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DATE: 24 JUNE 2018

**RE: PROPOSED AMENDMENT TO STANDING DISPOSAL AUTHORITY
PERTAINING TO FINALISED INQUEST DOCUMENTS IN
POSSESSION OF DEPARTMENT OF JUSTICE
AMENDMENT TO ANNEXURE “B” OF THE CODE “ARCHIVES”
YOUR REFERENCE 7/2/3 ARCHIVES A10 DATED 13 JUNE 1986**

A INTRODUCTION

- 1 On 12 October 2017, legal history was made in this country, when Judge B Mothle handed down judgment into the landmark case of the re-opened inquest into the death of Ahmed Essop Timol (Timol). The original inquest was held in 1972. The verdict returned by the magistrate in 1972 was that Timol committed suicide and no person alive was responsible for his death.
- 2 The family of Timol refused to accept this finding. For 45 years the family, in particular the author of this document, searched for the truth surrounding the death of Timol.
- 3 Numerous challenges were experienced in the four and a half decades that it took before the further evidence required for the re-opening in terms of the Inquest Act, 58 of 1959 was obtained and presented to the National Director of Public Prosecutions (NDPP). This evidence had to be secured by private investigation and due to efforts of the author of this document. This despite the fact that correspondence dated 06/12/2003 was directed to the National Director of Public Prosecutions, Mr Bulelani Ngcuka and for information to Minister of Safety and Security, Mr. Charles Nqakula; Intelligence Dr. Nonceba Sisulu and in the Presidency, Mr. Essop Pahad – appealing for the

matter to be re-investigated. After submissions were made to the National Director of Public Prosecutions (NDPP) Advocate SK Abrahams, then referred the matter to the Minister of Justice and Correctional Services for the re-opening of the inquest and on 26 June 2017 the inquest into the death was formally re-opened.

4 Judge Mothle was appointed and the re-opening of the inquest in the High Court of South Africa was the first of its kind by a Superior Court presided by a Judge of the High Court.

5 On 12 October 2017, Judge Mothle found, amongst other things, that:

“(d) Timol’s death was brought about by an act of having being pushed from the 10th floor or roof of the John Vorster Square building to fall to the ground, such act having been committed through dolus eventualis as the form of intent and prima facie amounting to murder. There is prima facie evidence implicating Gloy and van Niekerk who were on duty and interrogating Timol at the time that he was pushed to fall to his death. Rodrigues, on his own version, participated in the cover up to conceal the crime of murder as an accessory after the fact, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution.”

B PURPOSE OF THIS DOCUMENT:

6 The purpose of this document is simple. To lobby policy makers and government to preserve ALL inquest records, in particular those relating to

persons who died in police custody under the rule of the Apartheid Government.

C PROPOSAL:

- 7 Presently, the destruction of all finalised inquest records are prescribed by Department of Justice. All inquest proceedings are destroyed after a fixed period of time as set out in Annexure A, a directive from Department of Justice dated 13 June 1986. It is requested that this policy directive be amended as it is archaic and outdated. Further, due to the nature and extent of atrocities committed by the Apartheid Government and members of the special branch, important evidence contained in the inquest files are destroyed. This has allowed murderers to escape the sanctions of their actions.

D THE APPLICABLE LAW:

- 8 Inquest proceedings are regulated by the Inquests Act 58 of 1959. The purpose of holding an inquest is to investigate the circumstances of death apparently occurring from other than natural causes and where the prosecutor has declined to prosecute.
- 9 Section 17A (1) of the Act was inserted into the original text as an amendment by section 1 of Act 145 of 1992. It provides that:

“The Minister may, on the recommendation of the Attorney General concerned, **at any time after the determination of an inquest and if it deems it necessary in the interest of justice**, request a Judge President of

a provincial division of the Supreme Court of South Africa to **re-open** that inquest, whereupon the Judge thus designated shall re-open such inquest. “

10 At par 338 of the judgment (attached as per Annexure B) of Judge Mothe in the Timol inquest, the judge remarked as follows:

“One of the drawbacks with this re-opened inquest is the fact that the re-opening came late in the day when most of the members of the security branch involved with the interrogation of Timol and the investigation of Timol’s death had passed on. In addition, the court had to do with the mysterious disappearance of part of the 1972 inquest record that dealt with the evidence of the police officials in court, and in particular page 3 of the affidavit of Rodrigues, which according to the magistrate’s judgment explained how Timol fell. Consequently the key police witnesses who would have been called to testify again in regard to the events preceding the fall were not available. It is therefore important for the future that the **state ensures that the records of inquests are preserved, considering the fact that the Act (Inquest Act) provides for re-opening without any limitation as to the time.**”

E CONFLICT:

11 It is my respectful submission that if the Act provides for the re-opening of an inquest **without any limitation of time**, then the regulations and policies governing the destruction of records in possession of Department of Justice, is in direct conflict with the Act.

