

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

SAI
IAC 11

CASE NUMBER: 76755/18

In the matter between:

JOAO RODRIGUES

Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS OF SOUTH AFRICA

First Respondent

MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES

Second Respondent

THE MINISTER OF POLICE

Third Respondent

SUPPORTING AFFIDAVIT ON BEHALF OF FIRST RESPONDENT

I, the undersigned,

RAYMOND CHRISTOPHER MACADAM,

do hereby make oath and state that:

1.

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

2.

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



2

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

3.

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

4.

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

5.

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

6.

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

7.

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

8.

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

9.



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

10.

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

11.

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

12.

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

13.

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

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

14.

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

15.

The block contains several handwritten signatures and initials. On the left, there is a signature that appears to be 'J.M.G.'. To its right, there are two more signatures, one of which is a large, stylized signature that could be interpreted as 'J.M.G.' or similar. The handwriting is in black ink on a white background.

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

16.

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

17.

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

18.

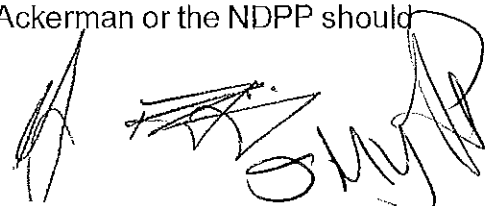
In terms of the DSO's legislative mandate it was for the Special Director of the DSO and not the Head of the DSO to issue declarations to investigate certain matters. At that stage the Special Director was Adv MG Ledwaba (Ledwaba).

19.

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

20.

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



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

21.

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

22.

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

23.

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

24.

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

25.

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

26.

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

27.



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

28.

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

29.

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

30.

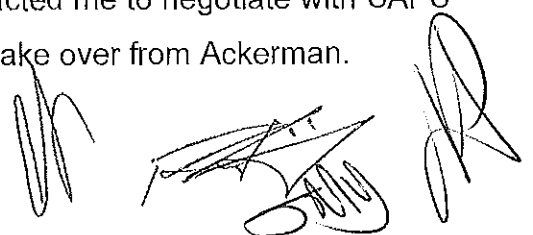
Adv Pikoli (Pikoli) was appointed as the NDPP. I was informed by Ackerman that Pikoli had set up an inter-departmental task team which would advise Pikoli on making decisions in TRC matters. Ackerman and Ramaite were the NPA representatives in the task team. On one or two occasions I stood in for Ackerman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

31.

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

32.

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

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33.

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

34.

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

35.

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

36.

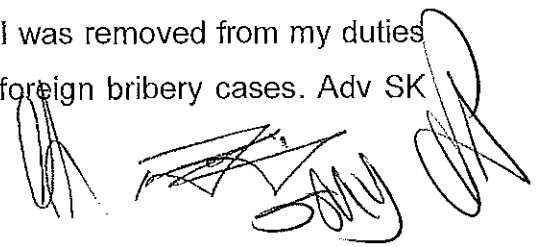
As a result thereof Senior Superintendent Bester was appointed to oversee the investigations of the ten (10) cases I had identified.

37.

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

38.

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



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

39.

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

40.

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

41.

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

42.

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

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

43.

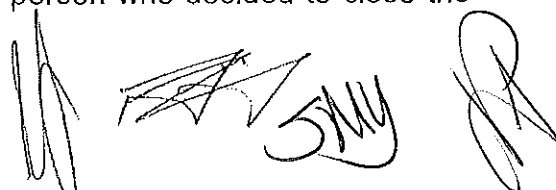
Subsequently I was informed by Pretorius that a decision had been taken to re-open the **Timol**-inquest. While the inquest was in progress Pretorius gave me a copy of a letter which I had written on 25 February 2004 to Mr Cajee, the nephew of **Mr Timol**. This letter is attached hereto as **Annexure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

44.

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

45.

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



46.

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

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

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

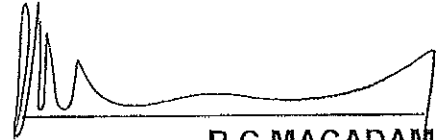
47.

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

48.

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


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


R C MACADAM

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

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

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


_____: (RANK)
COMMISSIONER OF OATHS

Full names: **ALBERTUS MARTHINUS MATHYS FLYNN**

Rank: **COLONEL**

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

er/timol



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

INTERNAL MEMORANDUM

SCORPIONS

P. O. Box 752,
PRETORIA
0001

VGM Building
Hartley St.
Weavind Park
0001
Pretoria
South Africa

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

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

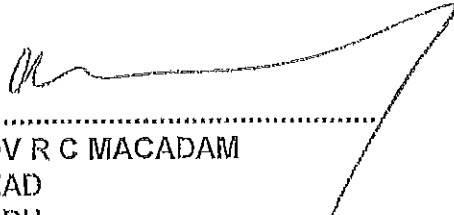
*Copy to book
5/5/03*

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

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4. The following investigation focus areas are identified:

