To: Helena Zwart (H)
Subject: RE: TRC cases

Hallo Helena,

Comm Lalla agreed to the meeting but requested that we involved Deputy National Commissioner Dramat. Welma will speak to his office and let you know. We are currently looking at the week of the 20th July.

Regards,

Colla

Superintendent Colla Bezuidenhout
Staff officer; Divisional Commissioner: Detective Service
Tel : +27 12 393 1024
Fax : +27 12 393 2193
Cell : +27 82 778 3694

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: 01 July 2009 11:34 AM
To: Bezuidenhout Colla - Superintendent
Subject: TRC cases

Dear Colla

Can you set up a short meeting with the Commissioner when he is available to discuss the TRC matters? We are under intense pressure and have been called upon to report on progress to the Minister and the Justice Portfolio Committee. The one matter which requires investigation prescribes on 12 September 2009 and this case must be fully investigated and the family afforded an opportunity to exercise their right to a private prosecution before the crime prescribes.

Our previous discussions on this topic did not materialise due to the fact that Willie Hofmeyr was not appointed as the head of DPCI.

Kind regards

Chris Macadam

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www.npa.gov.za/ReadContent458.aspx



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Helena Zwart (H)

From: Lalla Rayman - Divisional Commissioner [LallaR@saps.org.za]
 Sent: 14 July 2009 08:32 AM
 To: Helena Zwart (H)
 Subject: RE: TRC cases requiring investigation

Dagse Helena

Kommissaris Dramat se kantoor het nou net geskakel hy wil die vergadering uitstel na Augustus. Hy is nie beskikbaar volgende week nie.

Ek sal die nuwe datum met jou kommunikeer.

Groete

Welma

-----Original Message-----

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
 Sent: 13 July 2009 04:08 PM
 To: Lalla Rayman - Divisional Commissioner
 Subject: TRC cases requiring investigation
 Importance: High

Beste Welma

Aangeheg vind asb. 'n lys van die TRC-sake wat by die vergadering bespreek gaan word. Sal jy asb. so vriendelik wees om dit aan te stuur na die twee Kommissarisse, aangesien ons nog nie Kommissaris Dramat se kontakbesonderhede het nie?

Het Colla die dringendheid van die Lubowski-saak met jou bespreek?

Baie dankie en groete!

Helena Zwart
 NPA

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www.npa.gov.za/ReadContent450.aspx

Handwritten notes:
 5/11/09
 OK
 hc
 NGI

Helena Zwart (H)

From: DPCI:Head [dpci.head@saps.org.za]
Sent: 28 August 2009 02:02 PM
To: Helena Zwart (H)
Subject: FW: TRC/Nuclear matters

Good day Mr Macadam,

We wish to acknowledge receipt of your e-mail. DNC Dramat is unable to meet with you presently but will revert back to you in due course.

Thank you

Secretary : Pumla N Mphothulo
 The Head : Directorate for Priority Crime Investigations
 6th Floor Koedoe Building
 Tel : 012 393 5463
 Fax : 012 393 5079
 Cell : 082 778 3684
 E-mail : (internal) DPCI : Head
 (external) dpci.head@saps.org.za

From: Bezuidenhout Colla - Superintendent
Sent: 27 August 2009 07:18
To: Helena Zwart (H)
Cc: DPCI:Head
Subject: RE: TRC/Nuclear matters

Good morning,

Commissioner Dramat's office is at room 627, 6th floor, Koedoe building (opposite Police Head office in Pretorius str). His office number is 012 393 5463 and email dpci.head@saps.org.za His secretary is Pumla.

I will ask Comm Lalla about joining the meeting and will inform Helena.

Regards,

Colla

Superintendent Colla Bezuidenhout
 Staff officer: Divisional Commissioner: Detective Service
 Tel : +27 12 393 1024
 Fax : +27 12 393 2193
 Cell : +27 82 778 3694

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: 26 August 2009 12:19 PM
To: Bezuidenhout Colla - Superintendent
Subject: TRC/Nuclear matters

Dear Colla

2009/08/26

[Handwritten signature and initials]
 OMM
 LC
 NGI

I recently had a telcom with your Commissioner in which he advised that the TRC and the nuclear matters which we have previously discussed would now have to be attended to by Commissioner Dramat. Is it possible to provide me with Commissioner Dramat's address and fax number so that I can set up a meeting with him? Would your Commissioner be amenable to facilitate the meeting, as it might help if the two of us can inform Commissioner Dramat of the history of these matters.

Kind regards

Chris Macadam

Deputy Director of Public Prosecutions
Office of the National Director of Public Prosecutions
National Prosecuting Authority of South Africa
Tel: (012) 845 6431
Fax: (012) 845 6337
Mobile: 082 498 6033

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www.npa.gov.za/ReadContent458.aspx

SMY
[Signature]
[Signature]
he
NGI

Priority Crimes Litigation Unit

The National Prosecuting Authority of South Africa
Igunya Jikelele Labeshutshisi boMzantsi Afrika
Die Nasionale Vervolgingsag van Suid-Afrika

HEAD OFFICE

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18 January 2010

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Docex:
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Assistant Commissioner Lebeya
Directorate for Priority Crime Investigations
South African Police Service
Private Bag X302
PRETORIA
0001

Dear Commissioner Lebeya

INVESTIGATION BY SAPS OF CRIMINAL OFFENCES ARISING FROM THE TRC

My letter dated 13 July 2009, addressed to Deputy National Commissioner Dramat and Divisional Commissioner Lalla, and our meeting of 26 November 2009 have reference.

The issue related to the appointment of investigators to investigate the 11 matters identified by the NPA, which were itemised in my letter of 13 July 2009. Subsequently, the Acting National Director of Public Prosecutions declined to prosecute in the Lubowski matter and consequently, only the remaining 10 cases on the list required attention.

Senior Superintendent Bester of your office attended our meeting and informed you that he was in possession of a number of further dockets which he felt also required investigation. On 6 December 2009, I had a meeting with Senior Superintendent Bester and established that these dockets related to cases against the Liberation Movements in respect of which a decision was taken in 2004 by the then National Director not to prosecute. It should be noted that in the main, all the suspects implicated in the dockets had applied for and received amnesty. I therefore informed Senior

JMY

NGI



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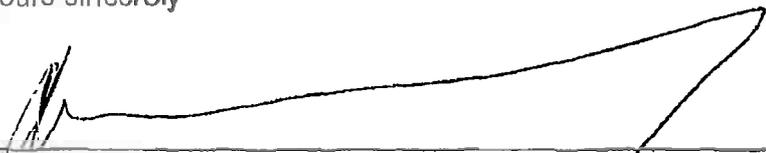
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Superintendent Bester that there was no basis upon which these cases could be reopened.

Consequently, only the remaining 10 cases on the list require attention. Since you raised the sensitivity of the matters with me, the National Director of Public Prosecutions was given a full written briefing on the matters. I had a meeting with him today and he indicated that SAPS should in fact investigate all the matters which required investigation. The matters should be referred to my office once the investigations have been concluded. Should you require any guidance as to how the matters should be investigated, you are at liberty to approach me for any such assistance which you might require.

Given the nature of the cases, it may be desirable that we meet to discuss the issues in person and in this regard, I would be grateful if you could indicate when you would be available to meet with me.

Yours sincerely



**ADV RC MACADAM
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
PRIORITY CRIMES LITIGATION UNIT
OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

~~ADV RC~~ JMY
W
NGI
52

/Z56 forms

Office of the Head
Priority Crimes Litigation Unit
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INTERNAL MEMORANDUM

TO : DR JP PRETORIUS SC
ACTING SPECIAL DIRECTOR OF PUBLIC
PROSECUTIONS: PCLU

FROM : ADV RC MACADAM
SDDPP: PCLU

DATE : 4 FEBRUARY 2016 (Opinion requested on even
date)

SUBJECT : OPINION: REOPENING TIMOL/AGGETT
INQUESTS

REF : 10/3/1/PCLU

Dear Torie

Tel: X126431

1. This opinion is provided arising from a meeting between members of the NPA and Messrs Varney, Dutton and others. An oral presentation was given, motivating the reopening of both inquests.
2. In order to address the request, it is necessary to briefly refer to the relevant provisions of the Inquest Act:
 - 2.1 Section 5 requires that an inquest be held in respect of each natural death where the deceased is suspected of having died of unnatural causes.
 - 2.2 Section 16 requires the inquest Magistrate to make findings as to:
 - 2.2.1 the identity of the deceased
 - 2.2.2 the date and cause of death
 - 2.2.3 whether the death was caused by a criminal act on the part of any person
 - 2.3 Section 17 requires the Magistrate to refer the inquest to the DPP in the event of either not being able to determine the death or in the event of a finding of criminal liability. He is also required to refer the matter to the DPP irrespective of his findings if so requested.

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- 2.4 Section 17(2) empowers the DPP at any time [my emphasis] after receipt of the inquest request the Judicial Officer to reopen the inquest and take further evidence.
- 2.5 Section 17A(1) also empowers the DPP to request the Minister to request the Judge President to appoint a Judge to reopen the inquest.
3. Sections 17(2) and 17A(1) both empower the DPP to cause inquests to be reopened on the basis of further evidence. The sole difference is whether the Minister and the Judge President must be involved and whether the inquest would be reopened by the original Inquest Court or by a Judge appointed by the Judge President. The invocation of section 17A(1) would be a more time-consuming process and would also place a burden on the High Courts which are under pressure with their existing civil and criminal rolls.
4. In my view, it would be appropriate to invoke section 17(2) where the new evidence would lead to certain of the original findings being amended, but would have no other public interest consequences, e.g. a prosecution or in a transparent manner to test the new evidence orally. Section 17A(1) would in my view be appropriate if there was high public interest in the new evidence, but the DPP was of the view that it should first be tested before instituting a prosecution.
5. It has to be stated that if the DPP is of the view that new evidence justifies the institution of a prosecution, then there is no need to first reopen the inquest before instituting the said prosecution.
6. The background to the two cases is as follows:

6.1 Achmed Timol

- 6.1.1 He died in detention in Johannesburg in October 1971 while under interrogation by the Security Branch having been arrested on charges linked to his involvement with the SACP.
- 6.1.2 The then Attorney General declined to prosecute and a formal inquest was held in the Johannesburg Regional Court, which handed down a verdict that he had committed suicide and that the police were not responsible for his death.
- 6.1.3 Shortly after the establishment of the PCLU in 2003, Mr Timol's nephew (a member of the NIA) approached the unit and indicated that he had established that the inquest record and docket were not available. (Governmental archive directives require the destruction of documentation after a certain period.)
- 6.1.4 He however alleged that the daughter of Sergeant Rodriques (who had been alone with the deceased immediately before he fell to his death) had approached Ivor Powell (then a journalist) and informed him that her father had confessed to her that the deceased had been murdered. The NDPP had directed that the DSO must assist the PCLU with the investigation of TRC matters. The DSO reported that the journalist had been interviewed, denied the allegation and produced the newspaper article which he had written, which contained no confession or new evidence. In the circumstances the DSO deemed it inappropriate to approach Rodriques or his daughter. The nephew was satisfied with this explanation and the matter was not taken further.

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6.1.5 In late 2015, I however asked the DPCI to register an enquiry due to extensive publicity given to the matter by the media and as a result of statements made by Adv Bizos SC and the family.

6.2 Neil Aggett

- 6.2.1 Dr Aggett died in police custody in Johannesburg in 1982 after a lengthy period of detention and interrogation by the Security Branch.
- 6.2.2 The then Attorney General declined to institute a prosecution and a formal inquest was held before a Regional Court Magistrate in Johannesburg. He handed down a verdict to the effect that the deceased had committed suicide and that the police were not responsible.
- 6.2.3 In 2013, a group of Dr Aggett's friends submitted a petition to the President and Minister of Justice, calling for the prosecution of the police officials responsible for his death.
- 6.2.4 As a result of this petition, the PCLU requested the DPCI to open an enquiry.

7. The status of the PCLU/DPCI investigations:

7.1 Achmed Timol (I/O Captain Ben Nel)

- 7.1.1 It has been established that the original inquest and docket are not available.
- 7.1.2 A copy of the inquest donated by the family attorney to Wits has been downloaded. It is missing 652 pages, which include the evidence and cross-examination of all the police officers involved. However, on the remaining evidence it was possible to establish who the witnesses were and what the issues in dispute were.
- 7.1.3 Captain Nel has been requested to canvas the availability of all the witnesses, i.e. the police officers, medical doctors and members of the deceased's family.
- 7.1.4 It has been established that other detainees who were never called as witnesses could possibly shed light on the matter. The first is a Mr Mohammed Essop, who was arrested at the same time as Timol. The second is Quentin Jardine, whose identity, it is alleged, led to the deceased deciding to commit suicide. The third is a Mr Pahad, whom it is alleged was arrested arising from Timol's interrogation. Ms Fullard has been tasked to uplift the detention files from DoJ&CD so that Captain Nel can conduct the necessary investigations in this regard.
- 7.1.5 It has been established that the TRC appointed a journalist, Piers Pigou, as an investigator and he dealt with the Timol matter. He has indicated that he is available for an interview when he returns to the country. As a matter of interest, it was in fact he who approached Sergeant Rodriques and not Ivor Powell. His notes reflect that Rodriques stood by his original statement. It may therefore be that Timol's nephew confused the two journalists and what Rodriques said.

 
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- 7.1.6 It has been established that Gordon Winter published a book in which he claimed to have first-hand knowledge of the Timol incident. Ms Fullard has undertaken to establish whether he is alive and where he is residing.
- 7.1.7 A Methodist priest in the UK made public statements to the effect that when Timol's body was viewed in the mortuary, it showed signs of gross mutilations. This claim would have to be followed up although it is in conflict with the evidence of the three doctors who testified at the inquest, including a pathologist, appointed by the family.
- 7.1.8 What also has to be followed up is whether the police, who were involved in the incident, were involved in other cases, which could have a bearing on their version in this matter. It would also have to be established whether there were other incidents involving detainees which would be relevant.

7.2 Neil Aggett (I/O Col Sam Mahlangu)

- 7.2.1 Col Mahlangu indicated that he was unable to locate the original inquest and docket.
- 7.2.2 He however established that a copy of the inquest was available on the Wits website and requested the PCLU to peruse it and to thereafter indicate whether further investigations were required.
- 7.2.3 The record is in the regional of some 8 500 pages and has been uploaded in blocks, which makes online reading time-consuming. Obviously downloading 8 500 pages would place an extreme burden on the office's printing facilities.
- 7.2.4 It has however been established that Adv Bizos SC, who acted for the family, conceded that there was no evidence to justify the conclusion that the deceased had been murdered. (Adv Bizos SC was assisted by a private pathologist and other medical experts.) He however submitted that Whitehead and Cornwright (the two officers responsible for Aggett's interrogation) should be prosecuted for culpable homicide. If the learned advocate is in fact correct, then the crimes prescribed in 2002 and no prosecution is feasible as requested by the deceased's friends.
- 7.2.5 The matter is however complicated by the fact that the former Deputy Judge President of the KZN High Court (Nicholson DJP) has published a book, alleging that the facts of the Aggett matter demonstrate unequivocally the crime of murder by induced suicide. If the learned Judge is correct, then the NPA would still have jurisdiction to prosecute on a charge of murder.
- 7.2.6 It has been established that Goosen, Pollock and Erasmus applied for amnesty on charges relating to breaking into the house of Aggett's parents, looking for evidence to support the claim that he had committed suicide. The TRC material has been uplifted and has been perused.
- 7.2.7 Aggett's detention file was also uplifted, but it contains no relevant information.
- 7.2.8 Deborah Quin was given the list of witnesses, who testified at the inquest and was requested to establish their availability, present whereabouts and

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also whether any of them were connected to other incidents which would be relevant. She is also looking into the issue of whether there were other deaths in detention at the same time, which could be relevant. She has already indicated that Cornwright is deceased and that Auret van Heerden, who was in detention in close proximity to Aggett, is currently in an old age home in the USA.

8. Currently the two matters are not receiving the attention of the PCLU due to firstly, operational constraints which arose since October 2015. (Adv Bukau was given an urgent espionage-related case and uncertainty surrounded Adv Macadam's position due to the NDPP on 8 October 2015, indicating that he had not cancelled his appointment as the OECD Foreign Bribery Prosecutor.) In a meeting with Adv Macadam in September 2015, the NDPP raised the issue as to whether the TRC matters should be taken away from the PCLU. As a result of all these uncertainties, a memorandum was prepared in January 2016, requesting the NDPP to confirm whether the PCLU should continue to deal with TRC cases or whether they should be referred to the DPPs. A response to this memorandum is still outstanding.
9. In my view, a decision on the request made by Messrs Dutton *et al* cannot be taken solely by the NPA.
- 9.1 Both are the subject of enquiries being conducted by the DPCI and clearly the views of the relevant senior managers within the DPCI should be canvassed.
- 9.2 In the Aggett matter a group of his former colleagues has formed an association, "Friends of Neil Aggett", which has called for the prosecution of the police officials involved. The request to reopen the inquest runs contrary to the group's position. The group has a direct interest in the matter and its view should be consulted.
- 9.3 Also in regard to the Aggett matter, although Cornwright is dead, Whitehead is still available and would clearly be affected by the reopening of the inquest. He would be entitled to legal representation, access to relevant material and the right to challenge any new evidence.
- 9.4 In the Timol matter, it still has to be established whether any of the police involved in his interrogation are still alive and whether any new evidence could result in a prosecution of them on a charge of murder.
10. In my view, it would be inappropriate at this stage to reopen the two inquests. On what has been placed before me it would not appear that Mr Dutton has conducted a comprehensive investigation which would justify all the relevant factors which would have to be taken into consideration by both the NPA and the presiding officers of the inquests.
- 10.1 The original inquests are not available and consequently the NPA would have to request Wits to make available its originals and to pay for all the relevant copies to be made.
- 10.2 A decision would have to be taken as to whether to invoke section 17(2), 17A(1), which would require a determination as to whether the witnesses and suspects are available, whether a charge of murder is feasible, whether a *viva voce* hearing, which would involve having to provide the suspects with legal representation, is necessary.
- 10.3 In my view, a Presiding Officer and the Judge President (if section 17A(1) is invoked) would be reluctant to reopen the inquests, to receive only Dutton's evidence and before the police have concluded their investigations and the NPA decided that there are no prospects of a successful prosecution. This would be particularly apposite in

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the Aggett matter where there are 8 500 pages of evidence to be perused, numerous witnesses who would be required to be recalled and where Whitehead could still be prosecuted.