12 In this regard, regard is to be held to paragraph 70, on page 30 of the judgment in which the following is quoted:

“Captain Nel is the investigating officer in this re-opened investigation and was tasked to accumulate the evidence and records of the 1972 inquest proceedings. He testified that he downloaded a copy of the inquest from the University of Witwatersrand historical paper’s website. He also contacted the South African National Archives who confirmed that the inquest records were not available. The archives supplied a document from the **Department of Justice dated 13 August 1986 authorising the destruction of old inquest registers and files which included that of Timol. He also proceeded to Johannesburg Magistrates court where he was informed that the records were not available.**”

F CHALLENGES:

13 Judge Mothle correctly noted the following salient challenges which I have identified and summarised:

13.1 “It is apposite to state up front that his 2017 inquest started **off with a limp**. Firstly, the inquest relates to an incident that occurred 46 years ago.”

13.2 Secondly, the records of the 1972 **inquest were incomplete**. Even though the 1972 inquest ran up to 1 157 pages. The court only received portions of the vital record (from the Timol family lawyers) which commenced from page 653 up to the end. Mysteriously missing from the record were pages 1 to 652, which consisted mainly of the oral evidence of the police witnesses, the originals or copies of the relevant photographs and other exhibits. As a result the 2017 re-opened inquest

had to rely on the magistrate’s summary as well as oral evidence of Rodrigues delivered in person in the 2017 proceedings.

G SUBMISSIONS:

14 Section 17A empowers a Director of Public Prosecutions to make a recommendation to the Minister for the re –opening of the initial inquest, by a designated judge, who can also take further evidence iro a specific matter as in section 17(2) of the Act.

15 Section 17A of the act empowers the judge to exercise the provisions of section 17(2) and to take further evidence generally in respect of any matter, in effect for the purposes of the reconsideration of the entire evidence including ***on the existing record***.

16 Most importantly, Section 17A (3) obligates the Judge to record any finding that differs from a **finding of the initial inquest** as well as the respect in which it refers.

17 In paragraph 27, page 9 of the judgment, the court notes the following:

“finally, the re-opened inquest is neither an appeal nor a review of the initial inquest. In both these instances, a court is **confined to the record of the initial inquest and only empowered to admit new evidence when a case has been made out for such**. The re-opened inquest requires a re-consideration of the **entire evidence considered by the initial inquest** as well as the evidence that was available at the time of the death, which for one or other reason was not an could not be considered during the initial inquest

proceedings, and has become available. **This is the information which would justify a re-opening.**”

18 It is respectfully submitted that the crux of the relevant legislation is that it is vitally important that the **record of the initial inquest be available** in order for it to be regarded as **evidence considered in its totality**. It places the court in a difficult position of all the records pertaining to an inquest are destroyed.

H BACKGROUND TO THE TIMOL INQUEST, ITS CHALLENGES AND WHY INQUEST RECORDS MATTER:

19 On 26 June 2017, Judge B Mothle’s opening address on page 4 at paragraph 11 recorded the following:

“Considering the conspectus of the documents that have been submitted thus far, there is no doubt in my mind that during these proceedings we, as South Africans are about to enter a door that will rekindle painful memories. A door that invites us to embark on a journey which will cause all of us to confront a **sordid part of our history**. The door will only close once the truth has been revealed.”

20 On 22 October 1971, at 23h00 my beloved uncle, Ahmed Essop Timol, a respected educator at Roodepoort Indian School was arrested, together with Salim Essop, (now Professor Salim Essop), at a roadblock on Fuel Road, in Coronationville.

21 On searching the vehicle driven by Timol, prohibited pamphlets of the banned SACP were found in the boot of the vehicle. After being arrested, they were

both taken to Newlands police station. At a certain point, both were taken to the notorious John Vorster Square.

