

**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING
EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE
INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION
COMMISSION CASES**


AFFIDAVIT

I, the undersigned


SHAMILA BATOHI

do hereby make oath and state that:

1. I am an adult female and the National Director of Public Prosecutions of the Republic of South Africa, duly appointed as such by the President of the Republic of South Africa, in terms of section 179(1)(a) of the Constitution. I assumed office on 1 February 2019.
2. The facts deposed to herein are, unless the context indicates the contrary, within my personal knowledge and are, to the best of my belief, both true and correct.
3. I depose to this affidavit in my capacity as the National Director of Public Prosecutions ("NDPP") in response to a letter from the Chief Evidence Leader of the Commission, Adv Ishmael Semanya SC dated 23 September 2025 and received on 29 September 2025 requesting:

T.D.T. 


- 3.1. my assistance with furnishing any material in the NPA, that may be relevant to the inquiry. This includes memoranda, correspondence, minutes of meetings, or other audio and/or documentary records relating to the Truth and Reconciliation Commission (TRC) cases referred by the Amnesty Committee for investigation or prosecution;
- 3.2. my own account of any discussions, decisions or considerations during my tenure as Provincial Director of Public Prosecutions as well as the period 2019 to date, that may bear on the matters set out in the Terms of Reference, with the aim of assisting the Commission in understanding the context within which decisions relating to TRC cases were taken.
4. Between 2000 and 2009, I held the position of Director of Public Prosecutions: Kwa-Zulu Natal (DPP: KZN). During my tenure as the DPP: KZN I was not involved in decisions or considerations related to TRC matters. During that period the TRC matters were centralised and dealt with at the Head Office of the National Prosecuting Authority (NPA) in Pretoria. For that reason, I did not have any participation nor involvement regarding these matters during my tenure as DPP: KZN. As a result, I do not have any personal account of the decisions, discussions or considerations during that period. Accordingly, I am therefore unable to provide the requested information to the Commission in my capacity as DPP: KZN.

T.D.T. 

5. I left South Africa in October 2009 and took up a post from 1 November 2009 at the Office of the Prosecutor of the International Criminal Court (ICC) in the Hague, Netherlands. I returned to South Africa to take up the position of NDPP from 1 February 2019. I cannot comment or express any personal opinion on the work of the NPA over the period that I was out of the country working at the ICC. However, if any of the witnesses identifies document/s, which to their knowledge are held by the NPA, which have not been submitted, all efforts will be made to find and provide such document/s to the Commission.

6. I am able though to inform the Commission about the key strategic interventions that I implemented after becoming NDPP from February 2019. It is to these issues that this affidavit now turns.

7. When I assumed office as NDPP, family members of victims of apartheid crimes, concerned citizens and organisations were actively demanding justice for the victims, and that the government take steps to deal with TRC matters. This was also at the time that the High Court in Pretoria was dealing with the Rodrigues matter, where allegations of possible political interference in the investigation and prosecution of TRC cases surfaced. I was cognisant that the NPA had to devote attention to dealing with TRC cases.

T.D.7 

8. This, I had to do, in the context of taking charge of an NPA which had been hollowed out by years of state capture, neglected because of years of limited budget allocations, and whose top leadership echelons were not stabilised. Amid these governance challenges and resource constraints, I nonetheless focused on implementing three key interventions to demonstrate to the people of South Africa that the NPA was committed to prioritising and prosecuting TRC matters. These interventions were:

8.1. developing mechanisms to focus on and better manage TRC matters;


8.2. enhancing engagements with relevant stakeholders, in particular families; and

8.3. addressing concerns about alleged political interference in the investigation and prosecution of TRC cases, as pronounced by the courts in relation to the Rodrigues matter.

9. It is to each of these matters to which I now turn.

OVERVIEW OF THE NATIONAL PROSECUTING AUTHORITY


10. The National Prosecuting Authority, commonly referred to as the NPA, is the constitutional institution mandated to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to such prosecution. The establishment, powers,

F.D.T. 

and functions of the NPA are founded upon section 179 of the Constitution of the Republic of South Africa, 1996, and further elaborated in the National Prosecuting Authority Act 32 of 1998, hereinafter referred to as the NPA Act.

11. Section 179 subsection 1 of the Constitution provides that there shall be a single National Prosecuting Authority structured in terms of an Act of Parliament, which shall consist of a National Director of Public Prosecutions, Directors of Public Prosecutions, and prosecutors as may be appointed in accordance with the law. This provision establishes the NPA as the central body responsible for the control and management of all criminal prosecutions in South Africa, ensuring uniformity, accountability, and the consistent application of the rule of law throughout the Republic.


12. Section 179 subsection 2 of the Constitution vests the power to institute criminal proceedings on behalf of the State, and to carry out any functions incidental thereto, in the NPA. This constitutional mandate ensures that prosecutorial authority remains independent of external control and is exercised solely in the interests of justice. Section 179 subsection 4 further highlights this independence by stipulating that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour, or prejudice.

T.D.T. 

13. The NPA Act gives legislative effect to these constitutional provisions. In terms of section 3 of the NPA Act, the National Prosecuting Authority is established as a single authority, structured under the control of the National Director of Public Prosecutions, an office I now occupy. The NDPP is the head of the NPA and is appointed by the President as contemplated in section 10 of the Act. The NDPP bears the responsibility of determining prosecutorial policy, issuing policy directives, and ensuring that the prosecution of offences is conducted in accordance with the law and the principles of fairness and consistency.

14. Section 20 of the NPA Act sets out the powers, duties, and functions of the prosecuting authority. It authorises the NPA to institute and conduct criminal proceedings on behalf of the State, to discontinue such proceedings when deemed appropriate, and to carry out all functions incidental to criminal prosecution. These powers are exercised subject to the Constitution, the NPA Act, and any directives issued by the National Director in terms of prosecutorial policy.

15. Importantly, section 179 subsection 5 of the Constitution provides that the National Director of Public Prosecutions, as head of the NPA, must determine and issue a prosecution policy with the concurrence of the Minister of Justice. The NDPP must also issue policy directives which bind all members of the prosecuting authority. This constitutional arrangement balances independence with accountability by ensuring that the prosecutorial framework operates within democratically defined


T.D.7 

policy parameters while remaining free from political interference in individual cases.

16. The independence and integrity of the NPA are further safeguarded by section 32 of the NPA Act, which prohibits any person from improperly interfering with, hindering, or obstructing the prosecuting authority or any member thereof in the exercise of their duties. This statutory protection reinforces the principle that prosecutors must act only in accordance with the law, the evidence, and their professional conscience.

CAPACITY AND MANAGEMENT OF TRC CASES


17. In March 2019, in only my second month in office, Adv. RC MacAdam was appointed as Acting Special Director of Public Prosecutions (SDPP) and Head of the Priority Crimes Litigation Unit (PCLU), the unit tasked with, amongst other things, handling cases arising from the TRC process.
18. On 3 April 2019, after consultation with internal relevant role-players, I directed that all matters which fell outside the core mandate of the PCLU be returned to the relevant Directors of Public Prosecutions (DPPs) in whose jurisdiction the crimes had been committed. This included matters that emanated from the TRC and other cases which could have been handled by specialised units like the Specialised Commercial Crimes Unit (SCCU). This was informed by the fact that

T.D.T. 

some matters were brought to the PCLU in circumstances where they fell outside of its mandate. This decision was taken in line with s20(3) and s24(1) of the NPA Act No. 32 of 1998, to enable the guiding of investigations and conducting of prosecutions to be dealt with by the DPPs in whose jurisdictions the crimes had been committed. The role of the PCLU, which at the time had very limited human resource capacity in relation to the volume and range of cases it had to deal with, was to render necessary guidance and support to TRC matters. The NPA ensured that there was continuity by the prosecutors who had been working on these cases, while the decentralisation process was implemented. Nodal points for TRC cases were identified in the Divisions, who also reported directly to the Acting SDPP of the PCLU.

19. The NPA's efforts to ensure accountability for TRC crimes must be understood within the context of the broader criminal justice system value chain. As part of this process, the NPA recognised the need to enhance the capacity of both investigators and prosecutors dedicated to TRC cases within the Divisions. The Directorate for Priority Crime Investigation (DPCI) is responsible for the investigation of TRC matters. The NPA held several meetings with the DPCI to explore ways in which we could focus on and increase capacity to investigate and prosecute TRC matters.


20. In a meeting held between the NPA and the DPCI on 31 January 2020, the DPCI indicated that they were considering re-employing

707 


retired detectives and that an advert was being prepared to be published by March 2020. This meeting was attended by the now retired head of the DPCI, General Godfrey Lebeya accompanied by officials whose names I cannot recall. For its part, the NPA also considered the appointment of additional TRC dedicated capacity in the Divisions, initially, on a contractual basis, considering that there were already serious staff shortages, and we were working in a fiscally constrained environment at the time.

21. The onset of the COVID-19 pandemic and the ensuing period of lockdown had the effect of slowing down the implementation of these initiatives. During this time, however, internally the NPA continued to have virtual meetings, and the PCLU conducted an audit of every death in detention case reported by the TRC identifying 59 cases for investigation, in addition to those already under investigation.

22. In December 2020, the NPA held a workshop, together with the DPCI, to develop a TRC case management approach. This involved a review and reconciliation of the NPA and DPCI TRC case lists and their consolidation into one list; the case management process by NPA nodal points in the Divisions, including liaison with provincial heads of the DPCI to identify and assign experienced investigators and prosecutors to cases respectively; as well as the strengthening of communication between NPA and DPCI and the PCLU's oversight role and management.

F.D.T. 


23. In February 2021, the NPA and DPCI attended a virtual workshop organised by the Foundation for Human Rights (FHR) to discuss the establishment of a dedicated capacity for TRC matters. Several proposals were presented at this workshop including the NPA's decentralised dedicated capacity approach with national oversight. The NPA clarified that the capacity in the Offices of the DPPs would be reinforced by the appointment of dedicated resources, and that a Deputy Director of Public Prosecutions, who would deal exclusively with the management and oversight of TRC matters would be appointed in the Head Office of the NPA, reporting directly to the Deputy National Director of Public Prosecutions: National Prosecutions Service (DNDPP: NPS) at the time, Adv RJ de Kock.
24. During 2021, the NPA approached the Department of Public Service and Administration to approve a deviation and to appoint additional capacity for a period beyond 12 months to prosecute cases emanating from the TRC. Approval was granted in September 2021 to appoint capacity additional to the establishment of the NPA for a period of three (3) years. As a result, in the 2021-2022 financial year, the NPA appointed 13 additional prosecutors, bringing the total to 23 dedicated prosecutors working on TRC matters.
25. This approval was coupled with the establishment of the separate TRC Component on 6 September 2021 at the NPA's Head Office,

T.D.T. 

within the office of the DNDPP: NPS, with Adv SH Singh as the coordinator, as mentioned above. Adv Singh's duties were to oversee TRC matters, deal with all the related issues, challenges and co-ordinate the progress of TRC matters in all Divisions. The rationale behind establishing the TRC Component was to adopt a focused approach with dedicated capacity that would ensure prioritisation of TRC cases. It was also to enhance our internal capacity and processes both to ensure effective handling of these cases without any undue political influence as per the Rodrigues judgement. The TRC Component was to adopt a prosecution guided investigative (PGI) methodology in order for prosecutors to advise and guide investigators from early stages of their investigation and thus enhance the chances of prosecutions being successful.

26. Notably, this PGI model yielded positive results if one has regard to the important inquests that have since been reopened and are pending in court. These include, amongst others, those of Griffiths Mxenge, Chief Albert Luthuli, Northcrest Five, Cradock 4, and Steve Biko. This is a demonstration of the NPA's leadership commitment to ensuring closure and justice for the families of apartheid era crimes.

27. In April 2022, a Special Director of Public Prosecutions in the office of the DNDPP: NPS was appointed, whose function was also to assist with strategic oversight of TRC matters. A Deputy Director of Public Prosecutions (DDPP) and administrative personnel were also

T.D.T. 

appointed to oversee and support the progress on TRC matters. Two additional state advocates have also been added to the TRC Component at the national office.

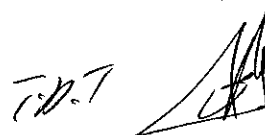
28. For its part, and to the best of my knowledge, after the COVID lockdown, in April 2021, the DPCI also appointed 34 former police detectives for a contractual period of three years dedicated to the investigation of TRC cases who worked with the NPA's 23 dedicated prosecutors.
29. During 2022, the DPCI also appointed a National TRC Co-ordinator, Colonel M Nkuna, to drive progress on investigations in TRC matters.
30. During the presentation to the Portfolio Committee on Justice and Correctional Services in June 2022, it was noted that dedicated capacity within the NPA comprised 16 prosecutors and 33 investigators. Prosecution guided investigation initiatives were sharpened with a close partnership with DPCI. The co-ordination between the NPA and DPCI to drive progress on TRC matters will be addressed by Adv Singh in her affidavit. The focus was on getting the basics right and putting in place structures to enhance progress.

ENHANCING STAKEHOLDER MANAGEMENT

Engagement with victims, family members and concerned civil society organisations

T.D.7 

31. Upon assuming office, and in the midst of all the pressures in trying to rebuild an NPA weakened by years of state capture, we took steps to meet, as much as possible, with representatives from families whose members had been the victims of apartheid crimes, their legal teams, former TRC commissioners, and organisations supporting such families, including the Foundation for Human Rights (FHR) and the Apartheid Era Victims Family Group (AVFG).
32. In April and August 2019, meetings with stakeholders served to understand their frustrations in seeking to obtain justice for their loved ones; explore issues regarding dedicated capacity to deal with TRC cases; discuss concerns over alleged political interference that led to prolonged delays in the investigation and prosecution of TRC cases; and explore possible forms of cooperation to obtain the common objective of seeking justice for the victims of apartheid crimes.
33. On 11 October 2019, together with NPA prosecutors, I attended a workshop organised by FHR to deal with TRC matters, under the theme *"Unfinished Business of the TRC" – The effective Investigation and Prosecution of Apartheid Crimes*. The workshop explored prosecutorial strategies, including prosecuting apartheid-era crimes as Crimes Against Humanity (CAH).
34. During the course of 2020, while the COVID lockdown persisted, engagements continued between the NPA and the FHR, albeit sporadically, regarding the establishment of a dedicated capacity for

Handwritten signature and initials in black ink, appearing to be 'T.D.T.' and a stylized signature.


the investigation and prosecution of TRC cases, which resulted in the workshop held in February 2021, referred to earlier in this affidavit.

35. From June 2022 onwards, the NPA strengthened efforts to communicate with victims and their families, after the Portfolio Committee on Justice and Correctional Services raised concerns about the NPA's poor communication with the families of the victims involved. These related to families complaining about not being timeously updated by the NPA or not receiving communication from the NPA before decisions were made public.¹

36. Paying heed to these concerns, we took steps to improve the NPA's communication with families so that they would be updated on progress on their respective matters. In particular, and in line with the victim-responsive approach adopted by the NPA in its strategy, the head of NPS, the late Adv De Kock issued a directive in 2022 that required TRC prosecutors to liaise directly with the families and victims, and to keep them informed of progress in the matters.

37. The NPA also engaged with FHR in January 2023 and January 2024. The meetings were also attended by DPCI. In addition, the NPA also liaised with the Apartheid Era Victims Family Group (AVFG) which comprises family members who have lost family members who were activists, between 1960 and 1994. The DNDPP: NPS arranged for the

¹ PMG Minutes, PC on Justice and Correctional Services, TRC prosecutions: NPA Progress Report, 1 June 2022.

T.D.T. 

AVFG to meet with the DPPs, prosecutors and DPCI investigators within the Divisions in which their matters are being investigated and decided.

38. In having access to DPPs, prosecutors and investigators in the regions, families were able to directly engage with them, provide any leads and information to investigators. This was greatly appreciated by AVFG, and it encouraged the building of trust between families, the investigator, and the prosecutor.
39. Regular progress reports are given to the families. This ensures that when decisions are finally taken, be it a prosecution, an inquest, or to close the matter (because all leads have been exhausted), families understand the reasons for the decision and are aware that the investigator and prosecutor have explored every possible avenue before arriving at their decision.
40. Because of transparency and accountability, the relationship between families, prosecutors and investigators is strengthened. Prosecutors and investigators are also mindful and committed to impartiality, fairness and the rule of law.
41. Between 2022 and 2024, a total of seven meetings took place between AVFG and the offices of the DPPs within different Divisions. All meetings were attended by the DPPs in whose Divisions the

T.D.T




matters are under investigation, the prosecutors and DPCI investigators. The process has been driven by Mr I Cajee, the nephew of Mr Ahmed Timol. A platform was shared with the families where they were given the opportunity to share their pain, their challenges and commitment to working towards justice.

Accountability to Parliament

42. In addition to making efforts to enhance the NPA's engagements with key stakeholders, starting in mid-2022, the NPA was requested to appear before Parliament to report specifically on progress made in dealing with TRC matters.


43. At the meeting before the Portfolio Committee on Justice and Correctional Services on 1 June 2022, the NPA noted that an important part of the plan to address TRC matters was to create a dedicated capacity. The NPA highlighted that 16 dedicated prosecutors and 33 dedicated DPCI investigators were working on TRC matters. As a result of this, from September 2021 to April 2022, the NPA and DPCI had increased the matters under investigation from 59 to 97 (including 5 on court rolls), across all Divisions. One of the first functions of the TRC component, after its establishment in 2021, was to conduct an audit of all matters under investigation which had been migrated to the Divisions. It was noted that 59 matters were still under investigation in September 2021. It was also necessary to ascertain the stage of investigation of each of the matters. A joint

J.D.T. 


methodology, agreed to between NPA and DPCI, was developed to gauge progress on the stage of investigation of matters.

44. Both the NPA and DPCI rolled out accountability sessions throughout the country where, for the first time, dedicated TRC prosecutors and investigators met to reflect and plan together. The focus was on quality investigations to inform an evidence-based decision by a prosecutor, following the prosecutor-guided investigations methodology.

45. On 25 November 2022, the NPA appeared again before the Portfolio Committee on Justice and Correctional Services to provide a further progress update on TRC matters. The NPA informed Committee members that dedicated capacity had been further enhanced and it stood at 25 dedicated prosecutors and 40 dedicated investigators who had been appointed in the Divisions. This had resulted in an additional 32 new investigations having been opened between May and October 2022, thus bringing the total to 129 matters under investigation at that time. The Committee was also informed that the progress is linked to monthly monitoring and evaluation of progress on all matters, the implementation of interventions to render support to the Divisions, and the regular interactive DPCI/NPA accountability sessions which are attended by both the prosecutor and investigator seized with a relevant matter together with their respective supervisors/heads, and ongoing skills transfer.

T.D.T 

46. The NPA appeared again before the Portfolio Committee on 17 September 2024. We were able to demonstrate to the Committee that since 2019, the NPA has been committed to dealing with TRC matters and the report showed the progress made over the years, and that we continue to make. The presentation highlighted that in 2024 the dedicated capacity had been slightly reduced, due to the expiration of some of the 3-year contracts that had started in 2021. These setbacks were offset by the Deputy Directors of Public Prosecutions (DDPPs) overseeing and guiding the TRC portfolios within the offices of the DPPs dealing with a high volume of matters. Further, where there are no dedicated prosecutors, DPPs have appointed prosecutors (from permanent staff) to assist on TRC matters. In some Divisions, where there is no dedicated prosecutor, DDPPs oversee these matters. These measures enabled the NPA, working with the DPCI, to sustain progress on investigations, which stood at 126 as of September 2024.
47. Informed by a favourable budget allocation and the NPA's commitment to prioritise TRC cases, the NPA obtained approval for the creation of nineteen (19) permanent prosecutor posts in October 2024, who will continue to be dedicated to TRC matters only. The process is underway to apply for an additional ten (10) posts to ensure continuity in prosecution-guided investigations and, where appropriate, prosecution of TRC matters.

F.D.7 

48. On 12 February 2025, FHR made comprehensive submissions to the Portfolio Committee on Justice and Constitutional Development. The Portfolio Committee requested the NPA to respond in writing. This was done on 27 March 2025.
49. On 20 May 2025, a virtual meeting of the Portfolio Committee was convened where the Committee considered the responses provided by the NPA and the DPCI to FHR's submissions.
50. Following the above meeting, I invited the FHR's Executive Director, Dr Zaid Kimmie to a meeting at the NPA's Head Office to listen to any remaining concerns and strengthen our working relationship, given our common goal of pursuing justice for the victims of apartheid era crimes and their families. We had a very constructive meeting on 1 August 2025, and there was a commitment to develop a structured engagement with FHR, NPA and DPCI.

ASSESSMENT OF TRC MEASURES IMPLEMENTED BY THE NPA

51. When I assumed office in February 2019, the South Gauteng High Court was seized with the matter of Rodrigues v National Director of Public Prosecutions of South Africa and Others 76755/2018. The matter was heard in March 2019 and judgment delivered on 3 June 2019.
52. The judgment referred to "political interference having materially

T.D.T. 

affected the ability of the NPA to properly deal with the TRC cases in that the resources that were necessary to conduct proper investigations were not forthcoming”². Whereas the Court did not pronounce on the form of this political interference, it nonetheless found that “whatever form the political interference took, the NPA was enjoined in terms of both its constitutional and legal responsibilities to act on behalf of society and protect the public interest”.³

53. The Court further found as follows:

It is also for these reasons that the conduct of the relevant officials and others outside the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted.


Finally, there must be a public assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. In this regard they should indicate the measures, including checks and balances, which will be put in place to prevent the recurrence of these unacceptable breaches of the Constitution.⁴

54. Following this judgment, I communicated with then Minister of Justice and Correctional Services, Mr Ronald Lamola, regarding the way forward.

² *Rodrigues v National Director of Public Prosecutions of South Africa and Others* (76755/2018) [2019] ZAGPJHC 159, para 57.

³ *Ibid*, para 57.

⁴ *Ibid*, para 65.

T.O.T. 


55. In April 2022, I received an unsigned copy of a legal opinion provided by the Branch: Court Services in the Department of Justice and Constitutional Development which suggested that it might not be appropriate for a retired judge to undertake an investigation (which was an option on the table) considering that the courts might be seized with the matter as final arbiter. The opinion suggested that an investigating panel chaired by Senior Counsel might be more appropriate.
56. In view of the above, on 18 May 2022, I wrote a memorandum to Minister Lamola requesting the appointment of a panel headed by Senior Counsel to investigate alleged interference in the prosecution of TRC cases.
57. On 27 July 2022, Minister Lamola and I had a virtual meeting to discuss the matter, and the Minister decided to source a legal opinion from the Office of the Chief State Law Advisor to guide next steps.
58. On 29 August 2022, I received a legal opinion of the Office of the Chief State Law Advisor from Minister Lamola. The Minister indicated that, premised on Paragraph 19 of the opinion, it fell within the discretion of the NPA to decide upon consideration of the facts whether an investigation was warranted. Paragraph 19 of this opinion states:

T.D.T. 

The High Court has, in our opinion, left it to the discretion of the NDPP to consider whether any action in terms of Section 41(1) of the NPA Act is warranted insofar as the conduct of the relevant officials and others outside of the NPA, at the time, is concerned.

59. On 5 October 2022, I wrote to Minister Lamola to inform him that, after having carefully considered the matter, the leadership of the NPA had decided to appoint Senior Counsel, whose mandate would be to review the measures that have been adopted by the NPA to deal with the TRC matters and assess whether they are adequate. If they were found not to be adequate, Senior Counsel would be asked to make recommendations to strengthen them. If, in the process of review, Senior Counsel had reason to believe that there is information that would amount to a violation of Section 41(1) of the NPA Act, such issues were to be escalated to the NDPP to take forward accordingly. If necessary, the NPA would refer the matter for criminal investigation. Counsel would be given three (3) months to conduct the work.
60. In January 2023, the NPA appointed Adv Dumisa Ntsebeza SC to conduct the investigation and a press statement to this effect was released⁵, in line with *Rodrigues*.

⁵ <https://www.npa.gov.za/media/npa-further-enhances-efforts-ensure-effective-handling-and-prosecution-trc-cases>

T.D.T. 

61. Adv Ntsebeza SC and his team were briefed in March 2023, a draft opinion was submitted in late June 2023, and a final opinion with an addendum (commencing from page 87) was received on 2 November 2023.

62. The key findings in the opinion were:


62.1. That the measures adopted and implemented by the TRC component to deal with TRC matters were, in large part, adequate.

62.2. That many cases were at the beginning stages of investigation and identified challenges included availability of evidence; tracing of witnesses, dockets and inquest reports; legal representation for ex-SAPS employees; and budgetary constraints for reconstructions, amongst others.

62.3. That the monitoring and oversight role of the TRC monthly reporting system was accepted.

62.4. That the appointment of dedicated prosecutors provided certainty and accountability.

62.5. That appropriate communication channels have been set up, between prosecutors and families.

T.D.T. 

- 62.6. That the accountability sessions were important where the TRC DPCI heads in each Division and prosecutors, met to update one another on approaches adopted and developments in each case.
- 62.7. It also found that the hybrid structure of the TRC Component was satisfactory. The TRC Component is made up of a combination of both dedicated TRC investigators and prosecutors working together towards a common objective. The opinion also accepted that the NPA, through the TRC Component, retains centralised control and sole responsibility under the authority of the DNDPP: NPS, which ensures that investigators and prosecutors are assigned solely to investigations and prosecutions.
63. The final opinion was shared with Minister Lamola and with the Portfolio on Justice and Constitutional Development. It was also uploaded onto the NPA's website in February 2024 and made public.
64. The NPA took note of the recommendations made in the opinion and took steps to address them, *inter alia* ensuring sufficient oversight by the DNDPP: NPS and TRC Component in relation to: the co-ordination of the investigatory and prosecutorial work carried out by the NPA Divisions, and support to address areas of common challenges, including limited cooperation by other organs of state; the

T.D.T



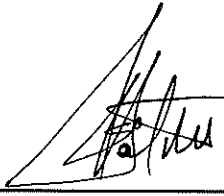
accountability of the Missing Persons Task Team (MPTT) to the DNDPP: NPS; engaging with DPCI to resolve issues relating to payment of legal costs for SAP and security branch employees accused of apartheid era crimes; the pursuit of charges of crimes against humanity; and the uploading of statements and affidavits, evidence and information onto our developing Electronic Case Management System (ECMS).

CONCLUSION

65. By deposing to this affidavit, I have sought to demonstrate that the NPA has, since 2019, through the actions set out above, taken concrete steps to ensure that there is accountability for the atrocious crimes referred by the TRC.
66. The NPA's actions and progress in dealing with TRC cases during this time bear testament to this. In line with the NPA's victim responsive approach, the NPA will continue to prioritise the interests of victims of apartheid-era crimes, in the pursuit of justice for them and for their loved ones.

T.D.T





DEPONENT

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Pretoria on this 21 day of **October 2025** and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended have been complied with.



COMMISSIONER OF OATHS

FULL NAMES: *Thapelo Duke Tiveni*
CAPACITY: *Constable*
AREA: *P.S.A Pretoria*
123 Westlake Avenue
Silverton

SOUTH AFRICAN POLICE SERVICE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
PRIVATE BAG X1500
2025 -10- 21
PRETORIA 0001
SECTION: ASSET FORFEITURE INVESTIGATION

**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING
EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE
INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION
COMMISSION CASES**

INDEX TO ANNEXURES _AFFIDAVIT OF NDPP – ADV S BATOHI

NO.	PARA NO.	DESCRIPTION	PAGE
1	3	Letter to Adv S Batohi from Chief Evidence Leader, dated 23 September 2025	SB 00001 – SB 00002
2	10-16	National Prosecuting Authority Act, No 32 of 1998	SB 00003- SB 00023
3	18	NDPP Directive for matters falling outside of core PCLU mandate to be returned to DPPs (including TRC matters), 3 April 2019	SB 00024- SB 00025
4	20	Brief Notes on TRC matters from meeting between NPA and DPCI on 31 January 2020.	SB 00026
5	23	Invitation to FHR Workshop on 17 February 2021	SB 00027- SB 00029
6	23	NPA TRC Case Management Plan presented at FHR Workshop on 17 February 2021	SB 00030- SB 00037
7	23	Letter by NDPP to FHR following Workshop on 17 February 2021, dated 8 March 2021	SB 00038- SB 00039
8	24	DPSA Approval for Appointment of Additional Capacity to Prosecute TRC matters, 07 September 2021.	SB 00040- SB 00041
9	25	Appointment of Adv Singh as Acting State Advocate to assist with coordination of TRC Matters, 7 September 2021	SB 00042
10	25	Letter from DNDPP: NPS to Head DPCI informing him of establishment of TRC Component, dated 10 September 2021	SB 00043- SB 00044
11	28	Joint Media Statement issued by the NPA and DPCI, 27 June 2021	SB 00045- SB 00048
12	30, 43	NPA Presentation to PC on Justice and Correctional Services on TRC Prosecutions, 1 June 2022	SB 00049- SB 00062
13	31	Letter to NDPP from I Cajee, dated 31 January 2019	SB 00063- SB 00064
14	32	Minutes of meeting between NDPP and FHR and others on 17 April 2019	SB 00065- SB 00068
15	35	PMG Minutes from Portfolio on Justice and Correctional Services Meeting:	SB 00069- SB 00089

NO.	PARA NO.	DESCRIPTION	PAGE
		TRC prosecutions: NPA Progress Report, 1 June 2022.	
16	36	Internal Memo: TRC Matters – Communication with Victims and Families, dated 20 June 2022.	SB 00090- SB 00091
17	45	NPA Presentation to PC on Justice and Correctional Services on TRC Prosecutions, 25 November 2022	SB 00092- SB 00117
18	46	NPA Presentation to PC on Justice and Constitutional Development on TRC Prosecutions, 17 September 2024	SB 00118- SB 00159
19	48	NPA Response to FHR Submissions to the PC on Justice and Constitutional Development dated 27 March 2025.	SB 00160- SB 00199
20	49	NPA Presentation to PC on Justice and Constitutional Development on its response to FHR Submissions, dated 20 May 2025.	SB 00200- SB 00234
21	51-53	Rodrigues v National Director of Public Prosecutions of South Africa and Others (76755/2018) [2019]	SB 00235- SB 00279
22	55	Legal Opinion from Branch: Court Services, Department of Justice and Constitutional Development entitled: Appointment of Investigative Panel to Investigate Alleged Interference in the Prosecution of Cases Emanating from the Truth and Reconciliation Commission, (Joao Rodrigues vs NDPP of SA and Others), dated 2 April 2022	SB 00280- SB 00285
23	56	Memorandum from NDPP to Minister Lamola entitled: Appointment of Investigative Panel to investigate the alleged interference in the prosecution of TRC Cases (Joao Rodrigues vs NDPP of SA and Others), dated 18 May 2022	SB 00286- SB 00288
24	57	Legal Opinion: Implications of the High Court and SCA Judgments regarding Joao Rodrigues, dated 29 July 2022	SB 00289- SB 00298
25	58	Letter from Minister Lamola to NDPP entitled: Discussions on TRC Matters, dated 29 August 2022.	SB 00299- SB 00300
26	59	Memo from NDPP to Minister Lamola entitled: Discussion and Proposal on the Rodrigues TRC Matter, dated 5 October 2022.	SB 00301- SB 00305
27	60	NPA Press Release dated 13 January 2023	SB 00306- SB 00307
28	61	Final Opinion on the NPA's TRC Component and TRC Prosecutions by Adv Ntsebeza SC, received by the NPA on 2 November 2023.	SB 00308- SB 00387



ADV SHAMILA BATOHI

Per Email: sbatohi@npa.gov.za

23 September 2025

Dear Adv Shamila Batohi,

REQUEST FOR ASSISTANCE WITH INFORMATION IN AID OF THE JUDICIAL COMMISSION OF INQUIRY TO INQUIRE INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES.

- 1 On 29 May 2025, the President of the Republic of South Africa, Mr Matamela Cyril Ramaphosa, issued Proclamation Notice 264 of 2025 establishing a Commission of Inquiry to Inquire into Allegations Regarding Efforts or Attempts Having been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission ('TRC') Cases ('**the Commission**').
- 2 The attached Terms of Reference of the Commission require that, among other things, the Commission must inquire, make findings, report and make recommendations concerning:

"1.1...whether, why and to what extent and by whom, efforts were made to influence or pressure members of the South African Police Service or the National Prosecuting Authority to stop investigating or prosecuting TRC cases;"
and

1.2...whether any members of the South African Police Service or the National Prosecuting Authority improperly colluded with such attempts to influence or pressure them."

- 3 At the relevant time from 2019 to date, you served as the National Director of Public Prosecutions, prior to which you had served as the Provincial Director of Public Prosecutions from 2000 to 2009. In those capacities, you would have had access to information concerning decisions, discussions, or policies affecting the investigation and prosecution of TRC-related cases.
- 4 The Commission therefore requests your assistance with furnishing any material in your possession, or to which you had access during your tenure, that may be relevant to its inquiry. This includes memoranda, correspondence, minutes of meetings, or other audio and/or documentary records relating to the TRC cases referred by the Amnesty Committee for investigation or prosecution.
- 5 In addition to providing such relevant material, the Commission requests, in the form of an affidavit, your own account of any discussions, decisions or considerations during your tenure as Provincial Director of Public Prosecutions that may bear on the matters set out in the above-mentioned paragraphs 1.1 and 1.2 of the Terms of Reference. Such a statement will assist the Commission in understanding the context within which decisions relating to TRC cases were taken.
- 6 Should you require any assistance in preparing your affidavit or in furnishing the requested material, you are entitled to liaise with your legal representatives. Alternatively, you may contact the Commission's Secretariat directly by sending an email to secretary@trc-inquiry.org.za, and we will provide the necessary support.
- 7 Please provide your response no later than 30 September 2025, to allow the Commission sufficient time to consider the information and complete its work timeously.

Yours faithfully

(ELECTRONICALLY SIGNED)
CHIEF EVIDENCE LEADER

Advocate I Semanya SC

National Prosecuting Authority Act 32 of 1998¹

SB 00003

[ASSENTED TO 24 JUNE 1998]	[DATE OF COMMENCEMENT: 16 OCTOBER 1998]
	(Unless otherwise indicated)

(English text signed by the President)

published in
GG 19021 of 3 July 1998

commencements
(see s. 46 of this Act)

provisions	date	refer to
ss. 9, 10, 12 and 17	1 August 1998	Proc R77 in GG 19118 of 31 July 1998
ss. 1-8, 11, 13-16, 18-37 and 39-46	16 October 1998	Proc R103 in GG 19372 of 16 October 1998
s. 38	23 April 1999	Proc R46 in GG 19988 of 23 April 1999

as amended

by	with effect from	refer to
Judicial Matters Second Amendment Act 122 of 1998	1 April 1999	s. 16 of Act 122 of 1998 ; Proc R38 in GG 19913 of 1 April 1999
National Prosecuting Authority Amendment Act 61 of 2000	12 January 2001	s. 26 of Act 61 of 2000 ; Proc R3 in GG 21976 of 12 January 2001
Judicial Matters Amendment Act 42 of 2001	7 December 2001	s. 48 of Act 61 of 2001
Criminal Law (Sentencing) Amendment Act 38 of 2007	31 December 2007	s. 9 of Act 38 of 2007
National Prosecuting Authority Amendment Act 56 of 2008	6 July 2009	s. 84 of Act 56 of 2008 ; Proc 45 in GG 32380 of 3 July 2009
	20 February 2009	Proc R12 in GG 31930 of 19 February 2009
Judicial Matters Amendment Act 11 of 2012	2 October 2012	s. 11 of Act 11 of 2012
Judicial Matters Amendment Act 8 of 2017	2 August 2017	s. 43 (1) of Act 8 of 2017
Judicial Matters Amendment Act 12 of 2020	22 October 2020	s. 3 of Act 12 of 2020
Cybercrimes Act 19 of 2020	1 December 2021	s. 60 of Act 19 of 2020 ; Proc R42 in GG 45562 of 30 November 2021
Judicial Matters Amendment Act 15 of 2023	3 April 2024	s. 35 (1) of Act 15 of 2023
National Prosecuting Authority Amendment Act 10 of 2024	19 August 2024; a date to be proclaimed - see PENDLEX	s. 13 of Act 10 of 2024 ;

ACT

To regulate matters incidental to the establishment by the Constitution of the Republic of South Africa, 1996, of a single national prosecuting authority; and to provide for matters connected therewith.

Preamble

WHEREAS [section 179](#) of the Constitution of the Republic of South Africa, 1996 ([Act 108 of 1996](#)), provides for the establishment of a single national prosecuting authority in the Republic structured in terms of an Act of Parliament; the appointment by the President of a National Director of Public Prosecutions as head of the national prosecuting authority; and the appointment of Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament;

AND WHEREAS the Constitution provides that the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority;

AND WHEREAS the Constitution provides that national legislation must ensure that the Directors of Public Prosecutions are appropriately qualified and are responsible for prosecutions in specific jurisdictions;

AND WHEREAS the Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice;

AND WHEREAS the Constitution provides that the National Director of Public Prosecutions must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy which must be observed in the prosecution process;

AND WHEREAS the Constitution provides that the National Director of Public Prosecutions may intervene in the prosecution process when policy directives are not being complied with, and may review a decision to prosecute or not to prosecute;

AND WHEREAS the Constitution provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings;

AND WHEREAS the Constitution provides that all other matters concerning the prosecuting authority must be determined by national legislation;

AND WHEREAS systemic corruption in society requires specialised, dedicated, multi-disciplinary measures to combat corruption;

[Para. 9 added by [s. 1](#) of [Act 10 of 2024](#) (wef 19 August 2024).]

AND TO ENSURE that the national prosecuting authority fulfils its constitutional mandate to provide, without limiting the investigative powers of the South African Police Service or the Directorate for Priority Crime Investigation, for-

- the establishment of the Investigating Directorate against Corruption, with investigative capacity, to prioritise and to investigate particularly serious criminal or unlawful conduct committed in serious, high-profile or complex corruption, commercial or financial crime; and
- the necessary infrastructure and resources to perform these functions,

[Para. 10 added by [s. 1](#) of [Act 10 of 2024](#) (wef 19 August 2024).]

.....

[Preamble substituted by [s. 1](#) of [Act 61 of 2000](#) (wef 12 January 2001) and amended by [s. 14](#) of [Act 56 of 2008](#) (wef 6 July 2009).]

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

INDEX

[Index inserted by [s. 21](#) of [Act 61 of 2000](#) (wef 12 January 2001) and amended by [s. 12](#) of [Act 10 of 2024](#) (wef 19 August 2024).]

[CHAPTER 1](#)

INTRODUCTORY PROVISIONS

[1](#) Definitions

[CHAPTER 2](#)

STRUCTURE AND COMPOSITION OF SINGLE NATIONAL PROSECUTING AUTHORITY

- [2](#) Single national prosecuting authority
- [3](#) Structure of prosecuting authority
- [4](#) Composition of prosecuting authority
- [5](#) Office of National Director of Public Prosecutions
- [6](#) Offices of prosecuting authority at seats of High Courts
- [7](#) Investigating Directorates

[CHAPTER 3](#)

APPOINTMENT, REMUNERATION AND CONDITIONS OF SERVICE OF MEMBERS OF THE PROSECUTING AUTHORITY

- [8](#) Prosecuting authority to be representative
- [9](#) Qualifications for appointment as National Director, Deputy National Director or Director
- [10](#) Appointment of National Director
- [11](#) Appointment of Deputy National Directors
- [12](#) Term of office of National Director and Deputy National Directors
- [13](#) Appointment of Directors and Acting Directors
- [14](#) Term of office of Director
- [15](#) Appointment of Deputy Directors
- [16](#) Appointment of prosecutors
- [17](#) Conditions of service of National Director, Deputy National Directors and Directors
- [18](#) Remuneration of Deputy Directors and prosecutors
- [19](#) Conditions of service of Deputy Directors and prosecutors, except remuneration

[CHAPTER 3A](#)

[19A](#) to [19C](#) inclusive

[Ss. 19A to 19C inclusive inserted by [s. 8](#) of [Act 61 of 2000](#) (wef 12 January 2001) and repealed by [s. 5](#) of [Act 56 of 2008](#) (wef 6 July 2009).]

[CHAPTER 3B](#)

APPOINTMENT, REMUNERATION AND CONDITIONS OF SERVICE OF INVESTIGATORS

[Chapter 3B (ss. 19D to 19F inclusive) inserted by [s. 6](#) of [Act 10 of 2024](#) (wef 19 August 2024).]

- [19D](#) Appointment of investigators
[S. 19D inserted by [s. 6](#) of [Act 10 of 2024](#) (wef 19 August 2024).]
- [19E](#) Vetting of investigators
[S. 19E inserted by [s. 6](#) of [Act 10 of 2024](#) (wef 19 August 2024).]
- [19F](#) Remuneration and conditions of service of investigators
[S. 19F inserted by [s. 6](#) of [Act 10 of 2024](#) (wef 19 August 2024).]

SB 00005

[CHAPTER 4](#)

POWERS, DUTIES AND FUNCTIONS OF MEMBERS OF THE PROSECUTING AUTHORITY

- [20](#) Power to institute and conduct criminal proceedings
- [21](#) Prosecution policy and issuing of policy directives
- [22](#) Powers, duties and functions of National Director
- [22A](#) Complaints mechanism and accountability
[Item 22A inserted by s. 12 (b) of [Act 10 of 2024](#) (wef 19 August 2024).]
[NB: A s. 22A has been inserted by [s. 8](#) of the National Prosecuting Authority Amendment [Act 10 of 2024](#), a provision which will be put into operation by proclamation. See PENDLEX.]
- [23](#) Powers, duties and functions of Deputy National Directors
- [24](#) Powers, duties and functions of Directors and Deputy Directors
- [25](#) Powers, duties and functions of prosecutors

[CHAPTER 5](#)

POWERS, DUTIES AND FUNCTIONS RELATING TO INVESTIGATING DIRECTORATES

- [26](#) Application
 - [27](#) Reporting of matters to Investigating Director
 - [28](#) Inquiries by Investigating Director
 - [29](#) Entering upon premises by Investigating Director
 - [29A](#) Powers and functions of investigators
[S. 29A inserted by [s. 9](#) of [Act 10 of 2024](#) (wef 19 August 2024).]
 - [30](#) and [31](#)
- [Ss. 30 and 31 substituted by [s. 14](#) of [Act 61 of 2000](#) (wef 12 January 2001) and repealed by [s. 9](#) of [Act 56 of 2008](#) (wef 6 July 2009).]

[CHAPTER 6](#)

GENERAL PROVISIONS

- [32](#) Impartiality of, and oath or affirmation by members of prosecuting authority
 - [33](#) Minister's final responsibility over prosecuting authority
 - [34](#) Reports by Directors
 - [35](#) Accountability to Parliament
 - [36](#) Expenditure of prosecuting authority
 - [37](#) Administrative staff
 - [38](#) Engagement of persons to perform services in specific cases
 - [39](#) Disclosure of interest and non-performance of other paid work
 - [40](#) Regulations
 - [40A](#)
- [S. 40A repealed by [s. 58](#) of [Act 19 of 2020](#) (wef 1 December 2021).]
- [41](#) Offences and penalties
 - [42](#) Limitation of liability

[CHAPTER 7](#)

TRANSITIONAL ARRANGEMENTS

- [43](#) Transitional arrangements
- [43A](#) Transitional arrangements relating to Directorate of Special Operations
[S. 43A substituted by [s. 13](#) of [Act 56 of 2008](#) (wef 6 July 2009).]
- [43B](#) Transitional arrangements relating to financial investigators and analysts
[S. 43B inserted by [s. 10](#) of [Act 11 of 2012](#) (wef 2 October 2012).]
- [43C](#) Transitional arrangements relating to Investigating Directorates
[S. 43C inserted by s. 10 of [Act 10 of 2024](#) (wef 19 August 2024).]
- [44](#) Amendment or repeal of laws
- [45](#) Interpretation of certain references in laws
- [46](#) Short title and commencement

[Schedule](#)

LAWS AMENDED OR REPEALED BY SECTION 44

- [1](#) This Act has been updated to include all available historical commencement details

CHAPTER 1 INTRODUCTORY PROVISIONS (s 1)

1 Definitions

In this Act, unless the context otherwise indicates-

'**Constitution**' means the Constitution of the Republic of South Africa, 1996 ([Act 108 of 1996](#));

'Deputy Director' means a Deputy Director of Public Prosecutions appointed under section 15 (1);

'Deputy National Director' means a Deputy National Director of Public Prosecutions appointed under section 14 (b);

'Director' means a Director of Public Prosecutions appointed under section 13 (1);

'Directorate of Special Operations'

[Definition of 'Directorate of Special Operations' inserted by s. 2 (a) of [Act 61 of 2000](#) (wef 12 January 2001) and deleted by s. 1 (a) of [Act 56 of 2008](#) (wef 6 July 2009).]

'head of an Investigating Directorate' means an Investigating Director referred to in section 7 (3);

[Definition of 'head of an Investigating Directorate' inserted by s. 2 (a) of [Act 61 of 2000](#) (wef 12 January 2001) and substituted by s. 1 (b) of [Act 56 of 2008](#) (wef 6 July 2009) and by s. 2 (a) of [Act 10 of 2024](#) (wef 19 August 2024).]

'Investigating Director'-

(a) means a Director of Public Prosecutions appointed under section 13 (1) (b) as the *head of an Investigating Directorate* established in terms of section 7; and

[Para. (a) substituted by s. 2 (b) of [Act 10 of 2024](#) (wef 19 August 2024).]

(b) in Chapter 5, includes any Director referred to in section 13 (1), designated by the National Director to conduct an investigation in terms of [section 28](#) in response to a request in terms of [section 17D \(3\)](#) of the South African Police Service Act, 1995 ([Act 68 of 1995](#)), by the Head of the Directorate for Priority Crime Investigation;

[Definition of 'Investigating Director' substituted by s. 2 (b) of [Act 61 of 2000](#) (wef 12 January 2001) and by s. 1 (c) of [Act 56 of 2008](#) (wef 6 July 2009).]

'Investigating Directorate' means an Investigating Directorate established by or in terms of section 7;

[Definition of 'Investigating Directorate' substituted by s. 2 (b) of [Act 61 of 2000](#) (wef 12 January 2001).]

'Investigating Directorate against Corruption' means the Investigating Directorate against Corruption established by section 7 (1A);

[Definition of 'Investigating Directorate against Corruption' inserted by s. 2 (c) of [Act 10 of 2024](#) (wef 19 August 2024).]

'investigation' in Chapter 5, means an investigation contemplated in section 28 (1);

[Definition of 'investigation' inserted by s. 2 (c) of [Act 61 of 2000](#) (wef 12 January 2001).]

'member of the prosecuting authority' includes-

(a) a member referred to in section 4;

(b) a member of the prosecuting authority appointed at or assigned to the *Office of the National Director* as contemplated in section 5 (2) (d);

(c) an investigator referred to in section 5 (2) (f);

(d) financial investigators and analysts referred to in section 43B;

(e) a member of the administrative staff appointed and employed in the Offices referred to in section 37;

(f) a person engaged to perform services contemplated in section 38 (1) or (3); and

(g) a person performing services for the prosecuting authority in terms of a secondment or any other consultancy agreement in line with prosecutorial and investigation powers;

[Definition of 'member of the prosecuting authority' inserted by s. 2 (d) of [Act 10 of 2024](#) (wef 19 August 2024).]

'Minister' means the Cabinet member responsible for the administration of justice;

'National Director' means the National Director of Public Prosecutions appointed in terms of section 179 (1) (a) of the Constitution;

'Office of the National Director' means the Office of the National Director of Public Prosecutions established by section 5;

'prescribed' means prescribed by regulation made under section 40;

'prosecuting authority' means the single national prosecuting authority referred to in section 2;

'prosecutor' means a prosecutor referred to in section 16 (1);

'Public Service Act' means the Public Service Act, 1994 ([Proclamation 103 of 1994](#));

'Republic' means the Republic of South Africa, referred to in section 1 of the *Constitution*;

'Special Director' means a Director of Public Prosecutions appointed under section 13 (1) (c);

'special investigator'

[Definition of 'special investigator' inserted by s. 2 (d) of [Act 61 of 2000](#) (wef 12 January 2001) and deleted by s. 1 (d) of [Act 56 of 2008](#) (wef 6 July 2009).]

'specified offence' means any matter which in the opinion of the head of an Investigating Directorate falls within the range of matters as contemplated in section 7 (1), and any reference to the commission of a specified offence has a corresponding meaning;

[Definition of 'specified offence' inserted by s. 2 (d) of [Act 61 of 2000](#) (wef 12 January 2001) and substituted by s. 1 (e) of [Act 56 of 2008](#) (wef 6 July 2009).]

'this Act' includes the regulations.

[2](#) The administration and the powers or functions entrusted by legislation transferred to the Minister of Justice and Constitutional Development (Proc 199 in GG 51368 of 11 October 2024)

CHAPTER 2

STRUCTURE AND COMPOSITION OF SINGLE NATIONAL PROSECUTING AUTHORITY (ss 2-7)

2 Single national prosecuting authority

There is a single national prosecuting authority established in terms of section 179 of the *Constitution*, as determined in *this Act*.

3 Structure of prosecuting authority

The structure of the single *prosecuting authority* consists of-

(a) the Office of the *National Director*;

(b) the offices of the prosecuting authority at the High Courts, established by section 6 (1).

4 Composition of national prosecuting authority

The prosecuting authority comprises the-

- (a) *National Director*;
- (b) *Deputy National Directors*;
- (c) *Directors*;
- (d) *Deputy Directors*; and
- (e) *prosecutors*.

5 Office of National Director of Public Prosecutions

(1) There is hereby established the National Office of the *prosecuting authority*, to be known as the Office of the National Director of Public Prosecutions.

(2) The *Office of the National Director* shall consist of the-

- (a) *National Director*, who shall be the head of the Office and control the Office;
- (b) *Deputy National Directors*;
- (c) *Investigating Directors and Special Directors*;
- (d) other members of the prosecuting authority appointed at or assigned to the Office;

[Para. (d) substituted by s. 3 (a) of [Act 10 of 2024](#) (wef 19 August 2024).]

(dA)

[Para. (dA) inserted by s. 3 of [Act 61 of 2000](#) (wef 12 January 2001) and deleted by s. 2 of [Act 56 of 2008](#) (wef 6 July 2009).]

(e) members of the administrative staff of the Office; and

[Para. (e) substituted by s. 3 (b) of [Act 10 of 2024](#) (wef 19 August 2024).]

(f) investigators.

[Para. para. (f) added by s. 3 (c) of [Act 10 of 2024](#) (wef 19 August 2024).]

(3) The seat of the *Office of the National Director* shall be determined by the President.

6 Offices of prosecuting authority at seats of High Courts

(1) The Cabinet member responsible for the administration of justice-

- (a) must establish an Office for the prosecuting authority at the seat of each Division of the High Court provided for in terms of section 6 (1); and
- (b) may, in consultation with the National Director, establish an Office for the prosecuting authority at the local seat of a Division contemplated in section 6 (3) (c),

of the Superior Courts Act, 2013 ([Act 10 of 2013](#)).

[Sub-s. (1) substituted by s. 26 of [Act 8 of 2017](#) (wef 2 August 2017).]

(2) An Office established by this section shall consist of-

- (a) the head of the Office, who shall be either a *Director* or a *Deputy Director*, and who shall control the Office;
- (b) *Deputy Directors*;
- (c) *prosecutors*;
- (d) persons contemplated in section 38 (1); and
- (e) the administrative staff of the Office.

(3) If a *Deputy Director* is appointed as the head of an Office established by subsection (1), he or she shall exercise his or her functions subject to the control and directions of a *Director* designated in writing by the *National Director*.

7 Investigating Directorates

(1)

[Sub-s. (1) deleted by s. 4 (a) of [Act 10 of 2024](#) (wef 19 August 2024).]

(1A) There is hereby established, in the *Office of the National Director*, an *Investigating Directorate* to be known as the *Investigating Directorate against Corruption* to investigate, and carry out, any functions incidental to investigations-

- (a) relating to serious, high-profile or complex corruption, commercial or financial crime cases-
 - (i) arising from the recommendations of commissions of inquiry;
 - (ii) referred to the *Investigating Director* by the *National Director* in terms of section 28 (1) (b); or
 - (iii) referred to the *Investigating Director* in terms of section 27, subject to section 26 (2);
- (b) relating to additional related offences or categories of offences, including common law offences of-
 - (i) fraud;
 - (ii) forgery;
 - (iii) uttering;
 - (iv) theft; and
 - (v) any offence involving dishonesty;
- (c) relating to additional related statutory offences or categories of statutory offences, including contraventions of-
 - (i) the Prevention and Combating of Corrupt Activities Act, 2004 ([Act 12 of 2004](#));
 - (ii) the Prevention of Organised Crime Act, 1998 ([Act 121 of 1998](#));
 - (iii) the Protection of Constitutional Democracy against Terrorist and Related Activities, 2004 ([Act 33 of 2004](#));
 - (iv) the Public Finance Management Act, 1999 ([Act 1 of 1999](#));
 - (v) the Local Government: Municipal Finance Management Act, 2003 ([Act 56 of 2003](#));
 - (vi) the Financial Intelligence Centre Act 2001 ([Act 38 of 2001](#)); and
 - (vii) any other statutory offence involving dishonesty; and
- (d) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings relating to any offence contemplated in paragraphs (a) to (c).

[Sub-s. (1A) inserted by s. 4 (b) of [Act 10 of 2024](#) (wef 19 August 2024).]

(1B) The President may, by proclamation in the *Gazette*, establish one or more additional *Investigating Directorates* in the *Office of the National Director*, in respect of matters that exclude those contemplated in subsection (1A).
[Sub-s. (1B) inserted by s. 4 (b) of [Act 10 of 2024](#) (wef 19 August 2024).]

SB 00008

(2) Any proclamation issued in terms of this section-

(a)

[Para. (a) deleted by s. 4 (c) of [Act 10 of 2024](#) (wef 19 August 2024).]

(b) shall be issued and may be amended or rescinded by the President on the recommendation of the *Minister*, the Cabinet member responsible for policing and the *National Director*; and

[Para. (b) substituted by s. 4 (d) of [Act 10 of 2024](#) (wef 19 August 2024).]

(c) must be submitted to Parliament before publication in the *Gazette*.

(3) The head of an *Investigating Directorate*, shall be an *Investigating Director*, and shall perform the powers, duties and functions of the *Investigating Directorate* concerned subject to the control and directions of the *National Director*.

(4) (a) The *head of an Investigating Directorate* shall be assisted in the exercise of his or her powers and the performance of his or her functions by-

(i) one or more *Deputy Directors*;

(ii) *prosecutors*;

(iiA) *investigators*;

[Sub-para. (iiA) inserted by s. 4 (e) of [Act 10 of 2024](#) (wef 19 August 2024).]

(iii) officers of any Department of State seconded to the service of the *Investigating Directorate* in terms of the laws governing the public service;

(iv) persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the *Investigating Directorate*; and

(v) any other person whose services are obtained by the *head of the Investigating Directorate*,

and the persons referred to in subparagraphs (i) to (v) shall perform their powers, duties and functions subject to the control and direction of the head of the *Investigating Directorate* concerned.

(b) For the purposes of subparagraphs (iv) and (v) of paragraph (a)-

(i) any person or body requested by the *head of an Investigating Directorate* in writing to do so, shall from time to time, after consultation with the *head of an Investigating Directorate*, furnish him or her with a list of the names of persons, in the employ or under the control of that person or body, who are fit and available to assist the head of that *Investigating Directorate* as contemplated in the said subparagraph (iv) or (v), as the case may be; and

(ii) such a person or body shall, at the request of, and after consultation with, the *head of the Investigating Directorate* concerned, designate a person or persons mentioned in the list concerned so to assist the head of the *Investigating Directorate*.

[S. 7 substituted by s. 4 of [Act 61 of 2000](#) (wef 12 January 2001) and by s. 3 of [Act 56 of 2008](#) (wef 6 July 2009).]

CHAPTER 3

APPOINTMENT, REMUNERATION AND CONDITIONS OF SERVICE OF MEMBERS OF THE PROSECUTING AUTHORITY (ss 8-19)

8 Prosecuting authority to be representative

The need for the *prosecuting authority* to reflect broadly the racial and gender composition of South Africa must be considered when members of the *prosecuting authority* are appointed.

9 Qualifications for appointment as National Director, Deputy National Director or Director

(1) Any person to be appointed as *National Director*, *Deputy National Director* or *Director* must-

(a) possess legal qualifications that would entitle him or her to practise in all courts in the *Republic*; and

(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.

(2) Any person to be appointed as the *National Director* must be a South African citizen.

[Date of commencement of s. 9: 1 August 1998.]

10 Appointment of National Director

The President must, in accordance with section 179 of the *Constitution*, appoint the *National Director*.

[Date of commencement of s. 10: 1 August 1998.]

11 Appointment of Deputy National Directors

(1) The President may, after consultation with the *Minister* and the *National Director*, appoint not more than four persons, as *Deputy National Directors* of Public Prosecutions.

[Sub-s. (1) substituted by s. 5 of [Act 61 of 2000](#) (wef 12 January 2001).]

(2) (a) Whenever the *National Director* is absent or unable to perform his or her functions, the *National Director* may appoint any *Deputy National Director* as acting *National Director*.

(b) Whenever the office of *National Director* is vacant, or the *National Director* is for any reason unable to make the appointment contemplated in paragraph (a), the President may, after consultation with the *Minister*, appoint any *Deputy National Director* as acting *National Director*.

(3) Whenever a *Deputy National Director* is absent or unable to perform his or her functions, or an office of *Deputy National Director* is vacant, the *National Director* may, in consultation with the *Minister*, designate any other *Deputy National Director* or any *Director* to act as such *Deputy National Director*.

12 Term of office of National Director and Deputy National Directors

(1) The *National Director* shall hold office for a non-renewable term of 10 years, but must vacate his or her office on attaining the age of 65 years.

(2) A *Deputy National Director* shall vacate his or her office at the age of 65.

(3) If the *National Director* or a *Deputy National Director* attains the age of 65 years after the first day of any month, he or she shall be deemed to attain that age on the first day of the next succeeding month.

(4)-.....

[Sub-s. (4) deleted by s. 2 (a) of [Act 12 of 2020](#) (wef 22 October 2020).]

(5) The *National Director* or a *Deputy National Director* shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).

(6) (a) The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-

- (i) for misconduct;
- (ii) on account of continued ill-health;
- (iii) on account of incapacity to carry out his or her duties of office efficiently; or
- (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

(aA) The period from the time the President suspends the *National Director* or a *Deputy National Director* to the time he or she decides whether or not to remove the *National Director* or *Deputy National Director* may not exceed 12 months.

[Para. (aA) inserted by s. 2 (b) of [Act 12 of 2020](#) (wef 22 October 2020).]

(b) The removal of the *National Director* or a *Deputy National Director*, the reason therefor and the representations of the *National Director* or *Deputy National Director* (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the *National Director* or *Deputy National Director* so removed, is recommended.

(d) The President shall restore the *National Director* or *Deputy National Director* to his or her office if Parliament so resolves.

(e) The *National Director* or a *Deputy National Director* provisionally suspended from office shall receive, for the duration of such suspension, his or her full salary.

[Para. (e) substituted by s. 2 (c) of [Act 12 of 2020](#) (wef 22 October 2020).]

(7) The President shall also remove the *National Director* or a *Deputy National Director* from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (a), is presented to the President.

(8) (a) The President may allow the *National Director* or a *Deputy National Director* at his or her request, to vacate his or her office-

- (i) on account of continued ill-health; or
- (ii) for any other reason which the President deems sufficient.

(b) The request in terms of paragraph (a) (ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.

(c) If the *National Director* or a *Deputy National Director*-

- (i) vacates his or her office in terms of paragraph (a) (i), he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without him or her being instrumental thereto; or
- (ii) vacates his or her office in terms of paragraph (a) (ii), he or she shall be deemed to have been retired in terms of section 16 (4) of the *Public Service Act*, and he or she shall be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her had he or she been compelled to retire from the public service owing to the abolition of his or her post.

(9) If the *National Director* or a *Deputy National Director*, immediately prior to his or her appointment as such, was an officer or employee in the public service, and is appointed under an Act of Parliament with his or her consent to an office to which the provisions of *this Act* or the *Public Service Act* do not apply, he or she shall, as from the date on which he or she is so appointed, cease to be the *National Director*, or a *Deputy National Director* and if at that date he or she has not reached the age at which he or she would in terms of the *Public Service Act* have had the right to retire, he or she shall be deemed to have retired on that date and shall, subject to the said provisions, be entitled to such pension as he or she would have been entitled to under the pension law applicable to him or her had he or she been compelled to retire from the public service owing to the abolition of his or her post.

[Date of commencement of s. 12: 1 August 1998.]

13 Appointment of Directors and Acting Directors

(1) The President, after consultation with the *Minister* and the *National Director*-

(a) may, subject to section 6 (2), appoint a Director of Public Prosecutions in respect of an Office of the *prosecuting authority* established by section 6 (1);

(aA)

[Para. (aA) inserted by s. 6 (a) of [Act 61 of 2000](#) (wef 12 January 2001) and deleted by s. 4 of [Act 56 of 2008](#) (wef 6 July 2009).]

(b) shall, in respect of any *Investigating Directorate* established in terms of section 7 appoint a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, as a Director of Public Prosecutions as the head of such an *Investigating Directorate*; and

[Para. (b) substituted by s. 6 (b) of [Act 61 of 2000](#) (wef 12 January 2001) and by s. 5 of [Act 10 of 2024](#) (wef 19 August 2024).]

(c) may appoint one or more Directors of Public Prosecutions (hereinafter referred to as *Special Directors*) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the *Gazette*.

(2) If a vacancy occurs in the office of a *Director* the President shall, subject to section 9, as soon as possible, appoint another person to that office.

(3) The *Minister* may from time to time, but subject to the laws governing the public service and after consultation with the *National Director*, from the ranks of the *Deputy Directors* or persons who qualify to be appointed as *Deputy Director* as contemplated in section 15 (2), appoint an acting *Director* to discharge the duties of a *Director* whenever the *Director* concerned is for any reason unable to perform the duties of his or her office, or while the appointment of a person to the

14 Term of office of Director

- (1) Subject to subsection (2), a *Director* shall vacate his or her office on attaining the age of 65 years.
- (2) A *Special Director* may be appointed for such fixed term as the President may determine at the time of such appointment, and the President may from time to time extend such term.
- (3) The provisions of section 12 (3), (4), (6), (7), (8) and (9), in respect of the vacation of office and discharge of the *National Director*, shall apply, with the necessary changes, with regard to the vacation of office and discharge of a *Director*.

15 Appointment of Deputy Directors

- (1) The *Minister* may, subject to the laws governing the public service and section 16 (4) and after consultation with the *National Director*-
 - (a) in respect of an Office referred to in section 6 (1), appoint a Deputy Director of Public Prosecutions as the head of such Office;
 - (b) in respect of each office for which a Director has been appointed, appoint Deputy Directors of Public Prosecutions; and
 - (c) in respect of the Office of the *National Director* appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the *National Director*.
[Sub-s. (1) substituted by s. 7 of Act 61 of 2000 (wef 12 January 2001).]
- (2) A person shall only be appointed as a *Deputy Director* if he or she-
 - (a) has the right to appear in a High Court as contemplated in sections 2 and 3 (4) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995); and
 - (b) possesses such experience as, in the opinion of the *Minister*, renders him or her suitable for appointment as a *Deputy Director*.
- (3) If a vacancy occurs in the office of a *Deputy Director*, the *Minister* shall, after consultation with the *National Director*, as soon as possible appoint another person to that office.

16 Appointment of prosecutors

- (1) *Prosecutors* shall be appointed on the recommendation of the *National Director* or a member of the *prosecuting authority* designated for that purpose by the *National Director*, and subject to the laws governing the public service.
- (2) *Prosecutors* may be appointed to-
 - (a) the *Office of the National Director*;
 - (b) Offices established by section 6 (1);
 - (c) *Investigating Directorates*; and
 - (d) lower courts in the *Republic*.
- (3) The *Minister* may from time to time, in consultation with the *National Director* and after consultation with the *Directors*, prescribe the appropriate legal qualifications for the appointment of a person as *prosecutor* in a lower court.
- (4) In so far as any law governing the public service pertaining to *Deputy Directors* and *prosecutors* may be inconsistent with *this Act*, the provisions of *this Act* shall apply.

17 Conditions of service of National Director, Deputy National Directors and Directors

- (1) The remuneration, allowances and other terms and conditions of service and service benefits of the *National Director*, a *Deputy National Director* and a *Director* shall be determined by the President: Provided that-
 - (a) the salary of the *National Director* shall not be less than the salary of a judge of a High Court, as determined by the President under section 2 (1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989);
 - (b) the salary of a *Deputy National Director* shall not be less than 85 per cent of the salary of the *National Director*; and
 - (c) the salary of a *Director* shall not be less than 80 per cent of the salary of the *National Director*.
- (2) If an officer or employee in the public service is appointed as the *National Director*, a *Deputy National Director* or a *Director*, the period of his or her service as *National Director*, *Deputy National Director* or *Director* shall be reckoned as part of and continuous with his or her employment in the public service, for purposes of leave, pension and any other conditions of service, and the provisions of any pension law applicable to him or her as such officer or employee, or in the event of his or her death, to his or her dependants and which are not inconsistent with this section, shall, with the necessary changes, continue so to apply.
- (3) The *National Director* is entitled to pension provisioning and pension benefits determined and calculated under all circumstances, as if he or she is employed as a Director-General in the public service.
- (4) The President may, whenever in his or her opinion it is necessary and after consultation with the *Minister* and the *National Director*, transfer and appoint any *Director* to any Office contemplated in section 6 (1) or *Investigating Directorate*, or as a *Special Director*.

[Date of commencement of s. 17: 1 August 1998.]

18 Remuneration of Deputy Directors and prosecutors

- (1) (a) Subject to the provisions of this section, any Deputy Director or prosecutor shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the Minister after consultation with the *National Director* and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the *Gazette*: Provided that such determination is not required in respect of any cost-of-living adjustment of such scale.
- (b) Cost-of-living adjustments of the scale determined by the Minister in terms of paragraph (a) shall be effected in accordance with the cost-of-living adjustments determined for legally qualified personnel in the Public Service.

[Sub-s. (1) substituted by [s. 9](#) of [Act 11 of 2012](#) (wef 2 October 2012).]

(2) Different categories of salaries and salary scales may be determined in respect of different categories of *Deputy Directors and prosecutors*. **SB 00011**

(3) A notice in terms of subsection (1) or any provision thereof may commence with effect from a date which may not be more than one year before the date of publication thereof.

(4) The first notice in terms of subsection (1) shall be issued as soon as possible after the commencement of *this Act*, and thereafter such a notice shall be issued if circumstances, including any revision and adjustment of salaries and allowances of the *National Director* and magistrates since the latest revision and adjustment of salaries of *Deputy Directors* or *prosecutors*, so justify.

(5) (a) A notice issued in terms of subsection (1) shall be tabled in Parliament within 14 days after publication thereof, if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(b) If Parliament by resolution disapproves such a notice or any provision thereof, that notice or that provision, as the case may be, shall lapse to the extent to which it is so disapproved with effect from the date on which it is so disapproved.

(c) The lapsing of such a notice or provision shall not affect-

(i) the validity of anything done under the notice or provision up to the date on which it so lapsed; or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred as at that date under or by virtue of the notice or provision.

(6) The salary payable to a *Deputy Director* or a *prosecutor* shall not be reduced except by an Act of Parliament: Provided that a disapproval contemplated in subsection (5) (b) shall, for the purposes of this subsection, not be deemed to result in a reduction of such salary.

19 Conditions of service of Deputy Directors and prosecutors, except remuneration

Subject to the provisions of *this Act*, the other conditions of service of a *Deputy Director* or a *prosecutor* shall be determined in terms of the provisions of the *Public Service Act*.

CHAPTER 3A

[Chapter 3A (ss 19A-19C) inserted by [s. 8](#) of [Act 61 of 2000](#) (wef 12 January 2001) and repealed by [s. 5](#) of [Act 56 of 2008](#) (wef 6 July 2009).]

19A to 19C inclusive

[Ss. 19A to 19C inclusive inserted by [s. 8](#) of [Act 61 of 2000](#) (wef 12 January 2001) and repealed by [s. 5](#) of [Act 56 of 2008](#) (wef 6 July 2009).]