11. In my view therefore, it would be inappropriate to accede to the request prior to the conclusion of the DPCI investigations and the NPA deciding not to prosecute. I am of the view that even if a decision not to prosecute is taken, then there would be new evidence which would justify the reopening of the inquests. At this stage it is not possible to predict what the consequences of this new evidence would be and therefore it cannot be predicted:
- 11.1 whether the additional statements should simply be placed before the Regional Court, which could in chambers consider them and elect to amend the original Magistrate's findings
- 11.2 whether a Judge should be appointed to hear the additional evidence *viva voce*
12. Having said that, it has to be, in the strongest possible terms, stated that it is imperative that the NDPP make a decision as to whether the TRC cases must remain with the PCLU or not. It will serve no purpose to decline the request, but to be placed in the position that two or more years down the line the cases have not been finalised because either the DPCI or NPA or both are unable to commit the necessary resources to finalise the matters timeously. It has to be emphasised that the Aggett matter requires a considerable amount of work due to the volume of evidence to be assessed, which may include an MLA request to the USA to interview Van Heerden. In the Timol matter there are also indications that evidence may be located in the UK, which would also have to be accessed through an MLA process.
13. Currently a member of the PCLU could give almost fulltime attention to the two matters. However, it is only to be anticipated that this will not be the case when shortly the unit's current workload will increase.
14. It is recommended that you:
- 14.1 advise the NDPP not to accede to the request to reopen the inquests until the investigations have been concluded and a decision taken not to prosecute
- 14.2 request the NDPP to, as a matter of urgency, make a decision as to whether the TRC matters must remain with the PCLU.

Kind regards

ADV RC MACADAM

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Office of the
National Director of Public
Prosecutions



The National Prosecuting Authority of South Africa
Igunya Jikelele Labeleshulshisi baMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

25 February 2004

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Dear Sir

INVESTIGATION INTO TIMOL CASE

I acknowledge receipt of your fax of 18 February 2004 and have to inform you that the case is registered under the above reference number. Last year investigations were conducted into the allegations that former security branch officer Rodrigues had confessed to his daughter who in turn informed IVOR POWELL.

The investigations produced negative results. I confirm that you furnish me with the following documents:

- i) Extract Bizos' book
- ii) Article Powell
- iii) TRC transcripts
- iv) INPUT Detainee
- v) Photographs

The testimony of a detainee who was held out of the window was not included.

I would be grateful if you would furnish me with a copy of it as well as any other relevant material, which you may have. The case will again be considered the light thereof.

Kind regards


RC MACADAM
DEPUTY HEAD: PCLU



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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 SUPER-INTENDENT BRITZ
DATE: 30 OCTOBER 2006

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. TRC CASES CLOSED
 - 2.1 Death in detention Ahmed Timol
 - 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

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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.

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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

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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

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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

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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

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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.

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

In the matter of:

Case Number: 01/17

RE-OPENED INQUEST: MRAHMED TIMOL

AFFIDAVIT OF ADV. RAYMOND CHRISTOPHER MACADAM

1.

I am a Senior Deputy Director of Public Prosecutions in the office of the National Director of Public Prosecutions.

2.

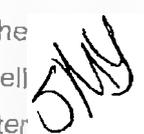
Since 2003 I have been a member of the PCLU.

3.

My attention has been drawn to paragraphs 27 to 30 of an affidavit made by Mr Imtiaz Cajee, which was placed before this Honorable Court on 14 August 2017. In my view this creates the impression that I had investigated a complaint made to the then National Director that the police officers involved with the death of Mr Timol be charged with murder and had advised Mr Cajee that my investigation had produced "negative results". This is not a true reflection of my involvement in the matter.

4.

I was not aware of a complaint made to the National Director but was approached directly by Mr Cajee who informed me that the daughter of Sgt. Rodrigues had approached a journalist Ivor Powell and informed him that her father had told her how the deceased was murdered. I immediately reported the allegations to the DSO ("The Scorpions") A Chief Investigating Officer was sent to interview Mr Powell and establish whether Sgt. Rodrigues could be charged with murder. I was informed that after



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investigation no basis for the allegations could be established. Mr Powell was emphatic that no such approach had been made to him.

5.

On 25 February 2004 I wrote to Mr Cajee informing him that this investigation had produced negative results. I did however invite him to supply me with additional information so that the case could be reconsidered. I did not however hear anything further from him. I attach a copy of my letter addressed to him as RCM1.

6.

Shortly thereafter, I was assigned a very lengthy prosecution relating to an international nuclear weapons syndicate and was no longer involved in TRC cases.

7.

I have had sight of the letter dated 29 November 2006 entitled "Report of the progress made by the Task Team on TRC Cases" which was attached as Annexure "A" to Mr Cajee's affidavit. I was not the author of the report. As the report clearly indicates it related to the work of a task team. I was not a member of this task team. As the report also reflects it was the decision of this team to close the matter relating to the deceased.

8.

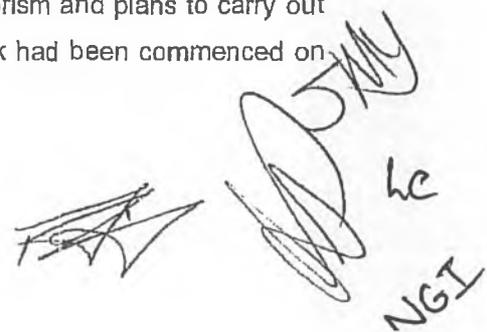
At a later stage I was again instructed to deal with TRC cases. The investigation of these matters was now the responsibility of the DPCI. In late 2015 I looked into this matter and was of the view that it should be investigated. I therefore requested the DPCI to open an investigation into the matter.

9.

I downloaded the copy of the inquest record which was held by Wits and requested the police to establish the whereabouts of the implicated parties, witnesses and medical experts. I also contacted Mr Piers Pigou who had dealt with the matter at the TRC. I also requested a researcher to obtain the detention files of persons who were detained at the same time as the deceased. Copies of my communications are attached hereto as RCM2 and RCM3.

10.

I was however assigned a very urgent matter relating to international terrorism and plans to carry out terrorist attacks in South Africa. I briefed Adv. Pretorius SC on what work had been commenced on



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the matter of the deceased. He informed me that he would monitor the police investigation and later advised me that he had decided that it would be appropriate to hold a formal inquest.

DEPONENT

Thus signed and sworn to at _____ on this _____ day of _____ 2017

The Deponent having knowledge that he knows and understands the contents of this affidavits, that it is both true and correct to the best of his knowledge and belief, that he has no objection to taking the prescribed oath and that the prescribed oath would be binding on his conscience.

COMMISSIONER OF OATHS

FULL NAME: _____

BUSINESS ADDRESS:

CAPACITY: _____

AREA: _____

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INTERNAL MEMORANDUM

TO: DR MS RAMAITE
 FROM: ADV AR ACKERMANN SC
 SUBJECT: AUDIT OF CASES EMANATING FROM TRC PROCESS
 DATE: 24 OCTOBER 2006

1. HISTORICAL BACKGROUND

- 1.1 After the closure of the Goldstone Commission in 1993/94 the government of the day decided that its work in investigating human rights abuses relating to conflicts of the past should continue under the supervision of the then Attorney General of Pretoria, Dr J D'Oliveira. A team of the South African Police Service was seconded to his office to conduct the necessary investigations.
- 1.2 The team was divided into two groups. One focusing on offences committed by security force members and the other group on offences committed by Liberation Movements and the Right Wing.
- 1.3 This latter team comprised of Director Nel and Senior Superintendent Britz.
- 1.4 The Attorney General decided that Deputy Attorney General Flick would supervise all the investigations conducted by the two police officers while he would deal with cases involving security force members.
- 1.5 On 7 November 1996 the National Commissioner at the request

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of Dr D'Oliveira instructed all his Provincial Commissioners to submit all outstanding and unsolved cases pertaining to the entire political spectrum of the conflicts of the past to Dr J D'Oliveira's office. Such instruction also related to cases where not all the accused had been prosecuted.

- 1.6 With the appointment of the NDPP the cases dealt with by D'Oliveira were transferred to his office while Fick continued to deal with the cases originally allocated to him i.e. the Liberation Movement cases. He continued to be assisted by the SAPS members, Nel and Britz. Their contracts were routinely extended by SAPS.
- 1.7 The NDPP however instructed Fick not to institute any prosecutions without his authorisation and no prosecutions were therefore instituted.
- 1.8 With the creation of the DSO in 2001 the cases with the NDPP were transferred to the DSO Head Quarters. Fick however continued with his cases assisted by the two police officers.
- (No prosecutions were instituted because the TRC's final report and the President's response thereto were outstanding.
- 1.10 With the creation of the PCLU in March 2003, the NDPP assigned all TRC matters to it after the TRC had tabled its final report and the President had mandated the NDPP to institute prosecutions where appropriate, arising from the TRC process.
- 1.11 The PCLU was not an investigative agency and was therefore dependant on SAPS and the DSO for investigations. The PCLU reports monthly to a Deputy National Director and the NDPP approved all its decisions to institute TRC prosecutions and, in certain high profile cases, certain decisions not to prosecute.
- 1.12 The DSO policy guidelines for prosecutions in these matters were accepted by the PCLU. In essence, these were to the effect that prosecutions should only be instituted for serious human rights abuses, based on reliable evidence while accepting that humanitarian factors and the interests of reconciliation could also be taken into consideration.
- (3 It was decided that Ackermann would take over Fick's cases and Macadam would take over the DSO cases.
- 1.14 The PCLU conducted an audit of all the cases in both offices.
- 1.15 In this auditing process it was established that the police officers at Fick's office at the DPP Pretoria had registered 395 police dockets.
- 1.16 During 2003/2004, Ackermann declined to prosecute in +- 80 of the abovementioned cases.
- 1.17 Similarly +- 50 cases from the DSO were finalised by Macadam and Ackermann.



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1.18 The audit process further identified a small number of cases warranting prosecution which are dealt with hereunder.

1.19 The 395 police docketts which were in the possession of Nel and Britz were returned to SAPS and the NDPP informed Commissioner Tim Williams that these docketts were police property and that the NPA had no interest in them except if SAPS desired prosecutions in which case they could be re-submitted for these purposes. The then Director General of Justice, Mr V Pikoli and other high ranking officials were present when this discussion between the NDPP and Williams took place. As of the date of this memo, no such docketts have been submitted to the NPA for decision.

2. CASES FINALISED IN COURT

2.1 S v Khwezi Ngoma and Others (Mhaga)

This matter involved four APLA cadres who attacked Willowvale police station in 1994 resulting in the death of a policeman and another injured. They didn't apply for amnesty. They made representation through their attorneys requesting a withdrawal of the charges but it was rejected and entered into plea bargain and received suspended sentences.

2.2 S v Aron Tyani & Another (Mhaga)

The matter relates to the attempted murder and murder of Stembele Zokwe an MK cadre during 1987 and 1988 by the Transkei security police. They were convicted and sentenced to direct terms of imprisonment in 2005.

2.3 S v Eugène Terre'blanche (Ackermann)

In November 2003 the accused pleaded guilty to several charges of terrorism, linked to 1994 pre-election bombings. He was sentenced to 6 years wholly suspended.

2.4 S v Blani (Macadam and Ackermann)

The accused was convicted on two counts of murder in Grahamstown High Court and sentenced to a partially suspended sentence.

3. MATTERS CLOSED BY PCLU

3.1 Death in detention Ahmed Timol

3.1.1 This matter relates to the death of Ahmed Timol who died in police detention on 27 October 1971 during interrogation by the Apartheid Security Police.

3.1.2 There was an allegation that one of the interrogators had confessed to a journalist that Timol had been murdered and that was followed up but was later denied by the said journalist.

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3.1.3 The matter was therefore closed.

3.2 Death In detention of Steve Biko

The matter prescribed in 1997 as evidence only proves culpable homicide which according to our criminal law prescribes after 20 years.

3.3 Carl Niehaus (Macadam)

3.3.1 Victim tortured during detention.

3.3.2 Victim does not desire prosecution.

3.3.3 File closed.

3.4 Skoulides (Macadam)

3.4.1 Victim's sister alleged that her brother had been framed for a murder committed by the Security Forces.

3.4.2 No evidence to substantiate this claim.

3.4.3 File closed.

3.5 Nelson Sithole (Macadam)

Closed – no evidence as to perpetrators.

3.6 Pro Jack (Macadam)

Closed – no reliable evidence as to perpetrators.

3.7 AM Zulu (Macadam)

No admissible evidence arising from TRC.

3.8 Bult (Macadam)

Offence not serious – assault common.

3.9 Castro Khumalo (Macadam)

Matter was referred to Missing Persons' Task Team.

3.10 Winnie Mandela (Macadam)

No reliable evidence.

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3.11 Ermelo Black Cats (Macadam)

No reliable evidence to prosecute IFP members in Mpumalanga linked to this incident.

3.12 Chadwick (Macadam)

Extradition request withdrawn because of a lack of evidence.

3.13 Anton Lubowski (Macadam)

No evidence.

3.14 Ciskei coup d'etat (Macadam)

No evidence.

3.15 General Basie Smit (Macadam)

No evidence.

3.16 S v Bongani Wana (Mhaga)

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

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

3.16.3 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.

3.16.4 The matter was then closed.

3.17 Representation by Mr SM Mavuya (Mhaga)

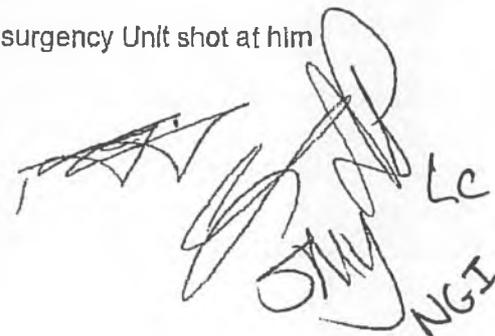
3.17.1 Mr Mavuya claimed to have been an informer during 1984 and was applying for amnesty and requested protection from members of his community.

3.17.2 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.

3.18 Representation by Mpho Masemola (Mhaga)

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

3.18.2 He also claimed that in 1991 members of the Counter Insurgency Unit shot at him



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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.

3.19 Representation by Mr N Dlamini (Mhaga)

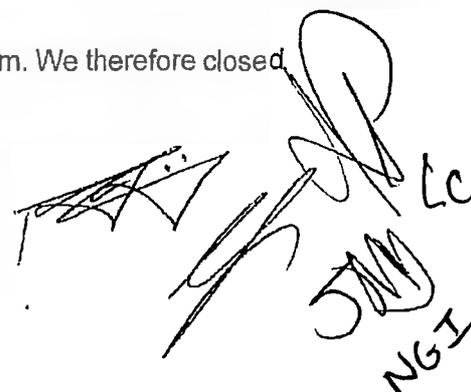
- 3.19.1 Mr Dlamini had made allegations against Swaziland police whom he claimed to have sold out some MK cadres during 1985 to 1986. Unfortunately he could not supply us with any proof apart from a newspaper article from Times of Swaziland which we did not receive.
- 3.19.2 Apart from lack of substance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

3.20 Thabo Armando Sithole (Ackermann)

- 3.20.1 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.
- 3.20.2 They received a report from Greytown police that he committed suicide by hanging himself.
- 3.20.3 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

3.21 Murder of Michael Mcetywa (Mhaga)

- 3.21.1 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.
- 3.21.2 A man called Mavuso is currently serving 25 years for the murder.
- 3.21.3 During his amnesty application which was refused, he implicated a number of IFP leaders.
- 3.21.4 The family of the deceased requested the PCLU to consider prosecution of the implicated IFP leaders.
- 3.21.5 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.
- 3.21.6 Apart from his evidence there was nothing to corroborate him. We therefore closed the file as there was no further action contemplated.



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3.22 Smit murders (Dr Pretorius)

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

3.22.2 Insufficient evidence to apply for extradition.

3.22.3 Matter closed.

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

No evidence that specific crimes had been committed, which attracted personal criminal liability could be found. Consequently, the case was closed.

3.24 IFP Hit Squads (allegations of Luthuli Mbambo and Mkhize)

No reliable evidence upon which to overturn the decision of the DPP: KZN not to prosecute.

3.25 Bombing of Early Learning Centre and other Western Cape CCB activities (Macadam)

The perpetrators were all granted indemnity in terms of the Indemnity Act or in terms of section 204 of the *Criminal Procedure Act, 1977 (Act 51 of 1977)*.

