IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES (TRC CASES INQUIRY)

HELD AT

Sci- Bono Discovery Center, Corner Mirriam Makeba & Helen Joseph Street, Newtown, Johannesburg

BEFORE

The Honourable Justice Sesi Khampepe (Judge RTD) – Chairperson

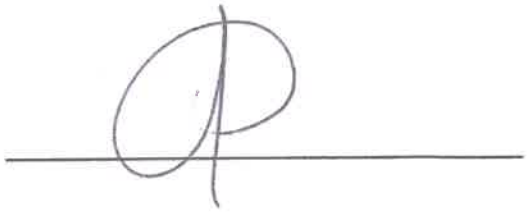
The Honourable Justice Frans Diale Kgomo (Judge President RTD)

Adv Andrea Gabriel (SC)

FILING SHEET

Filing of Adv Abrahams' Statement.

DATED AT JOHANNESBURG THIS 12TH DAY OF DECEMBER 2025.



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TO: THE SECRETARY

JUDICIAL COMMISSION OF INQUIRY INTO

ALLEGATIONS REGARDING EFFORTS OR

ATTEMPTS TO STOP THE INVESTIGATION OR

PROSECUTION OF TRUTH AND RECONCILIATION

COMMISSION CASES (TRC CASES INQUIRY)

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IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES (TRC CASES INQUIRY)

STATEMENT BY ADV SHAUN KEVIN ABRAHAMS

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A. INTRODUCTION

1. I am an adult South African male, and an advocate of the High Court of South Africa, practising as such under the name and style Advocate Shaun Kevin Abrahams. For the purposes of these proceedings I chose the address of my attorneys of record as the address to which I will receive notices and process.

2. The facts to which I depose herein fall within my personal knowledge and are, save where the context indicates otherwise, true and correct. Where I advance submissions of a legal nature, I do so on the strength of my own understanding and appreciation of the law, read together with legal advice received from my legal representatives, which advice I accept as sound.

3. Where I rely on information derived from others or gleaned from documents, I identify the source and, where available, annex the relevant supporting documentation.

4. I am the former National Director of Public Prosecutions ("**NDPP**"), duly appointed in terms of section 179(1)(a) of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"), read with sections 10 and 12 of the National Prosecuting Authority Act 32 of 1998 ("**the NPA Act**"). I held office from 18 June 2015 until 13 August 2018, when the Constitutional Court declared the termination of my predecessor's tenure and, consequently, my appointment invalid, as a result of the alleged unlawful conduct of the then President of the Republic, Mr JG Zuma, in procuring the vacation of office of Mr Mxolisi Nxasana ("**Nxasana**") through an unlawful settlement arrangement deemed a golden handshake.

5. Prior to my appointment as NDPP, I served as Acting Special Director of Public Prosecutions ("**SDPP**") and Head of the Priority Crimes Litigation Unit ("**PCLU**") from 1 March 2013 to 31 July 2014, following my appointment in terms of section 13(3) of the NPA Act.

6. This statement is submitted pursuant to a notice issued to me under Rule 3.3 of the Rules of this Commission, and in response to the Commission's written request of 29 October 2025 that I furnish information and material relevant to its mandate. This statement is further filed in answer to, and refutation of, allegations which primarily emanate from the founding papers in *L B M Calata and 22 Others v Government of the Republic of South Africa and 5 Others, North Gauteng Division, Pretoria, case number 2025-005245* ("***the Calata matter***").

7. With respect, the allegations are factually unfounded, legally misconceived and, unsupported by any admissible evidence. Contrary to the allegations, the prosecution of post-TRC matters and the re-opening of inquests commenced during my tenor as NDPP.

8. In what follows, I wish to: -

   8.1 Summarise the terms of reference of this Commission only in so far as they relate to me and my participation;

8.2 Set out the legal and institutional framework governing the National Prosecuting Authority ("**NPA**") and the PCLU;

8.3 Record the principal allegations made against me, with particular reference to the case advanced by the Calata Applicants; and

8.4 Provide a response thereto, demonstrating that at no point did I, or the NPA under my leadership, succumb to any improper pressure or collusion to suppress TRC cases, nor did I deliberately fail or refuse to prosecute such matters.

B. THE COMMISSION'S ESTABLISHMENT AND TERMS OF REFERENCE

9. Following proceedings instituted in the North Gauteng Division, Pretoria, in the *Calata matter*, in which the Applicants therein, *inter alia*, sought declaratory relief concerning the alleged unlawful obstruction of investigations and prosecutions of TRC cases, the President established this Judicial Commission of Inquiry in terms of section 84(2)(f) of the Constitution.

10. The Proclamation records that the Commission is appointed to investigate matters of public and national interest concerning allegations of efforts or attempts to stop the investigation or prosecution of TRC cases.

11. In terms of paragraph 1 of the Terms of Reference ("**ToR**"), the Commission must, in respect of the period since 2003, inquire into, make findings and recommendations on, *inter alia*: -

11.1 whether, why, and to what extent and by whom efforts or attempts were made to influence or pressure members of the South African Police Service ("**SAPS**") or the NPA to stop investigating or prosecuting TRC cases;

11.2 whether any members of the SAPS or the NPA improperly colluded with, or succumbed to, such attempts;

11.3 whether any action should be taken by any organ of state, including further investigations or prosecutions against persons who may have acted unlawfully by attempting to influence, or colluding with attempts to influence, SAPS or NPA members not to investigate or prosecute TRC matters; and

11.4 whether, in law and fairness, the payment of constitutional damages to affected persons is appropriate.

12. The ToR further recognise, as interested parties, the litigants in the Calata matter and other families and victims in TRC cases who have a substantial interest and are admitted as parties under regulations made in terms of the Commissions Act 8 of 1947.

13. The Proclamation clothes the Commission with significant coercive powers, *inter alia* to enter and search premises, secure the attendance of witnesses, and compel the production of documents and obliges it, where appropriate, to refer matters for prosecution, further investigation or separate enquiry to the competent authorities.

14. By design, the Commission is investigative and inquisitorial in nature. It does not sit as a court of review over individual prosecutorial decisions taken within the NPA (including decisions made by me as NDPP or Acting SDPP: PCLU), and is unable to

substitute its own judgment for that of constitutionally-designated prosecutorial decision-makers. To this extent, the Commission is mandated to determine whether there were unlawful efforts or attempts to influence or pressure law-enforcement authorities, and whether any officials colluded with such efforts.

15. In this context, the allegations levelled by the Calata Applicants against me, and in particular that "*I made little or no progress in the TRC cases*" as reflected in the Commission's Rule 3.3 Notice, must be assessed against the proper constitutional and statutory framework governing the NPA, as well as the factual record of what was, and was not, done during my tenure.

C. THE CONSTITUTIONAL AND STATUTORY FRAMEWORK OF THE NPA

The NPA and the NDPP

16. Section 179(1) of the Constitution establishes a single national prosecuting authority for the Republic, headed by the NDPP. The NPA Act is the legislation contemplated in section 179(1) and gives detailed effect to that constitutional architecture.

17. Section 179(2) of the Constitution, read with section 20(1) of the NPA Act, vests in the prosecuting authority, as exercised under the ultimate direction of the NDPP, the power to institute and conduct criminal proceedings on behalf of the State and to carry out all functions incidental thereto.

18. Critically, section 179(4) of the Constitution and section 32(1)(a) of the NPA Act require that the NPA exercise its powers and perform its functions "*without fear, favour or prejudice*" and subject only to the Constitution and the law.

19. Section 32(1)(b) expressly prohibits any organ of State or any other person from improperly interfering with the NPA or any of its members in the exercise of their powers and functions.

20. The NPA Act further: -

20.1 establishes the structure and composition of the NPA, including the Office of the NDPP and the offices of Directors of Public Prosecutions ("**DPPs**") at the seats of the High Courts;

20.2 delineates the powers, duties and functions of the NDPP and other office-bearers; including the power to determine prosecution policy and issue policy directives; and

20.3 provides for accountability mechanisms, including reporting to the Minister and Parliament (sections 33 and 35).

21. Whereas section 179(6) of the Constitution, read with section 33(1) of the NPA Act enjoins the Cabinet Minister responsible for the administration of justice with final responsibility over the NPA, as enumerated in the Report of the Commission of Enquiry into the fitness of Advocate Vusi Pikoli to hold the office of the NDPP under the chairmanship of Dr FN Ginwala (*Ginwala Commission Report*), dated 4 November

2008, that final responsibility does not extend to posit the Minister with prosecutorial decisions and powers.

22. The *Ginwala Commission Report, inter alia*, specifically recommended the following:

> "*(iii) The South African Constitution and legislation uniquely provide for both political accountability through the Ministers final responsibility as well as for prosecutorial independence. Until this relationship is established through practice over time, it will be necessary for any incumbent or incoming Minister and incumbent or incoming NDPP to discuss and try and reach a mutual understanding of their responsibilities and the parameters of their relationship.*
>
> *(iv) Further there should be a structured engagement and interface between the Minister and the NDPP on an on-going basis to clarify their respective functions and responsibilities and lines of communication. This relationship is key to the proper functioning of the NPA and the office of the NDPP as well as to ensure that there is democratic political oversight over this key organ of state."*

23. It is against this background and the prerequisites and dictates of section 179(6) of the Constitution, read with section 33(1) of the NPA Act, applicable legal precedents and the recommendations of the *Ginwala Commission Report*, that the foundation of the working relationship between the Minister and I, and our respective powers, duties, functions and responsibilities were fostered.

24. The Constitutional Court in the case of *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* confirmed that the independence of the NDPP and the NPA is central to the rule of law. It held that the manner in which Nxasana was induced to vacate office, and the consequent appointment of myself as NDPP, were constitutionally invalid because they flowed from an impermissible exercise of presidential power.

25. However, the Court emphatically did not find that I was unfit for office, nor that I had engaged in any impropriety. To the contrary, the Court specifically found that not a single party took issue with my fitness to hold office; preserved the validity of decisions taken by me as NDPP in order to avoid disruption to the administration of justice; and jettisoned me from the office of NDPP as a direct result of the unlawful conduct of the former President, notwithstanding my unawareness of the unlawful conduct.

26. It is thus important to note that any challenge to my appointment, as adjudicated in *Corruption Watch*, went to the President's conduct not mine. There is no judicial finding that I abused the powers of NDPP or that I improperly interfered with TRC prosecutions.

The PCLU (Priority Crimes Litigation Unit) and TRC-related matters

27. The PCLU is a specialised unit within the NPA, established in March 2023 pursuant to a Presidential Proclamation to, *inter alia*, deal with serious national and international crimes, including terrorism, sabotage, treason, sedition, foreign military crimes and such other priority crimes as determined by the NDPP, and to generally give such advice and render such assistance to the NDPP. The inaugural SDPP: PCLU was Adv Anton Ackermann SC ("**Ackermann SC**"), who headed the unit until his retirement in February 2013, whereafter I succeeded him, albeit in an acting capacity, from 1 March 2013 to 31 July 2014.

28. During 2003, NDPP, Mr Bulelani Ngcuka, issued a directive referring all matters emanating from the TRC, where individuals had either not applied for amnesty or had been refused amnesty, to the PCLU.

29. In 2005, the Missing Persons' Task Team ("**MPTT**") was created within the PCLU to investigate and locate the mortal remains of persons who disappeared under political circumstances during the period covered by the TRC, pursuant to recommendations made to Government concerning TRC matters.

30. Around 7 January 2008, Acting NDPP, Adv. Mokotedi Mpshe SC, referred to the PCLU contraventions of a wide range of statutes including the Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993, National Conventional Arms Control Act 41 of 2002, Nuclear Energy Act 46 of 1999, Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, National Conventional Arms Control Act 41 of 2002, Regulation of Foreign Military Assistance Act 15 of 1998, Protection of Information Act 84 of 1982, Intelligence Services Act 65 of 2002 and others together with their predecessor enactments where offences remained triable. Later, further matters including offences under the Implementation of the Geneva Conventions Act 8 of 2012 and the Prevention and Combating of Torture of Persons Act 13 of 2013 were also referred to the PCLU by Nxasana.

31. Advocates attached to the PCLU would, in the exercise of their functions, powers, duties and responsibilities, ordinarily report directly to the SDPP: PCLU, whilst the SDPP, would in turn, firstly report to a designated Deputy NDPP and in given

circumstances, directly to the NDPP. The Deputy NDPP, however, would always report directly to the NDPP.

32. Importantly, the PCLU has never possessed independent investigative powers. It has been structurally reliant, initially on the Directorate of Special Operations ("**DSO**" or "**Scorpions**") and, subsequently, on the Crimes Against the State ("**CATS**") component of the Directorate for Priority Crime Investigation ("**DPCI**" or "**Hawks**") within SAPS, to investigate TRC and related matters. At all material times these investigative components retained their own institutional independence and investigative prerogatives and powers.

33. Section 17F(4) of the SAPS Act places a statutory obligation on the NDPP to ensure that a dedicated cadre of prosecutors is available to assist and cooperate with the DPCI in the conduct of investigations. In relation to post-TRC matters falling within its mandate, the PCLU discharged that function by providing specialised prosecutorial support, advice and direction through a Prosecutor-Guided Investigation ("**PGI**") model.

34. At no stage during my tenure as Acting SDPP: PCLU, or as NDPP, did the PCLU possess legal authority to compel SAPS or any DPCI component to investigate TRC matters or to deploy specific resources in relation thereto. Nor did I ever issue, or acquiesce in, any instruction to discontinue or suppress investigations into TRC cases by influencing or pressuring anyone or improperly colluding with anyone. Neither was I influenced or pressurised by anyone.

D. PARTICULARS OF IMPLICATION AND THE CALATA ALLEGATIONS

35. The Commission's Rule 3.3 Notice reveals that the allegations implicating me are largely extracted from the founding affidavit and annexures in the *Calata matter*, rather than from any independent investigative work undertaken by the Commission's evidence leaders or investigators.

36. For present purposes, I address the four core allegations advanced by the Calata Applicants and as conveyed through the Commission's Rule 3.3 Notice : -

36.1 First, that I "*was appointed to take the TRC matters over from Macadam*" and having taken over TRC matters from Adv Chris Macadam ("**Macadam**"), I "*made little or no progress ...while... leading the PCLU*";

36.2 Second, that I was involved in the alleged "disappearance" or mishandling of the Cradock Four docket, Swartkop CAS 13/07/1985;

36.3 Third, that in the matter concerning the abduction and murder of Nokuthula Simelane, I failed in my obligations and only acted under pressure of litigation brought by her sister, Ms Thembisile Nkadimeng in *Nkadimeng II (Thembisile Nkadimeng v National Director of Public Prosecutions and Others, Pretoria High Court, Case No. 35554/2015)*;

36.4 Fourth, that the NPA, under my leadership, was "*under pressure*" from litigation and media scrutiny, and that post-TRC prosecutions only commenced as a belated, reactive measure rather than as an exercise of constitutional duty.

37. I deal with each in turn.

E. FIRST ALLEGATION: "*LITTLE OR NO PROGRESS*" AND "*APPOINTED TO TAKE THE TRC MATTERS OVER FROM MACADAM*"

Little or no progress

38. The contention that "*I made little or no progress*" in TRC cases during my period as Acting Head of the PCLU rests on a bare assertion in paragraph 327.2 of the Calata founding papers and its replication in the Commission's Rule 3.3 Notice issued to me. No factual particularity or documentary support is provided.

39. That assertion ignores the reality that: -

39.1. when I assumed the Acting SDPP position in March 2013, the PCLU had already been grappling for a decade with systemic obstacles to TRC prosecutions, including earlier refusals by the DSO and SAPS to investigate certain matters;

39.2. the PCLU's role was to provide prosecutorial direction, guidance and advice through PGI, not to investigate cases itself;

39.3. Macadam had been seized with the responsibility of TRC matters prior to me assuming the acting SDPP position, although he reported to me thereon during my tenure, and during which period I in turn reported to the responsible Deputy NDPP and NDPP.

39.4. PCLU prosecutors continued to guide and assist SAPS in the investigation of TRC matters, and I ensured that TRC-related work remained an integral part of the unit's agenda; and

39.5. any meaningful assessment of "progress" must be rooted in the particularities of each case, the investigative steps taken and witnesses interviewed, not in a generic and conclusory label.

40. In the absence of evidence showing that I refused to authorise prosecutions where the evidentiary threshold had been met, or that I issued instructions to withhold or delay decisions for improper reasons, the allegation collapses into impermissible opinion on matters which fall squarely within the Commission's mandate to determine on the basis of evidence, not conjecture.