CHAPTER 3B

APPOINTMENT, REMUNERATION AND CONDITIONS OF SERVICE OF INVESTIGATORS (ss 19D-19F)

[Chapter 3B (ss. 19D to 19F inclusive) inserted by [s. 6](#) of [Act 10 of 2024](#) (wef 19 August 2024).]

19D Appointment of investigators

(1) The *National Director* may, on the recommendation of the *head of an Investigating Directorate*, appoint fit and proper persons as investigators of that Directorate.

(2) A person appointed as an investigator-

(a) must have at least a grade 12 certificate or a relevant diploma or degree; and

(b) must have-

(i) knowledge and relevant experience of criminal or forensic financial investigation; or

(ii) any other relevant experience.

(3) The *National Director* must, in the prescribed form, issue and sign an identity-type document to each person appointed as an investigator of that Directorate, which shall serve as proof that such person is an investigator.

[S. 19D inserted by [s. 6](#) of [Act 10 of 2024](#) (wef 19 August 2024).]

19E Vetting of investigators

(1) Subject to subsection (2), no person may be appointed as an investigator, unless the person has been issued with a security clearance certificate following a vetting investigation conducted in terms of [section 2A](#) of the National Strategic Intelligence Act, 1994 ([Act 39 of 1994](#)).

(2) Any investigator may from time to time, or at such regular intervals as the *National Director* may determine, be subjected to a further vetting investigation as contemplated in subsection (1).

(3) If the certificate referred to in subsection (1) is withdrawn, the *National Director*, after consultation with the State Security Agency and subject to section 2A (8) of the National Strategic Intelligence Act, 1994, may discharge the investigator concerned from the *Investigating Directorate*, following any disciplinary process.

[S. 19E inserted by [s. 6](#) of [Act 10 of 2024](#) (wef 19 August 2024).]

19F Remuneration and conditions of service of investigators

(1) The remuneration, allowances and other service benefits of investigators are determined by the *Minister*, in consultation with the *National Director*, the Cabinet member responsible for public service and administration and the Cabinet member responsible for finance, by notice in the *Gazette*.

(2) (a) If an officer or employee in the public service is appointed as an investigator, the period of his or her service as an investigator shall be calculated as part of and continuous with his or her employment in the public service, for purposes of leave credits, pension benefits and any other condition of service, and the provisions of any pension law applicable to him or her or, in the event of his or her death, to his or her dependants, which are not inconsistent with this section, shall, with the necessary changes, continue to apply to such officer or employee.

(b) If a member of the South African Police Service, or the Directorate for Priority Crime Investigation referred to in Chapter 6A of the South African Police Service Act, 1995 ([Act 68 of 1995](#)), or the Independent Police Investigative Directorate, is appointed as an investigator under this Act, the period of his or her service as a member shall be calculated as

part of and continuous with his or her employment under the South African Police Service Act, 1995, or the Independent Police Investigative Directorate Act, 2011 ([Act 1 of 2011](#)), as the case may be, for purposes of leave, deemed pensionable service accrued and any other condition of service, and the provisions of any pension law applicable to him or her or, in the event of his or her death, to his or her dependants, which are not inconsistent with this section, shall, with the necessary changes, continue to apply to such officer or employee.

(3) The services of investigators in the *Investigating Directorate* shall, for the purposes of the application of Chapter IV of the Labour Relations Act, 1995 ([Act 66 of 1995](#)), be deemed to have been designated as an essential service in terms of section 71 of that Act.

(4) Subject to the provisions of this Act, the other conditions of service of investigators shall be determined in terms of the provisions of the Public Service Act: Provided that if a member of the South African Police Service, the Directorate for Priority Crime Investigation, or the Independent Police Investigative Directorate is appointed as an investigator under this Act, the conditions of service, including remuneration, allowances, pension and other service benefits applicable to such investigator, must be equal to, or not less favourable than, those conditions of service applicable to such investigator under the South African Police Service Act, 1995, or the Independent Police Investigative Directorate Act, as the case may be.

[S. 19F inserted by [s. 6 of Act 10 of 2024](#) (wef 19 August 2024).]

CHAPTER 4

POWERS, DUTIES AND FUNCTIONS OF MEMBERS OF THE PROSECUTING AUTHORITY (ss 20-25)

20 Power to institute and conduct criminal proceedings

- (1) The power, as contemplated in section 179 (2) and all other relevant sections of the *Constitution*, to-
- institute and conduct criminal proceedings on behalf of the State;
 - carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
 - discontinue criminal proceedings,

vests in the *prosecuting authority* and shall, for all purposes, be exercised on behalf of the *Republic*.

(2) Any *Deputy National Director* shall exercise the powers referred to in subsection (1) subject to the control and directions of the *National Director*.

(3) Subject to the provisions of the *Constitution* and *this Act*, any *Director* shall, subject to the control and directions of the *National Director*, exercise the powers referred to in subsection (1) in respect of-

- the area of jurisdiction for which he or she has been appointed; and
- any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the *National Director*.

(4) Subject to the provisions of *this Act*, any *Deputy Director* shall, subject to the control and directions of the *Director* concerned, exercise the powers referred to in subsection (1) in respect of-

- the area of jurisdiction for which he or she has been appointed; and
- such offences and in such courts, as he or she has been authorised in writing by the *National Director* or a person designated by the *National Director*.

(5) Any *prosecutor* shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the *National Director*, or by a person designated by the *National Director*.

(6) A written authorisation referred to in subsection (5) shall set out-

- the area of jurisdiction;
- the offences; and
- the court or courts,

in respect of which such powers may be exercised.

(7) No member of the *prosecuting authority* who has been suspended from his or her office under *this Act* or any other law shall be competent to exercise any of the powers referred to in subsection (1) for the duration of such suspension.

21 Prosecution policy and issuing of policy directives

(1) The *National Director* shall, in accordance with section 179 (5) (a) and (b) and any other relevant section of the *Constitution*-

- with the concurrence of the *Minister* and after consulting the *Directors*, determine prosecution policy; and
- issue policy directives,

which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in *this Act* or any other law.

(2) The prosecution policy or amendments to such policy must be included in the report referred to in section 35 (2) (a): Provided that the first prosecution policy issued under *this Act* shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first *National Director*.

(3) The prosecution policy must determine the circumstances under which prosecutions shall be instituted in the High Court as a court of first instance in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 ([Act 105 of 1997](#)).

[Sub-s. (3) added by [s. 7 of Act 38 of 2007](#) (wef 31 December 2007).]

(4) The *National Director* must issue policy directives pursuant to the policy contemplated in subsection (3), regarding the institution of prosecutions in respect of offences referred to in Schedule 2 to the Criminal Law Amendment Act, 1997.

[Sub-s. (4) added by [s. 7 of Act 38 of 2007](#) (wef 31 December 2007).]

(5) The prosecution policy and the policy directives contemplated in subsections (3) and (4) above, must be issued within three months of the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007.

[Sub-s. (5) added by [s. 7 of Act 38 of 2007](#) (wef 31 December 2007).]

22 Powers, duties and functions of National Director

(1) The *National Director*, as the head of the *prosecuting authority*, shall have authority over the exercising of all the

powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the *prosecuting authority* by the *Constitution, this Act* or any other law.

SB 00013

(2) In accordance with section 179 of the *Constitution*, the *National Director*-

- (a) must determine prosecution policy and issue policy directives as contemplated in section 21;
- (b) may intervene in any prosecution process when policy directives are not complied with; and
- (c) may review a decision to prosecute or not to prosecute, after consulting the relevant *Director* and after taking representations, within the period specified by the *National Director*, of the accused person, the complainant and any other person or party whom the *National Director* considers to be relevant.

(3) Where the *National Director* or a *Deputy National Director* authorised thereto in writing by the *National Director* deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one *Director* be investigated and tried within the area of jurisdiction of another *Director*, he or she may, subject to the provisions of [section 111](#) of the Criminal Procedure Act, 1977 ([Act 51 of 1977](#)), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other *Director*.

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to the *National Director* by section 179 or any other provision of the *Constitution, this Act* or any other law, the *National Director*, as the head of the *prosecuting authority*-

- (a) with a view to exercising his or her powers in terms of subsection (2), may-
 - (i) conduct any investigation he or she may deem necessary in respect of a prosecution or a prosecution process, or directives, directions or guidelines given or issued by a *Director* in terms of *this Act*, or a case or matter relating to such a prosecution or a prosecution process, or directives, directions or guidelines;
 - (ii) direct the submission of and receive reports or interim reports from a *Director* in respect of a case, a matter, a prosecution or a prosecution process or directions or guidelines given or issued by a *Director* in terms of *this Act*; and
 - (iii) advise the *Minister* on all matters relating to the administration of criminal justice;
- (b) shall maintain close liaison with the *Deputy National Directors*, the *Directors*, the *prosecutors*, the legal professions and legal institutions in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in respect of the *prosecuting authority*;
- (c) may consider such recommendations, suggestions and requests concerning the *prosecuting authority* as he or she may receive from any source;
- (d) shall assist the *Directors* and *prosecutors* in achieving the effective and fair administration of criminal justice;
- (e) shall assist the *Deputy National Directors*, *Directors* and *prosecutors* in representing their professional interests;
- (f) shall bring the United Nations Guidelines on the Role of Prosecutors to the attention of the *Directors* and *prosecutors* and promote their respect for and compliance with the above-mentioned principles within the framework of national legislation;
- (g) shall prepare a comprehensive report in respect of the operations of the *prosecuting authority*, which shall include reporting on-
 - (i) the activities of the *National Director*, *Deputy National Directors*, *Directors* and the *prosecuting authority* as a whole;
 - (ii) the personnel position of the *prosecuting authority*;
 - (iii) the financial implications in respect of the administration and operation of the *prosecuting authority*;
 - (iv) any recommendations or suggestions in respect of the *prosecuting authority*;
 - (v) information relating to training programmes for *prosecutors*; and
 - (vi) any other information which the *National Director* deems necessary;
- (h) may have the administrative work connected with the exercise of his or her powers, the performance of his or her functions or the carrying out of his or her duties, carried out by persons referred to in section 37 of *this Act*; and
- (i) may make recommendations to the *Minister* with regard to the *prosecuting authority* or the administration of justice as a whole.

(5) The *National Director* shall, after consultation with the *Deputy National Directors* and the *Directors*, advise the *Minister* on creating a structure, by regulation, in terms of which any person may report to such structure any complaint or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of a member of the *prosecuting authority*, and determining the powers and functions of such structure.

(6) (a) The *National Director* shall, in consultation with the *Minister* and after consultation with the *Deputy National Directors* and the *Directors*, frame a code of conduct which shall be complied with by members of the *prosecuting authority*.

(b) The code of conduct may from time to time be amended, and must be published in the *Gazette* for general information.

(7) The *National Director* shall develop, in consultation with the *Minister* or a person authorised thereto by the *Minister*, and the *Directors*, training programmes for *prosecutors* and investigators.

[Sub-s. (7) substituted by [s. 7](#) of [Act 10 of 2024](#) (wef 19 August 2024).]

(8) The *National Director* or a person designated by him or her in writing may-

- (a) if no other member of the *prosecuting authority* is available, authorise in writing any suitable person to act as a prosecutor for the purpose of postponing any criminal case or cases;
- (b) authorise any competent person in the employ of the public service or any local authority to conduct prosecutions, subject to the control and directions of the *National Director* or a person designated by him or her, in respect of such statutory offences, including municipal laws, as the *National Director*, in consultation with the *Minister*, may determine.

(9) The *National Director* or any *Deputy National Director* designated by the *National Director* shall have the power to institute and conduct a prosecution in any court in the *Republic* in person.

[NB: A s. 22A has been inserted by [s. 8](#) of the National Prosecuting Authority Amendment [Act 10 of 2024](#), a provision which will be put into operation by proclamation. See PENDLEX.]

23 Powers, duties and functions of Deputy National Directors

(1) Any *Deputy National Director* may exercise or perform any of the powers, duties and functions of the *National Director* which he or she has been authorised by the *National Director* to exercise or perform.

SB 00014

(2)

[Sub-s. (2) added by s. 9 of Act 61 of 2000 (wef 12 January 2001) and deleted by s. 6 of Act 56 of 2008 (wef 6 July 2009).]

24 Powers, duties and functions of Directors and Deputy Directors

(1) Subject to the provisions of section 179 and any other relevant section of the *Constitution*, *this Act* or any other law, a *Director* referred to in section 13 (1) (a) has, in respect of the area for which he or she has been appointed, the power to-

- (a) institute and conduct criminal proceedings and to carry out functions incidental thereto as contemplated in section 20 (3);
- (b) supervise, direct and co-ordinate the work and activities of all *Deputy Directors* and *prosecutors* in the Office of which he or she is the head;
- (c) supervise, direct and co-ordinate specific investigations; and
- (d) carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of *this Act*.

(2) In addition to the powers, duties and functions conferred or imposed on or assigned to an *Investigating Director*, such an *Investigating Director* or any person authorized thereto by him or her in writing may, for the purposes of criminal prosecution-

- (a) institute an action in any court in the *Republic*; and
- (b) prosecute an appeal in any court in the *Republic* emanating from criminal proceedings instituted by the *Investigating Director* or the person authorized thereto by him or her:

Provided that an *Investigating Director* or the person authorized thereto by him or her shall exercise the powers referred to in this subsection only after consultation with the *Director* of the area of jurisdiction concerned.

(3) A *Special Director* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the *National Director*: Provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20 (1), they shall be exercised, carried out and performed in consultation with the *Director* of the area of jurisdiction concerned.

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to him or her by section 179 of the *Constitution*, *this Act* or any other law, a *Director* referred to in section 13 (1)-

- (a) shall, at the request of the *National Director*, submit reports to the *National Director* or assist the *National Director* in connection with a matter referred to in section 22 (4) (a) (ii);
- (b) shall submit annual reports to the *National Director* pertaining to matters referred to in section 22 (4) (g);
- (c) may, in the case of a *Director* referred to in section 13 (1) (a), give written directions or furnish guidelines to-
 - (i) the Provincial Commissioner of the police service referred to in section 207 (3) of the *Constitution* within his or her area of jurisdiction; or
 - (ii) any other person who within his or her area of jurisdiction-
 - (aa) conducts investigations in relation to offences; or
 - (bb) other than a private prosecutor, institutes or carries on prosecutions for offences; and
- (d) shall, subject to the directions of the *National Director*, be responsible for the day to day management of the *Deputy Directors* and *prosecutors* under his or her control.

(5) Without limiting the generality of subsection (4) (c) and subject to the directions of the *National Director*, directions or guidelines under that subsection may be given or furnished in relation to particular cases and may determine that certain offences or classes of offences must be referred to the *Director* concerned for decisions on the institution or conducting of prosecutions in respect of such offences or classes of offences.

(6) The *Director* shall give to the *National Director* a copy of each direction given or guideline furnished under subsection (4) (c).

(7) Where a *Director*-

- (a) is considering the institution or conducting of a prosecution for an offence; and
- (b) is of the opinion that a matter connected with or arising out of the offence requires further investigation,

the *Director* may request the Provincial Commissioner of the police service referred to in subsection (4) (c) (i) for assistance in the investigation of that matter and where the *Director* so requests, the Provincial Commissioner concerned shall, so far as practicable, comply with the request.

(8) The powers conferred upon a *Director* under section 20 (1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings.

(9) (a) Subject to section 20 (4) and the control and directions of a *Director*, a *Deputy Director* at the Office of a *Director* referred to in section 13 (1), has all the powers, duties and functions of a *Director*.

(b) A power, duty or function which is exercised, carried out or performed by a *Deputy Director* is construed, for the purposes of *this Act*, to have been exercised, carried out or performed by the *Director* concerned.

25 Powers, duties and functions of prosecutors

(1) A *prosecutor* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her-

- (a) under *this Act* and any other law of the *Republic*; and
- (b) by the head of the Office or *Investigating Directorate* where he or she is employed or a person designated by such head; or
- (c) if he or she is employed as a *prosecutor* in a lower court, by the *Director* in whose area of jurisdiction such court is situated or a person designated by such *Director*.

(2) Notwithstanding the provisions of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), or any other law, any *prosecutor* who-

- (a) has obtained such legal qualifications as the *Minister* after consultation with the *National Director* may prescribe; and
- (b) has at least three years' experience as a *prosecutor* of a magistrates' court of a regional division,
- shall, subject to section 20 (6), have the right to appear in any court in the *Republic*.

CHAPTER 5 POWERS, DUTIES AND FUNCTIONS RELATING TO INVESTIGATING DIRECTORATES (ss 26-31)

26 Application

- (1) This Chapter only relates to *Investigating Directorates*.
- (2) Nothing in this Chapter or section 7, derogates from any power or duty which relates to the prevention, combating or investigation of any offences and which is bestowed upon the South African Police Service in terms of any law.
- [Sub-s. (2) substituted by s. 7 of [Act 56 of 2008](#) (wef 6 July 2009).]
[S. 26 substituted by s. 10 of [Act 61 of 2000](#) (wef 12 January 2001).]

27 Reporting of matters to Investigating Director

If any person has reasonable grounds to suspect that a *specified offence* has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may report the matter in question to the *head of an Investigating Directorate* by means of an affidavit or affirmed declaration specifying-

- (a) the nature of the suspicion;
- (b) the grounds on which the suspicion is based; and
- (c) all other relevant information known to the declarant.

[S. 27 substituted by s. 11 of [Act 61 of 2000](#) (wef 12 January 2001).]

28 Inquiries by Investigating Director

(1) (a) If the *Investigating Director* has reason to suspect that a *specified offence* has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an *investigation* on the matter in question, whether or not it has been reported to him or her in terms of section 27.

(b) If the *National Director* refers a matter in relation to the alleged commission or attempted commission of a *specified offence* to the *Investigating Director*, the *Investigating Director* shall conduct an investigation, or a preparatory investigation as referred to in subsection (13), on that matter.

(c) If the *Investigating Director*, at any time during the conducting of an investigation on a matter referred to in paragraph (a) or (b), considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the *investigation* so as to include any offence, whether or not it is a *specified offence*, which he or she suspects to be connected with the subject of the *investigation*.

(d) If the *Investigating Director*, at any time during the conducting of an *investigation*, is of the opinion that evidence has been disclosed of the commission of an offence which is not being investigated by the *Investigating Directorate* concerned, he or she must without delay inform the National Commissioner of the South African Police Service of the particulars of such matter.

[Sub-s. (1) substituted by s. 12 (a) of [Act 61 of 2000](#) (wef 12 January 2001).]

(2) (a) The *Investigating Director* may, if he or she decides to conduct an *investigation*, at any time prior to or during the conducting of the *investigation* designate any person referred to in section 7 (4) (a) or, in the case of an investigation requested by the Head of the Directorate for Priority Crime Investigation in terms of [section 17D \(3\)](#) of the South African Police Service Act, 1995 ([Act 68 of 1995](#)), any member of the *prosecuting authority* or a member of that Directorate, to conduct the *investigation*, or any part thereof, on his or her behalf and to report to him or her.

[Para. (a) substituted by s. 8 of [Act 56 of 2008](#) (wef 6 July 2009).]

(b) A person so designated shall for the purpose of the *investigation* concerned have the same powers as those which the *Investigating Director* has in terms of this section and [section 29](#) of this Act, and the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 ([Act 66 of 1975](#)), in respect of commissions of inquiry shall apply with the necessary changes in respect of such a person.

[Sub-s. (2) substituted by s. 12 (a) of [Act 61 of 2000](#) (wef 12 January 2001).]

(3) All proceedings contemplated in subsections (6), (8) and (9) shall take place *in camera*.

[Sub-s. (3) substituted by s. 12 (a) of [Act 61 of 2000](#) (wef 12 January 2001).]

(4) The procedure to be followed in conducting an *investigation* shall be determined by the *Investigating Director* at his or her discretion, having regard to the circumstances of each case.

[Sub-s. (4) substituted by s. 12 (a) of [Act 61 of 2000](#) (wef 12 January 2001).]

(5) The proceedings contemplated in subsections (6), (8) and (9) shall be recorded in such manner as the *Investigating Director* may deem fit.

[Sub-s. (5) substituted by s. 12 (a) of [Act 61 of 2000](#) (wef 12 January 2001).]

(6) For the purposes of an *investigation*-

- (a) the *Investigating Director* may summon any person who is believed to be able to furnish any information on the subject of the *investigation* or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the *Investigating Director* at a time and place specified in the summons, to be questioned or to produce that book, document or other object;
- (b) the *Investigating Director* or a person designated by him or her may question that person, under oath or affirmation administered by the *Investigating Director*, and examine or retain for further examination or for safe custody such a book, document or other object: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the *Investigating Director*, at his or her request be allowed, at his or her own expense and under the supervision of the *Investigating Director*, to make copies thereof or to take extracts therefrom at any reasonable time.

[Sub-s. (6) substituted by s. 12 (a) of [Act 61 of 2000](#) (wef 12 January 2001).]

(7) A summons referred to in subsection (6) shall-

- (a) be in the prescribed form;
- (b) contain particulars of the matter in connection with which the person concerned is required to appear before the

Investigating Director;

- (c) be signed by the *Investigating Director* or a person authorized by him or her; and
- (d) be served in the prescribed manner.

(8)(a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (10) (b) or (c), or in [section 319 \(3\)](#) of the Criminal Procedure Act, 1955 ([Act 56 of 1955](#)).

(9) A person appearing before the *Investigating Director* by virtue of subsection (6)-

- (a) may be assisted at his or her examination by an advocate or an attorney;
- (b) shall be entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate's court.

(10) Any person who has been summoned to appear before the *Investigating Director* and who-

- (a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the *Investigating Director* from further attendance;
- (b) at his or her appearance before the *Investigating Director*-
 - (i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce;
 - (ii) refuses to be sworn or to make an affirmation after he or she has been asked by the *Investigating Director* to do so;
- (c) having been sworn or having made an affirmation-
 - (i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;
 - (ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true,

shall be guilty of an offence.

(11) and (12)

[Sub-ss. (11) and (12) deleted by s. 12 (b) of [Act 61 of 2000](#) (wef 12 January 2001).]

(13) If the *Investigating Director* considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1) (a), the *Investigating Director* may hold a preparatory investigation.

(14) The provisions of subsections (2) to (10), inclusive, and of sections 27 and 29 shall, with the necessary changes, apply to a preparatory investigation referred to in subsection (13).

[Sub-s. (14) substituted by s. 12 (c) of [Act 61 of 2000](#) (wef 12 January 2001).]

29 Entering upon premises by Investigating Director

(1) The *Investigating Director* or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an *investigation* at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that *investigation* is or is suspected to be, and may-

- (a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;
- (b) examine any object found on or in the premises which has a bearing or might have a bearing on the *investigation* in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;
- (c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the *investigation* in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;
- (d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the *investigation* in question, or if he or she wishes to retain it for further examination or for safe custody: Provided that any person from whom a book or document has been taken under this section may, as long as it is in the possession of the *Investigating Director*, at his or her request be allowed, at his or her own expense and under the supervision of the *Investigating Director*, to make copies thereof or to take extracts therefrom at any reasonable time.

[Sub-s. (1) substituted by s. 13 (a) of [Act 61 of 2000](#) (wef 12 January 2001).]

(2) Any entry upon or search of any premises in terms of this section shall be conducted with strict regard to decency and order, including-

- (a) a person's right to, respect for and the protection of his or her dignity;
- (b) the right of a person to freedom and security; and
- (c) the right of a person to his or her personal privacy.

(3) No evidence regarding any questions and answers contemplated in subsection (1) shall be admissible in any subsequent criminal proceedings against a person from whom information in terms of that subsection is acquired if the answers incriminate him or her, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (12).

(4) Subject to subsection (10), the premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.

(5) A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating-

- (a) the nature of the *investigation* in terms of section 28;
- (b) that there exists a reasonable suspicion that an offence, which might be a *specified offence*, has been or is being

committed, or that an attempt was or had been made to commit such an offence; and
 (c) the need, in regard to the *investigation*, for a search and seizure in terms of this section, that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

[Sub-s. (5) substituted by s. 13 (b) of [Act 61 of 2000](#) (wef 12 January 2001).]

(6) A warrant issued in terms of this section may be issued on any day and shall be of force until-

- (a) it has been executed;
- (b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or
- (c) the expiry of three months from the day of its issue,

whichever may occur first.

(7) (a) Any person who acts on authority of a warrant issued in terms of this section may use such force as may be reasonably necessary to overcome any resistance against the entry and search of the premises, including the breaking of any door or window of such premises: Provided that such person shall first audibly demand admission to the premises and state the purpose for which he or she seeks to enter such premises.

(b) The proviso to paragraph (a) shall not apply where the person concerned is on reasonable grounds of the opinion that any object, book or document which is the subject of the search may be destroyed, tampered with or disposed of if the provisions of the said proviso are first complied with.

(8) A warrant issued in terms of this section shall be executed by day unless the person who issues the warrant authorises the execution thereof by night at times which shall be reasonable in the circumstances.

(9) Any person executing a warrant in terms of this section shall immediately before commencing with the execution-

- (a) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises;
- (b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

(10) (a) The *Investigating Director* or any person referred to in section 7 (4) (a) may without a warrant enter upon any premises and perform the acts referred to in subsection (1)-

- (i) if the person who is competent to do so consents to such entry, search, seizure and removal; or
- (ii) if he or she upon reasonable grounds believes that-
 - (aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and
 - (bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

(b) Any entry and search in terms of paragraph (a) shall be executed by day, unless the execution thereof by night is justifiable and necessary, and the person exercising the powers referred to in the said paragraph shall identify himself or herself at the request of the owner or the person in control of the premises.

(11) If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the *investigation* and that such information is necessary for the *investigation*, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

[Sub-s. (11) substituted by s. 13 (c) of [Act 61 of 2000](#) (wef 12 January 2001).]

(12) Any person who-

- (a) obstructs or hinders the *Investigating Director* or any other person in the performance of his or her functions in terms of this section;
- (b) when he or she is asked in terms of subsection (1) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading,

shall be guilty of an offence.

29A Powers and functions of investigators

(1) An investigator may, subject to the control and direction of a *head of an Investigating Directorate*, exercise such powers and must perform such duties as are conferred or imposed upon him or her by or under this Act, or any other law and must obey all lawful directions which he or she may receive from a person having the authority to give such directions.

(2) An investigator has the same powers as a peace officer or a police official as provided for in the Criminal Procedure Act, 1977 ([Act 51 of 1977](#)), including-

- (a) the investigation of offences;
- (b) the ascertainment of bodily features of an accused person;
- (c) the entry and search of premises;
- (d) the seizure and disposal of articles;
- (e) arrests;
- (f) the execution of warrants;
- (g) the attendance of an accused person in court; and
- (h) the service or execution of any subpoena or summons.

(3) An investigator has the same powers as if he or she had been appointed deputy sheriff or deputy messenger or other similar officer of the court.

(4) (a) The *Minister* may, in consultation with the Cabinet member responsible for police, by notice in the *Gazette*, confer upon investigators any power-

- (i) which is conferred by applicable law upon specified persons or a category of persons; and

- (ii) which relates to the prevention, investigation or combating of any offence or other criminal or unlawful activity.
- (b) Any notice referred to in paragraph (a)-
- (i) may be amended or rescinded by the *Minister* in consultation with the Cabinet member responsible for police; and
- (ii) must be submitted to Parliament before publication in the *Gazette*.

[S. 29A inserted by s. 9 of [Act 10 of 2024](#) (wef 19 August 2024).]

30 and 31

[Ss. 30 and 31 substituted by s. 14 of [Act 61 of 2000](#) (wef 12 January 2001) and repealed by s. 9 of [Act 56 of 2008](#) (wef 6 July 2009).]

CHAPTER 6 GENERAL PROVISIONS (ss 32-42)

32 Impartiality of, and oath or affirmation by members of prosecuting authority

(1) (a) A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law.

(b) Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

(2) (a) A *National Director* and any person referred to in section 4 must, before commencing to exercise, carry out or perform his or her powers, duties or functions in terms of *this Act*, take an oath or make an affirmation, which shall be subscribed by him or her, in the form set out below, namely-

'I
(full name)

do hereby swear/solemnly affirm that I will in my capacity as *National Director/Deputy National Director of Public Prosecutions/Director/Deputy Director of Public Prosecutions/prosecutor*, uphold and protect the *Constitution* and the fundamental rights entrenched therein and enforce the Law of the *Republic* without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the *Constitution* and the Law. (In the case of an oath: So help me God.)'

(b) Such an oath or affirmation shall-

- (i) in the case of the *National Director*, or a *Deputy National Director*, *Director* or *Deputy Director*, be taken or made before the most senior available judge of the High Court within which area of jurisdiction the Office of the *National Director*, *Director* or *Deputy Director*, as the case may be, is situated; or
- (ii) in the case of a *prosecutor*, be taken or made before the *Director* in whose Office the *prosecutor* concerned has been appointed or before the most senior judge or magistrate at the court where the *prosecutor* is stationed,

who shall at the bottom thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

33 Minister's final responsibility over prosecuting authority

(1) The *Minister* shall, for purposes of section 179 of the *Constitution*, *this Act* or any other law concerning the *prosecuting authority*, exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act*.

(2) To enable the *Minister* to exercise his or her final responsibility over the *prosecuting authority*, as contemplated in section 179 of the *Constitution*, the *National Director* shall, at the request of the *Minister*-

- (a) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;
- (b) provide the *Minister* with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;
- (c) furnish the *Minister* with information with regard to the prosecution policy referred to in section 21 (1) (a);
- (d) furnish the *Minister* with information with regard to the policy directives referred to in section 21 (1) (b);
- (e) submit the reports contemplated in section 34 to the *Minister*; and
- (f) arrange meetings between the *Minister* and members of the *prosecuting authority*.

34 Reports by Directors

(1) A *Director* must annually, not later than the first day of June, submit to the *National Director* a report on all his or her activities during the previous financial year.

[Sub-s. (1) substituted by s. 16 of [Act 15 of 2023](#) (wef 3 April 2024).]

(2) The *National Director* may at any time request a *Director* to submit a report with regard to a specific activity relating to his or her powers, duties or functions.

(3) A *Director* may, at any time, submit a report to the *National Director* with regard to any matter relating to the *prosecuting authority*, if he or she deems it necessary.

35 Accountability to Parliament

(1) The *prosecuting authority* shall be accountable to Parliament in respect of its powers, functions and duties under *this Act*, including decisions regarding the institution of prosecutions.

(2) (a) The *National Director* must submit annually, not later than the first day of September, to the *Minister* a report referred to in section 22 (4) (g), which report must be tabled in Parliament by the *Minister* within 14 days, if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

[Para. (a) substituted by s. 17 of [Act 15 of 2023](#) (wef 3 April 2024).]

(b) The *National Director* may, at any time, submit a report to the *Minister* or Parliament with regard to any matter relating to the *prosecuting authority*, if he or she deems it necessary.

36 Expenditure of prosecuting authority

(1) The expenses incurred in connection with-

- (a) the exercise of the powers, the carrying out of the duties and the performance of the functions of the *prosecuting authority*; and
- (b) the remuneration and other conditions of service of members of the *prosecuting authority*,

shall be defrayed out of monies appropriated by Parliament for that purpose.

(2) The Department of Justice must, in consultation with the *National Director*, prepare the necessary estimate of revenue and expenditure of the *prosecuting authority*.

(3) The Director-General: Justice shall, subject to the Public Finance Management Act, 1999 ([Act 1 of 1999](#))-

- (a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the *prosecuting authority*; and
- (b) cause the necessary accounting and other related records to be kept.

[Sub-s. (3) substituted by [s. 15](#) of [Act 61 of 2000](#) (wef 12 January 2001) and by s. 10 (a) of [Act 56 of 2008](#) (wef 6 July 2009).]

(3A)

[Sub-s. (3A) inserted by [s. 15](#) of [Act 61 of 2000](#) (wef 12 January 2001) and deleted by s. 10 (b) of [Act 56 of 2008](#) (wef 6 July 2009).]

(4) The records referred to in subsection (3) (b) shall be audited by the Auditor-General.

[Sub-s. (4) substituted by [s. 15](#) of [Act 61 of 2000](#) (wef 12 January 2001) and by s. 10 (c) of [Act 56 of 2008](#) (wef 6 July 2009).]

(5) The Director-General: Justice may, on the recommendation of the *National Director* and with the concurrence of the Minister of Finance, order that the expenses or any part of the expenses incurred by any person in the course of or in connection with an *investigation* contemplated in section 28 (1) be paid from State funds to that person.

[Sub-s. (5) added by [s. 15](#) of [Act 61 of 2000](#) (wef 12 January 2001) and substituted by s. 10 (d) of [Act 56 of 2008](#) (wef 6 July 2009).]

37 Administrative staff

The administrative staff of-

- (a) the *Office of the National Director*;
- (b) the Offices of the *Directors*, including *Investigating Directorates*; and
- (c) the Offices of *prosecutors* as determined by the *National Director*, in consultation with the *Director* concerned,

shall be persons appointed or employed under the *Public Service Act*.

38 Engagement of persons to perform services in specific cases

(1) The *National Director* may in consultation with the *Minister*, and a *Deputy National Director* or a *Director* may, in consultation with the *Minister* and the *National Director*, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.

(2) The terms and conditions of service of a person engaged by the *National Director*, a *Deputy National Director* or a *Director* under subsection (1) shall be as determined from time to time by the *Minister* in concurrence with the Minister of Finance.

(3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State-

- (a) the *National Director*; or
- (b) a *Deputy National Director* or a *Director*, in consultation with the *National Director*,

may, on behalf of the State, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the *Minister* as contemplated in that subsection.

[Sub-s. (3) added by [s. 16](#) of [Act 61 of 2000](#) (wef 12 January 2001).]

(4) For purposes of this section, '**services**' include the conducting of a prosecution under the control and direction of the *National Director*, a *Deputy National Director* or a *Director*, as the case may be.

[Sub-s. (4) added by [s. 16](#) of [Act 61 of 2000](#) (wef 12 January 2001).]

[Date of commencement of s. 38: 23 April 1999.]

39 Disclosure of interest and non-performance of other paid work

(1) The *National Director*, a *Deputy National Director* and a *Director* shall give written notice to the *Minister* of all direct or indirect pecuniary interests that they have or acquire in any business whether in the *Republic* or elsewhere or in any body corporate carrying on any such business.

(2) The *National Director*, a *Deputy National Director* and a *Director* shall not, without the consent of the President, perform any paid work outside his or her duties of office.

40 Regulations

(1) The *Minister* may make regulations prescribing-

- (a) matters required or permitted by *this Act* to be prescribed;
- (b) the steps to be taken to ensure compliance with the code of conduct referred to in section 22 (6); or
- (c) matters necessary or convenient to be prescribed for carrying out or giving effect to *this Act*.

[Sub-s. (1) amended by s. 11 (a) of [Act 56 of 2008](#) (wef 6 July 2009).]

(2)

[Sub-s. (2) amended by [s. 17](#) of [Act 42 of 2001](#) (wef 7 December 2001) and deleted by s. 11 (b) of [Act 56 of 2008](#) (wef 6 July 2009).]

(3) Any regulation made in terms of this section-

- (a) which may result in the expenditure of State monies shall be made in consultation with the Minister of Finance;
- (b) may provide that a contravention thereof shall be an offence; and
- (c) must be submitted to Parliament before publication in the *Gazette*.

[S. 40 substituted by [s. 17](#) of [Act 61 of 2000](#) (wef 12 January 2001).]

40A

[S. 40A inserted by [s. 18](#) of [Act 61 of 2000](#) (wef 12 January 2001) and repealed by [s. 58](#) of [Act 19 of 2020](#) (wef 1 December 2021).]

41 Offences and penalties

(1) Any person who contravenes the provisions of section 32 (1) (b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

(2) Any person convicted of an offence referred to in section 28 (10) or 29 (12) shall be liable to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.

(3) Any person who is convicted of an offence in terms of a regulation made under section 40, shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(4)

[Sub-s. (4) deleted by [s. 58 of Act 19 of 2020](#) (wef 1 December 2021).]

(5) Any person who, in connection with any activity carried on by him or her, in a fraudulent manner takes, assumes, uses or publishes any name, description, title or symbol indicating or conveying or purporting to indicate or convey or which is calculated or is likely to lead other persons to believe or to infer that such activity is carried on under or by virtue of the provisions of *this Act* or under the patronage of the *prosecuting authority*, or is in any manner associated or connected with the *prosecuting authority*, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment.

(6) Notwithstanding any other law, no person shall without the permission of the *National Director* or a person authorised in writing by the *National Director* disclose to any other person-

- (a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;
- (b) the contents of any book or document or any other item in the possession of the *prosecuting authority*; or
- (c) the record of any evidence given at an investigation as contemplated in section 28 (1),

except-

- (i) for the purpose of performing his or her functions in terms of *this Act* or any other law; or
- (ii) when required to do so by order of a court of law.

(7) Any person who contravenes subsection (6) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.

[S. 41 substituted by [s. 19 of Act 61 of 2000](#) (wef 12 January 2001).]

42 Limitation of liability

No person shall be liable in respect of anything done in good faith under *this Act*.

CHAPTER 7 TRANSITIONAL ARRANGEMENTS (ss 43-46)

43 Transitional arrangements

(1) (a) Anyone holding office as an attorney-general in terms of the Attorney-General Act, 1992 (Act 92 of 1992), shall, subject to paragraph (b), be deemed to have been appointed as a *Director* in terms of *this Act*, and shall continue to function in terms of the laws applicable to his or her Office.

(b) The President shall, as soon as reasonably possible after the commencement of this section, appoint each attorney-general referred to in paragraph (a) as a *Director* at the Office that, and for such term as the President, after consultation with the attorney-general concerned, may determine, but such term shall not extend beyond the date on which the attorney-general concerned will attain the age of 65 years.

(c) The provisions of section 12 (4) shall apply with the necessary changes in respect of a *Director* referred to in paragraph (b): Provided that the reference in section 12 (4) to the age of 65 years shall be construed as a reference to the date on which the *Director's* term of office as contemplated in paragraph (b) expires.

(d) If the term of office of a *Director* appointed under paragraph (b) expires before he or she has attained the age of 65 years, he or she shall be entitled to pension benefits determined and calculated under all circumstances as if he or she was employed as a Director-General in the public service, who served as a Director-General for five years.

(2) Anyone holding office as an attorney-general in terms of a law other than the Attorney-General Act, 1992, or holding an appointment as acting attorney-general, shall be deemed to have been appointed as an acting *Director* under *this Act* at the office where he or she holds such office or appointment, and shall continue to function in that capacity until otherwise determined under *this Act* or any other law.

(3) (a) Any person who immediately before the commencement of this section was employed by the State as a deputy attorney-general shall continue in such employment and shall be deemed to have been appointed as a *Deputy Director* in terms of section 15 (1).

(b) Any person who immediately before the commencement of this section was employed by the State as a state advocate or prosecutor and who has been delegated in terms of any law to institute criminal proceedings and to conduct any prosecution in criminal proceedings on behalf of the State-

- (i) shall continue in such employment as a *prosecutor*; and
- (ii) shall be deemed to have been authorised to exercise the powers referred to in section 20 (1): Provided that no *prosecutor* shall, by virtue of this section, have more powers than he or she would have had under the delegation concerned.

(4) Criminal proceedings which have been instituted before the commencement of *this Act*, must be disposed of as if the decision to institute and prosecute in such criminal proceedings had been taken by a member of the *prosecuting authority* appointed in terms of *this Act*.

(5) Any attorney-general, deputy attorney-general, state advocate or prosecutor who continues in office in terms of this section must, within three months after the commencement of *this Act*, take the oath or make the affirmation referred to in section 32 (2).

(6) As from the date of the commencement of this section, all offices of attorneys-general at the High Courts contemplated in item 16 (4) (a) of Schedule 6 to the *Constitution*, shall become offices of the *prosecuting authority* as referred to in section 6 (1) of *this Act*.

(7)

(8) Subject to the *Constitution* and *this Act*, all measures which immediately before the commencement of this section were in operation and applied to attorneys-general, deputy attorneys-general, state advocates and prosecutors, including measures regarding remuneration, pension and pension benefits, leave gratuity and any other term and condition of service, shall continue in operation and to apply to the said attorneys-general, deputy attorneys-general, state advocates and prosecutors until amended or repealed by *this Act*: Provided that no such measure shall, except in accordance with an applicable law or agreement, be changed in a manner which affects such attorneys-general, deputy attorneys-general, state advocates and prosecutors to their detriment.

(9) Notwithstanding the commencement of *this Act*, all measures regulating the institution and conducting of prosecutions in any court shall remain in force until repealed or amended under *this Act* or by any competent authority.

43A Transitional arrangements relating to Directorate of Special Operations

(1) In this section-

- (a) any word or expression in respect of which a specific meaning has been assigned by the South African Police Service Act, 1995 ([Act 68 of 1995](#)), has the same meaning; and
- (b) 'fixed date'¹³ means a date to be determined by the President by proclamation.

(2) Prior to a date determined by the *National Director*, any person employed by the *Directorate of Special Operations* must inform the *National Director* whether they consent to be transferred to the South African Police Service.

(3) As from the fixed date-

- (a) any person, who immediately before the fixed date held the office of *special investigator* and who has consented to the transfer, is transferred to the South African Police Service and becomes a member of the South African Police Service; and
- (b) such administrative and support personnel employed by the *Directorate of Special Operations* as may be agreed upon between the *National Director* and the National Commissioner, may be transferred to the South African Police Service.

(4) (a) An employee contemplated in subsection (3) may be transferred to the South African Police Service only with his or her consent.

(b) The remuneration and other terms and conditions of employment of employees transferred in terms of subsection (3) may not be less favourable than those that applied immediately before their transfer.

(c) The transfer contemplated in subsection (3) does not interrupt the employees' continuity of employment and the employees remain entitled to all rights and benefits, including pension benefits and privileges to which they were entitled to immediately before transfer.

(5) (a) An employee referred to in subsection (3) who does not consent to be transferred to the South African Police Service must, prior to the date referred to in subsection (2), notify the *National Director* thereof in writing.

(b) In respect of such an employee, the *National Director* may-

- (i) after consultation with the *Minister* and the Cabinet members responsible for the public service and for finance, offer to transfer the employee to a reasonable alternative post or position in any government department or state institution in accordance with subsection (4) (b) and (c) and section 14 of the Public Service Act, 1994 ([Proclamation 103 of 1994](#)), shall, unless the context indicates otherwise, apply to such a transfer; or
- (ii) after consultation with the *Minister*, offer to transfer the employee to a reasonable alternative post or position in the *prosecuting authority*, other than any post of *special investigator*, in accordance with subsection (4) (b) and (c).

(c) If the employee does not accept the offer made in paragraph (b) within 30 days of it being made, the employee's employment automatically terminates on the fixed date.

(d) An employee whose employment is terminated in terms of paragraph (c) is entitled to a severance package determined by the *Minister* in consultation with the Cabinet members for the public service and for finance.

(e) The severance package provided for in paragraph (d) may not be less favourable than the severance package provided for in the Determination on the Introduction of an Employee-Initiated Severance Package for the Public Service determined in terms section 3 of the Public Service Act, 1994.

(f) Any dispute arising from the interpretation or application of this section in so far as employees are concerned must be referred to the Labour Court for determination.

(6) Any decisions made, directions issued and any proceedings instituted by the employer immediately before the fixed date in respect of an employee referred to in subsection (3), remains [sic] applicable to him or her and must be implemented or finalised as if the National Prosecuting Authority Amendment Act, 2008, has not been passed.

(7) Any member of the *prosecuting authority* who was employed in the *Directorate of Special Operations* immediately before the fixed date, shall continue to be employed in the *Office of the National Director*, and shall exercise, carry out and perform his or her powers, duties and functions as conferred, imposed or assigned to him or her by the *National Director* and subject to the control and directions of the *National Director* or a person authorised thereto by the *National Director*.

(8) The National Prosecuting Authority Amendment Act, 2008, does not affect the validity of any *investigation* performed by the *Directorate of Special Operations* before the fixed date, including any functions incidental to such *investigations* or the institution of any criminal proceedings.

(9) (a) *Investigations* by the *Directorate of Special Operations* that are pending immediately before the fixed date must, on that date, be transferred to and continued by the Directorate for Priority Crime Investigation in accordance with a mechanism to ensure that the *investigations* are not prejudiced by the transfer.

(b) The *Minister*, in consultation with the Cabinet member for police and after consultation with the *National Director* and the National Commissioner, must determine the mechanism referred to in paragraph (a).

(10) As from the fixed date any liability incurred by the *Directorate of Special Operations* as a result of any *investigation* by that Directorate, shall pass to the *prosecuting authority*, unless the *Minister* in consultation with the Cabinet member for police, in a specific instance determines otherwise.

(11) (a) Any *investigation* that has been instituted under section 28 by the *Directorate for Special Operations*, and all steps taken as a result of such an *investigation*, shall be deemed to have been instituted or taken in consequence of the application

of section 17D (3) of the South African Police Service Act, 1995.

(b) The Head of the Directorate for Priority Crime Investigation may, at any time after the fixed date, withdraw such a request.

(c) The *National Director* must designate a *Director* in respect of each *investigation* referred to in paragraph (a), who must assist the Directorate of Priority Crime Investigation in carrying out such an *investigation*.

[S. 43A inserted by s. 20 of Act 61 of 2000 (wef 12 January 2001) and substituted by s. 13 of Act 56 of 2008 (wef 20 February 2009).]
 3 6 July 2009 - Proc 46 in GG 32380 of 3 July 2009

43B Transitional arrangements relating to financial investigators and analysts

(1) In this section *employee* means any person-

- (a) appointed in terms of Chapter 3A of this Act prior to the repeal of that Chapter by section 5 of the National Prosecuting Authority Amendment Act, 2008 (Act 56 of 2008); and
- (b) employed in the *Office of the National Director* to perform functions as a financial investigator or analyst in any financial investigation or process relating to the proceeds of unlawful activities or the civil recovery of property contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act, 1998 (Act 121 of 1998).

(2) Notwithstanding the repeal of Chapter 3A of this Act by section 5 of the National Prosecuting Authority Amendment Act, 2008 (Act 56 of 2008), after the commencement of the National Prosecuting Authority Amendment Act, 2008-

- (a) an *employee* referred to in subsection (1) shall continue to be so employed and to perform the said functions; and
- (b) the remuneration, allowances, service benefits and conditions of service of such *employee* shall continue to apply in respect of such *employee* or a person appointed in terms of subsection (4).

(3) Financial investigators or analysts shall exercise the powers and perform the functions-

- (a) as may be necessary or expedient for, or incidental to, any financial investigation or process relating to the proceeds of unlawful activities or the civil recovery of property contemplated in-
 - (i) Chapter 5 or 6 of the Prevention of Organised Crime Act, 1998; and
 - (ii) any other law; or
- (b) further conferred or imposed upon them by regulations made by the Minister in terms of section 40 of the Act as may be necessary or expedient for, or incidental to, the achievement of their objects and functions referred to in paragraph (a).

(4) The *National Director* or a member of the prosecuting authority designated for that purpose by the *National Director* may, whenever necessary, appoint any fit and proper person to perform functions as a financial analyst in any financial investigation or process relating to the proceeds of unlawful activities or the civil recovery of property contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act, 1998.

(5) An annual cost-of-living adjustment by the Minister for the Public Service and Administration in respect of employees who are employed in terms of the Public Service Act, 1994 (Proclamation 103 of 1994), shall, with the necessary changes, apply to an *employee* referred to in subsection (1) and a person appointed in terms of subsection (4).

(6) All other conditions of service of an *employee* referred to in subsection (1) and a person appointed in terms subsection (4), are governed and regulated by the provisions of the Public Service Act, 1994.

[S. 43B inserted by s. 10 of Act 11 of 2012 (wef 2 October 2012).]

43C Transitional arrangements relating to Investigating Directorates

(1) For purposes of this section, the phrase 'the *Investigating Directorate*' means the *Investigating Directorate*, established by Proclamation 20 of 2019.

(2) The *Investigating Directorate* shall, as from the date of the commencement of the National Prosecuting Authority Amendment Act, 2024, cease to exist as a separate *Investigating Directorate* and shall become part of the *Investigating Directorate against Corruption*.

(3) Proclamation 20 of 2019, in respect of existing offences or categories of offences as determined by the President therein, which had been issued under section 7 (1) in respect of the *Investigating Directorate* prior to the amendment of section 7 (1) by the National Prosecuting Authority Amendment Act, 2024, shall, as from the date of the commencement of that Act, be deemed to have been issued under section 7 (1A) with the necessary changes in respect of the *Investigating Directorate against Corruption*.

(4) Subject to the provisions of this Act, the *Investigating Director* and all staff of the *Investigating Directorate* shall be retained, remain in office and continue their functions under this Act in the *Investigating Directorate against Corruption*.

(5) From the date of the commencement of the National Prosecuting Authority Amendment Act, 2024, all pending matters pertaining to the *Investigating Directorate* shall be dealt with as if that Act had at all times been in force.

[S. 43C inserted by s. 10 of Act 10 of 2024 (wef 19 August 2024).]

44 Amendment or repeal of laws

The laws mentioned in the Schedule are hereby amended or repealed to the extent indicated in the third column thereof.

45 Interpretation of certain references in laws

Any reference in any law to-

- (a) an attorney-general shall, unless the context indicates otherwise, be construed as a reference to the *National Director*; and
- (b) an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a *Director* or *Deputy Director* appointed in terms of *this Act*, for the area of jurisdiction of that Court.

[S. 45 substituted by s. 13 of Act 122 of 1998 (wef 1 April 1999).]

46 Short title and commencement

Schedule
LAWS AMENDED OR REPEALED BY SECTION 44

Number and year of law	Title	Extent of amendment or repeal
Act 51 of 1977	Criminal Procedure Act, 1977	(a) Repeals sections 2 and 5.
		(b) Amends section 111 by deleting subsections (1) and (4) and substituting subsections (2) and (3).
Act 117 of 1991	Investigation of Serious Economic Offences Act, 1991	The whole
Act 92 of 1992	Attorney-General Act, 1992	The whole

PENDLEX: National Prosecuting Authority Act 32 of 1998 **after amendment by the National Prosecuting Authority Amendment Act 10 of 2024**

Section 22A - Complaints mechanism and accountability

(1) (a) The *Minister* shall, after consultation with the Chief Justice, appoint a retired judge for a non-renewable period of five years in order to investigate complaints or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of any person referred to in section 7 (4) (a).

(b) For purposes of paragraph (a) 'retired judge' shall mean a judge discharged from active service as referred to in the Judges' Remuneration and Conditions of Employment Act, 2001 ([Act 47 of 2001](#)).

(2) The performance of the functions provided for in respect of a retired judge does not derogate from the powers of the South African Police Service or Directorate for Priority Crime Investigation to investigate any criminal conduct in respect of any person referred to in section 7 (4) (a).

(3) The retired judge shall not investigate complaints about intelligence matters falling under the jurisdiction of the Inspector-General of Intelligence.

(4) The retired judge may receive complaints in the prescribed form and manner from-

- (a) any person who may provide evidence of a serious and unlawful infringement of his or her rights caused by the conduct of a person referred to in section 7 (4) (a); or
- (b) any person referred to in section 7 (4) (a), who may provide evidence of any improper influence or interference, hindrance or obstruction, whether of a political or any other nature, exerted upon him or her in the exercise, carrying out or performance of his or her powers, duties and functions.

(5) The retired judge may, upon receipt of a complaint in terms of subsection (4), investigate such complaint or refer it to be dealt with by the National Commissioner of Police, the relevant Director, the *National Director* or the Inspector-General of Intelligence.

(6) The retired judge shall report to the *Minister* the outcome of any investigation undertaken by him or her or any referral in terms of subsection (5).

(7) (a) The retired judge may request and obtain information from any member of the prosecuting authority in so far as it may be necessary for the retired judge to conduct an investigation.

(b) The refusal to comply with a request by the retired judge in terms of paragraph (a) shall be a criminal offence for which a person, upon conviction, may be sentenced to a fine or imprisonment of two years, or to both a fine and such imprisonment.

(8) To the extent that it is reasonably necessary for the performance of the functions of the retired judge, he or she-

- (a) may obtain information and documents under the control of the prosecuting authority;
- (b) may enter any building or premises under the control of the prosecuting authority in order to obtain such information and documents; and
- (c) shall be entitled to all reasonable assistance by any person referred to in section 7 (4) (a) or any other member of the *prosecuting authority*.

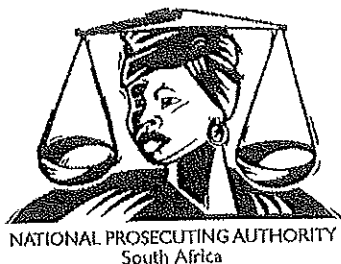
(9) The retired judge shall report annually to Parliament on the performance of his or her functions.

(10) The *National Director* may request the retired judge to investigate any complaint or allegation referred to in subsections (1) and (4) relating to a prosecution or an investigation conducted by an *Investigating Directorate*.

(11) If a structure contemplated in section 22 (5) receives any complaint or allegation referred to in subsections (1) and (4), such structure shall refer the complaint or allegation to the retired judge to investigate.

(12) Any person who makes a complaint in terms of this section shall not be entitled to use this section to establish whether there is an investigation against him or her, nor be entitled to any delay, interference or termination of such investigation on the basis that such complaint has been made.

(13) The *Minister* shall ensure that the retired judge has sufficient personnel and resources to fulfil his or her functions.



OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758

Email: ndpp@npa.gov.za
www.npa.gov.za

INTERNAL MEMORANDUM

TO: ALL DEPUTY NATIONAL DIRECTORS OF PUBLIC PROSECUTIONS

ALL DIRECTORS and ACTING DIRECTORS OF PUBLIC PROSECUTIONS

ALL ACTING SPECIAL DIRECTORS OF PUBLIC PROSECUTIONS

FROM: ADV. S. BATOHI
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

DATE: 03 APRIL 2019

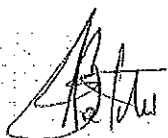
In consultation with Adv. Chris Macadam, Acting Head: PCLU, and Adv. Mzinyathi, Head NPS, I have decided that PCLU must focus on matters emanating from the original **Presidential Proclamation** and the **NPA Policy Directives** of 1 June 2015, as set out on pages 126 and 127 thereof. In the circumstances various matters that fall outside of this Proclamation will be returned to relevant DRPs in whose jurisdictions the crimes were committed, for them to deal with these matters in terms of section 20(1) of the **National Prosecuting Authority Act 32 of 1998**.

Insofar as matters falling within the core mandate of the PCLU are concerned I have taken cognizance of the fact that the **Proclamation** establishing the PCLU did not specify that the PCLU should guide specific investigations and conduct ALL prosecutions itself. The mandate was simply that all cases be managed and directed by PCLU.

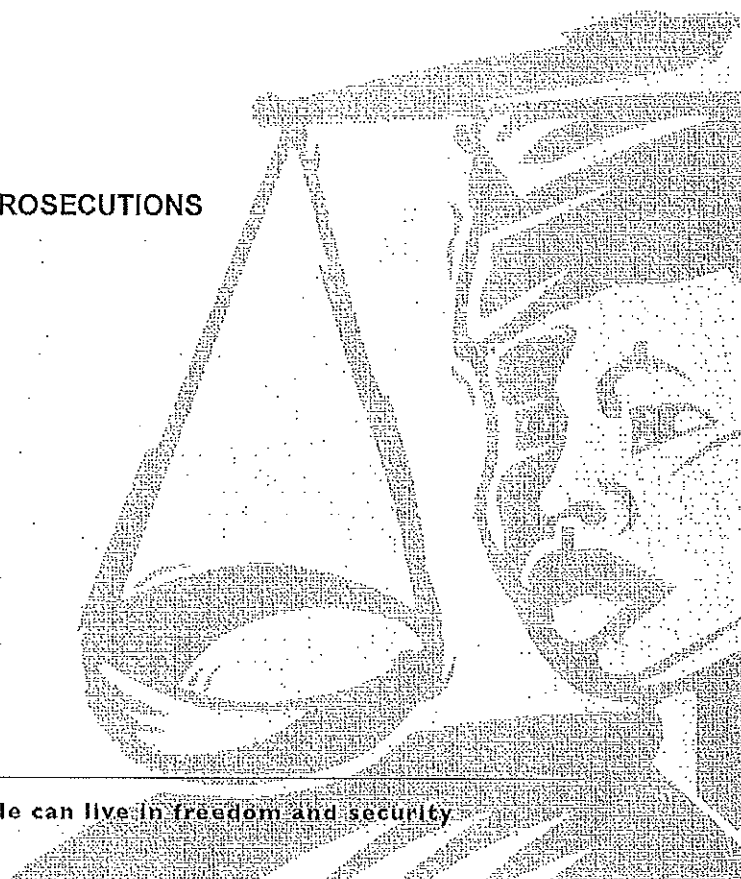
Noting that almost without exception all PCLU core cases were committed outside Pretoria and taking into account sections 20(3) and 24(1) of the **NPA Act**, I have decided that it would be most effective for the guiding of investigations and conducting of prosecutions to be dealt with by the DPPs in whose jurisdictions the crime were committed.

The role of the PCLU will be to render the necessary guidance and support to such matters. Several of the offences falling within the PCLU mandate require my authorisation for the institution of prosecutions. In all such matters the PCLU will perform the same role as the Organised Crime component of NPS does with racketeering authorisations.

Adv. Macadam and Adv. Mzinyathi will manage this process and ensure that there is proper hand-over of cases, and that prosecutors in the Divisions receive the necessary support and guidance. This matter will be discussed at the NOMM in order to ensure a clear and uniform understanding and a smooth transition to this mode of operation, which will develop stability in the Divisions, enhance efficiency and reduce costs.



ADV. S. BATOHI
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
REPUBLIC OF SOUTH AFRICA



From: Nonceba MN. Monageng
Sent: Tuesday, 23 June 2020 13:22
To: Shamila Batohi; Mthunzi C. Mhaga; Rodney J. De Kock; Chris Macadam; Bulelwa Makeke; Siphon S.R. Ngwema; Trish Matzke; Sibongile Mzinyathi; Jan Daniel JD. Schmidt
Cc: Carol Arendse (CG); Mahunadi Maphatiane (ME); Susan Bukau
Subject: Urgent Meeting on TRC Cases - Media Approach

SB 00026

Dear Principals and Colleagues,

Below are notes for your reading prior to the 4pm meeting this afternoon.

Kind regards
Nonceba

Meeting with General G. Lebeya and Brigadier Xaba from DPCI on 31 January 2020.

- About the TRC cases it was agreed:
- 1) Put a plan together to address all the 140 outstanding cases, how it will be prioritized.
 - 2) Adv. Macadam and Brigadier Xaba will develop a plan and the team will report to General Lebeya.
 - 3) Also resource planning – Gen Lebeya is in the process to appoint about 200 former SAPS officials (retired – advertisement by 1 March 2020) which will also deal with the backlog of TRC cases.
 - 4) The team will meet in the next two to three weeks and report to the NDPP and Gen Lebeya.

Kind regards

Danie



Mr. Jan Daniel Schmidt
Chief of Staff; National Director of
Public Prosecutions
Republic of South Africa

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park
Silverton, Pretoria, 0184
Private Bag X752, Pretoria, 0001

Tel: +27 12 945 6769
Cell: +27 76 949 5532
E-mail: jdscmidt@npa.gov.za
Web: www.npa.gov.za





**FOUNDATION FOR
HUMAN RIGHTS**

Old Trafford 3 Building, Isle of Houghton, 36 Boundary Road, Parktown, Johannesburg, 2198
Private Bag X124, Braamfontein, Johannesburg, 2017
Tel: +27(0)11-484-0390 Fax: +27(0)88-720-4813
E-mail: info@fhr.org.za Web: www.fhr.org.za

A just society for all

From: Mr Hanif Vally,
Executive Director,
Foundation for Human Rights
hvally@fhr.org.za

Date: 28 January 2021

To: **Adv Shamila Batohi**
National Director of Public Prosecutions (NDPP)
VGM Building, 123 Westlake Avenue
(Cnr Hartley Street),
Weavind Park,
Silverton, Pretoria, 0184
E-mail: ndpp@npa.gov.za ; sbatohi@npa.gov.za; mmutshivhana@npa.gov.za

CC: Deputy NDPP, Adv Rodney de Kock
rjedekock@npa.gov.za

Lt Gen S G Lebeya
National Head: Directorate for Priority Crime Investigation (DPCI)
E-mail: Lebeyasg@saps.gov.za

Ronald Lamola
Minister of Justice and Constitutional Development
Email: Ministry@justice.gov.za; ZaneNdlovu@justice.gov.za;
BSarela@justice.gov.za

John Jeffery
Deputy Minister of Justice and Constitutional Development
Email: JJeffery@justice.gov.za ; BIWilliams@justice.gov.za

Bheki Cele
Minister of Police
Email: ministry@justice.gov.za; GaehlerSMK@saps.gov.za; PhokaneN@saps.gov.za

Gen K J Sitole
National Commissioner of the SA Police Service
Email: sitholek@saps.gov.za ; selepemashadi@saps.gov.za

Foundation for Human Rights, NPC, (Registration No.: 95/08044/08)

Supervisory Board: Ms. Thoko Mpumlwana (Chairperson), Judge Siraj Desai (Deputy Chairperson), Judge Jody Kollapen (Treasurer),
Ms Louise Asmal, Adv Dumisa Ntsebeza SC, Judge James Yekiso, Prof Errol Holland, Ms Shirley Mabusele,
Ms Zibusiso Kganyago, Dr Sithembile Mbete, Dr Pali Lehohla, Mr Zukile Nomvete. Executive Director Hanif Vally



A just society for all

Dear Advocate Batohi,

Re: Workshop on a dedicated capacity dealing with TRC cases

We confirm that the virtual workshop agreed to last year between the FHR and its legal team and the National Prosecuting Authority (NPA) and the Directorate for Priority Crime Investigation (DPCI) will take place on the 17 February 2021. The Deputy National Director of Prosecutions Advocate Rodney de Kock and General Lebeya of the DPCI have confirmed their participation. Given the importance of the issues to be discussed at the workshop, namely establishing a dedicated unit (composed of investigators, prosecutors and other experts) to effectively investigate and prosecute TRC matters, where the alleged perpetrators of gross human rights violations either did not apply for amnesty or were refused amnesty, we would be deeply grateful if you too will attend.

In this regard, the Foundation for Human Rights (FHR) already shared a memo on comparative international research on how political crimes or system crimes are dealt with in other countries, under cover of a letter dated 7 September 2020, with all the relevant parties.

In order to facilitate the decision-making and implementation process of establishing such a dedicated capacity within the NPA, the FHR commissioned a legal opinion having regard to the Constitution, the National Prosecuting Authority Act 32 of 1998, the South African Police Services Act 68 of 1995 and other relevant laws. A copy of the opinion is attached hereto for your attention. The opinion sets out the legal options for such a dedicated capacity and makes the relevant recommendations.

It was jointly agreed among the stakeholders that FHR would set up a virtual workshop to take forward this discussion for which the research memo and the attached legal opinion will serve as a basis for the discussion.

FHR has taken the liberty of preparing a draft of the agenda which is attached hereto for your consideration and comments.

Kindly advise in writing whether you would be available on 17 February 2021 to participate in the workshop.

Yours sincerely,

Hanif Vally

Executive Director,
Foundation for Human Rights

Foundation for Human Rights, NPC, (Registration No.: 95/08044/08)

Supervisory Board: Ms. Thoko Mpumlwana (Chairperson), Judge Siraj Desai (Deputy Chairperson), Judge Jody Kollapen (Treasurer), Ms Louise Asmal, Adv Dumisa Ntsebeza SC, Judge James Yekiso, Prof Errol Holland, Ms Shirley Mabusela, Ms Zibusiso Kganyago, Dr Sithembile Mbete, Dr Pali Lehohla, Mr Zukile Nomvete. Executive Director Hanif Vally

DRAFT AGENDA

Meeting of the Legal Team with the representatives of the NPA, DPCI and the government

Dedicated capacity for the TRC matters

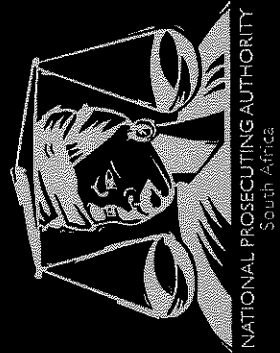
17 February 2021

1. Welcome (5 min)
2. Introductions (5 min)
3. The historical context and purpose of the workshop (Ms Yasmin Sooka) (10 min)
4. Proposal for a dedicated capacity for the TRC cases (Adv. Howard Varney) (15 min)
 - a. Deficiencies of the current decentralisation strategy
 - b. Examples of dedicated units from other countries
 - c. Reasons for a dedicated capacity within the NPA
 - d. Applicable law
5. Responses and inputs from NPA, DPCI and members of the Executive (40 min)
6. Discussion to reach consensus in principle for the establishment of a dedicated investigation and prosecution capacity for TRC cases (30 min)
7. Tea break (10 min)
8. Legal, organisational and financial implications of the new dedicated capacity (1.5 hours)
 - a. Legal authority
 - b. Structural and organisational issues
 - c. Investigative and Prosecutorial Resources required
 - i. Possible composition of the dedicated capacity
 - ii. Survey aimed at assessing the current capacity and capability
 - d. Possible sources of funding
9. Other matters arising and the way forward (15 min)
10. Closing

TRC CASE MANAGEMENT

Adv R de Kock

17 February 2021

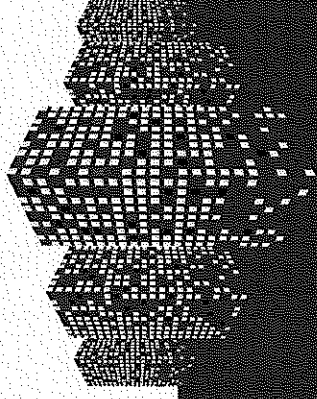


REBUILDING AN INDEPENDENT, PROFESSIONAL, ACCOUNTABLE AND CREDIBLE NPA

00030

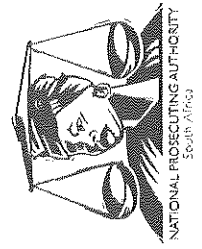
CONTENTS

- Introduction
- Agreed approach
- Resources
- Additional requirements
- Legal principles
- Other considerations

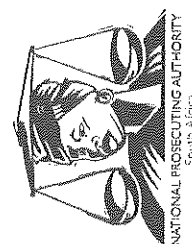
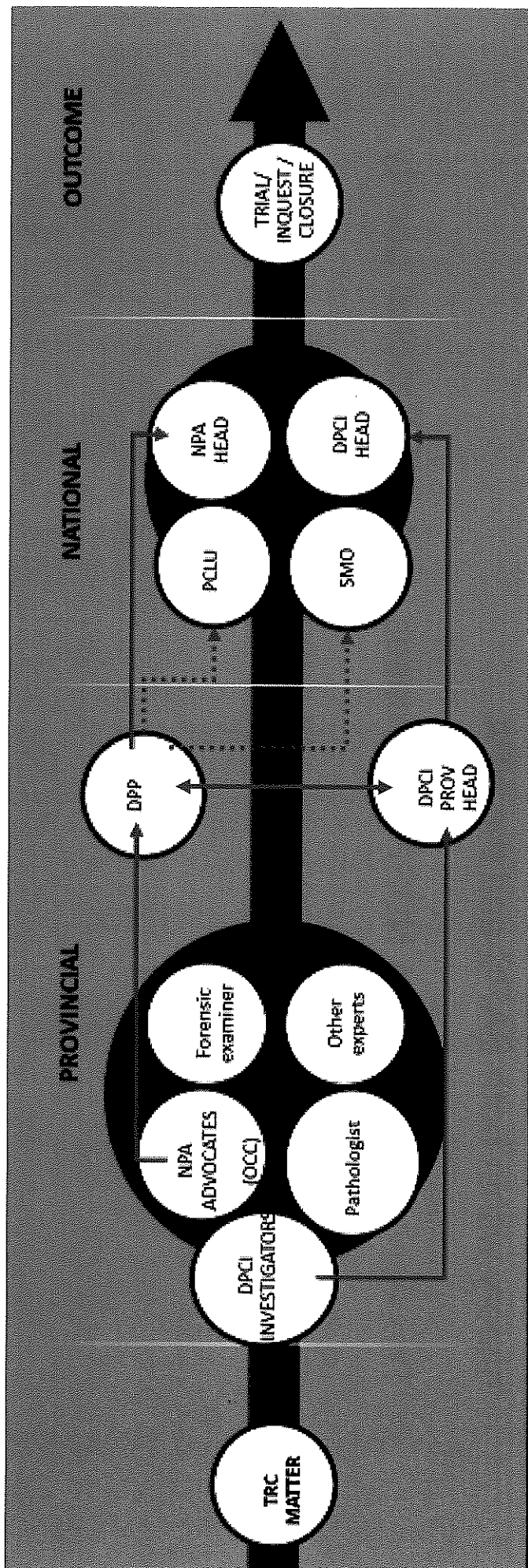


INTRODUCTION

- TRC covers the period March 1960 to 5 May 1994
- Prior to the appointment of the NDPP, TRC cases had an unfortunate history within both SAPS and the NPA
- The appointment of the NDPP TRC cases declared National priority crimes with national management and oversight

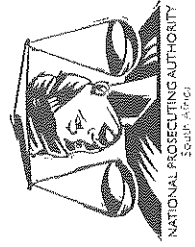


AGREED NEW APPROACH



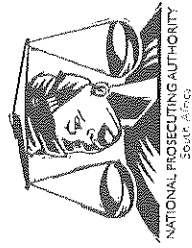
RESOURCES

- Current list contain 53 cases but 59 more planned
- DPCI made 127 additional contract appointments of which 40 to assist in TRC cases
- NPA to appoint additional capacity for period of 3 years on contract
- Move away from single investigator to team responsibilities to promptly finalise cases
- Close monitoring by SMO to monitor progress, evaluate each project against timelines and milestones



ADDITIONAL REQUIREMENTS

- Forensic capacity required
- Pathologists required
 - Cases to be identified
 - Department of Health in regions to be approached
- Identify other experts that may be required
- Missing Persons Task Team will also assist with expertise
- Research capacity to retrieve relevant material in state and private institutions



REBUILDING AN INDEPENDENT, PROFESSIONAL, ACCOUNTABLE AND CREDIBLE NPA

Thank You



NATIONAL PROSECUTING AUTHORITY
South Africa

Victoria & Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria 0001

Private Bag X752, Pretoria 0001

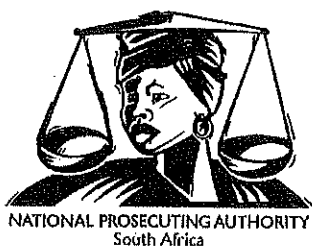
Head Office: 012 845 6000

E-mail: communication@npa.gov.za

www.npa.gov.za

SB 00039





**OFFICE OF THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758

Email: ndpp@npa.gov.za
www.npa.gov.za

Your ref: Mr Ahmed Mayel

Our ref: TRC cases

Enquiries: Adv RC Macadam

Email: cmacadam@npa.gov.za

To: Mr Hanif Vally
Executive Director
Foundation for Human Rights

Email: amayet@fhr.org.za and hvally@fhr.org.za

Dear Sir

RE: PROPOSAL FOR SPECIAL UNIT FOR TRC CASES

With reference to the virtual workshop held on 17 February 2021, I wish to raise certain preliminary issues before dealing with your proposal.