3.26 Plus-minus 80 cases against members of the Liberation Movement (Ackermann)

All these cases were investigated by SAPS and were all closed.

4. POTENTIAL PROSECUTIONS IDENTIFIED BY PCLU

4.1 S v Otto & 2 Others (poisoning of Rev. Chikane) (Ackermann)

4.1.1 Indictment already drafted in 2004 – prosecution was put on hold pending approval of guidelines.

4.1.2 In February 2006, NDPP authorized prosecution.

4.1.3 In terms of the guidelines, representations were received from the accused which were considered by the NDPP.

4.1.4 On 19 September 2006, Ackermann was directed to proceed with the prosecution against the accused.

4.1.5 Beginning of October 2006, it was decided to put prosecution on hold, pending the obtaining of a legal opinion on whether the accused have received indemnity or not in terms of the Indemnity Act, 1990.

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4.2 Pebco 3 (Ackermann)

4.2.1 In February 2004, the three accused were charged in the High Court on three counts of kidnapping and murder.

4.2.2 The matter is currently on review.

4.2.3 Next court appearance of accused is August 2007.

4.3 Cradock 4 (Ackermann)

4.3.1 Potential prosecution.

4.3.2 Legal obstacles.

4.3.3 Extensive investigations required.

4.4 S v Botha and Others (kidnapping of Ntombi Kubheka) (Ackermann)

4.4.1 Priscilla Ntombi Kubheka was an MK operative who lived in KwaMashu township in Durban.

4.4.2 She was kidnapped by Askaris, interrogated, tortured and subsequently killed by members of the Security Branch C1 Unit in 1987.

4.4.3 Seven members applied for amnesty for kidnapping, killing and disposing of the body of Kubheka. Only Baker and Radebe received amnesty while Botha, Du Preez, Van der Merwe and Visagie were refused. Docket in possession of PCLU.

4.5 S v Coetzee and Others (Nokuthula Simelane Kidnapping) (Ackermann)

4.5.1 Nokuthula Simelane was an underground MK operative acting as a courier and had been a major communication link between an MK base in Swaziland and SA.

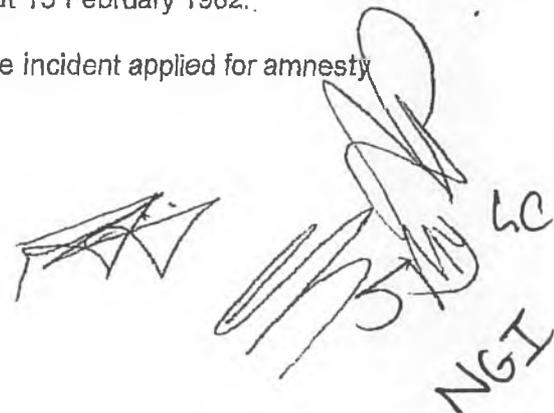
4.5.2 She disappeared in 1983 after being sent on a mission in SA.

4.5.3 Docket in possession of PCLU.

4.6 Cosas Four (Ackermann)

4.6.1 The matter relates to the killing of Eustice Blimbo Madikela, Ntshingo Mataboge, Fanyana Nhlapo and attempted killing of Zandisile Musi (collectively referred to as the Cosas Four) in an explosion at Krugersdorp on or about 15 February 1982.

4.6.2 The four officers and an Askari who were involved in the incident applied for amnesty and were refused.

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4.6.3 The PCLU is not in possession of the docket.

4.7 Murder of Askari Strongman Sambo

The matter had been identified as a potential prosecution case but a decision has already been made by the DPP in Pretoria not to prosecute.

4.8 Matter of SAP General Engelbrecht

The matter had also been identified for prosecution but a decision was made by the DPP in Pretoria not to prosecute General Engelbrecht.

4.9 Death of George Mashele and Lilian Magosha (Mhaga)

4.9.1 This office received representation from Joseph Yende who claims to be the son of Lillian and brother of George.

4.9.2 George and his mother died during a raid by the SAP at his home in July 1992.

4.9.3 According to the police statements and post-mortem reports, the two died as a result of hand grenade explosion.

4.9.4 There is no evidence to rebut that version but Yende claims that there are witnesses who claim to have seen otherwise.

4.9.5 The PCLU is currently arranging consultations with them to verify these allegations. The family was compensated by the TRC for the incident.

4.10 Nicolas Boykie Thlapi (Disappearance in police custody) (Mhaga)

4.10.1 ANC branch in Klerksdorp submitted a memorandum demanding investigation into the disappearance of Boykie in March 1986 after being arrested by police with other members of Ikakgeng Youth Congress.

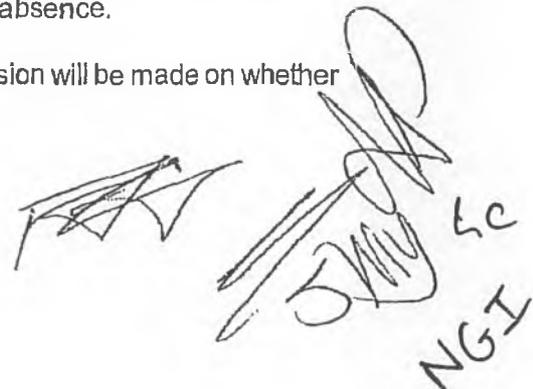
4.10.2 The matter is currently investigated by Capt Mathi of Klerksdorp serious and Violent Crimes Unit.

4.11 Lethlapa Mphahlele (Heidelberg Tavern and St James Massacre)

4.11.1 A representation was received by PCLU from Democratic Alliance and the father of Lynn Fourie who was killed during the attack.

4.11.2 A number of APLA cadres involved in the attack applied for and received amnesty after serving sentences. Mr Mphahlele applied for amnesty but later failed to appear before the commission resulting in his application refused in his absence.

4.11.3 As soon as an investigator is appointed for the case a decision will be made on whether



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to prosecute or not.

4.12 Bathandwa Ndondo (Murder by Vlakplaas operatives in 1985) (Ackermann)

4.12.1 Bathandwa Ndondo was an MK underground cadre operating in Transkei after his expulsion from the University of Transkei for his political involvement.

4.12.2 He was wanted by the Security police in Transkei and the Vlakplaas operatives and subsequently murdered in 1985. We received a representation from Adv Dumisa Ntsebeza requesting prosecution of the police officer who did not receive amnesty.

4.12.3 A decision had been made by the former NDPP not to prosecute him, we are therefore still considering the request as this will require overturning the previous decision if we decide to prosecute.

4.13 Moss Morudu (kidnapping and murder) 1987

4.13.1 Moss Morudu was a Cosas member in Mamelodi and had been politically active during 1986.

4.13.2 He was alleged to be a member of the underground unit of Umkhonto Wesizwe under the command of Obet Masango.

4.13.3 He disappeared from his home during October 1986 after the Security police had been looking for him in connection with a landmine explosion.

4.13.4 He was kidnapped by three security operatives under the pretence that they were MK cadres taking him to exile for military training. He was never seen again by his family.

4.13.5 The three officers who kidnapped Moss received amnesty for kidnapping and others did not apply for amnesty. As soon as an investigator is appointed a decision will be made on whether to prosecute or not.

4.14 Kidnapping and murder of Betty Boom, Mashiya and Selamane

The perpetrators were refused amnesty by the TRC.

4.15 Kidnapping and murder of Mbulelo Ngono

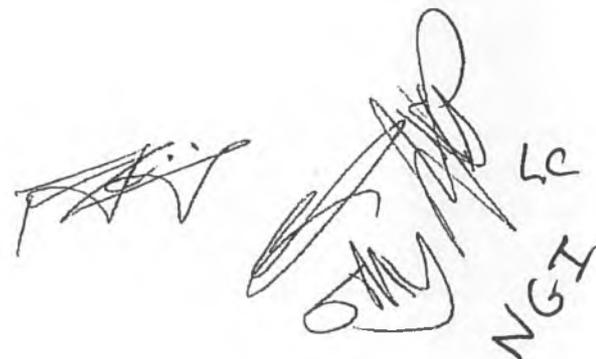
The perpetrators were refused amnesty by the TRC

4.16 Gaberone raid

The perpetrators were refused amnesty by the TRC

4.17 Maseru raid (General Johan van der Merwe implicated)

The perpetrators were refused amnesty by the TRC

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4.18 Samora Machel (Dr Pretorius)

This matter was reopened in 2005.

4.19 Philip Powell (Macadam/Ackermann)

4.19.1 NDPP directed that the PCLU apply for the extradition of Powell.

4.19.2 However, accused indicated that he wished to make representations.

4.19.3 Representations are awaited.

4.20 Victoria Mxenge (Macadam)

Allegations of an amnesty applicant must be investigated.

4.21 George Wauschope (Macadam)

4.21.1 The accused is a former leader of AZAPO. He was indicted to stand trial in the Johannesburg High Court in 1989 on charges of murder and attempted murder.

4.21.2 He absconded and took up exile in Zimbabwe.

4.21.3 The TRC rejected his application for amnesty, because he denied that he had admitted any crime.

4.21.4 In 2003, representations were made on his behalf to Minister Maduna to withdraw the charges.

4.21.5 The DSO evaluated the case in order to enable the Minister to respond.

4.21.6 The victims, who were also the eyewitnesses, were traced and they confirmed their allegations against the accused and also requested that he be prosecuted.

4.21.7 On their version, it would appear that the accused shot the deceased in the mistaken belief that he was a member of COSAS and in the process wounded an innocent bystander.

4.21.8 The former NDPP and the Minister decided that the prosecution should proceed.

4.21.9 The case was referred to the DPP: Johannesburg, who has in turn requested SAPS to conduct investigations.

4.21.10 These investigations are in progress.

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4.22 Eugène de Kock

4.22.1 De Kock's legal representative has indicated that he has laid a wide ranging number of charges with SAPS relating to matters which were not put before the TRC or in respect of which false testimony was presented to the TRC.

4.22.2 These allegations must be considered insofar as they are relevant to the TRC processes.



ADV AR ACKERMANN SC



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ANNEXURE "B"

REPUBLIC OF SOUTH AFRICA

INDEMNITY BILL

(Second Draft)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B - 2003]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP VRYWARING

(Tweede Konsep)

(MINISTER VIR JUSTISIE EN STAATKUNIDGE ONTWIKKELING)

[W - 2003]



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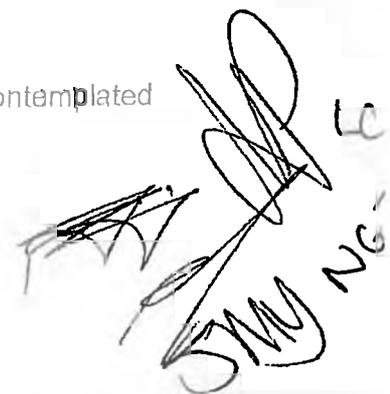
To provide for the granting of indemnity by the President to persons who make full disclosure of all relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the period from 1 March 1960 to the cut-off date; for the said purpose to establish a Committee on Indemnity to consider and investigate applications for indemnity and to make recommendations to the President; and to provide for matters connected therewith.

P R E A M B L E

SINCE the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provided for a law to be adopted by Parliament in terms of which amnesty should be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past;

AND SINCE that law was adopted and the mechanisms and procedures established by that law have run their course and have been concluded;

AND SINCE there remains a need for reconciliation and reconstruction as contemplated in that Constitution;



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TERMS OF REFERENCE OF THE AMNESTY TASK TEAM

The Task Team is to consider and report on the following:

1. What criteria does the National Prosecuting Authority apply in deciding on current and impending prosecution of cases flowing from the conflict of the past.
2. The formulation of guidelines that will inform current, impending and future prosecution of cases flowing from the conflict of the past.
3. Bearing the above-mentioned guidelines in mind, whether legislative enactments are required.
4. Whether any of the two Bills that have already been formulated can be proceeded with, bearing in mind the views of our intelligence agencies.

Leon Radman
0824582621

[Signature]

[Signature]
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AMNESTY TASK TEAM

FURTHER REPORT

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FURTHER REPORT: AMNESTY TASK TEAM

1. Background Information

1.1 On 3 March 2004 the Amnesty Task Team submitted a Report to a Heads of Department Forum for consideration.

1.2 The Heads of Department discussed the Report with members of the Task Team, whereafter they deliberated the Task Team's proposals and recommendations *in camera*. Following these deliberations, the Heads of Department indicated that they prefer the Task Team's recommendations relating to the establishment of a Departmental Task Team (hereinafter referred to as Option 1). They, however, requested the Task Team to give further consideration to the following aspects relating to Option 1:

- (a) Parallel structures in order to assist the proposed Departmental Task Team, are not acceptable. In performing its functions the proposed Task Team must make use of existing structures.
- (b) Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the National Director of Public Prosecutions decides not to prosecute? Investigate the possibility and desirability of legislation, if required.
- (c) The proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee.
- (d) It is important that the proposed Task Team, the Inter-Ministerial Committee and the National Director, in performing their functions and reaching decisions, should take national interest into account.
- (e) Advise the Forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court.
- (f) Advise the Forum on a time line for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.

2. Discussion

2.1 The establishment of a Departmental Task Team

Before discussing the above aspects, the Task Team once again considered the question whether legislation is required to establish the proposed Departmental Task Team. The Task Team met with two senior State Law Advisers of the Office of the Chief State Law Adviser. They confirmed the Task Team's conclusion in paragraph 3.4 of its Report, namely, that the recommendations pertaining to the establishment of a Departmental Task Team is an administrative process and does not require any legislation. They, however, recommended that the process and the establishment of the proposed Task Team be put into writing and suggested that the parties commit

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themselves to the process in a Memorandum of Understanding. The Task Team supports this proposal of the State Law Advisers

2.2 Ad paragraph 1.2(a): The involvement of existing structures

The Task Team supports this proposal of the Forum. However, in order to ensure the effective cooperation of such existing structures it is important that the existing structures, prior to the implementation of the proposed structure, commit themselves and give their full support and cooperation to the proposed process. It is proposed that such existing structures should be parties to the Memorandum of Understanding contemplated in paragraph 2.1 *supra*.

2.3 Ad paragraph 1.2(b): Consider the possibility and desirability of eliminating private prosecution and civil litigation in cases of no prosecution

2.3.1 The question whether it is possible or desirable to eliminate private prosecution and civil litigation elicited much debate within the Task Team. The Task Team obtained a written legal opinion from Adv JH Bruwer (attached hereto as Annexure "A") and also discussed the question with the two State Law Advisers referred to in paragraph 2.1 above. They are all in agreement that any legislation eliminating private prosecution and civil litigation will at least affect a person's right to equality (section 9(1) of the Constitution) and the right of access to courts (section 34). They also indicated that it is doubtful whether the motivation for such legislation would meet the requirements of section 36 (limitation clause) of the Constitution, and in case of the enactment of such legislation, an amendment of the Constitution would be required.

2.3.2 The State Law Advisers referred to in paragraph 2.1 above, indicated that they would advise against the enactment of any further legislation, since it would limit the rights of the victims or other interested parties. They further agreed with the Task Team that the proposed legislation, eliminating private prosecution and civil litigation, might be seen as a further amnesty process, which would be inconsistent with the Heads of the Department's view that Option 2 (a further amnesty process) is not an option at all.

2.3.3 In the final instance we wish to draw the Forum's attention to an article in *Rapport* of 7 March 2004 relating to the question of amnesty. During an interview with Archbishop Desmond Tutu, he expressed the view that every person who has not received amnesty through the TRC-process may be prosecuted and any new agreement to stop prosecutions is undesirable, since it will, among others, have the effect of negating the amnesty process of the TRC.

2.3.4 In the light of the above, the Task Team is of the view that private prosecution and civil litigation can only be eliminated by way of legislation and a Constitutional amendment. The Task Team is of the view that such a step would not be desirable.

2.4 Ad paragraph 2.1(c): The establishment of an Inter-Ministerial Committee

The Task Team supports this proposal. However, it wishes to point out that the State Law Advisers are of the view that the establishment of such a further structure may constitute a cumbersome process and increase the possibility of conflicting views

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between the various role-players and structures. Furthermore, they pointed out that the process might be seen as an attempt by the Government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision.

2.5 Ad paragraph 2.1(d): National interest should be the paramount objective

The Task Team wholeheartedly agrees with this viewpoint of the Forum.

2.6 Ad paragraph 2.1(e): The involvement of the International Criminal Court

This question was also referred to Adv JH Bruwer for his advice. In paragraph 3 of Annexure "A" he comes to the conclusion that, taking into account the provisions of section 5(1), read with section 5(6) and the definitions of the relevant crimes of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002), "it is not inconceivable that a complainant who is prohibited by legislation contemplated in paragraph 1(a) from instituting a private prosecution in the national court may approach the International Criminal Court for relief". The Task Team agrees with this viewpoint.

2.7 Ad paragraph 2.1(e): Setting a time line for the Task Team to complete its work

The Task Team is hesitant to propose a specific time line at the stage when the process is to be announced. The setting of a time line in respect of the TRC process led to expectations and the subsequent extension of the TRC process, although justified and unavoidable, led to fierce criticism. It is proposed that the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into account the extent to which its objectives are achieved.

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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

8 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

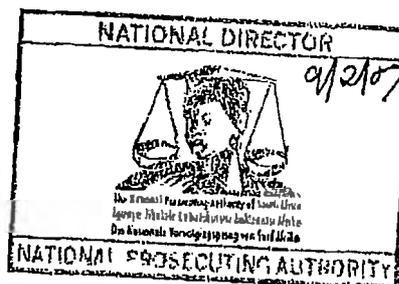
Our discussion in the above matter on Tuesday 6 February 2007 refers.