22 Timol was interrogated repeatedly and continuously, by more than 14 police officers, who took turned from the time of detention on 22 October 1971, until his death on 27 October 1971. Approximately 20 police officials all deposed to affidavits to the effect that during the time of his arrest, detention and subsequent death, Timol was never assaulted nor subjected to any form of ill treatment.

23 The version by Rodrigues, the only surviving member of the South African Police Force (as it then was) was that Timol was under interrogation by two officers at that stage namely Captain JH Gloy and Captain JZ van Niekerk. Important information was allegedly passed onto both the officers and Rodrigues who just happened to be present at the strictly controlled security branch offices on the tenth floor, was asked to guard Timol. Timol was sitting at a table and asked Rodrigues to go the toilet and at some stage during this request, Timol made for the window and jumped to his death.

24 The importance of preserving the inquest record became apparent when the re-opening into the inquest began.

25 There was little doubt that Timol had been tortured. He was not the first detainee to die under interrogation of the security branch and neither would he be the last. It was not unheard of for the apartheid government to resort to extreme measures to “deal” with activists who were opposed to their oppressive laws. Under the guise of protecting the South African people, the security branch abducted, tortured and murdered hundreds of activists. The apartheid government passed security legislation to ensure that the security branch were a law unto themselves. They could repeatedly, without a warrant, enter your residence, your workplace, search, ransack and seize any document which they considered prohibited. The effects of their criminal

reverberated throughout families and did not stop with the detainee. They would harass, detain and torture whoever they deemed necessary to impose their oppressive laws upon.

26 Families of detainees murdered in custody and under interrogation of members of the security branch saw no justice from courts. Judge Mothle on page 19 of his judgment at paragraph 47 notes:

“The evidence further reveals the role of some carefully selected prosecutors, magistrates and medical doctors who were complicit in the declaration of the so-called war against those opposed to the apartheid order. These persons betrayed and demeaned their respective oaths of office by participating in inquest proceedings that became a shame, concealing the atrocities committed by the security branch and ensuring that the judicial system finds “No one is to blame.”

27 The learned judge also in paragraph 61 of page 24 of his judgement held the following:

“In the absence of that portion of the record of proceedings dealing with the evidence by the police, the 2017 re-opened inquest was **deprived** of the benefit of the record of the police officers evidence in chief, cross examination and re-examination. Consequently, the 2017 re-opened inquest was constrained to deal with the version as deposed to in the sworn statements by each of the police officials and summarised by the magistrate in his judgment.”

28 During my quest to uncover the truth of what really happened to my uncle, I have confronted many challenges inter alia but not limited to the following:

29 Access to apartheid-era records from government departments (SAPS- for the docket and files of the police officers, Department of Justice- for Inquest records, National Archives- for records on all detained with my Uncle and State Security Agency- for intelligence gathering documentation) were challenging. Unnecessary red tape hindered the process of obtaining justice. The position as it stands remains unchanged, if not more challenging, since the outcome of the Timol matter.

30 Investigation, which should have been the executive function of the police services, was poorly and shoddily executed. For example, the security officer who according to the 1972 inquest version was in the room with Uncle Ahmed, was traced by me and not the investigating officer. We were all under the impression that all the police officials concerned were deceased. Had it not being for the information passed on to me, it might well have been that the person concerned would have remained undetected because he had also changed his name.

31 Important witness statements were never obtained. This includes that of Dr Saleem Essop, who was in the vehicle when they were stopped at a police roadblock. It is shocking that the witness directly linked to the matter remained unapproached for a statement for over forty years.

32 Evidence which was contained in court documents such as the inquest proceedings, was destroyed.

33 Had thorough investigations been undertaken and important evidence secured, the persons who were directly involved in my uncle's murder would have been brought to book before they passed.

34 Red tape and bureaucracy stone-walled my every effort to obtain files on members of the security branch. They would have provided vital evidence to the role played by individuals in my uncle's death.

35 Despite a finding by the specially convened Truth and Reconciliation Commission that certain incidents where police officers were directly implicated in suspicious deaths of detainees were identified, not a single matter has been placed on the court role for prosecution in the last 24 years.

36 Despite an allegedly specially constituted unit to investigate these types of crimes, not a single case has been successfully prosecuted, let alone proceeded in a criminal court.

I AN UNTENABLE POSITION IN OUR COUNTRY AS IT STANDS

37 Judge Mothle in his judgment on page 127, at paragraph 339 - 343, remarked as follows:

"The inquest also revealed that there are many more families who are seeking closure on the unanswered questions concerning the death of their relative in detention. They, like all families whose relatives died in detention, need healing. They need closure.