There is a need to reiterate at the outset, that we are on the same side and therefore should be working in a spirit of collaboration, which we have been trying very hard to do. Seeking justice for victims and survivors of atrocities committed during the apartheid regime is a top priority for the NPA. That this has not happened swiftly, is something for which various arms of government, including the Executive, must take responsibility. It is most unfortunate that only the NPA that is singled out and it is unacceptable that a member of my staff has allegations levelled against him, without affording him a fair opportunity to respond thereto. I am in the process of taking the necessary steps to have the enquiry conducted as directed by the Court in the *State v Rodrigues*; I will request that the enquiry look at all agencies involved therein, including the NPA.

Justice in our society so that people can live in freedom and security.

RE: PROPOSAL FOR SPECIAL UNIT FOR TRC CASES

During the workshop of 17 February, reference was made to a report by Clifford Marion, documenting his view on shortcomings with the current model in the NPA aimed at capacitating the regions. This report was not provided before the workshop and the NPA was unable to consider it and respond, as appropriate. It would have been appreciated if this report had been attached to one of the two letters that you have sent to us since the workshop. I would be grateful if this report could be provided without further delay. It may provide us with valuable insights on how we can improve the model.

On the way forward with regard to a dedicated capacity, which we agree is necessary, various options, including your proposal have been carefully considered. Taking into account all relevant factors, it has been decided that the capacity in the Offices of the DPPs will be reinforced by the appointment of dedicated resources, and a Deputy Director of Public Prosecutions, who will deal exclusively with management and oversight of TRC matters will be appointed in the Head Office of the NPA, reporting directly to Adv De Kock, the Head of NPS. The DPCI will be requested to align their deployment of investigators with the NPA's allocation of cases to prosecutors. The performance of prosecutors and investigators will be monitored on a monthly basis. Adv De Kock and General Lebeya will meet to discuss the possibility of co-location both at national and regional levels. They will also meet, on a quarterly basis, to deal with strategic issues and any obstacles which may arise and which cannot be addressed at the lower levels.

Sincerely



ADV. S. BATOHI
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 08/03/2021

CC: Lt General Lebeya
Honourable Dep Minister Jeffery
Adv de Kock



Justice in our society so that people can live in freedom and security



the **dpsa**

Department:
Public Service and Administration
REPUBLIC OF SOUTH AFRICA

Private Bag X916, PRETORIA, 0001 Tel: (012) 336 1000, Fax: (012) 326 7802
Private Bag X9148, CAPE TOWN, 8000. Tel: (021) 467 6120, Fax: (021) 467 6484

Adv. A Du Plessis
Deputy National Director of Public Prosecutions: NPA
Private Bag X752
PRETORIA
0001

Dear Adv. Du Plessis

REQUEST FOR APPROVAL TO APPOINT ADDITIONAL CAPACITY AS TEMPORARY SUPPORT FOR A PERIOD BEYOND 12 MONTHS AS PER REGULATION 57(4) OF THE PUBLIC SERVICE REGULATIONS, 2016 TO ATTEND TO A SPECIAL PROJECT TO PROSECUTE CASES EMANATING FROM THE TRUTH AND RECONCILIATION COMMISSION (TRC)

The letter dated 02 August 2021, pertaining to the subject matter, refers.

Regulation 57 (2) of the Public Service Regulations 2016, states that an Executive Authority may employ persons additional to the establishment where a temporary increase in work occurs or it is necessary for any other reason to temporarily increase the establishment of a department, for a period not exceeding 12 months.

Regulation 57(4) of the Public Service Regulations, 2016, states that the employment of persons additional to the establishment in terms of subregulation (2) (a) or (b) shall not exceed twelve (12) consecutive calendar months unless otherwise directed by the Minister.

It is deemed critical to note that the provision should not be read in isolation from the other parts of the Regulations, the Directives issued and Determinations made by the Minister for the Public Service and Administration, in terms of the Public Service Act (PSA), 1994, and other relevant policy pronouncements by government.

The NPA has indicated in the letter that the temporary capacity is required whilst processes are being put in place to capacitate the permanent structure. The letter further indicates that once these historical cases are dealt with the need for capacity to deal with same will no longer be required. This is therefore deemed a special project.

There will be a negative outcome if cases remain outstanding. This may lead to public outcry as articulated in the letter and may come across as the State not taking effective action to remedy. This is therefore a critical initiative that needs urgent attention and outcomes.


It is further noted that the organisational structure is still being finalized but it is clear from the letter that the capacity for purposes of the cases at hand will no longer be required following the finalization of the cases. The NPA has further undertaken to capacitate their permanent structure.

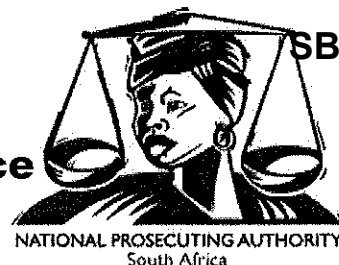
The NPA has indicated they have sufficient funding for the duration of the 3 year contracts, the approximate costs of which is R 77 287 398.

Based on the aforementioned, the MPSC supports the request by the NPA to appoint capacity additional to the establishment of the NPA for a period of three (3) years in order to prosecute TRC cases given the motivation provided and noting the nature of this special project. The total number of positions identified is twenty five (25), one at level 14 and twenty four at LP-9.

The NPA is also advised on the importance of capacitating an approved and consulted organisational structure and to note the potential of creating a legitimate expectation in terms of section 186 (1)(b) of Labour Relations Act for continued employment.

Kind regards,


Ms Yoliswa Makhosi
Director-General
Date: 07/09/2024



National Prosecution Service

**TO: ADV SH SINGH
STATE ADVOCATE**

**FROM ADV RJ de KOCK
DEPUTY NATIONAL DIRECTOR OF PUBLIC
PROSECUTION**

**SUBJECT: ACTING APPOINTMENT AS A SENIOR STATE
ADVOCATE**

DATE: 07 SEPTEMBER 2021

Head Office

Tel: +27 12 845 6000
Fax: +27 12 845 7326

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

P/Bag X752
Pretoria
0001
South Africa

www.npa.gov.za

I hereby request you to act as a Senior State Advocate in the NPS head office to assist in coordination of TRC matters. Your acting appointment is from 07 September 2021 until further notice without remuneration.

The acting appointment is accompanied by the authority to exercise all powers (including delegated powers) attached to the position.

I wish you all the best during your acting period.

Regards

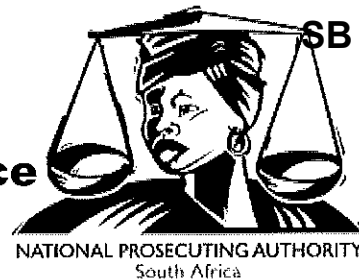

ADV RJ de KOCK
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTION: NPS

7/9/2021

ACCEPTED / ~~NOT ACCEPTED~~


ADV SH SINGH
STATE ADVOCATE: SGLD

DATE: 14/9/2021



National Prosecution Service

NATIONAL PROSECUTING AUTHORITY
South Africa

Reference number:

Enquiries: carendse@npa.gov.za

Dear General Lebeya

LebeyaSG@saps.gov.za

Head Office

Tel: +27 12 845 6000
Fax: +27 12 845 7326

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

P/Bag X752
Pretoria
0001
South Africa

www.npa.gov.za

ESTABLISHMENT OF A NEW COMPONENT WITHIN NPS TO DEAL WITH ALL MATTERS EMANATING FROM THE TRUTH AND RECONCILIATION COMMISSION (TRC) AND FUTURE CO-ORDINATION OF MATTERS

On 3 April 2019, the National Director of Public Prosecutions (NDPP), Adv S Batohi decided, after consultation with relevant role-players, that all matters which fell outside the core mandate of the Priority Crimes Litigation Unit (PCLU) be returned to the relevant Directors of Public Prosecutions (DPP's) in whose jurisdictions the crimes were committed.

Matters that were returned to the relevant DPP's included those that emanated from the South African Truth and Reconciliation Commission (TRC). The role of PCLU was to render necessary guidance and support to such matters.

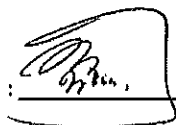
As of 6 September 2021, it was decided that all matters emanating from the TRC would no longer be managed by PCLU but rather directly through my office. A separate component within the NPS Head Office has thus been established in order to facilitate the effective monitoring and management of TRC matters.

Advocate SH Singh will be assisting with the co-ordination of these matters. Since our last meeting, new investigators were appointed to assist in investigations to be undertaken.

I would be grateful if you could indicate whether you will be able to meet with both Advocate Singh and I. It will be fruitful exercise to formally introduce

appointed investigators simultaneously in order to strengthen future co-operation in respect of investigations and/or prosecutions pertaining to matters emanating from the TRC.

Regards

A handwritten signature in black ink, enclosed in a rectangular box. The signature appears to be 'R de Kock'.

Adv R de Kock

Deputy National Director of Public Prosecutions

Date: 10/09/21

[Links](#) [FAQ's](#)

SB 00045

search police station here...





Search




[Home](#) / [Newsroom](#) / [Media Statements](#) / Details

Menu

 [Media Statements](#)

 [Speeches](#)

 [Latest News](#)

 [Events](#)

NPA and DPCI (Hawks) enhance collaboration to investigate and prosecute TRC cases

Date Published:

2021/06/27

Description Details:

Joint Media Statement issued by the National Prosecuting Authority (NPA) and the Directorate for Priority Investigation (Hawks)

PRETORIA - The National Prosecuting Authority (NPA) and the Directorate for Priority Crime Investigation (DPCI / Hawks) welcome the judgment of the Supreme Court of Appeal (SCA) on Monday, 21 June 2021 in the Rodrigues matter. This important SCA decision confirms the decision of the full bench of the Gauteng Division to dismiss an application for stay of prosecution, based on the delay before the accused was indicted.

The judgment is an important step towards honouring those who gave their lives for our constitutional democracy. It aligns with both the Hawks and NPA's commitment to end impunity as it enables the NPA to move ahead to prosecute Rodrigues and other perpetrators of apartheid era crimes where there is sufficient evidence, and where prosecutions have not taken place, for various reasons.

This judgment bolsters the NPA's determination under the current National Director of Public Prosecutions (NDPP), Adv Shamila Batohi and unwavering commitment of the National Head of the Hawks, Lieutenant General Godfrey Lebeya, to revive these investigations and initiate prosecutions.

The earlier Rodriguez judgment of the Gauteng Local Division of High Court, on 03 June 2019, directed the NDPP to enquire into improper influence brought to bear on the NPA. This is a complex and complicated matter and the NDPP has been engaging with the Minister of Justice to determine the most effective course of action.

South Africans in general, and families of victims in particular, need to understand why these crimes were not prosecuted in the past. This will also provide important lessons regarding the need to ensure a robust framework to protect the independence of the NPA. **SB 00046**

The NPA acknowledges that the unmerited delay of prosecutions of these cases amounts to the denial of justice to the victims of apartheid era atrocities. The NPA, as lawyers for the people and defenders of those who suffered from injustice, has established dedicated capacity to ensure that those who are responsible for atrocities can be held accountable in a fair and transparent process.

To ensure that justice is delivered, and to bolster the NPA's capacity to prosecute these TRC cases, the NDPP transferred the cases to the relevant Directors of Prosecutions (DPP) in the regions where the crimes were committed, with support from a National Office capacity. This approach increased the number of experienced prosecutors available to handle these complex cases. As a result, the number of cases has increased from 4 to 53 over the past 12 months.

Notwithstanding, it was realised that additional and dedicated capacity in both the NPA and importantly the DPCI was needed. As a result a TRC investigation strategy has been adopted by the NPA and DPCI to create dedicated and sustainable capacity to investigate and prosecute apartheid era atrocity crimes. The NPA is in the process of setting up a specialist unit to deal exclusively with these matters, and will be appointing former experienced prosecutors in offices which require additional capacity. A dedicated national office capacity will provide specialised advice, coordination, and monitoring and support

The Directorate for Priority Crime Investigation also embarked on the process to establish a dedicated team by a recruitment drive to re-enlist a number of competent and highly skilled former police officials with wealth of knowledge in the detective environment. Thirty four (34) of these members who were appointed from the 01 April 2021 for a contractual period of three years, are assigned to these cases.

The investigation of these cases that were being conducted by the fulltime Hawks members with multiple case dockets on hand, is now taken over by these dedicated and specialised teams, which is aligned to the regionalised approach adopted by the NPA. Our collective efforts are starting to pay off and a further 59 cases have been identified.

The focus is on implementation. It is envisaged that the investigations would be concluded by the end of the contractual period of the 34 former detective members.

We will continue with our ongoing collaboration with representatives of victims, in line with the NPA's victim responsive approach.

The inquests into the deaths in detention of Neil Aggett and Ernest Dipale, which were reopened have reached an advanced stage. The NPA has also obtained Ministerial approval to open another inquest. Moreover, work is being done on other matters which would enable consideration for those cases to be reopened as well.

The apartheid atrocities cases under consideration date back to the early 1960s. The health conditions and circumstances of the witnesses and suspects and nature of available evidence further complicate the investigation and prosecution of these cases. The challenges in investigating these cases cannot be underestimated.

"The work to investigation, without fear, favour or prejudice on all other remaining cases is continuing. The capacity of the team will be enhanced as the need arises. The DPCI shall

have built sufficient capacity to carry out any processes that may be left pending," says the Head of the Hawks Lieutenant General Lebeya.

SB 00047

Despite these challenges, the Hawks and the NPA will remain focused on action - doing all that we can to ensure accountability for these crimes. The victims deserve nothing less.

"Time is not in our side. We have a small window to address this; loved ones need to see justice being done; and justice will not be served until we act decisively against those that the NPA was once powerless to hold to account," says the NDPP, Adv Shamila Batohi.

Ends**Enquiries:**

NPA National Spokesperson

Sipho Ngwema

081 253 8889

DPCI Spokesperson

Lt-Col Nkwalase Philani

071 481 3468

Twitter: <https://twitter.com/SAPoliceService>Facebook: <https://www.facebook.com/SAPoliceService>Instagram: https://instagram.com/sapoliceservice_za/YouTube: <https://www.youtube.com/user/SAPoliceService>Website: www.saps.gov.za**Attachments:**

USEFUL LINKS

[Home](#)[About SAPS](#)[Resource Centre](#)

Services

Child Safety

Talk to Us

SB 00048

USEFUL LINKS

Careers

Be Alert!

Crime Stop

SAPS Copyright

SAPS Disclaimer

HEAD OFFICE

☎ +27 (0) 12 393 1000

🏠 SAPS Head Office

Telkom Towers Building

152 Johannes Ramokhoase Street

Pretoria

Private Bag X94

Pretoria

0001

SUPPORT TEAM

For Any Website Content:

Email: Captain - Sampson Yoland

✉ SampsonY@saps.gov.za

For Any Technical Assistance:

Email: SITA Web Team

✉ sapsweb@sita.co.za

© 2025 Copyright: SAPS - South African Police Service

Presentation to Portfolio Committee on Justice and Correctional Services

Progress on TRC Cases

01 June 2022



National Prosecuting Authority
South Africa

SB 00049

Contents

1. Introduction
2. Dedicated Capacity: NPA and DPCI
3. Progress Report
4. The Way Forward

Introduction

- Ensuring justice for the families and victims of apartheid-era crimes is a priority for the NPA. The lack of accountability for these heinous crimes continues to undermine the rule of law in SA
- Despite the delays, the NPA is now committed to delivering on this priority. We need to learn lessons from the past to secure the NPA's independence and credibility for the future
- Time is not on our side. That's why we are acting with urgency to develop strategies, capacities and partnerships to ensure progress in these cases
- Highlights from the past six months:
 - Established a dedicated TRC component under the DNDPP: NPS
 - Appointed additional dedicated capacity to focus on TRC matters. DPCI has done the same
 - Full-time TRC coordinator function in national office to drive internal and external collaboration

Introduction (continued)

- Highlights from the past six months:
 - Sharpened our prosecution-guided investigation approach in close partnership with DPCI
 - Under the co-ordinated guidance of the national office, we enhanced the capacity of DPP offices to prosecute these matters at provincial level, within the jurisdiction of where the offences were committed.
- Our efforts are paying off. We have seen substantial improvement over the last 7 months resulting in the re-opening of 38 new investigations into deaths of detainees.
- There are currently 97 matters under investigation with more matters identified for re-opening
- The Missing Persons Task Team (MPTT) established within NPS, has to date recovered the remains of 179 missing persons, of which 167 have been identified and returned to affected families.

Dedicated TRC Capacity

NPA		DPCI	
Total number of dedicated TRC prosecutors appointed in divisions: 16		Total number of dedicated TRC investigators appointed in the divisions: 33	
DPP: KwaZulu-Natal Division	4	Central Region: Head Office, Gauteng, Mpumalanga, Limpopo and North West	17
DPP: Western Cape Division	3	Coastal Region: Kwa-Zulu Natal	4
DPP: Gauteng Local Division	3	Eastern Region: Eastern Cape	8
DPP: Gauteng Division: Pretoria	1	Western Region: Western Cape	2
DPP: Limpopo Division	1	Karoo Region: Free State and North West	2
DPP: North West Division	1		
DPP: Eastern Cape Division	1		
Other: Head Office	2		

SB 00053

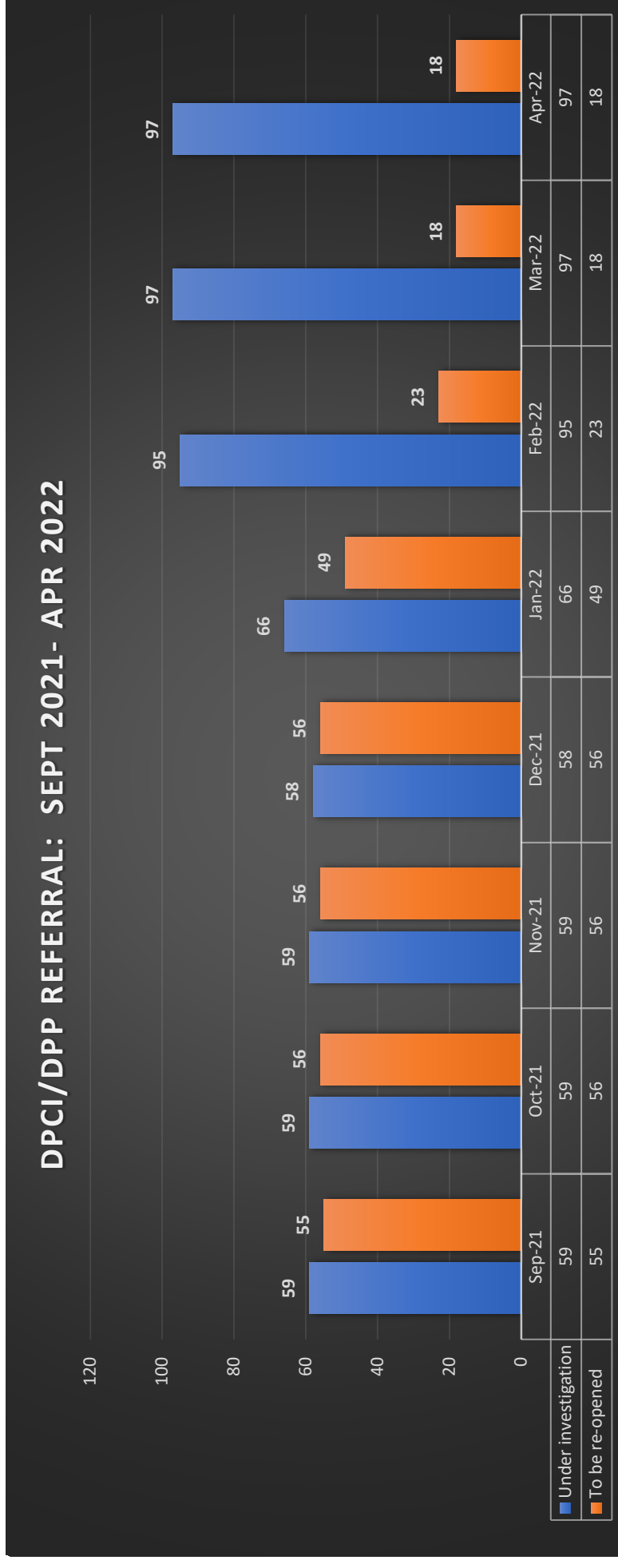
Progress update

- The audit of matters between DPCI and NPA was key in developing a co-ordinated and hands-on, standardised approach.
- Matters were identified for fast-tracking with consideration given to the seriousness of the evidence, age of the matters, age of the accused/persons of interest/witnesses, availability of experts and witnesses and exhibits/records.
- Divisions were encouraged to develop action plans with set time frames in respect of the strategic prioritisation and finalisation of matters.
- There is a critical analysis of progress within the divisions on a monthly basis.
- The dire need to prioritise TRC matters resulted in joint NPA/DPCI regional workshops co-ordinated by NPS National Office with effect from 13 June 2022.

Monitoring and Evaluation

- Progress in investigations is divided into three categories:
 - Category A: Available evidence, docket, inquest report etc.
 - Category B: Expert reports.
 - Category C: Stages nearing completion of investigations and/or decision making.

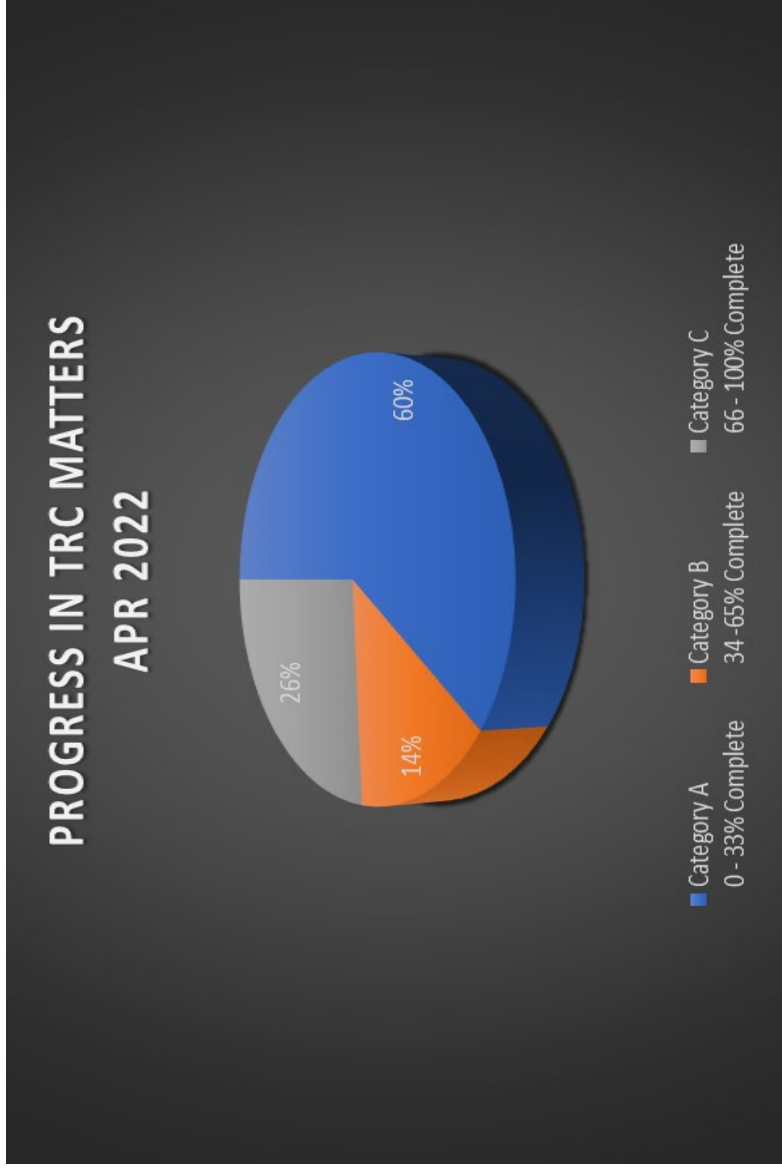
Improvement in Cases under Investigation



➤ New investigations re-opened since September 2021: 38

➤ Awaiting re-opening: 18

Divisional Progress as at 30 April 2022:



PROGRESS IN TRC MATTERS - APR 2022

Division	Category A 0 - 33% Complete	Category B 34 - 65% Complete	Category C 66 - 100% Complete	Total
ECD	10	3		13
FSD	2			2
GLD	4		4	8
KZN	5	2	12	19
LD	2	1	1	4
MD	2		1	3
ECD-MTHATHA	7			7
NWD	1	1	2	4
NCD	2		1	3
GDP	15	4	1	20
WCD	5	2	2	9
Total	55	13	24	92

Noteworthy matters

Case	Status
S V JA RODERIGUES -FINALISED	<ul style="list-style-type: none">➤ The matter was removed from the criminal roll of South Gauteng High Court on 30 September 2021 after the accused died on 07 September 2021. At the time of his death, the Accused's challenge to his prosecution was pending before the Constitutional Court.➤ On 14 January 2022, the Constitutional Court dismissed a bid by the Foundation for Equality before Law to have the appeal of Mr Roderigues ventilated.
DR AGGETT	<ul style="list-style-type: none">➤ On 04 March 2022, the South Gauteng High Court overturned the finding of the original Inquest court from suicide to murder. (The record of proceedings have been referred to the office of the DPP: Gauteng Local Division to consider the judgment of the inquest court).

Cases on the court roll

Case	Status
<p>The re-opened inquest of MR ERNEST DIPALE</p>	<ul style="list-style-type: none"> Evidence was led before the South Gauteng High Court into the re-opened inquest of Mr Dipale who also died under similar circumstances at John Vorster Square in 1982. Judgment is awaited.
<p>Re-opened inquest of DR HH HAFJEJEE</p>	<ul style="list-style-type: none"> Evidence has been led before the Pietermaritzburg High Court. Judgment is awaited.
<p>COSAS 4</p>	<ul style="list-style-type: none"> On the court roll South Gauteng High Court on 19 July 2022.
<p>S v COETZEE AND ANOTHER</p>	<ul style="list-style-type: none"> A trial date has been set for 6 - 17 June 2022. (Ms Nokuthula Simelane)
<p>S v JOHAN MARAIS AND OTHERS</p>	<ul style="list-style-type: none"> Matter postponed to 20 June 2022, Regional Court, Benoni (Mr Caiphus Nyoka)

Matters where decisions are imminent

Division	Number of matters
KZND	• Four (4)
MD	• One (1)
NWD	• Two (2)
NCD	• One (1)
GDP	• One (1)
WCD	• One (1) (Pending decision of the Minister, Imam Haron)
ECD	• One (1) (Cradock 4)
TOTAL	Eleven (11)

The Way Forward

- The NPA leadership is committed to accountability for these serious crimes
- The NPA must act independently and fearlessly. Prosecution must be based purely on evidence irrespective of race, colour, creed or political affiliation
- The NPA is committed to working with families and stakeholders. A partnership and collaborative approach is key to making progress in a holistic manner
- We are acting with a sense of urgency to deliver impact and build sustainability of our capacity and engagement on TRC and other complex crimes
- We aim to build required permanent capacity, tailored training and capacity building initiatives, and broad partnerships to ensure that we can deliver justice for these crimes now and into the future



National Prosecuting Authority
South Africa

Thank you

Head Office: 012 845 6000

E-mail: communication@npa.gov.za

VGM Building, 123 Westlake Avenue (Cnr Hartley Street),
Weavind Park, Silverton, Pretoria, 0184

www.npa.gov.za

31 January 2019

Dear National Director of Public Prosecutions (NDPP) - Advocate Batoyi

Congratulations on your appointment.

Whilst I acknowledge that the privilege of being this country's most senior prosecutor has come with many challenges, it would be my fervent request that you allocate some time to look into the non-prosecution of matters emanating from the Truth and Reconciliation Commission (TRC).

My uncle, Ahmed Timol and many others paid the ultimate price for the freedom and the rights enjoyed by our citizens today. Whilst the overturning of the verdict of the 1972 inquest was historic, and the charging of Mr Roderigues significant, 15 months have lapsed and defeating the course of justice are yet to commence. Respectfully, we can never forget the plight of hundreds of families who have an agonising wait for justice. Justice delayed is justice denied.

I am aware of the many other pressing challenges that you face. However, I, together with TRC Commissioner Yasmin Sooka, humbly seek an appointment to discuss the more than 300 cases which were identified by the TRC and handed over to the NPA for investigation.

Regards

Imtiaz Ahmed Cajee
Nephew of Ahmed Timol

Background

Ahmed Timol was a school teacher at the Roodepoort Indian High School. He left South Africa in December 1966 to perform the Hajj in Saudi Arabia, and moved on to London where he linked up with his exiled friends, Essop and Aziz Pahad. A decision was made by the Central Committee of the Communist Part that Timol would undergo his political training at the Lenin School in the Soviet Union in 1969, accompanied by Thabo Mbeki and Anne Nicholson.

Timol returned to South Africa in 1970, and proceeded to build underground structures for the banned ANC and SACP. He was successful in distributing propaganda to mailing lists across the country for a period of 18 months. On the evening of 22 October 1971, while in the company of medical student, Saleem Essop, Timol was stopped at a police roadblock in Coronationville.

Timol and Essop were taken to the Newlands Police Station where they were separated and taken to the John Vorster Square Police Station. Four days and 19 hours later, police alleged that Timol jumped to his death. By then, Essop was in hospital after being tortured to an inch of his life.

Timol was posthumously awarded the National Order of Luthuli on 11 December 2009 and the Isitwalandwe Medal on 12th January 2019.



A just society for all

Office of Executive Director

Ms Yasmin Sooka

E mail: yasmin.sooka@gmail.com;

ysooka@fhr.org.za

29 April 2019

Ms. Shamila Batohi

National Director of Public Prosecutions

VGM Building, 123 Westlake Avenue

(Cnr Hartley Street),

Weavind Park,

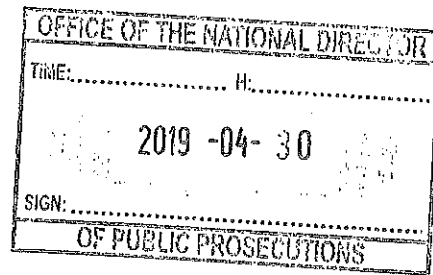
Silverton,

Pretoria, 0184

Attention Ms Shamila Batohi

ndpp@npa.gov.za

cc MMutshivhana@npa.gov.za



Dear Ms Batohi

Re: Notes from Meeting held with South African Coalition on Transitional Justice on 17 April 2019

On behalf of the South African Coalition on Transitional Justice, I would like to express my appreciation to you and your team for the constructive meeting held on 17th April 2019. For your ease of reference, I attach the list of the family members, lawyers and former commissioners who were present yesterday in our meeting. The families have requested that I convey their appreciation for the meeting with you.

I would also like to follow up our meeting by confirming a suitable date and time for a meeting in the week of the 6 May 2019 to follow up on all of the issues raised. This meeting will take place with the legal and investigation teams representing the families of victims. Given the Minister's recent decision to reopen the Aggett and Haffejee Inquests, it is quite critical that such a meeting takes place quite soon. The recent death of Stephen Whitehead has once again raised the need to act with urgency so that the families of the victims are able to access justice in their lifetimes.



These notes are not intended in any way to be minutes of the meeting but a reference on what we discussed and suggested be taken forward.

Sharing Expertise and Resources

There was consensus on both sides of the need to share our expertise and resources in the investigation and prosecutions of these matters given the experiences on the Simelane and Timol indictments which really owe their genesis to the work carried out by individual family members, Frank Dutton and Advocate Howard Varney, acting for the families rather than investigators or prosecutors working for the state with the exception of one or two individuals.

At the meeting, both Mr. Cajee and Mr. Hathorn pointed out that the joint task team established previously, did not work well despite the stated commitment by General Ledwaba. This is because many of the investigators appointed barring a few exceptions were either ex- Security Branch officers or themselves totally inexperienced and unsuitable for these investigations as many of them did not even know what an Inquest was. It was therefore not very clear to us how they could then be expected to investigate these matters.

Furthermore, the appointment of Captain Vreugdenburg to the joint task team was quite shocking and offensive to say the least, given allegations that he himself was implicated in the harassment of one of the victims prior to the victim's murder (which is one of the cases that the Joint Task Team was to investigate). At the second meeting of the task team, Captain Vreugdenburg reported back on the investigations being carried out ~ rather than allowing individual teams to report back on their respective investigations, ~ giving their work an undeserved positive spin. Vreugdenburg was also responsible for making a number of offensive and disparaging comments during the meeting, as you heard so eloquently from Mr. Cajee. Following this meeting, it became clear that the joint task team was not going to work.

Establishing an Inter-Ministerial Task Team

In our view, the best option would be to establish an inter-ministerial task team (which includes our investigators and representatives) and which will include stakeholders from State Security, Police, Military Intelligence and National Archives. This will allow access to apartheid-era archives where vast volumes of critical information reside that will assist in our investigations, again an issue raised by Imtiaz Cajee and Moray Hathorn.

I would also on behalf of the Coalition, like to reaffirm our commitment to share our knowledge, experiences and resources as we did in the past. We are also happy for our investigators and members to participate in any joint team including an inter-ministerial committee to ensure that the investigation of these unresolved cases remains a priority.

Future Meeting



A just society for all

As is usual with these kinds of meetings, there is not enough time to put forward all of the issues that need to be discussed. I would therefore like to request suitable dates from yourself regarding a follow up meeting which will mainly include the lawyers and legal advisors representing the families of victims. Advocate Howard Varney will be available from the 6 May which is when he returns from Geneva. We would again advise you of those who will also attend the meeting. My office will make contact with your secretary to ascertain your availability once the Easter Holidays are over.

Request for Information

Mr. Moray Hathorn also advised that he had made a number of requests to Advocate Torrie Pretorius for further information relating to the Timol and Aggett cases including a letter to the National Archives regarding his access to the archives. Mr. Hathorn has confirmed that he will be writing directly to you about these requests that have been made, so that they can be followed up.

Decentralization of Cases

In our meeting, we expressed our reservations regarding the decentralization of cases. In our meeting you advised that this was being done on your express instructions as you take the view that the function of the National Office is only to provide leadership and support to the provinces.. You also confirmed that there is no intention to remove these cases, from the leadership and management of the prosecutors and investigating officers who have worked on these cases. In particular, you also advised that Advocate Singh who has been responsible for the Timol, Aggett and Haffegee matters will remain in control of these cases. Again we look forward to a constructive discussion on this issue when we meet again.

Amending the indictments in the Timol and Simelane case

We are extremely pleased that you share the view that the indictments in the TRC cases and in particular the Timol and Simelane matters, should be amended to include serious international crimes. You also noted that you do not believe that it would be too difficult to amend the current indictment in the Timol matter. I confirm having advised you that we are also preparing a legal opinion on this issue, which we will share with you.

Indictment of Seth Sons' and Neville Els

We note that Ms. Andrea Johnson is reviewing the Seth Sons and Neville Els matter and that her preliminary view is that there is not sufficient evidence to ground an indictment. In this regard, we would respectfully refer you to the ruling by Judge Mothle in the Timol Inquest, where on the evidence before him, he ruled that Els should be investigated for misleading the Court in that he stated that he only knew of the allegation of assault on detainees from the media, which is in conflict with the police records which reflect that he was present as



A just society for all

one of the interrogators when Professor Naik (Naik was detained around the same time that Ahmed Timol was detained) was subjected to the "helicopter" method of torture.

Judge Billy Mothe also ruled that Sons should also be investigated for testifying under oath that that he had heard of detainees' assault from the media given that five witnesses filed affidavits to dispute this statement. Given Judge Mothe's ruling, we are of the firm belief that a perjury indictment is competent and would like to present our views on this issue when we meet again.

My PA will touch base with your office to confirm a suitable date and time for the follow up meeting to discuss cooperation on the Joint Task Team as well future strategies to deal with the TRC matters including Inquests.

We appreciate your commitment to dealing with these issues.

Yours faithfully,

Yasmin Sooka

Executive Director

TRC prosecutions: NPA Progress Report; Committee Report on Removal of Magistrate

[Justice and Correctional Services](#)

01 June 2022

Chairperson: Mr G Magwanishe (ANC)

Share this page:

Meeting Summary

[Video](#)

[Tabled Committee Reports](#)

The Portfolio Committee on Justice and Correctional Services received an update in a virtual meeting on the National Prosecuting Authority's (NPA's) recent progress in bringing finality to prosecuting unsolved Truth and Reconciliation Commission (TRC) cases.

The NPA reported that it now had a dedicated team of experienced prosecutors and investigators dealing with these cases, and assured the Committee that it would do all it could to ensure families were kept abreast of developments before the information was made public.

The Committee heard that under the coordinated guidance of the national office, the capacity of the Director of Public Prosecutions' office to prosecute such cases at the provincial level, in the jurisdiction where the offences had been committed, had improved. This had led to a substantial improvement over the last seven months, resulting in the reopening of 38 new investigations into the deaths of detainees. There were currently 97 matters under investigation, with more matters identified for reopening.

The Committee further heard that the NPA's Missing Persons Task Team had recovered the remains of 179 missing people so far, 167 of which had been identified and returned to their families. The teams working on the TRC cases had appointed 16 prosecutors and 22 investigators. Since September 2021, 38 investigations had been reopened and plans were afoot to reopen 18 more. Five cases were before the courts. Several matters had been fast-tracked after consideration of the seriousness of the evidence, the age of the case, the age of the accused/people of interest/witnesses, the availability of experts, and of witnesses and exhibits/records.

The NPA said it had made significant progress with its investigations of apartheid-era crimes referred by the Truth and Reconciliation Commission (TRC), and decisions on ten cases were imminent. These crimes included the security police killings of the "Cradock Four" activists in 1985. Decisions taken could be to open an inquest, launch prosecutions or close the cases. The National Director of Public Prosecutions said a decision on the Cradock Four would be taken in the next month or six weeks. Expert opinions were needed to evaluate some of the evidence. A decision had already been taken in the case of Imam Abdullah Haron, who died in security

branch detention in 1985. The Minister of Justice and Correctional Services had asked the Western Cape High Court to reopen the inquest into Imam Haron's death. The Committee was also told that the Minister was likely to establish an inquiry into whether politicians had hampered the NPA's attempts to prosecute apartheid-era crimes, and other reasons for delays in dealing with these matters since 1994.

Several Members asked about possible political interference and delays. They also had serious concerns about the NPA's poor communication with the families of the victims involved. In the past week, the Committee had been contacted by four families with the same concerns about not being timeously updated by the NPA or not receiving communication from the NPA before decisions were made public. Some families had been waiting 40 years for justice and closure. Members asked how the NPA was interacting with families. Did it have the contact details of all the families? Did the families know where they needed to go if they wanted to contact somebody from the NPA?

Meeting report

Consideration of report on the removal of Ms J Van Schalkwyk from office

The Committee began its meeting with the consideration of a [report](#) on the removal from office of Ms Judy van Schalkwyk, Chief Magistrate at Kempton Park.

Mr Siyabamkela Mthonjeni, Committee Secretary, shared a copy of the report on his computer screen. The Chairperson recalled that the report had been circulated the previous day, and that it would be taken as read.

Mr X Nqola (ANC) moved the adoption of the report, and Ms A Ramolobeng (ANC) seconded the motion. There were no objections, and the report was adopted.

The report would be sent to the Programming Committee for debate in the House, and the subsequent decision by the House.

Progress report by NPA on the Truth and Reconciliation Commission prosecutions

The Chairperson welcomed the delegation from the National Prosecuting Authority (NPA). He recalled that in the Committee's last interaction with Adv Shamila Batohi, National Director of Public Prosecutions (NDPP) and the team, it was agreed that the Committee and the NPA would meet quarterly to receive reports on the progress of the Truth and Reconciliation Commission (TRC) cases.

Adv Batohi introduced her colleagues: Adv Rodney de Kock, Deputy National Director of Public Prosecutions: National Prosecutions Service (NPS) -- under which the TRC component resides -- and Adv Anton du Plessis, Head of Strategy: Operations and Compliance, NPA, and members of their teams.

Introduction

Adv Batohi said ensuring justice for the families and victims of apartheid-era crimes was a

priority for the NPA. The lack of accountability for these heinous crimes continued to undermine the rule of law in SA. Despite the delays, the NPA was now committed to delivering on this priority. They needed to learn lessons from the past to secure the NPA's independence and credibility for the future. Time was not on their side, which was why they were acting with urgency to develop strategies, capacities and partnerships to ensure progress in these cases.

Highlights from the past six months included:

- Establishment of a dedicated TRC component under the DNDPP: NPS;
- Appointment of additional dedicated capacity to focus on TRC matters. The Directorate for Priority Crime Investigation (DPCI) had done the same;
- A full-time TRC coordinator function in the national office to drive internal and external collaboration;
- They had sharpened their prosecution-guided investigation approach in close partnership with the DPCI;
- Under the coordinated guidance of the national office, they had enhanced the capacity of DPP offices to prosecute these matters at the provincial level, within the jurisdiction of where the offences were committed.

Their efforts were paying off. They had seen a substantial improvement over the last seven months, resulting in the reopening of 38 new investigations into the deaths of detainees. There were currently 97 matters under investigation, with more matters identified for reopening. The Missing Persons Task Team (MPTT) established within the NPS had to date recovered the remains of 179 missing persons, of which 167 had been identified and returned to the affected families.

Adv Batohi said the meeting was an important engagement with the Committee. It was an "absolute travesty of justice" that victims of the atrocities committed during the apartheid era were still waiting for justice, either in the form of prosecutions, or in the form of inquests that were reopened, so that people could understand what happened to their loved ones. For the NPA as lawyers and as people, a victim-responsive approach had been taken in its strategy. It was important that survivors and families of victims received some level of justice for those atrocities.

The lack of accountability for those crimes continued to undermine the rule of law in South Africa. She would not go into the reasons for delays, and why the majority of the victims of those crimes had not received justice. There had been public information regarding the lack of action on the part of politicians. The NPA was hampered from doing its work in many ways. Because of all that, the NPA realised that it needed to act with a sense of urgency in trying to deliver justice to as many victims, survivors and families as it could. There was a need to learn from the lessons of the past, and ensure that the NPA worked independently, and thereby ensured its credibility.

Time was not on the NPA's side. Families were dying, the potential accused were dying, and

witnesses were dying. Families were dying without knowing what had happened to their loved ones. The NPA had accused persons dying in some of its cases, so it was very important to act with a huge sense of urgency. This was not just something that the NPA did – it worked closely with the Directorate for Priority Crime Investigation (DPCI). As much as the NPA was often called on to account for that -- and it needed to do so -- it did not have an investigative capacity to investigate those matters. Therefore, it had to work closely with its colleagues in the South African Police Service (SAPS) and the DPCI in order to ensure that it was able to deal with those matters with a sense of urgency.

Adv Batohi gave an overview of some of the highlights from the past six months.

A dedicated TRC component had been established in the NPA under Adv De Kock. The TRC matters were being dealt with in what was regarded as the Priority Crimes Litigation Unit (PCLU) in the NPA for a number of years. The PCLU had a number of issues that it needed to deal with, in addition to the TRC matters, including international crimes, and crimes relating to terrorism. There was a small component of around seven staff members. The PCLU was no longer existent in the NPA at the moment, because most of its members had either resigned or been sent back to their divisions. There was a new component in the NPS, and the NPA had also created a component dedicated to the TRC within the NPS. The NPA had appointed additional dedicated capacity. By dedicated, she meant that the prosecutors who were dealing with those matters were dealing with nothing else but TRC matters. In addition, the DPCI had worked with the NPA, and it had done the same -- adding a dedicated TRC component. That was critically important, because in the past, the NPA had very few staff members who were dealing with a number of other issues, in addition to TRC matters. If the NPA wanted to act urgently in the TRC matters, it needed a dedicated capacity. It had a full-time coordinator at the national office who was working closely with the small teams it had in the regions. The numbers depended on the workload in a particular division. The NPA had based its numbers on that, as had the DPCI.

Regarding the reopening of cases, Adv Bathohi recalled that there were families of detainees who had the means to get lawyers appointed, and had tried to push those cases forward. What the NPA had done was to reopen those cases, and were looking at all of those matters. Even in cases where families could not afford legal action, the NPA was looking at all of the deaths in detention.

The Committee may have seen the news in the media this week about the case of Imam Abdullah Haron, an anti-apartheid activist who died in security branch detention in 1985, being reopened. The family of the late Imam Haron had been informed this week. The National Director had been approached by Adv Nicolette Bell, Director of Public Prosecutions (DPP) in the Western Cape, who had been working very closely with the family of Imam Haron. Upon her recommendation, Adv Batohi had recommended to the Minister that the NPA reopen the inquest into the death of Imam Haron. The Minister had agreed to reopen the case, and had appointed a judge in the Western Cape to deal with that matter.

The MPTT, which was established within the NPS, had achieved continued success in locating and exhuming the remains of missing persons. It had to date recovered the remains of 179 missing persons, of which 167 had been identified and returned to affected families.

Adv Batohi added that one might say that the NPA was not moving as fast as it should be, but she assured the Committee that the NPA, together with the DPCI, was doing everything possible to ensure that all of those matters got attention. The numbers spoke for themselves. Hopefully, there would be more developments in matters being investigated and finalised the next time the NPA came before the Committee.

Dedicated TRC capacity

Adv De Kock added comments on the matter of Imam Haron. He said the Judge President of the Western Cape High Court had recently responded to the Minister's letter, and had appointed Judge Daniel Thulare of the Western Cape Division to hear the inquest in relation to Imam Haron. The prosecution team in the Director of Public Prosecutions' office would engage with the court on the process of managing the inquest under the direction of the judge assigned to the matter.

In the NPA, the total number of dedicated TRC prosecutors appointed in divisions was 16 people. In the DPCI, the total number of dedicated TRC investigators appointed in the divisions was 33 people.

(See the attached presentation for the full details).

Adv De Kock added that the NPA allocated personnel based on the number of matters located in each province. This dedicated capacity was additional capacity that the NPA had appointed to manage the work in each part of the country. For example, in the NPA, KwaZulu-Natal (KZN) had four additional personnel in the form of Senior State Advocates. All of the posts were at the level of Senior State Advocate, which was the most senior litigation post in the prosecution currently. There were Deputy Directors, but the Senior Advocates were the ones who took the most challenging cases to South Africa's courts.

In the Gauteng Division: Pretoria (under the NPA), the NPA had received a motivation for an additional three prosecutors, where it currently had one prosecutor. The NPA had approved the addition of three prosecutors, and it would try to get those additional prosecutors as soon as possible. The NPA had received a request from the DPP of the Eastern Cape for an additional three prosecutors, and those three had been approved. The NPA would make sure that it got the additional prosecutors to that division quickly. At the Head Office, there were two colleagues, specifically a Coordinator and a Deputy Director, assigned to the TRC work. The NPA anticipated that it would appoint an additional three colleagues at the national level under Head Office.

The model that the NPA was following was that the prosecutors (NPA) and investigators (DPCI) worked solely on TRC matters. That was the difference that the NPA had introduced. Previously, matters would be assigned to a prosecutor who potentially had many other matters. As far as this group of people was concerned, both the prosecutors and the investigators were working solely on TRC matters. The NPA was confident that that would speed up the investigations that it would talk about further on in the presentation.

The DPCI colleagues were also supported by the SAPS component. Where investigators needed additional assistance, SAPS was there to assist. Similarly, SAPS would also assist the prosecutors when needed. Although the NPA itemised the DPCI colleagues, they were operating within the broader framework of the prosecution so they could get support and advice from time to time, as well as help on matters from senior colleagues. That broader support was also available within the respective offices of the DPP.

Progress update

The audit of matters between the DPCI and NPA was key in developing a coordinated and hands-on, standardised approach. Matters were identified for fast-tracking, with consideration given to the seriousness of the evidence, age of the matters, age of the accused/persons of interest/witnesses, availability of experts and witnesses and exhibits/records.

Adv De Kock added that a lot of work had been done at the Head Office level to ensure that the Head Office could assist the regions with records, as much of the records were archived, and a lot of engagement happened to ensure that the regions received the relevant documentation from the archives in Pretoria, so that the NPA could assist the investigators and the prosecutors in the divisions.

Divisions were encouraged to develop action plans with set time frames in respect of the strategic prioritisation and finalisation of matters. There was a critical analysis of progress within the divisions on a monthly basis.

The NPA received its reports on the fifth of each month, and it was a compulsory requirement that the divisions submitted the reports to Adv De Kock's office, where the coordinator and the Head Office assessed reports and commented on progress. Where the NPS felt that progress was not sufficient, it engaged in those issues. It also supported its divisions. It was a collaborative approach, and its strategic direction on how it did the work was set by its national office. The NPS assisted the divisions in getting the work done.

The dire need to prioritise TRC matters had resulted in joint NPA/DPCI regional workshops coordinated by the NPS National Office with effect from 13 June 2022. Adv De Kock said the workshops would look at a number of issues on the specifics around the TRC's work. The work was unique, because the majority of the cases were very old, so the NPA needed to have a different methodology, and a different approach to the work. It would engage with its partners in bringing on additional expertise to assist it with that work. All of the prosecutors and investigators who were appointed would attend the workshop over a period of about two days, and the workshop would explain further approaches and understandings of how it would fast-track the work.

Monitoring and evaluation

Progress in investigations was divided into three categories:

- Category A: Available evidence, docket, inquest report etc.
- Category B: Expert reports.
- Category C: Stages nearing completion of investigations and/or decision making.

Adv De Kock said that category A was the first phase, and involved the collation of evidence, getting inquest records and other important evidentiary information, etc. The category B second phase related to additional reports and expert reports. Sometimes the NPA had to reconstruct the crime scenes. Sometimes it would also need additional experts on pathology reports. Some reports had been done years ago. All of the evidence needed to be reviewed again, specifically evidence of exactly how people had died. Medical information and medical reports would also need to be reviewed. These were all additional expert reports and expert evidence that the NPA would have to then collate in preparation for a hearing, either in court as an inquest, or in court as a prosecution. Category C related to the phase where a matter was nearing decision. Hopefully, by dividing progress in investigations into these three categories, the NPA would be better able to understand the progress in each investigation. It was confident that it was making good progress.

Improvement in cases under investigation

38 new investigations had been reopened since September 2021, and 18 were awaiting reopening. Adv De Kock recalled that the last time the NPA came before the Committee in September 2021, it had 59 matters that were under investigation. At that time, it had found 55 potential names of matters. A lot of work had to be done on those 55 potential matters to consider whether they qualified for further investigation. The bar chart in the presentation showed the progress made each month since September 2021.

(See the attached presentation).

November 2021 had been relatively static -- that was when a lot of work was done to understand those matters. From January 2022, there was significant movement. Where cases under investigation had increased, those matters were formally referred for investigation. The teams that had been appointed then received those matters, and those teams were assigned to do the investigations. Ongoing work involved continuing to identify other matters that the NPA either may not be aware of, or matters that still needed to be referred to the NPA. The cases involved a collaborative approach between the prosecution and the DPCI investigators. The cases were regarded as priority crimes, and that was why the NPA had its most senior members working on those matters.

Divisional progress as at 30 April 2022

A pie chart showed that 60% of the matters were in category A (0-33% complete); 14% were in category B (34-65% complete), and 26% were in category C (66-100% complete). The percentage of matters in category A was due to a large number of matters being referred from January 2022. Adv De Kock noted that the bulk of matters in category A should be moving to category B within the next quarter. Hopefully, by the third quarter, a lot of the matters would be in category C. Once matters were in category C, they were “ripe for decision-making.”

He used the example of the Imam Haron matter: That matter had started last year, and the NPA had been able to do various things quickly, including getting additional expert reports on the matter. It then got both the DPP of the Western Cape division and the prosecutors assigned to make a recommendation in respect of the matter. The decision was to make a recommendation to

the NDPP to approach the Minister to reopen the inquest.

In general, the NPA's work was designed to get the evidence as quickly as possible, so that the prosecutors would be able to make a decision in the matter. The decision would be either an inquest, or a decision to prosecute. There may be a decision not to prosecute, and that would be based on the evaluation of the entirety of the evidence that it had collected.

The Eastern Cape had a substantial number of matters. There were currently 13 matters, with ten in category A and three in category B. Adv De Kock had been informed by the DPP that the Cradock Four -- anti-apartheid activists who were killed by security police in 1985 -- matter was in category C. There were one or two aspects that needed to be handled. There had been a request for some additional expert opinion in respect of the matter on the evaluation of some of the evidence. The NPA was working closely with the lawyers that had been appointed. He had been informed by the DPP that as soon as the final outstanding opinion was received, and a few other issues were finalised, then the DPP would be able to make a decision on the Cradock Four matter.

In the Gauteng Local Division, four matters were ready for a decision. In the KZN division, 12 matters were ready for a decision. There would also be a provincial workshop in KZN, which would take place the following week. It would be a two- or three-day workshop, where all the KZN cases would be discussed. The NPA would send national colleagues to KZN to assist. Limpopo (four matters in total) had one matter in category C, as did Mpumalanga (three matters in total).

Adv De Kock noted that Eastern Cape Mthatha and the Eastern Cape Division were under one Director of Public Prosecutions. The Director in Mthatha currently took responsibility for the entire Eastern Cape.

The North West had two matters in category C (four in total); the Northern Cape had one matter in category C (three in total), and Gauteng Division had one matter in category C (20 in total). The Western Cape had two matters in category C (nine in total). One of the two matters in category C in the Western Cape was the Imam Haron matter, which Adv De Kock noted was moving into the High Court.

Noteworthy matters

Matters highlighted in the presentation were:

- S v JA Rodrigues (finalised);
- Dr Neil Aggett -- (*See the attached presentation for the full details.*)

Cases on the court roll

The cases highlighted in the presentation were:

- The reopened inquest of Mr Ernest Dipale, where judgment was awaited.
- The reopened inquest of Dr HH Haffejee, where judgment was awaited.

- The COSAS Four, which was on the court roll of the South Gauteng High Court for 19 July 2022.
- S v Coetzee and Another, where a trial date had been set for 6 to 17 June 2022.
- S v Johan Marais and Others, where the matter had been postponed to 20 June 2022, Regional Court, Benoni.

Matters where decisions were imminent

- KZN: Four
 - Mpumalanga: One
 - North West: Two
 - Northern Cape: One
 - Gauteng: One
 - Western Cape: One, pending the decision of the Minister (Imam Haron)
 - Eastern Cape: One (Cradock Four)
- Total: Eleven

Adv De Kock commented that a decision on the Imam Haron matter had been made. At the time that the NPA prepared the slides, it was still awaiting the Minister's decision.

The Chairperson interjected to say that with the Western Cape, Adv De Kock had specified that it was the Imam Haron matter. He had also specified that in the Eastern Cape, the decision on the Cradock Four was imminent. He did not know the names in the other cases.

Adv De Kock replied that the NPA could give the Committee the details of those cases. Alternatively, he could ask colleagues to give the names of the matters in the meeting or give the details in writing to the Committee.

The Chairperson observed that the whole world was watching the progress of those cases with interest, and it was important that people knew the names of the cases.

The way forward

- The NPA leadership was committed to accountability for these serious crimes.
- The NPA must act independently and fearlessly. Prosecution must be based purely on evidence, irrespective of race, colour, creed or political affiliation.
- The NPA was committed to working with families and stakeholders. A partnership and collaborative approach was key to making progress in a holistic manner.
- They were acting with a sense of urgency to deliver impact and build sustainability of their capacity and engagement on the TRC and other complex crimes.
- They aimed to build the required permanent capacity, tailored training and capacity building initiatives, and broad partnerships to ensure that they could deliver justice for these crimes now and into the future.

Adv Batohi said that the NPA had the full list of names -- it was just selecting those particular ones mentioned above.

She observed that the NPA was not where it wanted to be, but it had come a long way in trying to address those matters. She wanted to assure the Committee, the people of South Africa, and the families of the victims, that these cases were a top priority for the NPA. It hoped that it would be able to make significantly more progress on those matters as it moved forward. The NPA was committed to working with the families, the legal representatives of some of the families, and other critical stakeholders. This was not just something that the NPA was doing on its own – it had to work collectively, and also with the support of the Committee, to make sure that it was able to bring justice to the families of the victims of atrocities committed during the apartheid era.

The NPA was acting with a sense of urgency, and it knew that time was not on its side. It was moving towards building a more sustainable capacity in the NPA to deal with the TRC and other complex crimes. That was not to say that colleagues that were currently dedicated would be dealing with other crimes. The NPA realised that at that moment, it had a number of contract appointments dealing with the TRC matters. It had been fortunate to get a deviation from the Department of Public Service and Administration (DPSA) to appoint those colleagues on a three-year contract, because of the fact that those cases took longer. The NPA realised that it needed the capacity, and so it would try to convert those contracts to a permanent capacity. It knew that even when those matters were concluded, with the amount of work the NPA had in other areas, specifically other complex crimes, there would always be a need for prosecutors to be dealing with those matters.

Adv De Kock mentioned tailored training to deal with those matters, and to ensure that the NPA was working in meaningful partnerships with a range of stakeholders, in particular the families of the victims.

Discussion

Adv G Breytenbach (DA) said that the update was encouraging. It appeared that serious attention was finally being paid to those matters. It of course begged the question of what had happened in the preceding 25 years, and why in the entire history of the PCLU, progress had not been made before. Who had been responsible for that lack of progress, and what were the consequences of that lack of progress? Who was in charge of that unit, and why had it not made any progress? That demonstrated a serious lack of accountability. The Committee was entitled to know about the lack of what went on.

The National Director had said that the NPA was not going to go into the reasons for the delays – but that was precisely what the Committee was there to do -- specifically, to determine what the reasons for the delays were, and to ensure that the delays did not recur. She asked the NPA to delve into the reasons for the delays.

On the Cradock Four matter, the Committee was aware that Mr Lukhanyo Calata had gone to court to get an order to compel in July 2021. Almost a year later, there had not been a lot of discernible progress in that matter. There had been nothing in court. There appeared to be progress with negotiations, but there was nothing tangible that one could see on a court roll. The deadline that was given in writing by the NPA had been missed. The Committee had then been

told that the deadline was just a show of good faith, which was not met. What was the concrete timeline to which the Committee could look forward to some progress on that matter? Were the families of the Cradock Four (and certainly Mr Calata as an interested party) being kept up to date? Was there communication with Mr Calata and the families of the Cradock Four? Did the families know what was going on, and were they consulted? Were the families treated as part of the process? Adv Breytenbach's information was that the families were not treated as part of the process. Why not? It seemed to be deeply disrespectful not to include the families in information. She was not referring to talking to the lawyers, but was instead referring to talking to the families themselves.

The Minister of Justice and Correctional Services had made a public announcement to say that he would approach the Judge President to appoint a judge to deal with the Imam Haron matter. That was where the family of Imam Haron had heard about it. Why was the family not informed, and not consulted? Why was the family not treated with more respect? If that was not the NPA's mistake, then it needed to say so, so that the Minister of Justice and Correctional Services could explain it. She expected that after such a long, unforgivable delay, families would be treated with much greater respect.

She found the lack of tangible progress, and the fact that the families were not part of the process, deeply disturbing.

Mr G Hendricks (Al Jamah-Ah) remarked that the Imam Haron matter was close to the hearts of the Muslim community, and to the Pan Africanist Congress (PAC). Al Jamah-Ah had raised the matter six times over the past three years, with the last time being in September 2021. Al Jamah-Ah had received a detailed reply to its parliamentary question. He was pleased to say that the NDPP had delivered on her promises, and Al Jamah-Ah wanted to thank the NDPP very much for the progress that had been made so far.

He was disturbed that decisions were taken to prosecute or not to prosecute, given how those families must feel if at the end of the whole process (waiting 25 years or more), they were then told that the NPA was not prosecuting. There needed to be an exit strategy if that happened. He felt that even if the evidence was weak, every family needed to see that the perpetrators had their day in court. It was up to the courts to decide, but not to continue was "very, very sad."

Mr Hendricks was very pleased that there was a dedicated team dealing with TRC cases full-time. That was very important, because after a revolution, those who perpetrated crimes needed to be "dealt with severely." These matters had been postponed, and now that there was a dedicated team, which was the first step. Perhaps there also needed to be a dedicated SAPS team of double the current number of people who were working with the NPA. If there was not a dedicated SAPS team, nothing would happen. When there were high-profile cases, the Minister of Police would launch his 24-hour or 48-hour team to find the perpetrators. That was what needed to be done. He imagined that the Minister of Police would put in place at least six or seven SAPS teams if there were six or seven cases that were in their final stages.

Al-Jamah-Ah had also raised the issue of Chief Albert Luthuli, and it was promised that names would be given at a later meeting. He agreed with the Chairperson that "the whole world was

watching.” The Luthuli family was also watching. The family wanted to know which phase of investigation their matter was at, or what was happening with the matter. It could not be that the matters concerning the leaders of the PAC and ANC were not being treated very seriously.

He was glad that another Member had raised the issue of the Cradock Four. He had spoken with a Member of Parliament who came from that area. It was a serious issue, and was a betrayal of the people of both Cradock and South Africa as a whole. Poor communication had also been mentioned. Perhaps the NDPP needed to speak to the Department of Communications and Digital Technologies (DCDT) to assist it with communications, because the communications departments at Members’ constituency offices received a lot of complaints that there was poor communication and collaboration. Families were not kept informed. The Haron family heard about the decision on the matter only through the media. The first person the family phoned was Mr Hendricks, and had asked him what was happening. He told the family that it was “very strange” that the Western Cape team had “let the country down” and not informed the families that there was some progress. Imagine the relief that such news would have brought the families, which was now denied.

He understood that inquests were very important, and he was happy that a judge of the High Court was conducting them. The Committee had heard in the progress report that a lot of bodies of missing persons had been found. He was not sure if inquests had been held on those remains, and whether those matters were on the list to find the perpetrators. The Committee needed to get that answer.

There were people who were still alive who were in jail – people from the PAC, ANC, IFP etc. Such cases were part of the TRC cases. Instead of being put in graves, people were put in jail, and “hidden in jails, maybe half-killed, and were languishing in jails.” He did not know whether the delays were because the NDPP and the government “were scared of AfriForum.” The NDPP needed to tell the Committee whether it was scared of AfriForum or not.

President Ramaphosa had spoken about the social compact -- that communities, the general public and the corporate world needed to work together. Now was the time for the corporate world, “whose hands were not clean,” to provide funding, so that more resources could be put into bringing those matters to a head. South Africa’s top law firms needed to at least make available five of their staff full-time at a very senior level, and give as many resources as possible. That was how Mr Hendricks understood the social compact idea that President Ramaphosa had raised.

He thanked the Chairperson for his leadership in this matter. He had been strong in his message of how these matters needed to be brought to a head. He was sure that the Chairperson had been working behind the scenes, and that was why the Committee had seen that the NDPP had delivered. He also thanked Adv De Kock for his work.

Ms Y Yako (EFF) asked what the reasoning was behind having a certain number of prosecutors per province, as opposed to the amount of cases per province. There were low numbers in some provinces, but the number of cases being dealt with was high. She asked the NPA to explain the logic behind the allocation of staff.

She observed that her colleagues had already asked why there had been delays with cases. These were very serious cases. Had there been any political interference that had hampered the NPA from doing its job in prosecuting the crimes of apartheid? She asked if the NDPP could be as honest as possible, because the Committee was a platform on which it could protect the NPA, as well as protect the people of South Africa who had been victimised by apartheid crimes.

Mr Nqola echoed the sentiments of his colleagues, particularly in affirming that by the looks of the presentation, it seemed that progress had been made. As Adv Breytenbach and Ms Yako had said, the Committee took the work of the NPA very seriously, particularly in a society where crime was rising. To say that there had been a hampering of the functioning of the NPA was a very serious statement, and he asked the NDPP to help the Committee unpack that. In the report, there had been information on cases that were reopened. One could see progress from September 2021 to April 2022. If those cases were reopened, it meant that they had been closed at some point. Was there a link between the closure of those matters and the hampering of the NPA that the NDPP talked about?

Those matters were crimes against humanity that had been committed more than 28 years ago. Nature would dictate that some accused, witnesses, or any person who may be of help to some of those matters, may be deceased. The process did not revolve only around arrests – the families needed solace and closure. When families of the victims knew what had happened to their family member, that would bring comfort and closure to them. Even when those who may have been involved in the killing of South Africa's people were now deceased, processing those matters was being done for the families of victims and for communities.

Apartheid had indeed been a crime against humanity. The number of cases that had been referred for investigation, or the cases that were underway, were a total of 97. With those 97 cases, what was the strategic turnaround time of the NPA to ensure that those matters would be finalised? For example, would the time period be six months, two years, or five years? What was important was that those matters had been dragging on for too long, which the report had reaffirmed. In a normal society, one was not supposed to be discussing those matters 28 years after democracy.

The Cradock Four matter was in the category of matters where a decision was imminent. Whose decision was imminent -- was it a court decision, an NPA decision, or the Minister's decision? On the slide that spoke about matters where decisions were imminent, the words "Cradock Four" were written in brackets. What did that represent as they related to the Cradock Four?

He mentioned Adv Breytenbach's question on communication, where she mentioned the Calata family. He did not want to focus on the Calata family alone, but he wanted to expand on that and ask if there was there constant communication with all of the families to which the cases were directed.

Ms W Newhoudt-Druchen (ANC) observed that her colleagues had highlighted a very important aspect that she wanted to say regarding crimes against humanity. The cases were repeatedly talked about, but she felt that bringing closure to the pain of families was not happening.

What was the training that Adv De Kock had referred to? The Committee had been hoping that the NPA was working on those cases, and now it had to have training. Who provided the training? She felt that training should not be a reason for a delay in resolving those cases.

For the cases that were still being reopened, had the NPA interacted with each of the family members in those cases, or not?