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

I trust that you find the above in order.

With warm regards


MRS B S MABANDLA
MINISTER





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The National Prosecuting Authority of South Africa
 Igunya Jikelele Labelshutshisi 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

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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

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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.

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- (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

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

- 4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.
- 4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—
- (a) the terms of reference of the Task Team were explained and agreed to;
 - (b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

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

- 4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked "B" from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as Annexures "C" and "D", respectively)
- 4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.
- 4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

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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".

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- "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 Policy⁵, 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.

VP 15102+2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

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NGI

sl/ audit trc cases

**SCORPIONS**

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Office of the Head
Special National Projects
Directorate of Special Operations
HEADQUARTERS

INTERNAL MEMORANDUM

TO: NDPP REF: TRC GENERAL

CC: HEAD DSO
HEAD OPERATIONS
ADV ACKERMANN

FROM: HEAD SNPU

DATE: 15 MAY 2003

RE: AUDIT OF TRC CASES

A. CASES BEING PREPARED FOR PROSECUTIONS:**1. MOTHERWELL BOMBING****(a) Leg One**

The accused were all refused amnesty. On review however the High Court ordered that their applications be reheard because the TRC failed to lead evidence. Investigations conducted by my office indicate that the accused supplied a false motive for killing the deceased. Evidence will be made available to the TRC so that amnesty can be refused on a proper basis. This will open the way for legs two and three.

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(b) Leg Two

The three accused convicted in the 1996 prosecution were granted leave to appeal against their convictions to the SCA. I have taken over the argument of the appeal from the DPP Eastern Cape due to the fact that the prosecutor has retired.

(c) Leg Three

The prosecution of SAP General van Rensburg for ordering the killing of the Motherwell Four.

2. **BRIAN NGULUNGA**

The prosecution of SAP General van Rensburg for ordering the killing of Brian Ngulunga.

3. **PEBCO 3**

The prosecution of the Security Branch members responsible for the kidnapping of the deceased at Port Elizabeth Airport.

4. **WAUGHOPE**

Prosecution of AZAPO leader George Wauchope for murder and other related charges. I am awaiting the Minister's response to representations by the accused that he not be prosecuted.

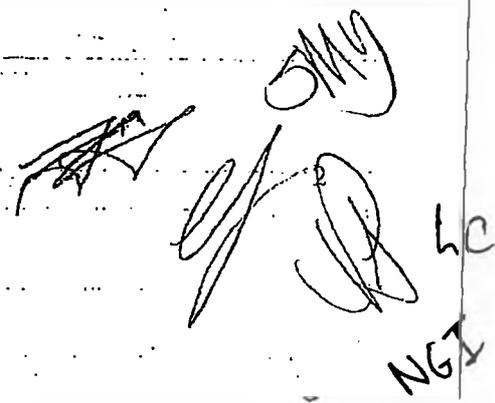
5. **POWELL**

The prosecution of Phillip Powell for possessing hand grenades in April 1994. The matter is with the NDPP.

6. **NQUTU ARMS CACHE**

The prosecution of J. M. Nqobobo and others for the concealment of the weapons found in the Nqutu Bunker in May 1999.

7. The prosecution of the CCB members responsible for the bombing of the Early Learning Centre (it must however be established that the accused did not receive indemnity in terms of the Indemnity Act of 1990).

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B. POTENTIAL FURTHER PROSECUTIONS ARISING FROM THE ABOVE

1. Murder of the PEBCO 3

There is currently no reliable evidence on the murder charge. If the accused are however convicted of kidnapping it is likely that at least one of them may supply information as to the killings in order to obtain a lesser sentence.

2. Gradock 4

There is no reliable evidence on this case. The TRC however established that the crime was committed by the same people who were involved in the Motherwell and PEBCO 3 cases. The successful prosecution of these cases could lead to some of the perpetrators coming forward also to obtain lesser sentences.

C. NEW CASES BEING EVALUATED FOR PROSECUTION PURPOSES

1. Murder of the COSAS 4

2. Murder of Askari Strongman Sambo

3. Murder of detainee on the East Rand by "Timol" Goetzee

4. Murder of Askari Dan Maboto

5. Allegations by IFP sentenced prisoner to have knowledge of murders in the East Rand from 1988

6. 447 dockets relating to APLA handed over by SAPS Crimes Against the State Unit

7. 6-8 dockets linking AWB to Pre election bombings previously dealt with by Advocate Fick

D. HIGH INTEREST CASES WHICH REQUIRE ATTENTION IRRESPECTIVE OF THE NATURE OF AVAILABLE EVIDENCE

1. Murder of Victoria Mxenge

2. Kidnapping, torture and murder of Ntombi Khubeka

3. Kidnapping, torture and murder of Nokutulu Simelane

4. Decision by DPP Pretoria not to prosecute SAP General Engelbrecht

5. Uninvestigated allegations against SAP General Bassie Smit

6. Ciskei Coup De AT

7. Transkei Coup De AT

Handwritten signatures and initials are present in the bottom right corner of the page, including a large signature, the initials 'JLM', and the text 'NGI'.

8. Pre Election Train Violence in Gauteng
9. Murder of Reggie Hadebe
10. Murder of Dulcie September
11. Refusal of Amnesty to 37 High Ranking ANC officials
12. Decision by DPP KZN not to prosecute IFP hit squads

E. REPRESENTATIONS TO INVESTIGATE SPECIFIC CASES

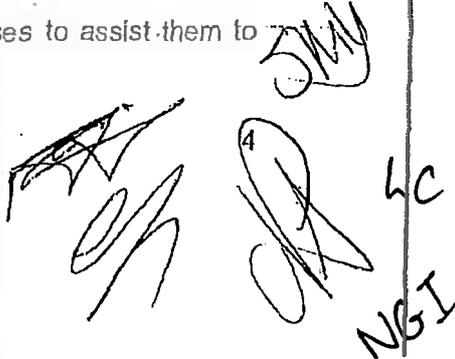
1. Death in detention Ahmed Timol
2. Murder of UDF activist Nelson Sithole
3. Murder of Pro Jack
4. Murder of IFP families in Table Mountain by A. M. Zulu
5. Murder of ANC supporter Batondo
6. False Conviction of Skouldies
7. Assault on A. Bult
8. Vlakplaas member Piet Snyders
9. Murder of Castro Khumalo

F. CASES IN THE PROCESS OF BEING CLOSED

1. Assault on Carl Niehaus- complainant does not desire a prosecution
2. APLA murder Mphahlela attacks on police stations: lack of reliable evidence
3. Mphahlela murder charges- lack of admissible evidence against him
4. Winnie Mandela- lack of reliable evidence
5. Steve Biko- crime prescribed in 1997
6. Smit Murders- perpetrators deceased
7. Ermelo Black Cats- lack of reliable evidence
8. IFP Murders Chadwick- accused in a mental institution in the United Kingdom

G. ASSISTANCE TO OTHER AGENCIES

1. Police Intelligence supplied with a breakdown of AWB amnesty hearings to assist in profiling of persons currently involved in Right Wing Activities
2. TRC supplied with material relating to IFP human rights abuses to assist them to oppose IFP application to have findings against it set aside



 HC
 NBI

H. REPARATIONS RELATED ACTIVITIES

1. Exhumation of bodies of Mamelodi 10
2. Reparations of remains of victims in the Kwaggasnek incident in Lesotho
3. Representations by members of the public to locate their missing relatives
4. Partnership with SA Disappearance Foundation

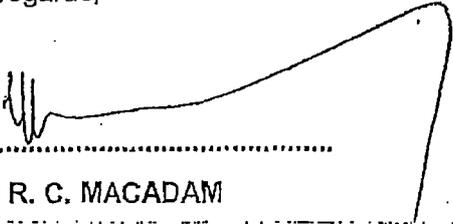
I. INVESTIGATION PUT ON HOLD PENDING THE APPEAL IN THE BASSON CASE RELATING TO JURISDICTION FOR CONSPIRACY TO COMMIT CRIMES OUTSIDE THE RSA

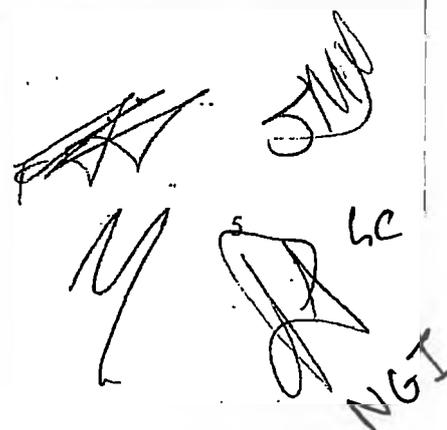
1. Murder of Anton Lubauwski
2. Lesotho Raid
3. Botswana Raid
4. Swaziland Raid

J. POLICY CONSIDERATIONS

1. Prosecutions not to be conducted on a piecemeal basis except where special circumstances (e.g. witness on point of death, accused about to leave RSA or engaged in current criminal activities)
2. Once all the cases earmarked for prosecution have been investigated a presentation will be given to the NDPP in order for him to confirm the prosecution strategy. Thereafter prosecutions will be instituted
3. After convictions have been obtained attention will be given to cases which currently had evidence since convictions may act as incentive for perpetrators to come forward

Kind regards,


ADV. R. C. MAGADAM
HEAD
SNPU


NGI

Justice Budget: input by National Prosecuting Authority and Specialist Units

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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 had 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 areas 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 they 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 appointed 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 facilities 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 STATEThe 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 closely 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.

Investigations

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Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

INTERNAL MEMORANDUM

TO : CIO Leask
FROM : Adv M G Ledwaba
DATE : 15 JULY 2003

SUBJECT : SNPU INVESTIGATIONS

1. Due to the recent creation of the PCLU it has become necessary to re-define the mandate and operations of the SNPU as follows:

(i) TRC cases

I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used. Notwithstanding the above decision Adv **TONGWANE** must finalize the Black Cats and Winnie Mandela cases. Due to the fact that NDPP has requested a speedy finalization of the two matters this must be done before 30 July 2003. I have also transferred the two researchers to the PCLU. It may be necessary for your investigators to introduce certain witnesses with whom they have dealt to the SAPS investigators and you are accordingly authorized to conduct the necessary handovers.

(ii) Operation Sunflower

Advocate **MACADAM** will continue to oversee the disruptive action with the Consumer Council with your assistance. Once the SAPS report is received and evaluated, I will make a decision on the final disposal of the case.

[Handwritten signatures and initials]
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(iii) **Operation Black Widow**

Adv TONGWANE must oversee the finalization of the investigation and conduct the prosecutions which may arise.

(iv) **Operation Final Curtain**

SAPS must continue with the investigations under the direction of the prosecutor arranged by Adv ACKERMANN. You may give limited assistance to SAPS and the prosecutor on specific aspects when necessary.

(v) **Foreign Mercenaries**

Adv PRETORIUS has been delegated to assess all cases currently being investigated by both SAPS and the DSO. (I have communicated separately to the Regional Head Gauteng in this regard). I will make a decision as to the involvement of the DSO in such investigations once I have received a report from Adv ACKERMANN.

Adv M G Ledwaba
HEAD : OPERATIONS

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SAP 21

SUID-AFRIKAANSE POLISDIENST



SOUTH AFRICAN POLICE SERVICE

Privaatsake/Private Bag X302

Verwysing Reference	3/9/91(93)
Navraag Enquiries	Div Comm De Beer
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Faksnommer Fax number	{ 012 } 393 2193

Afdelingskommissaris/Divisional
Commissioner
Speurdiens / Detective Service
Hoofkantoor / Head Office
PRETORIA
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2003-09-26

Advocate AR Ackermann, SC
Special Director
Head: Priority Crimes Litigation Unit
National Prosecuting Authority
Church Square
PRETORIA
0001

Dear Advocate Ackermann

INVESTIGATION OF TRC CASES

Your letter dated 20 August 2003, as well as the preceding discussion between ourselves, have reference.

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

From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking. Your letter only states that: "In March 2002, consideration was given to the issue of a Presidential proclamation, but problems were encountered in this regard."

You are aware of the fact that the capacity created for the D'Oliveira Committee is presently with the DSO.

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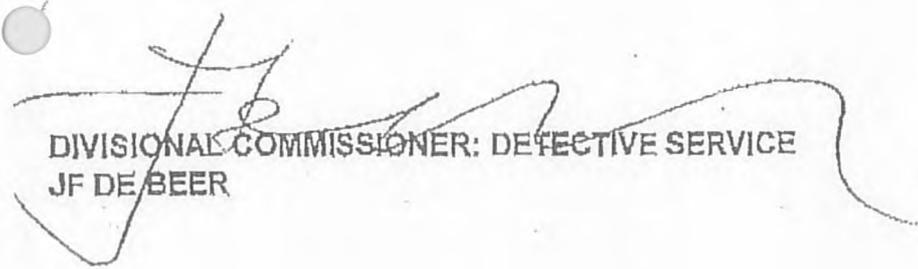
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In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seem to be common cause that the initial understanding was that the DSO would have investigated it, the opinion is held that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

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

You are therefor requested to approach the President on the matter, where after we can take the matter further, if necessary.

Kind regards.


DIVISIONAL COMMISSIONER: DETECTIVE SERVICE
JF DE BEER


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Office of the Head
Priority Crimes Litigation Unit
HEADQUARTERS

INTERNAL MEMORANDUM

TO: ADV GEOPH LEDWABA

CC: 1. NDPP
2. DR S RAMAITE SC
3. ADV LF MCCARTHY SC

FROM: ADV A R ACKERMANN SC

SUBJECT: INVESTIGATION OF TRC CASES BY THE DSO

DATE: 11 NOVEMBER 2003

P. O. Box 1511
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VGM Building
123 Westlake Str
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Dear Geoph

1. In the light of current developments, I am constrained to document the history of the above saga.
 - i) In 2001 the NDPP decided that the DSO was responsible for the investigation and prosecution of the above cases. Both Advocates Sonn and McCarthy made a number of public statements creating an impression that the DSO was making a sincere effort to do justice to the cases. In addition Advocate Sonn gave the President a full briefing on the matter.
 - ii) In 2002 the SNPU was established in order to investigate the cases.
 - iii) In 2003 and in response to the TRC's final report, the President placed the responsibility for the investigation and prosecution of TRC matter on the NDPP
 - iv) In May 2003 I gave the NDPP and his Deputies a full briefing on all TRC cases identified for prosecution.

My prosecution strategy was endorsed and Advocate McCarthy indicated that there would be no problem in having the cases declared in terms of Section 28 of the NPA Act. The NDPP briefed the Minister and Justice Portfolio Committee accordingly.

- v) Shortly thereafter and in the same month you were presented with applications in terms of Section 28 relating to the cases.
- vi) In July 2003 you verbally informed me that you were not prepared to sign the declarations and were withdrawing the DSO from the further investigation of the cases. A letter to this effect was given to the CIO Leask by you. (Copy attached)
- vii) In response thereto I requested Commissioner De Beer to appoint the police to take over the investigations. After a series of meetings with him, he approached the National Commissioner who indicated that the police would only investigate upon written instruction of the President (Copy of De Beer's letter is attached). His primary reason was that the SAPS had transferred all their members with appropriate experience to the DSO in order to capacitate it to conduct these investigations.
- viii) After receipt of De Beer's letter, I made several unsuccessful attempts to contact you to discuss the matter. Eventually I had to report the matter to Dr Ramaite.
- ix) On 3 November 2003 you informed me that you would sign the declarations in terms of Section 28(1)(b) and would appoint SSI De Lange to conduct the necessary investigations.
- x) On 6 November 2003 Dr Ramaite informed Adv Macadam that he had discussed the matter with Adv McCarthy who indicated that the DSO would investigate.
- xi) On 10 November 2003, Adv Macadam presented you with Section 28(i)(b) declarations. You informed him:
 - a) That you are not prepared to sign any declarations
 - b) De Lange would not be appointed despite the fact that it was explained to you that he was part of the initial investigation and familiar with all the witnesses and the facts of the cases.
 - c) That during the course of 10 November 2003 another investigator will be appointed.
 - d) The President should not be approached to involve SAPS

2. As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted. There are certain cases which could have been prosecuted which have prescribed. There is both National and International pressure to institute prosecutions (e.g. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the *bona fides* of the National Prosecuting Authority into serious dispute and do irreparable damage

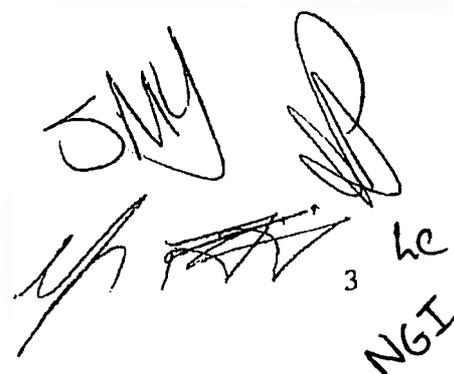
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Since I do not have any investigative capacity, I am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases and to sign the declarations in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

Kind regards



ADV AR ACKERMANN SC
SPECIAL DIRECTOR
HEAD: PCLU



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TERMS OF REFERENCE OF THE AMNESTY TASK TEAM

The Task Team is to consider and report on the following:

1. What criteria does the National Prosecuting Authority apply in deciding on current and impending prosecution of cases flowing from the conflict of the past.
2. The formulation of guidelines that will inform current, impending and future prosecution of cases flowing from the conflict of the past.
3. Bearing the above-mentioned guidelines in mind, whether legislative enactments are required.
4. Whether any of the two Bills that have already been formulated can be proceeded with, bearing in mind the views of our intelligence agencies.