41. I accordingly deny that, as PCLU head or as NDPP, I failed in any legal duty to pursue TRC matters. To the contrary, within the constraints and complexities outlined above, I did what I could, and what the law required of me, to advance them.

Appointed to take the TRC matters over from Macadam

42. Subsequent to the termination of my tenure as SDPP: PCLU on 31 July 2014, the Deputy NDPP responsible for the National Specialised Prosecution Services ('**NSPS**'), under whom the PCLU resorted during that period, Adv Nomvula Mokhatla ('**Mokhatla**'), took over the responsibility of heading the PCLU. (Nxasana, later on 1 February 2015, appointed Adv Andrea Johnson ('**Johnson**'), as the coordinator and head of the PCLU).

43. Macadam, who was still seized with the responsibilities of TRC matters, was appointed by Nxasana on or about 12 August 2014, as the designated prosecutor to manage and direct all Foreign Bribery investigations and prosecutions. Sometime thereafter, Mokhatla directed that I assume responsibility for the TRC cases. At the time there were only a handful of TRC matters under consideration by the PCLU and Macadam would in all probability have prepared a handover report, addressed to me, delineating the position in relation to each of these matters.

44. On 18 June 2015, I assumed office as NDPP. Evidently, I only assumed responsibility over TRC matters for a relatively short period of time constituting a mere few months. During that period Macadam largely still engaged with the SAPS on TRC matters, providing investigation guidance and advice. Having regard to the long history of systemic obstacles to TRC investigations and prosecutions, Macadam's longstanding involvement and responsibility of TRC matters prior to me and that of Ackermann SC prior to him, it could hardly have been expected of me to have made any substantial progress on TRC matters.

45. As asserted earlier, I reiterate and deny that I failed in any legal duty to pursue TRC matters, irrespective of the position I occupied and the associated period. I did what I could, and what the law required of me, to advance TRC matter within the constraints and complexities as outlined earlier.

F. SECOND ALLEGATION: THE "MISSING" CRADOCK FOUR DOCKET

46. The Calata Applicants rely on an affidavit deposed to by Macadam dated 24 May 2021 as part of the NPA's Rule 53 record, in which he states that during April 2013 he and I received a request for information on the Cradock Four matter from Ms Lepinka, personal assistant to Acting NDPP Adv Nomgcobo Jiba; that I responded to that request; and that he was thereafter asked to hand over the investigation docket, Swartkop CAS 13/07/1985, to the Office of the Acting NDPP, which he did.

47. I wish to emphasise the following: -

47.1. I have no specific personal recollection of the events described by Macadam in relation to the physical movement of the Cradock Four docket in April 2013.

47.2. Having revisited Macadam's affidavit (**annexed in the Calata matter as FA47**), I note that he does not allege that I instructed him to hand over the docket, neither that I removed it from his control, nor that I caused it to "disappear". Had I done so, one would expect an explicit statement to that effect, yet none appears.

47.3. The mere fact that a docket is transmitted from a specialised unit to the Office of the NDPP or Acting NDPP, particularly in a matter of high public sensitivity, is neither unusual nor indicative of improper motive.

48. Whereas Macadam was responsible for the Cradock Four matter whilst I was the SDPP: PCLU, he reported directly to me thereon. I in turn, reported to the responsible Deputy

NDPP and the NDPP on TRC matters. Following my appointment as NDPP, at no stage was I requested to invoke my powers under section179(5) of the Constitution, read with section 22(2) of the NPA Act, in relation to the Cradock Four matter.

49. While I do recall Macadam looking for the Cradock Four docket, to the extent that there is any uncertainty about the chain of custody or whereabouts of the Cradock Four docket, the appropriate course, which I invite the Commission to adopt, is to utilise its extensive powers to obtain the full set of NPA records, SAPS docket registers, docket control registers and the Rule 53 record, and to trace precisely what occurred.

50. There is, however, no factual basis for any suggestion that I caused, authorised or colluded in the "loss" or suppression of the Cradock Four docket. I categorically deny any such implication.

G. THIRD ALLEGATION: THE NOKUTHULA SIMELANE MATTER (*NKADIMENG II*)

51. The Calata Applicants allege that the litigation instituted by Ms Thembisile Nkadimeng in *Nkadimeng II* exposed political interference and suppression of TRC matters, that the NPA failed to oppose her application, and that I, as NDPP, only acted under pressure of that litigation by engaging in settlement discussions and thereafter charging the accused.

52. The contemporaneous record tells an entirely different story.

53. On 1 August 2013, while I was Acting Head of the PCLU, Macadam, who was seized with TRC matters, including the matter relating to Ms. Simelane, furnished me with a detailed internal memorandum (annexed hereto as "**SKA 1**"), advising on a letter of demand dated 31 July 2013 from the Legal Resources Centre ("**LRC**") addressed to Acting NDPP Adv Nomgcobo Jiba.

54. In the said letter, the LRC demanded that the NPA either charge the perpetrators of the kidnapping and murder of Ms Simelane by 30 August 2013, or decline to prosecute and refer the matter for a formal inquest.

55. In that memorandum, Macadam: -

55.1. set out the history of the investigation;

55.2. identified outstanding investigative steps;

55.3. stressed that, in terms of prosecutorial principle, an inquest should only be directed once a prosecutor is satisfied that a prosecution cannot be instituted; and

55.4. attached draft responses for the consideration of the Acting NDPP, together with extensive correspondence between the LRC, Ms Nkadimeng, Senior NPA officials and SAPS investigators.

56. This evinces that, far from suppressing the matter, the PCLU under my acting leadership treated it with seriousness and was engaged in ensuring that investigations were brought to a point where a proper prosecutorial decision could be taken.

57. On about 9 April 2015, SAPS presented the investigation docket in the Simelane matter to me for decision. Macadam and I were required to jointly consider the docket and make a recommendation to PCLU coordinator and head, Johnson.

58. On or about 20 May 2015, Ms Nkadimeng launched *Nkadimeng II* in the Pretoria High Court, seeking, *inter alia*, an order compelling the NDPP to take steps to refer the matter to a formal inquest if a prosecution was not instituted.

59. Whilst Macadam and I discontinued our deliberations on the matter following receipt of the application in *Nkadimeng II*, Macadam later provided his assessment to Johnson on the merits of the matter. A self-explanatory affidavit from Macadam dated 6 August 2015 is annexed hereto as "**SKA 2**". To my recollection, this affidavit was never filed in *Nkadimeng II*, and would have served as a supporting affidavit to the NPA's main affidavit, whomever would have been the deponent thereof.

60. Following my appointment as NDPP on 18 June 2015, as early as 15 July 2015, I submitted a memorandum to the Minister pursuant to section 33(2)(a) of the NPA Act in relation to the investigation and prosecution of matters emanating from the TRC. The memorandum would have preceded an in-person meeting between the Minister and I, during which I would have briefed him on the history and status of TRC matters.

61. The memorandum, an unsigned copy of which is annexed hereto as "**SKA 3**", would have been prepared by the PCLU and submitted to me through the Deputy NDPP under whom responsibility of the PCLU resorted.

62. Johnson later submitted a memorandum to me dated 17 July 2015, through the Deputy NDPP responsible, recommending that a formal inquest be held. The PCLU followed this up, through the Deputy NDPP concerned, with a memorandum dated 24 July 2015 for my consideration and signature, addressed to the Minister, recommending that an inquest be held and that the Judge President of the Gauteng Provincial Division be requested to designate to preside over the inquest. Although I did sign the memorandum addressed to the Minister, I do however recall holding the memorandum back and not submitting same to the Minister as I decided to first peruse the docket to satisfy myself on the merits of the content of the docket and possibly obtain a second opinion on the matter.

63. On 21 August 2015, I received an email (a copy of which annexed hereto as "**SKA 4**") from Mr Moray Hathorn ('**Hathorn**'), Nkadimeng's legal representative, requesting a meeting with me sometime during September 2015 and at which meeting he, *inter alia*, intended placing evidence before me in relation to the kidnapping and murder of Ms Simelane.

64. Having acquiesced to Hathorn's request, the meeting took place on or about 25 September 2015 in my boardroom at the VGM Building. Hathorn was accompanied by, *inter alia*, Nkadimeng, senior members of her legal team led by Adv Muzi Sikhakhane and which included Howard Varney SC ("**Varney SC**") and possibly others whose names I am regrettably unable to recall. Frank Dutton ("**Dutton**"), a private consultant and/or private investigator was also in attendance. My team, *inter alia*, included the

Deputy NDPP Adv Nomgcobo Jiba, members of the PCLU, my Special Advisor and Chief of Staff.

65. At this meeting, Nkadimeng's team delivered a presentation in support of the institution of a prosecution of the alleged perpetrators of the kidnapping and murder of Ms Simelane. Following the presentation and subsequent deliberations, it was agreed that the NPA would be afforded the opportunity to re-visit the matter and to revert to Nkadimeng and her legal team before the end of October 2015, with a potential prosecution at hand. *Nkadimeng II* was consequently put on hold.

66. Immediately thereafter I directed that a new team of prosecutors be assigned to the matter to study the investigation docket, along with all other relevant material, to further engage with Nkadimeng's team, namely, Varney SC, Hathorn, Dutton and others, and to advise on the reasonable prospects and sustainability of a successful prosecution.

67. Against this backdrop, my engagement, as NDPP, in discussions with Nkadimeng's legal representatives and the subsequent decision by the NPA to charge the four former security branch officers (Coetzee, Pretorius, Mong and Radebe) on 14 March 2016, much to the satisfaction of Nkadimeng and her team, reflect the culmination of a process of investigation and prosecutorial assessment and definitely not a capitulation to impermissible pressure.

68. At all material times, my conduct in relation to Ms Simelane's matter was directed at ensuring that the matter was properly investigated and that, once the evidential

threshold was met, charges were brought. There was thus no failure on my part to prosecute.

H. FOURTH ALLEGATION: "NPA UNDER PRESSURE" AND THE POST-TRC PROSECUTIONS

69. The Calata Applicants allege that, following the launch of *Nkadimeng II* and the attendant public attention, the NPA was "under pressure", and that only then did families of other detainees—such as those of Ahmed Timol and Neil Aggett—begin to "agitate" for their cases, supported by civil society organisations and pro bono counsel.

70. It is suggested that the NPA's subsequent actions, including the reopening of inquests and the institution of certain prosecutions, were motivated not by constitutional duty but by external pressure and a desire to deflect criticism.

71. Whilst litigation and public advocacy incidentally and fortuitously commenced at the inception of my appointment as NDPP, it did contribute to a renewed focus on TRC matters, which was complimentary to my victim centric approach to justice. Whereas litigation and public advocacy is both inevitable and legitimate in a constitutional democracy, I however do not accept and strenuously deny that the NPA under my leadership acted unlawfully, or that we succumbed to improper political pressure either to suppress or to selectively resuscitate such matters.

72. To the contrary: -

72.1. The PCLU focused on a number of post-TRC matters during which consideration was given to the reopening of several inquests. These processes commenced during early February 2016.

72.2. I made available members of the PCLU to regularly engage with Hathorn, Varney SC, Dutton and other persons in relation to TRC matters.

72.3. In relation to the death of Mr Ahmed Timol, I submitted a memorandum to the Minister requesting that he approach the Judge President of the Gauteng Division to appoint a judge to preside over the reopening of the inquest. In October 2017, judgment was delivered reversing the earlier inquest finding and recommending the investigation and prosecution of João Rodrigues and others for murder and defeating the ends of justice. João Rodrigues was charged with Timol's murder in July 2018.

72.4. In the case of Dr Neil Aggett, I similarly caused a memorandum to be prepared recommending that the Minister request the Judge President to appoint a judge to preside over the reopening of the inquest.

72.5. Following a request from Premier Willies Mchunu of KwaZulu-Natal, I directed the PCLU to investigate the prospects of reopening the inquest into the death of former ANC President Chief Albert Luthuli.

72.6. I directed the Deputy NDPP: Head: NPS to engage with the PCLU and the DPP's to establish whether TRC matters ought to be referred to the DPP's, to determine a framework thereon and to action the process.

72.7. Aside from providing regular in-person briefings to the Minister on matters relating to the NPA, including post-TRC matters and the work of the MPTT, I also submitted numerous memoranda to the Minister thereon, including a comprehensive memorandum to brief the Honourable President on matters relating to the NPA.

73. These steps that were taken during my tenure as NDPP demonstrate proactive, not reactive, conduct: We, at all material times, actively sought to utilise available legal mechanisms to revisit post-TRC matters and apartheid-era deaths in detention and to ensure accountability where the evidence permitted.

74. Accordingly, the characterisation of the NPA as having acted only when "under pressure" from litigation is a distorted portrayal. In this regard, the decisions I took and the acts I performed were rooted in constitutional and statutory duty, and by my innate commitment to a victim centric service in delivering justice, informed by evidence, not by fear of reputational harm.

I. THE NATURE OF THE EVIDENCE AGAINST ME

75. The allegations purporting to implicate me consist, in essence, of broad inferences drawn from institutional delay, coupled with isolated references to documents that, properly read, do not support the conclusions advanced.

76. No factual evidence is presented that I: -

76.1. instructed that any TRC matter not be investigated or prosecuted;

76.2. refused to authorise a prosecution where the evidentiary threshold had been satisfied;

76.3. interfered with any prosecutor or investigator to prevent action being taken; or

76.4. colluded with any political or other actor to suppress TRC cases.

77. The sweeping insinuations that my conduct was "improper" are therefore gratuitous, in that they lack a demonstrable factual foundation and amount to opinion evidence on the very issues that this Commission must determine for itself.

78. I am confident that, given the Commission's investigative mandate and its powers to obtain the complete documentary record and to hear from all relevant officials, it will attach no probative value to such unsupported opinion.

J. CONCLUSION AND RESERVATION OF RIGHTS

79. In summary, I have sought in this statement to: -

79.1. explain the mandate and limits of this Commission's ToR;

79.2. briefly set out the constitutional and statutory framework governing the NPA and the PCLU;

79.3. contextualise and address, in detail, the specific allegations advanced by the Calata Applicants and reflected in the Commission's Rule 3.3 Notice; and

79.4. demonstrate, with reference to objective facts, that there is no basis to conclude that I failed in my duties to investigate or prosecute TRC matters, or that I was party to any effort or attempt to stop such investigation or prosecution.

80. On the contrary, the record shows that during my tenure: -

80.1. TRC matters received the requisite dedicated attention by the NPA;

80.2. inquests were reopened (including in the Ahmed Timol and Neil Aggett matters);

80.3. prosecutions such as the Simelane case were authorised and pursued;

80.4. João Rodrigues was charged for Ahmed Timol's death in July 2018;

80.5. steps were taken to develop frameworks and policy guidance for the handling of TRC cases within the NPA.

81. For these reasons, any allegation that I "failed" in my duties to prosecute TRC matters as NDPP is, with respect, incorrect. It conflates institutional and historical challenges with personal fault, and attributes to me responsibility for systemic shortcomings and challenges that long pre-dated and, indeed, post-dated my tenure.

82. I note, moreover, that the NPA has not yet furnished me with the full corpus of documentation I requested in my correspondence of October 2025. I therefore reserve the right to supplement, clarify or correct this statement should further records come to light that bear on issues within the Commission's mandate.

83. I respectfully invite the Commission, should it deem it appropriate, to exercise its statutory powers to obtain from the NPA all documents, memoranda, reports and correspondence relevant to TRC matters during my tenures as Acting SDPP: PCLU and as NDPP, so that my evidence and that of other witnesses may be assessed against a complete and reliable documentary record.

84. I remain at the disposal of the Commission and stand ready to further assist the Commission in performing its important constitutional task.

SHAUN KEVIN ABRAHAMS
DEPONENT

I certify that the deponent has acknowledged that he knows and understands the contents of this statement, which was signed and sworn to before me at OLIFANTSFONTEIN on this the **12th day of December 2025**.

COMMISSIONER OF OATHS

7638838-9

SUID-AFRIKAANSE POLISIEDIENS
SUPPLY CHAIN MANAGEMENT
2025 -12- 12
OLIFANTSFONTEIN
SOUTH AFRICAN POLICE SERVICE

"SKA1"

/Z56 forms

INTERNAL MEMORANDUM

P. O. Box 752,
PRETORIA
0001

VGM Building
Hartley St.
Weavind Park
0001
Pretoria
South Africa

Tel: (012) 845 6000

TO: ADV SK ABRAHAMS
ACTING HEAD: PCLU

FROM: ADV RC MACADAM
SENIOR DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS: PCLU

SUBJECT: *NOKHUTHULA SIMELANE*

DATE: 1 AUGUST 2013

Dear Shaun

1. Late yesterday afternoon I was emailed the attached letter of demand from the LRC, addressed to Adv Jiba **(Annexure "A").**

2. The letter called upon me to advise the LRC if there were outstanding lines of investigation per return. My response is attached hereto **(Annexure "B").**

3. The letter demands that Adv Jiba make a decision either to prosecute or to hold a formal inquest by no later than 30 August 2013, failing which an application will be brought to the High Court. The document alleges that the NPA has had sufficient time to complete investigations.