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



.....
ADV R C MACADAM
HEAD
SNPU



2


RCM 2

sl/ audit trc cases



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

INTERNAL MEMORANDUM

TO: NDPP REF: TRC GENERAL

CC: HEAD DSO
HEAD OPERATIONS
ADV ACKERMANN

FROM: HEAD SNPU

DATE: 15 MAY 2003

RE: AUDIT OF TRC CASES

SCORPIONS

P. O. Box 752,
SILVERTON
0001

VGM Building
Hartley St.
Weavind Park
0001
Pretoria
South Africa

A. CASES BEING PREPARED FOR PROSECUTIONS:

1. MOTHERWELL BOMBING

(a) Leg One

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

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

(b) Leg Two

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

(c) Leg Three

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

2. **BRIAN NGULUNGA**

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

3. **PEBCO 3**

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

4. **WAUCHOPE**

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

5. **POWELL**

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

6. **NQUTU ARMS CACHE**

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

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

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B. POTENTIAL FURTHER PROSECUTIONS ARISING FROM THE ABOVE

1. Murder of the PEBCO 3

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

2. Cradock 4

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

C. NEW CASES BEING EVALUATED FOR PROSECUTION PURPOSES

1. Murder of the COSAS 4

2. Murder of Askari Strongman Sambo

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

4. Murder of Askari Dan Maboto

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

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

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

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

1. Murder of Victoria Mxenge

2. Kidnapping, torture and murder of Ntombi Khubeka

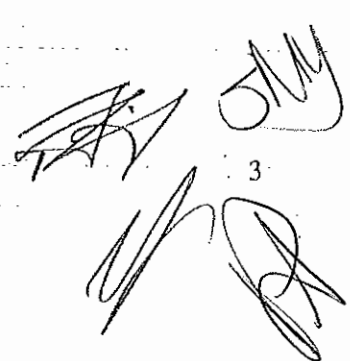
3. Kidnapping, torture and murder of Nokutulu Simelane

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

5. Uninvestigated allegations against SAP General Bassie Smit

6. Ciskei Coup De AT

7. Transkei Coup De AT



3

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

E. REPRESENTATIONS TO INVESTIGATE SPECIFIC CASES

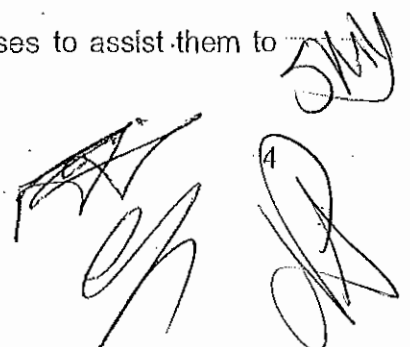
1. Death in detention Ahmed Timol
2. Murder of UDF activist Nelson Sifhole
3. Murder of Pro Jack
4. Murder of IFP families in Table Mountain by A. M. Zulu
5. Murder of ANC supporter Batondo
6. False Conviction of Skouldies
7. Assault on A. Bult
8. Vlakplaas member Piet Snyders
9. Murder of Castro Khumalo

F. CASES IN THE PROCESS OF BEING CLOSED

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

G. ASSISTANCE TO OTHER AGENCIES

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



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H. REPARATIONS RELATED ACTIVITIES

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

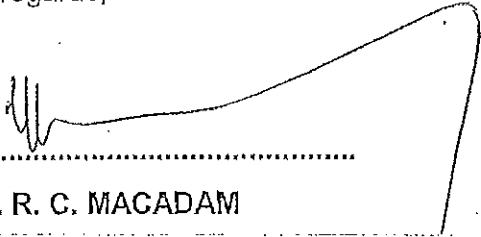
I. INVESTIGATION PUT ON HOLD PENDING THE APPEAL IN THE BASSON CASE RELATING TO JURISDICTION FOR CONSPIRACY TO COMMIT CRIMES OUTSIDE THE RSA

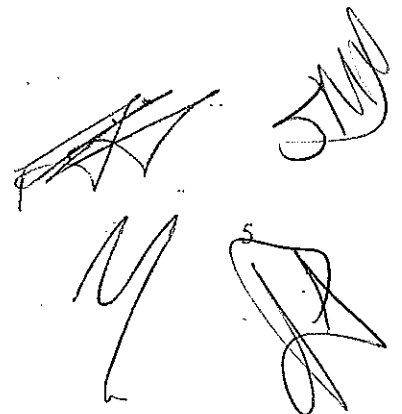
1. Murder of Anton Lubauwski
2. Lesotho Raid
3. Botswana Raid
4. Swaziland Raid

J. POLICY CONSIDERATIONS

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

Kind regards,


.....
ADV. R. C. MACADAM
HEAD
SNPU



RCM3

Investigations

P. O. Box 752,
PRETORIA
0001

Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

VGM Building
Hartley St.
Weavind Park
0001
Pretoria
South Africa

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

INTERNAL MEMORANDUM

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

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

(i) TRC cases

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

(ii) Operation Sunflower

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

(iii) **Operation Black Widow**

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

(iv) **Operation Final Curtain**

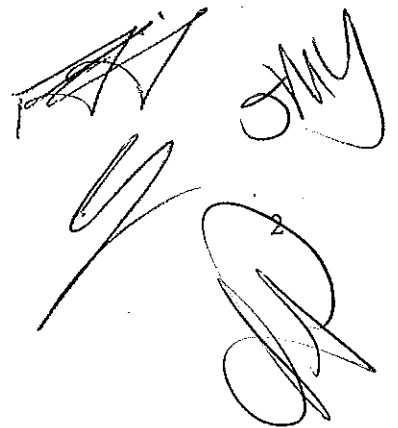
SAPS must continue with the investigations under the direction of the prosecutor arranged by Adv **ACKERMANN**. You may give limited assistance to SAPS and the prosecutor on specific aspects when necessary.

(v) **Foreign Mercenaries**

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

Adv M G Ledwaba
HEAD : OPERATIONS

/tp

The bottom right corner of the page contains several handwritten signatures and initials in black ink. There are four distinct marks: a large, stylized signature at the top left of the group, a signature below it, a signature to the right of the top-left one, and a large, circular signature at the bottom right.

RCM 4

G.P.-S. 002-0222

SAP 21

SUID-AFRIKAANSE POLISIEDIENS



SOUTH AFRICAN POLICE SERVICE

Privatsak/Private Bag X302

Verwysing Reference	3/9/9/1(93)
Navrae Enquiries	Div Comm De Bear
Telefoon Telephone	(012) 393 2191
Faksnommer Fax number	(012) 393 2193

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

2003-09-26

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

Dear Advocate Ackermann

INVESTIGATION OF TRC CASES

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

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

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

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

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

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

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

Kind regards.