DRAFT

Leon Radman
0824582621

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**REPORT
AMNESTY TASK TEAM**

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Secret**REPORT: AMNESTY TASK TEAM**

1. Background
 - 1.1 A Director-General's Forum, under the chairpersonship of the Director-General, Justice and Constitutional Development on 23 February 2004, appointed a Task Team to consider and report on the following:
 - "1. Consideration of the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past.
 2. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past
 3. Bearing the above-mentioned in mind, whether legislative enactments are required."
 - 1.2 The Task Team comprises the following members:

Deon Rudman (Chairperson):	Department of Justice and Constitutional Development
Yvonne Mabule :	National Intelligence Agency
Vincent Mogotlane :	National Intelligence Agency
Gerhard Nel	National Prosecuting Authority
Lungisa Dyosi	National Prosecuting Authority
Ray Lalla :	South African Police Service
Joy Rathebe	Department of Defence
 - 1.3 The Task Team was requested to submit its report to the Director-General's Forum by close of business on 1 March 2004. The Task Team met for the first time on 26 February 2004 and again on 1 March

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

2. Terms of reference

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

- (a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.
- (b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process. Among these are—
- individuals who were misled by their leadership to treat the process with disdain;
 - others who calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel;
 - others who expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases, which did not happen.

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- (c) "Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations."
- (d) "We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing."
- (e) "However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation."
- (f) "This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts."
- (g) "It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today, for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity."
- (h) "This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts."

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- (i) "Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action."
- (j) "Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard."
- (k) "The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments."

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

3. Discussion

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

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

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

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

3.2 Ad paragraph 1 of terms of reference

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

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

3.2.2 The functions of the proposed Task Team should be the following:

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

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- (b) To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—
- (i) the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;
 - (ii) the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.
- (c) To—
- receive information or representations from victims, perpetrators, legal representatives or any other person or institution regarding any specific matter;
 - gather intelligence information;
 - investigate the matter;
 - consult victims.
- (d) To consider the following factors when carrying out its mandate:
- (i) The general criteria governing a decision to prosecute as determined by the NDPP in the Policy Manual attached hereto as Annexure "A".
 - (ii) The following specific criteria:
 - o Whether the alleged offence is associated with a political objective committed in the course of the conflicts of the past.

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

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

(e) To consider—

- (i) the provisions of section 105A of the Criminal Procedure Act, 1977(Act 51 of 1977), relating to plea and sentence agreements and the directives issued by the NDPP in terms of section 105A(11) of the said Act;
- (ii) the provisions of sections 7 of the Criminal Procedure Act relating to the issuing of a *nolle prosequi* certificate and the right of a private person to institute criminal proceedings in terms of the section 8 of the said Act;
- (iii) the provisions of section 18 of the Criminal Procedure Act relating to the lapsing of the right to institute a prosecution for any offence after the expiration of a period of 20 years from the time when the offence was committed, other than the offences of murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child stealing; rape; or the crime of genocide, crimes

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

- (iv) the possibility of diversion in the case of juvenile offenders;
- (v) possible arrangements settling the matter out of court;
- (vi) the provisions of section 204(2) of the Criminal Procedure Act relating to the discharge of the alleged offender from prosecution for the alleged offence if such offender testified as a state witness and answered all questions frankly and honestly.

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

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

- (a) A possible negation of the constitutional rights of victims, the public at large and alleged offenders.
- (b) The possibility of the institution of private prosecutions.
- (c) The absence of any guarantee that alleged offenders will not be prosecuted. This might mean that they will be reluctant to approach the Task Team and make full disclosure. The concerns relating to persons who have disappeared, the arms caches that have not yet been discovered and the Kwazulu-Natal problem will not be solved.

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

3.3 Ad paragraph 2 of terms of reference

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

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

3.4 Ad paragraph 3 of terms of reference

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

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AMNESTY TASK TEAM

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FURTHER REPORT: AMNESTY TASK TEAM

1. Background Information

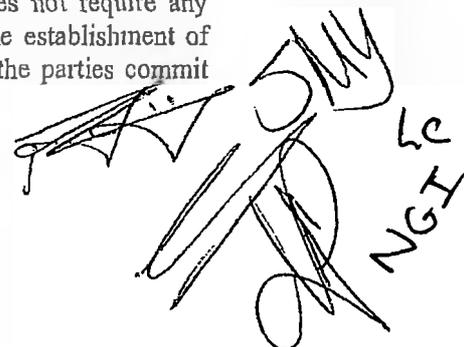
- 1.1 On 3 March 2004 the Amnesty Task Team submitted a Report to a Heads of Department Forum for consideration.
- 1.2 The Heads of Department discussed the Report with members of the Task Team, whereafter they deliberated the Task Team's proposals and recommendations *in camera*. Following these deliberations, the Heads of Department indicated that they prefer the Task Team's recommendations relating to the establishment of a Departmental Task Team (hereinafter referred to as Option 1). They, however, requested the Task Team to give further consideration to the following aspects relating to Option 1:
 - (a) Parallel structures in order to assist the proposed Departmental Task Team, are not acceptable. In performing its functions the proposed Task Team must make use of existing structures.
 - (b) Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the National Director of Public Prosecutions decides not to prosecute? Investigate the possibility and desirability of legislation, if required.
 - (c) The proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee.
 - (d) It is important that the proposed Task Team, the Inter-Ministerial Committee and the National Director, in performing their functions and reaching decisions, should take national interest into account.
 - (e) Advise the Forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court.
 - (f) Advise the Forum on a time line for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.

2. Discussion

2.1 The establishment of a Departmental Task Team

Before discussing the above aspects, the Task Team once again considered the question whether legislation is required to establish the proposed Departmental Task Team. The Task Team met with two senior State Law Advisers of the Office of the Chief State Law Adviser. They confirmed the Task Team's conclusion in paragraph 3.4 of its Report, namely, that the recommendations pertaining to the establishment of a Departmental Task Team is an administrative process and does not require any legislation. They, however, recommended that the process and the establishment of the proposed Task Team be put into writing and suggested that the parties commit

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themselves to the process in a Memorandum of Understanding. The Task Team supports this proposal of the State Law Advisers

2.2 Ad paragraph 1.2(a): The involvement of existing structures

The Task Team supports this proposal of the Forum. However, in order to ensure the effective cooperation of such existing structures it is important that the existing structures, prior to the implementation of the proposed structure, commit themselves and give their full support and cooperation to the proposed process. It is proposed that such existing structures should be parties to the Memorandum of Understanding contemplated in paragraph 2.1 *supra*.

2.3 Ad paragraph 1.2(b): Consider the possibility and desirability of eliminating private prosecution and civil litigation in cases of no prosecution

2.3.1 The question whether it is possible or desirable to eliminate private prosecution and civil litigation elicited much debate within the Task Team. The Task Team obtained a written legal opinion from Adv JH Bruwer (attached hereto as Annexure "A") and also discussed the question with the two State Law Advisers referred to in paragraph 2.1 above. They are all in agreement that any legislation eliminating private prosecution and civil litigation will at least affect a person's right to equality (section 9(1) of the Constitution) and the right of access to courts (section 34). They also indicated that it is doubtful whether the motivation for such legislation would meet the requirements of section 36 (limitation clause) of the Constitution, and in case of the enactment of such legislation, an amendment of the Constitution would be required.

2.3.2 The State Law Advisers referred to in paragraph 2.1 above, indicated that they would advise against the enactment of any further legislation, since it would limit the rights of the victims or other interested parties. They further agreed with the Task Team that the proposed legislation, eliminating private prosecution and civil litigation, might be seen as a further amnesty process, which would be inconsistent with the Heads of the Department's view that Option 2 (a further amnesty process) is not an option at all.

2.3.3 In the final instance we wish to draw the Forum's attention to an article in *Rapport* of 7 March 2004 relating to the question of amnesty. During an interview with Archbishop Desmond Tutu, he expressed the view that every person who has not received amnesty through the TRC-process may be prosecuted and any new agreement to stop prosecutions is undesirable, since it will, among others, have the effect of negating the amnesty process of the TRC.

2.3.4 In the light of the above, the Task Team is of the view that private prosecution and civil litigation can only be eliminated by way of legislation and a Constitutional amendment. The Task Team is of the view that such a step would not be desirable.

2.4 Ad paragraph 2.1(c): The establishment of an Inter-Ministerial Committee

The Task Team supports this proposal. However, it wishes to point out that the State Law Advisers are of the view that the establishment of such a further structure may constitute a cumbersome process and increase the possibility of conflicting views

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between the various role-players and structures. Furthermore, they pointed out that the process might be seen as an attempt by the Government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision.

2.5 Ad paragraph 2.1(d): National interest should be the paramount objective

The Task Team wholeheartedly agrees with this viewpoint of the Forum.

2.6 Ad paragraph 2.1(e): The involvement of the International Criminal Court

This question was also referred to Adv JH Bruwer for his advice. In paragraph 3 of Annexure "A" he comes to the conclusion that, taking into account the provisions of section 5(1), read with section 5(6) and the definitions of the relevant crimes of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), "it is not inconceivable that a complainant who is prohibited by legislation contemplated in paragraph 1(a) from instituting a private prosecution in the national court may approach the International Criminal Court for relief". The Task Team agrees with this viewpoint.

2.7 Ad paragraph 2.1(e): Setting a time line for the Task Team to complete its work

The Task Team is hesitant to propose a specific time line at the stage when the process is to be announced. The setting of a time line in respect of the TRC process led to expectations and the subsequent extension of the TRC process, although justified and unavoidable, led to fierce criticism. It is proposed that the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into account the extent to which its objectives are achieved.

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with the arrest
of state capture
Fascinating from the
first page to the last

Abbie Sachs,
Former Justice,
Constitutional Court

BULELANI NGCUKA

THE STING IN THE TALE

Marion Sparg

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The NPA also set up an Integrity Management Unit to ensure that the integrity of the NPA remained beyond reproach. The unit, which was led by Dipuo Mvelase, was responsible for, among other things, developing a management handbook, fraud response plan and anti-corruption strategy, providing training for management and staff, distributing and maintaining a gift register, overseeing the declaration of financial interests required in terms of the Public Finance Management Act, and conducting investigations into cases of corruption and maladministration involving employees of the NPA.

In 2001, the NPA had to take on a new responsibility when the minister of justice transferred the witness protection programme to the NPA. A senior prosecutor from the Western Cape, Dawood Adam, was appointed as head of the programme.



The Specialised Commercial Crimes Unit was set up in 1999 under the leadership of advocate Chris Jordaan. This unit worked closely with detectives from the SAPS commercial crimes unit in Pretoria, and prosecuted all commercial or 'white-collar' crimes. By 2003 this unit had achieved a conviction rate of 96 percent, with sentences ranging from five to 17 years.¹⁸ The unit started in Pretoria; a second unit was opened in Johannesburg in 2002, and a further rollout to Durban, Cape Town and Port Elizabeth was planned at the time of Bulelani's resignation in 2004.¹⁹

One of the cases this unit handled was the long-running Gary Porritt matter, which began in 2002 when Porritt and co-accused Sue Bennet faced over 3 000 charges including fraud and racketeering, and contravening the Income Tax Act, the Companies Act and the Stock Exchanges Control Act. The

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case is still not finalised even though two of Porritt's former colleagues, who are already serving time, turned state witness. Porritt faces 200 years in jail if convicted.

The unit also dealt with the headline-grabbing and long-running 'Kidneygate' case, involving international organ trafficking in which impoverished Brazilians were duped into selling organs to wealthy Israelis. It got under way in January 2004, with top surgeons and specialists facing charges of fraud, forgery, assault and contravening both the Human Tissue Act and the Prevention of Organised Crime Act. In a world first, a hospital group, Netcare, admitted guilt in November 2010 and was fined R4 million for its role in 109 illegal transplants.²⁰

The Priority Crimes Litigation Unit (PCLU) was established in 2003, headed by advocate Anton Ackerman, who had distinguished himself working for the Goldstone Commission appointed in 1993 to investigate political violence and killings. The PCLU managed investigations and prosecutions dealing with weapons of mass destruction, mercenary activities, the International Criminal Court at The Hague in the Netherlands, national and international terrorism, and the prosecution of people who were refused or who had failed to apply for amnesty in terms of the TRC process.

This unit handled two cases involving mercenaries, one of which was a group of South African citizens arrested in March 2004 in Zimbabwe and Equatorial Guinea, along with 18 Namibians, 23 Angolans, two Congolese and one Zimbabwean, all suspected to be en route to overthrow the government of Equatorial Guinea. Those involved included Simon Mann, a former British Special Air Services officer and owner of the private security company Executive Outcomes, and Nick du Toit, a former member of the notorious 32 Battalion of the South African

THE STING IN THE TALE: BULELANI NGCUKA

Defence Force (SADF), involved principally in the conflict in Namibia and Angola but also in violence in townships in Gauteng in 1992.²¹ The case led to the arrest of Mark Thatcher, the son of former British prime minister Margaret Thatcher, in August 2004, just after Bulelani's resignation.

Mark Thatcher, who at first denied any knowledge of the coup, pleaded guilty in 2005 to 'unwittingly' helping to finance the coup after South African police were able to prove that he had transferred about US\$285 000 (about R1.9 million at the time) to the mercenaries who were to execute the operation, and had met and talked frequently to them prior to the coup attempt. He was given a four-year suspended sentence and a fine of about US\$560 000 (about R3.7 million).²²

The unit also played a key role in securing the evidence that led to the conviction of Asher Karni, a South African businessman who was arrested in 2004 in the USA on charges of exporting nuclear-arms technology to India.²³

And the PCLU was involved in what was at the time thought to be the biggest case of international nuclear proliferation in the world. In 2004 police raided the premises of Tradefin Engineering in Johannesburg, where they discovered shipping containers destined for Libya with parts that would allegedly have allowed Libya to process enough enriched uranium for several nuclear bombs.²⁴ While trafficking charges against the company's director were later dropped, Gerard Wissler, a German engineer and former managing director of Johannesburg engineering company Krisch, reached a plea deal with the NPA in 2007 and was found guilty of seven charges of contravening the Non-Proliferation of Weapons of Mass Destruction Act and the Nuclear Energy Act, and two counts of forgery. In addition to house arrest of three years and a suspended sentence of 18

years, Wisser forfeited R6 million in cash and overseas assets worth about 2,8 million euros.²⁵

Anton Ackerman and advocate Torie Pretorius handled one of the first major trials for apartheid crimes – that of Wouter Basson, ‘Dr Death’, the head of the apartheid regime’s biological and chemical warfare programme. When the marathon two-and-a-half-year-long trial began in October 1999, two years after his arrest, Basson faced charges for crimes that were described as ‘so grotesque, they almost seemed make-believe. The most vivid example was that he was alleged to have supplied the drugs to operators who administered them to political detainees before throwing them out of a helicopter into the sea off the coast of Namibia.’²⁶ The charges included 229 murders, conspiracy to murder, fraud totalling R36 million, and manufacturing drugs.

It was a difficult trial from the start, says Bulelani, and indeed one report noted, ‘The state’s case was fraught with problems. Many witnesses were reluctant to testify, some refused to do so at all, and others were openly hostile to the prosecution. The prosecutors had to rely on testimony from operators who had carried out murders many years before and whose accounts of the incidents did not always tally. Ultimately Basson’s version of events was found to be the most believable by Judge [Willie] Hartzenberg.’²⁷

In 2002 Basson was finally acquitted of all charges. The state’s first appeal was dismissed but they took the matter to the Constitutional Court, which granted leave to appeal stating that the trial court had erred in dismissing charges against Basson regarding conspiracy to murder abroad. In the end, the Constitutional Court ruled against the NPA on the matter of whether the trial judge was biased or not but left it up

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to the NPA to decide whether to proceed with the conspiracy charges.²⁸

Ackerman commented later that they 'concluded that the conspiracy charges had in fact been dealt with on the merits by the trial court on other charges relating thereto. As such, the principle of double jeopardy applied and consequently, the charges could not be reinstated.'²⁹



The NPA was also involved in the Joint Anti-Corruption Task Team (JACTT), which was set up in 2003 to assist with the backlog of corruption cases in the Eastern Cape. It was led from the NPA side by Lungisa Dyosi and included representatives from the Scorpions (the agency that investigated and prosecuted organised crime and corruption), the Special Investigating Unit (SIU), the Asset Forfeiture Unit (AFU), the auditor-general's office and the intelligence services. The Scorpions were responsible for overall leadership of the project, which was one of the most successful mobilisations of different law-enforcement agencies at the time.

By September 2003 the JACTT was dealing with 374 cases, 144 arrests had been made, 18 convictions had been handed down and 113 people were facing trial.³⁰ By December 2004, it was reported that 60 percent of the cases finalised by the JACTT involved fraud and theft of social grants by paymasters working for the department of social development.³¹

When the Scorpions prepared papers for the 2005 Khampepe Commission,³² they reported that the JACTT had arrested 380 people and convicted 110 people in 119 cases amounting to about R19 million of potential loss to various government

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departments. More than 200 people were on trial in 151 cases, with potential losses of more than R38 million to the state, while a further 228 cases of fraud and corruption with potential losses of more than R138 million were under investigation.