4. It is extraordinary for this letter to have been sent and the statements contained therein are in numerous aspects incorrect and misleading.

5. The pertinent facts of the case are as follows:

   Prior to my involvement

   5.1 Ms Simelane disappeared without trace from the Carlton Centre in 1983.

   5.2 In 1996 members of the Soweto Security Branch submitted statements to the then Captain Andrew Leask, alleging that on the instructions of their superiors they had kidnapped her and taken her to a farm in Northam where their

superiors tortured her for a month. They however contradicted each other on the crucial issue of where and in whose company she was last seen alive. Captain Leask was instructed by his superiors not to proceed further with the investigation.

5.3 In 1997, the TRC had an amnesty application where the witnesses and their superiors all applied for amnesty for kidnapping and torture. The superiors admitted the kidnapping but disputed the allegation that she had been tortured for a whole month. Their version was that she had agreed to become a police informer and was handed over to an undercover police officer for re-infiltration into the ANC in Swaziland. They alleged that they left the farm to firstly carry out a series of bombings in Johannesburg and thereafter arrested a number of MK members.

5.4 Only in 2001 did the TRC hand down judgment, granting amnesty for kidnapping but refusing amnesty for torture in respect of the superiors. The TRC specifically refrained from making any findings about her possible murder.

5.5 The circumstances under which no further investigations into the matter were conducted from 2001 to 2009 have been comprehensively dealt with in the memorandum to the Minister dealing with TRC cases.

My involvement

5.6 I was appointed to deal with TRC cases in 2010 and on 27 October 2010 submitted a lengthy letter to the investigating officer **(Annexure "C")**, requiring a substantial number of complex investigations to be conducted.

5.7 As emerges from the LRC letter, on 29 January 2013, the family wrote to Dr Ramaite SC, raising a number of issues. I attach Dr Ramaite SC's reply **(Annexure "D")**, dated 31 January 2013, refuting the claims made and confirming that the matter was receiving proper attention.

5.8 In February 2013, I was contacted by Adv Robin Palmer, who informed me that he had been instructed to represent the family and he requested a meeting with the investigating officer and me on 18 February 2013, which took place.

5.9 The investigating officer and his commanding officer informed us that they would endeavour to finalise the outstanding investigations by 31 May 2013. The agreement was that we would again meet with Adv Palmer at the end of May 2013 to report on the progress made.

5.10 Adv Palmer was not available, but was per email on a regular basis updated with progress being made in the investigation and was satisfied therewith. Copies of the relevant emails are attached as **Annexure "E"**.

5.11 In fact, on 26 July 2013, he contacted me from abroad, requesting a meeting on 20 August 2013, which I agreed to.

6. The investigation has focused primarily on two crucial issues:

6.1 Firstly, establishing whether from mortuary records and other information the remains of the missing person can be located and exhumed. This is obviously the most vital aspect of the case.

6.2 Secondly, investigating the claim of the superiors relating to the return of the missing person to Swaziland and all the other acts which they allegedly performed in connection therewith.

7. During the course of an excavation in Brits, skeletal remains were found and the matter reported to the local police. An initial on-site examination suggested that the remains were of a female in the same age group as the missing person. The remains are currently undergoing a comprehensive forensic and DNA analysis and in order to establish whether they are those of the missing person and whether the cause of death can be determined.

8. Obviously the outcome of these tests is crucial to the determination as to whether a number of the original investigations still require to be conducted and will also identify a number of new investigations if a positive result is received.

9. Consultations between the SAPS Victim Recovery Unit and the investigator indicate that it is unlikely that these results will be known prior to the end of this month and consequently Adv Jiba would not be able to make a decision as per the LRC demand.

10. In terms of the NPA Policy a decision to prosecute may only be taken once the case has been fully investigated and the prosecutor is satisfied that there are reasonable prospects of a successful prosecution. Clearly no such decision can be taken prior to the conclusion of the investigation.

11. An inquest may only be held once a case has been fully investigated and the prosecutor is satisfied that no prosecution can be instituted. This again requires the finalisation of the investigation. It must be borne in mind that in inquest proceedings, the presiding officer is provided with all the relevant statements. If the investigation is incomplete, the presiding officer will decline to hold an inquest. In the instant matter it must be borne in mind that all the key witnesses are former SAPS members, who would all qualify for legal representation if an inquest were to be held. Even if the presiding officer allowed the inquest to commence while investigations were outstanding, this would result in numerous postponements and objections.

12. I have prepared a draft response for Adv Jiba's consideration. Due to the fact that the LRC letter constitutes a demand, she will have to respond to all the issues raised, because in the event of proceedings being instituted, her silence will be construed as an admission.

Kind regards

ADV RC MACADAM

1 August 2013

Your Ref: B Sibiya

Legal Resources Centre
Constitutional Litigation Unit
P O Box 9495
JOHANNESBURG
2000

Fax: (011) 834 4273

Dear Sir/Madam

KIDNAPPING, TORTURE, DISAPPERANCE AND MURDER OF NOKUTHULA SIMELANE

I acknowledge receipt of your letter of 31 July 2013, addressed to me, relating to the above matter, but forwarded per email to Adv Macadam of my staff.

I must at the outset express my understanding of your client's anguish at the unresolved disappearance of a family member since 1983. I am however constrained to respond to the issues raised in your letter.

I note that you have attached a copy of your client's letter of 29 January 2013, addressed to Dr Ramaite SC. I enclose herewith a copy of Dr Ramaite SC's letter of 31 January 2013 in which he responds to all the issues raised and gives your client the reassurance that the matter is receiving proper attention from both the South African Police Service (SAPS) and the National Prosecuting Authority (NPA). I do not propose to deal with the issues already dealt with by Dr Ramaite SC.

In your letter you refer to the NPA completing its investigations and also refer to investigations being conducted by Adv Macadam. It is important for you to note that the NPA is not an investigating agency

and Adv Macadam is not conducting an investigation. The investigation is the responsibility of the Directorate for Priority Crime Investigation (DPCI), a SAPS structure. Adv Macadam's function is to give guidance to such investigation as per statutory obligations contained in both the SAPS and NPA legislation.

Your statement regarding the "unwillingness" of the NPA to conclude "its investigations" is misplaced. I have been advised that your client had instructed Adv Palmer to represent them and that from February 2013 until 27 July 2013, he has been constantly updated on the progress being made with the investigations. In fact, Adv Palmer had proposed a meeting on 20 August 2013 with Adv Macadam and members of the DPCI.

I have further been advised that Adv Macadam did not give an undertaking to make a final decision whether to prosecute or not by the end of May 2013.

I have been provided with a full briefing on the matter and am satisfied that it was necessary to request the DPCI to conduct a number of extremely complex investigations before any decision to prosecute or hold a formal inquest could be taken. In terms of the NPA Policy, a decision to prosecute may only be made once a case has been fully investigated and the prosecutor is satisfied that a successful prosecution may be instituted. A prerequisite for the holding of an inquest also requires a decision from a prosecutor that there are insufficient grounds to institute a prosecution. This again requires a full investigation.

Insofar as you propose as an alternative to a prosecution a formal inquest, a presiding officer will not agree to the institution of inquest proceedings in the absence of all the relevant aspects being fully investigated. Were an inquest to commence in the absence of such an investigation, this would simply result in numerous postponements and objections from counsel representing the affected parties.

The statements made in paragraphs 5, 6 and 8 of your letter are consequently not accepted.

I have been advised that a recent development in connection with the investigation is the discovery of skeletal remains during the course of an excavation which remains are currently undergoing a full forensic examination. The DPCI has indicated that the outcome of this examination is necessary, as this will inform the nature of all further investigations which will be required to be conducted.

The DPCI has in this regard advised that it would not be in a position to place a fully investigated docket before the NPA so as to enable a decision whether or not to prosecute to be taken on 30 August 2013. Although a time frame for the conclusion of the investigation cannot be determined, the DPCI has indicated that the finalisation of the investigation will be prioritised once the results have been received.

In the circumstances, I therefore inform you that I am not in a position to comply with your demand. I also deem it necessary to advise you that my function is to accept or reject a recommendation whether to prosecute by the PCLU in consultation with the Directors of Public Prosecution of the North and South Gauteng High Court Divisions.

Although your client's concerns are noted, I am of the view that your client's interests would be best served by being able to obtain closure on the matter, which in turn requires that all the relevant facts be properly established. I would therefore advise you to consult with your client on the issue of the threatened High Court application against me. Should however you proceed with the application, it will be opposed and an appropriate order of cost will be sought.

Yours sincerely

ADV N JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

"A"

LRC

LEGAL RESOURCES CENTRE

PBO No. 930003292

Constitutional Litigation Unit • 16th Floor Bram Fischer Towers • 20 Albert Street • Marshalltown, Johannesburg 2001 • South Africa • www.lrc.org.za

PO Box 9495 • Johannesburg 2000 • South Africa • Tel: (011) 836 8831 • Fax: (011) 834 4273

Your Ref:
Our Ref: B Sibiya

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By fax: 012 845 7291; and
By hand

31 July 2013

Dear Advocate Nomgcobo Jiba,

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We act for Thembisile Phumelele Nkadimeng, the sister of the late Nokuthula Aurelia Simelane (Simelane), who was kidnapped and tortured by the former Security Police of the South African Police in 1983 and disappeared while in their hands.

2. We refer to the earlier correspondence in this matter between our client and your office. We also refer to the various communications and meetings held with your Advocate Chris Macadam from the Priority Crimes Litigation Unit (PCLU) earlier this year and in previous years. We attach for your easy reference a copy of our client's letter dated 29 January 2013 addressed to your colleague, Dr Silas Ramaite, the then Acting National Director of Public Prosecutions. This letter sets out the background to the case of our client's late sister.

3. Our client and her family have been seeking justice, truth and accountability for nearly 30 years. September this year will be the 30th anniversary of the disappearance of Simelane. It has been some 17 years since an investigation docket was opened into her disappearance. Simelane's case was one of the cases referred to National Prosecuting Authority (NPA) by the erstwhile Truth and Reconciliation Commission (TRC) in 2001 and was in turn referred to the PCLU

National Office:
Cape Town:
Durban:
Grahamstown:
Johannesburg:
Constitutional Litigation Unit

J Love (National Director) K Reinecke (Director: Finance)
S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Mudarikwa, HJ Smith
MR Chetty (Director), EJ Broster, PB Mahomed, AJ Richard
S Sephton (Director), C McConnachie
N Fakir (Director), T Mbhense, Y van Leeve
T Ngcukaitobi (Head of CLU), M Bishop, G Bizos SC, J Brickhill, S Ndidi, B Sibiya, W Wicomb

in 2003. This matter has been in the hands of the NPA for 13 years and has been with the PCLU for more than 10 years.

4. Most of the responsible perpetrators have received amnesty for the kidnapping of Simelane, while some also received amnesty for her torture. The crimes of assault and assault GBH have prescribed in terms of section 18 of Act 51 of 1977. No explanation has been provided for the failure to charge those perpetrators who were denied amnesty for the brutal torture of Simelane. None of the perpetrators applied for amnesty for her murder and some did not even apply for her kidnapping, even though the evidence firmly implicates them. In terms of section 18 of the said Act the crimes of kidnapping and murder never prescribe.

5. As appears from the correspondence, my client has engaged in extensive and strenuous endeavours to persuade the authorities to take action over many years. Her pleas have fallen on deaf ears. Ultimately an undertaking was provided by your Adv Macadam to make a final decision on whether to prosecute or refer this matter to an inquest by no later than the end of May 2013. At the end of May no such decision was taken and Adv Macadam advised that he required more time to finalize his investigations. Towards the end of June the said Macadam indicated that he could provide no date on when the investigations would be completed.

6. Our client has understandably lost all faith in the ability and/ or willingness of the NPA to ever conclude its investigations. Our client is of the view that if the suspects in this matter could not be prosecuted, it should have been referred to a judicial inquest years ago, if not decades ago.

7. Should your Adv Macadam be of the view that there are still outstanding lines of investigation that are critical and necessary for purposes of making a decision whether to prosecute or refer to an inquest, and that such investigation cannot be completed within the month of August he is invited to advise us per return. Should no such advice be forthcoming we will assume that there is no further inquiry that cannot be concluded within the next four weeks for purposes

of making the said decision and we will act in accordance with our instructions as set out below.

8. Our instructions are as follows:

8.1 The National Prosecuting Authority (NPA) has had more than sufficient time to complete its investigations;

8.2 There is more than sufficient evidence upon which to take a decision to prosecute or to refer to an inquest;

8.3 Even if there are unresolved lines of inquiry, the nature thereof are unlikely to be resolved by further investigation; and can in any event be concluded prior to the launch of a prosecution; or prior to, or during the course of an inquest;

8.4 The excessive delay in finalizing this investigation has severely prejudiced the right of my client and her family to justice and violated their constitutional right to human dignity; and

8.5 The prolonged delay constitutes disgraceful neglect by the criminal justice system; is deeply offensive to the rule of law and is contemptuous of the sacrifices made by Simelane in her struggle for the freedom of South Africa.

9. We are accordingly instructed to demand that you make a decision to charge the perpetrators responsible for Ms Simelane's kidnapping and / or murder and / or other offences by no later than close of business on Friday, 30 August 2013, alternatively; should you decline to prosecute anyone that you refer this matter to a formal judicial inquest. Should you decline or fail to make such a decision our instructions are to apply to the High Court for an order that the matter be referred to a judicial inquest.

Yours sincerely

pp Ml Moyane

Legal Resources Centre, Constitutional Litigation Unit, Johannesburg
Bongumusa Sibiya

COPY TO: **Minister for Justice and Constitutional Development**
By fax: 012 406 4680

AND TO: Advocate Chris Macadam
Priority Crimes Litigation Unit
By fax: 012 845 6337; and
By email: cmacadam@npa.gov.za or hzwart@npa.gov.za

AND TO: Captain Masegela,
South African Police Service
By hand

THEMBISILE PHUMELELE NKADIMENG

698 Umhlanga Street
Wingate Park
PRETORIA 0181

Tel: 012 421 3600
Fax: 012 4213616
Cell: 082 553 6680
Email: nkadimeng.thembi@gmail.com

OFFICE OF THE NATIONAL DIRECTOR
2013 -01- 30
NATIONAL PROSECUTING AUTHORITY

29 January 2013

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

BY HAND

Fax: (012) 845 6337

Dear Dr Silas Ramaite,

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

I am the sister of Nokuthula Aurelia Simelane ("Nokuthula"). My identity number is 730210 0329 088. On behalf of my family, I seek the holding of a formal inquest in terms of Act 58 of 1959 in respect of the circumstances surrounding the murder and other offences perpetrated by members of the former South African Police Security Branch against Nokuthula.

Background

Nokuthula was the first child of Ernestina and the late Matthews Simelane. She was a member of Umkhonto we Sizwe (MK), the military wing of the African National Congress (ANC). My sister was a student at the University of Swaziland in the early 1980s. During this time, she acted as a go-between for the ANC and exiled leaders in

Swaziland. In September 1983 shortly after completing her university studies, and whilst on an MK mission to South Africa, she was kidnapped by the Security Branch from the Carlton Centre in Johannesburg. She was then brutally tortured over a period of several weeks and then disappeared.

Most of the policemen who kidnapped and tortured her and then caused her disappearance applied to the TRC for amnesty. They received amnesty for her kidnapping even though they were found to have been untruthful about their treatment of my sister.[1] The senior officers were denied amnesty for her vicious assault. None of the police officers applied for amnesty for the murder of Nokuthula. The senior police officers, in whose presence she was last seen, have refused to disclose the whereabouts of the remains of Nokuthula. To this day her remains have not been found for a burial with dignity.

My family and I have constantly searched for the truth about what happened to my sister. Shortly after her disappearance we spoke with ANC members. We enquired at the South Africa / Swaziland border whether she had crossed into South Africa, but there was no record of her. We even made inquiries in neighbouring countries such as Botswana. Nokhuthula's disappearance was reported to the police, both in Swaziland and, subsequently, in South Africa.