DIVISIONAL COMMISSIONER: DETECTIVE SERVICE
JF DE BEER



RCM 5

er/memo

Office of the Head
Priority Crimes Litigation Unit
HEADQUARTERS

INTERNAL MEMORANDUM

TO: ADV GEOPH LEDWABA

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

FROM: ADV A R ACKERMANN SC

SUBJECT: INVESTIGATION OF TRC CASES BY THE DSO

DATE: 11 NOVEMBER 2003

P. O. Box 1511
SILVERTON
PRETORIA
0127

VGM Building
123 Westlake Str
Weavind Park
0184

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



Dear Geoph

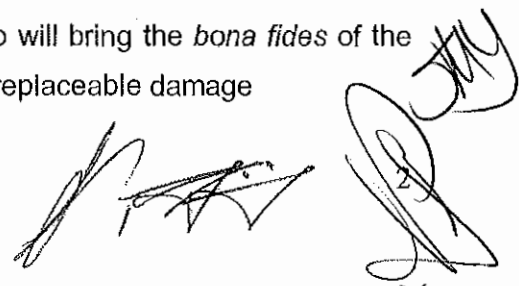
1. In the light of current developments, I am constrained to document the history of the above saga.
- i) In 2001 the NDPP decided that the DSO was responsible for the investigation and prosecution of the above cases. Both Advocates Sonn and McCarthy made a number of public statements creating an impression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

[Handwritten signatures and initials]

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

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

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

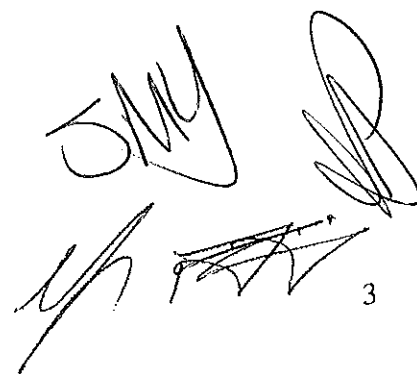


Since I do not have any investigative capacity, I am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases and to sign the declarations in terms of Section 28(1)(b). This chapter in our country's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

Kind regards



ADV AR ACKERMANN SC
SPECIAL DIRECTOR
HEAD: PCLU



RC 176

Helena Zwart (H)

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

Thanda

This is for your information/attention.

Kind regards

S Mzinyathi

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

Hi

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

Regards

Willie

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

Dear Willie

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

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

Kind regards

Chris Macadam

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

Hallo Helena,

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

Regards,

Colla

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

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

Dear Colla

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

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

Kind regards

Chris Macadam

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www.npa.gov.za/ReadContent458.aspx



Helena Zwart (H)

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

Dagsê Helena

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

Ek sal die nuwe datum met jou kommunikeer.

Groete

Welma

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

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

Beste Welma

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

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

Baie dankie en groete!

Helena Zwart
NPA

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Helena Zwart (H)

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

Good day Mr Macadam,

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

Thank you

Secretary : Pumla N Mphothulo
The Head : Directorate for Priority Crime Investigations
6th Floor Koedoe Building
Tel : 012 393 5463
Fax : 012 393 5079
Cell : 082 778 3664
E-mail : (internal) DPCI : Head
(external) dpci.head@saps.org.za

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

Good morning,

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

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

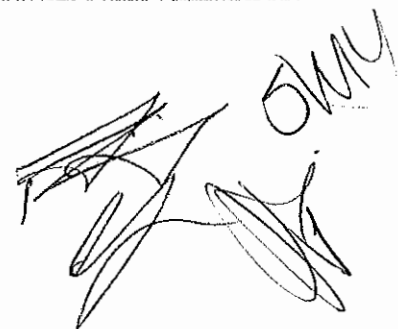
Regards,

Colla

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

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

Dear Colla



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

Kind regards

Chris Macadam

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

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Handwritten signature and initials in the bottom right corner of the page. The initials appear to be 'SMY' and there is a large, stylized signature below them.

RCM7

Priority Crimes Litigation Unit



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

HEAD OFFICE

Tel: +27 12 845-6000

Fax: +27 12 845-6337

Victoria & Griffiths
Mxenge Building
11 Mestlake Avenue
Weavind Park
Pretoria
0184

18 January 2010

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

Dear Commissioner Lebeya

INVESTIGATION BY SAPS OF CRIMINAL OFFENCES ARISING FROM THE TRC

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

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

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



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

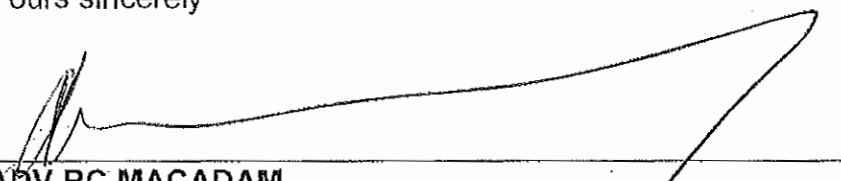
"Together beating the drum for service delivery"

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

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

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

Yours sincerely



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



Handwritten initials and signatures, including "JMY" and "CP".

Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

Private Bag X752,
PRETORIA
0001

VGM Building
Hartley St.
Weavind Park
0001
Pretoria
South Africa

INTERNAL MEMORANDUM

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

FROM : ADV RC MACADAM
SDDPP: PCLU

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

SUBJECT : OPINION: REOPENING TIMOL/AGGETT
INQUESTS

REF : 10/3/1/PCLU

Tel: X126431

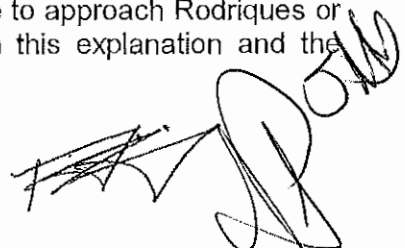
Dear Torie

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

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

6.1 Achmed Timol

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



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

6.2 Neil Aggett

6.2.1 Dr Aggett died in police custody in Johannesburg in 1982 after a lengthy period of detention and interrogation by the Security Branch.

6.2.2 The then Attorney General declined to institute a prosecution and a formal inquest was held before a Regional Court Magistrate in Johannesburg. He handed down a verdict to the effect that the deceased had committed suicide and that the police were not responsible.

6.2.3 In 2013, a group of Dr Aggett's friends submitted a petition to the President and Minister of Justice, calling for the prosecution of the police officials responsible for his death.

6.2.4 As a result of this petition, the PCLU requested the DPCI to open an enquiry.

7. The status of the PCLU/DPCI investigations:

7.1 Achmed Timol (I/O Captain Ben Nel)

7.1.1 It has been established that the original inquest and docket are not available.

7.1.2 A copy of the inquest donated by the family attorney to Wits has been downloaded. It is missing 652 pages, which include the evidence and cross-examination of all the police officers involved. However, on the remaining evidence it was possible to establish who the witnesses were and what the issues in dispute were.

7.1.3 Captain Nel has been requested to canvas the availability of all the witnesses, i.e. the police officials, medical doctors and members of the deceased's family.

7.1.4 It has been established that other detainees who were never called as witnesses could possibly shed light on the matter. The first is a Mr Mohammed Essop, who was arrested at the same time as Timol. The second is Quentin Jardine, whose identity, it is alleged, led to the deceased deciding to commit suicide. The third is a Mr Pahad, whom it is alleged was arrested arising from Timol's interrogation. Ms Fullard has been tasked to uplift the detention files from DoJ&CD so that Captain Nel can conduct the necessary investigations in this regard.

7.1.5 It has been established that the TRC appointed a journalist, Piers Pigou, as an investigator and he dealt with the Timol matter. He has indicated that he is available for an interview when he returns to the country. As a matter of interest, it was in fact he who approached Sergeant Rodrigues and not Ivor Powell. His notes reflect that Rodrigues stood by his original statement. It may therefore be that Timol's nephew confused the two journalists and what Rodrigues said.

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

7.2 Neil Aggett (I/O Col Sam Mahlangu)

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

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

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

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

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

Kind regards

ADV RC MACADAM

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RCM 9

Office of the National Director of Public Prosecutions



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

25 February 2004

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

A/INV/5/03/TRC

Imtiaz Cajee
P O Box 1888
GARSFONTEIN EAST
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Dear Sir

INVESTIGATION INTO TIMOL CASE

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

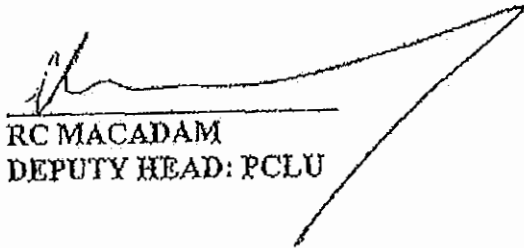
The investigations produced negative results. I confirm that you furnish me with the following documents:

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

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

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

Kind regards


RC MACADAM
DEPUTY HEAD: PCLU





/Z56 forms

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INTERNAL MEMORANDUM

TO: DR MS RAMAITE
CC: ADV VP PIKOLI
CC: ADV K PILLAY
FROM: ADV AR ACKERMANN SC
SUBJECT: 1. DETAILS OF TRC CASES CLOSED BY THE PCLU
2. REAPPOINTMENT OF SENIOR SUPER-INTENDENT BRITZ
DATE: 30 OCTOBER 2006

1. On 25 October 2006, the PCLU was requested by the "TRC Committee" to furnish more details regarding all the cases which the PCLU had declined to prosecute. The PCLU was also requested to furnish the background which led to the prosecution of one Biani.
2. TRC CASES CLOSED
 - 2.1 Death in detention Ahmed Timol
 - 2.1.1 This death in detention matter goes back to 1971.
 - 2.1.2 The nephew of the deceased requested that an allegation that one of the police officers who had interrogated the deceased had confessed to a journalist be investigated.
 - 2.1.3 The DSO traced and interviewed the journalist who denied the allegation. There was no other evidence to prove that the

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

2.1.4 The matter was therefore closed.

2.2 Death in detention of Steve Biko

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

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

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

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

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

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

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

2.3 Carl Niehaus

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

2.3.2 Mr Niehaus was consulted and did not desire prosecution.

2.3.3 File closed.

2.4 Skoulides

2.4.1 Skoulides had been convicted of murder.

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

2.4.3 The file was closed.



2.5 Nelson Sithole

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

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

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

2.5.4 File closed.

2.6 Pro Jack

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

2.6.2 The TRC asked that this matter be looked into.

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

2.7 AM Zulu

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

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

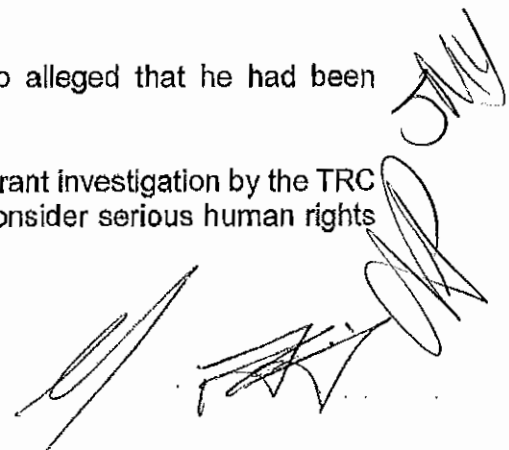
2.7.3 The convicted prisoner was an unreliable witness in his amnesty application and there was no other acceptable evidence implicating the persons whom he alleged had taken part in the attack with him.

