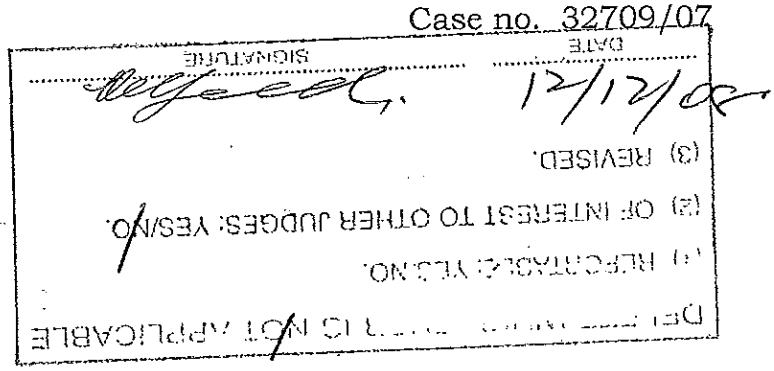
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
Held in PRETORIA

Case no. 32709/07



In the matter between:

THEMBISILE PHUMELELE NKADIMENG	1st Applicant
NYAMEKA GONIWE	2nd Applicant
NOMBUYISELO NOLITA MHLAULI	3rd Applicant
SINDISWA ELIZABETH MKHONTO	4th Applicant
NOMONDE CALATA	5th Applicant
KHULUMANI SUPPORT GROUP	6th Applicant
CENTRE FOR STUDY OF VIOLENCE AND RECONCILIATION (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	7th Applicant
INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	8th Applicant

And

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	1st Respondent

THE MINISTER OF JUSTICE	2nd Respondent
ERIC ALEXANDER TAYLOR	3rd Respondent
GERHARDUS JOHANNES LOTZ	4th Respondent
JOHAN MARTIN VAN ZYL	5th Respondent
HERMANUS BAREND DU PLESSIS	6th Respondent
WILLEM HELM COETZEE	7th Respondent
ANTON PRETORIUS	8th Respondent
FREDERICK BARNARD MONG	9th Respondent
MSEBENZI TIMOTHY RADEBE	10th Respondent

JUDGMENT

Judgment reserved: 24 November 2008
Judgement handed down: 12/12/08

LEGODI J,

INTRODUCTIONS

1. In this application, the applicants seek relief as follows:

"1. Pending the final outcome of this application, the coming into force and operation of the amendments to the National Prosecution Policy dated 1 December 2005 ("the policy amendments") is suspended and stayed.

2. Declaring the policy amendments to be inconsistent with the Constitution of the Republic of South Africa, 1996 and unlawful and invalid.

3. <u>Alternatively</u> to prayer 2 above

3.1 Reviewing and setting aside the adoption of the policy amendments in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

3.2 To the extent that it is required, condoning the applicants' non-compliance with the time period set out in section 7(1) of PAJA

4. Ordering that such of the respondents as may oppose the matter pay the applicants costs.

5. Granting the applicants further and/or alternative relief.

PARTIES

2. This application was instituted by the first five applicants and other applicants, whose particulars and interests are briefly set out hereunder as follows:

2.1 The first applicant is the sister to one Nokuthula Aurelia Simelane (hereinafter referred to as Nokuthula) who disappeared after being abducted by the then Security Brach. In the early eighties she operated as a courier for Umkhonto We Sizwe, the armed wing of African National Congress).

2.2 During the Truth and Reconciliation Commission (TRC), it was established that Nokuthula disappeared while on a mission in Johannesburg after meeting with one Norman Mkhonza, who was apparently working with the Security Branch.

2.3 It emerged during the TRC proceedings that she was abducted by the Security Branch with the help of Mkhonza. To date, Nokuthula has not been found nor has her remains been found.

2.4 During the TRC, evidence emerged that implicated a number of people in the possible abduction, assault and or killing of Nokuthula. No one has however been charged. The first applicant is challenging the

prosecution policy amendments in question as the sister of Nokuthula.

2.5 The second and fifth applicants are challenging the policy as the widows of what is commonly referred to as the "Cradock four".

2.6 Their husbands were on the 27 June 1985 scheduled to attend a meeting in Port Elizabeth. This was a meeting which was arranged by the United Democratic Front (UDF).