All these efforts proved fruitless until early 1996 when the Sowetan newspaper published a story about Nokuthula's disappearance. The newspaper article appeared to finally spur the police into action. A police investigation under case number CAS1469/02/1996 was opened under the auspices of the Priority Crimes Unit based at John Vorster Square (now Johannesburg Central Police Station). The investigating officer was Captain Leask. During July 1998 one of the senior officers was warned of his rights in terms of section 35 of the Constitution in respect of the "murder" of Nokuthula Simelane. He declined to make a statement.

[1] Decision (AC/2001/166) of the Amnesty Committee of the Truth and Reconciliation Commission.

We raised her disappearance with the TRC. We have pleaded with prosecutors to take the case forward. I have even appointed private detectives. A documentary was made and screened on TV ("Betrayal", 2003). A statue was erected in her memory in Bethal. However we are still without answers.

We know from the TRC hearings that my sister suffered terribly at the hands of the South African security branch. We know that she refused to collaborate with the forces of Apartheid. For this she paid the ultimate price. My father died in 2001, without knowing what happened to his daughter. I refuse to give up the search for the truth and justice.

Attempts to seek justice

I have met police officers as well as prosecutors from the Priority Crimes Litigation Unit (PCLU) of the National Prosecuting Authority (NPA) on a few occasions. On each occasion various excuses were provided as to why this case could not go forward.

Initially the PCLU advised that there was sufficient evidence to proceed against certain of the officers on charges of assault to do grievous bodily harm in respect of the physical torture of Nokuthula. However, they advised us that they were prevented from proceeding with assault prosecutions as the right to prosecute such offences had prescribed by virtue of section 18 of the Criminal Procedure Act 51 of 1977.

The PCLU also advised that their hands were, in any event, tied by an effective moratorium against the prosecution of the so-called political cases of the past. They were not permitted to proceed until a standardized policy had been put in place to deal with such cases. Towards the end of 2005 the Prosecution Policy was duly amended. It provided for an effective back-door amnesty for those responsible for so-called political crimes and who had not previously applied for amnesty. Together with the wives of the Cradock 4 I applied to court to have this policy set aside as unconstitutional. The Pretoria High Court struck down the policy in the case of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD

case no 92709/07). In this matter the NPA had argued that the amended policy survived constitutional scrutiny as families could still bring private prosecutions in matters where the NDPP declined to prosecute. The court rejected this contention stating that it was the primary responsibility of the NPA to prosecute. The NPA was denied leave to appeal.

Following the striking down of the amendments to the prosecution policy I was advised that the PCLU was still unable to take this matter forward because they lacked police detectives to carry out the necessary investigations.

During the course of 2006 one of my legal representatives presented the PCLU with a legal opinion in which it was concluded that the physical and mental abuse perpetrated against Nokhulhula constituted the international crime of torture. Torture was, by 1983, a prohibited and unlawful act in terms of customary international law. South Africa was obliged to investigate and prosecute transgressions of customary international law as well as violations of the Geneva Conventions. While the PCLU did not dispute the conclusions of this opinion they did not take the matter forward.

My legal representatives also proposed that those suspects who did not apply for amnesty be prosecuted for kidnapping. I am advised that kidnapping is listed as one of the exceptions to the 20 year prescription rule in section 18 of Act 51 of 1977. Notwithstanding that there was no legal impediment to the preferring of such charges this proposal was rejected. My legal representatives also proposed that charges of defeating the ends of justice be brought against two of the senior officers for intimidating a junior officer into making a false statement and for attempting to coach a witness into making a false statement. The PCLU declined to pursue such charges.

Other excuses include an apparent lack of evidence. In particular it has been claimed that none of the evidence that was led before the Truth and Reconciliation Commission (TRC) may be used in subsequent legal proceedings. I am advised that this view is without merit. It is based on an erroneous reading of section 31 of the Promotion of

National Unity and Reconciliation Act 34 of 1995 which, in any event, was not invoked in these particular proceedings before the TRC.

The need for a formal inquest

This matter is now urgent. Nearly 30 years has passed since Nokuthula's disappearance. Some 17 years has lapsed since the more recent police docket was opened. My mother is now elderly and sickly. Witnesses are also getting old. Some have died in suspicious circumstances.

The PCLU had previously suggested that an inquest be held in this matter. At that time my family and I preferred to see a prosecution taking place. Indeed we have been trying to launch a private prosecution, but we have been unable to raise sufficient funds to pay the security for costs, which we are advised will be a substantial sum of money. In the circumstances we now wish to have formal inquest held as speedily as possible.

If the authorities were going to prosecute this matter such prosecution would have taken place many years ago. This case has dragged on for way too long, and such delay has undermined the prospects for justice and played into the hands of the perpetrators. With every day that goes by without action being taken, the interests of justice are severely eroded. Moreover, and most regrettably, we have lost complete faith in the PCLU to run a successful prosecution.

Last week I met with the investigating officer, Captain Masehela. He advised me that he submitted his report to Advocate Chris Macadam at the PCLU during July 2011. In this report he proposed that this matter be dealt with in an inquest. I assume that this report was submitted in compliance with section 4 of the Inquest Act. I then spoke with Advocate Macadam who advised me to approach Madeleine Fullard, the Head of the Missing Persons Task Team at the National Prosecuting Authority of South Africa.

I met with Ms Fullard who advised that her Task Team had not been able to locate the remains of Nokuthula. She suggested that I approach the suspects and offer not to

prosecute them if they disclose the location of Nokuthula's remains. I have discussed this suggestion with my family and we have decided not to do a deal with the suspects. The suspects have had more than ample time to come forward and disclose the whereabouts of the remains. They have chosen rather to cause me and my family untold pain and anguish by maintaining a wall of lies and deceit.

Please advise me per return whether the statements and relevant documents have been submitted to a magistrate or judicial officer in terms of section 6 of the Inquest Act. If not, please advise why not. If the documents have been submitted, please advise which magistrate or judicial officer is dealing with this matter. I am advised that I am entitled to be given reasonable notice of the holding of an inquest in terms of section 7 of the Inquest Act. I further request that steps be taken to ensure that the inquest is a formal public inquest which includes the giving of oral evidence. Given the sensitivities of this matter I request that this inquest be held in the High Court of South Africa.

Should you at any point choose to institute criminal proceedings in this matter I request that you appoint a special prosecutor to lead the prosecution, in consultation with me and my family.

I accordingly ask that you treat this request with great urgency and advise me at your earliest convenience.

Yours sincerely,

T P NKADIMENG

Copy to: Advocate Chris Macadam, Priority Crimes Litigation Unit

"B"

Chris Macadam

From: Chris Macadam
Sent: 01 August 2013 09:47 AM
To: 'Mabatho Molokomme'
Cc: SlabbertJ@saps.gov.za; Susan Bukau
Subject: RE: JV PLEIN: 1469/02/1996

Dear Sir/Madam

I acknowledge receipt of your email of yesterday. I note that in paragraph 9 thereof you call upon me to advise you "per return" if I am of the view that there are "outstanding lines of investigations". I wish to bring pertinently to your attention that earlier this year, I was approached by Adv Robin Palmer, who informed me that he had been instructed by the family to represent them. I have since that date been in constant communication with him, updating him on the progress being achieved with the investigation and informing him of matters which still required attention. On 26 July 2013 he contacted me from New Zealand and again discussed the issue of what was outstanding. I agreed to meet with him on 20 August 2013 (which date was proposed by him) so that he could be fully briefed on the status of the matter. As Adv Palmer is fully aware, there are certain key investigations which must be conducted prior to a decision being taken either to prosecute or to request that a formal inquest be held. As he is fully aware, a fixed date for the conclusion of those investigations cannot be fixed due to the nature of the investigations which require the uncovering of evidence going back to 1983. The content of your letter runs counter to my engagements with Adv Palmer. Since your letter is addressed to Adv Jiba and in the final paragraph you demand that she make a decision to prosecute or hold an inquest by no later than 30 August 2013, I deem it inappropriate to respond further to you. The contents of your letter will be brought, via my superiors, to Adv Jiba with a recommendation that she respond appropriately to your demand and the issues raised in your letter. I however at this stage place on record that many of the allegations made therein are not accepted.

RC Macadam
Senior Deputy Director of Public Prosecutions

From: Mabatho Molokomme [mailto:mabatho@lrc.org.za]
Sent: 31 July 2013 03:19 PM
To: Chris Macadam; Helena Zwart (H)
Cc: Bongumusa Sibiya
Subject: JV PLEIN: 1469/02/1996

Dear All

Kindly see attached a letter for your attention.

Regards,
Mabatho Molokomme
Candidate Attorney
Legal Resources Centre
mabatho@lrc.org.za
www.lrc.org.za
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"C"

Priority Crimes Litigation Unit

The National Prosecuting Authority of South Africa
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27 October 2010

Captain TP Masegela
Crimes Against the State
PRETORIA
0001

Email: BesterL@saps.org.za

Dear Captain Masegela

NOKUTHULA SIMELANE
JOHN VORSTER SQUARE CAS 1469/02/96
CATS 01/082010

In this matter no person has as yet been arrested or prosecuted. No corpse has been found which matches that of the missing person. In the event of a prosecution not being conducted, an inquest would have to be held. Having regard to the facts of the case, were an inquest to be held, it would be desirable that a formal one be held.

The material placed before me consists of the following:

(a) A duplicate John Vorster Plein docket missing certain statements;

(b) An original investigation diary;

(c) Loose photographs;

(d) Extracts from the Amnesty application.

I have added the judgment of the Amnesty Committee to the TRC documents.

Both the initial investigation and the amnesty hearing require further investigations, which are set out hereunder. In the event of a

prosecution, only the police investigation and the statements and evidence of the State witnesses, who applied for amnesty, may form part of the docket. The amnesty statements and evidence of the accused could not form part of the docket.

In the event of an inquest, all the relevant facts would have to be placed before the inquest Magistrate, in which case all the amnesty material would have to be included.

It is therefore recommended that the docket be compiled in three separate sections:

1. The police investigation and all investigations carried out thereon;
2. All the material which was placed before the Amnesty Committee;
3. All investigations carried out as a result of the evidence before the Amnesty Committee.

A complete set of all the evidential material (testimony applications and documents) placed before the Amnesty Committee must be obtained. A bundle would have been compiled by the TRC of all the relevant documentary evidence, placed before the Committee. (This may have included the police docket.)

The applicants completed application forms and attached thereto statements and other documents.

The applicants and witnesses then testified and the transcripts of their evidence are necessary, as well as any documents which may have been introduced during their testimony.

Documentation currently missing includes:

- The testimony of Duma Nkosi;
- Portions of the cross-examination of Veyi;
- Statement made by Veyi, which accompanied his amnesty application.

As far as the police investigation is concerned, the following further investigations are necessary:

- ✓ Although the original "C"-clip is in the docket, the "B"-clip and the original "A"-clip are missing. There is a duplicate docket, but certain statements are missing, certain statements have not been allocated an "A"-clip number and certain statements have not been signed, nor commissioned.

- ✓ A portion of another docket Krugersdorp CAS 1263/01/96 has been included in the John Vorster docket, but the whole Krugersdorp docket is required.

- ✓ The original investigating officer is required to submit a statement, setting out all the steps taken in the investigation and indicating when last he had the original docket in his possession. He should also assist in reconstructing the docket and addressing issues relating to the unsigned statements, etc.

- ✓ According to the investigation diary, in 1996 the Rustenburg LCRC compiled a photograph album and sketch plan of the farm where the missing person was detained. This album and plan should be obtained, as at present, there are only loose photographs. If the original album cannot be located, then the farm must be revisited with the relevant witnesses and a new album and sketch plan compiled.

- ✓ It must be established whether all the original witnesses are available and if so, they must be requested to comment on whether they stand by their original statements and if they testified before the TRC, their TRC versions. Any contradictions or retractions should be properly explained.

- ✓ In several of the statements reference is made to persons who are claimed to be dead. Confirmation of these deaths must be obtained.

- ✓ The issue of "A22" (MT Radebe) is puzzling and must be clarified:

    - The first witness to come forward was Veyi, who indicated that Radebe participated in the torture at the farm. The statement of Radebe is however to the effect that he only guarded the missing person at the Norwood flat for a week and was then transferred to the John Vorster Vehicle Branch. Another witness, Selamolela, also alleges that Radebe was at the farm and in fact claims that the missing person was last seen in Radebe's company, together with two other persons, namely Coetzee and Pretorius. All the witnesses involved in the kidnapping and assault of the missing person made statements to Captain Leask, who warned them of their right against self-incrimination.

- In the case of Radebe, we only have an unsigned and unattested statement, purportedly taken by Captain Ndlovu of the Braamfontein Police. Radebe was not warned of his right against self-incrimination according to the statement. The circumstances under which the statement was obtained must be properly established and in particular, it must be established whether at any stage, Radebe signed an affidavit.

- If Veyi and Selamolela are telling the truth about Radebe's involvement at the farm, then his statement to the effect that he was never there must be a lie. Conversely, if in fact he was transferred to the Vehicle Branch, then a question mark hangs over the veracity and the reliability of Veyi and Selamolela as witnesses.

- Whether Radebe is being truthful or not could easily have been verified by establishing whether in fact he was transferred to the Vehicle Branch in early September 1983. The original investigating officer must indicate whether any investigations in this regard were conducted and if so, what the outcome thereof was. If this was not properly established at the time of the initial investigation, then this aspect must be now investigated. I assume that the SAPS personnel registers could provide relevant information. According to the private investigator, Radebe is still a serving member of SAPS.

- Radebe never applied for amnesty and the family of the missing person have made representations that he should be prosecuted. Whether he can at this stage be prosecuted would depend on whether he was given the status of a witness at the time of the initial investigation. The investigating officer must be requested to fully explain this issue.

- Once all of the above has been investigated, Radebe should be approached, warned of his rights and requested to indicate if he wishes to make a statement at this stage.

✓ Although it is alleged that Peter Lengene is dead, he made various statements in the docket. He alleges that there was an attempt by Pretorius and Coetzee involving Director Thoms, to induce him to make a false statement. The docket shows that the original investigators and other police officers were involved in arranging for the under-cover policeman, Norman Mkonza (Scotch) to have a taped conversation with either Pretorius or Coetzee. Various entries have been made in the investigation diary and reference is made to

a tape being kept as an exhibit. The investigating officer must explain what the outcome of all of this was and Director Thoms must also be approached to indicate whether he has any knowledge of this matter.

- ✓ According to Patrick Kobe ("A7"), he heard that Coetzee, Pretorius and Mong had killed the missing person. He must indicate from whom he received this information.

- ✓ A further statement must be taken from Duma Nkosi, providing the further additional detail:

  - Whether the missing person was known to him prior to her being sent to him by Mpho;

  - How he received instructions from Mpho;

  - What the missing person exactly was to do;

  - To whom he made enquiries to trace the missing person's whereabouts;

  - Whether he suspected that the missing person had been detained by the Security Branch and if so, whether he adopted any counter-measures.

- ✓ A further statement from Justice Ngidi must be obtained covering the following:

  - What the nature of his dealings with the missing person were;

  - When last he saw her before she disappeared;

  - Whether he was aware of what duties she was performing on behalf of Mpho;

  - What missions Mpho gave to Scotch and Frank;

  - What training was given to these persons and how well were they known to Mpho;

  - Since it appears that he was based in Swaziland at the time, he should comment on what structures were in place in Swaziland at the time. Lengene said that Coetzee and others were taking the missing person to Swaziland. The witness must be requested to indicate what structures would have

been in place on the Swaziland side of the border post and what would have happened had the missing person presented herself at that point.

- ✓ It must be established how far from the Oshoek Border Post the University where the missing person was studying at, the premises from which Gilbert Twala operated and the home of Thembi Vilakatim are.

- ✓ The person referred to as John June in paragraph 9 of Gilbert Twala's affidavit must be traced and requested to submit a statement regarding his knowledge of the matter.

- ✓ According to Veyi, Manuel from Mozambique was also involved. Efforts should be made to identify him and obtain a statement from him.

- ✓ There is also reference to an Adrian Bambo, who is also referred to as "Strongman". It must be established whether in fact he is now deceased.

- ✓ According to the witness statements, the following premises and intersections have relevance:

  - The Norwood Flats;
  - The farm at Northam;
  - The Potchefstroom Security Branch office;
  - The intersection referred to by Veyi;

  A map should be obtained where all these points are marked and the distances between them indicated.