2.7.4 The file was therefore closed.

2.8 Bult

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

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

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abuses.

2.8.3 The file was therefore closed.

2.9 Castro Khumalo

2.9.1 The victims requested that a prosecution be instituted.

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

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

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

2.10 Winnie Mandela

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

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

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

2.10.4 The file was therefore closed.

2.11 Ermelo Black Cats

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

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

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

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

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

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

2.12 Chadwick

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

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

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

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

2.12.5 The Acting NDPP confirmed this decision.

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

2.13 Anton Lubowski

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

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

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

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

2.14 Ciskei coup d'etat

2.14.1 The original TRC unit was looking into this matter.

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

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

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

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

2.15 General Basie Smit

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

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

2.15.3 The file was therefore closed.

2.16 S v Bongani Wana

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

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

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

2.16.4 The matter was then closed.

2.17 Representation by Mr SM Mavuya

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

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

2.18 Representation by Mpho Masemola

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

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

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

2.19. Representation by Mr N Dlamini

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

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

2.20 Thabo Armando Sithole

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

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

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

2.21 Murder of Michael Mcetywa

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

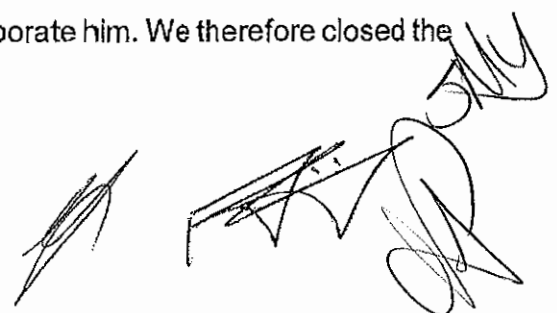
2.21.2 A man called Mavuso is currently serving 25 years for the murder.

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

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

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

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



2.22 Smit murders

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

2.22.2 Insufficient evidence to apply for extradition.

2.22.3 Matter closed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.27 S v Blani

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

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

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

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

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

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

2.27.7 Both deceased were assaulted and killed inside the house.

2.27.8 The group ransacked the house and removed certain items.

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

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

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- 2.27.11 A warrant for his arrest was obtained but not executed, because he could not be traced. This warrant was never cancelled by SAPS.
- 2.27.12 As a result of Commissioner Fivaz's instruction of 7 November 1996, namely that all cases be referred to Dr D'Oliveira's Unit, the docket came into possession of Britz. The investigation diary of the docket confirms that on 16 July 2003, Director Nel received it for further investigation. Director Nel established that certain suspects were still outstanding on warrants and thereafter traced them. He thereafter furnished the Serious & Violent Crimes Unit in Port Elizabeth with copies of the witness statements with instructions to trace the suspects and witnesses.
- 2.27.13 In 2003, Britz referred the docket to the PCLU, requesting a prosecution of Blani on the basis that he had been traced by SAPS and had not applied for amnesty. This case is reflected as case No 266 in the SAPS register.
- 2.27.14 On 25 January 2005, the accused pleaded guilty and received a partially suspended term of imprisonment.

2.28 The reappointment of Senior Superintendent Britz

- 2.28.1 At its last meeting, the Committee was informed by Assistant Commissioner Jacobs that Senior Superintendent Britz would be reappointed to investigate the dockets in possession of SAPS.
- 2.28.2 I wish to express my concern at this. Britz was a former member of the Security Branch, who, prior to the PCLU being involved with TRC cases, assisted the DPP: Pretoria with cases involving the Liberation Movement.
- 2.28.3 Former Police Commissioner General van der Merwe had formed an organization entitled "*The Foundation for Equality before the Law*" which was intended to ensure that no further prosecutions of Security Branch members would take place.
- 2.28.4 When I and my staff were appointed to take over the TRC cases in the DPP Office: Pretoria, we gained the firm impression that Britz was not only very sympathetic towards this organization, but had regular contact with General van der Merwe.
- 2.28.5 In particular, Britz tried to persuade me and my Deputy on numerous occasions that there was a provable case of terrorism against President Mbeki arising from the landmine campaign. This was raised in the context that were Security Branch members to be prosecuted, the President would also have to be charged. It was clear that he was against prosecutions of Security Branch members. Despite his claims, he could never produce a docket implicating the President. At one stage, he informed me that the docket was with General van der Merwe and his legal advisor. This raises a very serious question as to how an official police docket could be retained by General van der Merwe, who was not entitled to possess police material after his retirement from SAPS.

- 2.28.6 When the issue of prosecuting Security Branch members for the Pebco 3 incident was raised with their lawyer, he immediately indicated that he was preparing to submit a docket calling for the prosecution of the President. I can only draw the inference that sharing of information took place between Britz and Van der Merwe.
- 2.28.7 The issue of the prosecution of the President was raised at the highest level of Government and resulted in enquiries being conducted by Minister Maduna as well as members of the President's office. All parties were satisfied that the NPA had no intention of prosecuting the President. In fact, Mr Ngcuka had been provided with a report that no such case had been established in the TRC records.
- 2.28.8 This highly embarrassing incident caused Mr Ngcuka to instruct that Britz vacate the offices of the DPP and that all the relevant SAPS dockets be removed. Britz was subsequently relocated in the SAPS Crimes Against the State Unit. He requested the PCLU to provide written confirmation of the fact that the decision had been taken not to prosecute the President. When he received the letter, he tried to persuade the PCLU to reconsider its decision.
- 2.28.9 I therefore believe that Britz lacks the necessary objectivity to be of assistance to the Committee and that his reappointment may lead to further controversy as well as the potential leaking of information to General van der Merwe.