2.7 On the way, they were apparently, intercepted and or stopped by the security branch members. Few days thereafter, their bodies were found burnt, mutilated and spread all over a wide area in the Redhouse or Bluewater Bay, on the outskirts of Port Elizabeth.
Their bodies and especially their faces were deliberately dosed with petrol and set on fire with the intention or rendering them unrecognisable and not identifiable.

2.8 During the TRC, several security branch officials were implicated, some of them are still alive. These people who were implicated many of them have not been prosecuted yet.

2.9 The second to the fifth applicants are challenging the prosecution policy amendments referred to in paragraph 1 above. They are challenging these policy amendments as the widows of the Cradock Four.

3. The sixth to the eighth applicants are non-governmental organizations challenging the prosecution policy and directives concerned as interested parties in the protection of the constitution.

4. In terms of section 179(5) (a)(b) of the Constitution, the first respondent with the concurrence of the second respondent, and after consulting with the Directors of Public Prosecutions, must determine prosecution policy which must be observed in the prosecution.

5. Section 21(2) of the National Prosecuting Authority Act 32 of 1998 provides that the first prosecution policy issued under the Act shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first National Director.

6. The first prosecution policy was issued some time before 2005. The applicants are challenging the amendments to the first prosecution policy issued by the first respondent.

BACKGROUND

7. During or about 2005, the first respondent produced amendments to the prosecution policy. In terms of the amendments paragraph 8A was added to the first prosecution policy.

8. In terms of the addition, the first respondent purporting to act in terms of section 179(5) of the Constitution, introduced prosecution policy and directives in Appendix A (hereinafter referred to as policy amendments), to deal with prosecution of cases arising from conflicts of the past which were

committed before the 11 May 1994. The policy and directives aforesaid in Appendix A are repeated as follows:

APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCE EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. *In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy are as follows:*

   (a) It was recognised that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.

   (b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take party in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.

   (c) 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 unearthing 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.

   (d) Therefore, persons who had committed crimes before 11 May 1994, which emanate from conflicts of the past, could enter into agreements

with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these works still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. *In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:*

   (a) *The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.*

   (b) *The constitutional right to life.*

   (c) *The non-prescriptivity of the crime of murder.*

   (d) *The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed political motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.*

   (e) *The dicta of the Constitution justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See* ***Azanian People Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC****).*

   (f) *The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.*

   (g) *Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.*

   (h) *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****).*

(i) *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.*

(j) *The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.*

(k) *The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.*

3. *Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President include the following:*

(a) *Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.*

(b) *Section 105A of the Criminal Procedure Act, 1977, which makes the provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.*

(c) *Section 179(5) of the Constitution in terms of which the NDPP, among others-*

(i) *must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process:*

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a prima facie case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire protection.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interes.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

B. ***PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST***

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the

NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994.

1. *A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above, (the applicant) must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.*

2. *The NDPP must confirm receipt of the affidavit or affirmation and my request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The applicant may also mero moto submit further written sworn affidavit or solemn affirmation to the NDPP containing representations.*

3. *All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.*

4. *The Priority Crimes Litigations Unit (PCLU) in the office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.*

5. *The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.*

6. *The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:*

    (a) *The National Intelligence Agency.*

    (b) *The Detective Division of the South African Police Services.*

    (c) *The Department of Justice and Constitutional Development.*

    (d) *The Directorate of Special Operations.*

7. *The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.*

8. *The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status a section 204 witness and all section 105A plea and sentence agreements.*

9. *The NDPP may obtain the vies of any private or public or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.*

10. *A decision of the NDPP not to prosecute and the reasons for the decision must be made public.*

11. *In accordance with section 179(6) of the Constitution, the NDPP must inform the Minister of Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this proceeding policy relating to conflicts of the past.*

12. *The NDPP may make public statements on any matter arising from the policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.*

13. *The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representatives, guidelines and established practice. The victims must, as far as reasonably possible be consulted in any such further process and be informed should the accused's representations be successful.*

14. *The NDPP may provide for any additional procedures.*

15. *All stage agencies, in particular those dealing with the prosecution of all alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the*

prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. *CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST*

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past.