- ✓ At the end of the police investigation, the following emerges:

  - Veyi says that he was in the company of Selamolela when he saw the missing person in the boot of Coetzee's car after she had left the farm and at a four-way stop.
  - Selamolela however claims that he last saw her at the farm in the company of Coetzee, Pretorius and Radebe.

- Lengene says that the missing person was told to wash and put on new clothes, because she was being taken to Swaziland. He claims he drove her in a van to the servants' quarters in a certain house in Westonaria where she was left in the company of Sefuthi, Pretorius and Coetzee.

- Sefuthi merely mentions being at the farm, does not indicate when he last saw her and in whose company she was, but claims that he suspects that she was killed by Coetzee, Pretorius and Mong, because they threatened her with death during the interrogation. He does not mention Radebe as being present at the farm.

- It would appear that Pretorius, Coetzee and Mong were not informed of the allegations and invited to respond.

✓ The versions referred to above are all contradictory and on the very points where corroboration should be obtained, the witnesses contradict each other, e.g. Selamolela makes no mention of being at the intersection with Veyi and Sefuthi makes no mention of being at the house in Westonaria. Lengene's version of the missing person being prepared to return to Swaziland and leaving in his van is not supported by the other witnesses. It must be established whether there are other members of the Security Branch Unit to which all these persons belonged, who could possibly at this stage shed light on the various allegations.

✓ The confusion continues at the amnesty application where for example Selamolela is emphatic that he did not accompany Veyi to the intersection and suggests that this was Sefuthi. Sefuthi never testified at the amnesty application and as is clear from his statement to the police, last saw the missing person at the farm.

✓ Coetzee, Pretorius and Mong all testified at the amnesty application and denied that the missing person was as severely assaulted as claimed by the other witnesses. They also claimed that she agreed to become a police informer and was handed over to two under-cover police officers (whom they claimed were now dead), who dropped her off at the Oshoek Border Post. This contradicts the version of the other witnesses to the effect that the missing person at no stage agreed to cooperate and being an informer.

✓ Coetzee was cross-examined on the basis of information which Lengene provided to Fanie Malapo. A statement must be obtained from Mr Malapo in which he sets out what he knows about this

matter and what exactly was conveyed to him by Lengene and any other person whom he may have interviewed.

- ✓ It was a key feature of Mong, Pretorius and Coetzee's amnesty applications that they could not have participated in the protracted assaults as alleged, because at that time they were involved in the investigation of certain terrorist cases and carried out arrests. Efforts should be made to trace these cases in order to confirm whether there is objective proof that he was performing duties outside the farm at Northam at the relevant time. A Mr Brits was at one stage in charge of all the dockets opened by the Security Branch and I believe that these dockets are currently being stored at CATS.

- ✓ It was also a feature of the applications that they claimed that they planted certain explosive devices at power stations and a railway line in order to create the impression that these attacks had been carried out by MK. This was ostensibly to deceive the ANC into believing that these attacks had been carried out as a result of the missing person's information. Again with reference to the dockets and other records (e.g. Bomb Disposal Unit records) held by SAPS, it must be established whether these explosions in fact took place and whether there is evidence showing that it was these persons who carried out these attacks.

- ✓ Finally, it was also alleged that as a result of the information provided by the missing person that certain MK members were arrested and prosecuted. This issue also surfaced in the cross-examination of Gilbert Twala, who admitted that certain persons had been arrested, but alleged that this had taken place before the disappearance of the missing person and on the basis of the information of an informer. Again, efforts must be made to establish the relevant details regarding the arrest of these persons in order to establish which of the two versions is correct. In this regard, the Department of Justice & Constitutional Development still retains records relating to the detention of various people and these should also be checked.

- ✓ Coetzee, Mong and Pretorius place reliance on various people who they allege are now dead. In addition to the two under-cover police officers referred to above, reference is also made to Brigadier Muller, Coetzee's commanding officer, as well as to "Strongman" Mbombo. It must be established whether these persons did in fact hold the positions as alleged and when they died. This is important, because it will have to be decided whether they were implicated

specifically because it was known that they were dead and could not refute the allegations.

- ✓ Coetzee claims that Brigadier Muller briefed Brigadier Schoon about the plan to use the missing person as an informer. It must be established whether Brigadier Schoon is alive and if he can comment on this allegation.

- ✓ Coetzee also claims that the Eastern Transvaal Security Branch had a file on the missing person, who had been identified as a MK member. Efforts should be made to identify the members of this branch at that time to see if anyone can confirm or deny this allegation.

- ✓ The version of how the missing person was tortured, became an informer, was dropped off at the border post and then no inquiries made when she disappeared, appears to me to be implausible. Efforts should be made to establish whether there is a reliable senior member of the Security Branch who could indicate whether the process followed by Coetzee was in fact appropriate in the light of the procedures and practices of the Security Branch of that time.

- ✓ According to Veyi, he met with the Divisional Head of the Security Branch at Potchefstroom after leaving the farm. (See pages 105 and 106.) It must be established who the Divisional Head was at the time and if he is available, a statement must be obtained from him.

- ✓ It was common cause that Veyi first approached The Sowetan and in particular a journalist, Sharon Chetty. Veyi was cross-examined about the fact that the journalist reported that he had decided to come forward, because Coetzee and the others had been promoted and not himself. He denied having said this. The journalist also reported that the ANC only contacted the missing person's family 10 years after she had disappeared, which was also disputed by Gilbert Twala. The journalist must be traced and asked to comment on these allegations.

- ✓ Selamolela alleges that there was only one entrance to the Norwood Flats, which was disputed by Coetzee. It must be established which version is true. If the building has been unaltered, then current photographs can be taken. If however it has subsequently changed, then efforts must be made to establish whether there are plans or photographs of it as it existed in 1983.

- ✓ There were major disputes between the witnesses surrounding the dam, the outbuilding, the main farm house and the washing facilities available. If the premises have not been altered in the interim, they should be photographed to obtain clarity on all these issues.

- ✓ In his evidence, Gilbert Twala mentioned a number of persons who might have knowledge of the events, e.g. Wally and Wendy Mbana. Efforts must be made to trace these people to obtain statements from them.

- ✓ Gilbert Twala was called to refute the allegation that the missing person had returned to Swaziland and been murdered by the ANC. Under cross-examination he however alleged that he could not talk about ANC structures in Swaziland, but only knew about the Transvaal Unit located in Soweto. Efforts would have to be made to identify the relevant structures in Swaziland at the time, who can comment on the allegation made by Coetzee and others. Twala alleged that Siphiwe Nyanda, currently the Minister of Communications, may well be placed to assist in this regard. It was specifically alleged that the missing person had meetings with the current Minister. The Minister would have to be approached to provide a statement.

- ✓ Under cross-examination of Mr Twala, it was put to him that there was an intelligence unit which killed MK members, who were traitors. It was also alleged that the Motsoanyame Commission also made a finding concerning a person who had the same MK name as the missing person. These aspects would have to be investigated and if necessary, statements obtained.

- ✓ Swaziland is a SADC member and consequently, the SADC policing protocol applies. Contact should be made with the Swaziland authorities to establish whether it is at all feasible that records would exist showing that a body matching that of the missing person was ever found. It is highly unlikely that such a search of police dockets and inquests could be conducted, but it would have to be explained to a Court that this avenue was explored.

- ✓ It is clear that there are considerable disputes regarding how and under what circumstances the missing person left the farm. This raises the possibility as to whether she was not in fact killed and buried on the farm. A suitably qualified exhumation expert should be requested to visit the farm in order to establish whether any exhumation is at all possible. An exhumation under forensic procedures should be carried out if the response is positive.

- ✓ According to Lengene, the missing person was taken to a private residence in Westonaria. Under cross-examination, Coetzee admitted that he had a brother who lived in Westonaria and worked on a mine. This avenue should be properly investigated.

- ✓ According to Veyi, he was told by a former police officer who subsequently died, that Coetzee and Pretorius had shot the missing person and buried her in Rustenburg. It should be established whether Coetzee and Pretorius had safe houses in the Rustenburg area or friends or relatives who had plots or farms in Rustenburg. If any premises are identified, consideration should be given to whether an exhumation is feasible.

- ✓ As I have already indicated, the witnesses who gave statements must be requested to confirm what has already been said. It would appear that Coetzee, Pretorius and Mong have never cooperated with the investigation and it would be appropriate, once all the investigations have been concluded, to approach them via their attorney, Mr Wagener, to comment on the allegations.

- ✓ As I have also already indicated, the situation relating to Radebe is strange. It may well be that he could hold the key to explaining what really happened on the farm and he should be approached in this light.

The duplicate docket and four blue files may be collected from my office, but must be returned to me once the investigations have been concluded.

Kind regards

RC MACADAM
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
AND DEPUTY HEAD: PRIORITY CRIMES LITIGATION UNIT

"D"

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31 January 2013

Ms TP Nkadimeng
698 Umhlanga Street
Wingate Park
Pretoria
0181

Fax: (012) 421 3516
Email: nkadimeng.thembi@gmail.com

Dear Ms Nkadimeng

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. I acknowledge receipt of your letter, dated 29 January 2013 and at the outset express my extreme sympathy for the suffering you and your family have experienced due to the unresolved disappearance of your sister. The purpose of my communicating with you is to explain fully all the relevant facts relating to your sister's disappearance so as to allay your criticisms levelled at the PCLU. Your case has and will continue to receive diligent attention by the NPA. As will be explained hereunder, it is not possible to hold an inquest prior to the conclusion of the outstanding investigations, which must be conducted by the DPCI.

2. Although your sister disappeared in September 1983, the first information identifying suspects was only received by SAPS in 1996.

3. When the TRC was established, SAPS elected to put on hold all investigations where amnesty application had been lodged. Your sister's matter was one such case.

4. The judgment of the Amnesty Committee was only released in May 2001.

5. When the PCLU was established in 2003, the National Director referred all TRC cases to it.

6. It is correct that the TRC cases were temporarily put on hold pending the formulation of guidelines. This was because it was deemed important that special considerations applied to these cases.

7. Your application to have the provisions (which you state constituted a second amnesty process) set aside, resulted in the Court declaring the whole guidelines unconstitutional, including the mechanisms creating structures for the investigation of such cases.

8. When the President established the Ginwala Commission, SAPS declined to further investigate the matters, pending the conclusion of the Commission. One of the matters falling within the terms of reference of the Commission was the manner in which TRC cases were dealt with by the NPA.

9. The dissolution of the DSO, the establishment of the DPCI and the redefining of the mandate of the detective service did unfortunately hamper efforts to have your case investigated.

10. In early 2010, Adv Macadam was appointed by the Acting National Director to take over all the matters and to liaise directly with the DPCI, following an agreement reached between the NPA and General Dramat.

11. I enclose a copy of Adv Macadam's letter of 25 March 2010, addressed to the Unit Commander of the DPCI, who had been mandated to investigate TRC cases. As emerges from the letter, Adv Macadam did specifically request that the issue of prosecuting Detective Inspector Radebe be investigated. As is also clear from the letter, the NPA at that stage merely had a duplicate docket and it was obviously essential that the original docket and other evidence be located.

12. Captain Masegela was appointed to investigate the matter and in late 2010 submitted a docket to Adv Macadam. I enclose a copy of a letter, dated 27 October 2010, written by Adv Macadam to Captain Masegela, requesting an extensive number of all-embracing investigations. Yet again, the role of Detective Inspector Radebe was emphasised. As is evident from the investigations requested, your sister's case had obviously not been fully investigated, either by the TRC or by SAPS. It is also clear that it would not be possible to quickly finalise the investigation, because of the issues required to be canvassed.

13. It is correct that the PCLU declined to institute a prosecution on the Customary International Law crime of torture and on a

charge of attempting to defeat the ends of justice. The two letters, written by Adv Macadam, however demonstrate that the request that consideration be given to the prosecution of Detective Inspector Radebe, was acceded to.

14. It is the view of John Dugard, one of the world's leading experts in the field of International Law, that international crimes require domestic legislation before they can become enforceable in South Africa. The Constitutional Court, in the *Wouter Basson* matter, also specifically refrained from directing that he be charged for Geneva Convention crimes and in fact limited his potential prosecution only to offences under the Riotous Assemblies Act. The domestic Rome Statute, which criminalises certain international crimes, specifically prohibits prosecutions for such offences committed prior to the enactment of the Statute. The Torture Convention Bill also makes no provision for retrospective criminalisation. The PCLU's decision not to institute a prosecution on a charge of torture was correct. Only a charge of assault with intent to do grievous bodily harm could have been considered, but such crime had prescribed in 2003.

15. The person who alleged that he had been influenced to change his version was deceased even prior to the amnesty hearing. The tape recordings were lost while in police custody. There could therefore be no basis for a prosecution and in addition, charges of defeating the ends of justice would have prescribed in 2006.

16. The docket was not submitted to the PCLU in July 2011 under cover of a report, let alone one as required in terms of Section 4 of the Inquests Act. In fact, the docket was re-submitted with a substantial number of the original investigations not having been conducted and no evidence establishing that your sister was murdered.

17. Rather than requesting that the outstanding investigations be conducted at that stage, Adv Macadam explored a number of other options, aimed at trying to establish that your sister was in fact murdered by the Security Branch:

    17.1 In a statement, dated May 2011, the original investigating officer indicated that he had been instructed to hand over the docket to Captain Holmes so that it could be part of an investigation against General Engelbrecht. The original docket when located contained no statements taken by Captain Holmes and it was established that he had passed away many years previously. A perusal of the D'Oliveira material failed to reveal any record of investigations conducted by him into your sister's case. It was established that an investigation into General Engelbrecht was conducted, but that the Director of

Public Prosecutions: Pretoria declined to prosecute and the National Director concurred with this decision. That investigation contained no evidence referring to your sister's disappearance and murder.

17.2 A matter completely overlooked by both the TRC and SAPS was the claim by three of the suspects that bombings of two power stations and a railway line and the arrest of Justice Ngidi confirmed their version. After an extensive search, the dockets relating to the bombings were located and in fact found to contain evidence which would have been materially relevant at the time of the amnesty application. It was however further established that a separate committee of the TRC granted the persons involved in the bombings amnesty. The docket relating to Justice Ngidi could not be located; however, other evidence was obtained which indicated that he was arrested at a different time as alleged by the suspects.

17.3 The discovery of this additional evidence led Adv Macadam to conclude that your sister may have been in fact murdered on the farm. He requested the Missing Persons' Task Team (MPTT) to look into the possibility of conducting an exhumation. A senior international forensic anthropologist however advised that an exploration of the farm should only take place in spring before the summer re-growth of vegetation, but when the ground was again moist after spring rains.

17.4 As an interim measure, the MPTT commenced inspecting mortuary records with the aim of locating cases which matched the description of your sister. This has led to a process of retrieving various inquest records relating to unidentified persons. Once all the records have been obtained, they will be placed before Adv Macadam in order for him to decide whether any of them relate to your sister.

17.5 Although the exploration of the farm was conducted in October 2012, the report from the MPTT was only made available on 25 January 2013. This was because the MPTT explored every possible option which could lead to the identification of the burial site. All these options however were too of no avail and the MPTT has concluded that no exhumation is feasible in the absence of clear evidence as to a specific burial site.

18. The docket was only resubmitted to the PCLU late last week, again containing no further statements, save for the report of the MPTT. The allegation that Ms Fullard advised you to approach the suspects is disputed by her. In any event, I would not

authorise any such conduct, as this would not be conducive to the interests of justice.

19. The docket has been carefully perused by Adv Macadam and a Senior State Advocate and is in the process of being re-submitted to the investigating officer with an instruction that all outstanding investigations be concluded without further delay.

20. Only after the matter has fully been investigated can Adv Macadam, in consultation with the relevant Directors of Public Prosecutions, make a properly informed recommendation as to whether a prosecution can be instituted or not. The decision rests with me.

21. The placing of the existing statements before a Magistrate would not serve any useful purpose, because the Magistrate would be constrained not to hold an inquest until the matter has been properly investigated

22. Insofar as you request that the inquest be held in the High Court is concerned, the Inquests Act requires that the Minister approach the Judge President of the relevant division to appoint a Judge. I cannot request the Minister to exercise these powers in the absence of a fully investigated case.

23. As the evidence currently stands, there is confusion as to where your sister was last seen alive and consequently, Section 6(3) of the Inquests Act may apply, which requires that the Minister appoint a specially designated Magistrate. This provision also could not be invoked in the absence of a fully investigated case.