Responses

Adv Batohi responded to Adv Breytenbach's question on what had happened in the previous 25 years. Ms Yako had also mentioned political interference, and Mr Nqola had referred to the hampering of the functioning of the NPA. There had been a number of Members who had asked about possible political interference and delays. She stated that there had been no political interference at all since she had taken office. However, if one read the affidavit of the previous NDPP, Adv Vusi Pikoli, it would be clear to Members what kind of interference, in his view, the NPA had been subjected to at the time. She urged Members to refer to Adv Pikoli's affidavit.

Referring to the Rodrigues judgment, she said the judge had directed the NDPP to look into possible political interference in the functioning of the NPA at that time. Adv Batohi had been engaging with the Minister on that issue. She did not think the Minister had taken a final decision. The Minister was looking at a high-level panel or an inquiry that would be able to look into the issue that Members had raised. Hopefully, that would address the issue of understanding exactly what had happened, as well as possible accountability. Those discussions were at an advanced stage, and hopefully, there would be a notification in that regard fairly soon.

All were aware of the painful history of the Cradock Four matter, and how long it had taken. She was aware that there had been orders to compel that had been brought. She sincerely expressed her commitment that when the NPA had a case, it would decide to prosecute. There was "absolutely no reason" for the DPP, if there was evidence against anyone, not to take the decision to prosecute. Bringing applications to compel the NPA meant that it had to engage counsel, and it cost the NPA to go to court.

The NPA had been engaging with the families, because it did not want to be working against them. The NPA and the families were on the same side – both wanted justice for the victims. She wanted to assure the Committee and the people of South Africa that if there was sufficient evidence, the NPA would prosecute. There was no reason why it would delay taking a decision if there was sufficient evidence to prosecute.

She expanded on what she meant by sufficient evidence. The NPA must take a decision to prosecute when in the prosecutor's expert opinion, and in the DPP's expert opinion, it had a case and reasonable prospects of a successful prosecution. To do otherwise could result in the NPA being sued for malicious prosecution. She understood the need for families to get closure, but for the NPA to bring a prosecution where it had weak evidence, on the basis that the families needed to know, was "not the way to go." The NPA could open itself to malicious damage claims and malicious prosecution claims, which could cost the government and the NPA a lot of money. What the NPA did in many of those instances was that it had been asking the Minister – as it did in the Imam Haron matter – to hold a formal inquest. That meant it was not something that was

held in a magistrate's or a judge's chambers -- it was one that was open to the public. In such a formal inquest, oral evidence was led in a court of law where witnesses could be cross-examined, and at the end of the day, the magistrate or judge made a finding. That in itself was a very important process for families to get a level of closure, where there was insufficient evidence for the DPP to take a decision to prosecute.

The investigation on the Cradock Four was at a very advanced stage. Her understanding was that the NPA hoped that within a month to six weeks, the DPP would make a decision on that matter.

Regarding capacity, the SAPS was trying to assist with the NPA's work. It could only urge the SAPS to assist with capacity. The DPCI was "seriously constrained," given the work it had to do. Many of the members that the DPCI had recently appointed had been newly recruited. Recruitment did take a long time. She suggested that the next time the NPA reported, the Committee could invite the DPCI to report with the NPA.

Adv Batohi said the NPA was making "a huge effort" to communicate with the families directly. It was of concern that there were a number of families writing to say that they did not have enough information. The NPA would improve its communication. It was critical that families were updated on progress on those matters.

On the matter of Imam Haron, she noted that on the morning when she knew that the NPA was going to mention the matter in Parliament, she had called Adv De Kock and asked him to confirm that the family had been informed. The NPA had called DPP Nicolette Bell's office, and got confirmation that it had informed the family. However, the Minister made the decision to issue a statement, and regrettably, there was a public statement issued from the Minister's office before the family was informed. In future, the NPA would make sure that the minute it got communication from the Minister, it would communicate with the family immediately. That morning, she was concerned that she would say something on that public platform, and the families would hear it on that platform, which for her was not acceptable. The NPA wanted to apologise for the statement on the Imam Haron matter. It should not have happened, and the NPA would certainly make sure that communication, not just in respect of that family, but all communications, were significantly improved.

Adv Batohi wanted to emphasise that the NPA was not afraid of AfriForum. The NPA did its work not because AfriForum or any other group put any pressure on it. It did its work because it knew it was what it needed to do. The NPA would do its job properly. When it had the evidence, it would prosecute. There may be other groups that needed to find relevance, and speak more to the media about certain things, but the NPA did not do that. It just did its work, and it would keep families informed so that they were aware of what was going on.

She assured Ms Newhoudt-Druchen that the training was not a case of prosecutors who did not know what to do, and whilst training was happening, nothing was going on. The NPA had experienced prosecutors who knew how to deal with those matters. Dealing with those particular crimes, specifically atrocities committed in the apartheid era, required a slightly different approach, because these were very old matters, which meant that the NPA needed to go into the archives. The NPA also involved the investigators in the process. The NPA tried to give the staff

involved assistance and support so that they could move more quickly with the cases. It was not training that started from scratch, and it would not delay the matters.

Adv De Kock emphasised that the NPA had requested all of the provincial DPPs to view and participate in that day's meeting. Colleagues were hearing at first-hand some of the concerns that had been raised. The issue of communication with the families of victims was very critical to the way in which the NPA operated in terms of its own norms and standards. He had received some comments from DPPs where some family members had lawyers, and the DPPs had to communicate with families through lawyers, which was part of the protocols. The NPA would encourage colleagues to deal directly with those lawyers. The NPA's view remained that "we are lawyers for the people." Victims needed to hear from the NPA firsthand. The NPA gave its commitment that going forward, direct communication was the approach that it would take.

The NPA met with directors on a monthly basis in its various operational meetings, and at its national operations meetings in particular, where a number of urgent priorities of the NPA were discussed. The TRC matters were a standing item on that agenda, where meetings went into detail about progress in relation to all of the cases. Besides the mechanisms that the NPA had put in place, the accountability rested directly on the shoulders of each DPP, and on the shoulders of the operational entities, such as the NPS, within the NPA. From the national point of view, the NPA held its prosecutors and DPPs accountable for progress. Going forward, it would monitor, evaluate progress, and report back directly to all the affected families and victims in relation to the cases.

He said the allocation of resources per province was based on the number of cases in each division. It allocated more resources as it reopened more matters. That was why he had said that the NPA was giving an additional three or four prosecutors in the Eastern Cape. It had also allocated additional resources to one of the Gauteng divisions. Allocations were based on the numbers and volumes that staff had to deal with. In some instances, there was only one person allocated, because there were only two cases, but if, for example, the NPA allocated ten cases to a division that had only two people, it would increase the resources given to that particular division

Regarding training, there were a number of additional issues that the NPA would look at, such as certain strategies that needed to be followed in the investigation of those matters. When the NPA got to court, the normal court rules applied in litigation, and the procedures that needed to be followed in South African courts. These were the issues that fell under training. Training was to understand what strategies the NPA would follow in investigating how it would prosecute, and what issues may impact upon investigations. Many records had been destroyed. The NPA needed to reconstruct records, which was a difficult task. It also shared best practices. The upcoming workshop would enhance the work that was currently happening, and share best practices that the NPA had learned already from some of the matters that it was bringing to the courts.

The Chairperson had asked about the names related to the matters mentioned on the slide titled "*Matters where decisions were imminent.*" Adv De Kock wanted to emphasise that that was the context of the names. All the matters were given priority attention. The NPA was not saying that only the names mentioned on the slide were receiving attention. All matters were receiving

priority attention. The names mentioned on the slide -- specifically, the Cradock Four and Imam Haron -- were the ones that hopefully, within a short period of time, the NPA would be able to communicate regarding decisions about those cases. It would communicate immediately with the victims and families of the victims before it communicated broadly in the media. The NPA would try to find a balance, because sometimes things got into the media before it got an opportunity to communicate with the families of the victims.

- In KZN there were four matters: Ms Ntombikayise Kubheka, Mr Oupa Madondo, Mr Sobho Phewa, and Mr Goodwill Sikhakhane.
- In Mpumalanga: Mr "Sweet" Sambo.
- In North West: Mr Brian Ngqulunga and Mrs Irene Motase.
- In the Northern Cape: Mr Booï Mantyi.
- In North Gauteng (Pretoria): Mr Welcome Khanyile.
- In the Western Cape: Imam Haron.
- In the Eastern Cape: The Cradock Four – Mr Fort Calata, Mr Matthew Goniwe, Sicelo Mhlauli and Mr Sparrow Mkhonto.

Those were the names related to the cases where decisions were imminent. In relation to those matters, the communications would happen very shortly.

The Chairperson was unsure if Adv Breytenbach's question had been answered regarding who in the NPA had been responsible for the delays, and what consequences had followed.

Adv Batohi responded that her understanding had been that the question was about the delays in the past 25 years, to the extent that those matters did not proceed as quickly as the NPA wanted them to. The main challenges were that the cases were very old, records had been destroyed, and trying to locate witnesses. The NPA had dedicated capacity for finding evidence. She wanted to assure the Committee that with dedicated capacity, and with more capacity in the DPCI, cases would move forward. Investigators were critical in moving cases forward. The NPA took note of the Members' comments about that issue.

The NPA was constantly engaging with its colleagues in the DPCI to try to get more investigators that could work on the cases. Her understanding was that in the Eastern Cape division, there would be three people allocated. In the Head Office, there would be an additional three, and in Pretoria, there would be an additional four people. Resources, particularly amongst investigations, were difficult. It was not a case of the DPCI being able to reassign members, since members had "a lot on their plates," but they were committed to that process, and the DPCI was trying to give the NPA additional capacity.

Regarding cases being reopened, Mr Nqola had said that at some point, those cases would have been closed. Was there a link between those cases being closed, and what was hampering the NPA in the past? Those matters had not been receiving attention for various reasons. Hopefully, an inquiry would unpack whether there was a link between the lack of attention and the hampering of the NPA. With the proper dedicated capacity, finding those cases and reopening them with a dedicated capacity was what the NPA was doing at the moment.

There was also a question on what period the NPA was targeting to deal with those matters. The NPA was targeting three years. That was why it had contract appointments for three years. It was hoping that it would have been able to have dealt with a significant number of those cases in that period. There may be complexities in particular matters, but three years was its targeted period.

Further discussion

Ms N Maseko-Jele (ANC) asked about the issue of delays. Within the five years that the current team had been in the office, there were delays that had happened, and she hoped to receive an answer. Adv Batohi had given the Committee an answer to that question. She had also mentioned the issue of weak evidence or no evidence. How many of those cases might be affected by weak evidence or not enough evidence when it came to delays?

She had heard Adv De Kock say that he would bring the team to a meeting. As much as the Committee appreciated the progress, and that it might be thanking the Department for its efforts, to the families that had been waiting a long time, one day passing without getting justice would feel like a hundred years. How would the NPA monitor progress? The next time that the NPA came, the Committee wanted to see the tangibles. Her fear was that South Africa was sitting with two serious issues. There was the prosecution of state capture and the prosecution of past crimes. The country was seeing progress on state capture, which had happened recently, but there was "no progress" on old cases. What was being said to the country? What were the priorities when it came to the TRC issues? Those were the questions that Members often had to answer in their communities.

The presentation had mentioned cases in category C, which were those awaiting a decision. How long did the Department take to make a decision on those issues? What was the nature of the decision? How long did it take to make a decision, particularly on the TRC cases?

The Chairperson mentioned an issue raised by the Foundation for Human Rights -- that it was struggling to have prosecutors deciding to charge people with crimes against humanity. The argument was that apartheid had been declared a crime against humanity, but there seemed to be a "reluctance" to bring that additional charge, since it would introduce an element of international law.

The Committee appreciated the report that had been given. From the reports that the Committee had read, and what the NPA had given it, he thought that Members had summarised the "sore points." Generally, it was the issue of interacting with families. Did the NPA have the contact details of all the families? For instance, if the NPA talked about the Congress of South African Students (COSAS), the Cradock Four, or the Nokuthula Simelane case, did it have the exact contact details?

If those families wanted to contact somebody from the NPA, where should they go? As public representatives, and as Members who had talked to families, the experience was that it was not easy to discuss this subject with a person whose loved one was killed or went missing 40 years ago, and who had not had closure up until now.

Responses

Adv Batohi responded to Ms Maseko-Jele's mention of a delay of five years. She had been in office for three years and a few months. She observed that when she took office in 2019, she and her colleagues were dealing with an NPA which did not have any dedicated capacity. The PCLU had very few members dealing with the TRC matters and a range of other types of priority matters, such as terrorism and international crimes. Likewise, in the DPCI, there was no dedicated capacity for TRC matters.

In February 2020, which was the first year, there was the process of trying to understand one's priorities, and trying to liaise with stakeholders. The NPA had a meeting with General De Beer in February 2020; at the time, the issues of TRC and terrorism matters were being dealt with in the same part of the DPCI. The General had made it very clear to the NPA that he did not have the capacity to assist with investigations. He was going to embark on a recruitment process to get the capacity to deal with those matters. The DPCI was also under considerable pressure, with very few members trying to deal with a large number of cases, such as state capture, among others. With the investigative capacity, it took a very long time before the NPA got dedicated investigators. As far as she understood it, it was only in 2021 that the dedicated investigative capacity was created. It was within the past 18 months, at most, where the NPA had been able to get the dedicated investigative capacity. There was nothing it could do without investigators, as that was the starting point.

These were very difficult investigations. She mentioned the complexities due to the age of the matters, and the need to reconstruct records in some instances. In the past 18 months, a considerable amount of work had been done. The NPA was not where it wanted to be, and there were "no excuses" – she understood that it was "cold comfort" for the families, as they did not want to hear about all of those factors, especially if they had been waiting for 40 years. However, she wanted to give the families the assurance that the NPA was doing everything it could. Hopefully, there would be more families that would feel that they had received justice because of the NPA's dedicated focus on those matters. The NPA understood the families' need to understand what happened, to get closure, and to receive some level of justice for the atrocities and for their suffering.

The NPA could not give a number on how many cases would be affected by having weak evidence or no evidence, because it depended on the evidence. It was only when the NPA got to a point where there were no further investigations that could be done in a matter, and it did not have sufficient evidence, that the DPPs would make that decision.

On matters in category C, Adv Batohi had a document with her that contained a monthly investigations checklist. The checklist helped the NPA, in that it had different things that happened in the different phases of investigations. In phase one, for example, one of the checklist items was to contact families. Other items on the checklist included identifying the potential accused, and confirmation of whether the NPA had received documents at that early stage. The second phase included compiling those documents, obtaining more statements, affidavits, and forensic evidence. The third phase was when the NPA felt that it had advanced from that stage to the final stage, where it could assess all of the evidence, where there was not much outstanding, and where the NPA was in a position to take a decision. It was difficult to put timelines on the phases -- it was a guide for the NPA. It could take anything up to six months in the final phase. It

tried to keep the final phases as short as possible, but it depended on various factors. Sometimes there may be small things outstanding in the final stage, but it could be difficult to get those things for various reasons.

On the issue of crimes against humanity, and charging potential accused with crimes against humanity, she said that with her experience at the International Criminal Court, those types of crimes were not foreign to her understanding of it, and of understanding the need and importance of charging those international crimes in respect of some of the TRC cases. At the very early stages, to say that there was resistance on the part of the NPA to deal with them was factually incorrect. Adv Batohi had been very open, and had been engaging with families from the early days to urge working together to try to get a good case that could be taken to court with the charge of international crimes. These were complex legal issues that required a lot of thought and engagement. As the prosecution, the NPA had been ready to engage with those issues.

There had been different legal views on whether the NPA could or could not charge. It required the NPA to consider those matters carefully. The Foundation for Human Rights had been pushing for prosecution of crimes against humanity. Adv Batohi's final response to that was that she was open to such a charge, and that there would be appropriate cases where the NPA could charge crimes against humanity. It might not be able to make such a charge in a particular case for various reasons, including the fact that the matter was in court for trial. When one brought new charges, one needed to inform the accused persons, which would mean further delays. The NPA was ready to start with the matter in question. For various reasons, it decided that that particular matter was not an appropriate case in which to make those charges. However, the NPA was looking at the issue of charging crimes against humanity, and it understood the importance of bringing those cases forth.

There was a saying that "bad facts make bad law." Especially, when it was charging for the first time, the NPA needed to make sure that legally it could in fact charge those crimes. It needed to make sure that it charged such crimes in the appropriate cases. Hopefully, there would be those cases where the NPA would be able to charge crimes against humanity.

The NPA really wanted to work together with the families. Families also had legal support that the NPA wanted to work with, so stakeholders need not work separately. All were working towards the same end, namely, working for the victims that legal support and the NPA were representing. The NPA wanted to work together with the families of the deceased.

Contact details were on the investigation checklist, and the DPP's offices had contact details. As Adv De Kock explained, where there were lawyers representing the families, the families were working through the lawyers. The NPA would not want such lawyers to think that it was bypassing them and speaking directly to the families. This was certainly important to the NPA. One way of measuring whether it was doing that better would be that the next time it came to the Committee, it would hear Members saying that they were getting fewer calls from families to say that they did not know what was going on. She asked that if Members got such communication, they could forward it to the NPA's offices where it would look into it and make sure that there were follow-ups where there had been any gaps in communication.

Chairperson's concluding comments

The Chairperson said that the Committee was happy that the NPA had started the process, since it promised last year that it would have regular meetings with the Committee on progress reports. The Committee took the suggestion that the NPA made seriously -- the next time the NPA came, the Committee would invite the head of the Hawks. There were particular issues that were of serious concern. For instance, with respect to the Cradock Four, former members of the special branch had been appointed to investigate that particular case. What greater form of insult could there be to those families than that? To show that that was incorrect, the Hawks had subsequently appointed other members. Those were things that came as "a final nail to the hearts of the families." The Committee thought that it would be very important that the Hawks formed part of the meetings on the TRC cases.

Additionally, in the Committee's next report, it would be focusing on the issue raised by several Members, specifically that of families being contacted timeously. The Committee did not want to take it for granted that because it saw there was a checklist, NPA members had therefore contacted the families. The Committee would want to have a more detailed report on contact with the families. It was of serious concern that in the last five days, Members had received no fewer than four different family members complaining that they had not been contacted. When the NPA came back to the Committee during the next four months, the Committee would be focusing on the issue of contact with families.

The Committee wanted to see substantive progress. The NPA had made good progress, but the Committee wanted to see substantive progress above what it had reported. If the Committee and the NPA wanted to treat this as the normal course of its work, then at some point there would come a time when it would be too little, too late. It was important to stick to the Preamble of South Africa's Constitution -- "Let us not dishonour those who died for our freedom." The Committee thought that the NDPP, itself and the families should work together to ensure that those who fought for freedom were honoured.

The Committee would be paying particular attention to getting detailed reports from Adv De Kock and the DPPs, and on the process of contacting the families. Even if the NPA would not prosecute, it was important for the NPA to walk with the families to its decisions. He urged the NPA not to decide by itself what decision was good for families; it might be technically correct, but because it had not walked with the families to arrive at that particular decision, there might not be an appreciation of its decision.

The meeting was adjourned.



INTERNAL MEMORANDUM

TO: ALL DIRECTORS OF PUBLIC PROSECUTIONS

AND TO: ALL SPECIAL DIRECTORS OF PUBLIC PROSECUTIONS

FROM: ADV. R J DE KOCK
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
NPS

SUBJECT: TRC MATTERS: COMMUNICATION WITH VICTIMS AND FAMILIES

Colleagues,

1. On 1 June 2022, the National Director of Public Prosecutions, Adv S Batohi (NDPP) briefed the Portfolio Committee on Justice and Correctional Services on the progress made on TRC matters. All Directors of Public Prosecutions (DPPS) were privy thereto via virtual platforms.
2. A serious concern was raised by the Committee when it emerged that poor communication with families and victims had resulted in either some families and victims not updated regularly on progress made by the NPA or important decisions not been communicated at all or timeously to families.
3. In view of this, an apology had to be issued at the briefing, by the NDPP.
4. To avoid a recurrence, the NDPP has directed that henceforth, a name list of all families and victims together with their contact numbers be obtained. Should the families be legally represented, their contact details should also be reflected thereon.
5. Prosecutors must liaise with families to ensure that a more victim centred approach is followed. She reiterated that prosecutors were the "people's lawyers" and that prosecutors must play an active role in liaising with families.

6. The NDPP also emphasized the NPA's commitment to ensuring progress on the TRC matters with the creation of both a dedicated component within the NPS and dedicated capacity within the NPA to deal strictly with TRC matters only.

7. In line with the NDPP's directives, kindly let us have a contact list detailing all names and contact details of families, or victims and legal representatives, within each division by no later than 29 July 2022. The list is merely for our record purposes.



RJ DE KOCK

DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS: NPS

DATE: *20/6/2022*

Presentation to Justice Portfolio Committee on TRC Progress and Developments

25 November 2022



National Prosecuting Authority
South Africa

SB 00092

Contents

- 01 Introduction: ANDPP
- 02 Dedicated Capacity
- 03 Monitoring and Evaluation: Progress in investigation
- 04 Matters Enrolled and Finalised
- 05 Closing Remarks



National Prosecuting Authority
South Africa

1 Introduction by ANDPP

Introduction

Since the presentation to the Committee on 01 June 2022, the following progress has been made:

- ❖ Dedicated capacity to deal with TRC cases has been increased within both the NPA and DPCI.
- ❖ Increased engagements with the families/stakeholders:
 - ✓ Following internal communication from the NDPP, each division submitted names and contact details of families and representatives to the national office. This is updated in monthly reports where regular reporting to families is encouraged.
 - ✓ Engagements with DPPs and representatives of Apartheid Era Victims Family Group (AVFG).
 - ✓ Other stakeholders.

Introduction (cont.)

- ❖ Increase in NPA/DPCI TRC accountability sessions held within Divisions where challenges are addressed, and skills transfer takes place.
- ❖ These processes have contributed to the increase in the level of engagement and joint accountability.
- ❖ Between September 2021 & April 2022, 38 new investigations were opened. Between May 2022 & October 2022, an additional 32 new investigations were opened.
- ❖ In September 2021, 59 TRC matters were under investigation. As of October 2022, 64 **new investigations** stemming from the TRC have been re-opened.
- ❖ A total of 129 cases are presently under investigation.

Introduction (cont.)

- ❖ The measures summarised in this presentation are in line with commitments made by the NPA stemming from the Rodrigues judgement and communicated to the Honourable Minister of Justice and Correctional Services. They relate to our internal capacity, processes, and broader efforts to insulate the prosecution of TRC cases from political interference.
- ❖ In addition to enhanced capacity and stakeholder engagement, the NPA will appoint Senior Counsel to assess whether the measures it has adopted are adequate. If they are not, Senior Counsel shall make recommendations to strengthen them.
- ❖ If in the process of review, Senior Counsel have reason to believe that there is information amounting to a violation of Section 41(1) of the NPA Act, such issues are to be escalated to the NDPP. If necessary, the NPA will refer matters for criminal investigation.

Introduction (cont.)

- ❖ The Missing Person Task Team (MPPTT) in addition to recovering the remains of 179 missing persons, also has recorded successes amongst others:
 - ✓ Location of the remains of an MK member shot dead in 1980, which excavation is currently being planned.
 - ✓ The identification of a burial site where four missing MK members were ambushed in the Caprivi Strip in 1970.
 - ✓ The recovery of the remains of a political prisoner, Mr James Booï who had been buried in a pauper's grave. His remains were exhumed and presented to the family for re-burial which took place on 30 July 2022.

2 Dedicated Capacity

Dedicated Capacity: NPA and DPCI

NPA	DPCI
Total number of dedicated TRC prosecutors appointed in divisions: 25	Total number of dedicated TRC investigators appointed in Divisions: 40
<ul style="list-style-type: none"> •DPP: KwaZulu-Natal 5 •DPP: Western Cape 3 •DPP: Gauteng Local Division 3 •DPP: Gauteng Division Pretoria 3 •DPP: Limpopo 1 •DPP: North West 1 •Other: Head Office 2 •DPP: ECD (Mthatha & Makhanda) 7 	<ul style="list-style-type: none"> Central Region: Head office, Gauteng, Mpumalanga, Limpopo and North West 19 Coastal Region: KwaZulu-Natal 7 Eastern Region: Eastern Cape 8 Western Region: Western Cape 4 Karoo Region: Free State and North West 2
<p>Increase of dedicated prosecutors: 9</p> <p>Increase of investigators: 7</p>	

3 Monitoring and Evaluation: Progress made in investigations

Monitoring: Matters within Divisions

Division	Referred TRC Matters
DPP: WC	9
DPP: FS	2
DPP: MTHATHA	11
DPP: ECD	14
DPP: NW	5
DPP: KZN	29
DPP: MPUMALANGA	5
DPP: NC	3
DPP: GLD	25
DPP: GDP	16
DPP: LMP	10
Total	129

Monitoring (cont.)

- ❖ Internal communication forwarded to the Divisions to encourage active engagement between prosecutors and families/family representative.
- ❖ Family kept up to date and report back received at the national office monthly.
- ❖ Successful engagements facilitated by the national office with representatives of Apartheid Era Victims Family Group (AVFG) and the DPP divisions.
- ✓ Rolled out in GDP and GLD Divisions. Attended by Directors of Public Prosecutions (DPPs), dedicated TRC prosecutors, dedicated investigators and DPCI heads in October and November 2022, respectively.

Monitoring (cont.)

- ❖ **Stakeholder engagements**
 - ✓ GDP: 07 November 2022 – approximately 14 personnel and family members attended
 - ✓ GLD: 26 September 2022 – approximately 10 personnel and family members attended
 - ✓ Other Divisions to follow to ensure a more victim-centred approach is adopted.
- ❖ Continuous stakeholder engagement scheduled for December 2022.

Evaluation

Reporting

- ❖ Monthly reports received on all 129 matters under investigation from all Divisions.
- ❖ Detailed reports submitted to the national office in respect of all decisions taken.
- ❖ Divisions that are encountering challenges seek intervention. Intervention processes are implemented from the national office together with the relevant DPPs and DPCI heads.
- ❖ Divisions have self-imposed time-frames on matters that they have identified for fast-tracking. This is monitored strictly at the national office.
- ❖ Legal and administrative challenges are addressed via the national office.

Accountability

- ❖ NPA and DPCI accountability sessions:
 - ✓ Attended by both the prosecutor and investigator seized with the relevant matter with their respective heads at the same meeting.
 - ✓ Successful attendance by all investigators and prosecutors.
 - ✓ Each case docket was constructively critiqued and assessed to determine the quality of investigations and challenges facing investigators and prosecutors.
 - ✓ Existing skills were accessorised and upskilled for the benefit of prosecutors and investigators.
- ❖ Held within the Divisions of KZN, CT, NW and EC.

Accountability (cont.)

- ❖ Accountability sessions held within the divisions of KZN, CT, NW and EC.
- ✓ KZN: Session held in June 2022; follow-up session in October 2022; 13 personnel attended.
- ✓ CT: Session held in July: 4 personnel attended.
- ✓ NW: Session held in October: 5 personnel attended.
- ✓ EC: Session held in August: 22 personnel attended.
- ❖ Follow-up accountability sessions on a quarterly basis are encouraged and planned for other divisions.
- ❖ Divisions with larger volumes of matters received additional prosecutors.

Divisional Progress

- ❖ To date, there are 129 TRC matters under investigation.
- ❖ 64 new investigations have been re-opened.
- ❖ The highest volumes of TRC matters reported:
 - ✓ KZN: 29
 - ✓ GLD: 25
 - ✓ EC MAKHANDA: 25

Divisional Progress

Category A 0 - 33% Complete Focuses on available evidence, docket, inquest report, witness statements, post-mortem reports etc.	Category B 34 - 65% Complete Focuses on expert reports.	Category C 66 - 100% Complete Focuses on stages nearing completion of investigations and/or decision making.	Total
94	9	26	129

- ✓ **Category A:** In 64 of the 94 matters, statements have been obtained, witnesses have been traced, exhibits, dockets and records of inquest have been sought and some have been obtained. In most matters families have been informed, where traceable.
 - ✓ 56 matters occurred between 1980 and 1989
 - ✓ 27 matters occurred between 1970 and 1979

4 Matters Enrolled and Finalised

Matters Enrolled

Matter	Division	Status
Inquest: Mr Ernest Dipale	GLD	Arguments were heard on 1 November 2022. Judgement outstanding
S v Rorich and another (COSAS 4)	GLD	Judgement awaited on condonation application of SAPS in respect of legal costs. Accused still to plead.
Inquest: Dr HH Haffejee	KZN	Arguments have been heard on 18-19 October 2022. Inquest judgment outstanding.
S v Coetzee (Simelane)	GDP	Outcome of section 79 assessment awaited, accused must still plead.
S v Marais (Nyoka)	GDP	Accused appeared in the Regional Court, legal opinion obtained. Accused must still plead.

Matters Enrolled (cont.)

Matter	Division	Status
Mr Abdullah Haroon	CT	Inquest: 7-22/11/2022 Evidence led. Matter postponed for argument.
Ms N Kubheka	KZN	Inquest proceeded on 24/10/2022 at Umlazi). Postponed to 30/11/2022 – outcome of legal representation.
Mr Sbo Phewa	KZN	Inquest proceeded on 24/10/22 at Umlazi. Postponed to 30/11/2022 – outcome of legal representation.
Mr Zama Sokhulu	KZN	Inquest proceeded on 24/10/22 at Umlazi. Postponed to 30/11/2022 – outcome of legal representation
Mr James Mngomezulu	KZN	Inquest proceeded on 07/11/22 in Pongola. Matter postponed for outcome of legal representation.

Matters Finalised

Division	Name of Matter	Outcome
GLD	S v Rodrigues	Accused passed away on 7 September 2021. Charges withdrawn.
	Inquest- DR NH Aggett	Verdict overturned on 4 March 2022.
	Mr Paris Malatjie	Deceased was shot and killed by Sgt van As at the Protea Police Station. He was convicted of Culpable Homicide in the Johannesburg High Court, sentenced to 10 years imprisonment.
EC	Mr Sithembile Zokwe	Death in detention. Two SB police officers were convicted in former Transkei of murder: sentenced to 20 years imprisonment on 25/11/2005.
	Mr Eric Mntonga	Death in detention: Accused were tried and convicted in March and September 1989 for death of the deceased. Sentences ranged from 2 years to 12 years imprisonment.
KZN	Mr Goodwill Collin Sikhakhane	All suspects were granted amnesty. Decision was taken to not prosecute.
GDP	Mr Peter Thabuleka	All suspects were granted amnesty. Decision was taken to not prosecute.

Matters Finalised

Division	Name of Matter	Outcome
PCLU recorded prosecutions	S v Ferdi Barnard	Murder of Gordon Webster – Life imprisonment.
	S v Eugene de Kock	Multiple offences of murder, fraud etc, sentenced to two life terms plus 212 years imprisonment.
	S v Gideon Niewoudt and two others	Motherwell Bombings, sentenced to 20 years imprisonment.
	S v Wouter Basson	Acquittal
	S v Magnus Malan and others	Acquittal
	S v Kwezi Ngoma and others	Plea bargain, suspended sentence.
	S v Aron Tyani and another	Convicted and sentenced to direct imprisonment.
	S v Eugene Terblanche	Convicted and sentenced to 6 years imprisonment, wholly suspended.
	S v Biani	Convicted and sentenced to direct imprisonment.

Conclusion

- ❖ The hard, focused work and close collaboration between the NPA, DPCI, the victims and their representatives are bearing fruit.
- ❖ Monthly monitoring and evaluation of progress on all 129 investigations, interventions implemented to render support to Divisions.
- ❖ Culmination of interactive DPCI/NPA accountability sessions and ongoing skills transfer.
- ❖ Constructive participation between stakeholders and victims' families.
- ❖ We know more progress is expected, and we are committed to delivering on this commitment. Challenges still include age of matters, age of witnesses, persons of interest, suspects, destruction of records including inquest records⁸⁸ no trace of dockets, exhibits, etc.

REMEMBER THE IMAM'S STRUGGLE FOR JUSTICE

Shahheed Imam Abdullah Haron was killed in detention 50 years ago, Saturday 27 September 1969.



Shahida Haron Shamsie, Professor Muhammad Haron and Fatema Haron Masood honour the life and legacy of Imam Haron in these pages, and are joined by many others who point to the past as a place of memory and pain, and a place from which to re-commit ourselves to the pursuit of justice...

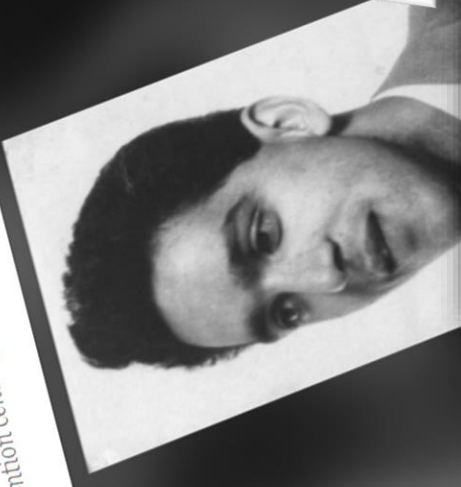
IMAM HARON INQUEST 2022



INQUEST INTO THE DEATH OF THE IMAM HARON COMMENCES - CAPE HIGH COURT MONDAY, 07 TO 18 NOVEMBER 2022 @mypaconline

Death on the 10th floor: The search for truth in South Africa

Families of anti-apartheid activists who died in the infamous John Vorster Square detention centre pursue justice.



NPA must prosecute apartheid-era crimes, urges TRC commissioner

SEP 2016



National Prosecuting Authority
South Africa

Thank you

Head Office: 012 845 6000

E-mail: communication@npa.gov.za

VGM Building, 123 Westlake Avenue (Cnr Hartley Street),
Weavind Park, Silverton, Pretoria, 0184

www.npa.gov.za

Presentation to Portfolio Committee on Justice and Constitutional Development

Progress on TRC Cases

17 September 2024



National Prosecuting Authority
South Africa

SB 00118

Contents

1. Introduction
2. Background
3. Action Plan
4. Capacity
5. Monitoring and Evaluation
6. Engagements
7. Challenges
8. Noteworthy Developments
9. Missing Persons Task Team (MPTT)
10. Closing Remarks

Introduction

- ❖ NPA is committed to ensuring justice for apartheid-era crimes and finality of matters so that families can find some closure
- ❖ Multi-pronged approach towards dealing with TRC matters
 - ✓ Prosecutions to ensure accountability for alleged perpetrators
 - ✓ Inquests
 - ✓ Missing persons – identification and return of remains

Introduction (cont.)

- ❖ In the last few years, the NPA has focused on:
 - ✓ reopening and pursuing priority cases;
 - ✓ enhancing its internal capacity and processes both to ensure effective handling of these cases and to prevent any undue political influence.
- ❖ Since 2021, a TRC Component has been created to prioritise and drive progress on TRC matters, working closely with DPCI.
- ❖ This presentation sets out progress in dealing with TRC matters.

Background

TRC Component

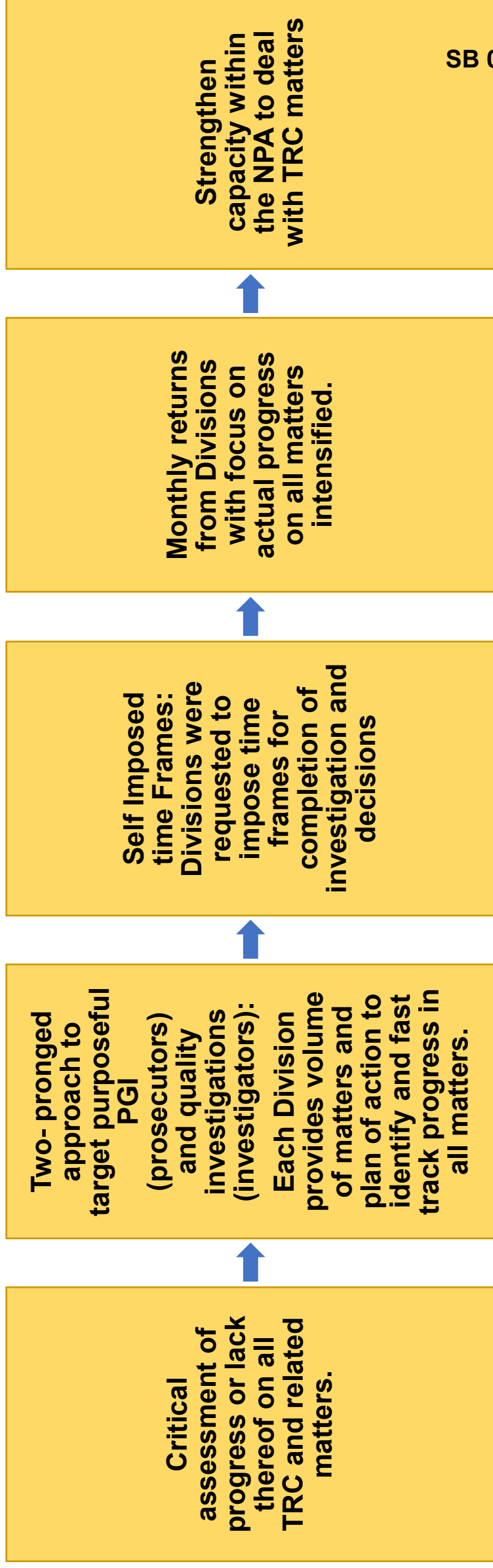
- ❖ Prior to September 2021- TRC matters were overseen by Priority Crime Litigation Unit (PCLU) - a component within the NPA, whose mandate it was to deal with amongst others, prosecutions arising from the TRC.
- ❖ As of 6 September 2021, TRC component created within the office of the Deputy National Director of Public Prosecutions (DNDPP) Adv RJ de Kock, to prioritise and drive progress on TRC matters.
- ❖ Appointment of a Special Director, a National TRC Coordinator and administrative capacity to assist.
- ❖ A total of 59 TRC matters were migrated to the Divisions by PCLU in 2019.

Background (cont.)

- ❖ Increased joint accountability sessions between the NPA and DPCI during 2024 have contributed to an increase in the level of engagement, progress and joint accountability.
- ❖ Intense accountability sessions within all the Divisions was an opportunity to ensure that challenges are addressed, skills transfer takes place and both prosecutors and investigators are held to account.
- ❖ Since September 2021, 104 **new investigations** stemming from the TRC have been re-opened.
- ❖ A total of 126 cases are presently under investigation.

Action Plan

DPP Jurisdiction on Matters



Involvement of DPCI

Focus on Investigation

Engagement of Directorate for Priority Crimes Investigation (DPCI) Senior management.

Focus on how best to render quality investigations into TRC matters.

Dual focus-prosecution guided investigations result in quality investigations- Decisions are informed by thoroughly investigated matters-emphasis on finality and closure

Monthly monitoring progress reports from investigators to DPCI management.

Monthly comparison of reports received from Divisions.

Formalising of approach to re-opening and registration of investigations into TRC matters/new referrals of TRC matters and appointment of investigators and prosecutors into prosecution guided investigations

NPA/DPCI Meetings

Appointment of a National TRC Coordinator for DPCI to enhance the support with the TRC component.

Needs identified: upskilling of both investigators and prosecutors-one action plan-common objectives.

**SWOT analysis: Identification of strengths, weaknesses, opportunities and threats: Challenges of investigating cold cases (i.e., no docket, no inquest records, declassification of records, National Archives, Universities etc.)
Experience sharing and exposure.**

Adoption of best practice, platform provided for prosecutors and investigators to meet, division by division, and account to DPPs and DPCI senior management with both coordinators to assist in expediting progress-introduction of Joint Accountability sessions with NPA and DPCI. Joint accountability on the same platform.

Rolled out fully in 2023 and 2024 as part of the NPA/DPCI Annual Operational Plan (AOP).

Capacity

- ❖ Dedicated capacity has ensured that both prosecutors and investigators are dedicated only to the progress on TRC matters.
- ❖ The appointment of TRC investigators and prosecutors was informed by the volume of matters within Divisions.
- ❖ The prioritisation of TRC matters also resulted in the appointment of Deputy Directors of Public Prosecutions (DDPPs) to oversee and guide the TRC portfolios within the office of the DPPs.
- ❖ Where there is no dedicated prosecutor/s, DPPs have appointed prosecutors (from permanent staff) to assist on TRC matters.
- ❖ In some Divisions, where there is no dedicated prosecutor, DDPPs oversee these matters.

Current Dedicated Capacity: NPA/DPCI

<p>➤ NPA: Total number of dedicated TRC prosecutors appointed in divisions: 16</p> <ul style="list-style-type: none"> ❖ DPP: Kwa-Zulu Natal 3 ❖ DPP: Western Cape 1 ❖ DPP: South Gauteng 3 ❖ DPP: North Gauteng 2 ❖ DPP: Limpopo 1 ❖ DPP: North- West - ❖ Other: Head Office 2 ❖ DPP: Mthatha/Makhanda 4 	<p>➤ Total number of dedicated TRC investigators appointed in Divisions: 29</p> <ul style="list-style-type: none"> ❖ Central Region: Head office, Gauteng, Mpumalanga, Limpopo and North-West 13 ❖ Coastal Region: Kwa-Zulu Natal. 4 ❖ Eastern Region: Eastern Cape. 6 ❖ Western Region: Western Cape. 3 ❖ Karoo Region: Free State and North-West. 2 ❖ TRC coordinator 1
---	--

NPA personnel assisting on TRC matters

TRC Nodal Points within all Divisions to oversee TRC Portfolio	Total number of TRC Nodal Points: 10
Divisions to oversee TRC Portfolio	Total number of senior state advocates assisting: 5
DIVISION	11
DPP: FS	DDPP guiding on all matters. No dedicated prosecutor.
DPP: MAKHANDA	DDPP guides prosecutors.
DPP: EC	DDPP guides in two divisions: EC and Makhandanda
DPP: NW	DDPP and senior state advocate assisting
DPP: KZN	DDPP overseeing all matters.
DPP: MPUMALANGA	ADPP and three DDPPs oversee and guide investigations
DPP: NC	Two DDPPS and three senior state advocates assisting
DPP: JHB	DDPP guides prosecutors.
DPP: PTA	DDPP guides prosecutors.
DPP: LMP	DDPP guides prosecutors.
DPP: WC	DDPP and senior state advocate assisting.

Volume of matters within the Divisions

Division	Total matters under Investigation
DPP: WC	11
DPP: FS	3
DPP: MAKHANDA	12
DPP: MTHATHA	5
DPP: NW	11
DPP: KZN	24
DPP: MPUMALANGA	7
DPP: NC	5
DPP: JHB	21
DPP: PTA	13
DPP: LMP	14
TOTAL	126

Categories by Division

NO	DIVISION	A	B	C	Total
1	KZN	6	3	15	24
2	JHB	14	1	6	21
3	LMP	9	0	5	14
4	PTA	6	0	7	13
5	MKHANDA	3	0	9	12
6	WC	2	0	9	11
7	NW	5	0	6	11
8	MP	5	1	1	7
9	MTHATHA	0	1	4	5
10	NC	2	0	3	5
11	FS	0	0	3	3
					126

C - Category matters

DIVISION	VOLUME OF MATTERS	NAME OF MATTER FINALISED	VOLUME OF MATTERS IN C CATEGORY
WESTERN CAPE	11	INQ- MR HARON	9
FREE STATE	3		3
MTHATHA	5		4
MAKHANDA	12		9
NORTH- WEST	11		6
KWA-ZULU NATAL	24	INQ-DR H HAFFEJEE INQ-Z SOKHULU S V WESLEY MADONSELA	15
MPUMALANGA	7		1
NORTHERN CAPE	5		3
JOHANNESBURG	21	INQ-DR AGGETT MR E DIPALE	6
PRETORIA	13		7
LIMPOPO	14		5
TOTAL	126		SB 00132

Accountability Sessions

Purpose of Joint Sessions

Primary purpose of joint NPA/DPCI accountability sessions is to upskill prosecutors and investigators, develop strategies to expedite investigations and decisions, share best practice adopted by other divisions, update on legal challenges, identify and target cogs in the process and, most importantly, to ensure accountability.

It is important for NPA and DPCI to work together towards one action plan. Joint accountability by both prosecutor and investigator on the same platform.

Dates are jointly identified by both coordinators and communicated to all DPPs and DPCI, months in advance. Attendance is compulsory.

Sessions are held over 2-3 days-informed by the volume of matters in each division. Agendas are circulated prior to sessions.

Sessions involve the DPP, DDPPs (TRC Portfolio), Provincial Heads of various divisions of DPCI, both National coordinators, all dedicated TRC prosecutors and TRC investigators. The DNDPP and SD, when available, also attend the sessions.

Accountability Sessions (cont.)

Content of Sessions



The first day of the session comprises of critical and honest assessment of progress for the specific Division, discussions and updating on the latest legal developments and challenges on all TRC matters - criminal and inquest court roll. Best practice in other Divisions to overcome such hurdles are shared.



Next two days go to the core purpose of the sessions. Both the investigator and prosecutor present each individual matter. All investigations discussed and assessed. Challenges as well as solutions are mooted. Common perpetrators, persons of interest, modus operandi etc. Constructive criticism with a view to a strong case formulated.



Any challenge/s that cannot be resolved, through the normal channels of investigation or through the office of the DPP or Provincial Heads, are escalated to National coordinators for their intervention e.g. access to stakeholders etc.

Accountability Sessions (cont.)

Divisions	NPA/DPCI Accountability Sessions-2024
NPA/DPCI	All TRC Nodal Points, NPA and DPCI-Annual operational plan shared for 2024-February 2024.
NPA/DPCI	Northern Cape-4-5 March 2024
NPA/DPCI	South Gauteng-13 March 2024
NPA/DPCI	Mpumalanga-15-17 May 2024
NPA/DPCI	Eastern Cape-21-23 May 2024
NPA/DPCI	Western Cape-4-5 June 2024
NPA/DPCI	Free State-18 June 2024
NPA/DPCI	KZN-24-26 June 2024

Accountability Sessions (cont.)

Province	Date of NPA/DPCI Accountability Sessions-2024
NPA/DPCI	North Gauteng-3-4 July 2024
NPA/DPCI	Limpopo -1-2 August 2024
NPA/DPCI	South Gauteng-21 August 2024
NPA/DPCI	Eastern Cape-3-4 September 2024
2022	5
2023	11

Skills sharing and in-house training

Date	Skills Development / Training
27 June 2024	Crime scene reconstruction and simulations
30 July 2024	Mutual Legal Assistance and Extraditions
2 July 2024	Orientation session on TRC matters: North West Province
9-11 April 2024	Preparation of memoranda: North West Province
6-7 August 2024	Preparation-for re-opening of inquest in the death of Mr Booï Manti
15 August 2024	Virtual meeting both NPA and DPCI-Electronic case management system (ECMS) input on creation of data base for uploading data on TRC matters.

Forthcoming Sessions

	Proposed Date	Province
1	19-20 September 2024	Eastern Cape-Preparation for North-Crest Five inquest proceedings.
2	8 October 2024	OWP-All Divisions and DPCI-pertaining to protection of witnesses and processes to be followed
3	9 October 2024	Specialist forensic pathologist- All Divisions and DPCI-wounds, injuries, suspicious deaths
4	22 October 2024	MPTT – Exhumations , role of MPTT and collaboration between TRC and MPTT

Engagements: Apartheid Era Victims Family Group (AVFG)

- ❖ Families led by AVFG approached the Head of NPS to engage with prosecutors and investigator officers to support the progress and efforts in building trust. Families needed accountability, transparency and closure.
- ❖ The AVFG was formed to ensure that the voices of the families are heard. Both the NPA and DPCI adopted a victim-centred approach.
- ❖ NDPP June 2022 directive that prosecutors actively engage with families and keep families updated on progress on their matters. It was the first time that families had access to prosecutors and investigators.
- ❖ Regular engagements and updating of families ensures that when decisions are finally taken, be it a prosecution, an inquest, or to close the matter (because all leads have been exhausted), families are aware that the investigator and prosecutor have explored every possible avenue before arriving at their decision.

Engagements: AVFG (cont.)

- ❖ Over the duration of more than a year and a half, a relationship of trust has been solidified between AVFG and both the NPA and DPCI.
- ❖ All information pertaining to potential witnesses or avenues to be investigated, are relayed to investigating officers to assess and investigate.
- ❖ Where families are aggrieved by any issue, this is communicated to the office of the DPP first.
- ❖ In the exceptional case that the challenge is not resolved, the NCO'S are engaged to resolve the challenge.
- ❖ The same process is followed with other stakeholders whilst ensuring that both the NPA and DPCI remain impartial and objective in their approach to all matters.

Stakeholder engagements

AVFG/FHR: 6 Divisions

Date	Division	Stakeholders
26 September 2022	DPP Johannesburg	AVFG/DPCI/prosecutors and investigators
7 November 2022	DPP Pretoria	AVFG/DPCI/prosecutors and investigators
15 February 2023	DPP Western Cape	AVFG/DPCI/prosecutors and investigators
17 April 2023	DPP Northern Cape	AVFG/DPCI/prosecutors and investigators
1 June 2023	DPP Eastern Cape	AVFG/DPCI/prosecutors and investigators
24 July 2023	DPP KZN	AVFG/DPCI-prosecutors and investigators
30 January 2023	National Office	NPA/DPCI/FHR

Stakeholder engagements (cont.)

Date	Division	Stakeholder/s
2 August 2023	DPP KZN (Head office)	AVFG/DPCI/prosecutors and investigators
28 September 2023 30 January 2024	NPS Head/AVFG NPS Head/FHR	Family representatives/AVFG Legal representatives

Engagement with other stakeholders 2024

Date	Stakeholder	Purpose
23 February 2024	Department of Public Works	To obtain original plans pertaining to State owned buildings for reconstructions of crime scenes.
22 February 2024	South African National Archives	To access the inventory of information, to assist in investigations of TRC matters
18 July 2024 and 27 August 2024	Department of Justice	To partner with the TRC department in upcoming matters and access to information to aid investigations-psychological counselling for families
23 July 2024	State Security Agency	To access the inventory of information to assist in investigations of TRC matters.
Date to be confirmed	Department of Justice	Follow up meeting
12 September 2024	Department of Public Works	Meeting with DG-Public Works
To be confirmed	State Security Agency	Meeting with management

Noteworthy Developments



FIRST CONVICTION WITH EVIDENCE POST 2021

KZN – 8 November 2023

STATE versus Wesley Matiri Madonsela

GUILTY = MURDER

SENTENCE = Ten Years Imprisonment

Noteworthy Developments (cont.)

Name of the Matter- Finalised with a decision	30 matters finalised
Re-opened inquest of Mr Ernest Dipale	Original court finding of suicide by hanging overturned.
Re-opened inquest of Dr Hoosen Mia Haffejee	Original finding of suicide by hanging overturned.
Re-opened inquest of Mr Abdullah Haron	Original finding of death resulting from a fall downstairs, overturned.
Inquest: Mr Zama Sokhulu	Proceedings finalised, matter referred to NPA for decision.
Re-opened inquest of Dr Neil Aggett	Original finding of suicide by hanging overturned.

Noteworthy Developments (cont.)

Name of the Matter on the Criminal Court Roll	Date of hearing
S v Mfalapitsa and another (COSAS Four)	20 November 2024-Trial
S v Coetzee and another (Ms Simelane)	14-18 October 2024 for further evidence in the s 77(3) application.
S v Marais and three others (Mr Nyoka)	Trial date-August 2024
S v Botha and others	12 November 2024-State attorney-legal representation
S v Botha and others	12 November 2024-State attorney-legal representation
S v Schoon and others	7 November 2024-state attorney-legal representation

Noteworthy Inquests

Name of the Matter	
Cradock Four	Inquest-re-opened-2-20 June 2025-challenge with legal representation
Chief Albert Luthuli	Inquest re-opened-awaiting appointment of judge
Mr Griffiths Mxenge	Inquest re-opened-awaiting appointment of judge
Dr Rick Turner	Inquest to be held-Judge to be appointed
Highgate Hotel	Inquest to be held-27 January to 7 February 2025
Mr Booi Mantyi	Re-opened inquest-Judge to be appointed
Mr Moss Morudi	Inquest to be held-Judge to be appointed
Northcrest Five	Inquest to be held-Judge to be appointed

Noteworthy Inquests (cont.)

Name of the Matter	
Mr Oupa Ronald Madondo	Inquest proceedings underway-5 and 6 November 2024
Mr Mthunsi Vlemeseni Njakazi	Inquest proceedings underway-August 2024
Messrs Nzuza and Ramotlo	Inquest to be held-shortage of capacity
Mr Vusumuzi Meshack Msani	Inquest to be held-shortage of capacity
Mr Vusumuzi Mbatha	Inquest to be held-shortage of capacity
Mr Tutu Shezi	Inquest to be held-shortage of capacity
Messrs Charles Ndaba and Mbuso Shabalala	Inquest to be held-shortage of capacity

Noteworthy Inquests (cont.)

Name of the Matter	
Mr Bhekani Sibusiso Mbokazi	Inquest to be held
INDICTMENTS	
Indictments to be served pending verification of addresses of perpetrators	3
MEMORANDA FOR INQUESTS AND RE-OPENING OF INQUESTS UNDERWAY	10

Challenges

- ❖ **Documents:** TRC acknowledged that files and documents had been destroyed in the normal course of events or as part of deliberate policy to conceal information. Documents are necessary to fully investigate the matter. All avenues are exploited to locate documents.
- ❖ **Lack of dockets, inquest records:** destruction of records and exhibits after a fixed period -loss of evidence.
- ❖ **Experts:** Expert evidence is important to gainsay versions of alleged suicides, falling downstairs, accidental deaths etc. State pathologists who are assisting, are overwhelmed with their normal duties, resulting in expert reports taking a lengthy period to be finalised.

Challenges (cont.)

- ❖ Witnesses / Accused / suspects / persons of interest are **deceased or old**.
Witnesses **unwilling or afraid** to co-operate with the investigating officers and the NPA.
- ❖ **Delay tactics** by accused persons and last-minute applications by legal counsels result in matters remaining on the court roll for lengthy periods of time.
- ❖ Hacking of cellphone communications between investigators and prosecutors- this is under investigation.

Missing Persons Task Team (MPTT)

- ❖ The TRC recommended that a Task Team be established in the NPA to continue to trace the fate and whereabouts of those who disappeared in political circumstances and to recover their remains where possible. This recommendation was accepted by government.
- ❖ The Missing Persons Task Team (MPTT) has recovered the remains of 180 individuals inside South Africa. The identified remains have been returned to their families at special ceremonies hosted by the Justice Ministry across the country.
- ❖ The MPTT also conducts Symbolic Reburials or spiritual repatriations with families in cases where the remains of the deceased cannot be located. Eleven (11) such symbolic reburials have been conducted, in partnership with the TRC Unit in the DoJ&CD.

Missing Persons Task Team (cont.)

❖ The MPTT has **special projects** that focus on groups that faced specific forms of political repression and deaths. These are:

1. **Gallows Exhumation Project:**

This project aimed to recover and return the remains of political prisoners who were sentenced to death and executed on the Gallows between 1960 and 1990. This project is approaching conclusion and only nine hanged political prisoners remain to be recovered.

2. **Exile Repatriation Project**

Hundreds of families whose loved ones went into exile and never returned reported them as missing to the TRC. Government further accepted the TRC recommendation that Community Reparations be implemented for specific communities severely impacted by political violence. The exile community is precisely one such group.

Missing Persons Task Team (cont.)

2. Exile Repatriation Project (cont.)

In 2021 Cabinet approved a National Policy on the Repatriation and Restitution of Human Remains and Heritage Objects. An Inter-Departmental Implementation Plan was similarly approved in 2023.

The MPTT is a key implementing partner in the Exile Repatriation Project and conducts the (a) data collection, (b) grave mapping, (c) exhumations and (d) confirmation of identity.

The Exile Repatriation Project is being launched on 27 September 2024 with the exhumation and repatriation of the remains of nearly 50 exiles currently being conducted by the MPTT in Zambia and Zimbabwe. A Homecoming Ceremony will be hosted for the families by President Ramaphosa at Waterkloof Airbase and Freedom Park.

MPTT Recent cases

- ❖ The MPTT recovered the last of the Mamelodi 10 and the remains were handed to the families and Mamelodi community by the Justice Minister and NDPP in 2023.
- ❖ Spiritual repatriations (symbolic reburials) were conducted in the case of four Mamelodi activists who were abducted and killed by the Northern Transvaal Security Police and whose remains could not be recovered.
- ❖ A spiritual repatriation was also conducted with the family of Bellington Mampe at the Worcester Prison. Mr Mampe died in political custody in 1963, and his burial site could not be located.
- ❖ The remains of two hanged PAC members were handed to their families in Soweto and Wolmarans respectively in 2023.

MPTT Recent cases (cont.)

- ❖ The MPTT is currently preparing for the exhumation of a young activist shot dead by police in Knysna in 1986. In addition, potential burial sites have been identified in the Matatiele area for excavation in the search for a missing MK member.
- ❖ The MPTT also assists the TRC Component in the NPA and DPCI in the form of research, family tracing, exhumations and DNA tests. For example, the MPTT assisted with the exhumation and forensic examination of remains believed to be those of Mr Thabo Mosala, who died in detention in 1976 and was reportedly buried in the Matatiele area of the Eastern Cape.

Concluding remarks

- ❖ Since 2019, the NPA has been committed to dealing with TRC matters and this report shows the progress that we have made over the past few years, and that we continue to make.
- ❖ We adopted measures to ensure that there is no recurrence of undue political interference in the prosecution of TRC matters and we appointed senior counsel to review and assess the measures.
- ❖ In June 2023, Adv Ntsebeza SC submitted his written opinion on the TRC component and TRC prosecutions, to the NPA. It has been released and published on our website.

Concluding remarks (cont.)

- ❖ The opinion found that the measures adopted and implemented by the NPA to deal with TRC matters – namely, the structure and checks and balances that form part of the TRC component - are largely adequate.
- ❖ The NPA has abided by its recommendations and submitted the report to the former Minister of Justice and Correctional Services, to consider the remainder of the recommendations.
- ❖ Measures taken are part of the NPA's strategic objective of having the requisite financial and operational independence to deliver on its constitutional mandate. We continue to engage the Department of Justice and Constitutional Development to deliver on parliamentary commitments made in Nov. 2023.



National Prosecuting Authority
South Africa

Thank you

Head Office: 012 845 6000

E-mail: communication@npa.gov.za

VGM Building, 123 Westlake Avenue (Cnr Hartley Street),
Weavind Park, Silverton, Pretoria, 0184

www.npa.gov.za



National Prosecuting Authority
South Africa

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Tel: +27 12 845 6000 | Victoria & Griffiths, Mxenge Building
123 Westlake Avenue, Weavind Park, Silverton, Pretoria
P/Bag X752, Pretoria, 0001, South Africa

To: MR XOLA NQOLA, MP
CHAIRPERSON
PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

And to: DR ZAID KIMMIE, EXECUTIVE DIRECTOR
FOUNDATION FOR HUMAN RIGHTS

From: ADV. S. BATOHI
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Subject: RESPONSE BY NPA TO SUBMISSIONS MADE BY THE
FOUNDATION FOR HUMAN RIGHTS (FHR) TO THE PORTFOLIO
COMMITTEE ON JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

A PURPOSE OF MEMORANDUM

1. This memorandum is prepared pursuant to written submissions made by the Foundation for Human Rights (FHR) dated 12 February 2025, to the Portfolio Committee on Justice and Constitutional Development (hereinafter JPC) and the subsequent appearance before the JPC on 19 February 2025. The submissions made by FHR to the JPC are attached, marked **Annexure A**.
2. At the close of the meeting, the NPA was requested to respond in writing to submissions made by FHR to both FHR and the JPC.

B THE GRAVAMEN OF SUBMISSIONS BY FHR

3. Despite FHR acknowledging that there has been progress on TRC matters since 2021, they levelled criticisms against the NPA's TRC Component, particularly in relation to

the following: the slow pace of progress and decision making; dedicated capacity within NPA and DPCI; the migration of TRC matters to the Divisions; challenges in respect of specific matters in which they appear; lengthy postponements; complaints in respect of specific matters under investigation; allocation of judges and dates in reopened inquests and formal inquests; legal representation for suspects/persons of interest; and systemic challenges within law enforcement agencies and the justice system.

C PROGRESS MADE ON TRC MATTERS WHERE FAMILIES ARE REPRESENTED BY FHR

4. FHR submits that they appear on behalf of 24 families, whose names they have listed on Annexure A (Annex 1: List of FHR supported cases). It is disputed that progress, particularly on TRC matters where families are represented by FHR, is slow.
5. To demonstrate the progress that has been made, the period 2021-2025 has been identified hereunder, with a concentrated focus on matters where FHR is involved.
6. Although all TRC matters are important and must be prioritised, irrespective of whether there is legal counsel for the family/victim or not, substantial progress has been made on TRC matters, specifically those cases where FHR is involved, and which were identified, prioritised and fast tracked. This is as a direct result of investigations by dedicated TRC investigators from the Directorate for Priority Crimes Investigation (DPCI) and prosecution-guided investigations by prosecutors dedicated to TRC matters only.
7. Prior to September 2021, there were 59 TRC matters under investigation by the Priority Crimes Litigation Unit (PCLU), a component established in 2003 within the NPA and mandated, amongst other duties, to manage and direct TRC investigations and prosecutions. In 2019, all TRC matters were migrated from PCLU to the respective Divisions in which offences or crimes were committed. Apart from the fact that crimes are investigated within the jurisdiction within which they are committed, there is greater capacity within the offices of the DPPs, in which Divisions the matters reside. Furthermore, in most matters, witnesses, similar fact detainees and family members of the victim reside in the area where the incident occurred.

8. On 30 January 2023, a meeting was held between NPA/DPCI and FHR wherein FHR was requested to furnish to DPCI a list of all matters in which they appeared. As investigations fall within the purview of DPCI, it was important to obtain a Power of Attorney in respect each matter, which as a legal document authorises the agent to act on behalf of the principal in specific matters and allows for delegation of decision-making authority. It was imperative that the families represented by FHR be identified to DPCI who are tasked to investigate TRC matters, before any information could be shared with FHR.
9. On 23 April 2023, FHR furnished communications which lists matters, in which FHR appears on behalf of families. Since 2023, more matters have been added to the list of FHR matters as per Annexure A of their submissions.
10. Column A hereunder, depicts the FHR matter under investigation. Column B depicts the status of the matter.
11. As indicated in Column B, DPCI still must obtain the Power of Attorney in respect of the most recent matters indicated by FHR.

Column A: Name of FHR matter	Column B: Progress to date
Dr Neil Hudson Aggett (Aggett)	The inquest into the death of Dr Aggett was re-opened in 2019. Evidence was led in 2019. On 4 March 2022, the original inquest finding was overturned. It was referred to the NPA for consideration of the findings of the inquest. Legal representatives for the family from Webber Wentzel attorneys engaged with the prosecutor who had been seized with the matter. Adv Varney appeared for the family at the re-opened inquest.
Mr Matthews Mabelane (Mabelane)	On 29 January 2025, the Minister of Justice and Constitutional Development (The Minister) approved the re-opening of the inquest into the death of Mr Mabelane. The legal representatives for the family, Bowmans Gilfillan, applied directly to the Minister to re-open the inquest. There is engagement between Bowmans Gilfillan and the DPP's office in Johannesburg in respect of updates on the matter and the way forward.