1. *The alleged offence must have been committed on or before 11 May 1994.*

2. *Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.*

3. *If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must,* ***in a balanced*** *way, be applied by the NDPP before reaching a decision whether to prosecute or not;*

    (a) *Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.*

    (b) *Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered.*

        (i) *The motive of the person who committed the act, commission or offence.*

        (ii) *The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.*

(iii) *Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or supporter.*

(iv) *The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued but does not include any act, omission or offence committed-*

(aa) *for personal gain; or*

(bb) *out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.*

(c) *The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose-*

(i) *the truth of the conflicts of the past, including the location of the remains of victims; or*

(ii) *possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.*

(d) *The personal circumstances of the alleged offender, in particular-*

(i) *whether the ill-health of the other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;*

(ii) *the credibility of the alleged offender;*

(iii) *the alleged offender's sensitivity to the need for restitution;*

(iv) *the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;*

(v) *renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and*

(vi) *the degree of indoctrination to which the alleged offender was subjected.*

(e) *Whether the offence in question is serious.*

(f) *The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.*

(g) *Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.*

(h) *If relevant, the alleged offender's role during the TRC process, namely in respect of co-operation, full disclosure and assisting the process in general.*

(i) *Consideration of any views obtained for purposes of reaching a decision.*

(j) *Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision*

9. These prosecution policy amendments and directives are challenged by the applicants briefly on the following grounds:

9.1 that the policy amendments introduce a prosecutorial indemnity;

9.2 that such prosecutorial indemnity is in breach of the Constitution on various grounds including:

9.2.1 infringement of the rule of law;

9.2.2 infringement of various constitutional rights,

9.2.3 non-compliance with international law, etc. All of the rights challenged as aforesaid are set out in details in paragraphs 42 and 43 of the applicants' founding affidavit,

9.2.4 that the prosecutorial indemnity is inconsistent with the right to just administrate action contained in section 33 of the Constitution and the requirements of Administrative Justice Act 3 of 2000,

9.2.5 that the applicants seek to review the policy amendments in terms of section 6 of PAJA.

10. The respondents resist these challenges on the basis that the policy amendments do not allow the respondents to make a decision not to prosecute on the basis of the criteria in A, B and C of the policy amendments referred to above, where there is sufficient evidence to support prosecution. Secondly, that even if the policy allows this, it does not amount to an effective indemnity from prosecution, because the perpetrators would still be exposed to private prosecutions and civil remedies.

11. Further, the defence raised by the respondents appears to be that, until such time as a decision not to prosecute is made on the basis of the policy amendments, the challenge is not justifiable at the instance of the applicants. Lastly, the defence is that the applicants' claim is not justified because the first respondent does not intend to ever implement the

policy amendments in the manner complained by the applicants.

12. In the supplementary heads of argument submitted on behalf of the respondents, another issue is raised. It is contended that what the applicants are claiming for, do not relate to resolution of real and concrete controversies involving persons who have interest in the resolution of the disputes. The facts upon which the applicants rely on for the relief sought are said to be totally unconnected to the prosecutorial policy. In short, it is contended that the matter is not ripe for adjudication by the court. The relief sought by the applicants is said to be academic and does not relate to material prejudice.

ISSUES RAISED

13. As I see it, the issues raised narrowed and argued before me are as follows:

- **Whether the application is academic, unripe and having no material effect to the applicants?**

- **Whether the policy amendments allow for an amnesty, indemnity or a re-run of the TRC? Or**

- **Whether the policy amendments in relation to a decision not to prosecute will have the effect of allowing for an amnesty or indemnity equivalent to a re-run of the TRC?**

DISCUSSIONS, SUBMISSIONS & FINDINGS

14. I find if necessary to deal with the two latter issues identified in paragraphs 13 above.

14.1 In a somewhat introduction to the issue, counsel for the respondents in paragraph 30 of his written heads of argument stated as follows:

"30. As stated above, the policy amendments were adopted with the object to achieve the Constitutional mandate placed on the NDPP, which mandate is the prosecution of crime. If the applicants' case is not about the intentions of the NPA, in relation to the application of the policy amendments, or mala fide on the part of the NDPP, then it must be accepted that when the amendments to the prosecution policy were adopted, they were adopted in accordance with constitutional mandate placed on him by the Constitution with the objective of the prosecution of crime. Therefore, the applicants' contention that the policy amendments were adopted for an ulterior purpose is without merit".

14.1.1 Surely, the intention by the first respondent (NDPP) to comply with its constitutional mandate to prosecute crimes is one thing. But the issue as I see it is, whether such intention is implicit in the policy amendment? If not, the next issue is whether the policy amendments should be allowed to exist in their apparent contrast to the intention and constitutional mandate and obligation of the first respondent.