24. Insofar as you also request the appointment of a special prosecutor in consultation with your family, I am of the view that this would impede on the independence of the NPA, because in certain cases, the Courts have set aside appointments of prosecutors where there is a connection to the complainant.

25. I trust that the above reassures you that the matter is receiving proper attention. You will be informed when the matter has been investigated and a decision taken. In the event of the decision being taken to hold an inquest, the various provisions of the Inquests Act will be invoked to ensure that it will be a formal one.

Yours sincerely

DR MS RAMAITE SC
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

"E"

Helena Zwart (H)

From: Robin Palmer <PALMER@ukzn.ac.za>
Sent: 11 February 2013 12:10 PM
To: Chris Macadam
Cc: Helena Zwart (H)
Subject: Nkadimeng case meeting: 2pm on Monday 18 February 2013

Dear Chris,

1. Further to our telcon, I confirm I will meet with you (together with Alan Wallis) re the Nkadimeng case progress on Monday 18 February at 2pm at your offices.
2. It may be useful to also have the investigating officer present at this meeting- could you kindly try to arrange this?

Regards,
Robin Palmer.

_____ Information from ESET Endpoint Antivirus, version of virus signature database 7992 (20130210) _____

The message was checked by ESET Endpoint Antivirus.

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Helena Zwart (H)

From: Robin Palmer <PALMER@ukzn.ac.za>
Sent: 17 May 2013 04:26 PM
To: Helena Zwart (H)
Subject: RE: NOKUTHULA SIMELANE

Thanks Chris- I will report back. Please let me know about timelines at the end of May.
Regards,
Robin.

From: Helena Zwart (H) [hzwart@npa.gov.za]
Sent: 17 May 2013 04:21 PM
To: Robin Palmer
Subject: RE: NOKUTHULA SIMELANE

Dear Robin

agree that it is not necessary to meet. The alibi of Mr Radebe has been investigated and it was established that he was only transferred to the Vehicle Theft Unit in September 1984 and therefore he was still at the Security Branch at the time when Ms Simelane was on the farm at Northam.

The safe houses in use by the Soweto Security Branch at the time have all been identified and all have been eliminated as having exhumation potential, save for the smallholding at Westonaria where consideration is being given to the feasibility of a probe. The detention files relating to Mr Ngidi have been obtained from Justice. They give the case reference number of the docket upon which he was arrested, as well as dates of his detentions. Investigations are now in progress to locate the docket and other evidence whereupon he will be interviewed. The detention files relating to Gilbert Twala are still awaited from Justice. The original under-cover agent, Scotch, has been traced and will be re-interviewed as it would appear that he has also knowledge relating to the arrest of the MK members, which is central to the defence put up by Coetzee, Pretorius and Mong. The outcome of these investigations will determine whether it is still necessary to approach General Nyanda for a statement.

Work is in progress regarding checking mortuary records for entries which could correspond to the physical description of Ms Simelane and the time of her disappearance and once more information is forthcoming, consideration will be given as to whether exhumations are necessary. The outcome of these investigations will determine the necessity or otherwise of having to conduct the original queries directed by myself.

Kind regards

Chris

From: Robin Palmer [mailto:PALMER@ukzn.ac.za]
Sent: 17 May 2013 03:46 PM
To: Helena Zwart (H)
Cc: Chris Macadam
Subject: RE: NOKUTHULA SIMELANE

Dear Chris,
I am out of the country for a while- perhaps you can update me on progress, and actions still to be taken with projected time-frames, at the end of May, and I will report to the other team members- a meeting seems unnecessary at this stage. I will be back in mid-to late June if a meeting is indicated at that stage.
Regards,
Robin Palmer.

From: Helena Zwart (H) [hzwart@npa.gov.za]
Sent: 17 May 2013 02:40 PM
To: Robin Palmer
Cc: XabaN@saps.org.za; Susan Bukau
Subject: NOKUTHULA SIMELANE

Dear Robin

With reference to our undertaking to meet at the end of May 2013, I would like you to indicate your availability. We are not in a position at this stage to have finalised all the investigations, but a number of key aspects have been dealt with and the remaining investigations should be finalised within a reasonable period of time.

Kind regards

Chris Macadam

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Helena Zwart (H)

From: Robin Palmer <PALMER@ukzn.ac.za>
Sent: 02 May 2013 02:20 PM
To: Helena Zwart (H)
Cc: nicolef@salc.org.za; howardvarney@gmail.com
Subject: RE: Nokuthula Simelane

Dear Chris,
Thank you for the reply. Kindly keep me updated.
Kind regards,
Robin Palmer.

From: Helena Zwart (H) [hzwart@npa.gov.za]
Sent: 02 May 2013 02:12 PM
To: Robin Palmer
Subject: RE: Nokuthula Simelane

Dear Robin

There are no new developments at present.

Kind regards

Chris Macadam

From: Robin Palmer [mailto:PALMER@ukzn.ac.za]
Sent: 02 May 2013 12:40 PM
To: Helena Zwart (H)
Cc: nicolef@salc.org.za; howardvarney@gmail.com; alanw@salc.org.za
Subject: RE: Nokuthula Simelane

Dear Chris,
I confirm receipt, and shall circulate to other team members. Do you have an update on the current status of the investigation?
Regards,
Robin Palmer.

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: Monday, April 15, 2013 3:47 PM
To: Robin Palmer
Subject: Nokuthula Simelane

Dear Robin

With reference to our telcon last Friday, I do not deem it necessary to reply to the last letter from your clients, as we discussed all the issues during the course of our telcon. In the light of the DA/NDPP matter, a number of decisions of the NPA may now be reviewed and I would be obliged to file a record of all the communications which could cause embarrassment and open the doors for allegations.

I confirm that you drew my attention to a Sunday Times article where extracts from one of my letters were quoted. It should be brought to your client's attention that these types of disclosures are potentially prejudicial, as if proceedings are instituted, the other parties may then on the basis of the article require discovery fo my internal communications with you and your client.

I note that Frank Dutton is being copied on the correspondence. He approached me two years ago, informing me that he had been appointed to investigate the matter on behalf of the family. It may well be necessary for him to provide the investigating officer with a statement outlining what he did.

I confirm that investigations are continuing regarding Radebe's claim to have been transferred to the Vehicle Theft Unit via the relevant police documentation and also locating all the dockets and background information relating to the detention of the various MK members as became relevant at the amnesty hearing.

Checks are also being conducted on the mortuaries in areas relevant to the investigation for any records which might correspond with the missing person.

Kind regards

Chris Macadam

_____ Information from ESET Endpoint Antivirus, version of virus signature database 8222 (20130412) _____

The message was checked by ESET Endpoint Antivirus.

http://www.eset.com
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"SKA2"

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eight Respondent

SUPPORTING AFFIDAVIT ON BEHALF OF THE FIRST RESPONDENT

I,

RAYMOND CHRISTOPHER MACADAM,

1.

I am an adult male, employed by the National Prosecuting Authority ("NPA") of South Africa. I am an admitted advocate of the High Court and since 2003, I have served as a Senior Deputy Director of Public

Prosecutions in the Priority Crimes Litigation Unit ("PCLU") of the Office of the National Director of Public Prosecutions ("NDPP").

2.

I am duly authorised to make this affidavit. The facts contained herein are true and correct. Unless otherwise stated or indicated by the context, the facts fall within my personal knowledge.

3.

The PCLU was established in 2003 and shortly after the unit commenced functioning, the then NDPP, Mr BT Ngcuka, directed that the PCLU should be responsible for the institution of prosecutions arising from the process of the Truth & Reconciliation Commission ("TRC").

4.

I initially assisted the Head of the unit, Adv Ackermann SC, in identifying cases falling within the NDPP's directive. In 2004 however, I was seized with a major matter relating to an international nuclear weapons proliferation network, which required full time attention for a number of years. As such, I no longer dealt with what I now refer to as "TRC cases."

5.

I am unable to recall an exact date, but I am able to confirm that Adv MJ Mpshe SC, the then Acting NDPP, (I believe that this was shortly before Adv Simelane was appointed as the NDPP.) directed that I should take over the TRC cases from Adv Ackermann SC.

6.

I was aware of the fact that firstly, the Directorate of Special Operations ("DSO") and thereafter the South African Police Service ("SAPS") had declined to investigate TRC cases. Adv Ackermann SC provided me with a list of cases which he had not been able to deal with as these matters all required investigations before decisions whether or not to prosecute could

be taken. The case before this Court was one of these matters. *("The instant case.)*

7.

I commenced meeting with the then Divisional Head of the Detective Service of SAPS (Commissioner Lalla), aimed at ensuring that the cases would be investigated. I was advised by Commissioner Lalla that a project team would be established to investigate the matters.

8.

Shortly thereafter I was advised by Commissioner Lalla that a decision had been taken to refer the matters to the Directorate for Priority Crime Investigation ("DPCI") and that I should convey my request to the Head: DPCI.

9.

In respect of the instant case, I had requested from the State Archives a complete record of an amnesty hearing, which had been held by the TRC. I was also only able to locate a duplicate police docket missing several statements.

10.

As a result of Commissioner Lalla's advice, I commenced a further set of engagements, aimed at persuading the DPCI to investigate the matters. On 25 March 2010, I had written to the DPCI, requesting that the instant matter be investigated. However, I was informed that the Head: DPCI had decided that investigations would commence only after the conclusion of the 2010 World Cup due to a number of additional operational commitments which had been occasioned by this event. I was informed that the investigations would be done by the Crimes Against the State ("CATS") component of the DPCI.

11.

In October 2010, I was provided with the original docket and on 27 October 2010, I directed extensive further investigations. A copy of my letter has been filed as **Annex "TN21.6"** to this application.

12.

I deem it important to explain the basis for directing such extensive investigations:

12.1 The applicant's sister had disappeared without trace in 1983.

12.2 Only in 1996 did a small number of junior members of the former Soweto Security Branch make statements to the police, implicating themselves and their superiors in her kidnapping and torture.

12.3 The witnesses contradicted themselves as to where and in whose company she was last seen alive and also as to who was involved in the offences. A warning statement was only taken from one suspect (a bare denial).

12.4 In 1997, an amnesty hearing of the TRC commenced involving certain of the State witnesses and three of their superiors. In my view, a number of persons who could have provided crucial evidence regarding the conflicting versions placed before the committee were never called. The judgment was only handed down in 2001.

13.

My approach to the case was that I would have to decide whether the circumstantial evidence would be sufficient (in the absence of a body having been discovered or evidence being found relating to the planning or killing of the victim) to justify a prosecution against the persons implicated on a charge of murder. Alternatively, I would have to give consideration to the prospects of a successful prosecution against persons who had been involved in the kidnapping and who had not applied for amnesty. In the event of me concluding that no successful prosecution was possible on either scenario, then in terms of the Inquests Act, No 58 of 1959 ("the Inquests Act"), an inquest would have to be held. A prerequisite for all three options would be a fully investigated police docket.

14.

I was on an ongoing basis consulted by the investigating officer regarding the conduct of the investigation. It was clear to me that he was encountering difficulties in complying with my instructions. At a certain stage however, he resubmitted the docket together with a statement from the 1996 investigating officer (Captain Leask). According to Leask, he had been instructed not to proceed further with the investigation, but to hand his docket over to a Captain Holmes. In this regard, he indicated that the case would be part of a larger investigation against a General Engelbrecht.

15.

I was aware that Captain Holmes was a member of the D'Oliveira Investigation Unit, which had been set up to investigate certain cases falling within the ambit of the TRC. I was however aware that he had been dead for a number of years although in 1996 he was still alive. Certain of the files relating to this unit had been transferred to the NPA and a number of members of the unit had also elected to transfer to the NPA. I made a number of enquiries aimed at establishing what further investigations he had conducted and obtaining the relevant files.

16.

All my enquiries produced negative results. In fact, all I could locate was a report compiled by the then Director of Public Prosecutions ("DPP"), Pretoria to the then NDPP, declining to prosecute General Engelbrecht. Nowhere in the report was reference made to the investigation of the instant case.

17.

Due to the fact that a task team had been set up within the NPA to trace the remains of persons who had disappeared during the period falling within the mandate of the TRC, I requested the task team to assist the investigating officer by establishing whether an exhumation was possible at the farm where the victim was taken to, as well as at any other properties which were in use by the Soweto Security Branch in 1983. I also requested that the

mortuary records be checked in all areas in which relevant events had taken place.

18.

I continued to advise the investigating officer on matters relating to the outstanding investigations. For example, I perused a number of docket registers looking for the cases relating to the false flag operations which were allegedly conducted as alleged during the amnesty application.

19.

It was a key issue at the amnesty hearing as to whether the victim had agreed to cooperate with the police and provided information leading to the arrest of some 18 members of the Liberation Movement. I perused docket registers trying to locate the relevant police dockets and also requested that security files be obtained from the relevant archives.

20.

In early 2013, the applicant wrote to Dr MS Ramaite SC, the then Acting NDPP, requesting that an inquest be held. In my view, it would be inappropriate to hold an inquest before the investigation had been concluded and before it could be established that there was no prospect of a successful prosecution against any of the persons implicated.

21.

This led to me having several communications with an Adv Palmer during the course of which I pointed out the matters which still required further investigation.

22.

In 2013, I was also advised by the investigating officer that he believed that he had found the skeleton of the victim. I directed the following further investigations in this regard:

22.1 A more comprehensive report from the anthropologist who had examined the skeleton.

22.2 DNA testing by a laboratory in Bosnia due to the fact that the local DNA tests were inconclusive.

22.3 A facial reconstruction of the skull.

23.

It was however subsequently established that the skeleton was not that of the victim. I continued to assist the investigating officer with the outstanding investigations.

24.

As is evidenced in the annexures attached to the application, the applicant later in 2013 instructed the Legal Resources Centre ("LRC") to communicate with the Head: PCLU and/or the NDPP, aimed at having an inquest held without further delay. The responses by the relevant officials in the NPA speak for themselves and require no further elaboration from myself. The responses are filed as **Annexes "TN21.4"** and **"TN21.2"** to the application. I am however unaware of how the then NDPP responded to a letter, dated 10 July 2014 from the LRC. My attitude was again that consideration could only be given to the request for an inquest once the investigations had been concluded and it decided that there was no prospect of a successful prosecution.

25.

I have previously been a senior member in three offices of the then Attorney General and had dealt with formal inquests on a number of occasions. As such, I was aware that in the case of an inquest, the docket is placed before the presiding officer and it is he/she who determines which witnesses should be called and not the prosecutor. Although the prosecutor may direct that certain witnesses be in fact called, the role of the prosecutor is primarily that of an evidence leader to assist the Court. In my view, if an uninvestigated

29.

Adv Abrahams advised me that the police had submitted the docket to him for decision on 9 April 2015. Adv Abrahams and I commenced collating all the relevant material and preparing to advise Adv Johnson, who had been appointed as the Coordinator of the PCLU in early 2015, as to the correct decision which she would have to make. A matter that required careful thought was whether a prosecution should be instituted against Sergeant Radebe for kidnapping or whether this should be held in abeyance pending the outcome of a formal inquest. Our view was that the circumstantial evidence would not be sufficient to sustain a conviction on a charge of murder.

30.

On 20 May 2015, this application was served on the NPA. Adv Abrahams and I suspended our deliberations on the decision to be taken on the matter in order to peruse the application (some 471 pages) so as to advise Adv Johnson and other NPA officials as to how the application should be responded to. Had the LRC, instead of launching this application (which, because of its voluminous content would have taken a considerable amount of time to prepare), written to the NPA, it would have been advised that a decision whether to prosecute or hold an inquest would be made within a short period of time.

31.

On 28 May 2015, I provided Adv Johnson with my assessment of the instant case. In a nut shell I recommended that she should provisionally decline to prosecute all the implicated parties and that a formal inquest before a Judge should be held. I pointed out to her that in terms of section 6(d) of the Inquests Act, the Minister of Justice & Correctional Services would have to appoint the Judge President of the Gauteng Division to appoint a Judge of his division to act as the Presiding Officer. I also pointed out to her that she would be obliged to consult with and obtain consensus from the DPPs of Johannesburg and Pretoria regarding her decision. This terminated my involvement in the instant matter.

32.

I have taken notice of the averment repeatedly stated in the applicant's papers to the effect that political interference is delaying the decision in this matter. The allegations are denied insofar as they relate to my involvement in the matter *de facto* commencing in October 2010 (when I was provided with the docket and directed a set of comprehensive investigations) to date. The communications authored either by the Acting NDPPs or the Acting Head of the PCLU, attached to the application, also refute this claim and in fact confirm a commitment to ensuring that the instant matter is properly investigated so that the correct decision could be taken.