By 2006, the JACTT team had finalised 113 cases in court and registered a 93 percent success rate.³³

The JACTT made use of the asset-forfeiture provisions in the Prevention of Organised Crime Act to reclaim money stolen from the state. In all, it was reported that by 2006 the AFU's JACTT-based investigation had confiscated about R5 million-worth of assets, with a further R15 million under restraint (the accused's property restrained before his/her conviction to ensure that it is available to be sold later to pay the confiscation order that may be made should the accused be convicted).³⁴

Lungisa says that the JACTT'S work was an important exercise in inter-agency cooperation in law enforcement. 'There was collaboration taking place between the different agencies all over the country, but it really came together in the JACTT. The process threw up so many anomalies. In one of the cases, we knew that the SAPS, the National Intelligence Agency (NIA) and the SIU were all relying on the same intelligence source for their information, but they wouldn't believe us. So we arranged for a presentation and asked both the SAPS and the NIA to present what they had. The NIA went first. After the others heard this presentation, they refused and said no, they didn't want to present. They realised they had been had – they were all using the same source and this guy was using all three agencies, playing them off against one another. It was happening simply because they weren't talking to one another.

'From a law-enforcement perspective, we all came out of that experience enriched. There are many in senior positions in the

THE STING IN THE TALE: BULELANI NGCUKA

SAPS and the NPA who got valuable experience in the JACTT, including Sibongile Mzinyathi and Saks Mapoma. The NIA agent I worked with is now a regional head. There are police officers I worked with in the JACTT who have moved up in the ranks and occupy senior positions.³⁵



Shortly after his appointment, Bulelani set up a working group led by Vincent Saldanha, who had served on the TRC and who went on to serve as a judge in the Western Cape, to review all the cases that had been refused amnesty by the TRC. The group drew up criteria to guide decisions on whether to investigate matters further or to make recommendations for prosecution.

Bulelani said he was obliged by law to prosecute where there was enough evidence to make a case, but at the same time part of him asked if it was worth it. Part of him wanted 'to go for them', but another part asked whether these apartheid perpetrators, many of whom were 'broken' or about to die, were really a threat to society.³⁶

When the PCLU was formally set up in March 2003, hundreds of TRC cases were referred to it. Ackerman conducted an extensive audit and identified only 16 that he said were worth pursuing; and only three were ready for immediate charges.³⁷

The first TRC-related matter the unit prosecuted was that of Eugene Terre'Blanche, leader of the Afrikaner Weerstandsbeweging, who was convicted on five counts of terrorism in 2003 for ordering at least five bombings before the 1994 elections. He had not applied for amnesty and this case did not require much investigation: those responsible for the bombings

were already serving life sentences, and Terre'Blanche himself was already in prison at the time, for the attempted murder of a farmworker in 2001. He entered into a plea agreement.³⁸

The highest-profile TRC prosecution Ackerman pursued was that of Gideon Nieuwoudt, a security policeman from Port Elizabeth with some of the bloodiest hands in apartheid history. 'Notorious Nieuwoudt', as he was called, was charged with the car-bomb murder in December 1989 of three black policemen and an askari – the 'Motherwell Four' – and sentenced to 20 years. He applied to the TRC for amnesty, was refused, and appealed. He was still waiting for a decision when he died in 2005. He was eventually refused amnesty, once again, in August 2005, about ten days after he died.

The TRC also refused to give amnesty to Nieuwoudt for the murder of three political activists from the Port Elizabeth Civic Organisation – the so-called 'Pebco Three', Qaqawuli Godolozu, Champion Galela and Siphon Hashe – who had been abducted, tortured and killed in 1985, and their bodies thrown into the Fish River. Two others were later charged with Nieuwoudt for the same killings – Johannes van Zyl, a security policeman from Port Elizabeth, and a former Vlakplaas member, Johannes Koole. Nieuwoudt, Koole and Van Zyl applied to court for a review of the TRC's 1999 decision to deny them amnesty, and this application was also outstanding when Nieuwoudt died in 2005.³⁹

There have been questions about political interference preventing the prosecution of TRC cases, allegedly because the ANC feared that the NPA was intent on charging senior ANC leaders. But Bulelani emphasises that he was not subjected to any political interference during his time.

Some of the controversy about political interference related

THE STING IN THE TALE BULELANI NGCUKA

to a decision in 2004 not to prosecute 37 ANC leaders who had been denied individual amnesty. The commission had granted the group, which included then president Thabo Mbeki, collective amnesty, since they had claimed collective responsibility for all actions carried out by the ANC and MK between 1964 and 1994.⁴⁰ The NPA found there was no basis for prosecution, as there was no evidence that specific crimes had been committed, which attracted personal criminal liability.

Another TRC-related prosecution was the Bisho Massacre case, which got under way in 2001. The Bisho Massacre had taken place in September 1992, when Ciskei soldiers had opened fire on protestors. Those charged were the man who gave the order to his troops to open fire on ANC marchers, Lieutenant-Colonel Vakele Mkosana, and an ordinary rifleman, Mzamide Gonya. Both faced charges of murder, attempted murder, and culpable homicide. Both were denied amnesty.

When he announced that the two would be prosecuted, Bulelani said the prosecution would be asking for life imprisonment; quoted in a newspaper report, he said, 'It was a cold-blooded and brutal murder of people.'⁴¹ The judge, however, accepted Mkosana's argument of self-defence and acquitted both men.⁴²

In 2006 an insider noted that the unit's ability to handle TRC cases was severely hampered by a standoff between the Scorpions and the SAPS about who was going to investigate the cases, and said this matter had not been resolved at the time Bulelani resigned in August 2004. The PCLU itself didn't have any investigators.⁴³

After Bulelani had quit the NPA, acting NDPP Silas Ramaite called a moratorium on TRC-related cases. Bulelani's successor, Vusi Pikoli, complained later about 'improper interference' in his work on TRC cases and said, 'Legally, I have reached a dead end.'⁴⁴

LAWYERS FOR THE PEOPLE

The failure of the NPA to prosecute TRC-related crimes remains a sore point for many families and comrades of those who died at the hands of apartheid security forces.

13

A balancing act

'It was clear that so much was wrong in the system, and that whatever decisions I took, I was going to face criticism and be lambasted from all sides.'

The constitution requires that the NDPP act without fear, favour or prejudice. At the same time, someone who simply stood up and said that politics was irrelevant would serve neither the NPA nor South Africa. If the NPA was to survive and function effectively, it needed a leader capable of navigating the tricky territory of politics, of being sympathetic to its nuances without compromising the independence of prosecutorial decisions.

In one of his very first cases, Bulelani was accused of advancing ANC interests.

The case of the 'Eikenhof Three' had been prosecuted in 1993 by then Transvaal attorney-general Jan d'Oliveira, subsequently one of two deputy NDPPs (Percy Sonn being the other). Siphon Gavin, Siphwe Bholo and Boy Ndweni had been accused of the murder of Zandra Mitchley, her son Shaun and his friend Claire Silberbauer in Eikenhof, south of Johannesburg, in March 1993. Zandra had been taking the children to school when their vehicle was fired on by the occupants of a BMW that had been hijacked earlier.

The main evidence against the three was their 'confessions',

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which the judge found had been 'freely made', and the evidence of witnesses, three of whom were schoolchildren.' There was evidence during the trial about confessions being obtained by torture; this evidence was dismissed. The alibis of the accused were rejected.

All three were convicted. Siphon Gavin and Siphwe Bholo were sentenced to death. Only Boy Ndweni, who was 17 years old at the time, escaped the death sentence.'

But then things started to unravel.

In December 1996, a senior commander of the Azanian People's Liberation Army (Apla), Phila Dolo, applied to the TRC for amnesty for the very same attack. He had given orders to four trained Apla members, who had carried out the attack.' Dolo himself had been arrested in May 1993 and sentenced in December 1994 to life imprisonment for an attack on the Diepkloof police station in Soweto.

The Eikenhof Three appealed and applied for bail. Bulelani had been in the job for three months when the bail application came up before Judge Piet van der Walt. Prosecutors had already decided to oppose bail when Dullah Omar approached Bulelani and said, 'All is not as it seems. You should consider not opposing bail.'

Bulelani said he would consult the prosecutors involved. He spoke first to D'Oliveira, who dismissed the minister's concerns, saying Dolo was a liar and that he had only 'confessed' to the TRC to get the trio out of prison. He had intimate knowledge of the facts of the case and the three were definitely guilty, D'Oliveira assured Bulelani.

The senior prosecutor involved in handling the bail application also didn't agree to not oppose bail.

This is what Bulelani reported back to Dullah, saying that

THE STING IN THE TALE: BULELANI NGCUKA

on the basis of this information, he would have to oppose bail.

Dullah then advised Bulelani to speak to Sydney Mufamadi, minister of police. What he heard was startling. Gavin, Bholo and Ndweni, feeling absolutely secure in their innocence, had handed themselves over to the police with the assistance of the ANC a few weeks after the Eikenhof attack. Following Dolo's application to the TRC, further investigation revealed that no fewer than five witnesses who had been in the area at the time of the attack had failed to identify the Eikenhof Three as being the attackers and, after being shown 300 photographs, had instead identified two people who were known by police to be Apla members. This evidence had not been made available to the defence during the trial and D'Oliveira had not called any of these witnesses.

The weapon in Dolo's possession when he was arrested in May 1993 had been tested and had proved to be the one used in the Eikenhof attack. In addition, Dolo had referred in his amnesty application to documents that had been seized by police in an Apla house in 1995, which had included a report of the Eikenhof attack; and the first security police reports after the attack had, unsurprisingly, concluded that Apla was responsible.⁴

In these circumstances, Bulelani decided, he could not oppose bail, and he instructed prosecutors to withdraw their opposition. He told D'Oliveira he was free to argue against the three convicted men's appeal when this came up but that it was not correct to oppose bail in light of what had emerged about the way the matter had been handled.

There was an immediate backlash.

Judge Van der Walt said Bulelani's decision was 'extremely unfortunate, ill-considered and extremely unwise' in the light of his

A BALANCING ACT

'connection' to the ANC. 'He himself is an ANC member, appointed by an ANC government. Any person in his position should be extremely wary to take a decision of this nature,' he said.⁵

Bulelani was stung by this criticism. His first inclination was to hit back, but he received a call from Arthur Chaskalson, who was now president of the Constitutional Court. 'Don't say too much, Bul. You'll be vindicated by the Supreme Court of Appeal,' was Arthur's advice, Bulelani says.

And, indeed, in August 1999 the Appeal Court set aside the sentences and convictions, and said it was up to the NPA whether to proceed with a retrial.

The ball was back in Bulelani's court. He decided to withdraw the case and the Eikenhof Three were finally released in November 1999. They had spent six years in jail for a crime they had not committed.

The Eikenhof Three case demonstrated the size of the challenge ahead and, says Bulelani, gave him 'a taste of what it was going to be like'.

On the one hand I knew I would constantly be told I was an ANC lackey, but I would also be heavily criticised for not moving fast enough to transform an organisation that had been an instrument of oppression throughout the apartheid years.

One of those who came to Bulelani's assistance after he was attacked by Judge Van der Walt was Anton Ackerman. Bulelani had just been appointed and did not yet know Anton.

He phoned me out of the blue and said he had investigated the matter. He said he had spoken to witnesses and it was clear to him they had been coached by police. He gave me an affidavit and said he would testify if necessary.

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In the end this wasn't necessary but he told me I had done the right thing by not opposing bail.



Bulelani faced a test of a different kind with the prosecution of Tony Yengeni, the ANC's chief whip in the national assembly, and a former MK commander.

In 1998 Yengeni, at the time serving as the chair of the joint standing committee on defence, had received a 47 percent discount on a Mercedes-Benz 4x4 bought from DaimlerChrysler.⁶ The news of the 4x4, and what the media dubbed the 'cars for VIPs' scandal, broke in July 2001. Yengeni immediately took out several full-page newspaper adverts denying that he had ever received any extraordinary discount. He said he had received a 26 percent discount for a damaged vehicle. He also did not disclose to parliament that he had received such a benefit – and this was what snared him.

Bulelani was called to a meeting by minister of justice Penuell Maduna to discuss 'an important matter'. He did not tell him what it was about.

When he arrived at Maduna's home, Bulelani found Tony Yengeni there. Yengeni put his case to Bulelani, who responded by advising him to speak to his lawyers and to tell them to arrange for a meeting with the NPA.

The case was being handled by Jan Henning and Gerda Ferreira. Gerda was spitting fire. Remember, Tony had been running a media campaign and attacking everyone involved in the case.

Jan was in hospital at the time so when the lawyers set

NOTES

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Chapter 12

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

AFFIDAVIT OF
MASHAU SILAS RAMAITE SC

I, the undersigned,

MASHAU SILAS RAMAITE SC;

Do hereby state under oath as follows:

INTRODUCTION

- 1 I am an adult male practising advocate and Senior Counsel. I was admitted as an Advocate in 1988 and granted the status of Senior Counsel in 2001.
- 2 I formerly served as Director of Public Prosecutions (DPP), North Gauteng, Special Director of Public Prosecutions in the Office of the National Director of Public Prosecutions, Deputy National Director of Public Prosecutions (DNDPP) and Acting National Director of Public Prosecutions ("ANDPP") in the National Prosecuting Authority ("NPA"). I



took early retirement from the National Prosecuting Authority in August 2019.

- 3 Save where expressly stated otherwise or 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.
- 4 I depose to this affidavit at the request of the Commission's Evidence Leaders and in order to ensure that all the relevant facts are placed before the Commission.

QUALIFICATIONS AND PROFESSIONAL EXPERIENCE

- 5 I obtained a *Baccalaureus Procuratoris* (B.Proc) in 1985 from the University of Fort Hare. I subsequently also obtained a Bachelor of Laws (LLB) in 1987, a Master of Laws (LL.M) in 1989 and a Doctor of Laws (LLD) in 1996, all from the University of South Africa (UNISA). I am also a Licensed International Financial Analyst.
- 6 I have worked as an Interpretor, Clerk of the Court, Prosecutor, Magistrate, Candidate Attorney, State Advocate, Senior State Advocate and Deputy Attorney-General. I have also worked as a University Part-time Lecturer, lecturing Constitutional Law, Administrative Law and Law of Delict.
- 7 I was appointed Acting Attorney-General responsible for the then Venda High Court in 1995, after the first democratic elections. In 1996 I was



appointed as a Deputy Attorney General and transferred to Pretoria, serving under Dr Jan D' Oliveira who was Attorney-General of the then Transvaal.

- 8 When the National Prosecuting Authority Act, 32 of 1998 came into operation in August 1998 and the National Prosecuting Authority ("NPA" was established, Bulelani Ngcuka was appointed as the inaugural National Director of Public Prosecutions ("NDPP") and I was appointed Director of Public Prosecutions ("DPP") responsible for all courts falling within the area of jurisdiction of the Pretoria High Court, which at that time covered the Vaal, North Gauteng, Limpopo and Mpumalanga. I was appointed as such by President N R Mandela on the recommendation of Mr Ngcuka as National Director of Public Prosecutions and Mr Dullah Omar as Minister of Justice. I served in that capacity from 1998 until 2001.
- 9 Before my appointment as DPP, Dr Jan D'Oliveira was the Attorney-General of the Transvaal, head-quartered in Pretoria. When I was appointed as DPP Dr Jan D'Oliveira was appointed as a Deputy National Director of Public Prosecutions ("DNPP") and moved to the Head Office of the NPA.
- 10 Upon my appointment as DPP, Pretoria I inherited all the cases and dockets which were being supervised by Dr Jan D' Oliveira as Attorney-General. Among these cases and dockets were cases and dockets that featured in the Goldstone Commission of Inquiry Regarding the



Prevention of Public Violence and Intimidation. I shall refer to these cases a little bit more later in this affidavit.

- 11 In 2001 Mr Ngcuka, the then NDPP moved me to Head Office as a Special Director of Public Prosecutions in his office. I served in this capacity from 2001 to 2003. In that capacity I served as his special advisor together with Adv. Lungisa Dyosi and was part of a team that identified the need for the establishment of specialized units to deal with cases which required a more specialized and dedicated focus. It was during this time that the Priority Crimes Litigation Unit ("PCLU") was established, together with the Specialized Commercial Crimes Unit ("SCCU") and the Sexual Offences Unit. ("SOCA"). The Witness Protection Unit ("WPU"), which was at that time operating from the Department of Justice, was moved to the Head Office of the NPA.
- 12 In 2003 I was appointed as DNDPP in charge of the National Special Services Division ("NSSD"), responsible for the PCLU, SCCU, SOCA and WPU. Adv. Leonard McCarthy was also appointed as a Deputy National Director of Public Prosecutions, responsible for the Directorate of Special Operations ("DSO").
- 13 I first became aware of dockets and cases relating to cases involving conflicts of the past during my tenure as DPP for Northern Gauteng. I subsequently became involved in dealing with these cases in my capacity as SDPP in the Office of the NDPP. A significant number of these cases featured in the Truth and Reconciliation Commission ("TRC") in that

some of the implicated persons had applied for amnesty during the active period of the TRC. Some of the implicated persons were mentioned in the dockets and cases which featured in the Goldstone Commission.