14.1.2 It appears therefore, that one should look closely at the policy amendments, with a view to find in them,

purported intention of the first and second respondents, in having brought about the policy amendments.

14.2 The applicants' contention is that, the purpose of the policy amendments is to allow the first respondent to conduct what is effectively a "re-run" of the Truth and Reconciliation Commission (TRC)'s amnesty process. Remember, TRC was specifically introduced and authorised in terms of the Interim Constitution. The main objective thereof was to deal with political commissions of offences in the past and, in particular the objective being to forge or bring about reconciliation in our country.

14.2.1 The response to this contention by the applicants was disputed and summed up as follows in the respondents' written heads of argument:

"32. It was submitted that the policy amendments correctly considered are not intended to be a process that can become a constitution or a re-run of the amnesty process of the TRC.

33. It must be appreciated that the purpose of the amendment policy is to ensure that the objects for which the Interim Constitution authorised the reconciliation process through the TRC process, should not be undermined.

34. The TRC process was a specific legislative process that authorised amnesty subject to the terms and conditions of that legislation.

35. The policy amendments are conscious that they are not a process in terms of which individuals are to receive any amnesty. The NDPP is not authorised to grant any amnesty.

36. It is therefore denied that the policy amendments can be considered to be re-run of the TRC process or to have an impact of undermining the constitutional compact that the South African society made with the victims of human rights"

14.2.2 What is quoted above, in my view captures the essence of the attack against the applicants' cause of complaint. In addition to this, it is the respondents' case that, as the first respondent exercises its power and obligation to institute prosecution proceedings, it would prosecute and if need be, only conclude agreements as envisaged in sections 204 and 105A of the Criminal Procedure Act.

14.3 The applicants in their heads of argument seek to identify the issue as follows:

"Firstly, the applicants do not allege that the policy amendments allow for an amnesty, indemnity or a re-run of the TRC, as the respondents suggest. Rather, the applicants allege that, the application of the policy amendments in relation to a decision not to prosecute will have this effect. As it will be seen below, the applicants alleged that, in light of the enormous difficulties associated with private prosecutions, a decision not to prosecute (on grounds other than the absence of evidence) on the basis of criteria that are strikingly similar to those applied by the

TRC amnesty committee constitute an effective re-run of the amnesty provisions of the TRC"

15. Before I turn to deal with the documents that contain the policy amendments under attack, I find it necessary to refer to the debate that ensued during the discussion. During the discussion, issues were further raised as follows:

- *Whether the applicants have demonstrated the existence of a prima facie case on which factors enumerated in part C of the policy amendments were relied upon in taking a decision to grant prosecutorial indemnity?*

- *Whether parts A, B and C confer a power not to prosecute where a prima facie case is established? And if so,*

- *Which provisions of the policy amendments empower the first respondent, a power not to prosecute, where prima facie is established?*

15.1 I see the question raised above as refining the issues to be decided. According to Mr Marcus on behalf of the applicants, in a response to an enquiry by the court, whether he understands part C as entitling the first respondent not to prosecute in the face of a prima facie evidence, he stated as follows:
"It says so, much explicitly. It says what it means"

15.2 I must pause for a moment to deal with the documents containing the policy amendments. Such policy amendments are quoted in paragraph 9 of this judgment.

I found it necessary to quote the policy amendments in their entirely for completeness sake and better understanding of the amendments. For this purpose, and in dealing with the interpretation or construction of the policy amendments, I will not repeat the quotation unless it becomes necessary to do so.

15.3 Apart from parts A and B of the policy amendments, the actual amendments are contained in part C. Part A deals with the introduction and the basis for bringing about the policy amendments as contained in part C. Part B deals with the procedure that has to be strictly followed in respect of persons wanting to make representations to the NDPP and in respect of those cases already received by the office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994. Any reference to any provision in parts A, B and C of the policy amendments will be referred to in this judgment as "paragraph".

15.3.1 Two classes of persons can seemingly make representations in terms of Part B paragraph 1 thereof, namely, those who are facing possible prosecution and secondly, those who wish to enter into an arrangement with the NPA as contemplated in paragraph1 of part A. Remember, in terms of section 179 (5)(d) of the Constitution, the first respondent may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the first respondent, from the accused person, the complainant and any other person or party whom the first respondent considers to be relevant.