Column A: Name of FHR matter	Column B: Progress to date
Mr Babla Saloojee (Saloojee)	The matter is in the C phase of investigation. There were challenges relating to the payment of experts to reconstruct the scene and provide an opinion. The motivation letter in respect of quotations for two additional experts has been escalated to DPCI. The opinion of an independent pathologist has been obtained. In the meeting with Apartheid Era Victims Family Group (AVFG), the spouse of Saloojee was represented by a family spokesperson, Mr Imtiaz Cajee. A power of attorney must be sourced from FHR.
Mr Ignatius Mthebule (Mthebule)	This matter is at an advanced stage of investigation. However, statements are being sought from comrades of Mthebule at Luthuli House. A meeting was also held with the family member of Mthebule to ascertain additional avenues to pursue more leads as part of the investigation. All people of interest have refused to cooperate. The victim is still missing. The family is represented by Eversheds Sutherland attorneys who are engaging with the NPA.
COSAS Four	Two former police officers have been charged criminally for Murder and Crimes against Humanity (CAH). There were several applications and challenges in this matter including challenges to the charge of CAH, applications by the Southern Africa Litigation Centre (SALC) to be joined as friends of the court in criminal proceedings, a review application of the decision of the TRC, refusal by SAPS to cover the reasonable costs of legal expenses of one of the accused persons, etc. The judgment on the charge of CAH has not yet been delivered. The trial date has been set for 14 April 2025. Legal representatives, Webber Wentzel, appear as watching brief on the matter. Advocate Varney appeared on behalf of the family.
Mr Caiphus Nyoka (Nyoka)	Four former police officers have been charged criminally for murder and defeating the ends of justice. On 12 November 2024, Mr Johan Marais was found guilty of murder. The matter has been postponed to 25 March 2025 for a pre-sentence report. The trial against the remaining accused (Engelbrecht and two others) was separated and evidence was heard during December 2024. The case against the remaining accused will resume on 12 May 2025 and continue until

Column A: Name of FHR matter	Column B: Progress to date
	30 May 2025. Mr Jos Venter, from Webber Wentzel, appears as watching brief on the matter.
Mr Sweet Sambo (Sambo)	A decision to close the file was taken by the DPP Mpumalanga during March 2023. The suspects in the matter were granted amnesty viz Mr Eugene de Kock and three others. Messrs McIntyre, Els and Venter were charged with assault with the intent to do grievous bodily harm under case number SH 177/92. They were acquitted. They were subsequently charged with murder. Their special plea was successfully upheld. The matter is considered finalised.
Cradock Four	The Minister approved the re-opening of the third inquest into the deaths of the Cradock Four in January 2024. The inquest was set to commence during September 2024. The NPA was ready to proceed. The matter did not proceed in September 2024 because the funding of legal fees for people of interest from SANDF and SAPS, had not yet been finalised. The NPA, to fast track the process, intervened and communicated with the office of the State Attorney, as early as 5 June 2024, with no success. The NPA therefore denies the allegation made by FHR in their submissions that legal representatives of SAPS and SADF witnesses stated that they were notified too late by the NPA to prepare for the inquest and were therefore unable to secure state funding. The State Legal Representation Policy, the SAPS National Instruction 1 of 2017 and the SANDF application, and the Undertaking with respect to the Defence by the State Attorney was also shared with all legal representatives. Other stakeholders were also engaged by the NPA to expedite the processing of legal representation. Moreover, the legal representatives for Mr Mbulelo Goniwe, the Goniwe family and Cradock Four community, Adv Ngcukaitobi, SC were also advised that their clients' application for the costs to be covered by Legal Aid South Africa had been declined. The application was made a year prior to the set down of the matter. The postponement was not opposed as all parties agreed that people of interest must be represented. The same approach was followed in respect of witnesses and the Cradock community. The lengthy postponement was not at the behest of the State but rather on the request of counsel for the family,

Column A: Name of FHR matter	Column B: Progress to date
	<p>Advocate Varney, who advised he was unavailable in November 2024 when all other counsels were available. He shared dates which suited his availability only in mid-2025. The matter was postponed to 2-20 June 2025. The instructing attorneys are Cliffe Dekker Hofmeyr (CDH) with Advocate Varney as counsel. Several meetings have taken place between the NPA and CDH and other counsels involved in this matter. As of February 2025, Legal Aid Board will assist the community of Cradock Four after there was an intervention. Adv Ngcukaitobi, SC has advised that funding has been secured for his clients. Despite a court order made by Judge Beshe in respect of dates by which applications for reasonable legal costs of people of interest were to be considered, applications for financial assistance were refused in February 2025.</p>
Highgate Hotel	<p>The DPP in the Eastern Cape took a decision during 2024 that a formal inquest be held. The date for the inquest was confirmed in line with the availability of counsel for the families. On 27 January 2025, the formal inquest was opened and commenced with evidence being led. The proceedings continued until 7 February 2025. The inquest resumed on 24 March 2025 with further evidence led. CDH are the instructing attorneys with Adv Varney as the counsel. Several meetings have taken place with Advocate Varney, CDH and the NPA.</p>
PEBCO Three	<p>Legal representatives have met with the NPA during December 2024 and February 2025 regarding challenges on the matter. The way forward was discussed. A decision will be taken in this matter. Instructing attorney CDH and Advocate Varney appear on behalf of the family and have engaged in several meetings with the NPA.</p>
Dr Rick Turner (Turner)	<p>The DPP took a decision that a formal inquest will be held in the High Court. The legal representatives of the family, Legal Resource Centre (LRC), have engaged and liaised with the NPA on the way forward. Advocate Varney has also liaised with Advocate Charles du Plessis from the NPA who has been seized with the matter.</p>
Mr Adriaano Bambo (Bambo)	<p>There is no valid written power of attorney provided by FHR to DPCI. However, on the intervention of the coordinators, and on request of the counsel of Webber</p>

Column A: Name of FHR matter	Column B: Progress to date
	Wentzel's Mr Venter, a meeting was facilitated between the DPP Mpumalanga, DPCI and Mr Venter, to engage on certain issues raised. The meeting provided no new leads to DPCI. Mr Venter from Webber Wentzel attorneys also appeared on behalf of the family of Ms Simelane and has engaged with the NPA on several occasions.
Sgt Richard and Irene Motasi	The matter is at an advanced, sensitive stage of investigations. A power of attorney must be secured by DPCI from FHR.
Ms Nokuthula Simelane (Simelane)	This matter is also on the criminal court roll where an inquiry in terms of section 77(3) of the Criminal Procedure Act 51 of 1977 is underway in respect of one of the two remaining accused who alleged that he suffers from a neuro degenerative condition and is therefore unable to follow proceedings. After a medical assessment and mental observation at Weskoppies Hospital, he was found fit to stand trial. There have also been several challenges in respect of payment of legal fees by SAPS, the inclusion of drafting of charges of CAH, the death of two of the four original accused, and the death of counsel and instructing attorney. The matter has been postponed to 19-22 May 2025 for finalisation of evidence in respect of the section 77 enquiry. Mr Jos Venter from Webber Wentzel appears as the watching brief on this matter. He liaises with the NPA and DPCI.
Mr Sons and Mr Els	A decision was taken on 7 July 2023, to decline to prosecute any person in connection with the matter. The charges against Messrs Sons and Els stemmed from the re-opened inquest into the death of Mr Ahmed Timol where the inquest court made certain findings and recommendations. Webber Wentzel appear as watching brief on the matter.
Gaborone Raid	The matter is under investigation where information has been requested via Mutual Legal Assistance (MLA). The investigator from FHR, former Brigadier Marion liaised with the investigator from DPCI on this matter. CDH appears on behalf of the matter.
Operation Zero Zero	This matter is in the C Phase of investigation where a decision must be taken. This matter is a sensitive one

Column A: Name of FHR matter	Column B: Progress to date
	with several senior ranking officials involved. A power of attorney must be secured from FHR.
Ms Ntombikayise Kubheka (Kubheka)	As a result of investigation by DPCI, the NPA took a decision to charge five people who were charged for murder. This matter is on the criminal court roll and stems from an inquest proceeding where proceedings were stopped and converted into criminal proceedings in terms of section 21(2) of the Inquests Act, 58 of 1959. There are challenges in this matter as SAPS does not want to fund the legal representation of the accused. The matter is on the court roll for 9 April 2025. A power of attorney must be secured as there were challenges pertaining to the one originally furnished.
Mr Sbo Phewa (Phewa)	This matter is linked to that of Ms Kubheka. As a result of investigations by DPCI, the NPA took a decision to charge five people who were charged with murder, which stemmed from an inquest proceeding which was converted to criminal proceedings in terms of section 21(2) of the Inquest Act, 58 of 1959. The matter is on the regional court roll but there are challenges where SAPS refuses to pay for the legal expenses of the accused persons. The matter is on the court roll for 9 April 2025. A power of attorney must be secured.
Dr Hoosen M Haffejee (Haffejee)	As a result of investigations by DPCI and the NPA during 2017, the NPA applied to the Minister to re-open the inquest into the death of Dr Haffejee, which was re-opened and evidence was given where families, detainees and people of interest, testified at proceedings. The original inquest finding was overturned on 13 September 2023. The inquest record was referred to the NPA for consideration and during September 2024, the DPP took a decision and declined to prosecute anyone in connection with the death. The family was advised of the decision.
Mr Nicholas Thlapi	As a result of investigations by DPCI, the NPA applied to the Minister to re-open the inquest into the death of Mr Thlapi which application was approved in October 2024. Pre- court preparations are underway. Counsel for the family have also been engaged. A person of interest has been advised to apply for legal

Column A: Name of FHR matter	Column B: Progress to date
	representation to avoid any challenges that may arise. Bowmans Gilfillan Incorporated appear on behalf of the family and have liaised with the NPA.
	As a result of investigation by DPCI, a decision was taken in 2022 to apply to the Minister to re-open the inquest into the death of Mr Haron. The Minister approved the re-opening of the inquest. Evidence was led of the family, detainees and persons of interest, and on 9 October 2023, the original inquest finding was overturned. The matter is in the process of a decision being taken. Webber Wentzel attorneys liaise with the NPA. Advocate Varney appeared for the family at the re-opened inquest.
Mr Bayempin Msizi (Msizi)	This matter was joined with that of Dr Haffejee but ultimately no evidence was presented on the Msizi matter. Both Haffejee and Msizi died within days of each other at Bright Beach Police station under almost identical circumstances. FHR appeared on behalf of the Msizi family. Despite thorough investigations, the post-mortem records, photo albums and docket cannot be traced. The family has been approached and is kept updated of the challenges in this matter. Without the necessary records, it is difficult to reconstruct the scene. Investigation is ongoing. Garlicke and Bousfield appear on behalf of the Msizi family. They liaise with the NPA.
Mr Mxolisi Dickie Jacobs	There are challenges in the investigation of this matter. To support the reconstruction of the scene, photograph albums, inquest records, postmortem records etc are required. Despite a diligent search, the Department of Correctional Services and SAPS cannot trace the documents. Investigations are ongoing. Mr Munier Ismael of Haffejee, Roskam Savage Attorneys, legal representative for the family, liaises with the NPA.
Mr Anton Fransch	Investigations by DPCI are at an advanced stage with expert reports obtained. An additional expert report is outstanding as the expert is on long leave. This is delaying the decision on the matter. An alternate expert has been sourced. ENS attorneys appear on behalf of the family and liaises with the NPA.

Column A: Name of FHR matter	Column B: Progress to date
Mr Ashley Kriel	The matter was under investigation by DPCI prior to 2021. Witness statements and a second opinion of pathologists have been received. The report of an additional expert is awaited as the experts are in the employ of the State and have other duties to attend to. ENS attorneys appear on behalf of the family and liaise with the NPA.
Mr Storey Luke Mazwembe	The matter has been under investigation since 2022. Department of Public works (DPW) has been approached to furnish the investigator with the structural plans for the reconstruction where it is alleged the deceased hung himself. There are challenges at DPW where there is a shortage of personnel to assist with the extraction of the plan of the cell. There was an intervention. It is expected that the structural plans will be provided shortly. A second opinion from a pathologist is in the process of been procured. Webber Wentzel appears on behalf of the family and liaises with the NPA.
Mr Batandwa Nondo	Adv Ngcukaitobi appears on this matter.

12. Another matter in which progress was demonstrated, and which has not been mentioned by FHR is the re-opened inquest of Mr Ahmed Timol. FHR represented the family and instructed Advocate Varney. The findings of the original inquest were overturned on 12 October 2017. The inquest record was thereafter referred to the NPA for consideration. As a result of further investigations undertaken by DPCI, the NPA took a decision to charge Mr. Rodrigues. He appeared in court on 29 July 2018. Unfortunately, Mr. Rodrigues passed away on 7 September 2021 before any evidence could be led.

13. FHR also submits that there is little information on the functions of individuals working at the NPA and DPCI TRC Components. Structured engagements are taking place between FHR's instructing attorneys, the NPA and DPCI as indicated in the table above.

D ANALYSIS OF PROGRESS ON FHR MATTERS POST SEPTEMBER 2021

Matter	Inquest re-opened and finalised	Inquest re-opened/formal inquest	Criminal Court roll	Under investigation-Phase A-B or C	Finalised	Power of attorney to be obtained
Aggett	X			X		
Mabelane		X				
Saloojee				X		
Mthebule				X		
COSAS Four			X			
Nyoka			X			
Sambo					X	
Cradock Four		X				
Highgate Hotel		X				
PEBCO Three				X		
Turner		X				
Bambo				X		X
Mr and Mrs Motasi				X		X
Simelane			X			
Sons and Els					X	
Gaborone Raid				X		X
Operation Zero Zero				X		X
Kubheka			X			X
Phewa			X			X
Haffejee	X				X	
Tlaphi		X				
Haron	X			X		
Msizi				X		
Jacobs				X		
Fransch				X		
Kriel				X		
Mazwembe				X		
Ndondo						X
	3	5	5	9	4	7

14. As indicated above, apart from other TRC matters, progress has been made on matters in which FHR appears.
15. TRC matters relate to incidents that occurred decades ago. Whilst it is acknowledged that time is of the essence, poorly investigated or inadequately guided cases cannot be placed on the court roll. Ultimately, a decision on a docket or an inquiry can only be taken once all the evidence is collated. Suspicion and conjecture are not evidence.
16. The NPA is not bound by the findings of an inquest court. Once an inquest is finalised, it is referred by the court to the NPA for a decision. In all matters, decisions will be taken on available evidence. It is therefore incorrect to say that there is an inaction on re-opened inquests. Incomplete transcribed records sometimes are the cause of delays in taking decisions. However, this is not the case in all matters. The State v Rodrigues is an example of charges being instituted once an inquest was completed. A decision was also taken on the Haffejee, the Sons and Els matters.
17. The NPA has often been criticised for poorly and ill-considered decisions made in matters. Challenges to expediting investigations include lack of dockets; lack of postmortem reports; deceased or ailing witnesses, victims and persons of interest; missing experts; and significant amounts of information that was destroyed in 1995, on instructions of senior ministers.

E THE TRC COMPONENT AND CRITICISMS LEVELLED AGAINST THE CURRENT APPROACH

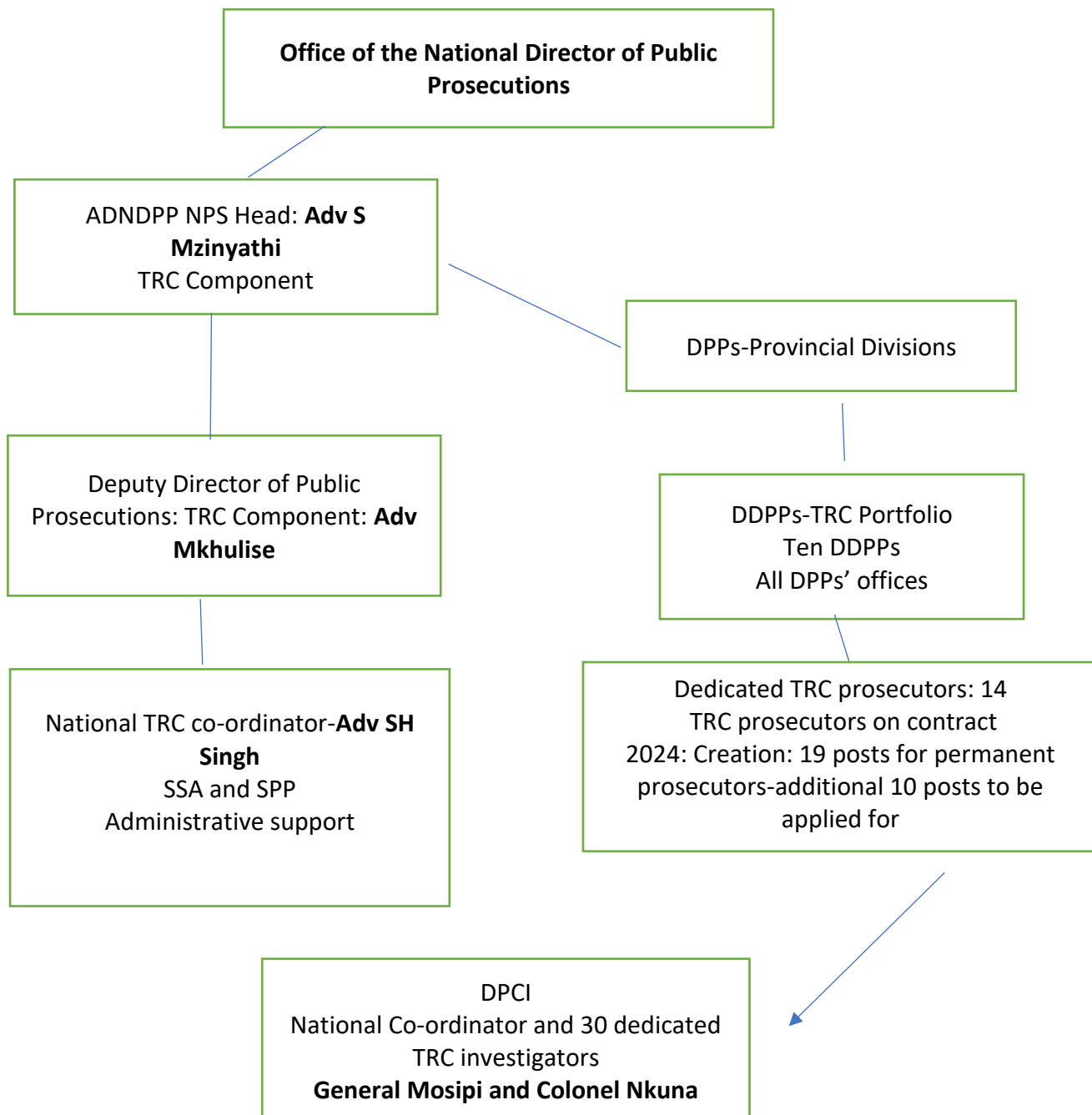
18. Even though FHR submits that the establishment of the TRC component within the NPA and DPCI is to be welcomed, it claims that it has failed to address key underlying challenges in investigation and prosecutions and that it remains unclear how the NPA prioritises investigations, which is a factor that inevitably impacts on progress.
19. Although clarity on the structure, composition and roles and responsibilities of the TRC component has been provided to FHR since January 2023, further elaboration is

provided on the composition of the TRC Component, the approach to prioritising matters and the progress made on matters.

F PRIORITISATION OF TRC MATTERS BY BOTH NPA AND DPCI

20. **Creation of a TRC Component:** During September 2021, a separate portfolio known as the TRC Component was established within the office of the Deputy National Director of Public Prosecutions: NPS (DNDPP: NPS), Adv De Kock to prioritise TRC matters. A National TRC co-ordinator, Advocate SH Singh, was appointed, whose duty was to specifically oversee TRC matters, and co-ordinate and assess progress of TRC matters in all Divisions.
21. **Appointment of a National co-ordinator-DPCI:** DPCI followed a similar route during 2022 by also appointing a National TRC co-ordinator, Colonel M Nkuna, to drive progress on investigations in TRC matters.
22. **Capacity:** The National TRC Component within NPS was expanded with the appointment of a Special Director of Public Prosecutions in April 2022, Adv Matzke, within the office of the DNDPP: NPS, to assist with strategic oversight of these matters. A Deputy Director of Public Prosecutions (DDPP) and administrative personnel were also appointed to oversee and support the progress on TRC matters. Two additional state advocates have also been added to the TRC Component.

ORGANOGRAM OF THE TRC COMPONENT



23. **Appointment of TRC Nodal Points at DPP offices:** Since 2019, all TRC matters have been migrated to the office of the DPPs within whose jurisdiction the offences occurred. Senior managers were appointed in each office. Within every Division, DPPs have assigned a DDPP or a Senior State Advocate (SSA) to oversee the TRC Portfolio. Within every Division, all TRC prosecutors hold the rank of SSAs who guide investigations on all TRC matters. The dedicated prosecutor is accountable to the DDPP seized with the TRC Portfolio, who in turn is accountable to the DPP. All decisions are taken by the office of the DPP. On TRC matters, the DPP is accountable to the DNDPP: NPS and ultimately the NDPP.
24. **Appointment of dedicated prosecutors and investigators on contract:** Prior to 2021, the NPA approached the Minister of Public Service and Administration (DPSA) to obtain a deviation from the normal recruitment process to appoint dedicated TRC prosecutors on a three-year contract, as opposed to the usual one-year contract to deal with TRC matters. DPCI also appointed investigators to prioritise investigations into TRC matters. Prosecutors and investigators were thereafter appointed on a three-year contract. The contracts were then extended for a year and in line with policy could not be extended. The prosecutors and investigators dedicated to TRC matters, deal exclusively with TRC matters.
25. **Appointment of permanent dedicated TRC prosecutors:** Commitment by the NPA to the TRC process continued and has now resulted in the approval for the creation of nineteen (19) permanent prosecutor posts in 2024, who will continue to be dedicated to TRC matters only. The process is underway to apply for an additional ten (10) posts to ensure continuity in prosecution-guided investigations and, where appropriate, prosecution of TRC matters. The handover and updating of the permanent prosecutors on the progress on TRC matters will be carefully monitored by the DPP's offices.
26. **Action Plan:** To proactively plan on how to ensure progress on TRC matters, it was necessary to reflect on what matters were under investigation, what were the obstacles preventing finalisation of matters, and how to focus on progress on the cases. It was important to adopt practical and actionable steps. After conducting an audit and critically analysing progress from the monthly reports from the Divisions, a two-pronged approach was followed, aimed towards the upskilling of both prosecutors and investigators. Whilst all prosecutors can prosecute a matter and investigators can

investigate a criminal case, investigating cold cases is unique and therefore requires a unique approach. The biggest hurdle was the tracing of dockets containing postmortem records, witness statements, photo albums of crime scenes etc and guiding investigations in the absence of critical documents.

27. **The approach:** An action plan was requested from each Division in which they had to indicate the volume of matters under investigation and an investigative and prosecution guided plan of action to expedite investigations, identify challenges with solutions, and fast track matters. An audit of TRC matters under investigation in 2021 revealed that 59 matters throughout the Divisions were under investigation. PCLU had also identified a further 55 deaths in detention that still needed to be registered for investigation. A process was formalised between the TRC Component and DPCI, to formally refer the outstanding matters for investigation. A Referral Form was developed which provided important information relating to the victim, his/her family, testimony at the TRC, whether they were still missing or deceased, contact details of family members, suspects if named, and other relevant details to assist the investigation. All matters under investigation are registered by DPCI whose function it is to prevent, combat and investigate national priority crimes, including TRC matters.
28. **Focus on quality investigations:** Senior DPCI management were engaged. The focus was on how best to conduct quality investigations into TRC matters even where there were challenges. Ordinarily, when a crime is committed, there is a docket which is immediately registered, witnesses consulted, the scene photographed, and victims identified. This was not the case for TRC matters. The TRC focussed on the period 1960-1994 with many cases being decades old.
29. **Decisions:** Ultimately, quality evidence collated by dedicated investigators would allow the prosecutor to decide whether to prosecute a perpetrator/s, or request that an inquest be re-opened or held, or decline to prosecute, and inform the family of the decision. All evidence and leads had to be thoroughly investigated. On instruction of the NDPP, a victim-centred approach is followed. Families must be kept fully informed of all developments in their matters. Where traceable, families are kept abreast of investigations and all decisions are communicated to families and legal representatives. DPCI also took a decision to trace families of victims by placing

information in newspapers through their media liaison officers in the respective areas where the deaths occurred.

30. **Self-Imposed time frames:** Self-imposed time frames for completion of investigations and decisions are encouraged. This, together with a critical assessment of the monthly feedback report, enables the Component to monitor progress on all matters under investigation. Apart from the NPA/DPCI accountability sessions that take place in all the Divisions, best practice is encouraged within the Divisions, where prosecutors and investigators have monthly feedback sessions on progress made and investigations are guided.
31. **Progress and the methodology to gauge progress:** In order to assess whether there was impact being made on TRC matters with action plans implemented, it was important to monitor and evaluate progress. Prosecutors needed to be specific about what investigations had taken place monthly. It was no longer acceptable to simply advise that investigations were ongoing. A methodology to gauge progress on the matters was jointly agreed to between prosecutors and investigators. From monthly reporting, investigations were assessed by placing them into three phases/categories: Medium A (0-33% of investigation completed): Investigation was assessed with the initial investigations to be completed, for example obtaining of the original case docket, postmortem records, photographic albums, witness statements, death certificates, etc. Medium B (34-65% of investigation completed): Most of the investigation had been completed with a decision to be made on either obtaining expert reports/trajectory experts/ballistic experts/crime scene reconstruction etc, to either prove or disprove a version, and Medium C (66-100% of investigation completed): this is the final part of the investigation where expert reports that have been obtained would enable the prosecutor and investigator to make an informed decision; or when the investigation is nearing completion and a decision needs to be taken.
32. **Joint accountability sessions:** During 2022, a platform was created when joint accountability sessions were held between investigators and prosecutors within the divisions. It was a novel unprecedented approach which also involved both the National coordinators, the DPP, DDPPS seized with TRC matters, and senior management and provincial heads of DPCI. The purpose thereof was to expedite progress on TRC matters, share and expose divisions to developments in other divisions, share best

practice, assess the blockages and action steps to remove the challenges. These include access to documents held in possession of other departments, declassification of documents etc where the investigators and prosecutors within the divisions experience challenges in accessing them. On rare occasions, family member/s may be invited by the DPP, to introduce him/her to the investigators or prosecutors. However, families are engaged separately and do not form part of our sessions.

33. **Primary purpose of accountability sessions:** At sessions, progress on every matter which is under investigation in the Division, is critically analysed to assess progress/no progress. Both investigators and prosecutors account, in the presence of DPPs and DPCI senior management, for the progress or lack thereof on the matters. The performance of each Division is gauged on a month-to-month basis. This is shared with all the Divisions. It offers a more realistic view of the progress on TRC matters. Accountability was and remains imperative.
34. **The sessions:** The volume of matters under investigation within each Division guides the duration of the joint accountability sessions which are held over two or three days. Where there are training sessions involved, this may take place over five days. Skills sharing and preparation for trials and inquests also take place well in advance, and are held over 3-5 days, attended by prosecutors, investigators and National coordinators. All sessions are intensive and leave little room for blame. All challenges raised are actioned and interventions identified where necessary. During 2024, 11 accountability sessions and 14 skills sharing sessions were held.
35. **Fast tracking of matters:** Matters are identified for fast tracking wherein all resources are pooled to expedite and finalise the investigation into a specific matter. Whilst all matters are important, matters which are identified for fast tracking are those where consideration is given to the age of the matters, seriousness of the offence, age of the accused and / or persons of interest, as well as the interests of the victims.
36. **Sharing of best practice:** The joint accountability sessions provide an opportunity to share best practices in other Divisions, provide updates on legal challenges on pending TRC matters in court, guide on challenges pertaining to access to documents, stakeholder engagement, progress within the specific Divisions, etc. Their purpose is

to sensitise prosecutors and investigators so that they are prepared to address challenges which may arise.

- 37. **Challenges:** Any challenge which cannot be resolved is escalated to the National Office of both NPA and DPCI. Ultimately the session is about accountability, jointly. Strict time frames are imposed and if they are not reached, it is necessary to ascertain why they have not been reached and strategies put in place by putting together an action plan to arrive at a decision. Provincial commanders and DPPs with DDPPs are on hand to guide investigations and offer solutions and prosecutions when challenges to investigations are raised.

- 38. **Annual Operational Plan (AOP):** The success of the sessions informed the decision to include accountability sessions between the NPA and DPCI as part of our Annual Operation Plan (AOP) to expedite investigations into TRC matters. During 2022, 5 sessions were held. In 2023, 11 sessions were held. And in 2024-11 sessions were held.

- 39. **In-house training:** To further enhance investigation and prosecutorial skills, we have engaged with experts to transfer skills to investigators and prosecutors during in-house skills transfer sessions. This includes crime scene experts, trajectory experts, senior forensic pathologists, persons dealing with MLAs and extraditions etc.

G THE LINK BETWEEN ACCOUNTABILITY AND PROGRESS

- 40. We submit that there is a direct link between our action plan and the progress on TRC matters. As reflected hereunder, a focused plan has resulted in progress:

PENDING JUDGMENTS/CRIMINAL COURT ROLL/INQUEST COURT ROLL

Description	Number	Details
Criminal cases on court roll	7	S v Rorich and another (COSAS FOUR)-14/4/2025 S v Coetzee and another (SIMELANE)-19-22/5/2025 S v Marais (sentence) (CAIPHUS NYOKA)-3/2025 S V Engelbrecht and others (CAIPHUS NYOKA)-12-20/5/2025

Description	Number	Details
		S v Botha and two others (N KUBHEKA)-5/3/2025 S V Botha and others (S PHEWA) 5/3/2025 S V Schoon and others (MNGOMEZULU)-31/7/2025
Re-opened inquests-date to be allocated	7	Cradock Four (2-20/6/2025) Mr Griffiths Mxenge (14/4/2025-16/5/2025) Chief Luthuli (14/4/2025-16/5/2025) Mr Booi Mantyi Mr Boykie Tlaphi Highgate Hotel (part heard 24 March 2025 until 27 March 2025. Mr Matthews Mabelane
Inquests-formal inquests	10	Dr Rick Turner Northcrest Five (1/3/2025-14/4/2025) Mr Moss Morudi Mr Kehla Nkutha Mr Sithembiso Nzuzza and Mr Moses Ramotlo Mr Vusumuzi Meshack Msani Mr Vusumuzi Mbatha Mr Sifiso Tutu Shezi Mr Charles Ndaba and Mbuso Shabalala Mr Bhekani Sibusiso Mbokazi
Finalised inquests	6	Dr NH Aggett Mr Ernest Dipale Dr H Haffejee Mr Abdullah Haron Mr Zama Sokhulu Mr Mthunsi Vlemeseni Njakazi
Total matters under investigation	157	
Pending inquests where evidence is been led	1	Mr Oupa Ronald Madondo

Description	Number	Details
Finalised Criminal matters-since September 2021	1	S v Wesley Madonsela: sentenced to ten years imprisonment on 9 November 2023. Leave to appeal conviction granted during November 2024.
Pending sentence where there is a conviction	1	S v Marais: postponed to March 2025 for sentencing. Accused found guilty of murder of Mr Nyoka-NG

H. FINDINGS OVERTURNED/CONVICTIONS

Re-opened inquest of Dr Neil Hudson Aggett (South Gauteng High Court)	Original court inquest finding overturned from suicide to murder-4 March 2022
Re-opened inquest of Mr Ernest Dipale (South Gauteng High Court)	Original court finding overturned from suicide to murder -11 July 2023
Re-opened inquest of Dr Hoosen Mia Haffejee (Kwa-Zulu Natal)	Original court finding overturned for suicide to death brought about by torture by members of the police force- 13 September 2023
Re-opened inquest of Mr Abdullah Haroon (Western Cape High Court)	Original court finding overturned from falling down the staircase to death brought about by torture by members of the police force on 9 October 2023
Inquest: Mr Zama Sokhulu (Mlobeli) (Kwa-Zulu Natal-Umlazi Magistrate Court)	Inquest finalised on 12 February 2024-record referred to NPA for a decision
S v Wesley Madonsela (Kwa-Zulu Natal)	Accused was found guilty of murder and sentenced to ten years imprisonment on 8 November 2023
S v Marais and others (North Gauteng High Court)	Mr Marais was found guilty of murder on 14 November 2024. Sentence proceedings will commence during January 2025.

Inquest: Mr Mthunsi Vlemeseni Njikazi (Kwz-Zulu Natal)	The accused in this matter was indicted on 7 November 2023. There were challenges when SAPS refused to pay for the legal expenses of the accused. He died on 29 December 2023. Inquest proceedings commenced and on 27 November 2024, the proceedings were finalised.
---	---

I OTHER-DECISIONS/PENDING INQUESTS

1	Mr Wellington Mbili
2	Mr Sithembiso Nzuza and Mr Moses Ramotlo
3	Mr Vusumuzi Meshack Msani
4	Mr Vusumuzi Mbatha
5	Mr Sifiso Tutu Shezi
6	Messrs Lolo Sono and Shabalala
7	Ms Susan Maripe
8	Sgt Richard and Irene Motasi
9	Mr Brian Nqulunga
11	Mr Charles Ndaba and Mbuso Shabalala
12	Mr Bhekani Sibusiso Mbokazi
13	Mr Zama Sokhulu
14	Mr J van der Merwe
15	Dr Muofhe
16	Mr Ernest Mamashila

J ASSESSMENT BY ADVOCATE NTSEBEZA, SC OF THE MEASURES, CHECKS AND BALANCES ADOPTED BY THE NPA TO DEAL WITH TRC MATTERS

41. As a direct result of the Full Bench judgment of **Rodrigues v National Director of Public Prosecutions of South African and others** (76755/2019)[2019]ZAGPJHC 159; [2019] 3 All SA 962 (GJ); 2019 (2) SACR 251(GJ), the NPA took a decision during

October 2022, to appoint senior counsel whose mandate it was to, amongst other terms, to review the measures, checks and balances adopted by the NPA to deal with TRC and related matters, and to assess whether the measures adopted by the NPA were adequate.

42. Advocate Ntsebeza (Ntsebeza) SC, who served as a commissioner at the TRC, together with Adv Ncquele and Katzee, were appointed to execute this mandate.

43. During the period of assessment, the work done by both the NPA and DPCI was scrutinised by Adv Ntsebeza SC who, by virtue of his appointment and experience as a TRC commissioner, and his team, would have been best placed to assess whether the measures, checks and balances adopted the NPA were adequate and to make recommendations if they were inadequate.

44. The Opinion was received during November 2023. It noted, *inter alia*:

- That the measures adopted and implemented by the TRC component to deal with TRC matters, were in large part, adequate.
- That many cases were at the beginning stages of investigation and identified challenges such as available evidence, tracing of witnesses, the docket and the inquest report, legal representation for ex SAPS employees and budgetary constraints for reconstructions, amongst others.
- The monitoring and oversight role of the TRC monthly reporting system was accepted.
- The oversight exercised through the centralised control under the sole responsibility and authority of the DNDPP: NPS, Adv De Kock at the time, was acknowledged.
- It was acknowledged that the DPP regional Divisions accounted to the TRC National co-ordinator through written monthly updates for each of the Divisions.
- It highlighted the regular briefing sessions between the national TRC Component and DPP Divisions of investigating officers and prosecutors to discuss areas of complexity, problems that arose and which were common to several cases, and areas that require DNDPP intervention to move them forward or to liaise with other organs of state to ensure co-operation and assistance.

- It also acknowledged the assignment of investigators and prosecutors solely to TRC matters. It found that the appointment of dedicated prosecutors provided certainty and accountability.
- It also acknowledged that prosecutors remained directly accountable to the victims' families and are expected in the course of their duties to provide regular updates to families and to facilitate accountability and transparency, and that appropriate communication channels have been set up.
- It also acknowledged that one of the most important measures that were introduced was for the provision of monitoring and accountability sessions with the DPPs of each Division, the TRC DPCI heads in each Division and prosecutors, sitting together to update one another on approaches adopted and developments in each case. This had the dual effect of specialised training of prosecutors on historical crimes and sharing of intelligent resources.
- The audit of the hands- on approach, fast tracking of investigations of TRC matters was not criticised.
- It also found that the hybrid structure of the TRC Component was satisfactory.

45. Ntsebeza's Opinion, with recommendations, was shared with the Minister of Justice and Correctional Services, Mr R O Lamola as well as the Chairperson of the Portfolio Committee on Justice and Correctional Services at the time, the Honourable G Magwanishe.

46. The Opinion is at odds with the submissions made by FHR who have levelled criticism that there is a clear lack of accountability; that the TRC Component is nameless, toothless, opaque, without a full-time dedicated head, with the buck stopping at no one; that Divisions do not report to the TRC Component; that there is a failure to make decisions; and that there is no transparency.

47. At a meeting held on 30 January 2023, between FHR, NPA and DPCI, the issues raised by FHR - including capacity and the presentation by the NPA and DPCI on progress on TRC matters to the JPC in June 2022 and November 2022 - were elaborated upon.

48. The creation of a platform where structured stakeholder engagement would take place between FHR, NPA and DPCI was discussed, identical to that which is being

implemented with the Apartheid Era Victims Family Group (AVFG) and other parties. It was explained that there is a single NPA and that ultimately decisions are taken by the DPP in respect of all TRC matters under investigation in his/her Division. It was further noted that the NPA had adopted a prosecution policy, that it functioned within a legal framework in line with directives and had a considered approach in the way matters were approached.

K CREATION OF A SPECIALISED UNIT/INVESTIGATIVE DIRECTORATE

49. FHR submits that their approach to creating a specialised unit or an investigative directorate where prosecutors and investigators could work together to solve cases was rejected by the NPA.

50. Part Two of the Prosecution Policy provides that an Investigating Directorate is established in terms of section 7 of the NPA Act and has the primary function of, and responsibility for, the investigation of such offences or criminal or unlawful activities as may be set out in a Proclamation issued by the President.

51. In removing TRC prosecutions from the PCLU mandate and creating a separate Component during September 2021, the TRC Component was established within the office of the DNDPP: NPS, as previously explained, to give a special focus and prioritise the management of TRC matters.

52. Prioritising progress is the TRC Component's focus. This was the primary intention of creating a separate component to deal with TRC matters. There is no evidence to sustain the argument made out by FHR that the appointment of an investigative directorate would have provided different or better results than the current component. There is a plan that has been implemented, which has produced results, which have by far exceeded any progress within the last three decades.

L APPOINTMENT OF A SPECIAL DIRECTOR

53. FHR also recommends the creation of the post of Special Director of Public Prosecutions to head the TRC Unit or Directorate. They argue that a Special Director

will deliver tangible results and significantly improve the quality of investigations and prosecution.

54. The power to appoint a Special Director lies with the President. Part Two of the Prosecution Policy Directives provides that where the President has conferred or imposed on or assigned to a Special Director the powers, duties and functions of instituting and conducting prosecutions they shall be exercised, carried out and performed in consultation with the DPP of the area concerned. Inevitably, the Special Director will exercise his/her functions in consultation with the DPP of the area concerned. This procedure is arguably no different from what the TRC Component exercises presently.

55. FHR argues that the creation of a senior post of a Special Director or the change of the name of the component will “significantly improve the quality of investigations and prosecution”. FHR offers no plan of action to drive progress apart from the appointment of a Special Director, a special name for the component and the creation of an investigative directorate.

56. There is no guarantee that a change in structure will affect its functioning. Excellent work is being done by the TRC Component. Nonetheless, the NPA is prepared to consider the creation of a Special Director post. The ultimate decision will, however, lie with the President.

M THE DECENTRALISATION POLICY

57. FHR submits that the decision taken to decentralise TRC matters from the PCLU in 2019, to the NPA’s provincial offices failed to deliver any tangible results.

58. We submit that this submission by FHR is not supported by the facts, as has been demonstrated above. In fact, it was the correct decision that should have been taken at the outset as jurisdiction has always been the determining factor for the investigation of matters.

59. In terms of section 179(5)(a)(b) of the Constitution, the NDPP, with the concurrence of Minister of Justice and Constitutional Development, and after consulting with the

Directors of Public Prosecutions, must determine prosecution policy which must be observed by the prosecution.

60. Part Two of Prosecution Policy provides that the primary responsibility for instituting and conducting prosecutions vests in the DPPs in respect of offences committed under their areas of jurisdiction. All crimes are investigated within the area of jurisdiction where they occurred. Therefore, the decision to migrate the matters to the respective Divisions within the jurisdictions in which they occurred was a sound decision. It also ensured that locally placed dedicated prosecutors are readily available to attend to matters in court.

N OTHER STAKEHOLDERS

61. FHR advises that it made the submissions to the JPC (Annexure A), on the suggestion made by the DNDPP: NPS, in his report to Parliament on 21 November 2023, that families and civil society organisations working with these matters be given an opportunity to share their views and experiences.
62. The NPA engaged with FHR in January 2023 and January 2024. The NPA acknowledges the importance of structured stakeholder engagements. However, there are other organisations that are also involved in structured engagements with the NPA. Both the AVFG and the Khulumani Support Group can also provide a holistic and considered view of their engagements with the offices of the DPPs, prosecutors and investigators.
63. AVFG is led by family members who have lost family members under tragic circumstances. During 2022, AVFG made a request to meet the DNDPP: NPS. In line with our victim-centred approach and policy, the DNDPP: NPS invited AVFG to first meet with the DPPs and DPCI investigators within the Divisions in which their matters are being investigated and decided. This resulted in families being introduced to prosecutors and investigators seized with their matters. This occurred between 2022 and 2024. The engagements with the office of the DPPs, DPCI and prosecutors was unprecedented. In accessing DPPs, prosecutors and investigators, families were able to identify the investigator and prosecutor seized with their matters, provide leads and information to investigators, without interfering with the functions of a prosecutor or

investigator. It encouraged the building of trust between families, the investigator, and the prosecutor. Regular progress reports are given to the families. Because of transparency and accountability, the relationship between families, prosecutors and investigators is strengthened. Prosecutors and investigators are also mindful and committed to impartiality, fairness and the rule of law.

64. A total of seven meetings took place between AVFG and the offices of the DPPs within the different Divisions listed below. All meetings were attended by the DPPs in whose Divisions the matters are under investigation, the prosecutors and DPCI investigators. The process was driven by Mr I Cajee, the nephew of Mr Ahmed Timol, who has expressed in writing his appreciation, on behalf of families, for the excellent engagements. A platform was shared with the families where they were given the opportunity to share their pain, their challenges and commitment to working towards justice.

DIVISION	DATE OF MEETING	FAMILY
Pretoria	7 November 2022	Matter of Messrs Kgoathe/Modipane/Monnogotla, Nyoka family, Simelane and Sons and Els
Johannesburg	26 September 2022	Matter of Messrs Saloojee, Akhalwaya, Napier and others
Western Cape	15 February 2023	Matters of Mr Fransch, Mr Haron, Mr Kriel, Ms September and Mr Robbie Williams and Coline Waterwitch
Northern Cape	17 April 2023	Matter of Mr Jacobs
Eastern Cape	1 June 2023	Matters of Messrs Mohapi and Biko, Family members present.
Kwa-Zulu Natal	24 July 2023	Spokesperson of Haffejee family, Mr G Mxenge, Mrs Victoria Mxenge, Mohsheen Jeenah

National office	30 January 2024	NPA/DPCI and AVFG
-----------------	-----------------	-------------------

65. In line with the victim-responsive approach adopted by the NPA in its strategy, the NDPP also issued a directive in 2022 that required TRC prosecutors to liaise directly with the families and victims, and to keep them informed of progress in the matters. The same is required of investigators. Families are made aware that there are challenges in the investigation of the matters. All challenges with a prosecutor or investigator must be addressed either with the office of the DPP or DPCI, respectively. Should the matter be incapable of being resolved, it is escalated to the co-ordinators. Failing resolution by the co-ordinators, it is escalated to the DNDPP: NPS. All information collated must be passed to the investigating officer. This is the same process of collaboration that has been established with all stakeholders including FHR.

O ALLOCATION OF JUDGES

66. The responsibility for the appointment of judges in all matters vests ultimately with the Chief Justice, who through his/her Judges President, exercises responsibility over the establishment of the exercise of judicial functions of the courts.

P LEGAL REPRESENTATION FOR PERSONS OF INTEREST AND SUSPECTS

67. This issue has caused delays. Legal representations for people of interest, particularly those who were in the employ of the South African Police Force when the alleged offences were committed, is a function exercised by office of the State Attorney, ultimately the Department of Justice and Constitutional Development (DOJ&CD).

68. Although it is not the function of the NPA, prosecutors play a vital role in ensuring that people of interest, in the interest of fairness, are sensitised in respect of their rights and that applications for the reasonable costs of legal fees are made to the State Attorney. The NPA has no control over the distribution of resources in respect of legal fees.

69. Inquest proceedings, even though they are not criminal proceedings, are more aligned

to criminal proceedings. Ordinarily, inquest proceedings commence with no additional expenses, as all expenses incurred incidental to an inquest are those which are offered in support of capacity by the DOJ&CD, for example provision of a court, the state prosecutor/s who represent the victim/family, witness fees etc. We are guided by section 8(2) of the Inquest Act which is prescriptive in that the laws governing criminal trials also apply in inquests, in so far as they relate to securing the attendance of witnesses at an inquest, their examination, the recording of evidence given by them, the payment of allowances to them, etc.

70. In inquests, the evidence leader is a state prosecutor. It is also the state prosecutor who submits a report together with all relevant statements, documents and information, on an alleged death or death of any person to a presiding officer. Witnesses will also be examined by the prosecutor or any person designated by the judicial officer who is holding the inquest. Any person who satisfies the judicial officer that he has a substantial and peculiar interest in the issue of the inquest may personally, or by counsel or attorney, put such questions to a witness giving evidence as the judicial officer may allow.
71. The witness' costs of accommodation, travelling, and testifying, are paid for by the courts in which the matters were heard.
72. When any person testifies, there is also an added factor in that the presiding judicial officer must, consistent with the Bill of Rights in the Constitution, draw to the attention of witnesses, who may be at risk of possible prosecution, their rights against self-incrimination and procurement of legal representation, prior to testifying. It was advised that the South African Police Service (SAPS) have refused to fund the expenses of the persons of interest who were in the employ of the state when the murders of the Cradock 4 took place.
73. The payment of legal costs of ex- employees must be made by SAPS who applies for it in terms of Standing Order 109. The High Court judgment of **Willem Helm Johannes Coetzee and others and the Minister of Police, the Provincial Commissioner for Gauteng, SAPS Case number 72747/2016 reported on 15 May 2018** supported this and found that the SAPS are successors in title to the SAP and inherit its liabilities and responsibilities. In the matter of COSAS Four, (**The Minister of Police and Rorich**

Christiaan Siebert and others Case Number SS70/202) the same challenge was experienced where there was a refusal to fund the costs of legal expenses of the accused police officers.

74. During January 2023, the South Gauteng High Court in Johannesburg issued an order dismissing the Minister's application for leave to appeal the judgment (delivered in May 2022) directing the police to pay the legal fees of Mr Christiaan Rorich charged in the COSAS Four matter. State Attorney Kobus Meier representing the Police Minister had informed the court that he had received instructions from the Minister of Police, to petition the SCA and if necessary, the Constitutional Court, on the matter.
75. The issue of the challenges of legal costs was raised by FHR in a meeting with the NPA and DPCI on 30 January 2023. This is a matter for SAPS to address. Notwithstanding, the DNDPP: NPS undertook to advise the SAPS National Commissioner of the judgments and the fact that this was contributing to undue delays.
76. During March 2023, correspondence was addressed to the Minister of Police, wherein it was requested that the Minister intervene urgently in the issue of payment of legal fees of police officers charged in TRC and related matters. During April 2023, the police minister took a decision to not challenge the order directing the SAPS to pay legal fees of former apartheid era police officers on trial for the killing of COSAS Four. This issue has again been addressed by the current Acting DNDPP: NPS.
77. Similarly, during February 2025, and in relation to the Cradock Four matter, it was resolved that the costs of the witnesses will be paid by the Legal Aid Board. The issue of costs for funding of legal representatives for the Cradock Four community has also been resolved. As part of the case management meeting held on 6 March 2025 in the Cradock Four matter, an urgent directive was issued by the presiding judge, Madam Justice Beshe, that the legal representatives of the SADF and SAP members consider urgent applications for funding from the relevant state departments.

Q REPARATIONS

78. The Promotion of National Unity and Reconciliation Act No 34 of 1995 provided for, and oversaw, the issue of reparations to victims who suffered gross human rights violations. The recommendations formed part of the Final Report of the TRC.

79. The Department of Justice and Constitutional Development is seized with the processing of reparations.

R COMMISSION OF INQUIRY

80. This matter is *sub judicæ* and forms part of the claim for constitutional damages in current litigation in which the NPA, together with others, is cited as a respondent.

S PROSECUTORIAL STRATEGY

81. All decisions taken on TRC matters are governed by the NPA policy. The legal framework for prosecutions is established through the Constitution, the NPA Act 32 of 1998 and the Criminal Procedure Act. If investigations reveal that there is evidence against perpetrators who did not apply for amnesty or were refused amnesty, they will be prosecuted. We are guided in this regard by the High Court Judgement of **Nkadimeng and others v the NDPP and others** (32709/07) [2008] ZAGPHC 422 (12/12/2008). If persons of interest or perpetrators are deceased, inquests may be held in respect of the suspicious circumstances surrounding the death of the victim if investigations inform such a decision. Inquests may also be re-opened if there is new evidence which was not considered by the original inquest court.

82. In some cases, whilst there is a suspicion that a person met with an unnatural demise, the evidence to that effect is just not available. In such cases, an inquest cannot be held. Families will be informed of the situation and a decision to close the matter will be communicated to the families.

T OVERSIGHT

83. FHR argues that there is lack of clear accountability and whilst the TRC Component falls directly under the DNDPP: NPS, it provides little or no strategic direction or oversight over the TRC cases.
84. During the meeting of 30 January 2023, where FHR engaged with both the NPA and DPCI on TRC matters, the DNDPP: NPS, Adv de Kock highlighted the framework and policy directives within which all prosecutors take place. He advised that ultimately it is the DPP who takes a decision on matters investigated by DPCI. He also highlighted appearances by the NPA before the Justice and Portfolio committee during June 2022 and November 2022 where substantive representations were made on progress on TRC matters.
85. All matters are overseen by DPPs in whose jurisdiction the matter is investigated. TRC Nodal Points have been appointed within every Division. They hold the rank of Deputy Directors of Public Prosecutions (DDPPs) and oversee the TRC Portfolio. All DPPs are accountable to the NDPP. The DNDPP: NPS exercises his powers through the NDPP. The NDPP may, in terms of section 179(5)(d) of the Constitution, review a decision to prosecute or not to prosecute, after consulting the relevant DPP and after taking representations from the accused, the complainant and any other person or party whom the NDPP considers relevant.
86. Progress on TRC matters, or the lack thereof, are discussed at monthly middle management meetings (NOMM), which are attended by all DPPs and Component Heads.
87. In addition to internal oversight and accountability, the Cabinet Member responsible for the administration of justice must exercise final responsibility over the prosecuting authority. The NPA is accountable to Parliament. Parliament has oversight on TRC matters. It therefore cannot be argued that there is no oversight over TRC cases or that there is little or no strategic direction. The end goal is that decisions are taken, always after exploring all leads and a thorough investigation.

88. In its claim for constitutional damages in the matter of *Calata and Others vs Government of RSA and Others*, FHR seeks the payment of R8 000 000,00 over a five-year period for purposes of enabling families and organisations supporting families to play a monitoring role in respect of the work of the policing and justice authorities charged with investigating and prosecuting the TRC cases.
89. The NPA is the only organ of state mandated by the Constitution to institute and prosecute criminal proceedings on behalf of the State. Its work and functions are monitored by Parliament to which it accounts as part of its oversight functions. If an agency or organisation is granted permission to monitor the work of the NPA, it will detrimentally affect the way the NPA discharges its constitutional mandate, and its prosecutorial independence may not be consonant with the law.
90. FHR further argues that its queries are bounced around between the TRC Component and the provincial DPP offices and that nobody takes full responsibility for the cases. It also maintains that the TRC Component maintains an arm's length from cases and repeatedly says that FHR cannot get involved in cases, and that the NPA fails to make decisions.
91. The NPA functions within a legal framework, policy and directives. Ideally, all challenges should be directed to the respective DPP's office. It is not a requirement that the co-ordinator liaise directly with the prosecutor but in the interests of fast-tracking matters, this does take place.
92. In a matter in which FHR has indicated an interest in, it raised concerns with the TRC co-ordinators that there might be a link to another matter which is currently enrolled. Even though FHR did not have a valid power of attorney to deal with the matter, there was intervention were both the co-ordinators intervened and requested the DPP's office to engage with the counsel to hear his concerns.

U SPECIFIC MATTERS

93. FHR submits that the employment of prosecutors on contract has contributed to uncertainty and high turnover. They identify three matters but simultaneously welcome the creation of permanent posts.

94. **Mabelane matter:** In the Mabelane matter, a decision was taken by the prosecutor seized with the matter to support the request to re-open the inquest. From reports received, the first prosecutor who dealt with the matter dealt with it during the period when the matters were migrated to the Divisions in 2019. Shortly after she was transferred, two other prosecutors - who subsequently left the NPA - dealt with the matter for a very limited duration. Since then, the same prosecutor remains on the matter. The Inquest Act makes provision for an inquest to be re-opened after application is made to the Minister on the recommendation of the Attorney General (now the NDPP) to re-open the inquest.
95. **PEBCO Three:** After the migration of TRC matters in 2019, with no dedicated prosecutors appointed at that stage, the matter was allocated to a permanently employed prosecutor. After he retired, the present dedicated prosecutors have overseen the matter and have liaised with Advocate Varney and CDH, the instructing attorneys. The most recent meeting was held in February 2025.
96. **Mr Iggy Mthebule:** FHR submits that the prosecutor seized with the matter was informed a few days before the meeting that her contract had not been renewed. The contract for the dedicated prosecutor was concluded for three years only. The contract expired in December 2024. The prosecutor was aware of the three-year contract period and as such could not have become aware that it would not be renewed just a few days before the contract expired. A handover was done to the current prosecutor. Even with permanent dedicated capacity, prosecutors might change for a variety of reasons-transfer, illness, retirement etc.

V IDENTITY OF PROSECUTORS TO FHR

97. As indicated on par 11, all instructing attorneys who have been identified on the respective matters in which FHR appears, engage with the NPA. It cannot then be alleged that FHR does not know the identity of the prosecutors.

W LIST OF MATTERS UNDER INVESTIGATION

98. During the meeting held between FHR, the NPA and DPCI on 30 January 2023, FHR advised that they represent all TRC families formally and informally and requested that the list of all matters under investigation be disclosed to them so that they could inform the families if information needed to be shared.
99. At that meeting, General Mosipi, who represented the DPCI, stated that matters under investigation by DPCI remained the function of DPCI and that the list of matters under investigation belonged to DPCI. He requested that FHR identify the families that they represent, and that the list be submitted to DPCI. It was emphasised that the integrity of the investigation had to always be protected and not be compromised. The list of cases under investigation by DPCI would not be shared with FHR. FHR accepted and understood this when they complied with the request of DPCI and provided a list of FHR -supported matters to DPCI.
100. It was stressed that the TRC cases were sensitive in nature and that it was the mandate of the DPCI and NPA to investigate and prosecute respectively, where necessary. General Mosipi emphasised that there are restrictions and limitations on what can be divulged and ultimately FHR must deal with those matters in which they represent families. It was emphasised that TRC matters were taken seriously and if there was information to be shared, it must be shared with investigating officers.
101. The DNDPP: NPS emphasised that the NPA had a Constitutional mandate to protect the integrity of our cases. An example was cited of a person approaching the NPA on the pretext of wanting to attend to a matter in court as a spectator. Shortly thereafter, a general power of attorney was presented purporting to represent the family. The emergence of the general power of attorney signed by another family member caused a rift between the families. Both the NPA and DPCI were adamant that there must be a strict relationship, and the accused must have a fair trial and there must be no interference with the decisions taken.
102. Shortly after the Opinion of Adv Ntsebeza SC was released, access to the list of matters under investigation listed in Annexure C of his Opinion, was also sought from both the NPA and DPCI. A formal request was made in terms of section 23(2) of PAIA,

to the Information Regulator South Africa, by a Daneel Knoetze, amongst others, for the “TRC Component’s prosecutor training manual and TRC specific prosecution policy” as well as access to Annexure C of the Opinion of Adv Ntsebeza, SC which contained a list of matters under investigation.

103. A decision had been taken by the NPA to not release Annexure C on the basis that it contained information pertaining to third parties, that releasing the document will be in contravention of the POPI Act, and that the SAPS was the custodian of the document. The application to the DPCI, who are the investigators seized with the matters, was also unsuccessful. In December 2024, a copy of Annexure C, with the redacted portions of the record containing third party information was furnished.

104. The persistence by FHR to disclose the list of TRC matters under investigation cannot override the safety of witnesses in matters under investigation, our prosecutors and investigators. There have already been instances where sensitive discussions on persons of interest at accountability sessions have made their way to persons of interest; phones of prosecutors and investigators have been hacked; a person of interest having used his dogs to chase investigators; various WhatsApp groups between persons of interest advising of the imminent arrival of investigators; and potential threats that have been made against investigators., Since the conclusion of the TRC, this period of investigation has yielded the most results on TRC prosecutions and investigations. The lull in investigations since the completion of the work of the TRC does not necessarily translate into acceptance that perpetrators will not be punished.

105. In the words of Judge Mohamed, as quoted in the case of **Azapo and others v the President of South Africa and others** (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996), “a nation divided by a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens living alongside everyone else, and they may be very powerful and dangerous. If the army and police have been the agencies of terror, the soldiers and the cops aren’t going to turn overnight into paragons of respect for human rights. Their numbers and expert management of deadly weapons remain significant facts of life....the soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathisers in the population

at large. If they are treated too harshly-or if the net of punishment is cast too widely-there may be a backlash that plays into their hands”.

X MODUS OPERANDI

106. As part of investigations by DPCI and prosecution guided investigations, both the NPA and DPCI are aware that *modus operandi*, similar fact evidence and common perpetrators are important to identify and investigate. As part of the accountability sessions, these commonalities are emphasised. And to expedite the matters where investigations are complete, the matters are enrolled at the Regional Courts where the court rolls flow more easily than at the High Courts.

107. Prosecutors and investigators from selected Divisions have also, as part of special projects, liaised on strategy and how best to approach certain prosecutions and investigations.

Y WRITTEN JUSTIFICATION ON NPA’S DECISIONS

108. Families are kept fully apprised verbally of any decision taken on their matter as it is a more personal and interactive manner of building a rapport with families. However, there is no reason why, if decisions are taken, they cannot be reduced in writing to both families and their legal representatives.

109. The prosecutor is enjoined by the Constitution of the Republic of South Africa, 1996 and section 32 (1) of the NPA Act to act without fear, favour or prejudice. It is required of a prosecutor to be satisfied that there is reasonable and probable cause, not just a *prima facie* case against an accused person. The prosecutor should interrogate the docket in its entirety and apply his/her mind properly before taking a decision. Even if a court is not overly eager to limit or interfere with the legitimate exercise of the prosecuting authority, a prosecuting authority’s decision to prosecute is not immune from the scrutiny of a court when such a discretion is not properly exercised.

110. The Code of Conduct for Members of the NPA, makes it abundantly clear that the prosecutorial discretion to institute and stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and Policy Directives and be

free from political, public and judicial interference. It also requires that prosecutors be impartial in performing their duties without fear, favour or prejudice. In particular, they need to consider the public interest, as distinct from media or partisan interests and concerns however vociferously these may be presented.

111. Most importantly, it is required of prosecutors to only institute a prosecution when the case is properly investigated, based on well-founded evidence which is reasonably believed to be reliable and admissible, and not be swayed by public opinion and undue pressure from stakeholders.

112. TRC cases are unique. Because of the national and historical significance of the matters, all cases must be thoroughly investigated. It cannot be expected to simply prosecute suspects without evidence. Prosecution also cannot be based on suspicion or be made on emotions.

113. In **S v Yengeni 2006(1) SACR 405 (T)** Bertelsmann and Preller JJ observed: ‘The Constitution guarantees the professional independence of the [NDPP] and every professional member of his staff, with the obvious aim of ensuring their freedom from any interference with their functions by the powerful, well connected, the rich and the peddlers of political interference’. The court further observed that the independence of the Judiciary is directly related to, and depends upon, the independence of the legal professions and of the [NDPP]. Undermining this freedom from outside influence would lead to the entire process, including the functioning of the judiciary, being held hostage to those interests that might be threatened by the fearless, committed and independent search of the truth.

114. In terms of the law, the NPA accounts to Parliament. In terms of the Inquest Act, it is the office of the NDPP that submits the application for re-opening of inquests. All decisions, whether to prosecute/not to prosecute, hold an inquest or apply to re-open an inquest will be based on thorough investigations by DPCI. All families and legal representatives are kept abreast of decisions taken, based on evidence collated in a docket.

Z CONCLUSION

115. The NPA acknowledges South Africa's painful past and together with DPCI, is committed to ensuring progress on TRC matters. Since 2019, both the NPA and DPCI have committed to dealing with TRC matters and this response reflects the progress which has been made over the past few years, and that we continue to make. This commitment is demonstrable through the progress made, not only on matters where FHR is a party thereto, but on all TRC and related matters.

116. Besides creating dedicated attention and capacity to deal with TRC matters, we also adopted measures to ensure that there is no recurrence of undue political interference in the prosecution of TRC matters. It is imperative that important stakeholders such as FHR support the NPA in its efforts to ensure that justice is done for victims and families with due regard to the rule of law and the independence that must be exercised in taking decisions.

117. The NPA is committed to ensuring justice for apartheid era crimes and finality of matters so that families can find some closure. Without closure, we cannot move forward. If the truth is not exposed, there will be no closure. Even when all leads have been exhausted, both the NPA and DPCI are committed to provide some degree of closure by ensuring that families are aware of all leads pursued to properly investigate the matters through prosecuted investigations.

118. We acknowledge that our country's history is besmirched with unspeakable acts of gross human rights violations, committed under a veil of secrecy. As shameful as our past is, we cannot deny that these atrocities took place, and we are committed to dealing with our history and the pursuit of justice for victims in line with the rule of law.



ADV. S. BATOHI

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

DATE: 27 March 2025

NPA Response to Submissions by FHR

Presentation to Portfolio Committee on Justice and Constitutional Development

20 May 2025



National Prosecuting Authority
South Africa

SB 00200

CONTENTS OF PRESENTATION - NPA RESPONSE TO SALIENT ISSUES

- ❖ Introduction
- ❖ Creation of the dedicated TRC Component
- ❖ Action plan implemented
- ❖ Progress made on FHR related matters
- ❖ Opinion of Adv Ntsebeza, SC
- ❖ Update on Commission of Inquiry (COI)
- ❖ Update on Cradock Four matter
- ❖ Creation of Special Unit/Investigative Director/Post of a Special Director
- ❖ Concluding remarks

INTRODUCTION

- ❖ NPA is committed to ensuring justice for apartheid-era crimes and finality of matters so that families can find some closure
- ❖ Multi-pronged approach towards dealing with TRC matters
 - ✓ Prosecutions to ensure accountability for alleged perpetrators
 - ✓ Inquests
 - ✓ Missing persons – identification and return of remains – NPA's Missing Persons Task Team (MPTT)

INTRODUCTION (cont.)

- ❖ NPA established TRC Component in 2021, with dedicated capacity (in both NPA and DPCI), and focus on Prosecution-Guided Investigations (PGI).
 - Creation of 19 permanent posts for dedicated TRC prosecutors. Applying for an additional ten posts due to increase in volume of matters.
- ❖ There are 194 matters under investigation. In 35 of these, decisions have been taken (not to proceed for different reasons); 159 are in hand.
- ❖ Two convictions secured – (cases of murder of Mr Wesley Madonsela and Mr Nyoka)
- ❖ Seven (7) criminal cases on the High Court roll: including COSAS Four (where the court made a historic finding on charges of CAH); and matter of Ms Simelane (where a section 77(3) inquiry is expected to conclude this week (19-22 May 2025)), amongst others.

INTRODUCTION (cont.)

- ❖ **Six inquests have been concluded** including that of Messrs Ernest Dipale, Zama Sokhulu, Mthunsi Vlemeseni Njakazi, Abdullah Haron, and Drs Aggett and Haffejee where the original court findings were reversed after evidence was led. The inquest of Mr Ronald Madondo is also underway.
- ❖ **Inquests into the deaths of the following are ongoing:**
 - **Chief Albert Luthuli:** High-profile, currently being heard at Pietermaritzburg High Court. We expect to conclude with the evidence by 20 June 2025.
 - **Mr Griffiths Mxenge:** Matter will be heard at the Pietermaritzburg High Court on 17 June 2025
 - **Highgate Hotel Massacre:** Further evidence to be led between 11-15 August 2025; arguments to be heard between 1-5 September 2025.
 - Formal inquests to be held in matter of the **Northcrest Five (EC), Mr Moss Morudi (NW), Mr Kehla Nkutha** (Mpumalanga), amongst others.
 - Re-opened inquests: **Mr Matthews Mabelane (JHB)** and **Mr Boykie Tlaphi (NW)** underway shortly.

INTRODUCTION (cont.)

- ❖ NPA is working to finalise more indictments; additional matters have been lined up for the inquests to be re-opened, or formal inquests to be held, once investigations are finalised.
- ❖ All decisions will be evidence-based and based on fairness to accused persons and persons of interest.
- ❖ But there are some matters where too much time has lapsed and, despite diligent investigation, we are unable to find the necessary evidence to reconstruct scenes, obtain expert opinions, obtain witness statements or similar fact evidence from which we can work on.
- ❖ In line with our victim-centered approach, we are committed to keeping families informed, and where there is no evidence, this is communicated to families.
- ❖ We would welcome the Committee's intervention on addressing some of the challenges that will be outlined in the presentation.

INTRODUCTION (cont.)

- ❖ Written submissions made by Foundation for Human Rights (FHR) to Portfolio Committee on Justice and Constitutional Development (PC) on 12 February 2025.
- ❖ Appearance by NPA before PC on 19 February 2025
- ❖ As requested by the PC, NPA provided written responses to both FHR and PC on 27 March 2025.
- ❖ This presentation presents salient issues raised by FHR in their submissions and the NPA's responses.

SALIENT ISSUES RAISED BY FHR

- ❖ Slow pace of progress and decision making
- ❖ The TRC Component-Dedicated capacity within NPA and DPCI
- ❖ Specific challenges on FHR related matters
- ❖ Legal representation - persons of interest
- ❖ Commission of Inquiry
- ❖ Creation of a specialised unit/Investigative Directorate

CREATION OF THE TRC COMPONENT - SEPT 2021

- **The Priority Crimes Litigation Unit (PCLU)** – established by Presidential Proclamation on 23 March 2003, to manage and guide investigations and prosecutions of specific crimes and offences, including prosecutions arising from 2003.
- **2019:** Decision to migrate all TRC and related matters to the Divisions in which the offences occurred.
- **September 2021:** creation of a separate component -TRC Component -established within the office of the Deputy National Director of Public Prosecutions, Adv de Kock (at the time) to prioritise TRC matters.
- **Appointment of a NPA National Coordinator (NCO).** DPCI also appointed a national coordinator to coordinate, assess and drive progress on all TRC matters under investigation.

ACTION PLAN IMPLEMENTED - NPA AND DPCI

- **Capacity:** Prior to September 2021, deviation was obtained from DPSA to appoint prosecutors on a three-year contract. The contracts were later extended for an additional year.
- **Appointment of dedicated TRC prosecutors:** Primary function of prosecutors appointed to TRC matters was to oversee and guide investigations on TRC matters. This is their exclusive function.
- **Appointment of dedicated TRC investigators by DPCI:** followed a similar process and appointed investigators who would be appointed to investigations emanating from TRC matters only.
- **Current position:** Approval obtained for the creation of 19 permanent posts for dedicated TRC prosecutors. Interviews are underway, appointments are underway. Prosecutors: contract: 14. DPCI investigators: 30
- **Handover:** to ensure skills transfer and continuity of investigations and decisions

ACTION PLAN IMPLEMENTED - NPA AND DPCI (cont.)

- **Audit:** Required to plan how to improve progress on TRC matters, ascertain what matters were under investigation and do an in-depth analysis of each matter.
- **TRC Cases are unique:** unique cases-unique approach.
- **Divisions-Approach:** Action plans invited from the Divisions with self imposed time frames. PGI and investigators plan. Highlight challenges, provide solutions to fast-track matters.
- **Critical analysis of each case: Hands-on approach:** Every case under investigation within each Division was assessed separately. Key questions asked including: how long is the matter under investigation? How old is the matter? What is preventing the matter from being finalised? Are there victims/ witnesses and persons of interest who are still alive? Is there a particular modus operandi? What is crux of this case? What progress has been made? Is there guidance given pointed to obtaining the required evidence to take a decision? What type of expert/s opinions is/are required to determine whether a victim/s died under suspicious circumstances, how can we fast track the matter, can we pool our resources, how can we address the obstacle/s preventing the finalisation of a decision?
- **Monthly feedback:** Monitoring involves comprehensive monthly reports to both (NPA and DPCI) National Coordinators (NCOs) to gauge progress

ACTION PLAN IMPLEMENTED - NPA AND DPCI (cont.)

Focus on quality investigations: Senior DPCI Management and NCO engaged.

- Focus of Investigations: Improve guidance and render quality investigations even with challenges of missing/lack of/destroyed dockets/ reconstruction of dockets, reconstruction of crime scenes, obtaining of experts. Crux of the issues in a matter; collation of quality evidence on which a prosecutor can make a decision.
- Identification of victims/complainants/witnesses
- Tracing of families and victims-regular feedback and updates
- identification of modus operandi and commonalities
- Identification of persons of interests/suspects
- Sources of evidence and accessing of documentation including access to National Archives, SSA, Military and Defence Archives, other government departments

ACTION PLAN IMPLEMENTED - NPA AND DPCI (cont.)

Platform for Joint Accountability Sessions: Unprecedented approach (2022): platform within every Division, headed by DPPs, attended by TRC DPCI investigators, TRC provincial Heads, TRC prosecutors, TRC Nodal Points. DDPPs and NCO engaged on every TRC matter within their Division.

Ultimate purpose: Joint accountability by NPA and DPCI on every case under investigation. Constructive engagement with investigators and prosecutors in the presence of seasoned senior supervisors and respective heads who guide on challenges and the way forward.

Major points of discussion: Progress/lack of progress; challenges and blockages; solution-oriented actions. Share best practice, legal challenges and developments within the Divisions. Matters identified for fast tracking considering age and seriousness of matters, ages of witnesses, victims, accused, persons of interest, etc.

Duration: informed by volume of matters under investigation (between 2-4 days). Accountability session takes place twice a year or more in specific Divisions. There are ten Divisions.

Endorsement-Accountability session: by ex TRC Commissioner: Adv Ntsebeza SC in his opinion on NPA's TRC measures

PROGRESS - FHR RELATED MATTERS

- Progress has been made on TRC matters (including FHR-related matters) especially since September 2021.
- Certain matters, including FHR matters, identified for fast tracking and prioritisation.
- There is a link between the progress made thus far on FHR matters/other matters and the decisions taken to prioritise, fast track, monitor and ensure accountability.
- Regard must be had to resources and personnel and equal attention to all matters, not only matters where Counsel is involved.
- All families need closure.

SPECIFIC ISSUES – PROGRESS ON FHR MATTERS

ISSUE RAISED	NPA RESPONSE (PAGES 3-11)
SPECIFIC PROGRESS ON EACH OF THE FHR MATTERS	<ul style="list-style-type: none">• 24 Families represented by FHR- over a three-year period• Progress on each matter reflected on pages 3-10• Timol Matter: Re-opened inquest; FHR represented the family. Roderigues was charged criminally. NPA took a decision on evidence collated by DPCI.
	<ul style="list-style-type: none">• 3 Inquests where FHR involved: Evidence led; matter finalised• 5 matters where inquests have been re-opened; FHR is involved• 5 matters where criminal charges have been preferred, matters on the criminal court roll• 9 other matters: decisions in the final phase of investigation, or a decision is pending.• 3 other matters: Decisions have been taken

PROGRESS - FHR LISTED MATTERS

NAME OF MATTER	PROGRESS TO DATE	UPDATE
Dr Neil Hudson Aggett-alleged suicide	A formal inquest into the death of Dr Aggett was re-opened. The original court finding of suicide was overturned.	The re-opened inquest was finalized. The record was referred to NPA for consideration of findings. Webber Wentzel are in engagements with the prosecutor on the matter.
Mr Matthews Mabelane-alleged suicide	A formal inquest into the death of Mr Mabelane was re-opened on 29 January 2025.	Inquest into the death re-opened. Legal representatives (Bowmans Gilfillan) in contact with the prosecutor tasked on the matter.
Mr Babla Saloojee-alleged suicide	Matter is in C phase of investigation. Expert opinion on reconstruction of the crime scene in relation to allegation that deceased attempted to jump out of the building was required.	The challenge relating to payment of the expert fees has been resolved.
Mr Ignatius Mthebule	The victim is still missing. The matter is at an advanced staged of investigation.	Statements are being sourced from Mr Mthebule's comrades at Luthuli House. Family represented (Eversheds Sutherland attorneys).

PROGRESS - FHR LISTED MATTERS (cont.)