33.

Investigations were directed on 27 October 2010 and the final statements filed in the docket on 8 April 2015. The delay in finalising the investigation may be attributed to a combination of the following:

33.1 No investigations at all were conducted at the relative time, i.e. 1983.

33.2 The 1996 investigation was terminated at an early stage.

33.3 No investigations were conducted from 1996 until October 2010.

33.4 The paucity of the evidence available. It is significant that the primary relief sought by the applicant is not a prosecution, but only a formal inquest.

33.5 The challenge in attempting to investigate a complex matter almost 30 years later.

33.6 Difficulties encountered in trying to locate highly relevant State information. I merely highlight certain of the most important issues:

34.1 July 2011: The investigating officer submitted his report recommending an inquest.

34.2 22 January 2013: Captain Masegela returns docket and provides report in terms of s4 of the Inquests Act.

34.3 31 July 2014: Captain Masegela and Col Xaba advise that the docket was submitted to the PCLU on 14 July 2014 with the investigations finalised.

These averments are not correct. At no stage was the docket submitted in either July 2011 or January 2013 with a report recommending that an inquest be held. I attach as **Annex "RCM1"**, an extract from the investigation diary from 29 June 2011 to 26 September 2012, confirming that the investigation was still in progress and witness statements being filed. In similar vein, I attach as **Annex "RCM2"**, an extract from the investigating diary from 8 November 2012 to 25 February 2013, confirming that the investigating officer was in the process of communicating with the NPA's task team regarding its efforts to locate the remains of the victim. Finally, I confirm that no docket was submitted to me on 14 July 2014, let alone a fully investigated one. I attach as **Annex "RCM3"**, the relevant extract from the investigation diary confirming that on 14 July 2014, the investigating officer filed a statement relating to DNA samples and only met with me on 25 September 2014 when he was requested to obtain the contact details of all the witnesses who had been interviewed by a private investigator. This was to enable witness statements to be obtained from them. In fact, the case continued to be under investigation until 8 April 2015 when the final statement was filed.

35.

I know and understand the contents of this declaration. I consider the oath binding on my conscience and have no objection to the oath.

Dated at Pretoria **on this** 6th **day of August 2015 at** 09.00.

DEPONENT

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 the 6th day of **August 2015** at 09.00.

COMMISSIONER OF OATHS

BENJAMIN NEL
218 VISAGIE STREET
SENR. PET JOB GRAD BUREAU
PRETORIA
CAPTAIN
S A POLICE SERVICE

G.P.S. 002-0214

SAP 5

C 86

"RCM1"

SUID-AFRIKAANSE POLISIE SOUTH AFRICAN POLICE

ONDERSOEKDAGBOEK
INVESTIGATION DIARY

Stasie/Station: JHB SENT

M.R./C.R. No. G.O./INQUEST No.: 1469/00/F96

Navraag/Enquiry No.:

Tyd, datum Time, date		Verwysing Reference
10h00 2011.06.09	Brief van at Swaziland Royal Police aangeleg 800 per verkleuring van A/O Kgomo is gemaak en aangeleg 800 per. Dit is gaan laboratorium oor die bloedvlekke in Swaziland wat	A31 A32
	CAPT T.P. MASEGELA	
11h00 2011.09.07	Boer oor by 76 Amy Street Mamelodi en spoor die gedeelte Hy ontkom by venster maar hy is nie seker waar die deel van kostuum kobe was ook by Northam of nie	
	CAPT T.P. MASEGELA	
11h50 2011.09.07	By 22 Murray Street Mamelodi spoor was gemaak en hy deel hy was dat hier wat Kgt Manuel Gumede wat doe is. Boodskap gekies en hy bekend aan die offisier	
	CAPT T.P. MASEGELA	

SAP 5

C37

Tyd, datum Time, date		Verwysing Reference
08:10	Statement of Capt Masegela is	
2011-07-08	accepted as part	A33
	Investigation Docs part	B28
	CAPT T.P. MASEGELA	
16:00	Docs are by Midrand en	
	Nuccing Alex N/A Different	
	procedure en accepting	
	Docs part	A34
	T.P. MASEGELA Captain/Kaptein	
12:00	By uitsig cos gedeelte 2 spoed	
2012-09-26	Sieg Smith. Hy sleep weg uit	
	slot die Bronner van die	
	plaas sy pa is en sy pa is	
	in Mossel Bay. Sieg se kontak	
	nommer is 0824722117 en	
	sy pa is Piet. Piet se nommer	
	is 0825627701	
	CAPT T.P. MASEGELA	
09:00	Arrived die crew wag die	
2012-09-27	Plaas Man. Piet Smit op	
	0825627701 ons by uit	
	slot ons by sy Plaas uit	
	Qwter. Hy slept weg uit	
	Robert sy pal weg is	
	toestemming Steers per EPOS	
	CAPT T.P. MASEGELA	

G.P.-S. 002-0214

SAP 5

C 38

"RCM2"

SUID-AFRIKAANSE POLISIE SOUTH AFRICAN POLICE

ONDERSOEKDAGBOEK
INVESTIGATION DIARY

Stasie/Station JHB M.R./C.R. No. G.O./INQUEST No. 1469/06.02.96

Navraag/Enquiry No.

Tyd, datum Time, date		Verwysing Reference
06:40 2012.09.28	Toestemming om by die plaas gaan ondersoek doen is aanvaar en aanyeling saam met	B 29
12/10/24 07:30	1. Kontak na Nathan, Plaas Uitsig-Ons, Smit Trust. 2. Deursoeking van plaas, buitegebou, dammie en oslaap. 3. Evidensie sal gemaak word deur NPA. Dit sal ook aanvanklik sal gaan. 4. Stel JT by die kantoor aanklus, Sr Cpt Kent	
10:00 2012.11.08	By Prioritty Crimes Litigation unit gespreek Mashilelu Fetkani en hy het gesê hy wee dat die report nog nie reg is nie. Hy se ek moet hoor die volgende week bel	CAPT TR MASEGELA
07:10 2012.11.16	Skakel Mashilelu Fetkani en hy het gesê Dunan is nog bezig sal weg laat weet sodra die report reg is	CAPT TR MASEGELA

SAP 5

C 39

Tyd, datum Time, date		Verwysing Reference
11:30 2013.01.25	The report is attended as pol	A35
	Captain	
08:00 2013.02.25	Rooiwys gefret van beskou van Sale Hawker op 2013.02.26. Skakel N Fulford - 0828169220 Skakel N Vegi - 0110070526 Skakel Kapt Ngqula - 0827798625 Ons vertrek om 09:30 op 2013.02.26 By VW garage Outwood.	
	Brief ma Grace Margaret Jas	B30
09:00 2013.02.26	By Teazen Midrand weg om ons te	
09:00	Vergadering gehou en hoe ons gaan	
10:05 2013.02.26	Nimrod Vegi wys uit NO 11 Olifantsvlei as 'n plek waar hulle aangval deur gestaan het. Spreek Letukile Raku. Die eiendom van die pol Barry Greighton 082 883 4065 is weg uit. Hy het die pol bel bekat	
10:45 2013.02.26	By NO 11 van Richard Street spreek Wanito Ngwira. Hy wou saam ons die eiendom van die pol	
	is Steven Dlamini - 0827750004	
13:10 2013.02.26	By Intersection van Centurion Ville	

"RCM" 3

SAP 5

C 94

Tyd, datum Time, date		Verwysing Reference
0900 2014.09.14	Local Record Scene inspection and photo will be compiled later	
	CAPT T.P. MASEGELA	
10:00 2014-07-14	DNA samples taken, MR Det. Sizakele Simelane as did Moodley Keeys item no	
	Bring company CAPT T.P. MASEGELA	A188
10:00 2014.09.17	Meeting Men [illegible]	
		A189
	Meeting Men FK Dutton meeting [illegible]	A190
	Mdlozelo	
10:00 2014.09.25	By Adv Mkadam se kantoor besoek deur Lt Kol Xaba, Brig Gebbert, Mkadam en my self. (1) Dutton moet nog die kontakonderhoud doen as die gekwid word gevoer is en by Nemcomva gee. (2) Brief na IHRC gestuur soos per	B65

CAPT T.P. MASEGELA

"SKA3"

MINISTERIAL MEMORANDUM

TO: **T.M. MASUTHA, MP (ADV)**
MINISTER: JUSTICE & CORRECTIONAL SERVICES

FROM: **ADV. S.K. ABRAHAMS**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SUBJECT: **MEMORANDUM TO THE MINISTER IN TERMS OF SECTION 33(2)(a) OF THE NPA ACT, NO 32 OF 1998, AS AMENDED**

REPORT ON INVESTIGATIONS AND PROSECUTIONS EMANATING FROM THE TRUTH & RECONCILIATION COMMISSION (TRC)

DATE: **15 JULY 2015**

REF: **3/3/1/Ministerial Memoranda – PCLU/TRC(1/2015)**

1. **PURPOSE**

The purpose of this memorandum is to provide the Honourable Minister with a comprehensive report on the investigations and prosecutions of matters emanating from the Truth and Reconciliation Commission (TRC).

2. **BACKGROUND (PRIOR TO THE INVOLVEMENT OF THE PRIORITY CRIMES LITIGATION UNIT (PCLU)**

2.1 The mandate of the TRC was to investigate politically motivated human rights' abuses committed during the period 1 March 1960 to 5 May 1994.

2.2 During that period South Africa comprised of an Apartheid State and several self-governing territories, each with its own police force and prosecuting authority, acting independently of each other. In many cases, little or no sincere investigations were conducted into State orchestrated violence directed against the Liberation Movements. Prior to the April 1994 elections, the Apartheid State's Security Forces deliberately destroyed substantial documentation in order to conceal the involvement of State structures in human rights' abuses.

2.3 In 1990, the Harms Commission found that there was no basis for the allegations that the Security Forces were operating covert assassination squads. In either 1992 or 1993, the Goldstone Commission was established, which continued probing the existence of these squads. Limited information was received about certain State structures which were in fact involved in covert assassinations. The Commission had no law enforcement powers and was dissolved.

2.4 Although a single national police force was established shortly after the 1994 elections, the investigation of TRC cases was dealt with on a fragmented basis. Although the D'Oliveira Unit (a SAPS structure reporting to the then Attorney General: Transvaal) was established to take forward the work of the Goldstone Commission, its mandate limited it only to a small number of cases involving the Apartheid State's security structures. The prosecution of cases remained at the discretion of the Attorneys General which had been in existence prior to the elections.

2.5 In 1990, an Indemnity Act came into effect, granting indemnity for certain categories of politically motivated offences. The

scope of the indemnities granted was significantly extended by the Further Indemnities Act of 1992. In 1995, President Mandela issued a blanket indemnity for all contraventions of the Firearms - and Explosives Acts committed before 3 December 1993. The TRC recognised all indemnities granted under the previous legislation.

2.6 The TRC commenced its work in 1996. The TRC Act specifically made provision for investigations and prosecutions to be put on hold pending the hearing of amnesty applications. SAPS decided to suspend investigations in all cases where it was believed that amnesty applications would be lodged. This was to save resources being wasted if in fact amnesty was granted.

2.7 The TRC in the main had three sources of evidence:

2.7.1 Complaints by victims and hearings conducted by the Human Rights' Violations Committee.

2.7.2 The questioning of persons suspected of having committed human rights' abuses. The TRC Act specifically rendered such interrogations inadmissible in criminal proceedings.

2.7.3 Applications for amnesty from persons involved in human rights' abuses. The TRC Act specifically excluded the amnesty applications and subsequent oral testimony from being used in criminal proceedings.

2.8 In September 1998, the NPA Act came into effect and the country's first NDPP was appointed.

2.9 In October 1998, the TRC tabled its "*Final Report*" in which it recommended that consideration be given to prosecutions in cases where amnesty had either been refused or not applied for and where admissible evidence [my emphasis] was available. The TRC conceded that much of its evidence would be inadmissible.

2.10 The NDPP immediately established a Human Rights' Component in his office to address this recommendation of the TRC. Informal meetings took place between members of this unit and members of the TRC. However no evidence was handed over identifying cases for prosecution. The amnesty process had not been concluded and in fact the final amnesty judgments were only delivered in 2002. For obvious reasons decisions whether or not to prosecute could not be taken before it had been established whether persons had received amnesty or not.

2.11 The Human Rights Division dissolved in 2000. For a very brief period the DSO was tasked with TRC matters, but since that organisation had itself only just been created, little or no work was in fact done on TRC cases. The D'Oliveira Unit had also dissolved in the same period.

2.12 The Directors of Public Prosecution (DPPs) had taken over the functions of the Attorneys General. They continued to deal with matters with which their offices were previously seized. Prosecutions were instituted in cases where amnesty had been refused (e.g. the Bisho massacre). In addition, the DPP: North Gauteng declined to prosecute Security Branch General Engelbrecht in respect of a number of cases where he had been

implicated by convicted Vlakplaas Commander de Kock. The then NDPP concurred with this decision.

3. MANAGEMENT BY THE PCLU

3.1 In 2003, the PCLU was established as a special directorate in the office of the NDPP to manage and direct investigations and prosecutions in relation to certain specified offences. The NDPP however had the power to refer additional cases to the PCLU.

3.2 Also in 2003, the amnesty process was concluded and consequently the President informed Parliament that prosecutions arising from the TRC process would be dealt with according to the ordinary prosecution principles.

3.3 The NDPP directed that the PCLU should be responsible for managing the outstanding TRC cases in respect of which decisions whether or not to prosecute were required. The NDPP had however to confirm all decisions taken. The PCLU was not an investigative unit and was not tasked to evaluate every complaint laid with the TRC and each and every finding made by the various committees thereof.

3.4 The PCLU took the following steps to identify such outstanding cases:

3.4.1 The Divisional Head of the Detective Service of SAPS was requested to issue an order to all the Provincial Commissioners to report outstanding cases to the PCLU.

3.4.2 A similar request was made to all the DPPs.

3.4.3 Former members of the D'Oliveira Unit and the Human Rights' Component were interviewed.

3.4.4 Two former TRC researchers were employed on contract to work through the TRC data / material located in the State Archives for suitable cases.

3.5 In a small number of instances victims contacted the PCLU requesting that their cases be looked into. These requests were accepted even if the criteria specified by the TRC were not meant to enable the victims to obtain closure.

3.6 A major challenge was locating the material necessary to make decisions:

3.6.1 The Director General: DoJ&CD had after the closure of the TRC issued a directive that all inquests older than 10 years may be destroyed.

3.6.2 Police dockets could not be located either because they had not been returned by the TRC or had been lost during the integration process of the former police forces or due to the closure of police units.

3.6.3 Difficulties were encountered with the location of court records.

3.7 The audit process however identified 400 cases which were in the main disposed of on the following basis:

3.7.1 Amnesty granted

3.7.2 Crimes prescribed: In terms of s18 of the Criminal Procedure Act, No 51 of 1977, crimes such as assault (dealt with as torture by the TRC) culpable homicide, attempted murder, accessory after the fact and defeating the ends of justice prescribe after 20 years. As at July 2015, all such cases falling within the TRC timeframe have prescribed.

3.7.3 Persons having been refused amnesty or not having applied having been granted indemnity in terms of s204 of Act 51 of 1977. In addition, in certain circumstances where s204 did not apply, the Competent Prosecuting Authorities at the time declined to prosecute the persons in return for them having supplied useful information for the purpose of investigations.

3.7.4 Matters already finalised by the DPPs or Attorneys General.

3.7.5 No satisfactory evidence upon which a successful prosecution could be instituted.

3.7.6 Insufficient evidence available upon which to assess whether a prosecution could be instituted or not, e.g. previous court records and police dockets not available.

3.7.7 Witnesses and/or suspects deceased.

3.7.8 Matters falling outside the jurisdiction of the South African Courts, e.g. the murder of Dulcie September in Paris.

3.7.9 Persons having been granted indemnity under the two Indemnity Acts.

3.8 Prosecutions were however instituted in the following cases:

3.8.1 *S v Terre'Blanche*: The leader of the AWB entered into a plea and sentence agreement resulting in a wholly suspended sentence being imposed relating to a series of bombings in the North West Province.

3.8.2 *S v Blani*: The accused, a member of the UDF, entered into a plea and sentence agreement resulting in a partially suspended prison sentence for an attack on an elderly couple living on a farm in the Eastern Cape.

3.8.3 *S v Nieuwoudt & 2 Others*: The accused, three former Security Branch members, were charged with the murder, kidnapping and assault of three Port Elizabeth activists (the PEBCO 3 incident). Although the accused were indicted in the Port Elizabeth High Court, the case was on an ongoing basis postponed and withdrawn due to lack of evidence after a period of five years.