15.3.1.1 In my view, the representations envisaged in paragraph 1 of part B of the policy amendments are not covered and sanctioned by the Constitution. Such representations as sanctioned in section 179(5)(d), are for a review of a decision, the review being in respect of a decision previously taken to prosecute or not to prosecute. For example, if a decision was previously taken not to prosecute A on a charge of murder of B, but later review such a decision and decide to charge A on the murder of B, A might be required to make representations in terms of section 179(5)(d), as to why the initial decision not to prosecute should not be reviewed.

15.3.1.2 Invitation for representations in terms of paragraph B.1 of the policy amendments are in my view, in respect of those who are facing possible prosecution, where a decision is not taken on their fate. Secondly, the representations relate to those persons in respect of whom their cases have already been received by the first respondent, but a decision is not taken to prosecute or not to prosecute them in respect of offences relating to the conflict of the past and committed before 11 May 1994.

15.3.1.3 In terms of paragraph A1 (c) of the policy amendments as part of the normal legal processes and in the national interest, the first respondent 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 prosecuting mandate and are accommodated in the existing legislations (my own emphasis). During the discussion

Mr Semenya on behalf of the respondents, was quizzed on the reasons for the representations as envisaged in paragraph B1 of the policy amendments. His answer thereto was firstly, that the legislations referred to in paragraph A1 (c) of the policy amendments are sections 204 and 105A of the Criminal Procedure Act. Secondly, he contended that such agreement referred to in A.1.(c) are therefore in terms of the two sections.

15.3.1.4 Mr Semenya obviously had some difficulties in expanding on his submission as referred to in 15.3.1.3 above. His submission cannot be correct, for the following reasons: Firstly, representations in terms of paragraph B1 of the policy amendments are aimed at enabling the first respondent to decide whether or not to prosecute. Secondly, section 105A relates to a situation where a decision to prosecute has already been taken. Thirdly, section 204 can only take place where a decision to prosecute has already been taken against other persons or person and indemnity is granted by the court and not by the prosecution to a witness who testified in the proceedings. Implementation of sections 105A and 204 is therefore subject to judicial consideration, and are entirely matters of discretion by the trial court. The decision to prosecute or not to prosecute in terms of the first respondent's constitutional obligation and also as envisaged in the policy amendments, is entirely a matter falling within the domain of the first respondent.

15.3.2 All of these, in my view, raise another question. If indeed the policy amendments are intended to and or should be understood to be subject to the provisions of section 204 and 105A, why then the need for the amendments? Or to

put it differently, if indeed the policy amendments are not intended to authorise the first respondent to grant indemnity or amnesty, why then the need for the amendments? Remember, when the first prosecution policies were introduced, clear guidelines relating to prosecution of offences were set out. For example, reference is made in paragraph C.2 of the policy amendments to paragraph 4 of the said first prosecuting policy of the first respondent. The first prosecuting policy and directives, in my view, are adequate enough to deal with any decision to prosecute or not to prosecute in respect of any offence whether or not committed in conflicts of the past.

15.4 In my view, there is no need in the light of detailed first prosecuting policy to introduce and adopt a procedure as set out in parts A and B of the policy amendments. Of course, this has to be seen in the light of the ultimate policy amendments as contained in part C thereof. This should then bring me to deal with the interpretation of part C of the policy amendments as fully set out in paragraph 9 of this judgment.

15.4.1 Remember, when Mr Marcus on behalf of the applicants, was quizzed by the court, whether his understanding was that the prosecution can in terms of the policy amendments decline to prosecute in the face of a prima facie case, he stated as follows"

"It says so, much explicitly. It says what it means"

15.4.2 Part C, of the policy amendments sets out criteria that should be followed for the prosecution of cases arising from conflicts of the past. Paragraphs C1 and C2 thereof

in my view, are important, in particular C2 (read paragraph C.2 quoted in paragraph 9 of this judgment).