ADV AR ACKERMANN SC



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

In the matter of:

Case Number: 01/17

RE-OPENED INQUEST: MR AHMED TIMOL

AFFIDAVIT OF ADV. RAYMOND CHRISTOPHER MACADAM

1.

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

2.

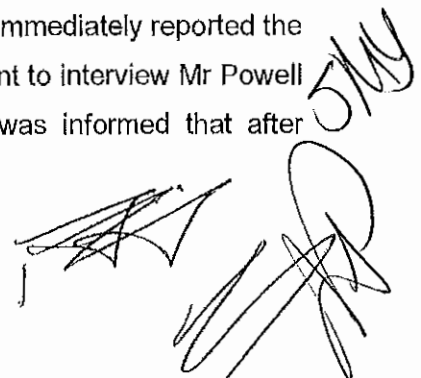
Since 2003 I have been a member of the PCLU.

3.

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

4.

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



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

5.

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

6.

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

7.

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

8.

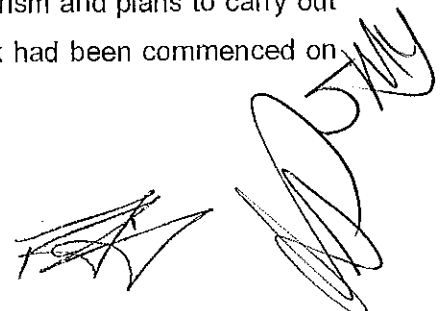
At a later stage I was again instructed to deal with TRC cases. The investigation of these matters was now the responsibility of the DPCI. In late 2015 I looked into this matter and was of the view that it should be investigated. I therefore requested the DPCI to open an investigation into the matter.

9.

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

10.

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



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

DEPONENT

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

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

COMMISSIONER OF OATHS

FULL NAME: _____

BUSINESS ADDRESS:

CAPACITY: _____

AREA: _____



RC 1712

/Z56 forms

Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

P. O. Box 752,
PRETORIA
0001

VGM Building
Hartley St.
Weavind Park
0001
Pretoria
South Africa



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

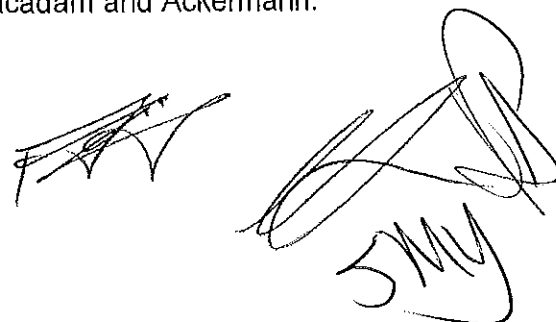
1. HISTORICAL BACKGROUND

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

Tel: (012) 845 6474

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

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

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

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

2. CASES FINALISED IN COURT

2.1 S v Khwezi Ngoma and Others (Mhaga)

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

2.2 S v Aron Tyani & Another (Mhaga)

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

2.3 S v Eugène Terre'blanche (Ackermann)

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

2.4 S v Blani (Macadam and Ackermann)

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

3. MATTERS CLOSED BY PCLU

3.1 Death in detention Ahmed Timol

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

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

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3.1.3 The matter was therefore closed.

3.2 Death in detention of Steve Biko

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

3.3 Carl Niehaus (Macadam)

3.3.1 Victim tortured during detention.

3.3.2 Victim does not desire prosecution.

3.3.3 File closed.

3.4 Skoulides (Macadam)

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

3.4.2 No evidence to substantiate this claim.

3.4.3 File closed.

3.5 Nelson Sithole (Macadam)

Closed – no evidence as to perpetrators.

3.6 Pro Jack (Macadam)

Closed – no reliable evidence as to perpetrators.

3.7 AM Zulu (Macadam)

No admissible evidence arising from TRC.

3.8 Bult (Macadam)

Offence not serious – assault common.

3.9 Castro Khumalo (Macadam)

Matter was referred to Missing Persons' Task Team.

3.10 Winnie Mandela (Macadam)

No reliable evidence.



3.11 Ermelo Black Cats (Macadam)

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

3.12 Chadwick (Macadam)

Extradition request withdrawn because of a lack of evidence.

3.13 Anton Lubowski (Macadam)

No evidence.

3.14 Ciskei coup d'etat (Macadam)

No evidence.

3.15 General Basie Smit (Macadam)

No evidence.

3.16 S v Bongani Wana (Mhaga)

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

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

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

3.16.4 The matter was then closed.

3.17 Representation by Mr SM Mavuya (Mhaga)

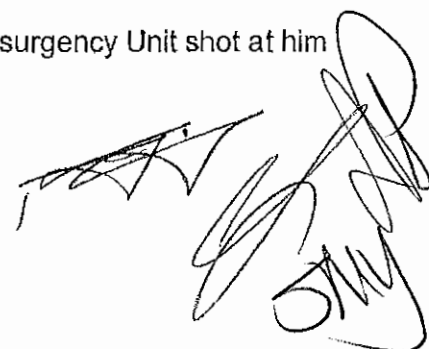
3.17.1 Mr Mavuya claimed to have been an informer during 1984 and was applying for amnesty and requested protection from members of his community.

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

3.18 Representation by Mpho Masemola (Mhaga)

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

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



during a march he had organised. We however informed him that in as far as the torture in 1985 the matter has since prescribed and in respect of 1991 shooting there was no evidence to support his allegations as he bases his accusations on assumptions.