NAME OF MATTER	PROGRESS TO DATE	STATUS
<p>COSAS FOUR-Attack on Messrs Madikela, Matabane, Nhlapo and Musi</p>	<p>Matter enrolled on the South Gauteng High Court roll. Two former police officers have been charged for Murder and Crimes against Humanity (CAH). Several applications in the matter including challenges to legal representation, a review application of the TRC decision, challenges to the charge of CAH, a recusal application against the presiding officer.</p>	<p>Since February 2025, challenge to the CAH charges was dismissed. Followed by unsuccessful application for recusal of presiding officer. Then filed leave to appeal against CAH charges, which was dismissed. Matter has now been set down for 23 May 2025 for leave to appeal against the presiding officer's decision to recuse himself. Webber Wentzel appears as watching brief.</p>
<p>Mr Caiphus Nyoka-killed in altercation-SAP members</p>	<p>Matter enrolled at the North Gauteng High Court. Four police officers were charged for murder and defeating the ends of justice.</p>	<p>On 12 November 2024, Accused #1 was found guilty of murder. Sentencing will take place on 5-6 June 2025. Separation of trials for the remainder of accused. Watching brief Webber Wentzel</p>

PROGRESS - FHR LISTED MATTERS (cont.)

NAME OF MATTER	PROGRESS	STATUS
Mr Caiphus Nyoka-ctd	The trial against the remaining three accused proceeded separately. On 14 May 2025, the State closed its case.	Matter is on the roll again on 19 May 2025 for the Defence case. Section 174 application to be ventilated.
Mr Sweet Sambo	A decision was taken to close the case. Suspects were granted amnesty. The other accused were tried and acquitted. They were then charged with murder. They successfully raised a special plea which was upheld.	Matter has been finalised.
Cradock Four-murders of Messrs Goniwe, Calata, Mhlauli and Mkhonto	Addressed later in this presentation	

PROGRESS - FHR LISTED MATTERS (cont.)

NAME OF THE MATTER	PROGRESS	STATUS
PEBCO THREE-Messrs Hashe, Galela and Godolozikidnapping and murder	Legal representatives of the families have engaged with the NPA during December 2024 and February 2025.	Decision has been taken by the DPP. Internal processes underway. Cliffe Dekker Hofmeyr (CDH) Attorneys represent the family. Adv Varney is instructed by the family.
Highgate Hotel-killed-Messrs Hacking, Gates, Wheeler, Harris and Whitfield	Decision was taken to hold a formal inquest which commenced on 27 January 2025; evidence was led. Further evidence led during March 2025.	Matter is part heard. Evidence will be led during August 2025 with arguments set down for 11-15 August 2025. Adv Varney appears for the family, instructed by CDH.
Dr Rick Turner-shot and killed	Decision was taken by the DPP to hold a formal inquest in the High Court.	Legal representatives from Legal Resource Centre have engaged and liaised with the NPA. Adv Varney appears for the family. C phase of investigations. Finalisation of consultations with witnesses, pagination, indexing.

PROGRESS - FHR LISTED MATTERS (cont.)

NAME OF THE MATTER	PROGRESS	STATUS
Mr Adriaano Bambo - shot and killed	The matter is at an advanced stage of investigation.	Further engagements with an important witness have been scheduled. A decision is imminent.
Sgt Richard and Irene Motasi- both husband and wife were shot and killed	The matter is at an advanced stage of investigation.	A meeting has been scheduled with the legal representatives of the family, Norton Fullbright, the NPA and DPCI for 10 June 2025.
Ms Nokuthula Simelane- kidnapped-still missing	Two police officers are on trial in this matter. An inquiry into section 77(3) is underway into one of the two remaining accused.	The hearing is part heard. Evidence of the expert for the Accused will be heard on 19-22 May 2025.

PROGRESS - FHR LISTED MATTERS (cont.)

NAME OF THE MATTER	PROGRESS	STATUS
Mr Sons and Els -stemmed from the re-opened inquest into the death of Mr Timol	Finalised.	A decision was taken on 7 July 2023 to decline to prosecute any person on the matter. Webber Wentzel appeared for the family.
Gabarone Raid	The matter is under investigation. Information has been requested via MLA process. The private investigator of CDH has liaised with DPCI on this matter. Further investigation is required.	The matter is under investigation.
Operation Zero Zero	The investigation is of a sensitive nature.	The matter is in the C (final) phase of its investigation. A decision must be taken based on the evidence that has been collated by DPCI.

PROGRESS - FHR LISTED MATTERS (cont.)

NAME OF THE MATTER	PROGRESS	STATUS
Ms Ntombikayise Kubheka-died in custody	An inquest was originally instituted. Proceedings were stopped and converted into criminal proceedings. Five police officers have been charged for murder.	Challenges with the refusal by the SAPS to fund the legal expenses of the accused. Matter is on the court roll on 10 June 2025 for the State Attorney-legal representation
Mr Sbo Phewa-linked to that of Ms Kubheka above	An inquest was originally instituted. Proceedings were stopped and converted into criminal proceedings. Five police officers have been charged for murder.	The SAPS refuses to fund the legal expenses of the accused. The matter is on the criminal court roll for 10 June 2025 for the State Attorney - legal representation.
Dr Hoosen Mia Haffejee-alleged suicide.	The inquest into the death of Dr Haffejee was re-opened. Evidence was led. The original inquest finding was overturned. The inquest record was referred to the NPA for consideration.	Finalised. A decision to decline to prosecute anyone was taken during 2024.

PROGRESS - FHR LISTED MATTERS (cont.)

NAME OF THE MATTER	PROGRESS	STATUS
Mr Nicholas Thlapi-taken into custody by SAP- still missing	An application was made to the Minister to re-open the inquest into the death of Mr Thlaphi. A formal inquest had been held previously. Pre-court preparations are underway. Person of interest who has been identified has been notified to apply for legal representation to avoid any delays.	Inquest re-opened. Family representatives are Bowmans Giffillan Incorporated and are liaising with the NPA and DPCI.
Mr Bayempin Msizi-alleged suicide	The matter was joined with that of Dr Haffejee. Ultimately no evidence was led. FHR appears for the family. Challenge with tracing of records. Investigation has not been finalised.	The family is kept updated through the legal representatives (Garlicke and Bousefield Attorneys).
Mr Mxolisi Dickie Jacobs-alleged suicide	There are challenges in the matter. Challenge with the tracing of records. Investigation is ongoing.	The family is kept updated through legal representatives, Munier Ismael of Haffejee, Roskam Savage Attorneys.

PROGRESS - FHR LISTED MATTERS (cont.)

NAME OF THE MATTER	PROGRESS	STATUS
Mr Anton Fransch-killed in altercation with SAP	There has been a lengthy feedback session with the family and DPCI and a witness living abroad. The crime scene has been visited. Evidentiary material has been submitted to the explosive expert; opinion of second pathologist received. Video evidence obtained. Majority of police personnel files sourced.	The explosive expert is on long leave (causing delays). Another expert has been sourced. ENS Attorneys appear on behalf the family and engage with DPCI and NPA.
Mr Ashley Kriel-killed in altercation with SAP	Witness statements and second opinion of pathologists have been sourced. It is still outstanding. The report of an additional expert who is in the employ of the State is still awaited.	Ballistic report is pending. Second pathologist report is outstanding. ENS Attorneys appear on behalf of the family and engage with NPA and DPCI
Mr Storey Luke Mazwembe-alleged suicide	Reconstruction cannot be done until the structural plans of the cell (as it was when the death occurred) are obtained from DPW. Continued engagements by DPCI with DPW. There is a shortage of personnel. A second opinion of a pathologist has been procured.	Webber Wentzel appears on behalf of the family. They liaise with the NPA and DPCI.

PROGRESS - FHR LISTED MATTERS (cont.)

NAME OF THE MATTER	PROGRESS	STATUS
Mr Batandwa Ndongokilled in altercation with police	This is a fairly new investigation registered in August 2024. Investigation is in the C phase of investigation. Tracing of witnesses/persons of interest is underway.	This is in the final stages of investigation. A decision is imminent. The family representative is updated on developments on the matter.

SPECIFIC ISSUES - NTSEBEZA OPINION

ISSUE RAISED	NPA RESPONSE (pp. 22-23)
	<p>NPA took a decision in October 2022 to appoint Senior Counsel to assess whether measures, checks and balances put in place in September 2021 to deal with TRC matters were adequate, in line with the Rodrigues matter</p>
	<p>Work done by the NPA and DPCI was assessed. Opinion was received in November 2023 and found that measures adopted and implemented to deal with TRC matters are in large part adequate. Acknowledged that many of the matters were in beginning stages of investigation. Challenges were largely availability of dockets, inquest records, decades old cold cases, payment of experts for reconstructions, access to stakeholders and information, Same issues raised in 2025.</p>
	<p>Legal representation: Addressed by DNDPP: NPS with two Ministers of Police (2023 and 2025)</p>
	<p>Opinion accepted: monitoring and oversight role of monthly TRC reporting, oversight under the DNDPP: NPS, monthly updates to National Coordinators by DPPs; importance of regular briefing sessions between NPA and DPCI-dedicated personnel; accountability to families, transparency, communication channels, stressed importance of accountability sessions. Audits fast tracking-satisfactory hybrid structure Recommended a Commission of Inquiry (COI)</p>

UPDATE ON COMMISSION OF INQUIRY

- Presidency has announced that the President will establish a Commission of Inquiry to assess alleged political interference and delays in prosecution of TRC cases.
- The NPA is awaiting confirmation of the Terms of Reference, the appointment of a Judge and a date.
- The NPA will abide on the intervention applications by former President Mbeki and Ms Mabandla.

SPECIFIC ISSUES - OPINION AT ODDS - FHR

ISSUE RAISED	NPA RESPONSE - PAGES 24-25
<p>FHR criticism is at odds with Adv Ntsebeza SC Opinion</p>	<p>Checks, balances and Oversight: Opinion showed there is accountability; adequate checks and balances. Prosecutors account to the DDPP-TRC Nodal Point. The DDPP is accountable to the DPP; DPP is accountable to the DNDPP. DNDPP accounts to the NDPP. Powers of Review: NDPP. All TRC decisions taken by the Divisions: memoranda are submitted to DNDPP-NCO.</p>
	<p>Issues communicated at stakeholder engagement held with FHR. Oversight by Parliament: Appearances before Committee in June and November 2022 - same issues highlighted; presentations are shared.</p>
	<p>Structured engagement protocols also shared. DPP offices' have jurisdiction over matters. Also shared with AVFG, follow protocol. Engagements with DPP offices. FHR liaises with the offices of the DPPs.</p>
	<p>NPA functions within a legal framework and directives, we have a prosecution policy and must follow a considered approach in the way matters are approached. Single NPA, ultimately decision taken by DPP.</p>
	<p>TRC matters are a standing agenda item at NOMM which is attended by all DPPs.</p>

THE RE-OPENED INQUEST OF THE CRADOCK FOUR

- The issue of legal representation for persons of interest was canvassed as early as 5 June 2024.
- Prosecutors assisted and intervened when challenges arose with legal services of both SANDF and SAPS. The policy of SAPS and SANDF was shared with Counsel. Other stakeholders were also engaged.
- Legal representatives for a witness Mr Goniwe, and for the Cradock Four community also advised that their application for their legal costs to be covered, was declined. Their application had been made the previous year. They were in the process of filing papers to have the decision reviewed.
- The inquest was postponed on 2 September 2024 to 2 June 2025.

CRADOCK FOUR INQUEST (cont.)

- Multiple case management meetings have taken place in the interim.
- **Legal Aid approved:** On 12 March 2025, Legal Aid was approved for Counsel for Mr Goniwe and Counsel for the Cradock Four community.
- **Payment for SAPS members:** In the interim, payment of legal expenses of the three SAPS members were approved on 5 May 2025. Counsel must still be appointed to participate in the inquest.
- **Payment of legal fees: Dept of Education:** Both the witness and person of interests' application were refused. The review applications of persons of interest and other witnesses were struck from the court roll due to lack of urgency; placed on the normal court roll.
- **Counsel for another person of interest: SAPS:** will be decided on 19 May 2025.

CRADOCK FOUR INQUEST (cont.)

- **SADF:** There is one person of interest who applied for his legal representation to be paid by SADF. It was refused. The decision has been taken on review. SADF has counsel and an instructing attorney. The issue will be ventilated at the case management meeting on 19 May 2025. This remains a challenge. Counsel for SADF is part of the case management meeting.

What is expected to happen:

- Given that SADF and Department of Education have not granted authorisation for legal fees to be paid, an application was made by Counsel for the families to lead family witnesses on 2 June 2025, who would not implicate persons of interest. The application is opposed by legal representatives of persons of interest. The judge must make a formal ruling on 19 May 2025.

CREATION OF A SPECIAL UNIT/INVESTIGATIVE DIRECTORATE

- The creation of a separate TRC component in September 2021 resulted in special focus given to prioritising TRC matters. This was the primary intention of creating a separate component.
- The NPA is prepared to consider the creation of a post for a Special Director.

CHALLENGES INHIBITING PROGRESS

- Sourcing, creating a pool of and payment of experts
- Costs of legal representation for persons of interest/Accused-SAPS and SADF-other
- Access to documentation in possession of Stakeholders (e.g. DPW, military and defence, intelligence archives, etc.)
- Declassification of Apartheid era files.

CONCLUDING REMARKS

- Since 2019, the NPA has been committed to dealing with TRC matters and this report shows the progress that we have made over the past few years, and that we continue to make.
- Besides creating dedicated attention and capacity to dealing with TRC matters, we also adopted measures to ensure that there is no recurrence of undue political interference in the prosecution of TRC matters. We appointed senior counsel to review and assess the measures.
- In June 2023, Adv Ntsebeza SC submitted his written opinion on the TRC Component and TRC prosecutions, to the NPA, which found that the measures adopted and implemented by the NPA to deal with TRC matters – namely, the structure and checks and balances that form part of the TRC Component - are largely adequate. The NPA has abided by its recommendations.
- Combined, these measures have contributed significantly to achieving progress with TRC matters within the Divisions and working collectively towards the pursuit of justice for the victims and their families, to which we remain committed.



National Prosecuting Authority
South Africa

Thank you

Head Office: 012 845 6000

E-mail: communication@npa.gov.za

VGM Building, 123 Westlake Avenue (Cnr Hartley Street),
Weavind Park, Silverton, Pretoria, 0184

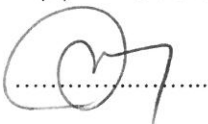
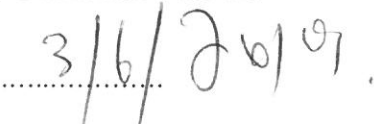
www.npa.gov.za

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 76755/2018

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
	
SIGNATURE	DATE

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

MINISTER OF POLICE

Third Respondent

IMTIAZ AHMED CAJEE

Fourth Respondent

YASMIN SOOKA

First Amicus Curiae

DUMISA BUHLE NTSEBEZA

Second Amicus Curiae

MARY BURTON	Third Amicus Curiae
WENDY ORR	Fourth Amicus Curiae
GLENDA WILDSCHUT	Fifth Amicus Curiae
FAZEL RANDERA	Sixth Amicus Curiae
SOUTHERN AFRICA LITIGATION CENTRE	Seventh Amicus Curiae
PAN AFRICAN BAR OF SOUTH AFRICA	Eighth Amicus Curiae
LAW SOCIETY OF SOUTH AFRICA	Ninth Amicus Curiae

JUDGMENT

Flynote

Criminal Procedure – Permanent stay of prosecution – Delay in prosecution – section 35 (3) of the Constitution, 1996 in relation to the delay in prosecution – Factors to consider include the length of the delay, reasons the government relies on to justify the delay, the accused’s assertion of a right to a speedy trial, prejudice to the accused, nature of the offence and public consideration – new factor to add in is the interests of family and/or the victims of the crime – length of delay was unreasonable especially in light of political interference – age and infirmity are to be considered at sentencing - however, no trial prejudice and no exceptional circumstances present to justify radical and far reaching relief of a stay of prosecution – application for stay of prosecution dismissed.

Headnote

The Applicant seeks a permanent stay of prosecution with respect to a charge of murder and another charge. The Applicant alleges that he has suffered a delay in respect of the prosecution which results in an infringement of his right to fair trial in terms of section 35(3) of the Constitution, 1996. The charge of murder relates to the death of Mr Ahmed Timol, an anti-apartheid activist who died on or about 27 October 1971. This case comes before the courts after the reopening of an inquest in 2017 (2017 Inquest) conducted in 1972 following Mr Timol’s death (First Inquest) which

found that Mr Timol had committed suicide and no one alive was responsible for Mr Timol's death. The 2017 Inquest however found that Mr Timol was murdered.

The court discussed the factors to consider for a permanent stay of prosecution namely the length of the delay, the reasons the government relies on to justify the delay, the accused's assertion of a right to a speedy trial, prejudice to the accused, nature of the offence and public consideration. The court also added a new factor, namely, the interest of the family or victims of the crime.

The applicant alleged that he suffers memory loss as a result of his age and therefore will be prejudiced. The court provided that age and infirmity are considered at sentencing or prior to the trial. The court held that there is no prejudice to the accused as there is no evidence to prove that poor memory will taint the fairness of the trial as the State carries the burden of proving guilt beyond reasonable doubt.

The court was faced with the issue of political interference in the National Prosecuting Authority in finalising the prosecution of the applicant. The period in question was considered to be the period between 2003 and 2017. The court directed that the conduct of the relevant officials and others at the time needed to be brought to the attention of the National Director of Public Prosecutions for her consideration so that she may take any necessary action. The court concluded that although there was political interference, investigating it further in this court was not necessary.

The court held that while the delay in prosecution has caused some measure of prejudice, it cannot be said to taint the fairness of the proposed trial which the Applicant is entitled to. The court held the interests of justice and the societal need to ensure accountability for the commission of serious offences and the nature of the crime located in its historical context all militate against the granting of a permanent stay of prosecution. The court dismissed the application grounded in section 35(3) of the Constitution.

KOLLAPEN J (MOSHIDI J and OPPERMAN J concurring)**Introduction**

[1] In this application, the Applicant seeks a permanent stay of prosecution in respect of a charge of murder and one other charge. The application relates to events that span some 47 years and covers large periods of South Africa's painful and turbulent past as well as the steps taken to deal with and come to terms with that past in the building of a new future and society. In broad terms, it involves the death of the late Mr Ahmed Timol, attempts to uncover the truth of what happened to him, the State's decision to prosecute the Applicant for the death of Mr Timol and the Applicant's assertion that he is entitled to a permanent stay of prosecution.

The relief sought

[2] The relief the Applicant seeks is set out fully in the Notice of Motion and is described as follows:

1. "A declaratory [sic] order that the criminal proceedings instituted against the Applicant constitutes an unfair trial against the Applicant as is envisaged in section 35(5) of the Constitution of the Republic of South Africa, Act 108 of 1996.
2. A declaratory [sic] order that the criminal proceedings instituted against the Applicant constitute an infringement of his fundamental rights to a fair trial as is provided for in section 35(5) of the Constitution read with section 342A of the Criminal Procedure Act, Act 51 of 1977.
3. That the Applicant is granted a permanent stay on the charge of murder in the criminal proceedings against the Applicant relating to the death of the late Ahmed Essop Timol on or about the 27th of October 1971.
4. That the First and/or Second Respondents are prohibited from proceeding with the criminal prosecution against the Applicant on a charge of murder relating to the death of Ahmed Essop Timol.

5. That the First and/or Second Respondents are ordered to withdraw the criminal proceedings against the Applicant relating to the death of Ahmed Essop Timol.
6. That the Respondent(s) is/are ordered to pay the costs of this application only in the event of them and/or anyone of them opposing [sic] this application and in such instance only against the Respondent(s) who oppose /opposes this application.
7. Further and/or alternative relief."

[3] In *Sanderson v Attorney-General, Eastern Cape*¹ the Constitutional Court described the relief of a permanent stay of prosecution as being "radical, both philosophically and socio-politically"² and went on to observe that "[i]ndeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused."³

The Respondents

[4] The First to Third Respondents are State parties who all oppose the relief sought. The Fourth Respondent is the nephew of the late Mr Timol and was given leave by this Court to be joined as a party. Whilst he is a party in his personal capacity, he also speaks for the extended Timol family.

The Amici

[5] The applications by the *amici* were not opposed by any of the parties. An order was made at the hearing of the matter admitting them as *amici*. The Court was satisfied that it was in the interests of justice to do so and that they would

¹ 1998 (2) SA 38 (CC). *Sanderson* deals with the delay after a person has become an accused but the four factors distilled were accepted, with qualification, and applied in respect of a pre-trial delay. See *Bothma v Els and Others* 2010 (2) SA 622 (CC) at para [37].

² *Id* at para 38.

³ *Id*.

advance submissions that would be of assistance to the Court in adjudicating the matter.

[6] The first to sixth *amicus curiae* are former TRC commissioners who sought to offer their expertise and unique experience in matters related to reconciliation, amnesty, and the appropriate treatment of crimes committed under apartheid.

[7] The seventh *amicus curiae*, the Southern African Litigation Centre (SALC), has developed expertise in the area of human rights and international law and sought to offer its expertise in the area of the best international law practice in dealing with crimes against humanity.

[8] The eighth *amicus curiae*, the Pan African Bar Association of South Africa (PABASA) is a voluntary organisation of advocates committed to the values of the Constitution such as equality, freedom and dignity.

[9] The ninth *amicus curiae*, the Law Society of South Africa, is an association of attorneys who are committed to the rule of law and accountability for criminal conduct and was admitted on the basis of its experience in that area.

Background facts

The late Ahmed Timol: the man and the political activist

[10]The late Mr Ahmed Timol (Timol), a teacher by profession, was a passionate and courageous advocate for freedom and justice who became actively

involved in the political struggles in South Africa as a member of the South African Communist Party (SACP).

[11] On the night of 22 October 1971, at around 23h00, Timol and his colleague Salim Essop (Essop) were arrested at a roadblock when documents and pamphlets of the banned SACP were found in the boot of the vehicle they were travelling in. Both Essop and Timol were arrested and initially taken to Newlands Police Station from where they were transferred to John Vorster Square by members of the Security Branch.

[12] Essop testified during the Inquest opened in 1972 (1972 inquest) that the last glimpse he had of Timol was when he saw Timol with a black hood placed over his head, being dragged along by two Security Branch officers. Timol, according to Essop, seemed unable to walk normally and the two Security Branch officers were holding him up. Essop testified about the torture he suffered at the hands of the Security Branch officers, such as electrocution, and thought that Timol suffered the same fate, if not worse.

[13] On 27 October 1971 Timol died and the police, in whose custody he was at the time, said he had committed suicide by jumping from Room 1026 on the 10th floor of John Vorster Square. An inquest held in Johannesburg in 1972 came to the same conclusion and found that no person was responsible for his death. It also found that the Applicant was the only other person with Timol when the latter was said to have moved towards the window in Room 1026, opened it,

and jumped out despite unsuccessful efforts by the Applicant to reach Timol before he jumped.

[14]The Timol family were not satisfied with the finding of the 1972 Inquest Court and, determined to uncover the truth and seek justice, began a long process in which they undertook further investigations; obtained new evidence that was not placed before the 1972 Inquest Court; and prevailed upon the authorities and others to seek the reopening of the inquest into Timol's death. Those efforts spanned a long period of time and ultimately resulted in a decision by the Second Respondent to reopen the inquest.

[15]The second inquest was held in the Gauteng Division of the High Court of South Africa in 2017 (the 2017 inquest) before Mothele J. The Court heard evidence from a number of witnesses who knew Timol and who were in detention at the time he was. These witnesses were able to testify with regard to the methods of interrogation and torture that many detainees experienced at the hands of the Security Branch. The Applicant also testified in this inquest, as did members of the Timol family. The court also heard expert evidence from pathologists who concluded that the injuries suffered by Timol prior to the fall were so serious that Timol would not have been able to walk, eat, or drink unaided. The 2017 Inquest Court found that Timol's death was brought about by him having been pushed from the 10th floor or the roof of John Vorster Square with the necessary intent to kill in the form of *dolus eventualis*. The Court also found that the Applicant, on his own version, participated in the cover up to conceal the crime

of murder and that he be investigated with a view to being prosecuted for being an accessory after the fact in respect of the crime of Timol's murder.

[16]The findings of the 2017 inquest were in stark contrast to those of the 1972 inquest with the conclusion being that Timol had been murdered and that the Applicant had participated in the cover up to conceal the murder of Timol and committed perjury.

[17]Of relevance in this application are the events that led to the first democratic elections in 1994 and the agreements reached between the National Party and the liberation movements in dealing with the past which ultimately resulted in the promulgation of the Promotion of National Unity and Reconciliation Act (the "TRC Act").⁴ The Truth and Reconciliation Commission (TRC), which was established in terms of the TRC Act was tasked with establishing "as complete a picture as possible of the nature, causes and extent of the gross violations of human rights"⁵. It was also required to facilitate the granting of amnesty for those who had committed crimes with a political objective and who had made full disclosure of all relevant facts.

[18]The mother of Timol participated in the TRC process at a victims hearing seeking to know who killed her son and the circumstances under which he died. The Applicant did not participate in that hearing and in its final report, the Truth and Reconciliation Commission concluded that:

⁴ 34 of 1995.

⁵ The preamble of the TRC Act.

“[T]he commission finds that the SAP and in particular Colonel Greyling, Captain Bean, Sergeant Rodrigues, Warrant Officer Cloete, Sergeants FJ Ferreira, MC Pelser and DL Carter were directly responsible for the death of Mr Ahmed Timol. The commission finds further that the inquest magistrate’s failure to hold the police responsible for Ahmed Timol’s death contributed to a culture of impunity that led to further gross human rights violations”.⁶

[19]The Applicant did not apply for amnesty in terms of the TRC process and it was not disputed in these proceedings that the State retained the right to prosecute those who had committed crimes in the past if either they did not apply for amnesty or were unsuccessful in their application for amnesty.

[20]The finalisation of the work of the TRC as well as the amnesty process was concluded in approximately March 2002 when the TRC was dissolved by Presidential Proclamation. What should have followed, according to the submissions of the first to sixth *amici*, was what they describe as a ‘bold prosecutions policy’ which would require the State to prosecute those who had not applied for amnesty in order to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law. There was however no bold prosecutions policy rather what can only be described as a timid retreat.

[21]What occurred in the period from about 2003 until 2017 was that all investigations into TRC cases and other crimes of the past were stopped as a result of an executive decision taken at a high level that purported to interfere with the National Prosecuting Authority’s prosecutorial decision making.

⁶ TRC Final Report, Volume 3, Chapter 6, page 542 at para 61.

[22]The First Respondent describes this interference as follows:

“The only conclusion to arrive at is that the delay in prosecuting the Applicant was not as a result of the First Respondent’s own doing or its malice- it was as a result of the political interference and the ‘severe political constraints’ to which the First Respondent was subjected”.⁷

[23]There was thus what can only be described as high level executive interference on investigating and prosecuting TRC crimes and other crimes of the past in the period from 2003 until about 2017. In an affidavit filed in other proceedings before this Court (*Thembisile Phumelele Nkadimeng v National Director of Public Prosecutions and 8 others*⁸) the former National Director of Public Prosecutions, Advocate Vusi Pikoli describes what he regarded as an assumption on the part of the then Minister of Justice that TRC matters will not be prosecuted. He says that he -

“found this to be a disturbing development as it appeared that at a political level there was an expectation that I would not prosecute TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear favour or prejudice”.⁹

[24]In the same affidavit he then deals with a Memorandum he prepared arising out of this improper interference and concluded:

I complained that such interference impinged upon my conscience and oath of office. I indicated that I was unable to deal with these cases in terms of the normal legal process and sought guidance on the way forward.”¹⁰

⁷ See First Respondent’s Supplementary Affidavit at para 2.12.

⁸ Gauteng Division, case no 35554/2015.

⁹ See Fourth Respondent’s Answering Affidavit, Annexure IC6 at para 49.

¹⁰ Id at para 52.

This Memorandum is dated 15 February 2007 and in September that year, Advocate Pikoli was suspended from office.

[25]The Applicant was arrested and charged with murder on 30 July 2018. He was brought to Court and released on bail. His case has been transferred to this Court where it is currently pending - awaiting the outcome of this application.

The legal basis upon which the relief is founded

[26]The application is advanced on the basis that the Applicant's rights in terms of Section 35(3) of the Constitution - to have his trial begin and conclude without delay - has been violated by the delay of some 47 years. This delay, he contends, has redounded to his prejudice and has undermined his right to a fair trial. He accordingly seeks relief on that basis.

[27]In addition, he argues that his prosecution is premised upon an improper motive as the 2017 Inquest Court did not recommend that he be investigated for murder, but rather as an accessory after the fact to murder and that the charge sheet which charges him with premeditated murder is accordingly advanced for an improper motive given the 2017 Inquest Court's findings.

Preliminary issues for determination

[28]Whilst the Applicant has sought to argue that he has advanced a proper case for the main relief he seeks, he has also raised a point *in limine* which may be conveniently dealt with at this stage.

In Limine

[29] It is argued by the Applicant that in the face of the undisputed political interference that was brought to bear on the prosecutorial machinery - and which I have described above - there is insufficient information before this Court that explains in detail how and why such political interference occurred. The Applicant contends that it is unclear whether the nature of the political decisions arrived at constituted an amnesty and/or a pardon and that this Court is accordingly hamstrung by the lack of such information in determining the relief.

[30] The Applicant therefore takes the position that the Court should not finalise the application before it but rather use its powers to make an order directing that all relevant information relating to the genesis and the detail of the political interference be placed before it before deciding the application.

[31] While the issue of the political interference is a matter of great seriousness, and is one I will deal with in greater detail, including the manner in which the evidence about the interference was revealed, I do not agree that the matter cannot be finalised in the absence of the details the Applicant contends for.

[32] While these details will no doubt be relevant in the writing of the history of this episode in our democracy - and no doubt more will emerge around it - the absence of such detail would not stand as an obstacle to this Court determining the issues before it. In particular, all of the parties are in agreement that there was political interference and that such interference may well have delayed the investigation and prosecution of the Applicant. It does

not take the matter any further to seek the finer detail of how the political interference materialised.

[33] In so far as there was a possible amnesty or pardon, I am of the view, for the reasons that will emerge, that whilst it is extremely unlikely that there was an amnesty or pardon, even if there was, its legal basis and legal validity would be highly questionable. I deal fully with those issues later in this judgment but for now, I am not persuaded that there is any merit in acceding to the request by the Applicant in respect of the point *in limine*.

[34] For these reasons the point *in limine* is not sustainable and is dismissed.

The merits

[35] A few preliminary observations may be necessary in locating the relief sought within its proper legal and factual context.

Pre-trial delay versus prosecution delay

[36] The legal basis for this application is founded upon the right contained in Section 35 (3)(d) of the Constitution which provides that:

“Every accused person has a right to a fair trial, which includes the right –

...

(d) to have their trial begin and conclude without unreasonable delay”.

It is not the case for the Applicant that there has been an unreasonable delay following the commencement of the prosecution in July 2018 and accordingly, this is not an application that activates the provisions of Section 342A of the

Criminal Procedure Act which deals with what was termed as “intra-curial delay” by the High Court in *State v Naidoo*¹¹. This application relates to the alleged delay in the investigation of the matter and the commencement of the prosecution.

The factors necessary to consider when determining relief for a permanent stay of execution

[37] In *Bothma v Els*¹² the Constitutional Court referred with approval to the approach taken in *Sanderson*,¹³ that in determining relief for a permanent stay of prosecution, the Court was required to engage in a balancing exercise in which the conduct of both the prosecution and the accused were weighed and the following considerations examined:

- a. The length of the delay;
- b. The reasons the government assigns to justify the delay;
- c. The accused’s assertion of a right to a speedy trial; and
- d. Prejudice to the accused.

[38] The Court however, went on to caution that the above factors did not constitute a definitive check list and added a fifth factor - the nature of the offence and the public policy considerations that may be attached to it.¹⁴ This, in my view, also has relevance in these proceedings as the offence in question is the crime of murder allegedly committed during the apartheid era and, in respect of which,

¹¹ 2012(2) SACR 126 (WCC).

¹² 2010 (2) SA 622 (CC) at para 36.

¹³ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC).

¹⁴ *Bothma* above n 9 at para 37.

there has been considerable legal and policy considerations that sought to guide the new democratic society in its approach to such crimes.

[39]A sixth factor may also become important. This relates to the interests of the family and/or the victims of the crime. The role and participation of victims has been a central feature in the approach to dealing with crimes committed in the past. A victim's interests and voice, whilst not dispositive, is an important part of the balancing exercise that *Sanderson* contemplates.¹⁵

Main issues for determination

[40]The following issues accordingly arise for determination and are not to be dealt with in an insulated fashion, but rather as part of a weighted balancing exercise.

The length of the delay

[41]While it remains the assertion of the Applicant that there was a delay of some 47 years from 1971 - when the crime was allegedly committed - to 2018 - when he was charged - the timeline of 47 years is more nuanced and complex than that and may be broadly divided into 3 periods.

I. The period from 1971 to 1994

¹⁵ *Sanderson* above n 10 at para 36.

[42]The relevance of this period and the 1994 cut-off date is that the approximately 23 years it spanned, covered the pre-democratic era. It was a time when a minority government was in power and one that was, in law, responsible for a system of arrest and detention without trial and under whose watch some of the most serious and systemic violations of human rights took place. The Applicant was in the employ of that government and in particular, in its security machinery. It hardly could have been expected from that government that the will to investigate such crimes as the murder of Mr Timol would have emerged and persisted, resulting in a proper investigation and charges being proffered.

[43]On the contrary, the 2017 Inquest found a cover up that was engineered, and of which, the Applicant was a part of and in respect of which he committed perjury. The conclusion of the TRC in this regard - that the First Inquest failed to properly hold the police accountable, thereby contributing to a culture of impunity - is also relevant in this context.

[44]It can therefore hardly be open to the Applicant to suggest that the 23 years from 1971 to 1994 could be characterised as constituting a delay when, objectively speaking, all of the legal and factual considerations to which I have referred, would have militated against any action on the part of the authorities by way of an investigation or a prosecution. The Applicant had elected to make himself a part of that system, had participated in its oppressive machinery, and allegedly sought to cover up his wrong-doing. Surely he cannot now be seen to reap a benefit from such a state of affairs and locating part of the culpability in the delay over those 23 years to that system. To allow him to do so would

seriously offend notions of fair play and the interests of victims that have become a central feature of our criminal justice system.

[45] Accordingly, whilst this period does chronologically fall into the timeline of 47 years, it should not, for the reasons given, be reckoned as constituting part of the delay.

II. The period from 1994 to 2002

[46] This period was characterised by the formation of a newly elected and democratic government. It included policy and legal initiatives to deal with the crimes of the past. An important aspect of these initiatives was the establishment of the TRC which created a process that allowed for victims to be heard as well as for perpetrators of crimes that were politically motivated to apply for and receive amnesty.

[47] During this time it would have been open to all who had committed crimes in the past with a political motive to come forward and apply for amnesty. Provided that full disclosure was made and the crime was committed with a political motive, a perpetrator would have been entitled to obtain amnesty.¹⁶

[48] The amnesty provisions in the TRC Act were not universally accepted, particularly by families of loved ones who were murdered during the pre-apartheid period. This difficulty was eloquently captured by the

¹⁶ Above n 4 at section 20(1) (a)-(c).

Constitutional Court in *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa*:

“Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured,

maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the “reconciliation and reconstruction” which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.”¹⁷

[49] The cut-off date for amnesty applications was initially 14 December 1996 but was extended to 10 May 1997. The TRC was dissolved on 31 March 2002. On 15 April 2003, the President placed the final TRC Report before Parliament and directed that the National Director of Public Prosecutions institute prosecutions where appropriate.¹⁸

[50] This period in the 47 year timeline largely encompassed dealing with the past. During this time the process of victims and perpetrators coming forward was encouraged and it was certainly the view of the former TRC Commissioners that upon the conclusion of the Commission there would be a bold prosecutions policy to deal with perpetrators of crimes who never came forward to seek amnesty.

[51] The TRC report captures this desire in the following terms:

“... the need for an accountable amnesty provision which did not encourage impunity, while at the same time taking account of the rights of victims. Furthermore, it has always been understood that, where amnesty has not been applied for, it is incumbent

¹⁷ 1996 (4) SA 672 at para 17.

¹⁸ Government Gazette (Notice 1539 of 2008) (12 December 2008), 31723. See also the Fourth Respondent’s answering affidavit, annexure IC7, the affidavit of Adv Anton Ackermann at para 13.

on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law.”¹⁹

[52] Accordingly, this part of the timeline, to the extent that it constituted a delay, was a delay of the kind that was regarded as necessary and important to allow a new society to come to terms with its past, to allow victims and perpetrators to take advantage of the opportunities created by the TRC Act, and to provide a mechanism – flawed, but the product of a historical compromise - to seek and find closure.

[53] It could not, in my view, be said to be a part of the delay when, by operation of the law, it was a period of hiatus that was contemplated by the TRC Act. Even if it could be regarded as a period of delay, then there are meritorious reasons why it was the kind of delay that could hardly be regarded as culpable. It was a historic and unique time in the history of South Africa. A difficult political compromise was being given effect to. The nation was collectively prevailed upon to give the process an opportunity to succeed in the hope that it would advance the twin objectives of reconciliation and reconstruction. It was imperative that South Africa embrace this process if it were to have any chance of growing as a new nation and overcoming the deep distrust and suspicion that characterised the relationship between its people for so long.

[54] That being the case, one then moves to deal with the third period. It is the delay during this period in which the Applicant locates his case.

¹⁹ TRC Final Report above n 6, Volume 6, Section 5, Chapter 1, page 595 at para 24.

III. The period from 2003 to 2017

[55] This is the period characterised by the political interference to which reference has already been made. There can be little argument that the political interference resulted in TRC cases (and one must assume the Timol case) not receiving the necessary attention by virtue of investigation that could have led to a decision to prosecute.

[56] There are, however, a number of issues that span this period – this includes the issues deemed necessary to consider by *Bothma* i.e. the reasons the government assigns to justify the delay; the accused's assertion of a right to a speedy trial; and the prejudice to the accused – which require special attention.

i. The nature of the interference and its impact on the Prosecuting Authority

[57] Whilst it is manifestly clear that the political interference materially affected the ability of the NPA to properly deal with the TRC cases in that the resources that were necessary to conduct proper investigations were not forthcoming, the NPA cannot, as it seeks to do, portray itself purely as a victim of the political machinations of the time. Whatever form the political interference took, the NPA was enjoined in terms of both its constitutional and legal responsibilities to act on behalf of society and protect the public interest.²⁰

²⁰ See First Respondent's Supplementary Affidavit, page 766 at para 2.30.

[58] Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the State,²¹ whilst Section 179(4) requires the NPA to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement.²²

[59] That legislation is the National Prosecuting Authority Act²³ and provides as follows:

“32 Impartiality of, and oath or affirmation by members of prosecuting authority

(a) A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law.

(b) Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

...

41 Offences and penalties

(1) Any person who contravenes the provisions of section 32 (1) (b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.”

[60] In these circumstances it must follow that the NPA had a duty to assert its authority and independence and resist the political interference. It cannot be

²¹ Section 179(2) of the Constitution provides:

“The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings”.

²² Section 179(4) of the Constitution provides:

“National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice”.

²³ 32 of 1998.

acceptable for it to simply have allowed, as it did, the manipulation of the criminal justice system in the serious manner in which it occurred.

[61] The constitutional design that is evidenced in South Africa's Constitution can only be advanced if the institutions of State accept and discharge their responsibilities in the manner contemplated. Unwavering fidelity to the Constitution and the law must, at all times, be displayed. It is therefore not open to the NPA to seek to absolve itself of its constitutional duty in failing to pursue the TRC cases.

[62] In *S v Basson*²⁴ the Constitutional Court described the importance of this duty in the following terms:

"... In our constitutional state the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The state must protect these rights through, amongst other things, the policing and prosecution of crime.

...

... By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective. Where, therefore, a court quashes charges on the ground that they do not disclose an offence with the result that the state cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the state, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the state is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter."²⁵

²⁴ 2005 (1) SA 171 (CC).

²⁵ *Id* at paras 31 and 33.

[63] The necessity of an independent prosecuting authority was highlighted by the Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others*:

“At the centre of any functioning constitutional democracy is a well-functioning criminal justice system. In *Democratic Alliance Yacoob ADCJ* observed that the office of the NDPP “is located at the core of delivering criminal justice”. If you subvert the criminal justice system, you subvert the rule of law and constitutional democracy itself. Unsurprisingly, the NPA Act proscribes improper interference with the performance of prosecutorial duties.

...

Improper interference may take any number of forms. Without purporting to be exhaustive, it may come as downright intimidation. It may consist in improper promises or inducements. It may take the form of corruptly influencing the decision-making or functioning of the NPA. All these forms and others are proscribed by an Act that gets its authority to guarantee prosecutorial independence directly from the Constitution.”²⁶

[64] Of course it may well be asked, what was the NPA required to do in the face of high level political interference? Rather than simply succumb to it, it was open and incumbent upon the NPA to have brought this interference into the open. Victims of those crimes where investigation and prosecution was being suppressed certainly had the right to know what was happening and why such cases were not being prosecuted. Society as a whole had an ongoing interest in the work of the TRC and the follow up that the government had committed itself to. Parliament, which ultimately represents the legislative authority of the State, had a right to know when the letter and spirit of legislation that it had

²⁶ 2018 (2) SACR 442 (CC) at paras 20-21.

passed was being deliberately undermined. None of this occurred and the NPA must accordingly accept the moral and legal consequences of this most serious omission and dereliction of duty on its part.

[65] It is also for these reasons that the conduct of the relevant officials and others outside of the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted.

Finally, there must be a public assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. In this regard they should indicate the measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution.

ii. The manner in which the Respondents have introduced the issue of political interference into evidence

[66] Very much related to the above, is the manner in which the NPA dealt with the disclosure of the acts of political interference in these proceedings. The main answering affidavit of the NPA was signed on 3 December 2018 and filed shortly thereafter. There was no mention made of the political interference that was brought to bear on the NPA. The Fourth Respondent then filed an answering affidavit in January 2018 wherein he set out, in considerable detail, the political interference. This included the affidavit deposed to by Adv Pikoli in the *Nkadimeng* matter as well as the Memorandum prepared by him in

February 2007 expressing his grave misgivings about such interference and his reluctance to go along with it.

[67] It was only after this affidavit was filed that the NPA then revealed the existence of the political interference and then also filed the affidavit of Adv Macadam which further detailed the extent of the political interference the NPA was subjected to. MacAdam's affidavit was signed on 1 November 2018, well before the NPA's answering affidavit was signed and filed. It begs the question as to why such an important affidavit was not filed as part of the answering affidavit when it was ready and presumably available to being filed.

[68] The suggestion that it was deliberately withheld from this Court is difficult to refute especially given its seriousness and the detailed allegations contained therein of political interference.

[69] This is not how an organ of State, that is meant to act without fear, favour or prejudice and in the public interest, should conduct litigation.

[70] In *Grootboom v NPA*²⁷ the Constitutional Court, in dealing with the manner in which state organs are expected to litigate and be of assistance to Courts, remarked as follows:

"There is another important dimension to be considered. The respondents are not ordinary litigants. They constitute an essential part of government. In fact, together with the office of the State Attorney, the respondents sit at the heart of the administration of justice. As organs of state, the Constitution obliges them to "assist

²⁷ 2014 (2) SA 68 (CC).

and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”²⁸

iii. The question of whether an amnesty or pardon may have been granted and if so, the consequences thereof

[71]The Applicant, in dealing with what may have prompted the political interference, suggested that an amnesty or a pardon may have been given by the President in respect of TRC cases - including his. He contends that he may well have been the beneficiary of such an amnesty or pardon. At best, this assertion amounts to nothing more than speculation on the part of the Applicant as there is nothing on the papers to suggest that either an amnesty or a pardon was granted to the Applicant.

[72]While there were political attempts made to consider pardons and amnesties post the TRC process, none of them materialised. The Courts took the firm view, particularly in matters relating to pardons, that when such power was exercised, it triggered the duty to hear persons affected and that the exclusion of victims from such a process was irrational.²⁹

[73]Therefore, on this aspect there is simply no evidence of an amnesty or pardon being granted to the Applicant. Even if one was granted, it would, at best, have been a private process to the exclusion of victims and would not survive legal

²⁸ Id at para 30.

²⁹ See *Albutt v CSV* 2010 (3) SA 293 (CC) at para 69 where the Constitutional Court held:

“In my view, the address of former President Mbeki to Parliament itself evidenced and indeed recognised that, given our history, victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity. It follows therefore that the subsequent disregard of these principles and values without any explanation was irrational. On this basis alone, the decision to exclude the victims from participating in the special dispensation process was irrational.”

or constitutional scrutiny in the light of the observations of the Constitutional Court in *Albutt*.³⁰

iv. The effects of the delay and the Applicant's assertion to a speedy trial.

[74] Reverting then to the timeline of 47 years that the Applicant advances as being the period of the delay. It must follow that certainly the period from 1971 until 2003 must be excluded for the reasons already given. What remains, and what the Applicant has focussed on in a substantial manner, is the delay from 2003 until 2017. There can be little doubt that this constitutes a substantial period of time and the reasons advanced by the State - namely that of political interference - cannot serve to justify the delay. It is arguable that, excluding the process of the Second Inquest, had the necessary resources been made available to investigate the case and the evidence been placed before the NPA without any political interference, it may have been possible for a decision to prosecute to have been taken somewhere earlier within that 14 year period. That it did not happen, must be largely attributable to the political interference and the willingness of the NPA to yield to such interference.

[75] Whilst it must therefore follow that there was a delay of a lengthy period in bringing the Applicant to trial, this cannot be the end of the enquiry. In *Bothma* the Court, in dealing with a lengthy pre-trial delay which it described as "the extreme belatedness of the prosecution", located the enquiry in the following terms:

³⁰ *Id* at para 74.

“In this context, then, the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence.”³¹

[76] Further, in *Sanderson* the Court, in dealing with time, observed that:

The amount of elapsed time is obviously central to the enquiry. The right, after all, is to a public trial “within a reasonable time after having been charged”. Understanding how this factor should be incorporated into the enquiry is not straightforward. In the United States and Canada, time is considered to be a “triggering mechanism” which initiates the enquiry and it also functions subsequently as an independent factor in the enquiry. In my respectful view, time has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation.

Time does not only condition the relevant considerations, such as prejudice, it is also conditioned by them. The factors generally relied upon by the state - waiver of time periods, the time requirements inherent in the case, and systemic reasons for delay - all seek to diminish the impact of elapsed time.”³²

[77] Even though the delay would have resulted in some prejudice to the Applicant - the trial he is now required to face could have occurred much earlier - the question this Court is required to consider in the balancing exercise is not prejudice in isolation, but rather, as posited in *Bothma*, whether the delay would “inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence”.³³

v. Prejudice to the Accused

³¹ *Bothma* above n 9 at para 35.

³² *Sanderson* above n 10 at paras 28-29.

³³ Above n 26.

[78] The Applicant argues that the lengthy delay will materially prejudice his right to a fair trial. In support thereof he states, “[a]s mentioned at this stage basically all the material witnesses passed away and/or disappeared and the memory of available witnesses, including my own memory, faded significantly because of the passage of time”.³⁴

[79] In *Bothma*, the Court in dealing with what would constitute irreparable trial prejudice said the following:

“These findings call for interrogation of what is meant by irreparable or insurmountable trial prejudice. Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained.”³⁵

[80] Also in *Wild and Another v Hoffert NO and Others* the Constitutional Court, having found that there was an unreasonable delay, nevertheless concluded that there was no trial related prejudice or exceptional circumstances to justify a permanent stay of prosecution.

“Those interests, so it was held, had to be taken into consideration in assessing the fundamental question whether there had been an infringement of the protection afforded by the constitutional imperative of a speedy trial. Although the starting point is to establish whether the time lapse between charge and trial is reasonable, time is

³⁴ See Applicant's Founding Affidavit at para 63.

³⁵ *Bothma* above n 9 at para 68.

not merely a trigger to an enquiry as to prejudice. It remains the most important consideration throughout the enquiry, bearing on the other considerations and, in turn, being coloured by them. Furthermore, other than is the case in some comparable jurisdictions, no formal line is drawn in our law between particular time spans regarded as acceptable and those that do not pass muster. Our approach, rather, is to make a flexible evaluation of the time elapsed in the context of and in conjunction with all other relevant features of the case, starting with the nature, gravity and extent of the prejudice suffered, or likely to be suffered, by the accused. The most invasive prejudice suffered by a person pending trial is obviously pre-trial incarceration, which entails not only loss of personal liberty but often loss of livelihood and the ability to maintain dependents. Ordinarily, therefore, this form of prejudice will weigh heavily in deciding how long a wait is reasonable.”³⁶

[81] In examining the trial prejudice that the Applicant contends he will face, it is not in dispute that the Applicant has access to the full docket in the criminal trial the State seeks to pursue. The Applicant is at liberty to engage experts, if he regards that as necessary, in supporting his defence and importantly, the trial Court, in such proceedings, is constitutionally bound to ensure that the trial is conducted in a fair manner.

[82] The Applicant is currently on bail and his legal fees are being paid for by the State – these exclude the risk of pre-trial incarceration and the financial burden of funding his defence.

[83] The applicant alleges he suffers from memory loss due to old age. Notably, age and infirmity are generally considered at the stage of sentencing. In the case of *S v Hewitt*,³⁷ a 75 year old man convicted of the rape of two girls during the

³⁶ 1998 (2) SACR 1 (CC) at para 6.

³⁷ 2017 (1) SACR 309 (SCA).

1980's and the indecent assault of another girl in 1994 appealed his sentence of eight years imprisonment. The court expressed the view that "[r]egarding his age, whilst courts have considered oldness as a mitigating factor, it is certainly not a bar to a sentence of imprisonment".³⁸ Our courts have, prior to this case, also taken the position that old age is not a bar to imprisonment.³⁹

[84] More so, it is accepted that old age is not a bar to prosecution and imprisonment internationally. In *Papon v France*⁴⁰ the European Court of Human Rights dealt with the case of Maurice Papon who had been convicted of aiding and abetting crimes against humanity during World War II. He appealed his sentence on the basis of his age and ill-health. The court concluded that although Papon was 90 years of age and was ill, he would be under constant medical supervision and therefore there was no bar to his imprisonment.

[85] Similarly in the United States, the case of *Killen v State of Mississippi*⁴¹ which concerned the deaths of 3 persons by members of the Ku Klux Klan on 21 June 1964 is illustrative. In January 2005, Edgar Ray Killen, at the age of 80, was indicted for the deaths. He was found guilty of three counts of murder and was sentenced to serve 20 years for each count.

³⁸ *Hewitt* para 15.

³⁹ *S v Zinn* 1969 (2) SA 537 (A) at 542B-C.

⁴⁰ (No. 1) Application 64666/01.

⁴¹ 958 So. 2d 172 (2007) Mississippi Supreme Court.

[86] Furthermore, there is also no evidence that the alleged poor memory of the Applicant and other witnesses is likely to taint the fairness of the trial. If anything, that remains a neutral factor as it applies equally to the State and ultimately, it is the State that carries the burden of proving guilt beyond reasonable doubt.

[87] Indeed in *Wild* the Court made reference to the continuing remedy that an accused person enjoys during a trial to obviate any possible infringement of rights during trial in the following remarks:

“The conclusion that a permanent stay of prosecution is not appropriate relief to be granted to the appellants here, by no means puts paid to their rights under s 25(3)(a). Those rights and the duty to devise appropriate remedial relief for their infringement will continue throughout the trial. For example, it is trite that a judicial officer, when structuring sentence, is obliged to have regard to pre-trial detention and any other significant prejudice suffered as a result of the case hanging over the accused's head for a protracted period. Similarly, should it transpire that there had indeed been trial-related prejudice, this judgment would constitute no impediment to appropriate relief then being granted.”⁴²

[88] Hence age and infirmity are not grounds upon which the applicant can singularly rely as a form of prejudice. These are grounds which, generally, a trial court must consider at sentencing.

[89] In conclusion, while the delay has caused some measure of prejudice, it cannot be said that it will taint the fairness of the proposed trial or that such a trial, if it proceeds, will not of necessity incorporate the safeguards of fairness that the

⁴² *Wild* above n 30 at para 36.

Applicant is entitled to. In any event, the right to a fair trial is subject to the limitations envisaged in section 36(1) of the Constitution.

Nature of the Crime

[90] The charge the Applicant faces is one of murder and in *Zanner v Director of Public Prosecutions, Johannesburg*, the Supreme Court of Appeal observed that:

“The nature of the crime involved is another relevant factor in the enquiry. This is particularly so in the present case, considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime. It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. Clearly, in a case involving a serious offence such as the present one, the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay.”⁴³

[91] Similar sentiments were expressed in *Bothma* where the Court alluded to, what it termed, the “profound societal interest in bringing a person charged with a criminal offence to trial.”

“The judgment in *Sanderson* points out that in determining reasonableness it is not only the interests of the accused that must be borne in mind. In making a value judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. When a permanent stay of prosecution is sought this societal interest will loom very large. “The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structural legal system; a system which

⁴³ 2006 (2) SACR 45 (SCA) at para 21.

requires the prosecution to prove its case in a public forum.” The judgment notes that “[w]e also have to be prepared to pay a price for our membership of such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused.

...

The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us, 'Molato ga o bole' (Setswana) or 'ical'aliboli' (isiZulu) there are some crimes that do not go away.”⁴⁴

[92] The seventh *amicus curiae* also urged the Court to seriously consider the nature of the crime in determining the relief sought. They contended that the facts advanced in support of the crime of murder, which is reflected in the indictment, would also sustain a conclusion that the alleged crime in question would constitute a crime against humanity of apartheid. Alternatively, it would constitute a crime against humanity of persecution on racial or political grounds; further alternatively, a crime against humanity of murder. They, together with the eighth *amicus curiae*, argued that each of these offences triggers an obligation in terms of customary international law on the part of the South African government to investigate and prosecute such offences.

On that basis, the seventh *amicus curiae* contend that the application for a stay of prosecution should be refused as to grant it would undermine South Africa's ability to discharge its obligations in terms of international law.

In addition it has urged the Court to construe the charge sheet as constituting the elements necessary to found a crime against humanity, alternatively to use its inherent power to correct the charge sheet to reflect the legal

⁴⁴ *Bothma* above n 9 at paras 41 and 77.

characterisation of the offence as a crime against humanity, further alternatively, to refer the charge sheet back to the First Respondent for reconsideration.

[93] The charge sheet read with the summary of substantial facts locate the alleged crime within the apartheid system which is described in the summary of substantial facts as “a system of institutionalised racial segregation and discrimination that was in existence from 1948”. The State, however, has not elected to charge the Applicant with committing a crime against humanity. I have doubts whether under such circumstances it is open to the Court to amend the charge sheet or to direct that the State reconsiders the charge sheet.

Section 86 of the Criminal Procedure Act, upon which the *amicus* relies on for this submission, provides for the amendment of the charge sheet in very limited circumstances and in the main deals with charge sheets that are defective for want of any essential averments therein and instances where there is a variance between an averment in the charge sheet and the evidence led in Court.⁴⁵ Clearly section 86 is not of application here.

In addition, and given the principle of the separation of powers, the independence of the prosecutorial authority, and its role as set out in Section

⁴⁵ Section 86 (1) provides:

(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is and in any other part thereof which it may become necessary to amend.

179 of the Constitution, it may be inappropriate and outside the boundaries of judicial authority for a Court to direct that the charge sheet be amended as the *amicus* suggests. This especially in a matter where the State has already decided to prosecute. It may well be different if one was dealing with a refusal to prosecute which is not the case here.

[94] In argument, counsel for the seventh *amicus*, in response to a question from the Court, accepted that if the prosecution of the Applicant were to continue, that would be a proper discharge of the international obligations South Africa has in terms of international customary law. Under such circumstances it becomes unnecessary to make a determination on whether this Court is dealing with conduct which goes beyond laying the basis for a murder charge but also constitutes a crime against humanity. That argument may well be possible and indeed a compelling one, but given the relief I intend proposing, there would be no need to deal with it and make a determination thereon. Of course it would be open to the State, if they so desire, to reconsider the charge sheet, alternatively, to leave it as it is but upon conviction (if that was to follow) to argue in mitigation that the conduct of the Applicant would also have constituted a crime against humanity. Those are matters for the future and for the Trial Court.

The interest of the victims and the family

[95] While the interests of the victims and family can never be dispositive in an application of this nature, in the context of this application, those interests

warrant mention. The Timol family have, for many years, simply sought to establish what had happened to the late Ahmed Timol and the circumstances that led to his death. They persisted in seeking the truth and finding a measure of justice and, for a long time, their efforts seemed to come to nothing. They were not in search of revenge, but rather the truth and participated in the victims hearing of the TRC. They also implored the Applicant to come forward and reveal all. They accepted that the prospect of amnesty being granted to those responsible for the murder of Timol, was one that was real and a prospect that was contemplated by the TRC Act.

[96] It was largely through their efforts that a decision was taken to reopen the Inquest and the Second Inquest was ultimately held. Now that a decision to prosecute has been taken, and someone is at least indicted for the death of Timol, they too are entitled to the justice that has eluded them for so long. Whatever the outcome of the criminal trial may be, they have an interest in ensuring that there is a proper process to ventilate the truth of what occurred and for the Applicant's guilt or innocence to be determined in a court of law. It will no doubt bring a measure of closure after almost 50 years.

Conclusion on the unreasonable delay challenge

[97] In conclusion, whilst it is accepted that there was a delay that would correctly be characterised as unreasonable in its duration and in respect of the justification advanced for it, there is no evidence that the delay will result in trial prejudice nor are there any exceptional circumstances present that would justify granting the radical and far reaching relief the Applicant seeks.

[98] If anything, the interests of justice; the societal need to ensure accountability for the commission of serious crimes; and the nature of the crime located in its historical context all militate against the grant of the relief sought.

[99] The application grounded in section 35(3) of the Constitution accordingly falls to be dismissed.

Improper Motive

[100] The second thrust of the Applicant's challenge is that the prosecution has been advanced for an improper motive. In this regard, he contends that the Inquest Court concluded that he be investigated for his role as an accessory after the fact to murder and not in respect of the crime of murder.

[101] He therefore concludes that the State, in charging him with the offence of murder, acted on an improper motive as it was a decision not supported by the findings of the Inquest Court.

[102] The Respondents' stance is that the Inquest Court never excluded the possibility that the Applicant be charged with murder and that its conclusions are, nevertheless, not definitive of the charge the State may elect to bring. In addition, they point out that the evidence led at the Inquest Court may well sustain a charge of murder on the basis of *dolus eventualis*.

[103] One has to guard against the temptation to utilise this hearing to determine the strength of the case the Applicant is to meet in the criminal proceedings the

State has initiated. This is not the forum for the ventilation of such issues and, as the ninth *amicus curiae* has pointed out, the Applicant has remedies to deal with those issues, including the utilisation of section 22(c) of the NPA Act and Section 174 of the Criminal Procedure Act. Motive and, reasonable and probable cause, should not be conflated. We are satisfied that the evidence intended to be presented at trial, meets a basic threshold and that the applicant has sufficient remedies available to him to deal with the nature and quality of the evidence intended to be presented against him.

[104] In any event, the First Respondent, without admitting in any manner that the prosecution was brought with an improper motive, argues that the motive will, in any event, be irrelevant. It relies on the dicta in *NDPP v Zuma* to the following effect:

“The court dealt at length with the non-contentious principle that the NPA must not be led by political considerations and that ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute. This, however, does need some contextualisation. A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr. Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.

This does not, however, mean that the prosecution may use its powers for ‘ulterior purposes’. To do so would breach the principle of legality. The facts in *Highstead Entertainment (Pty) Ltd t/a ‘The Club’ v Minister of Law and Order* illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits – they had enough exhibits already – but to put Highstead out of business. In other words, the confiscation had

nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what 'ulterior purpose' in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction the reliance on this line of authority is misplaced as was the focus on motive."⁴⁶

[105] There is, in my view, nothing to suggest that the prosecution was advanced for an improper motive.

Costs

[106] None of the parties seek an order as to costs and have cited the *Biowatch* principle in support thereof.⁴⁷

Concluding remarks

[107] This, in many respects, is a difficult case. Not necessarily on account of the legal issues it raises, but rather to the extent that it compels us to revisit our troubled past; examine what occurred there; recognise the need for reconciliation; and the consequences that invariably went with it. Importantly, this case reaffirms that justice and the truth were never meant to be compromised during all that our young society sought to do in dealing with its troubled, turbulent and shameful past.

[108] The refusal of a permanent stay of prosecution is not a signalling that we are required to be vengeful to those who are alleged to have committed serious crimes in the past but rather, an affirmation that the principles of accountability

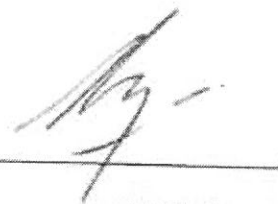
⁴⁶ 2009 (2) SA 277 (SCA) at paras 37-38.

⁴⁷ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at para 21.

and responsibility for breaching the rules of society stand at the doorway of our new constitutional order.

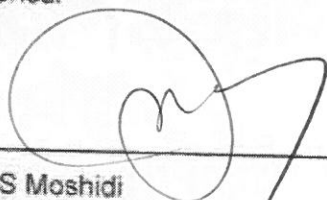
Order

- [1] The application is dismissed
- [2] No order is made as to costs



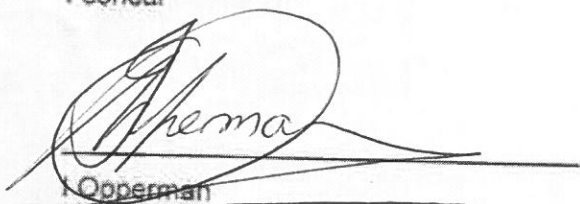
NJ Kollapen
Judge of the High Court of South Africa
Gauteng Division, Pretoria

I concur



DSS Moshidi
Judge of the high court of South Africa
Gauteng, Local Division, Johannesburg

I concur



J Qopperman
Judge of the High Court of South Africa
Gauteng, Local Division, Johannesburg

Counsel for the Applicant:	Adv JG Cilliers SC Adv SJ Coetzee
Instructed by:	Ben Minnaar Attorneys
Counsel for the First Respondent:	Adv K Tsatsawane SC Adv T Seboko
Instructed by:	The Director of Public Prosecutions
Counsel for the Second Respondent:	Adv PD Hemraj SC Adv RJ Mbuli
Instructed by:	State Attorney
Counsel for the Third Respondent:	Adv K Tsatsawane SC Adv T Seboko
Instructed by:	State Attorney
Counsel for the Fourth Respondent:	Adv H Varney Adv T Scott
Instructed by:	Legal Resources Centre and Webber Wentzel
Counsel for the First to Sixth <i>Amici Curiae</i> :	Adv A Dodson SC Adv M Mbikiwa
Instructed by:	Haffegee Roskam and Savage Attorneys
Counsel for the Seventh <i>Amicus Curiae</i> :	Adv SA Nakhjavani Adv B Meyersfeld
Instructed by:	Lawyers for Human Rights
Counsel for the Eighth <i>Amicus Curiae</i> :	Adv Ngcukaitobi Adv S Kazee Adv J Grant
Instructed by:	Mchunu Attorneys

Counsel for the Ninth *Amicus Curiae*: Adv G Breytenbach SC

Adv B Tshabalala

Instructed by: Mkhonto Ngwenya Incorporated Attorneys

Date of hearing: 28th and 29th March 2019

Date of Judgment: 3 June 2019



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

BRANCH: COURT SERVICES

Tel: 012 315 1016

Fax: 012 3234406

MINISTER MEMO

DATE:	2 April 2022	FILE NR:	
TO:	Minister Lamola, MP	FROM:	S Chiloane Deputy Chief State Law Adviser: Policy Development
SUBJECT:	APPOINTMENT OF INVESTIGATIVE PANEL TO INVESTIGATE THE ALLEGED INTERFERENCE IN THE PROSECUTION OF CASES EMANATING FROM THE TRUTH AND RECONCILIATION COMMISSION: (JOAO RODRIGUES V NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA AND OTHERS)		

1. Purpose

The purpose of this Memorandum is to recommend that the Minister:-

- (a) appoint an Investigating Panel to investigate alleged interference and delay in the prosecution of cases pursuant to the decision of the Gauteng Division of the High Court in the matter of *Joao Rodrigues v National Director of Public Prosecutions of South Africa and Others* (Case No. 76755/2018) (*Rodrigues Judgment*); and
- (b) approve the terms of reference of the Investigating Panel concerned.

2. Authority

2.1 In terms of Section 179(5) and (6) of the Constitution of the Republic of South Africa, 1996, (the Constitution) the National Director of Public Prosecution must, *inter alia* -

- (a) determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public prosecutions, prosecution policy, which must be observed in the prosecution process;

- (b) issue policy directives which must be observed in the prosecution process;
 - (c) may intervene in the prosecution process when policy directives are not complied with; and
 - (e) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following: (i) the accused person; (ii) the complainant; (iii) any other person or party whom the National Director considers to be relevant.
- 2.2 In terms of section 179(6) of the Constitution the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.
- 2.3 On 3 June 2020 the Gauteng Division of the High Court, in the *Rodrigues Judgment* ordered that an investigation into alleged interference in the prosecution of cases emanating from the TRC be undertaken. The directive of the court is explicit from the following paragraphs of the Judgment:

Paragraph [55] where the court contended that:

“there can be little argument that the political interference resulted in TRC cases (and one must assume the Timol case) not receiving the necessary attention by virtue investigation that could have led to a decision to prosecute.”

Paragraph [65] where the court ordered as follows:

“It is also for these reasons that the conduct of the relevant officials and others outside of the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted.

Finally, there must be a public assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC

cases will never occur again. In this regard they should indicate the measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution.” (own emphasis).

3. Background

- 3.1 The Prosecutorial Policy was revised in 2005 to address the prosecution of cases emanating from the TRC. The revised Policy included Paragraph C which relates directly to the TRC cases.
- (Revised Prosecution Policy)
- 3.2 It is evident, from the evidence presented in the *Rodrigues* Judgment and several concerns expressed in the media that Paragraph C of the Prosecutorial Policy has not been observed by the NPA. The reasons for the non-observance with Paragraph C of the Prosecution Policy are, in the absence of any investigation to ascertain reasons for such, will be speculative.
- 3.3 The Minister, by virtue of his or her oversight over the NPA in terms of section 179 of the Constitution, is empowered to investigate circumstances and reasons for the non-observance of Part C of the Prosecution Policy in particular. The court in the *Rodrigues* judgment is paragraph 65 restated above alludes to this authority under the circumstances.
- 3.4 The evidence presented before the court revealed that the TRC had, at the conclusion of its work in 2003, referred several cases to the National Prosecuting Authority for prosecutions. Further, that between 2003 and 2017, no prosecutions were initiated arising from the TRC recommendations allegedly due to interference by the Executive. These allegations are contained in several affidavits which form part of the evidence presented as evidence in the court. This include the affidavits of Vusumzi Patric Pikoli (who was National Director at the time) and Jacobus Petrus Pretorius and Anton Rossouw Ackermann, then members of the NPA.

- 3.5 The Supreme Court of Appeal (SCA) on 21 June 2021, in dismissing the appeal by Rodrigues for the stay of prosecution, re-affirmed the High Court's order that an investigation be held into the conduct of the NPA with regards to the TRC cases. At paragraph [27] thereof the SCA remarked:

“The Full Court rightly recommended a proper investigation into these issues by the NDPP and a determination whether any action in terms of s 41(1) of the National Prosecuting Authority Act 32 of 1998 (NPA Act) was necessary.”

- 3.6 Given the delay in the prosecution of the cases emanating from the TRC it is in the interest of the administration of justice that such an investigation be undertaken in order to remove obstacles and hindrances in the prosecution of TRC related cases.

4. DISCUSSION

4.1 Consideration of appoint of Senior Counsel to head the investigation

- 4.1.1 Adv S Batohi, National Director of Public Prosecution (National Director), submitted a recommendation to the Minister that a Judge discharged from active service be appointed to conduct the investigation ordered by the court in the *Rodrigues Judgment*. Retired Deputy Judge President of the Gauteng Division of the High Court Judge Mojapelo, was subsequently requested to undertake the investigation ordered by the court. Judge Mojapelo was requested to conduct the above investigation in terms of section 7 of the Judges Remuneration and Conditions of Employment Act, 2001 (Act No, 41 of 2001)
- 4.1.2 Following engagements with Judge Mojapelo regarding the matter it appeared that it may not be appropriate for the investigation not to be undertaken by a Judge in view of the likelihood of the courts being seized of the matter as final arbiter in future, An investigating panel chaired by a Senior Counsel is deemed appropriate under the circumstances.
- 4.1.3 It a submitted view that the decision to appoint the investigative panel derives from the Minister's constitutional power of oversight over the NPA read with section 21 of the National Prosecuting Act, 1998 (Act No.32 of 1998). Such a decision will constitute and executive decision which the Minister is empowered to take under

section 85(2) of the Constitution. A view is therefore held that such a decision will meet the test of rationality and reasonableness. (See attached article by Scott Roberts regarding the rationality test that the executive decision must conform to).