It is thus the view of this court that the families whose relatives died in detention, particularly those where the Inquest returned a finding of death of suicide, should be assisted, at their initiative, to obtain records and gather further information, with a view to have the initial inquest re-opened. The Human Rights Commission, working in consultation with the law enforcement agencies, should be sufficiently resourced to take on this task.

It will be remiss of this Court not to address an issue on which Bizos's evidence put a spotlight. This is the impropriety role played by some in the magistracy, prosecuting authorities and medical experts in the past inquest proceedings. Bizos' evidence reveals the role of some of these public officials in being complicit in exonerating members of the security branch from the crimes that committed. The 1972 inquest into the death of Timol is one such example. From the outset, it had to take a court order to allow Timol's family and their lawyers access to case documents, before the inquest commenced. The evidence of the 1972 inquest further demonstrates how the prosecution made no effort to obtain evidence other than that of the police and the magistrate attempting to explain ante mortem injuries, without any shred of evidence supporting his statement about a brawl.

Bizos also makes reference in his publication, ("No one to blame") to the Inquest into the death of Steven Bantu Biko. The much publicised and documented unprofessional conduct of the doctors who testified in that inquest illustrates the point. Doctors, like lawyers, take an oath, in their profession. It is a Hippocratic Oath.

Every professional lawyer and public official survives on integrity. Magistrates and prosecutors are lawyers participating in the administration of justice and are expected to discharge their functions in terms of the Oath they were sworn to uphold. For all public office bearers of the state, an oath is sacrosanct. Apart from their knowledge and experience in practise of law, lawyers, in particular judicial officers, are expected to bring to bear their honesty, independence, personal and professional integrity and ability to act without fear or favour in the administration of justice. It is not ethical and proper on the part of a judicial officer to preside over or decides cases either out of fear, or in favour of a person, entity or institution, or in expectation of promotion or reward, or in advancement of some real or perceived interest. Judicial officers have to be loyal only to the Constitution and the cause of

justice. Public Officials in the administration of justice are enjoined by the law to jealously guard against casting aspersions on the integrity of the judicial system, by conducting themselves in a manner contrary to their oath of office. Such conduct has no place in a Constitutional Democracy.”

J THE ROLE PLAYED BY THE NATIONAL PROSECUTING AUTHORITY AND THE SOUTH AFRICAN POLICE SERVICES

38 In line with what the court has advised: I propose that the Minister review the statistics that are annually provided by the NPA reflecting thousands of unsolved unnatural deaths that occur annually.

39 It is well- known fact that very few unnatural deaths end in criminal prosecutions. This can only be instituted if an accused or suspect is charged in respect of an unnatural death. This rarely happens.

40 Once the prosecutor declines to prosecute anyone, based on investigation and the documents contained in a criminal case docket, the prosecutor instructs the investigating officer to prepare the documents for an inquest.

41 These documents, including the medico legal reports, affidavits, DNA reports etc. are then removed from the actual docket and submitted to a magistrate who will apply his mind to the matter and decide whether a person should be prosecuted or not.

42 If the magistrate decides that no one is responsible for the death of the deceased, he/she records that there is no prima facie evidence against any person.

- 43 The inquest proceedings are then returned to the area where the body of the deceased was found for filing with the Department of Justice.
- 44 In keeping with policy, after a certain time period, the record of the proceedings are destroyed.
- 45 Once the proceedings are destroyed, all the records pertaining to the deceased, including the investigation, the witness statements, post mortem examinations, etc. are lost forever.
- 46 It is this result that gives rise to the challenge encountered by the court in the Timol matter, because in order to re-open an inquest, once new evidence becomes available, the record of the initial inquest is lost forever once the initial inquest proceedings are destroyed.
- 47 This has systematically allowed atrocities committed by the Security Branch police officials to go undetected.
- 48 As is evident in the Timol matter, it was important and necessary to have regard to what the evidence was at the 1972 inquest proceedings. The court that presided over the 2017 re-opened inquest had to contend with half the record and missing pages from what was in its possession.
- 49 Whilst it is obvious that the filing of records will create a logistical nightmare, it is my submission that we have advanced in terms of technology and modern methods of storing information pertaining to inquests can be undertaken.

Please advise as to whether the Honourable Minister and relevant departments are amenable to the amendment.

SIGNED.