TRC CASES - BACKGROUND

- 14 As already mentioned, when I was appointed DPP, North Gauteng, I inherited cases and dockets which arose from the Goldstone Commission. These were cases which were being handled and supervised by Dr Jan D'Oliveira who, in addition to his position as Attorney-General for the Transvaal, was also the Chief Evidence Leader for the Goldstone Commission.
- 15 There were two categories of cases which arose from the Goldstone Commission of Enquiry which I inherited. Each category was assigned to a Deputy Attorney-General in the Office of the Attorney-General, Transvaal. The first category consisted of cases involving the Boeremag and right wing individuals; these were assigned to Adv. Paul Fick, SC. The second category consisted of cases involving the security forces, mainly State Security, the Police and the Defence; these were assigned Adv. Anton Ackermann, SC.
- 16 For the most part of my time as DPP, North Gauteng Adv. Ackermann was busy with the Wouter Basson trial, which resulted in not much attention to the bulk of the cases arising from the Goldstone Commission. There was also only one police investigator who part of the investigating team of the



Goldstone who assigned to deal with these case. The police investigator was subsequently withdrawn by the National Commissioner of Police and ordered to return all dockets in his possession or under his control to the Office of the DPP.

- 17 Soon after the dockets were returned to the Office of the DPP, I approached the NDPP, Mr Ngquka, and raised my concern about lack of investigative capacity to deal with these cases. In 1999 the NDPP issued a directive that all TRC-related cases must be transferred to the Office of the NDPP.
- 18 Subsequent to the issuing of the directive, all TRC-related cases were transferred to the Office of the NDPP. The NDPP established the Human Rights Investigative Unit ("HRIU"), which headed by Vincent Saldhana and functioned as a working group tasked with revieweing, investigating and prosecuting cases in which implicated persons had been denied amnesty or had not applied for amnesty. No prosecutions were instituted during this period.
- 19 The HRIU operated until 2000. In 2000 cases and dockets which were with the HRIU were transferred to the Directorate of Special Operations ("DSO"). A sub-unit, known as the Special National Projects Unit ("SNPU") and headed by Adv. Chris Macadam was established and operated until 2003. No prosecutions were instituted during this period.



20 As already stated, I was appointed as SDPP in the Office of the NDPP and served as a Special Advisor to the NDPP, together with Mr Lungisa Dyosi. In one of our discussions with the NDPP about formulating and developing a strategy for addressing and combatting some of the criminal phenomena which the NPA had to deal with, it was decided to establish specialized units within the Office of the NDPP, with specific focus on priority crimes, commercial crime and sexual offences. It was a result of this that the PCLU, the SCCU and SOCA were established by proclamation. These units resorted under the National Special Services Division, which I was appointed to head as a Deputy National Director of Public Prosecutions.

21 I recommended to the NDPP that Adv. Anton Ackermann, SC be appointed as SDPP in charge of the PCLU. I did so because when I was DPP, North Gauteng Adv. Ackermann, SC was a Deputy DPP who reported to me and had dealt with cases involving conflicts of the past. He had successfully prosecuted Dr Wouter Basson and I regarded him as a fearless and formidable litigator.

22 Adv. Anton Ackermann, SC was appointed by Presidential Proclamation as an SDPP and head of the PCLU on 24 March 2003. The mandate of the PCLU, as stated in the Proclamation, was to manage and direct investigations and prosecutions in relation to various priority crimes, including serious national crimes such as terrorism, sabotage, high treason, sedition, international crimes under the Rome Statute, foreign military assistance and other priority crimes as determined by the NDPP.



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- 23 In May 2003 the NDPP, Mr Bulelani Ngcuka, made a determination that all TRC-related cases in which amnesty has been denied or where no application for amnesty was made were 'priority crimes' in terms of the Proclamation. Some 400 or so investigation dockets were transferred to the PCLU. Adv. Ackermann, SC and Chris Macadam, who was assigned as a Deputy DPP in the PCLU, conducted an initial audit of TRC-related cases and identified some 21 cases which required further investigation.
- 24 Although I was not involved in the day to day operational activities of the PCLU, Adv. Ackermann, SC kept me abreast of the work of the unit by way of monthly reports. These reports were tabled and discussed at the monthly meetings of the Executive Committee ("EXCO") of the NPA, which was chaired by the NDPP and made up of all the DPP's and SDPP's.
- 25 In July 2004 Mr Ngcuka resigned from his position as NDPP. I was appointed as Acting NDPP and served in that capacity until 30 January 2005, after which Adv. Vusi Pikoli was appointed as NDPP.
- 26 During 2003, 2004 and 2005 the PCLU identified a number of TRC-related cases for further investigation and possible prosecution. It instituted prosecutions against Eugene Terre' Blanche, Buyile Roni Blani and Gideon Niewoudt, Johannes Martin van Zyl and Johannes Koole.
- 27 At the instance of the PCLU and in 2004, Gideon Niewoudt, Johannes Martin van Zyl and Johannes Koole were each charged with abduction,



assault and murder of three anti-apartheid activists, known as the PEBCO 3. The accused persons had been denied amnesty in 1999, They subsequently launched an application for a review of the decisions to refuse them amnesty. Niewoudt died in 2005 and, sadly, the review was delayed by some five years and was only finalised in 2009 when the High Court ruled that an Amnesty Committee be convened to hear the application of van Zyl.

- 28 The case against van Zyl and Koole was provisionally withdrawn in 2009 pending finalisation of the rehearing of the amnesty application. To my knowledge, the Amnesty Committee was never reconvened and the case against van Zyl and Koole was never reinstated.
- 29 In November 2004, the PCLU decided that three former security police officers, Major-General Christoffel Smith, Colonel Gert Otto and Johannes van Staden should be arrested and charged for the attempted murder by poisoning of Rev. Frank Chikane in 1989. I was briefed by Adv. Ackermann about the pending arrest and charges. I endorsed the decision to arrest and charge the individuals and personal took the decision and gave authorisation that criminal proceedings must be instituted and that the prosecution must proceed.
- 30 On or about 11 November 2004 Adv. Ackermann, SC reported to me that he had received a call from a Mr Wagenaar, an attorney representing Smith, Otto and van Staden, advising him not to proceed with the arrest and charging of his client. He informed me further that Wagenaar had told



him that he must expect a telephone call from the Ministry of Justice and that he would be advised that the case against Smith, Otto and van Staden must be placed on hold.

31 Adv. Ackermann also informed me that soon after he had spoken with Wagenaar he received a telephone call from an official in the Ministry of Justice and informed that a decision had been taken that the case involving Rev. Chikane should be put on hold pending the development of guidelines to deal with the TRC cases. I told Adv. Ackermann that I have no knowledge of the development of any such guidelines. As far as I was concerned, prosecution policy and guidelines already existed; the existing guidelines were developed in line with the United Nations Guidelines on the Role of Prosecutors and applied and continued to apply in all cases involving the decision whether or not to prosecute and whether or not to continue or discontinue a prosecution.

32 I advised Adv. Ackermann, SC that it would be better to wait and have a better understanding of what exactly was happening. Shortly after I have spoken with Adv. Ackermann, SC, I received a telephone call from the Minister of Justice, Mrs Brigette Mabandla. She told me that there is a Task Team which was appointed by the Directors-General Forum to develop a mechanism to deal with TRC cases. I expressed to the Minister my concern that any process or mechanism which involves the Executive or the Justice and Security cluster would amount to encroaching in prosecutorial decision-making and would be a violation of prosecutorial independence as enshrined in Section 179. The Minister nevertheless



insisted that the prosecution of all TRC-related cases must be put on hold until the development and adoption of guidelines.

33 Subsequent to my telephone call with the Minister of Justice I called Adv. Ackermann and told him that I received an instruction from the Minister that the investigation and prosecution of all TRC-related cases must be put on hold pending the development and adoption of guidelines. I told Adv. Ackermann, SC that my understanding was that an effective moratorium has been placed by Government on all TRC cases and that until it was lifted we have no choice but to wait.

34 After the call from the Minister of Justice and my discussion with Adv. Ackermann, all TRC cases which were being handled by the PCLU were accordingly placed on hold pending the development and formulation of guidelines. My understanding was that the guidelines were in relation to cases arising from conflicts of the past. As I understood, they were to be incorporated as amendments to the existing Prosecution Policy.

35 As I have already stated, I raised my concern with the Minister regarding lawfulness and constitutionality of the guidelines. Even though I was not privy to the rationale, content and context of the proposed guidelines, I held the opinion that there was nothing wrong with the existing prosecution policy and that any guidelines or policy which sought to a specific class of cases would be irrational.



- 36 In my view, which I openly expressed at various EXCO meetings, the existing prosecution policy and policy directives were sufficient and no further guidelines were required.
- 37 The existing prosecution policy and policy directives were determined by the NDPP with the concurrence of the Minister of Justice and after consulting with the DPP's, as provided in section 179(5)(a) and (b) of the Constitution and section 22(1) of the National Prosecuting Act, 32 Of 1998. They were first issued in 1999 and became effective on 01 November 1999.
- 38 The existing prosecution policy and policy directives already provided a rational framework for prosecutors to perform their duties with independence and impartiality and to make consistent, fair and transparent decisions on whether to institute criminal proceedings. The primary criterion is whether there is sufficient admissible evidence to provide a reasonable prospect of a successful prosecution.
- 39 I served as Acting NDPP for six months, from July 2004 to January 2005. On 01 February 2005 Adv. Vusi Pikoli was appointed as NDPP. I continued serving in my capacity as DNDPP, still responsible for the PCLU and reporting to the NDPP.
- 40 In October 2006 the NDPP, Adv. Vusi Pikoli assigned me to chair a Task Team that was set up, as I understood at that time, to review TRC-related cases and to agree on providing investigative capacity. The task team met



for the first time on 12 October 2006 and consisted of senior officers from SAPS, NIA and the Department of Justice and Constitutional Development.

41 At the second meeting, which was held on 25 October 2006, Adv. Ackermann, SC presented an audit report on all TRC-related cases which were being handled by the PCLU. The need for investigative capacity to attend to these cases was discussed. The SAPS representative, Mr Lekalakala, made a commitment that he will discuss the need for investigative capacity with the National Commissioner of Police, Mr Jackie Selebi, and will report back at the next meeting.

42 The next meeting was held on 06 November 2006. The Chikane matter was discussed for the first time at this meeting. Mr Lekalakala informed the meeting that the National Commissioner of Police believed that Rev. Chikane was not interested in a prosecution. Adv. Ackermann informed the meeting that Rev. Chikane had left the matter in the hands of the prosecution. The meeting ended without any resolution and with no commitment regarding the provision of investigative capacity. I reported the development and outcome of the meeting to Adv. Pikoli.

43 A further meeting was held in early December 2006 to try and resolve the impasse. At this meeting Police Deputy Commissioner Jacobs informed the meeting that the National Commissioner was not prepared to provide any investigative capacity in the Chikane matter because Rev. Chikane



had not been consulted and did not wish to become involved in any prosecution. I once again reported this to the NDPP.

- 44 Most strikingly, at the meeting which took place in early December 2006, Commissioner Jacobs informed the meeting that the National Commissioner of Police had told him to make it clear the function of the Task Team was to make a final recommendation to a "Committee of Directors-General" which would in turn make a recommendation to the NDPP on whether or not to prosecute and who to prosecute and who not to prosecute. This was, in my view, inconsistent with prosecutorial independence.
- 45 In Septemeber 2007 Adv. Pikoli was suspended as NDPP. Adv. Mokotedi Mphse, SC was appointed as Acting NDPP. Soon after the appointment of Adv. Mpshe, SC as Acting NDPP, Adv. Ackermann informed me that he has been relieved of his duties in relation to the TRC cases.
- 46 I have read the affidavits of Lukhanyo Calata, Anton Ackermann and Vusumzi Pikoli which were supplied to the Commission by Webber Wentzel Attorneys.

CONFIRMATION OF AFFIDAVITS

- 47 I confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 in the matter of *Calata and Others v Government of South Africa and Others* (Gauteng Division, Case No 2025-005245) insofar as it relates to me.



48 I confirm the contents of the affidavit of Anton Rossouw Ackermann dated 07 May 2015 in the matter of *Nkadimeng v National Director of Public Prosecutions and Others* (Gauteng Division of the High Court, Pretoria, Case No. 36554/2015) insofar as it relates to me.

49 I also confirm the contents of the affidavit of Vusumzi Patrick Pikoli dated 06 May 2015 filed in the matter of *Nkadimeng v National Director of Public Prosecutions and Others* (Gauteng Division of the High Court, Pretoria, Case No. 36554/205) insofar as it relates to me.

CONCLUSION

50 I regard the imposition of a moratorium by the executive or a member of the executive on the prosecution of TRC cases purely on the basis of developing and adopting guidelines to deal specifically with these cases as a form of political interference.

51 The development and formulation of prosecution guidelines by a Committee consisting of Directors-General of the security cluster is inconsistent with section 179(5)(a) and (b) of the Constitution and section 22(1) of the National Prosecuting Authority Act, 1998 and unlawful.

52 I also regard the attempt to involve a body consisting of Directors-General to make recommendations on who to prosecute and who not to prosecute as an encroachment into prosecutorial independence.



53 There is no doubt in my mind that the effective investigation and prosecution of TRC cases were severely hampered by political interference.


DEPONENT

SIGNED AND SWORN TO BEFORE ME AT PRETORIA ON THIS 26th DAY OF NOVEMBER 2025, THE DEPONENT HAVING ACKNOWLEDGED IN MY PRESENCE THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THE PROVISIONS OF GOVERNMENT GAZETTE R1478 OF 11 JULY 1980 AS AMENDED BY GOVERNMENT GAZETTE R774 OF 20 APRIL 1982, CONCERNING THE TAKING OF THE OATH, HAVING BEEN COMPLIED WITH.

 CST
DS9839-3
K RASEKLALA

COMMISSIONER OF OATHS

Full names: RASEKLALA KAMOLELO

Business address: 497 Pretoria Rd Silverton

Designation: Constable

Capacity: POLICE OFFICER





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

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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

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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.

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

- 4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.
- 4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—
- (a) the terms of reference of the Task Team were explained and agreed to;
 - (b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

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

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

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

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

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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".

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- "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 Policy⁵, 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.

VP
15/02/2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

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INTERNAL MEMORANDUM

TO : ADV VP PIKOLI
 NATIONAL DIRECTOR OF PUBLIC
 PROSECUTIONS

FROM : ADV AR ACKERMANN
 SPECIAL DIRECTOR OF PUBLIC
 PROSECUTIONS AND HEAD: PRIORITY CRIMES
 LITIGATION UNIT

DATE : 16 MAY 2006

SUBJECT : NATIONAL INTELLIGENCE AGENCY INCIDENTS

Dear Adv Pikoli

1. I confirm that you advised me that at a recent meeting, the National Commissioner made certain allegations against myself, my involvement in cases arising from the TRC process and expressed a reluctance on his part to have SAPS cooperate with the PCLU. I further confirm that you asked me for the basis of the acrimony which exists between myself and the National Commissioner.
2. The purpose of this memo is to respond to the above allegations.

Number of copies: 2

Copy 1: Adv VP Pikoli

Copy 2: PCLU File

3. The PCLU was created by Mr Ngcuka in 2003 as a special directorate in his office. The President formally established the unit by way of a proclamation which mandated it to manage and direct investigations and prosecutions into:
 - 3.1 Serious international and national crimes which impact on State security;
 - 3.2 Prosecutions arising from the Statute of Rome;
 - 3.3 Specific cases referred by the NDPP on an *ad hoc* basis.
4. I was appointed as the Special Director in charge of the unit. The unit had no investigative capacity and therefore was reliant in this regard on both SAPS and the DSO. The NDPP appointed DDPP's Macadam and Pretorius to assist me.
5. Shortly after my appointment, my deputies and I had meetings with Commissioner de Beer, the Divisional Head of the Detective Service and his legal advisor, Assistant Commissioner Jacobs to appraise them of my unit's mandate and to establish a working relationship between the Detective Service and my unit. This meeting was extremely cordial and Commissioner Jacobs drew my attention to certain cases involving trafficking in conventional arms which were under investigation by SAPS. He informed me that the Conventional Arms Control Body had expressed its concern that no prosecutions had been instituted and the DPP's appeared to be unable to properly deal with the cases. The cases in question were drawn by my office and shortly thereafter, prosecutions instituted.
6. I also introduced the unit to the DSO.
7. Shortly thereafter, Mr Ngcuka informed me that my unit should take over the management of TRC investigations and prosecutions from the DSO. I am informed that this decision was based on the following background:
 - 7.1 Shortly after his appointment, Mr Ngcuka created a Human Rights Unit in his office, headed by a DDPP (Mr Brink Ferreira) to deal with such cases.

7.2 For various reasons, this unit had been unable to discharge its mandate and in 2001, Mr Ngcuka had transferred the cases to the DSO. Mr Ngcuka was adamant that all the TRC matters had to be investigated by the DSO and not SAPS.

7.3 As a consequence of this decision, the DSO requested Commissioner de Beer to conduct an audit of all TRC cases carried by SAPS and to refer the cases in question to the DSO. SAPS was perfectly amenable to this request as is confirmed from the attached documentation relating thereto.

7.4 The DSO had only a small number of investigators in its head office available to conduct all the investigations which were necessary and this limited any progress which could be made. Only a handful of cases were finalized where decisions were made not to prosecute.

7.5 At this point in time, the final report of the TRC had not been released and there was widespread speculation that the President was intending to declare an amnesty for further prosecutions. As a result, it was felt that it would be inappropriate to institute prosecutions before the report was released and the President had responded thereto.