(Scott's article)

4.1.4 In view of her experience and seniority Adv S Baloyi, SC appears suitable to head the Investigating Panel. Other members of the panel may be appointed after consultation with Adv Baloyi.

4.2 Terms of Reference for the Investigating Panel

4.2.1 Draft terms of reference have been prepared and are enclosed for consideration and approval by the Minister.

4.2.2 It is anticipated that the investigation may not be concluded in less than six months, calculated from 1 May 2022. This is on the assumption that the remainder of the April months would be utilised for formalisation of the appointment of the panel and attended pre-investigation processes.

5. Recommendation

5.1 It is recommended that the Minister appoints an Investigating Panel to investigate the alleged interference and delay in the prosecution of cases emanating from the TRC as motivated in the memorandum; and

5.2 approve and sign the accompanying terms of reference of the Panel.

MR S CHILOANE
DEPUTY CHIEF STATE LAW ADVISER: COURT SERVICES

Date:

SUBJECT:	ESTABLISHMENT OF AN INVESTIGATIVE PANEL TO INVESTIGATE ALLEGED INTERFERENCE AND DELAY IN THE PROSECUTION OF CASES EMANATING FROM THE TRC
-----------------	---

The Memorandum is Noted/

I hereby Appoint / Not Appoint the Investigating Panel and Approve / Not Approve its accompanying terms of reference

Letter to the National Director **Signed/**

Comments:

MR RO LAMOLA, MP
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Date:



**OFFICE OF THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

Victoria & Griffiths Mxenge Building,
123 Westlake Avenue, Weavind Park Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758

Email: ndpp@npa.gov.za
www.npa.gov.za

OFFICE OF THE NATIONAL DIRECTOR	
TIME:.....	H:.....
2022 -05- 18	
SIGN:.....	
OF PUBLIC PROSECUTIONS	

MINISTERIAL MEMORANDUM

**TO : MR. R. O. LAMOLA, MP
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

**FROM : ADV. S. BATOHI
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**SUBJECT : RE: APPOINTMENT OF INVESTIGATIVE PANEL TO
INVESTIGATE THE ALLEGED INTERFERENCE IN THE
PROSECUTION OF TRC CASES: (JOAO RODRIGUES V
NDPP AND OTHERS)**

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to provide comments on the approach adopted by the Honourable Minister to appoint a panel to investigate alleged interference and delays in the prosecution of TRC cases, in line with the decision of the Gauteng Division of the High Court in the matter of Joao Rodrigues v NDPP and Others (Case No. 76755/2018) (*Rodrigues Judgment*)

2. BACKGROUND

2.1. Evidence presented before the court in the *Rodrigues* matter revealed that after the conclusion of its work in 2003, the TRC had referred several cases to the National Prosecuting Authority (NPA) for prosecution. However, evidence also showed that between 2003 and 2017 no prosecutions were initiated arising from TRC recommendations allegedly due to interference by the Executive.

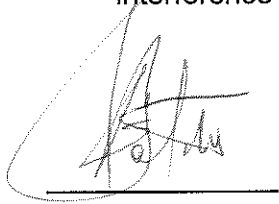
- 2.2. On 21 June 2021, the Supreme Court of Appeal (SCA) dismissed the appeal by Rodrigues for a stay of prosecution but reaffirmed the High Court's order that an investigation be held into the conduct of the NPA in relation to the TRC cases.
- 2.3. The Honourable Minister's initiative to appoint an investigative panel to investigate the alleged interference in TRC prosecutions is therefore appreciated and welcomed.
- 2.4. This is an important issue that has been outstanding for some time and of great concern to many victims and their families. This initiative is likely to go a long way in ensuring that the matter is finally resolved in line with our commitment to deal effectively with TRC prosecutions.

3. DISCUSSION

- 3.1. I have perused the memorandum dated 2 April 2022, attached as **Annexure A**, and also discussed it with my leadership team.
- 3.2. I support the appointment of an investigative panel headed by Senior Counsel as opposed to by a retired Judge. However, I am concerned that Senior Counsel might not have the necessary powers to subpoena or compel people to appear before the inquiry, as some people may refuse to participate due to their being implicated in the alleged interference, thereby making it difficult for the inquiry to do its work.
- 3.3. Other than the issue raised immediately above, I am in support of the initiative to appoint the investigative panel.

4. RECOMMENDATION

4.1. It is recommended that the Honourable Minister notes the comments made in relation to the memorandum to appoint a panel to investigate alleged interference in the prosecution of TRC cases.



ADV. S. BATOHI
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 18/05/2022

PARAGRAPH 4: NOTED
COMMENTS:

MR. J. JEFFERY, MP
DEPUTY MINISTER: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT
DATE:

PARAGRAPH 4: NOTED
COMMENTS:

MR. R. O. LAMOLA, MP
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES
DATE:



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER
Private Bag X81, PRETORIA, 0001, Tel (012) 315 1130, Fax (012) 315 1743, Momentum Centre East Tower 12th Floor,
Pretorius Street Office Email: OCSLA@justice.gov.za

Ref: 143/2022/23
Enq: S Ramaila
Tel: 012-357 8300
E-mail: SRamaila@justice.gov.za
website: <http://www.doj.gov.za>

Date: 29 July 2022

The Ministry
Justice and Correctional Services
316 Thabo Sehume
PRETORIA
0001

Attention: Dr Tsietsi Ramatsekisa [tsietsi.ramatsekisa@gmail.com]

Cc: Kalayvani Pillay [KalaPillay@justice.gov.za]

Dear Minister Lamola

REQUEST FOR LEGAL OPINION: IMPLICATIONS OF THE HIGH COURT AND THE SUPREME COURT OF APPEAL JUDGMENTS REGARDING JOAO RODRIGUES: YOUR EMAIL DATED 27 JULY 2022

INTRODUCTION

1. The Office of the Minister has requested us to provide it with a legal opinion on an extremely urgent bases regarding the implication of the judgments of the Gauteng Local Division, Johannesburg (the High Court) and the Supreme Court of Appeal (SCA) in the matter of Rodrigues v National Director of Public Prosecutions and Others.¹

2. The specific legal questions in respect of which our legal opinion is sought are framed as follows:

- (a) The implications of the judgment and the steps that ought to be taken in respect of the Executive (Minister).
- (b) The implications of the judgment and the steps that ought to be taken in respect of the National Director of Public Prosecution (NDPP).

¹ The citation of the High Court judgment is 2019 (2) SACR 251(GJ). The citation of the SCA is (1186/2019) [2021] ZASCA 87 (21 June 2021).

- (c) In line with the two judgments, who is better suited to conduct the investigation between the executive and the NDPP?
- (d) What method of investigation is suitable for the investigation? (e.g a panel of advocates or a retired judge etc...)
- (e) Whether in terms of the judgment there is any conduct that may warrant invoking section 41(1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act).

BACKGROUND

3. The abovementioned questions arise in the context of the High Court and SCA judgments referred to in paragraph 1 above, whose salient facts we set out herein below.

3.1 The National Prosecuting Authority (NPA) brought a charge of murder and defeating and/or obstructing the administration of justice against Mr Joao Rodrigues (Mr Rodrigues) in the Gauteng Division of the High Court. The murder charge related to the death of the late Mr Ahmed Essop Timol (Timol) on 27 October 1971 at John Vorster Square Police Station. The indictment followed the outcome of an inquest hearing held in the High Court before Mohle J in 2017.

3.2 The inquest court found Timol's death was brought about by Timol being pushed from the 10th floor or the roof of John Vorster Square with the necessary intent to kill him. The court also found that Mr Rodrigues, on his own version, participated in the cover-up to conceal the crime of murder, and that he be investigated with a view to him being prosecuted for being an accessory after the fact in respect of the crime of murder.

3.3 Before pleading to the charges, Mr Rodrigues filed an application in the High Court seeking a permanent stay of prosecution against him in respect of the charge of murder and one other charge. The specific orders Mr Rodrigues sought in his applications were as follows:

- 3.3.1 A declaratory order that the criminal proceedings instituted against Mr Rodrigues constitute an infringement of his fundamental rights to a fair trial as provided for in section 35(5) of the Constitution of the Republic of South Africa, 1996 (the Constitution), read with section 342A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- 3.3.2 An order for a permanent stay on the charge of murder in the criminal proceedings against Mr Rodrigues relating to the death of Timol on or about 27 October 1971.

3.3.3 An order that the NDPP and/or the Minister be prohibited from proceeding with the criminal prosecution against Mr Rodrigues on a charge of murder relating to the death of Timol.

3.3.4 An order that the NDPP and/or the Minister be ordered to withdraw the criminal proceedings against Mr Rodrigues relating to the death of Timol.

4. The National Director of Public Prosecutions of South Africa, the Minister, the Minister of Police and Imtiaz Ahmed Cajee (Timol's nephew) were cited as the first, second, third and fourth respondents, respectively. Nine amici curiae applied to the High Court to be admitted to Mr Rodrigues' application and their applications to join in the matter were granted.

5. The High Court dismissed Mr Rodrigues' application and also refused his application for leave to appeal to the SCA. Mr Rodrigues then brought an application to the SCA for leave to appeal which the SCA granted. However, subsequent to hearing the merits of the appeal, the SCA dismissed Mr Rodrigues' appeal.

6. Mr Rodrigues's application was advanced on the basis that his rights in terms of section 35(3) of the Constitution — to have his trial begin and conclude without delay — have been violated by a delay of some 47 years. He argued that the delay was prejudicial to him and undermined his right to a fair trial.² Additionally, he argued that his prosecution was premised on an improper motive due to the fact that the 2017 inquest court did not recommend that he be investigated for murder but rather as an accessory after the fact to murder, and that the charge-sheet, which charges him with premeditated murder, was accordingly advanced for an improper motive.³

7. Regarding the issue of delay, the High Court concluded that whilst it was accepted that there was a delay that would correctly be characterised as unreasonable in its duration and in respect of the justification advanced for it, there was no evidence that the delay would result in trial prejudice nor were there any exceptional circumstances present, that would justify granting the radical and far-reaching remedy of a permanent stay of prosecution. It further indicated that the interest of justice, the societal need to ensure accountability for the commission of serious crimes and the nature of the crime located in its historical context, all militated against the granting of the relief Mr Rodrigues sought.⁴

² Para [25] of the High Court judgment.

³ Para [26] of the High Court judgment.

⁴ Para [97] to [98] of the High Court judgment.

8. Regarding the issue of improper motive, the High Court concluded that there was nothing to suggest that the prosecution was advanced for an improper motive.⁵

9. The SCA agreed with the High Court's conclusions and reasoning and, thus, dismissed Mr Rodrigues' appeal.⁶

10. However, both the High Court and the SCA made some important conclusions and remarks in relation to the Executive's political interference with the NPA's prosecutorial decision-making and the NPA's failure to assert its authority and independence and resist political interference. In this regard and for purposes of answering the questions raised in the brief we would be referring to the relevant parts of the judgment.

The implications of the judgment and the steps that ought to be taken in respect of the Executive (Minister)

11. The implication of the judgment and the steps that ought to be taken in respect of the Executive may be deduced from the following content of the judgment:

11.1 The finalisation of the work of the TRC, as well as the amnesty process concluded in approximately March 2002 when the TRC was dissolved by a Presidential Proclamation: What should have followed, according to the submission of the first to sixth amici, was what they describe as a '**bold prosecution policy**' which would require the state to prosecute those who had not applied for amnesty in order to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law. **There was, however, no bold-prosecutions policy, rather what can only be described as a timid retreat.**⁷

11.2 What occurred in the period from about 2003 until 2017 was that **all investigations into TRC cases and other crimes of the past were stopped as a result of an executive decision taken at a high level, that purported to interfere with the NPA's prosecutorial decision-making.**⁸ There was thus what can only be described as **high-level executive interference in investigating and prosecuting TRC crimes** and other crimes of the past in the period from 2003 until about 2017.⁹

⁵ Para [105] of the High Court judgment.

⁶ See paras [21], [23], [25], [27], [30], [33], [39], [42], [44], [45], [46], [52], [56], [57], [59] of the SCA judgment.

⁷ Para [20] of the High Court judgment.

⁸ Para [21] of the High Court judgment.

⁹ Para [23] of the High Court judgment.

11.3 The period 2003 to 2017 is characterised by **political interference**. There can be little argument that the **political interference resulted in TRC cases not receiving the necessary attention** by virtue of investigation that could have led to a decision to prosecute.¹⁰ The **political interference materially affected the ability of the NPA** to properly deal with the TRC cases due to the fact that resources that were necessary to conduct proper investigations were not forthcoming.¹¹

11.4 According to the High Court, there must be a public assurance from both the executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. In this regard, they should indicate the measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution.¹²

12. Notwithstanding the High Court's remarks referred to in the preceding paragraph, the High Court did not make an order to this effect under the orders it granted. There is thus, in our opinion, no specific order that the Executive is required to comply with. However, the High Court's remarks in the preceding paragraph are authoritative and require some positive steps and actions on the part of the Executive.

The implication of the judgment and the steps that ought to be taken in respect of the NDPP

13. The implication of the judgment and the steps that ought to be taken in respect of the NDPP may be deduced from the following content of the judgment:

13.1 The NPA cannot portray itself purely as a victim of the political machinations of the time. Whatever form the political interference took, the NPA was enjoined in terms of both its constitutional and legal responsibilities to act on behalf of society and protect the public interest.¹³

13.2 Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the state, whilst section 179(4) requires the NPA to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give

¹⁰ Para [55] of the High Court judgment.

¹¹ Para [57] of the High Court judgment.

¹² Para [65] of the High Court judgment.

¹³ Para [57] of the High Court judgment.

effect to this requirement. The NPA Act is the Act referred to in section 179(4). Section 32(1) and 41(1) of the NPA Act states as follows, respectively:¹⁴

“Impartiality of, and oath or affirmation by members of prosecuting authority

32 (1) (a) A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law.

(b) Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

....

41 Offences and penalties

(1) Any person who contravenes the provisions of section 32 (1) (b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

...”

13.3 In these circumstances the NPA had a duty to assert its authority and independence and resist political interference. It cannot be acceptable for it to simply have allowed, as it did, the manipulation of the criminal-justice system in the serious manner in which it occurred.¹⁵

13.4 The constitutional design that is evidenced in South Africa's Constitution can only be advanced if the institutions of state accept and discharge their responsibilities in the manner contemplated. **Unwavering fidelity to the Constitution and the law must, at all times, be displayed.** It is not open to the NPA to seek to absolve itself from its constitutional duty in failing to pursue the TRC cases.¹⁶

13.5 In the face of the high-level political interference, NPA was required to bring this interference into the open. The NPA must accordingly accept the moral and legal consequences of this most serious omission and dereliction of duty on its part.¹⁷

13.6 It is also for these reasons that the conduct of the relevant officials and others outside of the NPA at the time should be brought to the attention of the NDPP for her consideration

¹⁴ Para [58] and [59] of the High Court judgment.

¹⁵ Para [60] of the High Court judgment.

¹⁶ Para [61] of the High Court judgment.

¹⁷ Para [64] of the High Court judgment.

and, in particular, to consider whether any action in terms of section 41(1) of the NPA Act is warranted.¹⁸

14. The abovementioned remarks are, in our opinion, an important reminder by the High Court to the NPA, of its institutional and functional independence, that its duty is first to the Constitution and the South African society. The NPA has a duty to resist any political interference and that it should speak out against political interference thereby making affected persons, the society and Parliament aware of any political interference.

15. Insofar as the High Court's remarks in paragraph [65] of the judgment are concerned, namely that the conduct of the relevant officials and others outside of the NPA at the time should be brought to the attention of the NDPP for her consideration, and in particular, to consider whether any action in terms of section 41(1) of the NPA Act is warranted", we note that the High Court did not make any express and specific order to this effect under the order it granted.

16. The remarks, although authoritative and requiring some positive steps and actions on the part of the NPA, have, in our opinion, the effect of leaving it to the discretion of the NDPP to decide, after consideration or investigations, whether any action in terms of section 41(1) of the NPA Act is warranted. Furthermore, the High Court has not specifically identified and definitively determined any officials' conduct to be constituting improper interference contemplated in section 32(1)(b) of the NPA Act. It appears that it is for that reason that the court has left this to the NDPP for further consideration or investigation.

In line with the two judgments, who is better suited to conduct the investigation between the executive and the NDPP?

17. It is not clear whether the investigation referred to in this question is the investigation regarding whether there was political interference in the prosecuting of TRC cases or an investigation regarding TRC cases themselves. At any rate, we presume that it is the investigation regarding whether there was political interference in the prosecuting of TRC cases.

18. **To the extent that the investigation refers to whether there was political interference, we are of the opinion that the Executive should not investigate itself.** It will serve no useful purpose for the Executive to investigate whether it (the Executive) politically interfered with the NPA's prosecutorial decision-making by taking a decision to stop

¹⁸ Para [65] of the High Court judgment.

all investigations into or prosecution of, TRC cases and crimes of the past. It appears to us that the Executive acknowledges that there was a decision to stop investigations into or prosecution of, the TRC cases and crimes of the past. This, it appears, was a policy decision the Executive adopted, that TRC cases would not be prosecuted and this was conceded by the State parties in the Rodrigues judgments under consideration.¹⁹

19. As indicated above, apart from the remarks of the courts, there is no specific order, under the orders the High Court and the SCA made, specifically directing either the Executive or the NDPP to investigate. The High Court has, in our opinion, left it to the discretion of the NDPP to consider whether any action in terms of section 41(1) of the NPA Act is warranted in so far as the conduct of the relevant officials and others outside of the NPA, at the time, is concerned.

20. **In our opinion, apart from the remarks of the court, the judgment does not direct the Executive to investigate itself or to be investigated by the NDPP.** In paragraph [65] of the High Court judgment, it is stated that “there must be a public assurance from both the executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again”. This, read together with the other remarks made by the High Court in its judgment in relation to the Executive, appears to us to mean that the Executive’s policy position relating to TRC cases amounts to political interference and that the Executive should refrain from engaging in any conduct or taking decisions that interfere with the NPA’s prosecutorial decision-making and that the Executive should assure the public that there will not be political interference with the NPA’s prosecutorial decision-making.

21. In the light of what is stated above, although the remarks of the court are authoritative and require some positive steps and actions on the part of the Executive and the NPA, we do not read the content of paragraph [65] of the High Court judgment to mean that the NDPP should **specifically** investigate the Executive for political interference so as to determine whether to invoke section 41(1) of the NPA Act. What is to be referred to the NDPP for consideration and possible investigation as to whether any action in terms of section 41(1) of the NPA Act is warranted, is “the conduct of the relevant officials and others outside of the NPA at the time”.

What method of investigation is suitable for the investigation? (e.g a panel of advocates/retired judge etc..)

¹⁹ Para [26] of the SCA judgment.

22. In the light of what we state above, we are of the view that it is not necessary for the Executive to be concerned about finding a method of investigation that would be suitable. This question, thus, falls away. We are however, of the view that the Executive should as the court stated, take steps to assure the public that "the kind of political interference that occurred in the TRC cases will never occur again". The Executive should also indicate "the measures, including checks and balances, which will be put in place to "prevent a recurrence of these unacceptable breaches of the Constitution." The Executive should therefore also revisit its policy position regarding the investigation and prosecution of TRC cases with a view to changing it so as to ensure that there is no interference with the NPA's prosecutorial decision-making.

Whether in terms of the judgment there is any conduct that may warrant invoking section 41(1) of the NPA Act

23. As regards this question, we reiterate the contents of paragraph 16 above wherein we state that the High Court has, in our opinion, left it to the discretion of the NDPP to decide whether any action in terms of section 41(1) of the NPA Act is warranted. Furthermore, the High Court has not specifically identified and definitively determined any officials' conduct to be constituting improper interference contemplated in section 32(1)(b). The judgments, as they read, do not single out any official or the Executive as having contravened section 32(1)(b) and therefore warranting action to be taken against them in terms of section 41(1) of the NPA Act.

24. Accordingly, whether there is a need for action to be taken regarding "the conduct of the relevant officials and others outside of the NPA at the time" is a matter that must be considered and decided on by the NDPP. Identifying such officials or persons may require an investigation as hinted by the courts. The nature and scope of such an investigation is a matter that must be decided upon by the NDPP. The outcome of such an investigation should also assist in determining the measures, including the checks and balances, to be put in place in order to prevent any contraventions of section 32(1)(b).

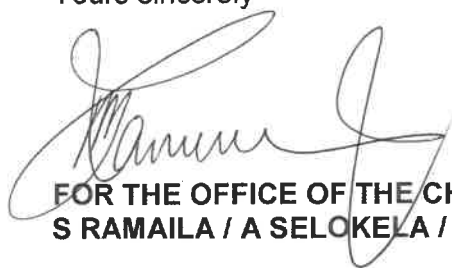
CONCLUSION

25. In the light of what we have stated above, we are of the opinion that the decision taken by the Executive to stop all investigations relating to TRC cases amounts to political interference as determined by the High Court in its judgment and concurred to by the SCA.

The political interference materially affected the ability of the NPA to proceed with the prosecution of the cases.

26. We are further of the opinion that, the Executive should take steps to assure the public that "the kind of political interference that occurred in the TRC cases will never occur again" and should, together with the NPA, introduce measures, including checks and balances, which will be put in place to prevent improper interference with the functioning of the NPA. With regard to any interference that occurred in respect of the prosecution of TRC cases, the NDPP may institute an investigation, the nature and scope of which the NDPP must decide, in order to determine whether or not action should be taken against any person in terms section 41(1) of the NPA Act.

Yours sincerely



**FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
S RAMAILA / A SELOKELA / S MASAPU**



MINISTER
JUSTICE AND CORRECTIONAL SERVICES
REPUBLIC OF SOUTH AFRICA

Private Bag X276, PRETORIA, 0001 Tel: (012) 406 4669, Fax: (012) 406 4680
Private Bag X256, CAPE TOWN, 8000 Tel: (021) 467 1700, Fax: (021) 467 1730

Enq: X4699
Email: TRamatsekisa@justice.gov.za

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

VGM BUILDING

123 Westlake Avenue Weavind Park,

Silverton

PRETORIA

Dear Adv S Batohi

RE: DISCUSSIONS ON TRC MATTERS

Pursuant to our meeting held virtually on the 27th of July 2022 pertaining the judgment of the Gauteng High Court and the Supreme Court of Appeal of Rodrigues (TRC cases).

I have sourced as agreed in the meeting an opinion from the Office of the Chief State Law Advisor as attached herein. My cogitated view as guided by the opinion is that the matter should be in your hands for a decision as to whether there are facts that necessitate an enquiry.

My above view is premised on Paragraph 19 of the opinion that suggest that it is within the discretion of the NPA to decide upon consideration of the facts whether there is anything that warrants investigation to consider whether there is any conduct that warrants invoking Section 41(1) of the NPA Act.

I hope you will find the above in order

A handwritten signature in black ink, appearing to be 'R O Lamola', written over a horizontal line.

R O LAMOLA, MP
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

DATE: 29/08/2022



National Prosecuting Authority
South Africa

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SB 00301**

Tel: +27 12 845 6000 | Victoria & Griffiths, Mxenge Building
123 Westlake Avenue, Weavind Park, Silverton, Pretoria
P/Bag X752, Pretoria, 0001, South Africa

MINISTERIAL MEMORANDUM

OFFICE OF THE NATIONAL DIRECTOR	
TIME: 11	H: 10
2022 -10- 05	
<i>Alba</i>	
OFFICE OF THE NATIONAL DIRECTOR	

To: Mr. R. O. Lamola, MP
Minister of Justice and Correctional Services

Copy to: Mr. J.H. Jeffery, MP
Deputy Minister of Justice and Constitutional Development

From: Adv. S. Batohi
National Director of Public Prosecutions

Subject: Discussion and Proposal on the Rodrigues TRC matter

MINISTRY FOR JUSTICE AND CORRECTIONAL SERVICES	
PRETORIA	
2022 -10- 06	
PRETORIA	
MINISTÈRE VIR JUSTISIE EN CORREKTIONELE DIENSTE	

1. Purpose

The purpose of this Memorandum is to inform the Minister that after having carefully considered the matter, the leadership of the National Prosecuting Authority (NPA) has decided to appoint Senior Counsel, whose mandate will be to review the measures that have been adopted by the NPA to deal with the Truth and Reconciliation Commission (TRC) matters, and assess whether they are adequate, and if not, to make recommendations to strengthen them. If, in the process of review, Senior Counsel has reason to believe that there is information that would amount to a violation of Section 41(1) of the NPA Act, such issues are to be escalated to the NDPP to take forward accordingly. If necessary, the NPA will refer the matter for criminal investigation. We will give Counsel a deadline of no longer than 3 months.

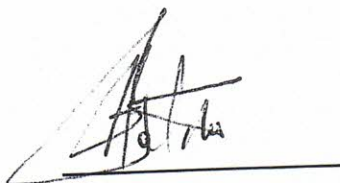
2. Measures Implemented

The measures in place can briefly be summarised as follows:

- 2.1 TRC matters have now been prioritised. The first step was to remove TRC matters from the domain of Priority Crimes Litigation Unit (PCLU), the unit which previously oversaw the investigation on the matters.
- 2.2 A separate portfolio, to deal exclusively with the management of TRC matters was established within the office of the Deputy National Director of Public Prosecutions: NPS (DNDPP: NPS), Adv De Kock since September 2021. A national TRC co-ordinator, to specifically oversee TRC matters and deal with all the related issues and challenges was also appointed at that stage. The purpose of this is to oversee and co-ordinate the progress within NPS of TRC matters in all divisions.
- 2.3 The National Component within NPS was expanded with the appointment of a Special Director in the office of the DNDPP in April 2022 to assist with strategic oversight of these matters. We are currently in the process of filling a position of a Deputy Director of Public Prosecutions in the same office who will also be allocated the TRC portfolio. Interviews have already been held and the process is being expedited.
- 2.4 An audit of all TRC matters was key to developing a well-co-ordinated, hands on-approach to steer TRC matters in the right direction. The audit was duly done, and this enables us to monitor progress on all matters under investigation.
- 2.5 Whilst all matters are important, certain matters were identified for fast tracking with consideration given to the age of the matters, seriousness of the offence, age of the accused and / or persons of interest as well as the interests of the victims.
- 2.6 NPA provincial divisions, under the leadership of Directors of Public Prosecutions (DPPs), were invited to submit time frames and action plans, for the matters they had identified for fast tracking.
- 2.7 Each Division submits to the NPS Head Office by the 5th of each month, a detailed compulsory report on all TRC matters, which includes critical analysis of the progress in respect of each matter.

- 2.8 The national co-ordinator assesses the progress made in the monthly reports and, where interventions are required, engages the relevant offices to assist them to overcome any challenges or impediments.
- 2.9 The NPA approached the Minister of Public Service and Administration (DPSA) to obtain a deviation from the normal recruitment process to appoint dedicated TRC prosecutors on a three- year contract, as opposed to the usual one- year contract. At the same time the DPCI followed a similar process for the appointment of investigators on a contract basis. The purpose of this is to ensure continuity in the investigation and, where appropriate, prosecution of TRC matters.
- 2.10 Thus far, sixteen (16) dedicated prosecutors in the NPA, and thirty-three (33) investigators within the ranks of the DPCI, have been appointed to deal with TRC matters throughout the country.
- 2.11 Regional workshops are co-ordinated jointly from the NPA and DPCI national office. The aim of the workshops is to look at the unique challenges presented during the investigation of TRC cases and to develop strategies to address this. There is ongoing, close co-operation from the national office with the DPCI dedicated investigators and prosecutors to ensure that acquired skills are shared and imparted. This process is well underway, and workshops have already taken place in Kwa Zulu Natal, Eastern Cape, and Western Cape.
- 2.12 A Training Manual in guiding TRC investigations is being developed by NPS head office in conjunction with colleagues of DPCI.
- 2.13 A draft Policy and formal prosecutorial guidelines for consideration by the leadership are at an advanced stage of development. This will formalise the approach that must be followed by all prosecutors in dealing with the investigation and prosecution of TRC matters.
- 2.14 In line with the victim-responsive approach adopted by the NPA in its strategy, a directive has been issued that requires TRC prosecutors to liaise directly with the families and victims, and to keep them informed of progress in the matters. Prosecutors are complying with this directive and have been meeting and consulting with the families and victims in respect of these matters.

- 2.15 In addition the NPA is also engaging with various organisations and law firms that represent the interests of the families and / or victims. Recently a meeting was held in the South Gauteng Division with members of the Apartheid Era Victims Family Group (AVFG). This platform has allowed families to engage directly with the DPPs and prosecutors. Regular progress reports in respect of all matters will be given to interested parties.
3. The Minister is aware of the NPA submission pertaining to the request that the draft Regulations to create an Office for Ethics and Accountability in (terms of section 22(5) of the NPA Act) be published. It is submitted that the envisaged mandate and work of the said office is another measure which will guarantee that checks and balances are in place within the NPA. This will ensure a culture of accountability, compliance and good governance.
4. Furthermore, Minister will recall the discussion during our meeting of 24 August 2022 with regards to the remarks in the Rodrigues judgment that "*Finally, there must be public assurance from both the executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again*". Minister indicated that he would issue a public statement in the media, assuring the nation that no such interference will recur in the prosecution of TRC matters by the NPA. Minister is urged to make this statement as soon as practicable.
5. The NPA will also issue a statement on the appointment of Senior Counsel and our spokespersons can manage the process and timing of the releases. I will forward to Minister a report on the findings of Senior Counsel, once available. The NPA will endeavour to implement the findings and any recommendations that are made by Counsel.



ADV S. BATOHI

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS:

DATE: 05/10/2022

Noted

Comments

[Handwritten signature and scribbles over the comment lines]

MR. R.O. LAMOLA, MP

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

DATE: 07/11/2022



NPA Further Enhances Efforts To Ensure Effective Handling And Prosecution Of TRC Cases

on 13TH JAN 2023

The National Prosecuting Authority (NPA) has taken an important step to further enhance its efforts to deal with and prosecute cases stemming from the Truth and Reconciliation Commission (TRC). Over the last couple of years, the NPA has focused on reopening and pursuing priority cases, and enhancing its internal capacity and processes both to ensure effective handling of these cases and to prevent any undue political influence. 64 new cases have been registered for investigation. 25 prosecutors and 40 investigators have been appointed within the various divisions to deal specifically with TRC matters. A detailed overview of these measures was presented to Parliament in November 2022.

As part of this effort, the NPA has appointed Adv D Ntsebeza SC to review the measures that have been adopted to deal with and prosecute TRC matters and to provide recommendations as needed. This is in line with the remarks made by the Full Bench in *Rodrigues v National Director of Public Prosecutions of South Africa and Others* 76755/2018(2019) in the South Gauteng High Court in 2019 where the court held:

“It is also for these reasons that the conduct of the relevant officials and others outside the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted. Finally, there must be a public assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. In this regard they should indicate the measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution.”

The Senior Counsel will conduct a thorough assessment and make recommendations, if necessary, to strengthen the NPA's handling of TRC cases. Further, if Counsel finds evidence or information that could amount to a violation of Section 41(1) of the NPA Act, such issues will be escalated to the National Director of Public Prosecutions (NDPP) to take forward as appropriate. If necessary, the NPA will refer relevant matters for criminal investigation.

Senior Counsel has three months to finalise his report and recommendations. The NPA will provide the necessary support to ensure that this timeline is kept and relevant interventions and improvements are implemented without delay.

The NPA has engaged with the Executive as appropriate on this matter. The Executive is expected to release its own statement in due course, as per the remarks by the Court highlighted above.

SB 00307

Adv Mthunzi Mhaga

NPA Spokesperson

0836418141

CONNECT WITH US



(<https://www.linkedin.com/company/npa>)



prosecuting-

(<https://www.instagram.com/prosecuting-adv-mthunzi-mhaga>)

QUICK LINKS

ABOUT THE NPA

OUR WORK

MEDIA CENTRE

GET IN TOUCH

CAREERS

CONTACT THE NPA

Head Office: Victoria & Griffiths Mxenge (VGM Building)

OPINION

for

NATIONAL PROSECUTING AUTHORITY

concerning

THE TRC COMPONENT AND TRC PROSECUTIONS

Instructed by

Office of the State Attorney
Pretoria

Ref: Mr S. Khosa
5107/2022/Z45

Dumisa B Ntsebeza SC

Sha'ista Kazee

CONTENTS

<u>EXECUTIVE SUMMARY</u>	<u>4</u>
<u>INTRODUCTION</u>	<u>9</u>
I. THE TRUTH AND RECONCILIATION COMMISSION REPORT	10
II. AMNESTY VERSUS PROSECUTION	11
<u>PART 1 – TERMS OF REFERENCE AND SCOPE OF THE OPINION</u>	<u>13</u>
<u>PART 2 – THE STATUTORY DUTY TO PROSECUTE APARTHEID-ERA CRIMES</u>	<u>16</u>
I. PROSECUTORIAL POWER	16
II. INTERNATIONAL LAW AND THE CRIME OF APARTHEID	18
<u>PART 3 – THE STRUCTURE OF THE NPA’S TRC COMPONENT</u>	<u>23</u>
<u>PART 4 – SUBMISSIONS/INFORMATION/AFFIDAVITS CONSIDERED</u>	<u>34</u>
I. THE NPA	34
II. THE FOUNDATION FOR HUMAN RIGHTS	38
III. MR TEBOGO RAMAGELE	42
IV. MR IMTIAZ CAJEE	45
V. THE CALATA AFFIDAVIT SUBMITTED TO THE ZONDO COMMISSION	52
<u>PART 5 – FINDINGS</u>	<u>54</u>
I. THE REVIEW OF MEASURES ADOPTED BY THE NPA	54
II. WHETHER THE MEASURES ADOPTED BY THE NPA ARE ADEQUATE	59
III. THE REASONS FOR NOT MAKING A FINDING UNDER SECTION 41(1) OF THE NPA ACT	67
<u>PART 6 – RECOMMENDATIONS</u>	<u>70</u>
<u>ANNEXURE A</u>	<u>73</u>
<u>ANNEXURE B</u>	<u>77</u>
<u>ANNEXURE C</u>	<u>78</u>
<u>ADDENDUM TO THE OPINION</u>	<u>87</u>

ACRONYMS USED

AVFG	- Apartheid-era Victims Family Group
DNDPP	- Deputy National Director of Public Prosecutions
DPCI	- SAPS: Directorate of Priority Crimes Investigation
MPTT	- NPA: Missing Persons Task Team
NDPP	- National Director of Public Prosecutions
NPA	- National Prosecuting Authority
NPS	- NPA: National Prosecution Service
PCLU	- NPA: Priority Crimes Litigation Unit
SAP	- South African Police (apartheid-era)
SAPS	- South Africa Police Services

Legislation and Conventions:

Constitution	- Constitution of the Republic of South Africa, 1996
Commissions Act	- Commissions Act 8 of 1947
CPA	- Criminal Procedure Act 51 of 1977
ICC Act	- Rome Statute of the International Criminal Court Act, 2002
NPA Act	- National Prosecuting Authority 32 of 1998
SAPS Act	- South African Police Service Act 68 of 1995
TRC Act	- Promotion of National Unity and Reconciliation Act 43 of 1995
Apartheid Convention	- International Convention on the Suppression and Punishment of the Crime of Apartheid, UN General Assembly, 1973
Rome Statute	- Rome Statute of the International Criminal Court, 1998

EXECUTIVE SUMMARY

“Reconciliation must be accompanied by justice, otherwise it will not last. We all hope for peace, it should not be peace at any price, but peace based on principles, on justice.”¹

- 1 The investigation and prosecution of apartheid-era crimes in South Africa is an integral component of the South African reconciliation project. It is the component of justice and resolution.
- 2 The NPA’s TRC Component has been in place for 22 months, and we are instructed to review its structure and effectiveness. Where necessary, we are to make recommendations for improvement. In addition, we are to advise whether, given the findings and ***obiter dicta*** in the *Rodrigues* judgment,² there was political interference in the work of the TRC prosecutions and related matters between 2003 and 2017.
- 3 The need for a legal opinion of this type, some two and a half decades after the conclusion of the work of the Truth and Reconciliation Commission is a devastating indictment on South Africa. We, the people of South Africa, in the preamble of the Constitution 1996, have stated that we have recognised the injustices of our past, and that we believe that South Africa belongs to all who live in it. It is evident, though, that in our modern history, we have failed to honour those who suffered for justice and freedom in our land.

¹ Corazon Aquino, first female President of the Philippines (1986 – 1992)

² *Rodrigues v National Director of Public Prosecutions of South Africa and Others* 2019 (2) SACR 251 (GJ) specifically paras 61-65

- 4 South Africa made a constitutional pact to honour the men, women and children who sacrificed their lives for our democratic freedoms, and yet, in many cases, their bones have not been found and the truth behind their stories has not been unearthed. The TRC process had the central objective of healing the divisions of the past, of providing an opportunity for reconciliation, and of facilitating the just prosecution of perpetrators of gross violations of human rights. Only half of the work has taken place. The courage of all survivors who have carried their childhood wounds into their adult lives, and lived to tell the truth, did not receive reciprocal respect, dignity and compassion from the State, which had a duty to take their truths forward. The State could use its forensic skills in taking their truth forward and using the forensic skills, its investigation powers and prosecutorial might, to ensure that justice is served in the victims' (or survivors', as some prefer to be called) lifetimes. It is a task that requires commitment, courage, integrity, patience and resilience on the part of State agents entrusted with the task. There are simply no shortcuts.
- 5 In our Opinion, we note the work of the TRC Component over the past 22 months and make recommendations on how the TRC Component may increase its effectiveness and achieve results within the five-year timeframe it has set for itself.
- 6 The NDPP, Advocate Shamila Batohi, has acknowledged the failures of the past, and has submitted before the National Assembly Portfolio Committee on Justice and Correctional Services that ***“We realise that we need to act with a real sense of urgency in terms of trying to deliver justice to as many victims, survivors and families as we can. We need to learn from... lessons of the past and ensure that the NPA works independently, and thereby ensure its credibility”*** (1 June 2022).

- 7 Our finding is that the NPA, the State entity responsible for discharging the mandate to bring justice to the victims and survivors of apartheid-era crimes between 1 March 1960 and 5 December 1993, have failed in its mandate.

- 8 The consequences of this failure have manifested themselves in the vast number of cases that have now become irredeemable – memories have faded, witnesses have died, perpetrators have died, evidence which should have been archived, has, over time, got lost or destroyed—or both. Against these odds, one has to ask, how it is even possible to realise the national social compact struck with victims and all South Africans – to achieve accountability and justice.

- 9 Consequently, we recommend the followings, the details of which are set out in Part 6 of our Opinion:
 - 9.1 The DNDPP NPS Head and the TRC Component: DPP Special Director must exercise an integral role in the coordination of the investigatory and prosecutorial work carried out in the NPA regional divisions.

 - 9.2 The NPA should expedite the finalisation of the TRC prosecutor policy and training manual.

 - 9.3 The NPA Missing Persons Task Team (**MPTT**) should called upon to account for its work, should be called upon to share relevant intelligence with the investigating officers and prosecutors of the TRC Component.

 - 9.4 The NPA and DNDPP de Kock should engage urgently with their counterparts in the SAPS, in order to resolve any impasse concerning the allocation of

financial resources for work carried out by the SAPS Forensic Unit, and the streamlining of all authorisations for the payment of the reasonable legal costs of former SAP and Security Branch employees accused of apartheid-era crimes.

- 9.5 The NPA and DNDPP de Kock should engage with their counterparts in the NIA urgently, in order to secure the relevant and necessary intelligence for furthering the investigation and prosecution of TRC related cases.
- 9.6 The NPA should adopt a stance on whether it is prepared to pursue charges of a crime against humanity in respect of apartheid-era atrocities.
- 9.7 All investigation reports, investigating officer statements and affidavits obtained since 2003 should be uploaded into electronic format, should be text searchable and indexed and should facilitate connections between cases, witnesses, alleged perpetrators and the geographically tagged, for intelligence gathering of so-called death camps and sites of torture and disappearance.
- 9.8 The TRC Component should consider establishing an interactive website dedicated to the sharing of expertise on TRC investigations and prosecutions.
- 9.9 The NPA must pursue the establishment of an independent commission of inquiry under either section 84(2)(f) of the Constitution, or the Commissions Act, 1947 to investigate the extent of, and rationale behind, the political interference with the NPA between the period 2003 and 2017.

- 10 Our limited research has revealed that Truth and Reconciliation processes in other countries have shown that reconciliation requires political will, joint leadership, trust building, accountability and transparency, as well as a substantial investment of resources. The failure to investigate and prosecute TRC related cases points to an unwillingness on the part of the post-Apartheid establishment to exploit science and technology and human resources for purposes of investigating and prosecuting TRC related cases.
- 11 We are hopeful, however, that in the renewed focus that the NPA is placing on investigations and prosecutions of TRC related cases/crimes, there will be no continuation of the kind of political interference that characterised the progress – or lack thereof – in achieving the prime objectives of investigations and prosecutions of the TRC related matters in the almost three decades since 1998, to say nothing about the zero progress since 2003. We also urge that, in the renewed focus the NPA is placing in the TRC prosecutions and related matters, all organs of State should work in a collaborative manner, and with a unified focus, because we believe that it is not too late to bring justice to some of the remaining victims.³

³ We list in the Opinion the names of the families and the deceased for whom the two and a half decade delay has closed the door to reconciliation and justice.

INTRODUCTION

1 In September 2021, the National Prosecuting Authority (**NPA**) established a TRC Component within the office of the Deputy National Director of Public Prosecutions (**DNDPP**), Advocate Rodney De Kock, to manage all investigations and prosecutions of TRC related matters. The NPA, under DNDPP De Kock, has procured this Opinion for a review of the work carried out under the TRC Component for its effectiveness and extent to which it is fit for purpose. We are instructed that the intention is for the TRC Component to complete its work in five years. We are also tasked to consider whether there is sufficient evidence of a violation of sections 32(1)(b) read with 41(1) of the National Prosecuting Authority Act 32 of 1998 (**NPA Act**). The sections read, in relevant part:

s 32(1)(b) "Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state or any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

s 41(1) "Any person who contravenes the provisions of section 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for period not exceeding 10 years or two both such fine and such imprisonment."

2 The legacy that the TRC has left on South African society is deep and fraught with frustration and a feeling of betrayal, by apartheid victims/survivors and their families, by the post-apartheid South African government. The approach taken by this country is, at best, infuriatingly incomprehensible.

3 Closure for victims/survivors, regrettably, has not happened.

I. THE TRUTH AND RECONCILIATION COMMISSION REPORT

4 By way of background, we recall that on 29 October 1998, the Truth and Reconciliation Commission (**TRC**) published a comprehensive report setting out its activities and findings based on factual and objective information and evidence collected or received by it or placed at its disposal. The Truth and Reconciliation Commission of South Africa Report (**TRC Report**) was compiled in terms of section 4(e) of the Promotion of National Unity and Reconciliation Act 43 of 1995 (**TRC Act**). The Report was handed to President Mandela.

5 The TRC was charged with the task of investigating and documenting gross violations of human rights spanning the period 1 March 1960 (the month in which the Sharpeville massacre took place) to 5 December 1993 (the date the final agreement was reached in the political negotiations).⁴

6 The TRC Report was tabled in Parliament in terms of section 44 of the TRC Act and the final Report comprising seven volumes was published on 21 March 2003.⁵ The transitional justice project that South Africa embarked in the 1990's has been interpreted internationally as setting the standard for a modern archetype of restorative justice in a transitional democracy.

⁴ The end date for the mandate of the work of the TRC was changed to the 10 May 1994, being the date on which President Mandela was inaugurated as the first post-apartheid, democratically elected President of the Republic of South Africa

⁵ The complete TRC Report is publicly available on the Department of Justice website on the following link: <https://www.justice.gov.za/trc/report/>

II. AMNESTY VERSUS PROSECUTION

- 7 The TRC Act provided that where amnesty was not applied for or was not granted under section 21 of the TRC Act, those who failed to get amnesty would be prosecuted. It was therefore incumbent on the democratic State to have a bold and fearless prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations under domestic and international law.⁶ The TRC referred to the NPA some 300 cases of those people who did not apply for or were not granted amnesty. These were mainly South African Police Security Branch or other police officers.
- 8 The TRC Component is currently seized with 133 cases for investigation and possible prosecution nationwide.
- 9 It is now 25 years since the TRC completed its work, and there have been only a handful of successful prosecutions.⁷ Between September 2003 and 2017 a mere handful of TRC related prosecutions took place, this includes G. Niewoudt, A. Tyani and Blani. It is shameful that the Simelane, Timol and Aggett families have had to carry out their own investigations into the deaths of their loved ones with the assistance of private investigators and the services of pro bono attorneys. We set out in **Annexure A**, a timeline of material events concerning the investigation and prosecution of TRC matters. We do not expand on

⁶ TRC Report Volume 6 Section 5: 595 par 24

⁷ These include the arrest and prosecution of Eugene de Kock, the former colonel of the apartheid government, *S v De Kock* 1997 (2) SACR 171 (T), concerning the murders and other atrocities committed in the Vlakplaas area. Also see the prosecution of Dr Wouter Basson, *S v Basson* 2007 (3) SA 582 (CC), who was the head of South Africa's chemical and bacterial weapons programme during the apartheid era.

each of the events listed in Annexure A, but we have found, however, this to be a useful context within which to consider the questions posed to us.

10 The suggestion that the NPA has acted in disregard of its domestic and international law obligations in pursuing TRC prosecutions is weighty, understandable and justified, in our humble view. We are seized with determining whether the NPA has carried out its constitutional and statutory duties in respect of investigating and where necessary, prosecuting TRC related matters, without fear favour or prejudice.

11 The ambit of our mandate is set out below.

PART 1 – TERMS OF REFERENCE AND SCOPE OF THE OPINION

12 On 6 March 2023, we were briefed with the terms of reference (TOR) for this Opinion.⁸

The TOR were clarified in correspondence dated 31 March 2023. The team is to:

12.1 **review** the measures adopted by the NPA to deal with the TRC and related matters;

12.2 **assess** whether the measures put in place are adequate and, if the measures are not adequate, to make recommendations to strengthen the measures;

12.3 **determine** whether there is reason to believe that there is information that amounts to a violation of section 41(1) of the NPA Act, AND to **escalate** same to the NDPP to address this appropriately.

13 In setting this mandate, the NPA accepts that the TRC matters must be dealt with by the NPA. The acceptance of the institutional and statutory obligation to deal with the TRC matters is noteworthy and, we understand, led to the NPA's decision to migrate all TRC matters from the NPA's Priority Crimes Litigation Unit (**PCLU**) to the relevant regional offices of the DPPs in April 2019.

14 In carrying out the inquiry into a possible violation of section 41(1) of the NPA Act, we are instructed to scrutinise the period 2003 to 2017, the period considered and dealt with in the *Rodrigues* judgment⁹ paragraphs 55-89 and specifically paragraph 65.

⁸ NPA powerpoint presentation dd 3 March 2023, "TRC Matters"

⁹ *Rodrigues v National Director of Public Prosecutions of South Africa and Others* 2019 (2) SACR 251 (GJ)

- 15 The team was not restricted as to whom it may interview or from whom it may solicit additional background information. Given the limited timeframe afforded to the team, emphasis was placed on previous reports generated on outstanding TRC prosecutions and affidavits submitted in relation to allegations of political interference and bureaucratic stonewalling described in the affidavits submitted in the **Rodrigues** litigation and later before the Zondo Commission. We list in **Annexure B** the list of reports and affidavits on which we placed greater reliance.
- 16 In addition, the members of the team consulted with (1) one of the families pursuing a case in the Free State province, (2) two representatives of the Foundation for Human Rights who represent several victims' families. Other than the workshop the team had attended in Pretoria earlier in the year, the team also attended a feedback workshop hosted by the DPP: Kwa-Zulu Natal (KZN). The team attended the KZN meeting because the majority of the outstanding TRC cases are situated in the KZN province. Ideally, the team would have gone to all the provinces, but due to the strictures of time — and resources (see hereinbelow) — this could not happen.
- 17 We note the following important **caveat** to this Report and the recommendations made:
- 17.1 **First**, that the three-month period is not sufficient for a comprehensive due diligence of either the actions adopted by the NPA since the establishment of the TRC Component in September 2021, or a definitive assessment of the extent of political interference over a decade and a half, between 2003 – 2017.

- 17.2 **Second**, the team has not been given any investigatory powers or powers to subpoena or interrogate individuals or stakeholders who may have valuable information on the rationale behind certain NPA policy decisions adopted during 2003-2017 or the reasons why prosecutions were not pursued and charges under international law were not instituted against accused persons for the crime of apartheid.
- 17.3 **Third**, the allegations in the *Rodrigues* judgment against individual politicians and certain members of Cabinet are serious. In order for determinations to be made under section 41(1) of the NPA Act, a proper investigation, affording the principal players an opportunity to present their version of events should take place. This Opinion, therefore, can only accept, without more, the findings and dicta of the full bench and the SCA in the *Rodrigues* judgments.¹⁰
- 18 In what follows we turn to consider the duty to prosecute apartheid-era crimes for which amnesty under section 20 of the TRC Act was not granted and, thereafter consider the NPA's TRC Component established in September 2021.

¹⁰ *Rodrigues v National Director of Public Prosecutions and Others* 2021 (2) SACR 333 (SCA)

PART 2 – THE STATUTORY DUTY TO PROSECUTE APARTHEID-ERA CRIMES**I. PROSECUTORIAL POWER**

19 In terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution, and the NDPP has exclusive power on whether a particular prosecution should or should not be instituted on behalf of the State. Section 179(4) of the Constitution enjoins the NPA to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this right. The NPA Act is this national legislation.

20 The powers to institute and conduct criminal proceedings are contained in section 20 of the NPA Act and are vested in the NPA to be exercised on behalf of the Republic. The DNDPP exercises this power to institute and conduct criminal proceedings, carry out all incidental functions, and discontinue criminal proceedings subject to the control and direction of the NDPP.¹¹

21 In exercising statutory authority, all prosecutors are to remain impartial and “*exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.*”¹² Section 32(1)(b) places an injunction on all organs of state and all people:

“Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state or any other person shall

¹¹ NPA Act, section 20(1) and (2)

¹² NPA Act section 32(1)(a) provides “*A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.*”

improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.”

- 22 A contravention of section 32(1)(b) is an offence under section 41(1).¹³
- 23 On prosecutorial policy, the NDPP must determine the prosecution policy. The NPA Prosecution Policy Directives, June 2022 provide, *inter alia*:
- 23.1 that the primary responsibility for instituting and conducting prosecutions vests in the DPPs in respect of offences committed within their areas of jurisdiction (paragraph 6); and
- 23.2 in Part 45B para 1(m), “*offences arising from the past committed between 1 March 1960 and 5 May 1994*” fall under the scope of the PCLU at the Office for the NDPP.¹⁴
- 23.3 in paragraph 3C, for prosecutions in the public interest and gives guidance on prosecutorial decision making in relation to prosecution of cases in the public interest, of which the TRC cases form part.
- 24 We are instructed that a draft TRC specific prosecution policy is under consideration. We have not been informed of when the draft policy is to be finalised and have not been provided with a copy thereof.

¹³ NPA Act section 41(1) provides, “Any person who contravenes the provisions of section 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.”

¹⁴ This is quite evidently a reference to the mandate period of the TRC process in South Africa — 34 years of South African history under the Apartheid regime

- 25 Under section 22(2) of the NPA Act, the NDPP is empowered to intervene in any prosecution process when the prosecution policy is not followed and, after consultation, may review a decision to prosecute or not to prosecute.
- 26 It appears that despite the reassignment of the TRC prosecutions and related matters from the PCLU to the devolved provincial structures forming the TRC Component in September 2021, the Prosecution Policy Directives were not revised to reflect this change. There is accordingly a discrepancy in the NPA's adherence to its Prosecution Policy Directives. It is advisable that this discrepancy is corrected and the establishment and activities of the TRC Component are aligned to that of the NPA's governing policy documents.
- 27 The oversight powers of the NDPP are not to be interpreted to mean that the Office of the NDPP is wholly separate from the prosecution decision-making process, is unable to engage in or support the needs of a DPP in prosecutions or, where necessary, may not intervene to assist the needs of any DPP in ensuring the successful prosecution of a matter.

II. INTERNATIONAL LAW AND THE CRIME OF APARTHEID

- 28 The prosecution of gross violations of human rights as defined in the TRC Act is in part founded on the fact that under international law, apartheid is a crime.
- 29 At the time the TRC Act was promulgated in 1995, during the work of the TRC Commissioners, and on the publication of the final TRC Report in 2003, apartheid was

defined as a crime under international law, and had been so defined and regarded internationally, up to that point, for over two decades.¹⁵ That apartheid is a crime against humanity is confirmed in the Statute of the International Criminal Court (ICC).¹⁶

- 30 The Apartheid Convention, 1973, binds 109 State Parties and defines the crime of apartheid in article 2 to mean:

“inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”

- 31 In terms of section 84(5) of the 1977 Additional Protocol I to the Geneva Convention, 1949, practices of apartheid constitute grave breaches of the Protocol and are also regarded as war crimes.

- 32 The Rome Statute of the International Criminal Court (**Rome Statute**)¹⁷ deals in part with crimes against humanity. Article 7(1)(j) read with Article 7(2)(h) recalls the crime of apartheid as defined in the Apartheid Convention, accepts that this is a crime against humanity. It records that the crime includes, inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial

¹⁵ *The International Convention on the Suppression and Punishment of the Crime of Apartheid* (the Apartheid Convention), UN General Assembly (1973). The Convention is one of a series of General Assembly and Security Council resolutions condemning apartheid as a crime against humanity. This categorisation has been echoed in the jurisprudence of the International Court of Justice and the International Law Commission's Draft Articles on State Responsibility and Crimes against the Peace and Security of Mankind.

¹⁶ Adopted July 1998, entry into force 1 July 2002

¹⁷ 17 July 1998, in force 1 July 2002

group over any other racial group or groups and committed with the intention of maintaining that regime.¹⁸

33 Prof Dugard states that the principal features of apartheid evident in South Africa range from murder, torture and arbitrary arrest of members of a racial group to legislative measures calculated to prevent a racial group from participating in the political, social, economic and cultural life to the advantage of another domineering racial group.¹⁹ As such, individuals, members of organisations, and representatives of the State, regardless of their motives and their country of residence, are held criminally responsible under international law, if they:

33.1 commit, participate in, directly incite, or conspire in the commission of acts of apartheid; or

33.2 directly abet, cooperate with, or encourage the commission of the crime of apartheid.

34 In *Tadic*, the International Court of Justice (ICJ) confirmed that a crime against humanity is a charge that may be brought against a single individual for a single act in circumstance where that act is on a large scale, and/or the act falls within a systemic pattern of violations.²⁰

¹⁸ We note for purposes of this opinion that Article 11 of the Rome Statute confirms that its jurisdiction operates prospectively, only with respect to crimes committed after the entry into force of the Statute.

¹⁹ Dugard, *International Law: A South African Perspective* (2014) 157

²⁰ ICTY, *Tadic* judgment CC/P10/190-E (7 May 1997) par 649. Publicly accessible at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-94-1/JUD61R0000060781.TIF>

- 35 South Africa is infamous as the nation that conceived, implemented and brutally enforced this crime for decades. South Africa therefore may be considered as the State Party that is best able to give effect to the content of the crime, develop customary international law to reflect the horrors of the systemic gross human rights violations and contribute to the development of international law from the perspective of the global south.
- 36 This begs the question whether South Africa is under any international law obligation in domestic law to take cognisance of, and give effect to, its international law obligations.
- 37 Section 232 of the Constitution entrenches customary international law as part of South African domestic law and, as such, any conduct that at the time of its commission constituted a crime against humanity under customary international law is capable of prosecution under this provision. The application of section 232 of the Constitution arguably imposes an additional constitutional injunction on the NPA to pursue the charge of crimes against humanity against perpetrators of apartheid-era atrocities.
- 38 The implementation of the Rome Statute of the International Criminal Court Act, 2002²¹ (**ICC Act**) provides for domestic prosecution of war crimes, genocide, and crimes against humanity. Crimes against humanity, are defined to mean “*any of the following conduct when committed as part of a widespread or systemic attack directed against any civilian population, with knowledge of the attack*” and includes ***the crimes of apartheid, murder, torture, rape and enforced disappearance***.²² Although the ICC Act applies

²¹ Act 27 of 2002

²² ICC Act Schedule 1 Part 2

prospectively only,²³ and its application is therefore limited to offences committed after 2000, this limitation arguably does not apply to crimes that are continuous in nature, such as enforced disappearance.

39 This must read with the Criminal Procedure Act 51 of 1977 (**CPA**), which provides in section 18 that there is no statutory limitation on the prosecution of crimes against humanity and war crimes as contemplated in section 4 of the Rome Statute Act. All such crimes constitute an offence under Schedule 8 of the CPA.

40 To date, no person has been charged domestically with the crime of apartheid. On our reading of the submissions before us, there is no reason in law not to institute charges under international law against alleged perpetrators. We note that in the *Glenister* judgment,²⁴ the Constitutional Court considered the impact of international law on South African domestic law and held that, even where an international instrument is not domesticated (as is the case in the present matter), South Africa's obligations under international law infuse the interpretation of rights in the Bill of Rights and, as such, South Africa cannot ignore its international law commitments.

41 The NPA's exercise of its discretion not to charge accused persons with the crime of apartheid, however, is beyond the mandate of our opinion, and we make no findings on this aspect.

²³ Section 5(2) of the ICC Act

²⁴ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) par 189

PART 3 – THE STRUCTURE OF THE NPA’S TRC COMPONENT

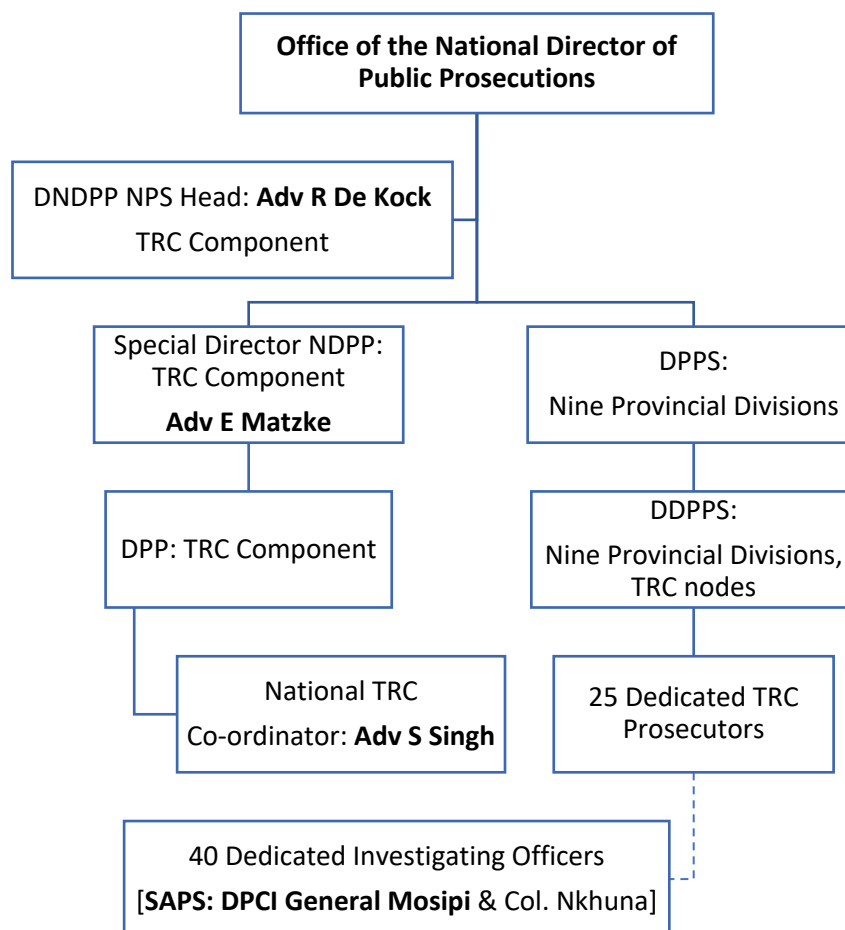
- 42 The investigation and prosecution of TRC matters was previously carried out by the PCLU, a specialised unit established in terms of a Presidential Proclamation²⁵ to manage and guide investigations and prosecutions of specific crimes and offences of national and international security concern.
- 43 In September 2021, the TRC Component was established within the office of DNDPP, Advocate De Kock, who is head of the National Prosecution Service (**NPS**), one of the four specialised units of the NPA. The TRC Component is a separate portfolio with the specific purpose of dealing with the investigation and prosecution of TRC related matters.
- 44 In order to drive the investigation and prosecution process, a national co-ordinator, Adv Singh was appointed together with a Special Director, Deputy Director and administrative support personnel. In order to ensure dedicated attention is given to the TRC matters, 25 prosecutors and 40 investigating officers nationwide have been assigned to the TRC Component.
- 44.1 To ensure that there is no disruption in the work of the Component, the Department of Public Service and Administration has granted a deviation for three-year contracts for prosecutors in the TRC Component as opposed to one-year employment contracts. These contracts are due to expire in 2024.

²⁵ 24 March 2003

44.2 The investigating officers are appointed through the SAPS: Directorate for Priority Crime Investigations (**DPCI**) in terms of the mandate under section 17D(1)(a) of the SAPS Act 68 of 1995.²⁶ The investigating officers are appointed in the various divisions, being the Central Region, Coastal Region, Eastern Region, Western Region and the Karoo Region.

45 We set out below the organogram of the TRC Component as provided to us.

Table: Organogram of the TRC Component



²⁶ The subsection provides, “The functions of the Directorate are to prevent, combat and investigate — national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Minister and approved by Parliament ...”

- 46 We are instructed that the structure of the TRC Component was chosen primarily to avoid the centralised control of all TRC prosecutions and related matters in the national office. The NPA considers that centralised control over TRC prosecutions and related matters rendered the work particularly vulnerable to political interference.
- 47 Where one person or unit, in the case of the PCLU, is responsible and accountable for all prosecutions, including oversight over the extent and diligence of investigations carried out, susceptibility to improper interference is a continuing concern. While the likelihood of such an eventuality cannot in the ordinary course be presumed, the history of the TRC prosecutions and the findings in *Rodrigues*, make clear that this has indeed been the case.
- 48 The introduction of 25 dedicated prosecutors with a fixed-term contract of three years provides certainty and accountability. This is not only in respect of any key performance indicators and organisational accountability of individual prosecutors but, more importantly, ensures that the prosecutors do not have other case load responsibilities that detract from the TRC prosecutions. Given that the NPA has given the TRC Component a timeframe of 5 years within which to complete its work, the three-year contracts for each of the dedicated prosecutors will need to be renewed for a further three-year term before the contracts lapse in 2024.
- 49 We are advised that the office of the DPP KZN has the most TRC cases and, accordingly, the majority of the dedicated prosecutors are situated in KZN. The distribution of prosecutors and investigating officers across the regional offices is set out in the Table below.

TABLE: Allocation of NPA prosecutors and DPCI investigators to TRC cases²⁷

DPP Regional Office	Dedicated Prosecutors	Dedicated DPCI Investigating Officers	Cases under investigation
DPP: Kwa-Zulu Natal	5	7	27
DPP: Mthatha & Makhandla	7	8	10 + 13
DPP: Western Cape	3	4	10
DPP: Northern Cape	-	2	7
DPP: Free State	-	(DPCI Karoo Region)	3
DPP: South Gauteng	3	19	25
DPP: North Gauteng	3	(DPCI Central Region)	15
DPP: Limpopo	1		13
DPP: Mpumalanga	-		6
DPP: North-West	1	-	5
DPP: Head Office	2	-	-
TOTAL	25	40	134 ²⁸

50 The distribution of dedicated NPA and DPCI officials is properly contextualised when the figures are considered against the distribution of the total number of 134 TRC prosecutions and related matters throughout the country. This is set out in the fourth column of the Table. We list in **Annexure C**, all 133 cases currently under investigation.

51 From the above table it appears that:

51.1 Special Director Matzke and Adv Singh in the Head Office are included as part of the 25 dedicated prosecutors, even though they are not part of the regional prosecution teams.

²⁷ The data has been taken from the briefing documents and PowerPoint presentations provided to us by the TRC Component

²⁸ We note that the briefing document reflects the correct number of cases in each DPP region but incorrectly arrives at a total of 135 cases.

- 51.2 The basis for the allocation of prosecutors per region is not clear when regard is had to the number of cases or workload in each division. For example, DPP Mthatha and DPP Western Cape both have 10 TRC cases for investigation. The Western Cape has been allocated 3 dedicated prosecutors and Mthatha has been allocated 7 dedicated prosecutors to be shared with DPP Makhanda. This is contrasted with DPP Northern Cape and DPP Free State, which together also have 10 TRC case investigations, but there is no indication of even 1 dedicated prosecutor. The apparent failure to have even one dedicated prosecutor in these two divisions is bound to have consequences for the effectiveness of the TRC Component, its responsiveness to families of victims/survivors, and third party stakeholders.
- 51.3 We are informed that the role of Special Director Matzke and Adv Singh is one of supervision, co-ordination, sharing of information amongst the dedicated prosecutors, and carrying out necessary interventions where similar challenges or procedural hurdles arise in a number of investigations or prosecutions. We are of the view that this is critical to ensuring a uniform approach to the TRC prosecutions — an approach which should be guided by an agreed understanding of questions of law that may frequently arise. This includes, for example, questions of delayed prosecutions, payment of legal costs, presumption of death for missing victims or victims whose remains were destroyed, the probative value of evidence secured on affidavit where the witnesses are now deceased and the admissibility of testimony given before the TRC.

52 In explaining the TRC Component, the NPA emphasised that:

52.1 The TRC Component has adopted a hands-on approach and that all matters taken over from the PCLU were audited to determine the work already completed on the file, the progress made on the investigation, and the measures adopted to fast-track matters.

52.2 Following the audit, it was found that 59 matters were under investigation and 55 matters were awaiting referral for prosecution. The decision to fast-track certain cases was made taking into account the age of the matter, whether the accused and key witnesses are still alive, the progress of the investigation thus far, and question of prescription that may arise.

52.3 Internal and external collaboration on the TRC prosecutions and related matters is handled by Adv Singh, the national coordinator, and this includes both the divisions of the NPA and stakeholders such as the DCI and the MPTT.

52.4 The appointment of dedicated prosecutors for a fixed term of three years and the allocation of dedicated investigating officers serves an addition purpose of capacity building within the NPA. The prosecution of historical atrocities, international crimes and war crimes are specialised fields of practice and it is important that the NPA strengthens its expertise and experience in this area of law.

53 On the monitoring and oversight role, the TRC Component has adopted a monthly reporting system, whereby memoranda on decisions taken and inquests that have been reopened are channelled from the DPP regional divisions to the national office. Of

significance, we were informed that no decision is made in the DPP divisions until such time as it is confirmed by DNDPP de Kock.

- 54 In addition, accountability sessions are convened at which matters are critiqued and analysed. The sessions are attended by the TRC national coordinator, the DPPs of each division, the TRC DPCI heads in the divisions, and the TRC dedicated prosecutors. These NPA / DPCI workshops and sessions are important for specialised training, sharing of common challenges and an assessment of when intervention by the DNDPP or the national coordinator is warranted.
- 55 The NPAs preference for a regionally based structure for the TRC Component (as opposed to the centralised structure under the PCLU), is coupled with a centralised oversight and endorsement process that is implemented from the Office of the DNDPP: NPS. We were informed however, that because the DNDPP has review powers under section 22(2)(c) of the NPA Act,²⁹ the primary decision-making responsibility in respect of prosecutorial decisions remains the DDP of the relevant division, in accordance with section 20(5) of the NPA Act.³⁰
- 56 It emerges from the material with which we have been briefed that NDPP Batohi made a presentation to the National Assembly portfolio committee on 1 June 2022, in which

²⁹ Section 22(2)(c), “In accordance with section 179 of the Constitution, the National Director — may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within the period specified by the National Director, of the accused person, the complainant and any other person or party whom the National Director considers to be relevant.”