15.4.3 If the answer to paragraph C 2 of the policy amendments is in the affirmative other criteria set out in paragraph C 3(a) to (L) must still be considered. Immediately the question is "*What else is required for the purpose of taking a decision to prosecute or not to prosecute in the face of the strength of adequate evidence* (my own emphasis). Of course, the question must be seen amongst others in the light of the following criteria which must still be considered in terms of paragraph C 3:

15.4.3.1 the extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society. (**see paragraph C 3 of the policy amendments quoted in paragraph 9 of this judgment**). This should be seen in the light of an introduction to these policy amendments as set out in paragraph A1 quoted in paragraph 9 of this judgment. The respondents wished to seek to deny that there is any reference to consideration of reconciliation and reconstruction in the policy amendments. Of course this is incorrect. The wording of the policy amendments should be seen in context. In my view, they were correctly referred to by Mr Marcus as a copy or duplication of the guidelines set out for and used during the TRC hearings. For example, "Why should the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation have any bearing on the decision to prosecute or not to prosecute, especially in the light of the

strength of adequate evidence? Why should the extent to which the prosecution or non-prosecution of the alleged offender, be dictated by national project of nation-building through transformation, reconciliation, development of our society? (**See paragraph C 3 (f) of the policy amendments**). What is stated in paragraphs C 3 (d) (iv) and C.3 (f) is indeed like a "copy cat" of the TRC's guidelines.

15.4.4 When there is sufficient evidence to prosecute, the first respondent must comply with its obligation. Entitlement by the first respondent, to refuse to prosecute where there is a strong case and adequate evidence to do so, would in my view be unconstitutional. Paragraph C 2 read with paragraph C 3 of the policy amendments, allow the first respondent even where there is a strong case and adequate evidence not to prosecute. This is contrary to the first respondent's constitutional obligation to ensure that those who are alleged to have committed offences are prosecuted.

15.4.4.1 Perhaps Mr Marcus was right in expressing himself, as indicated in paragraphs 15.1 and 15.4.1of this judgment. I am mindful of the first respondent's assertion that, it was not and it is still not its intention not to prosecute where there is a strong case and adequate evidence to backup the prosecution. Surely, this is understandable, because the very existence of the first respondent is to prosecute crimes. The submission as I understood it is that, there is no need for the applicants to panic. That might be so, however, the real issue as I see it is whether the policy amendments which do not properly reflect the

intention of the respondents should be allowed to remain in the book. I do not think so.

15.5 In paragraph 14.3 of this judgment, I quoted paragraph 2.1 of the applicants' written heads of argument. At the risk of repetition, the applicants aver that it is not their case that the policy amendments expressly allow for an amnesty, indemnity or a re-run of the TRC, rather that the application of the policy amendments in relation to a decision not to prosecute will have this effect. This submission should be seen in the light of paragraph C 2 read with C 3 of the policy amendments.

15.5.1 This submission on behalf of the applicants, suggests a broader interpretation or construction of the policy amendments. I do not intend referring to legal principles and case laws dealing with the manner of interpretation, where a literal meaning does not seem to make sense or does not properly reflect the intention of the legislature, in the instant case, the intention of the respondents who produced the policy amendments. The policy amendments have the effect of legal binding.

15.5.2 The many criteria referred to in paragraph C3 are to enable the first respondent in deciding whether or not to prosecute offences committed before 11 May 1994 arising from conflicts of the past. However, many of these criteria in my view, are not relevant in deciding whether or not to prosecute. Remember, these criteria as contained in paragraph C3 are subject to two factors. Firstly, the offence or offences must have been committed on or before 11 May 1994. (**See paragraph C1**). Secondly,

there must be a strong case supported by adequate evidence (**see paragraph C2**).

15.5.2.1 As I said, once criteria C 2 presents itself in a particular case, the first respondent is constitutionally bound to prosecute. The many factors referred to in C3 are factors which in my view, should be considered when the first respondent decides to enter into negotiations or agreement in terms of section 105A. Section 105 A, has nothing to do with the decision to prosecute or not to prosecute. It can only be invoked once a decision to prosecute has been taken and an accused person is on trial. It is a provision which is under judicial consideration. Decision to prosecute or not to prosecute is not. Many factors as set out in C3 in my view, are relevant and important in deciding whether a sentence agreed upon in terms of section 105A is appropriate or not, but not in deciding whether to prosecute or not to prosecute.

15.5.2.2 As I said earlier in this judgment, section 204 is a process which is followed on the strength of a state's case and on whether a particular individual who participated in the commission of the offence is prepared to assist in successfully prosecuting his or her co-perpetrators. The section does not require representations and I do not think it is necessary for such representations to be made. The question again arises, why then representations as envisaged in paragraph B1 of the policy amendments if not to give indemnity other than in terms of section 204?