3.19 Representation by Mr N Dlamini (Mhaga)

- 3.19.1 Mr Dlamini had made allegations against Swaziland police whom he claimed to have sold out some MK cadres during 1985 to 1986. Unfortunately he could not supply us with any proof apart from a newspaper article from Times of Swaziland which we did not receive.
- 3.19.2 Apart from lack of substance in his allegations the NPA does not have jurisdiction in crime committed in Swaziland. He could not indicate to us his interest in the matter when requested to do so.

3.20 Thabo Armando Sithole (Ackermann)

- 3.20.1 The mother of Thabo requested the NPA to investigate death of his son who died in police custody after being arrested for robbery in 1976.
- 3.20.2 They received a report from Greytown police that he committed suicide by hanging himself.
- 3.20.3 The PCLU could not find any records of the inquest and the police in Greytown police station could not assist us as they could not find any records of Thabo though they remember that he was indeed detained there. The PCLU therefore decided to close the file as there was no further action contemplated

3.21 Murder of Michael Mcetywa (Mhaga)

- 3.21.1 The matter arises from a representation by Zolile Mcetywa who is the son of the deceased who was an ANC chairperson in Pongola and murdered in 1993.
- 3.21.2 A man called Mavuso is currently serving 25 years for the murder.
- 3.21.3 During his amnesty application which was refused, he implicated a number of IFP leaders.
- 3.21.4 The family of the deceased requested the PCLU to consider prosecution of the implicated IFP leaders.
- 3.21.5 After reading various documents and consulting with Mavuso it transpired that he is the only witness who can be used but he demanded that the NPA secures his release before he can testify against the IFP leaders.
- 3.21.6 Apart from his evidence there was nothing to corroborate him. We therefore closed the file as there was no further action contemplated.

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3.22 Smit murders (Dr Pretorius)

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

3.22.2 Insufficient evidence to apply for extradition.

3.22.3 Matter closed.

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

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

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

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

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

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

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

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

4. POTENTIAL PROSECUTIONS IDENTIFIED BY PCLU

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

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

4.1.2 In February 2006, NDPP authorized prosecution.

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

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

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



4.2 Pebco 3 (Ackermann)

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

4.2.2 The matter is currently on review.

4.2.3 Next court appearance of accused is August 2007.

4.3 Cradock 4 (Ackermann)

4.3.1 Potential prosecution.

4.3.2 Legal obstacles.

4.3.3 Extensive investigations required.

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

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

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

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

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

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

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

4.5.3 Docket in possession of PCLU.

4.6 Cosas Four (Ackermann)

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

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

4.6.3 The PCLU is not in possession of the docket.

4.7 Murder of Askari Strongman Sambo

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

4.8 Matter of SAP General Engelbrecht

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

4.9 Death of George Mashele and Lilian Magosha (Mhaga)

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

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

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

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

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

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

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

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

4.11 Lethlapa Mphahlele (Heidelberg Tavern and St James Massacre)

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

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

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

to prosecute or not.

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

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

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

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

4.13 Moss Morudu (kidnapping and murder) 1987

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

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

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

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

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

4.14 Kidnapping and murder of Betty Boom, Mashiya and Sejamane

The perpetrators were refused amnesty by the TRC.

4.15 Kidnapping and murder of Mbulelo Ngono

The perpetrators were refused amnesty by the TRC

4.16 Gaberone raid

The perpetrators were refused amnesty by the TRC

4.17 Maseru raid (General Johan van der Merwe implicated)

The perpetrators were refused amnesty by the TRC

4.18 Samora Machel (Dr Pretorius)

This matter was reopened in 2005.

4.19 Philip Powell (Macadam/Ackermann)

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

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

4.19.3 Representations are awaited.

4.20 Victoria Mxenge (Macadam)

Allegations of an amnesty applicant must be investigated.

4.21 George Wauschope (Macadam)

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

4.21.2 He absconded and took up exile in Zimbabwe.

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

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

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

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

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

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

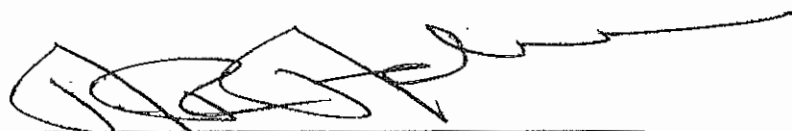
4.21.9 The case was referred to the DPP: Johannesburg, who has in turn requested SAPS to conduct investigations.

4.21.10 These investigations are in progress.



4.22 Eugène de Kock

- 4.22.1 De Kock's legal representative has indicated that he has laid a wide ranging number of charges with SAPS relating to matters which were not put before the TRC or in respect of which false testimony was presented to the TRC.
- 4.22.2 These allegations must be considered insofar as they are relevant to the TRC processes.



ADV AR ACKERMANN SC



RCM 13

ANNEXURE "B"

REPUBLIC OF SOUTH AFRICA

INDEMNITY BILL

(Second Draft)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B - 2003]

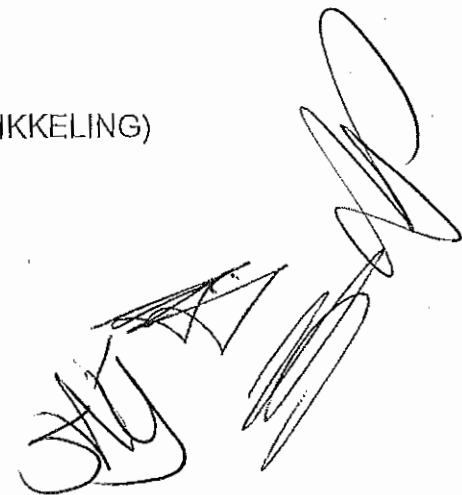
REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP VRYWARING

(Tweede Konsep)

(MINISTER VIR JUSTISIE EN STAATKUNIDGE ONTWIKKELING)

