

381

FA8
TN8

217

1

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

TP (1)

Le
NGI

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.

TA 9

LC
NGI

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.

TP

NGI
LC

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"), Bulefani 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

TPA

NGI

Special Operations ("DSO"), more widely known as the Scorplons. 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

TP

Am

hc
NGI

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. (Afrikaner 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,

TP 9

NGI

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,

TP

NGI

NGI

225

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

TP 17

NG 17

NG 17

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:

TP 9

NGI

- 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 Coetsee 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 Coetsee; 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

TPM

AS
HC
NGI

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

TP 7

NGI

NGI

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.

TP 11

MS
LC
NGI

230

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

TP 9

AP
NGI

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 (*Nkadineng & 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.

TPD ↓

W/S ↓

LC
NGI

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.

TP

jm
LC
NGI

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

TP ①

LC
NGZ

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.



TP 9

1 pm

LC
NGI