15.5.3 Looking at what is envisaged in paragraph B 1, one sees a recipe for conflict and absurdity. What is conspicuous in

paragraph B 1 regarding the representation is absence of the status of such representations. Put it differently, how does the first respondent intend dealing with representations in terms of paragraph B1 in a situation where it decides to prosecute a person referred to in C3 after having made such representations in terms of paragraph B 1?

15.5.3.1 If indeed representations in terms of B1 are intended to enable the first respondent to take a decision to prosecute, and not to grant indemnity, how does it hope to have a full disclosure as intended in B1? Surely, unless it intends not to prosecute those who make a full disclosure, in terms of paragraph B1, it cannot hope that any person who runs the risk of being prosecuted by his or her own full disclosure will come forward as envisaged in B1. Remember, this full disclosure as envisaged in B1 is emulation of a full disclosure as it was in terms of the TRC guidelines.

15.5.4 The whole procedure as envisaged in part B1, is a recipe for conflict and absurdity, because on the one hand it does not provide protection for such a disclosure. On the other hand, the first respondent says it is not indemnity or amnesty. It is a recipe for conflict, for example, the first respondent may wish to use the representations once it has decided to prosecute and the person who made such representations is on trial. It is a recipe for absurdity, because the first respondent insists that it does not intend to grant indemnity. The need for the procedure does not prevail, unless the intention is to grant indemnity or amnesty. Broad interpretation or construction of parts A, B, and C of the policy

amendments displays amnesty or indemnity or agreement, contrary to that allowed in terms of section 204 and 105A of the Criminal Procedure Act and also contrary to the intention of the first respondent seen in the light of its insistence that it was never its intention to act other than in terms of its obligation to prosecute and to utilise sections 204 and 105A The result of this is that the policy amendments are not only unconstitutional but absurd and cannot continue to exist.

16. I now turn to deal with the other issue which was intended to be raised as a preliminary issue. The issue was in detail dealt in the respondent's supplementary written heads of argument. The argument was that the applicants' application is not ripe. The issue was introduced as follows in the first respondent' heads of argument:

"1. One of the cardinal policies or principles of judicial function is the adjudication of real and concrete disputes between the parties. Stated differently domestic, foreign, as well as international courts have consistently said that the function of the courts is never to answer abstracts, academic or hypothetical questions"

16.1 Having said this, Mr Semenya then at length dealt in detail with the principles applicable to the issue as raised. Having referred to the applicable principles the submission was concluded as follows on pages 8 to 9 of the respondents' supplementary heads of argument:

"2. The authorities said above, more than amply demonstrate that as a matter of policy, the courts should concern themselves with the resolution of real and concrete controversies involving persons who

have interests in the resolution of those disputes. We submit in the present case, what the applicant call the "stories of five South African families" is totally unconnected to the prosecutorial policy under question. We say so for the following reasons:

2.1 There is no evidence that any one has been arrested in connection with the victims of the cases cited in the applicants' papers (Nokuthula Aurelia Simelane; Mathew Goniwe, Sicelo Stanley Mhlauli; Sparrow Thomas Mkhonto and Fort Calatha).

2.2 The applicants have furnished no evidence indicating that the police have secured sufficient evidence to mount a prima facie case against anyone in respect of the victims on whose behalf the application is launched;

2.3 There is no basis offered by the applicants that the first respondent has taken any decision to grant "prosecutorial indemnity/immunity" to anyone;

2.4 More importantly, the applicants have not shown any concrete facts which meet the facts cited in the prosecutorial policy to inform the decision whether to prosecute or not to prosecute. For instance, whether there is "adequate evidence" whether there has been full disclosure of all relevant factors alleged in the offences; whether the offences were associated with political objectives" the motive of persons who committed the acts; the personal circumstances of the offender" or whether the offences are serious". All of these factors must be first established before the applicants can contend for the "effective indemnity".

4. *The other reason why the application should fail, is that the applicants are seeking a declarator, a power which a court exercises in terms of section 19(1)(a)(iii) of the Supreme Court Act, which courts have a discretion to grant even where a proper case has been made out. The courts have consistently said"*

16.2 I do not intend referring to authorities relied upon for the submission as quoted above. However, I find it necessary to look at the submission closely.

16.2.1 The contention by the first respondent should be seen in the light of its insistence that it intends enforcing the policy amendments as they are. In other words, that, it will continue to require persons who qualify in terms of the policy amendments to make representations in terms of paragraph B1. Secondly, that it will continue to decide whether or not to prosecute and to consider other factors as set out in paragraph C3, once a strong case and adequate evidence are established as envisaged in paragraph C2 in respect of offences referred to in paragraph C1 (**refer to the provisions of the paragraphs as quoted in paragraph 9 of this judgment**).