[W - 2003]



BILL

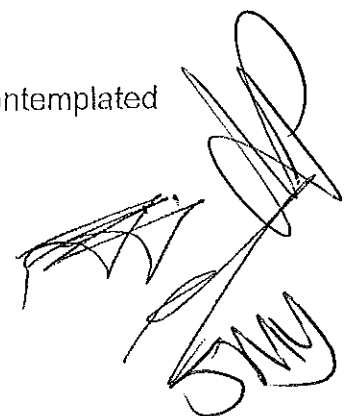
To provide for the granting of indemnity by the President to persons who make full disclosure of all relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the period from 1 March 1960 to the cut-off date; for the said purpose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

PREAMBLE

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

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

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

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TERMS OF REFERENCE OF THE AMNESTY TASK TEAM

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

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

DRAFT

Leon Robinson
0824582621

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RCM15

AMNESTY TASK TEAM

FURTHER REPORT

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FURTHER REPORT: AMNESTY TASK TEAM

1. Background Information

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

2. Discussion

2.1 The establishment of a Departmental Task Team

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

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

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

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

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

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

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

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

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

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

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

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

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

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

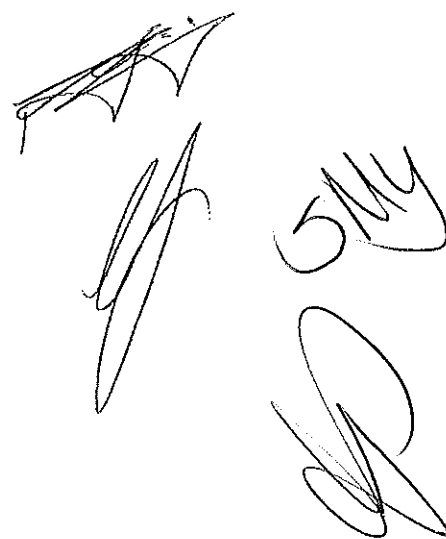
2.6 Ad paragraph 2.1(e): The involvement of the International Criminal Court

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

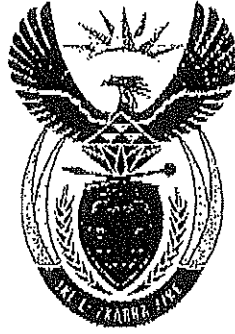
2.7 Ad paragraph 2.1(e): Setting a time line for the Task Team to complete its work

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

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MINISTRY: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

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

8 February 2007

Dear Adv Pikoli

RE: TRC MATTERS

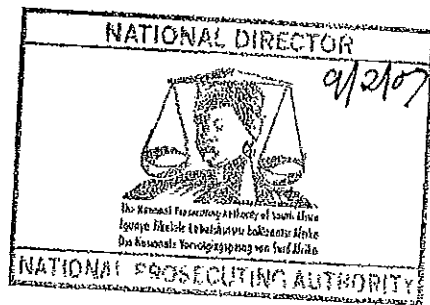
Our discussion in the above matter on Tuesday 6 February 2007 refers.

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

I trust that you find the above in order.

With warm regards

MRS B S MABANDLA
MINISTER





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

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

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

- (a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;
 - (b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and
- 5/11/07
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- (b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

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

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

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

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



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

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

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

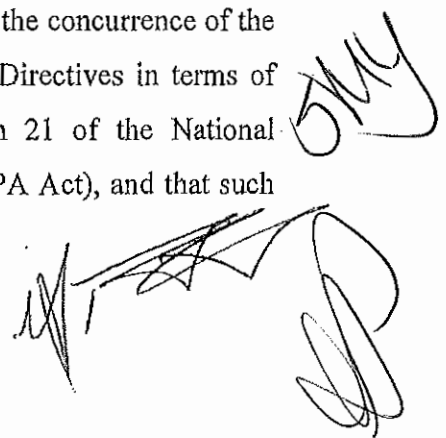
(i) *the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;*

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

2.2 Background relating to Amended Prosecution Policy

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

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



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

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

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

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

- (a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).
- (b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.²
- (c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.³
- (d) It is important to note that the President made it clear that—

¹ Attached hereto as Annexure "A".

² See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.

³ See paragraph A.1(c) and (d) of Appendix A.

- (i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the normal legal process;
- (ii) in order to reach a well-considered decision, the NPA should work together with the Intelligence Agencies, which include the NIA and the SAPS;
- (iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be in accordance with standard and normal execution of justice;
- (iv) such agreements should be in accordance with the NPA's prosecution mandate; and
- (v) such agreements should be in accordance with existing legislation.

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

- (a) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson CCT 30/03.*)⁴
- (b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).
- (c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.
- (d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

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

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

- (a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;
- (b) the PCLU "shall be assisted in the execution of its duties" by a senior designated official from the following State departments or other components of the NPA:
 - (i) The National Intelligence Agency.
 - (ii) The Detective Division of the South African Police Service.
 - (iii) The Department of Justice & Constitutional Development.
 - (iv) The Directorate of Special Operations.

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

- (a) the decision whether to prosecute or not vests in the prosecuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;
- (b) such decision must be exercised in accordance with the Constitution and existing legislation;
- (c) the abovementioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

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

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

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

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

- (a) the terms of reference of the Task Team were explained and agreed to;
- (b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

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

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

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

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

- the National Commissioner is of the opinion that it must be established what disclosures were made...";
- "the National Commissioner is of the opinion that such process need to be followed in each case...".

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

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken."
- "In my view a comprehensive report...should be discussed by the Directors-General".

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

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

5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy⁵, the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

⁵ See paragraph B.6 of Appendix A.

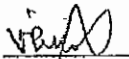
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5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.

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

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

 15.02.2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development