7.6 Shortly after the creation of the PCLU (April 2003), the report became available and the President, in a public statement, ruled out any form of further amnesties. He specifically mandated the NDPP to proceed with prosecutions according to normal practices.

8. During May/June 2003, I immediately conducted an audit of TRC cases on hand and a presentation was given to Mr Ngcuka and his deputies. I had identified certain cases warranting prosecution, as well as a number of matters which required further investigation. Mr Ngcuka and his deputies were satisfied with my presentation and I was given the go-ahead to proceed.

(Annexure "A")

9. I however ran into considerable difficulties in obtaining the necessary legal authorizations for

investigations from Adv Ledwaba (who was Head of the DSO's operations). In addition, the DSO investigators complained that they required access to SAPS dockets and personnel to conduct the necessary investigations and that SAPS was reluctant to assist them. This related to investigations against members of the security forces. As far as investigations against APLA and MK were concerned, these were being dealt with by a Director and Senior Superintendent from SAPS, who reported to Adv Fick SC, a DDPP in Adv Mpshe's office.

(Annexure "B")

10. As a result of the above difficulties, I met with Commissioner de Beer and requested him to take over the TRC cases dealt with by the DSO. He requested me to put my request in writing, as he indicated that this matter would have to be discussed with Commissioner Selebi. After I put in my request, he, in writing, advised me that SAPS would not investigate, unless the President authorized it to do so. There was however no objection to SAPS continuing with the APLA and MK investigations. Relevant correspondence is attached hereto.

(Annexures "C", "D" and "E")

11. I appointed DDPP Macadam to focus on the DSO cases, while I dealt with the SAPS cases. Both Macadam and I disposed of a large number of cases on the basis that there were no grounds to prosecute. Macadam however had identified a small number of cases involving security branch members, but informed me that he could not prosecute these matters, as he had dealt with the accused while he was a member of the TRC. In addition, I believed that a prosecution relating to the attempted poisoning of *Rev Chikane* was also justified and that it would be inappropriate for any person other than myself to conduct the prosecution because of the links to the *Wouter Basson* matter which I personally had dealt with. I therefore decided to deal with all these matters myself. I appointed Macadam to deal with the *Blani* matter which SAPS had informed me justified prosecution.
12. Due to the fact that the security branch cases were ones where amnesty had been refused, I informed the suspects' attorney of my intention to institute proceedings so that any review of the amnesty process could be dealt with expeditiously. During the course of the discussions, I was informed by the attorney that he acted for a group of former police generals, who were

protecting the interests of any security branch member faced with prosecution. In this context, he informed me that a solid case had been prepared, implicating the President on a charge of terrorism, linked to the MK landmine campaign. The two SAPS members dealing with the APLA and MK cases also informed me that there was a case against the President. It was clear to me that the case against the President was being relied on to intimidate the NPA and not prosecuting security branch members. Due to the fact that neither the lawyer in question nor the SAPS members could on any occasion produce a docket containing evidence implicating the President, I instructed Macadam to go through all the relevant TRC evidence in order to establish whether there was any merit in the allegations against the President. Mr Ngcuka was at all times informed of these developments.

13. Due to the difficulties encountered with the DSO, my two deputies and I met with Commissioner Lalla to inform him of my unit's mandate and to request him to channel any intelligence relating to the cases to my unit. During the course of these discussions, I did express my dissatisfaction with the DSO and informed him of the allegations being made against the President. Macadam also asked his assistance concerning the *Motherwell* case where the accused were alleging that the deceased had been killed because they were MK operatives. As I subsequently discovered, this conversation was clandestinely recorded both on audio and video.
14. At a later stage, my two deputies and I were at short notice summoned to a meeting with Mr Ngcuka. Mr Ngcuka informed me that Commissioner Selebi had addressed a meeting of the Directors General and alleged that Mr Ngcuka was preparing to have the President and six generals arrested and charged with terrorism. Mr Ngcuka further informed me that Commissioner Selebi was in possession of a video recording in which I had admitted that the President was due to be arrested. I was then shown the video recording of my meeting with Commissioner Lalla and this was how I learned that the meeting had been recorded.
15. Mr Ngcuka further informed me that Commissioner Selebi had complained about the NPA being in possession of SAPS dockets. Apparently, the allegation was that these dockets contained the evidence that would be used to prosecute the President and other high profile

ANC leaders. I denied the existence of both an attempt to arrest the President and others as well as the existence of the so-called relevant police docket against them. Mr Ngcuka then made arrangements for you and three police commissioners to be present at Adv Mpshe's office the next day for an inspection of the docket to be carried out.

16. At Adv Mpshe's office, Mr Ngcuka invited SAPS to identify the docket relating to the President and others, which they were unable to do. Mr Ngcuka then instructed the SAPS Commissioners to have all the SAPS dockets removed forthwith and for the two SAPS members working with Adv Fick to vacate their office at the DPP's premises.
17. Shortly thereafter, Minister Maduna personally visited Mr Ngcuka, myself and Macadam and was fully briefed on all these developments. Macadam had compiled a report to Mr Ngcuka in which he had expressed the opinion that having perused all the relevant TRC material, there was no case against the President or the other prominent ANC members who had been refused amnesty. A copy of the report is attached hereto. Minister Maduna also satisfied himself and said that the allegations made by Commissioner Selebi were untrue and undertook to inform the President accordingly.

(Annexures "E" and "F")

18. While I was absent from the office, I was informed by Macadam that Mr Ngcuka had summoned him to a meeting with Mr Billy Masetla. I was further informed that the purpose of the meeting was to satisfy the Office of the President that there was no intention to prosecute the President. Macadam finally advised me that he had given Masetla a copy of his report and that he was satisfied with the manner in which the matter had been dealt with.
19. I was angry that Commissioner Lalla had clandestinely recorded a confidential meeting and in my personal capacity, sent him a letter in which I expressed my feelings. I heard nothing further from him.

(Annexure "H")

20. Thereafter, Mr Ngcuka resigned and Dr Ramaite was appointed as the Acting NDPP.

21. As a result of pressure to deliver on the TRC matters, I decided that it was important to institute a prosecution relating to the attempted poisoning of Rev Chikane. On the eve of the arrest of the suspects, I was informed by Dr Ramaite that their arrests should be placed on hold until further notice. Shortly thereafter, I was informed that guidelines had to be formulated and incorporated into the NPA's general policy and procedure before any further prosecutions arising from TRC matters could be instituted.
22. Shortly thereafter, Dr Ramaite informed me that he had attended a meeting in Cape Town with the Minister of Justice & Constitutional Development, other Cabinet Ministers and Commissioner Selebi. He further informed me that Commissioner Selebi had alleged that the NPA was planning to paralyse Government by arresting a large number of prominent Government officials who had previously been involved in MK activities. As a result, Dr Ramaite submitted a comprehensive, secret internal memorandum to the Minister, explaining in detail how the NPA was managing TRC cases and denying the allegation made by Commissioner Selebi. It is believed that Commissioner Selebi had sight of this report.

(Annexure "I")

23. Due to delays with the finalization of the processes necessary before the guidelines could be implemented, no significant work was done on TRC prosecutions in 2005.
24. In the latter part of 2005 however, it was publicly announced that the President had appointed a commission to establish whether the DSO should be incorporated into SAPS. I was approached by the NPA's legal advisor, Gerhard S Nel, and informed that Commissioner Selebi had submitted an affidavit to the Commission in which he had made several allegations against the PCLU and had in essence recommended its closure. I was required by Mr Nel to respond to these allegations insofar as they related to the PCLU, which I did. I also attended the sittings of the commission and also discussed certain of the allegations with Deputy National Commissioner Pruis and Commissioner de Beer. It appeared to me that Commissioner Selebi was under the impression that the PCLU was in some way part of the DSO.

(Annexure "J" – first 9 pages)

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25. In early 2006, the guidelines were finally implemented and you instructed me to proceed with prosecutions. The guidelines make provision for the PCLU to be assisted by representatives of SAPS, NIA and the DSO.

26. Prior to the implementation of the guidelines, you had advised me to convene a meeting of these role players so as to inform them of the nature of the guidelines which were due to come into effect. Under your name, an invitation was extended to all the role players. However, only the DSO representative attended the meeting.

(Annexure "K1")

27. After the guidelines had been implemented, you again requested the relevant State departments to nominate officials as contemplated by the guidelines.

(Annexure "K2" – NIA invitation)

28. I also met with Adv Mngwengwe, who agreed that SAPS could take over the TRC cases currently with the DSO. I also had a series of discussions with Commissioner de Beer in order to arrange for SAPS to take over all these TRC cases. In the course of these discussions, I gained the impression that Commissioner de Beer was not opposed to doing so, but that he required higher authority before he could agree to do so. In follow-up discussions, it appeared that there was now some reluctance on the part of SAPS to take over these cases, which was not the case when I originally had spoken to Commissioner de Beer.

29. Eventually, at the request of Commissioner de Beer, I compiled a letter for you to submit to Commissioner Selebi, outlining all the cases which required investigation and requesting him to have the necessary investigators appointed. I have not had sight of a reply from him and only learned from you that he had at this meeting expressed his reluctance to cooperate with the PCLU and made other specific allegations against me.

(Annexure "L")

30. I must confess to being taken aback by these allegations and deal hereunder with the specific ones which you brought to my attention:

30.1 "The chasing away of NIA from my office"

I am not aware of such an incident and deny that such an incident has ever taken place. The only time I have met with a NIA official was on 27 February 2006 at ±11:45 in my office at the VGM Building in Weavind Park. This meeting occurred as a result of an invitation the PCLU had extended to NIA to discuss the implementation of the TRC guidelines.

(Annexure "K1")

NIA failed to send a representative to the first meeting. After approval of the TRC guidelines by the Portfolio Committee of the Department of Justice & Constitutional Development, the PCLU once again addressed a letter to NIA to discuss the possible assistance that NIA could render to it in the prosecution of perpetrators. As already stated, this meeting took place on 27 February 2006.

I stand to correction, but my recollection of this meeting is as follows:

- (i) The meeting was scheduled for 11 am;
- (ii) The representative of NIA was Ms Yvonne Mabule;
- (iii) She arrived at plus-minus 11:45;
- (iv) I provided her with a brief background which had led to the drafting of the guidelines;
- (v) I also provided her with a copy of the guidelines and referred her specifically to par B6, in which it is stated:

"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 Service.*
- (c) The Department of Justice & Constitutional Development.*
- (d) The Directorate of Special Operations."*

- (vi) I am quite certain that I would have stressed the point that the final decision on whether to prosecute or not is vested in the NPA;
- (vii) She informed me that NIA would only be interested in matters which threatened national security;
- (viii) At that point in time, I showed her a draft letter addressed to Commissioner Selebi, setting out the relevant cases under investigation. I am not sure whether I have provided her with a copy of the letter.

(Annexure "L")

- (ix) I think that I also informed her that the only case that came to mind, which could negatively have influenced the security of the Republic, was the Powell case which involved alleged arms caches in KwaZulu-Natal.
- (x) I can also recall that I cautioned her to keep the intelligence operations separate from police investigations to avoid any legal challenges.
- (xi) This meeting was very cordial and tea or coffee was served during the discussions.
- (xii) The meeting lasted at least 45 minutes.

- (xiii) The only indication that could have created the perception of "*chasing her out of my office*" was the fact that according to my diary, I had another appointment at 13h00 with one Sophie Matemane. Although I might have been in a hurry at this point in time, I never "*chased her out of my office*".
- (xiv) I am quite certain that a *verbatim* recording of the meeting could be obtained from NIA.

30.2 The reluctance of SAPS to cooperate with Ackermann/PCLU relating to TRC matters

My staff and I have had numerous meetings and dealings with SAPS members in connection with TRC matters and on not one occasion have we been informed of any such reluctance, nor am I in receipt of any written communication from SAPS in which such sentiments are expressed. In fact, on more than 10 occasions, Commissioner de Beer informed me that he was more than willing to provide investigators, but that he required the permission of Commissioner Selebi. In at least three cases, investigators have already been earmarked to commence investigations once the required permission has been obtained. Since 2003, all the non-TRC matters have been dealt with by a specialised SAPS unit, headed by Senior Superintendent Bester. Commissioner de Beer also informed me that Senior Superintendent Bester and his unit should also be involved in the investigation of the TRC matters. I have discussed these matters with Senior Superintendent Bester and some of his investigators and none of them have expressed any reluctance to investigate these matters, nor to work with me or the members of the PCLU. It would therefore appear that the only source of reluctance to investigate TRC cases, emanates from Commissioner Selebi.

30.3 As a result, I can see no reason for SAPS not to cooperate with the PCLU in the investigation and prosecution of TRC matters. My staff and I have a more extensive knowledge of such matters than the DPP's offices. In the numerous discussions concerning these matters between myself and the DPP's they have expressed their difficulties in dealing with these cases and have welcomed the PCLU playing the role set out in the guidelines. It also makes sound sense to centralize all these matters in

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your office so as to ensure consistency in decision making and to fast track investigations and prosecutions.

30.4 The criminal charge against myself

I was shocked to be informed by Commissioner de Beer that I had been implicated by De Kock and another Vlakplaas operator, Snyman as having attempted to protect Director Human of SAPS who had been accused of ordering the murder of an Askari. I established that these allegations related to a docket which had been opened in Mpumalanga in respect of the shooting of the Askari by Captain Koekemoer of the Murder & Robbery Unit. The original docket had been submitted to a Magistrate to hold an inquest and the Magistrate had accepted Captain Koekemoer's version that he had acted lawfully in self-defence. I furthermore established that thereafter, an amnesty application had been held where Snyman had implicated Director Human, who was the former Head of the D'Oliveira Investigation Unit, which had investigated a number of cases against the security branch and Adv de Jager, who was a deputy in Dr D'Oliveira's office and involved in overseeing these investigations. The amnesty record shows that the allegations involving Human and De Jager were investigated and that there were discrepancies between the versions of Snyman, De Kock and another Vlakplaas operator. I was in no way implicated in this hearing. I was at no stage involved in the investigation of this incident. I have been informed that this incident was one of several cases in which a decision was taken not to prosecute by Dr Ramaite, when he was the DPP, Pretoria, acting on the advice of a Senior Deputy and Senior State Advocate. This decision had also been confirmed by Mr Ngcuka. I have made a statement to the investigating officer in which I in detail denied the allegations. My office also assisted the investigating officer by handing over documentation which was relevant to the investigation. I therefore regard the allegations by De Kock and Snyman as false. I am quite sure that a perusal of the evidence will confirm this. Warning statement is attached.

(Annexure "M")

31. Alleged acrimony between the National Commissioner and myself

I have had no direct confrontations with Commissioner Selebi and in fact, I have never had any personal dealings with him. I can only speculate as to the reason for the alleged animosity.

31.1 It would appear that Commissioner Selebi has an obsession concerning a non-existent attempt on my part to prosecute the President and other prominent ANC leaders. It may be that he was placed in an embarrassing position as a result of his original allegations which were disproved and this coming to the attention of both Minister Maduna and Mr Masetla, whom I take it, would have reported it to the President. See also the Secret Internal memorandum addressed to our Minister, especially pages 4 – 9.

(Annexure "I")

31.2 I was informed that there was ill feeling between Mr Ngcuka and himself and I can again speculate that I was perceived as being an ally of Mr Ngcuka.

31.3 It would also appear that he erroneously believes that the PCLU is part of the DSO and his feelings concerning the DSO are a matter of public record. My involvement in the Khampepe Commission may also be held against me.

(Annexure "J")

31.4 In certain matters accorded a high profile by SAPS, my unit declined to prosecute. In one such matter, the suspect has instituted a multi-million rand suit against SAPS and Justice. In another matter, he requested that the docket not be read by my staff member, but by persons in the DPP Office, Pretoria. The DDPP who read the docket also agreed that there were no grounds to charge the suspects and eventually, the complainant also accepted that there was no such case.

31.5 In certain cases, members of my staff have complained about poor police investigations. These complaints however were always done in a constructive manner

and not intended to in any way damage SAPS.

31.6 I was invited to address the Controlling Body concerning problems with prosecuting South Africans performing security services in Iraq. He attended this meeting and alleged that the NPA was dragging its heels on these matters. Dr Ramaite submitted a detailed letter to him, pointing out that this claim was unfounded. A copy of this letter was also submitted to the political heads who attended the meeting.

31.7 A combination of the above.

32. In the short period of its existence, I believe that the PCLU has proved its worth and achieved considerable success in the fields of:

32.1 Nuclear proliferation;

32.2 Chemical and biological warfare proliferation;

32.3 Conventional arms control;

32.4 Mercenary activity.

In several of these matters the cases have been investigated by SAPS and the PCLU has always given it credit for its work. On an *ad hoc* basis, my staff members have worked long hours of overtime to assist individual police officers in obtaining search warrants and with other complicated investigations.

33. I have, on more than one occasion, spoken to Commissioners De Beer and Pruis and suggested that we meet informally to resolve any differences which may exist between SAPS and the PCLU. After you had informed me of Commissioner Selebi's latest allegation, I also wrote to him, requesting a meeting to discuss the matter. As of the date of this letter, I have not received a reply from him.

(Annexure "N")

34. Despite this "animosity", my staff and I are perfectly willing to work with Commissioner Selebi

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and with SAPS. I believe that this will be to the benefit of our country, as the PCLU's short record to date establishes that when it teams up with SAPS, a significant inroad into combating crime is achieved. I believe that both SAPS and the NPA should have the same object of combating crime and not acting in opposition to each other.

Kind regards



AR ACKERMANN