16.2.2 Coming back to the submission as quoted in 16.1 above, it is necessary to elaborate on the submission.

16.2.2.1 The stories of the first five applicants are described as totally "unconnected to the prosecutorial policy". I do not think so. Firstly, their stories relate to conflicts of the past committed before 11 May 1994. Secondly, the five applicants have direct interest in the prosecution of those

who are connected to the crimes alluded by them in the founding affidavit. Thirdly, some of these persons who were involved or might have been involved have not been granted indemnity, either because they did not apply or they were found not to have given a full disclosure. Lastly, the first respondent is under obligation to prosecute them once a strong case and adequate evidence is established.

16.2.3 The reasoning for the submission as set out in paragraph 2 of the first respondent' supplementary heads of argument quoted above should also be considered closely.

16.2.3.1 I do not think that anyone connected with the commission of the crimes cited in the applicants' papers need to be arrested before the applicants could be entitled to bring the application on the basis that their application would then be ripe or not academic. The essence of the application as I see it is prompted by the introduction of the policy amendments and the desire by the first respondent to enforce the policy amendments complained of. I did not understand counsel for the respondents to suggest that any of the applicants is not a party or persons referred to in section 38 of the Constitution. This concession in my view, should settle the score.

16.2.3.2 Clearly, the second to the fifth applicants are widows of the Cradock four who were killed in gruesome manner during 1985. The killings were politically motivated. Some of the people who were involved or might have been were not granted amnesty during the TRC proceedings. Some did not apply for amnesty and have not been prosecuted yet. If the first respondent was to deal with

these people receive their representations as contemplated in paragraph B1 and receive adequate evidence suggesting a strong case for prosecution as contemplated in paragraph C 2; the first respondent may still decide not to prosecute as contemplated in paragraph C3, after having considered the criteria therein. The applicants' interests lie in the first respondent's obligation to prosecute in circumstances as might prevail under paragraph C 1 and C 2. Paragraph C3 is threatening such interest. Therefore, such people as referred to in B1 in respect of offences referred to in C 1 do not have to be arrested before the applicants could be entitled to bring an application of this nature.

16.2.3.3 The basis of the attack against the policy amendments really is not much of what the applicants can provide to the first respondent regarding possible prosecution of particular persons. The applicants are not asking for prosecution of certain people, that is not part of their prayers. In any event, I do not think that they have to furnish evidence as suggested in paragraph 2.2 of the respondents' supplementary heads of argument. Crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted. Victims of crimes rely on these institutions for investigation and prosecution. As I said, the essence of the complaint is that the policy amendments allow the first respondent not to prosecute even in circumstances where there is a prima facie case seen in the light of paragraphs C 2 and C 3 of the policy amendments.

16.2.3.4 The respondents did not have to take a decision not to prosecute, to grant indemnity, and or immunity to anyone, before the applicants could bring the application. **(See paragraph 2.3 of the respondents' supplementary heads of argument)**. Lastly, the applicants did not have to show any concrete facts which meet the factors cited in paragraph C 3. of the policy amendments as suggested in paragraph 2.4 of the respondents' supplementary heads of argument. At the risk of repeating myself, paragraphs C 2. and C 3 state or suggest that the first respondent may still not prosecute, despite adequate evidence against a particular individual having committed an offence referred to in C 1. Alternatively paragraphs C 2 and C 3 broadly interpreted confer such a power to the prosecution, contrary to its constitutional obligation. This is a real threat to the applicants' constitutional rights. This threat cannot be side stepped by an undertaking that it will not happen. For as long as the first respondent insist that it will enforce the policy amendments, the applicants should be entitled to have the policy amendments impugned on the ground that it is unconstitutional.

COSTS

17. The first to the fifth applicants have direct interest in the institution of the present proceedings. They should therefore be entitled to costs. The first five applicants having decided to institute the present proceedings, I do not think that it was necessary for the other applicants to join forces.

CONCLUSION

18. Consequently I make the order as follows:

18.1 The policy amendments to the National Prosecution Policy dated the 1 December 2005 is hereby declared to be inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid.

18.2 The first respondent to pay the costs of the application for the first to fifth applicants.

M F LEGODI
JUDGE OF THE HIGH COURT

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