³⁰ Section 20(5), Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director.

she explained that progress on all investigations is monitored and divided into three categories, A, B and C on the following basis:

56.1 A Category – where the matter is focussed on securing the available evidence, docket, inquest report, etc;

56.2 B Category – where the matter is focussed on obtaining the necessary expert reports, including scene reconstruction and analysis, DNA evidence, etc; and

56.3 C Category – where the investigatory aspect of the matter is nearing completion and a decision is to be taken whether or not to prosecute the matter.

57 As at February 2023, we have been informed that the 134 cases fall into the above categories A to C, in each of the DPP divisions:

TABLE: Categorisation of progress made on the cases in the TRC Component

DPP Division	A	B	C	Total
Western Cape	4 (40%)	2 (20%)	4 (40%)	10
Free State	1 (33%)	1 (33%)	1 (33%)	3
Mthatha	8 (80%)	2 (20%)	-	10
Makhanda	11 (85%)	1 (7,5%)	1 (7,5%)	13
North West	2 (40%)	2 (40%)	1 (20%)	5
Kwa-Zulu Natal	13 (48%)	5 (19%)	9 (33%)	27
Mpumalanga	3 (50%)	-	1 (16%)	6 ³¹
Northern Cape	6 (86%)	-	1 (14%)	7
Johannesburg	19 (76%)	1 (4%)	5 (20%)	25
Pretoria	9 (60%)	-	6 (40%)	15

³¹ Information on the progress for each of the 6 cases was not provided

DPP Division	A	B	C	Total
Limpopo	10 (77%)	-	3 (23%)	13
TOTAL	86 (64%)	14 (10%)	32 (24%)	134

58 The detailed list included as Annexure C to this Opinion lists 138 cases, as that list includes:

58.1 The additional case in KZN of Michael Ncetywa-Mcetywa. The case was closed in April 2023.

58.2 The additional three cases in Pretoria of Cajee, Sons & Els and the cases of Shonyeka and Hamakwayo. The former concerns charges of perjury in the regional court and the latter two have been determined not to fall within the TRC related cases.

59 The above table therefore does not take into account these four matters.

60 It is apparent that the majority of cases STILL remain at the beginning stage of the investigation and require the location of and access to available evidence, the docket, and the inquest report, for example. It is surprising and concerning that the majority of the cases remain in Category A despite the passing of some 22 months of dedicated and focused work by investigating officers and prosecutors working together.

61 On a national basis, the following ten matters were in court and have been finalised since the establishment of the TRC Component in September 2021.

	Case / matter	Date	Outcome
1	S v Roderigues	30/9/21 SG	Accused passed away on 7 September 2021. Charges withdrawn
2	Inquest – Dr NH Aggett	4/3/2022 SG	Verdict overturned.
3	Mr Sithembile Zokwe	12/07/2022 EC 10/3/5/2022)	Death in detention. Two SB police officers were convicted in former Transkei of murder: sentenced to 20 years imprisonment on 25/11/2005
4	Peter Thabuleka	July 2022 NG	Decline to prosecute. No evidence of assault.
5	Mr Eric Mntonga	July 2022 EC	Death in detention: Accused were tried and convicted in March and September 1989 for death of deceased.
6	Mr Goodwill Collin Sikhakhane	July 2022 KZN	All the suspects were granted amnesty . Decision was taken to not prosecute.
7	Mr Paris Malatjie	5/7/83	Deceased was shot and killed by Sgt van As at the Protea Police station. He was convicted of culpable homicide in the Johannesburg High court, sentenced to 10 years imprisonment
8	Mr Michael Ncetywa (Mcetywa)	Waiting for Information: KZN	The Accused, Mr Emmanuel Mavuso, applied for amnesty for the murder of the deceased. Amnesty was refused on 22 November 2000. He was charged and sentenced to 25 years imprisonment.
9	Mr Mqiniseni Simon Zwane	KZN	Investigation has been closed. Main suspect is deceased. Charge of attempted murder has prescribed.
10	Johannes Sweet Sambo	MP	Suspects were granted amnesty. (Eugene de Kock plus three others), McIntyre, Els and Venter were charged with Assault GBH under SH 177/92 and were acquitted. They were then charged with murder in <i>McIntyre and other v Pietersen NO and another</i> , the special plea was upheld in terms of s106(1)(d) of the CPA.

62 A further 14 cases are before the criminal court:

	Case / matter	Division	Outcome
1	Inquest: Mr Ernest Dipale	SG	Arguments heard on 1 November 2022; Judgment outstanding

	Case / matter	Division	Outcome
2	S v Rorich and Ano. (COSAS 4)	SG	Trial – February 23: Postponed to April 2023 for pre-trial conference.
3	Inquest: Dr HH Haffejee	KZN	Arguments heard on 18 and 9 October 2022, Inquest judgment outstanding
4	S v Coetzee (Simelane)	NG	Trial: Postponed to 9 December 2022 for outcome of section 79 assessment. Accused found fit to stand trial, postponed to 12-15 June 2023 for pre-trial and further particulars to be attended to.
5	S v Marais (Nyoka)	NG	Trial-First appearance scheduled for 6 February 2023 in the High Court Pretoria, representation to add <u>charges of CAH</u> . First appearance on 6 February 2023. The matter was postponed to 17/4/2023 for further particulars.
6	Mr A Haroon	CT	Inquest: 7-22/11/2022, Inquest commenced
7	Ms N Kubheka	KZN	Inquest: 22 March 2023 (Umlazi) for former SB members to obtain legal representation
8	Mr Sbo Phewa	KZN	Inquest: 22 March 2023 (Umlazi) Inquest commenced, postponed to allow SB members to obtain legal representation
9	Mr Zama Sokhulu	KZN	Inquest: 22 March 2023 (Umazi) Inquest commenced, postponed to allow SB members to obtain legal representation
10	Mr James Mngomezulu	KZN	Inquest: 28 March 2023 (Pongola). Outcome of legal representation from former employer SAPS
11	Mr Mthunsi Vlemeseni	KZN	Inquest: 10 March 2023 (Durban Magistrate Court). The chief magistrate proposed that a meeting be held to discuss pre-inquest conduct
12	Siphelele Mxolisi Nxumalo	KZN	Indictment is underway for murder of the deceased
13	Mr Seth Sons	PTA	Decision taken to charge accused in the Regional Court on charges of perjury, defeating the ends of Justice and contravening the inquests Act. Summons to be issued.
14	Mr Neville Els	PTA	Decision taken to charge accused in the Regional Court on charges of Perjury, defeating the ends of Justice and contravening the Inquests Act. Summons to be issued.

PART 4 – SUBMISSIONS/INFORMATION/AFFIDAVITS CONSIDERED

63 We are grateful to the organisations and individuals who submitted to the team their views on difficulties faced when dealing with the prosecutors and investigators responsible for the TRC prosecutions, and the systemic challenges that they have encountered in these matters. We summarise four submissions below, all of which indicate that those seeking to pursue TRC prosecutions and related matters have been frustrated, black-balled, marginalised or ignored in their efforts.

I. THE NPA

64 The NPA convened a briefing session on 6 March 2023. The team was subsequently invited to attend a briefing session on 4-5 April 2023 between the TRC national component, including DNDPP De Kock, Special Director Matzke and Adv Singh, with the DPP KZN, the 5 dedicated prosecutors and the 7 DPCI investigating officers. In addition, the NPA provided to the team a lever-arch file of documents for further context and consideration.

65 The NPA accepted that the delay in finalising the TRC prosecutions and related matters cannot be justified. Progress in the investigation and prosecution of TRC related cases is long overdue. This acceptance of its past failures by the NPA is sensible.

66 We were urged to consider the various affidavits concerning the work of the NPA in relation to the TRC matters as an important context to the present structure of the TRC

Component. We have done so and the affidavits on which we placed greater reliance are included in Annexure B.

67 The common challenges identified by the investigators and prosecutors working in the TRC Component and communicated to us, include:

67.1 access to documents, including dockets and inquest records and documents forming part of the docket, such as post-mortem reports and photo albums;

67.2 engagement with and access to records held by the MPTT;

67.3 tracing potential witnesses and tracing relevant information from previous investigations;

67.4 facilitating and securing witness protection for key witnesses;

67.5 delays in securing legal representation for accused persons who are former South Africa Police (SAP) and Security Branch members;

67.6 lack of cooperation from former Security Branch members, including those who were granted amnesty by the TRC process; and

67.7 budgetary constraints of the SAPS Forensic Unit that delay essential work such as scene reconstruction and simulation.

68 We do not have the data for the progress of the work carried out in each of the provinces and the specific challenges faced by each region. We do have detailed data for DPP: KZN and, for illustrative purposes, we categorise the cases by identifying the

challenges the investigating officers and prosecutors face and whether or not the matter is to proceed to prosecution.

DPP KZN allocation [27 cases], challenges identified	No of cases
Access to documents (previous investigation reports / post-mortem / etc)	15
Tracing of and consultation with witnesses	17
Cooperation from witnesses and SB members granted amnesty	2
Scene reconstruction and simulation (SAPS: Forensic Unit)	5
Payment of the reasonable costs of legal representation	8

- 69 It is of great concern that out of the 27 KZN cases, 62% are experiencing difficulties with tracing or consulting with witnesses who may be old, infirm or whose addresses and contact details are unknown. In 55% of the cases access to documents such as the docket, previous investigation reports or port-mortem reports is a problem. It is unclear whether these statistics are representative of all the TRC related cases in the DPP divisions or whether these specific to the DPP: KZN division.
- 70 A number of these challenges underscore that the work of the TRC Component is not carried out in a silo. There can be little patience with challenges such as lack of access to dockets, inquest records or relevant information and intelligence from previous investigations. Surely, the records can be sourced from the PCLU archives or duplicates located in the records of the MPTT?
- 71 Similarly, the delays in securing legal representation for former SAP and Security Branch members ought to be readily capable of resolution, given the high court judgment in S

v Mfalapitso & Others,³² in which the Court confirmed that the SAPS authorities are legally obliged to provide legal representation to accused persons who are former members of the SAP. The Minister of Police did not appeal the judgment and this is a clear matter in which direct engagement between the DNDPP and the SAPS ought to resolve the apparent impasse on the necessary approvals for the funding of legal representation for accused perpetrators.

- 72 The consequence of the impasse is of serious concern because any delay by the SAPS in authorising the funding of legal representation to alleged perpetrators means that the matter is incapable of proceeding in court. This creates a backlog on the court roll and raises the grave possibility of the prosecution being struck from the court roll. It is lamentable that even after a decision to prosecute has been taken, cases are capable of being held hostage by another organ of State.
- 73 It is apparent that the SAPS is similarly capable of effectively stymying the progress of TRC related cases at the investigation stage. The impasse concerning payment for essential work carried out by the SAPS Forensic Unit in Pretoria, particularly for scene reconstruction and simulation, and the finalisation of the report, also falls to be addressed at the national level. It is these systemic obstructions which may well result in the TRC Component not meeting its five-year target.

³² Case no. SS70/2021 dated 4 May 2022.

II. THE FOUNDATION FOR HUMAN RIGHTS

- 74 The Foundation for Human Rights (“FHR”) is an NPC established in 1996 through a cooperation agreement between the European Union and the South African government, and works to protect human rights in South Africa. The Unfinished Business of the TRC is one of four human rights programmes on which the FHR works and we are informed that it is working with families in respect of 23 TRC cases that remain unresolved.
- 75 The FHR has produced a number of publications dealing with the prosecution of crime of particular atrocities, including crimes against humanity. This includes extensive research on comparative governments’ national policies and approaches that have been adopted elsewhere to guide decisions to prosecute these types of crimes. This research is carried out with the aim of understanding what governments and prosecuting authorities have determined is the most effective way to ensure successful prosecutions in both civil and common-law jurisdictions.
- 76 In its submission, the FHR emphasised the irreparable harm caused to the families of victims, the effect of political interference on investigations and prosecutions. They identified key challenges to successful investigations and prosecutions, the importance of public accountability, the relevance of international law charges, and nature of the relationship between the NPA and third parties.
- 77 The FHR submitted that It is readily apparent that a siloed approach to the investigations and prosecutions will necessarily undermine the adequacy of the investigations carried out. It will also result in continued delays in the work of the TRC

Component, thus frustrating affected families and effectively inhibiting the NPA's target to complete the work of the TRC Component in five years.

78 We summarise the contentions made in respect of each issue raised by FHR.

The irreparable harm caused to the families of victims

79 Families have had to wait decades for the truth of what happened to their loved ones, to reconcile themselves with the atrocities carried out to individuals in furtherance of the apartheid regime, and to see justice enforced against the perpetrators. South Africa's failure to place the TRC project and subsequent prosecutions at the forefront of the national project shows a callous disregard to those who have sacrificed for democracy.

80 It is readily apparent that a number of TRC cases have been closed because the accused persons have died or have been declared medically unfit to stand trial.

81 The clearest way to emphasise the impact of the two and a half decade obfuscation and delay is by listing the names of the deceased and/or the families who are now unable to get closure or any form of public acknowledgement or justice.

81.1 In the case of the COSAS Four, Eustice "Bimbo" Madikela, Ntshingo Mataboge, Zandisile Musi and Fanyana Nhlapo – Three of the five perpetrators behind the operation to murder the students have died, Mr J Coetzee, A Grobbelaar and Brigadier W Schoon. The remaining accused, Messrs Rorich and Mfalapitsa are aged 75 and 68 respectively.

- 81.2 In the case of the Cradock Four, (Fort Calata, Mathew Goniwe, Sicelo Mhlauli, and Sparrow Mkhonto) – all the perpetrators have died, including all six members of the Police death squad, the Commander of Security and SAP Commissioner, J van der Merwe and the Head of the Security Branch: Black Affairs Unit, Eastern Cape, H Du Plessis. Mr Matthew Goniwe’s spouse, Mrs Nyameka Goniwe, died on 29 August 2020 before seeing the prosecution of the perpetrators of her husband’s murder. There is no one left to peruse or hold accountable.
- 81.3 In the case of Nokuthula Simelane – two of the four accused perpetrators have died, Messrs T Radebe and F Mong in 2019 and 2021 respectively. It is unclear whether the third accused, Mr W Coetzee is mentally fit to stand trial. In addition, several family members and witnesses in the Simelane case have passed on; three have died during the past 12 months.
- 81.4 In the case of Neil Aggett – the lead interrogator and torturer of Dr Aggett, Lieutenant S Whitehead, died in April 2019.
- 81.5 In the case of Hoosen Haffejee – the arresting officer and lead interrogator of Dr Haffejee, Security Branch Col. J Taylor, died in August 2019.
- 81.6 In the case of Ahmed Timol – a key witness, Ernest Matthis died in May 2019 and the murder accused, Security Branch Sergeant J Rodrigues, died in September 2021.
- 82 These are only the more prominent cases that remain in the public consciousness. There are many more missing and murdered people in relation to whom the

perpetrators, accomplices and witnesses with vital information have died. The legacy is tragic.

Political interference:

- 83 The allegation of political interference is well-known and is broadly considered to have started in 2004, with the mooted of back-door amnesties for perpetrators of gross human rights violations who did not apply or were refused amnesty.³³ The subsequent launch by former President Mbeki of the Special Dispensation for Political Pardons, was set aside in 2010.³⁴
- 84 In the cases of both *Nkadimeng* and *Rodrigues*, affidavits were submitted by senior officials of the NPA confirming that there was continued political interference on the NPA's prosecutorial discretion and which resulted in the decision not to investigate or prosecute any of the several hundred criminal cases in which amnesty had been denied or had not been applied for.
- 85 More recently the Zondo Commission accepted that political interference in the prosecutorial discretion on TRC related cases formed a part of State Capture. Mr Lukhanyo Calata submitted representations to the Zondo Commission on the role played by the South African executive in the suppression of TRC investigations and prosecutions.

³³ Amnesty Task Team Report, accessible as part of the pleadings filed in *Nkadimeng & Oths v NDPP & Oths* [2008] ZAGPHC 422; *CSV & Others v President of the RSA & Others*, Case no. 15320/09

³⁴ *Albutt v Centre for the Study of Violence and Reconciliation & Oths* 2010 (3) SA 293 (CC)

86 The FHR informed us of the steps it has taken to have an independent commission of inquiry established for the specific purpose of establishing the sources of political interference and the full reasons for the stifling of TRC investigations and the suppression of prosecutions.

87 We note that on 5 November 2021, Minister of Justice Lamola publicly announced that he had appointed persons to carry out an inquiry to investigate the suppression of the cases referred by the TRC to the NPA. We are not aware of the work carried out pursuant to the inquiry or the findings thereof.

III. MR TEBOGO RAMAGELE

88 A consultation was held with Mr Ramagele and his colleagues who are family members of the disappeared **Ladybrand Four**, uMkhonto weSizwe (MK) cadres Joyce 'Betty Boom' Koekanyetswe, Nomasonto Mashiya, Tax Sejaname and Mbulelo 'Khaya Kasibe, all of whom were abducted from Lesotho by members of the Orange Free State Security Branch.

89 We were informed that although the family has repeatedly submitted written statements and affidavits to investigating officers over the decades, the frustration and pain the families have experienced is a result of the failure of the investigating officers and prosecutors assigned to the case to retain records. Each time a new investigating officer is assigned to the matter fresh interviews and statements are taken. Thus far there have been 6 investigating teams on the matter and each time, the investigation starts afresh and the families are told there is nothing in the file.

90 Mr Ramagele said that it is clear that the graves of one or more of the **Ladybrand Four** are situated in Rosendal in the Free State. Through great effort, the families were able to convince the Free State MEC to assist in putting together a unit to look for the burial sites in Rosendal but this unit was almost immediately dissolved before any work was carried out. No satisfactory reason for this about turn has been provided to the family.

91 In addition, the MPTT met with the families three times over the years. At the third meeting the families were informed that the investigation team had started talks with Mr E. de Kock and discussions were held offering not to prosecute De Kock in exchange for complete disclosure and, in this way obtain closure for the families. The families do not know what has happened since this communication, and Mr Ramagele is vehemently against any such negotiated agreement or plea bargain.

92 The family is increasingly frustrated with the investigating officers that have been assigned to their case. At one point, the investigating officer turned out to have been a former policeman who is retired and was brought back on contract to work only on the TRC and related matters. The family is highly distrustful of this type of officer because their intentions are unknown and, given the officer's long history in the police force, it is unclear whom they serve, or whether their true political objectives are not to stymie the investigation and prevent it from reaching the prosecution stage.

93 We note from the above that:

93.1 Families have deep distrust of the investigation and prosecution process.

Given the evidence on affidavit as part of both the **Rodrigues** case, and that

submitted before the Zondo Commission, this distrust is not without foundation.

- 93.2 It is unclear what the motive for taking repeated statements or affidavits is. While memories fade and witnesses and individuals with pertinent information die, it is undesirable for witnesses to give numerous written statements over many decades. When the matter goes to trial (which is the ultimate objective) cross-examination on the discrepancies between different statements is likely and may lead to adverse credibility findings against the particular witness giving evidence.
- 93.3 It is unknown whether the loss of witness statement and key intelligence information is due to sheer incompetence, misconduct and dereliction of duty by investigating officers and prosecutors assigned to cases, or whether it is due to a malicious and intentional targeting of TRC investigations aimed at preventing the prosecution of any of the 300 cases originally referred to the NPA by the TRC.
- 93.4 It is unclear to whom the written evidence is being submitted to if it is not retained in the case file. This is a question of concern given that all criminal investigations ought to be kept confidential not only to protect sensitive information, but to aid in intelligence gathering and witness protection. Given that the information in the TRC investigations impacts, directly or indirectly, **politically exposed persons (PEPs)** people with the power to undermine investigations and intimidate witnesses with sensitive

information, the loss of witness statements and key investigation leads are of great concern.

- 94 The family strongly believes that the way forward is a Commission of Inquiry with powers to subpoena key people and the authority to search for and seize information. This is the only effective solution, especially when, they say, it is clear that the military, crime intelligence, the NPA and the State Security Agency hold pertinent information.
- 95 Rather than the siloed retention of information between the various structures, the TRC investigations and prosecutions are serious and important enough to warrant collaboration between all organs of State for the furtherance of the democratic project.

IV. MR IMTIAZ CAJEE

- 96 Mr Cajee is the nephew of **Ahmed Timol** who was killed in police detention in October 1971. Mr Cajee's relentless pursuit to uncover the truth and find justice for his uncle, led to the reopening of the inquest into Ahmed Timol 2017. In the first inquest, in 1972 the record runs into some 1,157 pages and the magistrate handed down a 77 page judgment while, in the 2017 inquest, Judge Mothle handed down a judgment of 130 pages, in which it was held that Ahmed Timol's death *"was brought about by an act of having been pushed from the 10th floor or roof of the John Voster Square building to all to the ground, such act having been committed through dolus eventualis as the form of intent and prima facie amounting to murder"*.³⁵

³⁵ *The re-opened inquest into the death of Ahmed Essop Timol (IQ01/2017) [2017] ZAGPPHC 652 para 335(d)*

- 97 The judgment recognised the monumental task of re-opening the 1972 inquest, given that some 650 pages of the original inquest record had been lost and critical pages of sworn statements were missing.³⁶ These difficulties are likely to arise in other TRC related cases too and valuable lessons may be learned from the Timol inquest for other inquests that are still to be re-opened.
- 98 Since Mr Cajee's dogmatic persistence to force the State's hand to carry out its constitutional obligations, he has assisted the families of other victims to carry out the groundwork necessary to re-open other apartheid-era inquests.
- 99 The affidavit filed by Mr Cajee explained the steps he took since 2001 by approaching the lead investigator at the time, Mr Pigou, of the PCLU in 2003, the PCLU's decision to close the case due to insufficient evidence in 2006 and, finally, the collaborative effort in 2016 with the FHR to campaign for the reopening of the Timol and Aggett inquests.
- 100 Mr Cajee has said that the true intention of the NPA in response to the TRC cases is evidenced in the back-door amnesty policy introduced in 2008. In his view the TRC prosecutors were always guided by PCLU prosecutors, who consisted of a number of DPP special directors. The conduct of the individual prosecutors coupled with the back-door amnesty policy demonstrated the NPAs unwillingness to pursue these cases.
- 101 Mr Cajee said that the marginalisation of TRC cases is glaring from the facts of Rodrigues prosecution:

³⁶ *The re-opened inquest into the death of Ahmed Essop Timol* (above) paras 8-10 and 337-339

- 101.1 Following the inquest decision in October 2017, Mr Cajee convinced the NPA to lay criminal charges against Rodrigues, Els and Sons for the murder of his uncle. While case numbers were issued, **for six months the docket languished** between the PCLU and the DPP Johannesburg division. A new investigator was tasked with the file, a decision was made to charge Rodrigues and he had his first court appearance on 30 July 2018.
- 101.2 **Rodrigues made 19 court appearances between July 2018 and his death on 7 September 2021.**
- 101.3 After appearances in both the high court and the SCA, and a budget of R3,5 million on counsel for the respective parties, **not even one witness' evidence had been led at the time of Rodrigues' death.**
- 101.4 On 20 May 2020 Mr Cajee was informed that the NPA decided not to charge Els or Sons. This decision was taken without interviewing the witnesses who had given testimony at the 2017 inquest and provided affidavits attesting to the torture they had suffered.
- 101.5 Mr Cajee has reviewed the May 2020 decision and, **despite a three-year delay, the review has not been finalised.**
- 102 Mr Cajee has also been involved in three task teams in 2018 and 2020 to maintain pressure on the NPA to pursue TRC investigations and prosecutions and to assist families in doing the investigatory groundwork in respect of their cases. Mr Cajee's affidavit of his experiences in the task teams, reads as follows:

“The team was made-up of a single prosecutor and multiple handpicked investigators. It was evident that investigators were afraid of their seniors. At the last meeting, a senior DPCI official made insensitive remarks about the 101h floor. Police officers were judge, jury and executioners in their own matters. I raised concerns about the involvement of former white officers in investigating their former colleagues and families would not trust them. Despite these challenges, progress was been [sic] made, when I was informed by my legal representatives that Adv [Toerie(?)] Pretorius had asked for my removal citing that I might have a conflict of interest. This was unfounded as my sole purpose was to assist other families. Despite the excellent progress been made, and a training manual created by me for investigating officers on how to conduct these investigations my removal resulted in the task team investigating TRC matters collapsing around April 2018.

...

In mid-September 2020, a task team comprising of senior comrades from the ANC's Luthuli House, FHR and members of the Apartheid-era Victim's Family Group (AVFG) held numerous meetings to pave the way forward. The Minister and Deputy Minister of Justice participated in these meetings. A detailed plan was presented that involved lobbying the support of law students from academic institutions, legal firms in the public domain that included Black Lawyers' Association (BLA), the National Democratic Lawyers Association (NADEL). Again, significant progress was made when the task team collapsed. It was evident to me that pursuing post-TRC prosecution had become political and a business proposition that did not always benefit victims.”

103 Mr Cajee noted the positive commitment of the TRC Component under DNDPP de Kock.

He confirmed that the Apartheid-era Victims Family Group (AVFG) have held meetings with the DPPs in the regional divisions and the investigating officers and prosecutors

where the AVFG members reside (save for the Johannesburg region). The benefit of these meetings, convened at the instance of the DNDPP, is that the AVFG families have direct access and contact with the investigating officers and prosecutors responsible for their respective case/s. We are informed that this approach was not followed by the PCLU.

- 104 A concern raised by Mr Cajee, that is reflective of that raised by Mr Ramagele, concerns the dedicated investigating officers assigned to work on the TRC Component:

"I have been critical of the appointment of former apartheid-era police officers to investigate TRC cases. They are required to investigate their former colleagues and their loyalty will be tested. During the re-opened Dr Neil Aggett Inquest, Investigating Officer Ben Nel testified that he was called "verraier" (sell-out) by his colleagues when investigating TRC cases. These appointments have been done and cannot be reversed. However, their performance must be assessed before renewing their contracts. It must be noted that investigating officers appointed by some attorneys are also former apartheid South African Police Force employees."

- 105 It is during the Rodrigues proceedings that the affidavits of then NDPP Advocate Vusi Pikoli, then head of the PCLU, Advocate Ackermann and Advocates Macadam and Pretorius were filed before the court setting out the depth and extent of alleged political interference in the prosecution of TRC cases. Additional supplementary affidavits were filed in answer to Mr Cajee's affidavit to explain to the court why the NPA was not responsible for the delays in prosecuting Rodrigues.

- 106 The Pikoli affidavit, in relevant part, stated the following:

“8. As a result of my decision to authorise prosecution of a former Commissioner of Police on corruption charges, I was suspended from duty by the then President, Mr T Mbeki on 23 September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the truth and reconciliation commission ... contributed to the decision of President Mbeki to suspend me ...”

14. ... I confirm that there was political interference that effectively barred or delayed investigation and possible prosecution of the cases recommended for prosecution by the TRC, ...” [emphasis added]

107 Importantly, the affidavit records Adv Pikoli’s belief that the Minister of Justice preferred that the deadlock between the NPA and the SAPS, National Intelligence Agency and Department of Justice remain in place.³⁷ This reluctance was attributed to the *“fear of opening the door to prosecutions of ANC members, including government officials”*.³⁸

108 The Pikoli affidavit records that in early 2006, the then Commissioner of Police, Mr J Selebi, objected to Adv Ackermann’s participation in the TRC cases. The affidavit also records a subsequent meeting, later in 2006, to which NDPP Pikoli was called. The meeting was attended by the then Ministers of Social Development, Safety and Security, Defence and Justice and Constitutional Development and the Chief Director in the Office of the President. In the meeting, NDPP Pikoli was warned that any prosecution of any suspects in the Rev. Chikane matter, could open the door to further prosecutions of

³⁷ Pikoli affidavit para 54

³⁸ Pikoli affidavit para 60. The Ackermann affidavit supports and underscores the contents of the Pikoli affidavit.

other ANC members.³⁹ The perpetrators in the Rev. Chikane matter, Adriaan Vlok, Johan Van der Merwe and three others ultimately entered into a plea and sentence agreement in August 2007.⁴⁰

109 The Ackermann affidavit gave a number of additional examples of political interference with the prosecutorial discretion of the NPA. One example is of correspondence dated 6 December 2006, from the Head of the SAPS: Legal Support Division purporting to advise the NPA PCLU Head, Adv Ackermann that before any prosecutorial decisions were made, the multi-departmental committee (or Task Team)⁴¹ would submit a final recommendation to a committee of relevant Directors-General in respect of each case and that this committee of Directors-General would in turn advise the NPA on whom it may or may not prosecute.⁴² Of its face, this is obvious contemporaneous documentary evidence of organs of State seeking to interfere with prosecutorial decision-making contrary to section 179(4) of the Constitution and section 39(1)(b) of the NPA Act, in that the SAPS: Legal Support Division is improperly interfering, hindering or obstructing the NPA (or any member thereof) in the exercise, carrying out or performance of its, his or her powers, duties or functions. The suggestion that another organ of State may usurp the prosecutorial discretion of the NPA or any individual prosecutor is *ultra vires* the powers of the that organ of State or government official, is contrary to section 179(2) of the Constitution and is thus unconstitutional.

³⁹ Pikoli affidavit paras 30-33

⁴⁰ In terms of section 105A of the CPA and in terms of which Vlok and Van der Merwe were sentenced to 10 years imprisonment

⁴¹ The Task Team comprised of members of the NIA, the SAPS, the Department of Justice and representatives of other government departments

⁴² Ackermann affidavit paras 17.1 – 17.3

110 The Pretorius affidavit placed the following before the court.⁴³

110.1 the delays were a result of severe political constraints and interference in the work of the NPA.⁴⁴

110.2 the NPA did not deny that the executive branch of the State took political steps to manage the conduct of criminal investigations and possible prosecutions of the perpetrators of the politically motivated murders. The NPA could not be held responsible for these delays nor was it occasioned by malice on the part of the NPA.⁴⁵

110.3 The secret Amnesty Task Team and the guidelines issued by former President Mbeki are two such examples.⁴⁶

111 The affidavits filed by Messrs Pikoli, Pretorius, Ackermann and Macadam, taken at face value, reveal a concerted political objective to stymie any investigation or prosecution into the TRC cases.

V. THE CALATA AFFIDAVIT SUBMITTED TO THE ZONDO COMMISSION

112 Mr Lukhanyo Calata is the son of Fort Calata, who together with Mathew Goniwe, Siculo Mhlauli, and Sparrow Mkhonto (**the Cradock Four**) were murdered by the apartheid-era security personnel near Gqeberha on 27 June 1985.

⁴³ Pretorius supplementary affidavit dd. 4 February 2019

⁴⁴ Pretorius supplementary affidavit (above) paras 2.3, 2.8 and 2.12

⁴⁵ Pretorius supplementary affidavit (above) para 2.11

⁴⁶ Pretorius supplementary affidavit para 2.15

113 The Calata affidavit was filed before the Zondo Commission on behalf of his family and other victims of apartheid-era crimes.⁴⁷ The principal submission is that these families have been pursuing justice for their loved ones for decades and that all the cases referred by the TRC to the NPA were deliberately suppressed and the perpetrators of the crimes shielded from justice. This, it is said *“was the result of political interference from the highest levels of government which was brought to bear on the NPA and the ... SAPS”*.⁴⁸

114 The affidavit suggests that both the SAPS and the NPA have colluded with political forces, including the ANC, to ensure the deliberate suppression of the several hundred apartheid-era cases. Virtually all the cases handed over to the NPA with the recommendation that they be investigated were abandoned. The affidavit recalls two examples in the form of the work of the Amnesty Task Team and former President Mbeki’s Special Dispensation on Political Pardons. Both initiatives were discontinued only following recourse to the courts.

115 The affidavit draws together the disclosures made in the Pikoli, Ackermann and Macadam affidavits, and the fruitless attempts to persuade DSO Special Director Ledwaba to reconsider his refusal to investigate TRC cases.⁴⁹ The complicity or acquiescence of the NPA and the SAPS in the relentless political interference remains unclear. The Calata affidavit therefore motivates that the only way to bring the political

⁴⁷ This included the sister of Nokuthula Simelane, the brother and nephew of Ahmed Timol, the brother of Mathews Mabelane, the sister and nephew of Neil Aggett, the daughter and son of Imam Haron, and the sister and brother of Hoosen Haffejee.

⁴⁸ Calata affidavit dated 29 August 2019 para 7

⁴⁹ Lukhanyo Calata affidavit dd. 29 August 2019 paras 63.1 to 63.5

interference out into the open and to provide victims' families with the answers they deserve is through a commission of inquiry.

PART 5 – FINDINGS

116 The findings below are categorised under headings that correspond to the TOR. We consider below, a review of the measures adopted by the NPA to deal with the TRC prosecutions and related matters or investigations and prosecutions of TRC related cases, whether the measures put in place are adequate, and if we find that they are inadequate, to suggest what needs to be done to make them fit for purpose. We do give our reasons why we do not, or cannot, appropriately make a finding under section 41(1) of the NPA Act.

I. THE REVIEW OF MEASURES ADOPTED BY THE NPA

117 We find that the measures adopted and implemented in the TRC Component are, **in large part**, adequate.

118 Any review of the structure and work of the TRC Component must of necessity take into account alternative structures that have been mooted and presumably jettisoned by the NPA. An obvious relevant comparison is with the structures adopted by other countries who have needed to set up dedicated investigative and prosecutorial units to focus exclusively on particularly egregious crimes, and mostly international crimes against humanity. It is critical that victims/survivors and families of victims/survivors of

such crimes are able to see accountability and justice being done, particularly for high-level perpetrators.

119 Specialised investigation and prosecution units are not unfamiliar to South Africa, and the PCLU is one such unit established by Presidential Proclamation. Yet, it is precisely the centralised structure of this unit that led to its ineffectiveness and susceptibility to political interference.

120 Whether or not specialised units are more effective is considered in a research report published by the International Centre for Transitional Justice, *Gearing up the fight against Impunity: Dedicated Investigative and Prosecutorial Capacities (ICTJ Report 2022)*.⁵⁰ The report notes that the generally accepted rationale behind specialised units includes:

120.1 the concentration of national efforts under one organisational unit to facilitate coordinated work and the exchange of information and leads;

120.2 ensuring clear lines of responsibility and accountability;

120.3 the skilling up of a team of motivated investigators and prosecutors with the necessary expertise; and

120.4 the fostering of close cooperation between investigators and prosecutors.

⁵⁰ Varney and Zdunczyk, *Gearing up the fight against Impunity: Dedicated Investigative and Prosecutorial Capacities* (March 2022) (“ICTJ Report”)

- 121 It is said⁵¹ that countries in which in fact dedicated prosecution units, have worked well. They include Argentina,⁵² Germany⁵³ and France.⁵⁴ Countries that have left prosecutions to the general national criminal justice system have less impressive track records and this can be observed in, for example, Peru,⁵⁵ the United Kingdom,⁵⁶ Kenya⁵⁷ and Tunisia.⁵⁸
- 122 Of significance to the task before us, is that while a dedicated unit that is adequately resourced may be critical to the effective and successful prosecution of past atrocities, this alone is no guarantee of success *if the political will is absent*. Where a government does not accept as part of the national identity, the importance of accountability and justice for crimes or atrocities that imprint on the national consciousness, accountability through successful prosecutions will not be achieved.
- 123 In the present case, the hybrid structure the NPA has created through the TRC Component:

⁵¹ ICTJ Report, 2022 chapter 2

⁵² Concerning dictatorship-era crimes, particularly that of the disappeared persons, see National Commission on Disappeared Persons, *Nunca Más (Never Again) Report* (1984)

⁵³ The prosecution of Nazi Crimes under the Central Office of the Land Judicial Administration for the Investigation of National Socialist Crimes established in 1958. See also the specialised international crimes unit established in the Federal Prosecutor's Office in 2010 with the primary objective of pursuing universal jurisdiction cases.

⁵⁴ The establishment of the Crimes Against Humanity Unit within the Office of the Prosecutor in 2011 to deal with the crime of impunity following the Rwandan criminals fleeing Rwanda for France after the 1994 genocide.

⁵⁵ Concerning human rights violations and committed during the internal armed conflict between 1980 and 2000 that resulted in some 70,000 fatalities, see the Comisión de la Verdad y la Reconciliación (TRC) Report, 2003

⁵⁶ Concerning the significant human rights violations that took place in Northern Ireland, known as "the Troubles", between 1968 and 1998. In 2005 the Historical Enquiries Team was established as a special unit of the Police Service of Northern Ireland to investigate some 3,269 unsolved murders during the Troubles.

⁵⁷ Concerning the atrocities committed between 1963 and 2008, including the post-election violence of 2007, see the Truth, Justice and Reconciliation Commission Report, May 2013. All efforts to establish a special tribunal or an international crimes division of the Kenyan High Court have failed.

⁵⁸ Concerning the popular uprising, the Révolution de la Dignité in 2010 and 2011, that ended President Bin Ali's authoritarian rule, see the Truth and Dignity Commission, 2014 and the 13 specialised criminal chambers created in 2013 to deal with atrocities committed during this period. No provision was made for the establishment of dedicated investigative or prosecutorial units.

- 123.1 retains the aspect of centralised control under the sole responsibility and authority of DNDPP de Kock;
 - 123.2 ensures that all investigating officers and prosecutors are assigned solely to the TRC investigations and prosecutions and have no other responsibilities;
 - 123.3 requires that each DPP regional division accounts to the national coordinator in writing on a monthly basis on updates for each of the cases in that division;
 - 123.4 convenes regular briefing sessions between the national TRC Component and the DPP regional divisions of investigating officers and prosecutors to discuss areas of particular complexity, problems that arise and are common to a number of cases, and areas that require the intervention of the DNDPP to move issues forward or to liaise with other organs of State to ensure cooperation and assistance.
- 124 We are informed that in this way, prosecutors remain directly accountable to the victims' families and are expected as part of their duties to provide regular updates to the families on the progress of their case. When asked about making the names of all prosecutors public in order to facilitate transparency and accountability over the TRC cases, we were advised that the prosecutors had liaised with all families, had set up appropriate communication channels and no public notice of individual prosecutors was warranted.
- 125 On this point, we are of the view that the TRC Component has overlooked the public significance of the cases they are entrusted to manage. The progress of each of the 134

cases is not only important to the victims' families but is part of the national consciousness for all South African from all walks of life. We also accept that organisations like the AVFG, victims' families and civil society may choose to pool their information, including the names of the prosecutors seized with a case, the state and progress of their investigations, and the extent to which key information or challenges may arise in several cases. The information is thus neither confidential nor secret in the true sense.

126 In adopting this view we do not underestimate the possibility that if all 25 dedicated prosecutors' names were made public, they may be subjected to undue influence, intimidation or threats from PEPs and other interested parties. However, this possibility exists in many high profile cases or cases involving particularly dangerous or financially well-resourced accused persons. It is indeed the role of the NPA to provide support and security to their prosecutors and there is no reason for the TRC Component to be treated differently.

127 We find that the hybrid structure of the TRC Component is satisfactory. Whether it is fit for purpose, and is able to achieve its stated objective, however, is a result not so much of its composition and the checks and balances incorporated therein, a function of whether it is sufficiently resourced, and its investigating officers and prosecutors are sufficiently supported and protected from political interference.

128 We consider below whether the structure and checks and balances that form part of the TRC Component are adequate.

II. WHETHER THE MEASURES ADOPTED BY THE NPA ARE ADEQUATE

129 The *Rodrigues* judgment requires that there must be “public assurance, from both the Executive and the NPA, that the kind of political interference that occurred in the TRC cases will never occur again” and that the NPA “should indicate the measures, including checks and balances that will be put in place to prevent a recurrence of the unacceptable breaches of the Constitution”.⁵⁹

130 In the Timol inquest judgment, Judge Mothle recommended:

*“It is thus the view of this Court that the families whose relatives died in detention, particularly those where the inquest returned a finding of death by suicide, should be assisted, at their initiative, to obtain the records and gather further information with a view to have the initial inquest re-opened. The Human Right Commission, working in consultation with the law enforcements agencies, should be sufficiently resourced to take on this task.”*⁶⁰

131 Judge Mothle suggested that it would be of assistance if the Human Rights Commission and the IPID, for example, are sufficiently resourced to undertake the task of preparatory work, in consultation with the NPA, for the re-opening of such inquests at the request of the families concerned. Against these recommendations, we consider the approach adopted by the NPA.

⁵⁹ *Rodrigues* (above) para 65

⁶⁰ *The re-opened inquest into the death of Ahmed Essop Timol* (IQ01/2017) [2017] ZAGPPHC 652 para 340

- 132 The measures, checks and balances adopted by NPA in establishing the TRC Component and creating the feedback channels on monitoring progress, reporting on decisions taken, and accessing intervention of the DNDPP where necessary, is set out in Part 3 above.
- 133 It appears that one of the most important measures that have been introduced is the provision for monitoring and accountability sessions with the DPPs of each division, the TRC DPCI heads in each division and the prosecutors, sitting together to update one another on approaches adopted and developments made in each of the cases. This has the dual effect of specialised training on prosecutions of historical crimes and sharing of intelligence resources.
- 134 That having been said, we have observed three areas of concern with the TRC Component.
- 135 The **first concern** is the adequacy of the audit of all TRC investigations, prosecutions, and related matters.
- 135.1 Although the TRC referred some 300 cases to the NPA for further investigation and prosecution where amnesty was not applied for or was not granted, no clear account was provided to us regarding **each** of the **approximately 300 cases**.

- 135.2 We also accept as correct the contents of the internal DSO Memorandum to NDPP dated May 2003, which claims to be an audit of all TRC cases prepared for prosecution and which list a total of 48 cases.⁶¹
- 135.3 We are instructed that the TRC Component was initially seized with 114 cases (59 matters under investigation and 55 matters awaiting referral). Following an audit carried out by the TRC national coordinator, the number of cases has now increased to 134 matters. We are advised that it is possible that additional cases will arise as the audit and investigation processes continue.
- 136 The importance of the audit and the total number of cases considered by the TRC Component goes to the heart of the rationale for pursuing these apartheid-era crimes. It is not sufficient to make these cases a priority of the NPA to fast-track certain cases; it is necessary to disclose frankly the reasons why these cases are being investigated and the other 215 cases are no longer being pursued. It should not be left to the public to speculate why 215 apartheid-era atrocities are no longer suitable for or capable of further investigation or prosecution.
- 137 The **second concern** is the pace of the work carried out thus far. The TRC Component was established in September 2021. We are told that the unit requires an additional 5 years to complete its work. Thus far, in the past two years the statistics given to us indicates that in many of the cases, and just over half in the KZN division, the challenges faced by the dedicated investigating officers and prosecutors remain at the very first leg

⁶¹ Internal DSO "Scorpions" Memorandum to NDPP re: Audit of all TRC cases being prepared for Prosecution, Macadam affidavit "RCM2" in the *Rodrigues* case

of the investigation, namely, that of sourcing relevant and necessary information in the case file or docket, which then impacts on access to previous investigation reports, post-mortem reports and previous witness statements. If the documents cannot be located over 22 months, in circumstances where there are full-time investigators and prosecutors on the task, it is inconceivable that these matters will move forward at an expedited rate and be prosecuted over the next five years.

138 There are two possibilities that arise from this inaction. Either this is a glaring indication of incompetence of the dedicated 40 investigating officers and 25 prosecutors who are seized with no other task than to take these matters forward or it is evidence of the deliberate slow pace of work. In our view, the failure to access information, to compel the MPTT to hand over its records, to reconstruct the documentary evidence from the national archive, or obtain duplicate copies of records from other organs of State, such as the NIA or SAPS over almost two years, cannot be placed solely at the door of the inaction of the last decade and a half between 2003 and 2017.

139 Things must move now. There is a plan, and a target, and a structure. The NPA Leadership must insist on results, on outcomes of the investigative process, of prosecutions that are based on solid evidence, on cooperation demanded from all other organs of State. There is no nice way to state this demand that needs to be made from the NPA. The DNDPP must crack the whip.

140 The third concern is whether the TRC Component receives adequate support from other departments and organs of State. This concern does not appear to be solely a question of political interference, nor do we have sufficient information to suggest that

this is the case. What is apparent is that there are clear areas of engagement that individual prosecutors and DPPs of the divisions are unable to effectively manage in a siloed manner. The DNDPP and the national TRC Component must exercise their authority in an unequivocal manner. We note below those entities that have come to our attention and whose participation and support is integral to the success of the work of the TRC Component.

140.1 **The Missing Persons Task Team (MPTT).**⁶² The MPTT was established in 2005 and is responsible for locating the graves of the deceased who were killed during the apartheid era. The MPTT falls under the NPA and used to be located in KZN. The four members of the MPTT now reside in Cape Town and it is unclear whether the members of the MPTT have taken all records and intelligence with them. The importance of accurate and reliable intelligence in the successful prosecution of TRC cases cannot be underestimated. It is imperative that the intelligence held by the MPTT is electronically saved, backed up and made freely available to investigating officers and prosecutors seized with a docket. Electronic records of when and who accessed the records should be retained together with a record of any changes or additions to the information as a necessary security measure. It is unclear whether this valuable research collated and secured over decades is readily available to the TRC Component. Given that the MPTT falls under the auspices of the NPA, we are of the view that there can be few

⁶² The MPTT was established on recommendation of the TRC and is responsible for locating the graves of the deceased under apartheid, exhuming their remains, and identifying the remains for reburial to take place. They have uncovered the remains of 138 missing persons as of 20 April 2018. The above overview is taken from the advice given to us

reasons why the information may not be securely and reliably accessed by the members of the TRC Component.

140.2 **The SAPS Forensic Unit.** The NPA and the SAPS are working collaboratively on the TRC Component and the 40 dedicated investigating officers are testament to the SAPS's support for the TRC work. However, it is apparent that financial consideration and claims of budget constraints have been mooted as reasons for the delay and/or refusal to process evidence until it is clear whether the laboratory tests are to be covered by the SAPS or the NPA TRC Component. Budget allocation concerns of this kind are not unique, but it is important that the national TRC Component is able to deal with this question with urgency and decisiveness. The need for forensic work, including DNA collection and identification of human remains, and scene reconstruction and simulation, are essential to any decision to prosecute. It would be inefficient and counter-productive for issues of this kind to be dealt with at a divisional level.

140.3 **The SAPS.** A related concern is reliance on, and an integral involvement of retired SAPS investigating officers as part of the team of dedicated investigating officers in the TRC Component. While this was explained to us as necessary on account of the vast years of experience and skills these officers hold in investigating cold cases, the reality of TRC investigations is sufficiently distinctive to warrant a considered and different approach. A large number of the cases to be investigated are those of ex-policemen. The decision to bring these individuals back into a central role to spearhead the

investigation is a decision with obvious susceptibility to abuse and stonewalling. We note, for example, the evidence submitted in the Calata affidavit before the Zondo Commission. The affidavit records that in January 2018 civil society activists placed 20 cases before the NPA and the Hawks for investigation. While the Hawks did allocate investigating officers to the cases, it was later discovered that the officers leading the investigations were former senior Security Branch or associates of the Security Branch. Egregiously, the most senior investigating officer was implicated in the torture of a political detainee in the 1980s.⁶³ Investigating officers are instrumental to the calibre of work of the dedicated prosecutors and their integrity and commitment to the work must be steadfast. It is important that the TRC Component reassure the public that the inept conduct of the past is over. It is also important that the SAPS support the investigating officers that have been seconded or brought in as dedicated TRC investigating officers and that they are not instructed to divide their time on other non-TRC criminal investigations.

140.4 **The National Intelligence Agency (NIA).** For successful prosecutions the sharing of intelligence is key. The custodianship of important information and intelligence resources lie not only in the hands of the MPTT and the forensic unit but also in information held by the NIA. To the extent that information is marked classified or sensitive, it is imperative that inter-governmental agencies cooperate in the national agenda of holding to

⁶³ Calata affidavit para 21

account perpetrators of apartheid-era atrocities and assist in identifying remains of victims located at death camps and related sites.

141 In each of the above areas of concern, it is not the integrity or commitment of individuals that is questioned. Rather, we note that the TRC Component operates in a political context in which the executive arm of government has evidently, for two and a half decades, orchestrated itself to thwart any progress on apartheid-era investigations and prosecutions. Despite the dicta in the *Rodrigues* judgment, neither the State nor the SAPS nor the NPA have articulated a concerted national commitment to support the investigation and closure of TRC cases and the prosecution of perpetrators of apartheid-era atrocities.

142 The NPA's current commitment to pursuing investigations and prosecution of persons implicated in TRC related offences is noted and the commitment made by NDPP Advocate Batoji, before the National Assembly Portfolio Committee aforementioned, are evidence of the seriousness of the undertaking to the people of South Africa. In our view, this public undertaking and assumed accountability further justifies the establishment of a commission of inquiry to investigate the narrow question of whether the allegations of political interference between 2003 and 2017 rise to the level of an offence under section 41(1) of the NPA Act.

143 The success of the TRC Component will only be judged finally in five years' time. Any praises the TRC Component receives in the future will be wholly dependent on all organs of State committing the necessary financial and human resources and intelligence records to support the work.

III. THE REASONS FOR NOT MAKING A FINDING UNDER SECTION 41(1) OF THE NPA ACT

144 The affidavits filed by senior members of the NPA and the PCLU point to a conclusion that the NPA was swayed from its constitutional and statutory obligation to ***“exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law”***.⁶⁴

145 It appears that in circumstances where some prosecutors had the courage to stand up and resist political interference, they were removed from their positions or removed from the responsibility of handling certain cases. It is not controversial that those individuals involved in manipulating the criminal justice system and seeking to introduce policy and strategic interventions to prevent the NPA from carrying out its prosecutorial function must be held to account. Our opinion, however, suffering from the limitations of the terms of reference of our brief, and the lack of an investigative arm, and related strictures regrettably, is not a fit for purpose vehicle to carry out that task. Indeed, no opinion without proper investigation, could carry a burden of that kind.

146 The Calata affidavit, for example, filed before the Zondo Commission, names 16 prominent political individuals and officials who held positions between 2003 to 2017 in the Office of President, the Ministry of Justice, the Ministry of Safety and Security, the SAPS, the DSO, the NIA, the Ministry of Defence and the NPA.⁶⁵

⁶⁴ Section 32(1)(a) of the NPA Act

⁶⁵ Calata Affidavit paras 68-73

147 This information is in the public domain and the procedure for a comprehensive investigation is by no means complex. If the NPA is unable to find sufficient basis to investigate and charge any implicated person/s for an offence under section 41(1) of the NPA Act at this stage, it is important that in any commission of inquiry, the implicated individuals are given an opportunity to respond to the grave allegations against them.

148 The commission of inquiry is to be established under section 84(2)(f) of the Constitution,⁶⁶ alternatively, section 1 of the Commissions Act 8 of 1947, as amended. The commission would have a very narrow scope of inquiry centred on section 32(1)(b) read with section 41(1) of the NPA Act – to determine whether the conduct of individuals holding senior political office and positions between the period 2003 and 2017 acted improperly to dissuade, interfere, hinder or obstruct the investigation and/or prosecution of the cases the TRC referred to the NPA in 2003. The terms of reference and powers of the commission would have to:

148.1 authorise the subpoena of individuals who have already submitted evidence on affidavit, such as advocates Pikoli, Ackermann, Macadam and Messrs Calata and Cajee.

148.2 authorise the subpoena of persons implicated in the above mentioned affidavits, including former President Mbeki and the former ministers of justice, police and defence, and the former heads of the NIA, SIU and DSO.

⁶⁶ The section provides, “The President is responsible for appointing commissions of inquiry”

148.3 permit limited cross-examination of witnesses who testify so as not to unduly broaden the ambit of the inquiry.

149 We are making this latter recommendation without the benefit of submissions or evidence from the PEPs and those implicated in the affidavits in our possession. It would be imprudent to express any opinion on whether the interference amounts to a contravention of section 41(1) of the NPA Act. In our view, a commission is the only sensible way forward in order to get to the bottom of why the TRC cases were never investigated or prosecuted with zeal, and whether any one or more PEPs are to be considered for prosecution under section 41(1).

PART 6 – RECOMMENDATIONS

150 We make the following recommendations:

- 150.1 The DNDPP NPS Head and the TRC Component: DPP Special Director must exercise an integral role in the coordination of the investigatory and prosecutorial work carried out in the NPA regional divisions, specifically in areas of common challenges, obstructions and obfuscations by other organs of State.
- 150.2 The NPA should expedite the finalisation of the TRC prosecutor policy and training manual.
- 150.3 The NPA Missing Persons Task Team (MPTT) should be called upon to account for its work, should be called upon to share relevant intelligence and/or information with the investigating officers and prosecutors of the TRC Component.
- 150.4 The NPA and DNDPP de Kock should engage urgently with their counterparts in the SAPS, in order to resolve any impasse concerning the allocation of financial resources for work carried out by the SAPS Forensic Unit, and the streamlining of all authorisations for the payment of the reasonable legal costs of former SAP and Security Branch employees accused of apartheid-era crimes.

- 150.5 The NPA and DNDPP de Kock should engage with their counterparts in the NIA urgently, in order to secure the relevant and necessary intelligence for furthering the investigation and prosecution of TRC related cases.
- 150.6 The NPA should adopt a stance on whether it is prepared to pursue charges of a crime against humanity in respect of apartheid-era atrocities that occurred during the period of the TRC's investigative mandate.
- 150.7 All investigation reports, investigating officer statements and affidavits obtained since 2003 should be uploaded into electronic format, should be text searchable and indexed and should facilitate connections between cases, witnesses, alleged perpetrators and the geographically tagged, for intelligence gathering of so-called death camps and sites of torture and disappearance. The database must be secure and capable of tracing the activity of all users logging onto the database.
- 150.8 The TRC Component should consider establishing an interactive website dedicated to the sharing of expertise on TRC investigations and prosecutions. The website would act as a central repository of publicly available information, such as pleadings filed in prosecution, progress updates on matters finalised, human remains that have been successfully identified by the MPTT, an indication of which TRC investigations have been closed or referred for prosecution and disclose the official contact details for the national office of the TRC Component.

150.9 The NPA must pursue the establishment of an independent commission of inquiry under either section 84(2)(f) of the Constitution, or the Commissions Act, 1947 to investigate the extent of, and rationale behind, the political interference with the NPA between the period 2003 and 2017.

150.9.1 The inquiry should take into consideration the multiple state entities involved, including the executive, the SAPS, South African intelligence agencies and politically exposed (connected) persons (PEPs) and specifically the 16 individuals named in the Calata affidavit filed before the Zondo Commission.

150.9.2 It is important that any inquiry is public and is empowered with sufficient authority to carry out the investigation and is clothed with powers of search and seizure and is able to subpoena people of interest.

150.9.3 The inquiry must be empowered to make recommendations of possible prosecution under section 41(1) of the NPA Act.

30 June 2023

Chambers, Sandton

Johannesburg

ANNEXURE A

CHRONOLOGY OF MATERIAL EVENTS

	DATE	EVENT	REFERENCE
1	21 March 2003	Truth and Reconciliation Commission Final Report, emphasising the need for a bold prosecution policy.	https://www.justice.gov.za/trc/report/
2	November 2004 – December 2005	The National Prosecution Authority (NPA) did not prosecute apartheid era cases on the basis that a new policy was to be developed for TRC prosecutions and related matters	
3	March 2003	The Priority Crimes Litigation Unit (PCLU) was established through Presidential Proclamation and is located in the Office of the National Director of Public Prosecutions (NDPP). The PCLU has the mandate to manage and direct the investigation and prosecution of crimes contemplated in the Rome Statute, 2002 and serious international and national crimes against the State.	Presidential Proclamation, 2003; Adv. Ackermann affidavit in Simelane case no. 3554/2015 (see below)
4	May 2003	Internal DSO “Scorpions” Memorandum to NDPP, audit of all TRC cases being prepared for prosecution (8 cases listed; 7 additional cases under evaluation; 12 cases of high interest; 9 cases in which public representations had been made; 8 cases that are in the process of being closed; and 4 cases on hold for conspiracy to commit crimes outside the RSA)	Macadam affidavit “RCM2” in the Rodrigues case
5	15 July 2003	Adv Ledwaba of the DSO issued internal memorandum stating that the SAPS are to take over the investigation of all TRC cases handled by the Macadam. The “files must be closed off and all the material given to the PCLU...”. The DSO did not appoint investigators to the TRC cases.	Adv Pretorius and Macadam affidavits (RCM3”) in the Rodrigues case.
6	February 2004	The Director General: Justice and Constitutional Development chaired the Amnesty Task Team to look consider the options of amnesty for perpetrators of TRC atrocities who have made a full disclosure	Report: Amnesty Task Team, Calata affidavit annexure “LC1”.
7	1 February 2005	Adv Pikoli appointed NDPP (previously DG: Department of Justice)	
8	2005	NPA’s Prosecution Policy, specifically para 8A and Appendix I, which provided for the possibility of an alternative amnesty regime	
		Establishment of the NPA: Missing Person Task Team (MPTT)	

	DATE	EVENT	REFERENCE
10	October 2006	PCLU Internal Memorandum, Audit of Cases emanating from TRC Process (4 cases finalised in court; 25 cases closed by PCLU plus an additional 80 cases against members of the liberation movement closed by SAPS; and 22 potential prosecutions identified by PCLU)	Macadam affidavit annexure "RCM12" in the Rodrigues case
12	8 February 2007	Letter from Minister of Justice Mabandla to NDPP Pikoli re "TRC Matters" in which the Minister expressed surprise at the media reports that the NPA will go ahead with prosecutions of TRC matters	Pikoli affidavit annexure "VVP2"
14	15 February 2007	NPA Secret Internal Memorandum to Minister Mabandla re Prosecution of Offences emanating from conflicts of the Past: Interpretation of Prosecution Policy and Guidelines	Macadam affidavit annexure "RCM17" in the Rodrigues case
16	August 2007	Plea and sentencing agreement in the Rev. Chikane matter under section 105A of the CPA on behalf of Messrs A. Vlok, J. Van der Merwe and three others.	
18	23 September 2007	Suspension of NDPP Pikoli. Adv Mpshe was appointed as the acting NDPP.	
19	11 October 2007	Report of the Amnesty Task Team	Calata affidavit annexure "LC1"
20	2007 - 2009	Former President Mbeki established a Special Dispensation to process applications for pardons by offenders who had not participated in the TRC amnesty process but who had claimed their offences were politically motivated. A multi-party Pardons Reference Group (PRG) was established to consider applications for pardons for politically motivated crimes committed before June 1999.	<i>CSVR & Others v President of the RSA & Others</i> , Case no. 15320/09, North Gauteng High Court
21	December 2008	The high court declared the 2005 amendments to the Prosecution Policy be inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid.	<i>Nkadimeng & Oths v NDPP and Others</i> [2008] ZAGPHC 422
22	February 2010	In <i>Albutt</i> , Ngcobo CJ held at para 61, that "the principles and the spirit that inspired and underpinned the TRC amnesty process must inform the special dispensation process whose twin objectives are nation-building and national reconciliation."	<i>Albutt v Centre for the Study of Violence and Reconciliation & Oths</i> 2010 (3) SA 293 (CC)
23	May 2015	Following the delays in the investigation, the Simelane family filed a court application seeking a finalisation of the investigation into Nokuthula Simelane and the NPA's prosecutorial decision. The supporting affidavits of Adv V Pikoli and Adv A Ackermann provide accounts of political interference, by people including then Minister of Justice Mabandla and the circumstances on which the investigation was stopped.	<i>Nkadimeng v NDPP and others</i> , 3554/2015 (application to compel)

	DATE	EVENT	REFERENCE
24	October 2017	Ahmed Timol inquest judgment, (IQ01/2017). The Judge recommended that the former security branch officers Els and Sons be prosecuted for perjury.	The re-opened inquest into the death of Ahmed Essop Timol [2017] ZAGPPHC 652
25	June 2018	Coetzee judgment handed down. The SAPS were ordered to pay the legal fees of the former Security Branch officers accused of the murder of Nokuthula Simelane in 1983. The judgment was not appealed.	<i>Coetzee & Others v Minister of Police & Others</i> , 2018
26	3 April 2019	NDPP decision that all TRC matters to be migrated from PCLU to relevant provincial DPPs.	
27	2019	The Zondo Commission decided to accept representations regarding the political interference in the prosecution of TRC cases and related matters as a form of State Capture.	Representations by Lukhanyo Calata & accompanying chronology
28	2019	Establishment of the Apartheid-era Victims Family Group (AVFG), with the Our primary objective was for families to have their own voices and not to be only represented by legal counsels.	
29	February 2019	Former TRC Commissioners call on President Ramaphosa to offer an apology to apartheid-era victims and to appoint a commission of inquiry into the political inference in the investigation and prosecution of TRC cases	https://www.scribd.com/document/398985821/TRC-members-write-letter-to-Ramaphosa#from_embed
30	August 2019	Minister of Justice released a press statement announcing that the inquests into the deaths of Aggett and Haffejee would be reopened.	
31	2019 - 2021	Following his indictment in 2018, Joao Rodrigues filed an application for a permanent stay of his prosecution. In 2019 the Full Bench of the High Court (and the SCA in 2021) dismissed his application. The Macadam affidavit (dd. November 2018) recalls meetings with the Directorate of Special Operations (DSO), in which he was informed that the DSO would not investigate any TRC cases. In the affidavit, Macadam confirmed that a moratorium had been placed on all TRC investigations and prosecutions. In 2017, Macadam discovered a number of documents further indicating political interference, including a secret memorandum by Adv Pikoli to the Minister of Justice Mabandla.	<i>Rodrigues v National Director of Public Prosecutions and Others</i> 2019 (2) SACR 251 (GJ); <i>Rodrigues v National Director of Public Prosecutions and Others</i> 2021 (2) SACR 333 (SCA)
32	June 2021	NPA and the DPCI issue press statement concerning the new approach to investigations and prosecutions of the cases arising from the TRC process	NPA press statement dd 27.06.2021

	DATE	EVENT	REFERENCE
33	July 2021	The application to compel in the Cradock 4 matter, following the NPA's failed to make a prosecutorial decision.	Case No. 3S447/21
		The Justice Portfolio Committee requested that the NDPP provides a progress on the TRC prosecutions and related matters to the Committee every 6 months.	Parliamentary Monitoring Group (PMG) Reports
37	August 2021	Reopened inquest, Hoosen Haffejee .	
38	6 September 2021	NDPP establishes separate portfolio within the Office of the DNDPP, the TRC Component.	
39	2022	Reopened inquest, Abdullah Haron .	Case No. I01/2022
40	4 March 2022	Neil Aggett inquest judgment, 445/2019; 139/1985. Allegations of intimidation made by the investigating officer, Nel, from his colleagues in DPCI.	Re-opened Inquest into the Death of Dr Neil Hudson Aggett [2022] ZAGPJHC 110
41	May 2022	The question of the payment of legal costs re-emerged in the trial proceedings in the COSAS 4 and Caiphus Nyoka matters. The high court confirmed the judgment in <i>Coetzee</i> above.	
42	June 2022	NDPP Batoyi informed the Justice Portfolio Committee that the PCLU was no longer in existence.	
43	October 2022	NPA and DPCI issued a joint statement that formal inquests will be held in respect of the deaths of Ntombikayise Kubheka, Musawenkosi Phewa, Zamukwenzani Bright Mlobeli/Sokhulu, and Jameson Ngoloyi Mngomezulu	NPA press statement dd 24.10.2022

Annexure B

LIST OF PRIMARY DOCUMENTS AND AFFIDAVITS CONSIDERED

In addition to the briefing sessions and consultations carried, we were provided with following documents, reports and affidavits to consider. The most relevant of which are listed below.

1. Affidavits:

- 1.1. Adv Pikoli dated 6 May 2015
- 1.2. Adv Ackermann dated 7 May 2015
- 1.3. Adv Pretorius dated 4 February 2019
- 1.4. Mr Calata dated 29 August 2019
- 1.5. Mr Cajee dated 6 June 2023

2. Documents and Reports:

- 2.1. TRC Matters presentation to Adv Ntsebeza SC and team, 6 March 2023
- 2.2. NPA Presentation to Parliament Portfolio Committee on TRC Cases, 1 June 2022
- 2.3. NPA TRC Report: February 2023 (Confidential)
- 2.4. Ministerial Memorandum from NDPP Batohi to Minister Lamola, 5 October 2022
- 2.5. KZN DPP, TRC accountability briefing session outline, April 2023 (Confidential)
- 2.6. DPP KZN, various reports on TRC Matters April 2023 (Confidential)

ADDENDUM TO THE OPINION

1. Following the finalising of the Opinion, we received correspondence from the Client raising a number of concerns with certain facts recorded.
2. We appreciate the opportunity to clarify our Opinion and to address the concerns raised by the NPA and the MPTT. We present this addendum to the Opinion in which we set out the revisions made. We trust that this will clarify what has been interpreted as an unfair indictment against the work of the MPTT.

3. **Ad par 9.3 (p 6)**

- 3.1. This paragraph forms part of the executive summary and is copied directly from our recommendations. We do not respond to this concern here but rather at the appropriate paragraph in the body of the Opinion.

4. **Ad para 9 (p 11)**

- 4.1. We are advised that the statement "*between September 2003 and 2017 there was not a single prosecution of a TRC related matter*" is incorrect. We noted three cases that were finalised between 2003 and 2017 and the sentence has been corrected.

- a) *S v Ferdi Barnard*: This case was finalised in 1998, ie before 2003.
- b) *S v Eugene de Kock*: This case was finalised in 1997, ie before 2003 (see Opinion p 11, fn 7)
- c) *S v Gideon Niewoudt and two others*: Charged in 2004, died in 2005
- d) *S v Wouter Basson*: This is noted in the Opinion p 11 footnote 7
- e) *S v Magnus Malan and others*: This case was finalised in 1998, ie before 2003
- f) *S v Kwezi Ngoma and others*: The date on which this case was finalised could not be confirmed
- g) *S v Aron Tyani and another*: This case was finalised in 2005.
- h) *S v Eugene Terblance*: This case was finalised in 2003.
- i) *S v Blani*: This case was finalised in 2005

5. Ad para 67.2 (p 35)

5.1. This paragraph lists the concerns raised by the TRC Component.

5.2. The MPTT has requested that this sentence be redacted from the Opinion. There is no reason that the particular concern should be redacted from the Opinion when it accurately records the views of the TRC Component. The sentence, therefore, is retained in the Opinion.

6. Ad para 70 (p 36)

6.1. The MPTT raises this paragraph as a concern but no context is provided as to what aspect of the paragraph is incorrect or misleading. The MPTT has stated that its work goes beyond the work of the TRC Component and stated that its records do not relate to intelligence records but rather to *"mortuary records and cemetery records, post-mortems, forensic reports, with a small subset of LCRC (formerly PVAK) photographs and dockets in respect of missing persons. The MPTT faces exactly the same challenges regarding tracing of old documents as the current TRC investigators"*.

6.2. The paragraph does not suggest that the MPTT hold classified, national intelligence information. The reference is only to "intelligence" or information about inquests.

6.3. There is no reason for the redaction or removal of this paragraph.

7. Ad para 140.1 (p 43)

7.1. This paragraph is said to *"contain[s] seriously erroneous information regarding the composition and location of the MPTT and the nature of its records. The overwhelming bulk of its records are not relevant for TRC investigations and therefore electronic scanning will not assist their work and would take an enormous amount of time. This will be a future project of historical importance. Relevant records have been shared"*.

7.2. To contextualise this paragraph, the team has included a new footnote 62 clarifying the MPTT and its mandate as obtained from the NPA records. The following text is included:

“The MPTT was established in 2005 and is responsible for locating the graves of the deceased under apartheid, exhuming their remains, and identifying the remains for reburial to take place. They have uncovered the remains of 138 missing persons as of 20 April 2018. The above overview is taken from the advice given to us.”

8. Ad para 150.3 (p 70)

8.1. The MPTT states that the recommendation is inaccurate, that it holds no “intelligence” information and that the recommendation does not specify to whom the MPTT is to account. The MPTT emphasised that, *“Any document that has relevance to a TRC investigation that we are made aware of is shared with the relevant investigator or prosecutor”*.

8.2. The NPA requested the Opinion, the MPTT is a component of the NPA, and therefore the MPTT should account for its work to the NPA. To the extent that the MPTT has already accounted for its work by the time that this Opinion was finalised and had already convened meetings with the KZN TRC Component to resolve any misunderstandings and concerns of that unit, the recommendation may be considered to be satisfied.

8.3. To provide additional clarity, the team has inserted the words, *“and/or information”* into para 150.3 after the word “intelligence”.