3.9 Approximately 350 of the 400 cases were finalised on the above basis. In respect of the remaining 50, further investigations were

necessary before decisions whether or not to prosecute could be taken.

3.10 Both the DSO and SAPS were requested to investigate the remaining 50 cases, but declined to do so. The reasons for SAPS not investigating are set out in the letter of 26 September 2003 by the Divisional Commissioner, attached hereto as **Annexure "A"**. The contents of the letter are self-explanatory and in fact the then NDPP elected not to approach the President as indicated by SAPS.

3.11 The ANDPP (Dr Ramaite SC) put the management of TRC cases on hold pending the formulation of special guidelines in terms of s179 of the Constitution. This was done shortly after a decision was taken to charge three further Security Branch members. Shortly thereafter the NPA was provided with a copy of an Indemnity Bill, which had been drafted by DoJ&CD. (An extract of the Bill is attached as **Annexure "B"**.) The constitutionality of the Bill was obviously questionable and in fact it was never enacted.

3.12 The formulation of the guidelines took a considerable amount of time. Once they entered into law, they placed the decision on making decisions whether or not to prosecute on the NDPP. The PCLU was required to assist the NDPP in making decisions and formed part of a multi-disciplinary task team made up of SAPS, NIA, DoJ&CD and the DSO (the TRC Task Team). The guidelines made provision for the NDPP to grant indemnity to accused if they satisfied the criteria which were applied by the TRC's Amnesty Committee.

3.13 The Task Team first conducted a review of the matters previously dealt with before giving attention to matters requiring investigation.

3.14 A plea and sentence agreement was entered into with the former Minister of Police (Vlok), former National Police Commissioner (Van der Merwe) and three former members of the Security Branch relating to the attempted murder of Rev Frank Chikane. The accused all received wholly suspended sentences.

3.15 The plea and sentence agreement was widely criticised by civic society and in fact Rev Chikane laid a complaint against the Head of the PCLU with the Minister.

3.16 The NDPP (Adv Pikoli) was suspended and the Ginwala Commission was appointed to enquire into the complaints made against him. Rev Chikane lodged a complaint relating to the Vlok/Van der Merwe matter with the Commission.

3.17 SAPS notified the ANDPP (Adv Mpshe SC) that it would not continue to investigate TRC cases pending the outcome of the Ginwala Commission.

3.18 A group of victims brought an action in the High Court to have the TRC guidelines set aside on the basis that they had introduced a second amnesty process and hence unconstitutional. This application was successful and further delayed the investigation of TRC cases because the then Minister (Mabandla) and NDPP (Mpshe SC) first attempted to take the judgment on appeal, but abandoned such course of action upon legal advice.

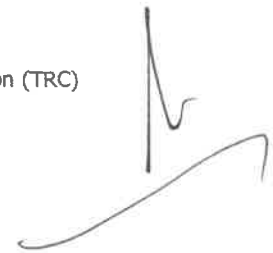
3.19 By that stage the number of outstanding cases requiring investigation had been reduced to 8. The remaining 40 had been finalised as not justifying the institution of prosecutions.

3.20 After the findings of the Ginwala Commission had been handed down, the PCLU commenced negotiating with SAPS for the investigation of the remaining 8 cases. In addition, the PCLU was requested to also attend to the Viyane, Guguletu Seven, Lolo Sono & Shabalala, Japie Maponya and Neil Aggett matters.

3.21 Initially the investigation of TRC cases fell within the mandate of the Detective Service and a series of negotiations took place with the Divisional Head. Shortly before a project team was due to be appointed, the responsibility for TRC matters was transferred to the DPCI (the Hawks). The DPCI indicated that the cases would be investigated by a component of its head office, but that such investigations could only commence once the 2010 World Cup had been held due to the fact that its members were committed to security duties.

3.22 The Anton Lubowski murder in Windhoek, Namibia was investigated. A decision was taken not to prosecute in respect of an alleged conspiracy, formulated in South Africa by members of a covert military structure on the basis that there was no acceptable evidence to prove the existence of the conspiracy or to identify the conspirators. The murder itself could not be enquired into because it was committed outside the jurisdiction of the South African Courts. The decision not to prosecute was confirmed by Adv Mpshe SC and the Minister was informed accordingly.

4. CASES ON HAND



4.1 *The Cradock 4* incident

This matter relates to the kidnapping and murder of Mr Goniwe and three other Eastern Cape activists in Port Elizabeth in 1985. The DPCI investigated two former members of the Port Elizabeth Security Branch as well as a General in Crime Intelligence in relation to their alleged involvement in the crimes. The first suspect died before the investigation against him could be concluded. In respect of the other two suspects, both the PCLU and the DPP: Eastern Cape were of the view that there was no basis upon which a prosecution could be instituted against either of them. The NDPP must however confirm the decision not to prosecute.

4.2 *Pebco 3* incident

This matter relates to the kidnapping, torture and murder of Mr Hashe and two other members of the Pebco Civic Organisation in 1985 in the Eastern Cape. Although the charges had been withdrawn, the matter nevertheless required further investigation because numerous issues had not been canvassed when the initial decision to institute a prosecution had been taken. The DPCI has still to finalise all the outstanding investigations. Although it is unlikely that a prosecution will be instituted, an inquest will have to be held.

4.3 Disappearance of *Nokuthula Simelane*

This matter relates to the disappearance of an MK operative in 1983 from the Carlton Centre, Johannesburg. A group of Security Branch members were granted amnesty for her kidnapping, but no evidence was forthcoming relating to her ultimate fate. On the version of certain of the amnesty applicants, the suggestion was that she was in all probability murdered by the other applicants. These applicants however deny those allegations and suggest that she agreed to be an informer and was reinfiltrated into the MK structures in Swaziland. The suggestion is that she was murdered by the ANC. Her remains have never been discovered. An application was brought by the victim's family to compel a decision. The NPA has however decided not to prosecute at this stage and the process is in motion to hold a formal inquest before a Judge of the High Court.

4.4 *The Highgate Hotel* incident

This matter relates to an attack on a hotel in East London in 1993. A number of people were killed and seriously injured. No persons were ever prosecuted or applied for amnesty. Some years after the closure of the TRC the former investigator and the current leader of the PAC alleged that the attack was carried out by unidentified members of the Security Forces. These allegations are under investigation. Although it would appear unlikely that the perpetrators would be identified, nevertheless an inquest will have to be held. The DPCI must still finalise all the outstanding investigations.

4.5 Murder of *Viyane*

This matter relates to the fatal shooting of a civilian by the police in Northern KwaZulu-Natal in 1993. Although the case was not dealt with by the TRC, the family have requested an investigation because it is alleged that the deceased was killed because of his allegiance to the ANC. The allegations have been investigated and it has been established that the case was not politically motivated. The case was referred to the DPP: KZN to consider reopening the inquest in the light of an additional statement obtained from one of the police officers involved in the shooting. She however has declined to reopen the inquest on the basis that the new statement is untrue and would not result in a different finding were an inquest to be held.

4.6 Attempted murder of *Rev Frank Chikane*

During the course of the plea and sentence agreement set out above, the accused in that matter implicated former Security Branch General Basie Smit. The DPCI was requested to investigate his involvement. The DPCI conducted a very weak and unsatisfactory investigation, claiming that Rev Chikane could not be traced. Before the matter could be taken further, the crime prescribed, thereby preventing any further probe into the alleged involvement of General Smit.

4.7 *Heidelberg Tavern Massacre*

A number of APLA operatives were convicted of having carried out the above attack which resulted in a number of people being murdered and seriously injured. The operatives all received amnesty. However, after the closure of the TRC, a former Head of the PAC made a number of radio interviews in which he claimed responsibility for the attack. The father of one of the deceased has requested that the matter be investigated. Investigations are in progress.

4.8 ***St James Church Massacre***

A number of APLA operatives were convicted of having carried out the above attack which resulted in a number of people being murdered and seriously injured. The operatives all received amnesty. However, after the closure of the TRC, the former Head of the PAC made a number of radio interviews in which he claimed responsibility for the attack. A parliamentarian was approached by a number of survivors of the attack and she has requested that the matter be investigated. Investigations are in progress.

4.9 **Arms Cache: *Philip Powell***

In April 1994, Mr Powell, an IFP senator was linked to arms found in a KwaZulu police camp in Northern KwaZulu-Natal. The then Attorney General of Natal declined to prosecute him. Mr Powell was thereafter implicated as having received a huge consignment of arms in October 1993. A prosecution could not be instituted on that charge because a Presidential Proclamation of 1996 gave blanket amnesty for all firearms offences committed on or before December 1993. In 1998, Mr Powell pointed out a bunker containing arms at Nqutu. The

DPP: KZN declined to prosecute. The NDPP however requested that the matter be fully investigated. This investigation established that not all the arms had been recovered and that Mr Powell's version regarding the April 1994 cache was untrue. The official who made the decision not to prosecute indicated that in the light of the new evidence, he would have favoured a prosecution. The NDPP therefore gave Mr Powell notice of his intention to set aside his decision not to prosecute relating to the April 1994 case. Mr Powell emigrated to the United Kingdom and a warrant for his arrest was issued. The issue of extradition was taken up with the UK authorities but it emerged that the offence would be classified as political by the UK and therefore extradition was not applied for. Representations were received from Mr Powell seeking the cancellation of the warrant. The matter was investigated further in order to establish whether the evidence on which the warrant was obtained, was still available. The DPCI indicated that it was difficult to confirm the availability of the evidence and the offence prescribed in April 2014.

4.10 Murder of *Sono and Shabalala*

This matter relates to the activities of the Mandela United Football Club. The two persons disappeared having last been seen in the company of members of this club. Investigations by both SAPS and the TRC failed to locate either the remains of the two persons or any evidence relating to their deaths. In 2013 however, the Missing Persons' Task Team located two mortuary records containing photographs which were positively identified by the families as being the two persons. Medical evidence suggested that they had been brutally murdered. Their remains have now been exhumed and are undergoing DNA and forensic

testing. The TRC and SAPS investigations are being revisited in order to establish whether the perpetrators of the two murders can be identified and a successful prosecution instituted. In the event of no such evidence being forthcoming, the Magistrate: Johannesburg will be requested to reopen the original inquests in order to receive the new evidence relating to the identities of the deceased and their causes of death. The Head of the PCLU had earlier declined to prosecute, because of unsatisfactory evidence.

4.11 ***Guguletu Seven***

This matter relates to the fatal shooting of seven MK operatives by the police in Cape Town in March 1986. A member of the public has requested the Minister to confirm whether the case is under investigation. This matter was not one of the cases identified for investigation because an inquest found that no one was responsible for the deaths of the deceased and amnesty was granted to two members of the Security Branch involved in the incident. The TRC material has however been re-evaluated and the conclusion reached that the initiation of an investigation would not lead to a successful prosecution. The TRC granted amnesty to the senior member of the Security Branch on the basis that the deceased had initiated the shooting by throwing a hand grenade and that the member had attempted to arrest them. The TRC further found that neither the Murder & Robbery nor the Riot Units' senior officials had given any instructions that the deceased should be killed. Although a junior member of the Security Branch had testified that a sergeant in the Riot Unit had shot one of the deceased after he had surrendered, he was adamant that he was not able to identify this person. In addition, he admitted that he had not mentioned this incident in previous

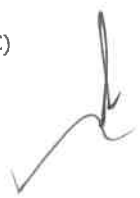
statements. An askari who had originally alleged that the deceased had been murdered and that false evidence had been placed before the inquest was found to be an unsatisfactory witness by the Amnesty Committee.

4.12 ***Dr Neil Aggett***

The above person was an activist, who committed suicide in detention in 1982. An inquest found that the police were not responsible for his death. No one applied for amnesty for his death. The TRC's Human Rights' Committee however found that the police were responsible for his death on the basis of the circumstances under which he was detained. In 2012, the Mail & Guardian alleged that one of the persons responsible for Dr Aggett's interrogation now held a number of contracts with Government. This led to the matter being raised by the Justice Portfolio Committee. Any charge of assault or culpable homicide has prescribed in 2002. The matter is being investigated solely on the basis of whether the persons involved in his detention foresaw that he would commit suicide and persisted with their actions reckless as to whether suicide resulted. This could be the basis for a charge of murder. There is however no evidence to suggest that his interrogators killed him.

4.13 ***Japie Maponya***

This is one of the matters in respect of which De Kock was convicted and refused amnesty. The remains of the deceased were never recovered. As a result of the Missing Persons' Task Team, it was in 2014 established that one of the persons involved in the offence had not applied for amnesty and



consequently the possibility of being able to prosecute him for his involvement in the case is being considered.

5. COMMENTS

5.1 It is a fact that there are very few cases arising from the TRC process which warrant investigations and decisions to prosecute. As appears from the breakdown of the cases above, it would appear unlikely that successful prosecutions could be instituted in many of the cases.

5.2 Unfortunately a perception has been created with the media and the public by former members of the TRC that the TRC supplied the NPA with volumes of evidence justifying numerous prosecutions. This is unfortunately not the position and to date the record has not been publicly set straight.

5.3 The correct position is as follows:

5.3.1 The TRC did not supply the NPA with volumes of evidence. It has been established that all that transpired was that the TRC supplied lists of amnesty applicants' names to the component in the NDPP's office referred to above. This component had to in turn request the DPP: Cape Town to retrieve the amnesty judgments from the TRC.

5.3.2 Prior to the TRC a number of prosecutions were in fact instituted. These include the prosecution of former Vlakplaas Commander de Kock, Military Doctor Wouter Basson, CCB operative Ferdi Barnard, Magnus Malan (the former Minister of Defence) and a

large number of Defence Generals, as well as a number of key prosecutions linked to the political violence in KwaZulu-Natal. Where convictions were obtained, it would be irrelevant that subsequently amnesty was refused (as was the case with the De Kock and Barnard matters). Where acquittals resulted (as in the case of Basson and Malan), there would be no incentive to apply for amnesty and no opportunity for further persons to be implicated. It is a matter of fact that many of the amnesty applications related to persons who had already been convicted.

5.3.3 The granting of amnesty in a number of significant cases which commanded high public interest. Such matters include the murder of Griffiths Mxenge, the poisoning and murder of Simphiwe Mtimkulu, the kidnapping and murder of the Mamelodi 10, the majority of the killings committed by Vlakplaas and other Security Branch structures, etc.

5.3.4 The granting of amnesty to certain perpetrators making the prosecution of other persons difficult, e.g. the *Guguletu Seven* matter referred to above and the granting of amnesty to the Head of the Eastern Cape Security Branch, who ordered the murders in the *Pebco 3* matter.

5.3.5 The impact of prescription, e.g. the death and detention of Steve Biko and all the other cases relating to torture and culpable homicide.

5.3.6 The absence of credible investigations at the time when the crimes were committed and the destruction and loss of documentation.

5.3.7 The age of the cases. Many of the witnesses and suspects were deceased before decisions could be taken to institute prosecutions.

5.3.8 Many of the cases are dependent on perpetrators being prepared to testify against their co-conspirators. Unfortunately a number of accomplices have been discredited in previous proceedings to such an extent that no reliance can be placed on their credibility.

5.3.9 The acquittals in the high profile *Magnus Malan, Wouter Basson* and *Bisho massacre* cases do not serve as an incentive for perpetrators to come forward.

6. MATTERS OF CURRENT CONCERN

6.1 There are therefore currently only eight cases in respect of which final decisions whether to prosecute or not must be taken. (In respect of the Nokuthula Simelane matter, the decision not to prosecute will be considered after the holding of an inquest.) Although the finalisation of these cases is a priority for the NPA, it is dependent on the DPCI to conclude the investigations.

6.2 Unfortunately the quality of investigations is very poor and is having a negative impact on being able to finalise the cases quickly.

6.2.1 In the Rev Chikane matter, no investigations were conducted, despite a lengthy directive being issued by the prosecutor and in fact, it was even suggested that Rev Chikane could not be traced.

6.2.2 In the Heidelberg Tavern and St James Church cases, the DPCI claimed that the police dockets and court records could not be located although it has now been established that for many years the relevant material was in fact in the possession of the DPCI.

6.3 The failure for the matters to be investigated from 2003 until 2011 has prevented prosecutions being instituted in cases that could possibly have resulted in convictions. This is because by the time the cases were eventually investigated, the suspects and/or witnesses were already deceased. (The Cradock 4 and Pebco 3 cases are examples thereof.)

6.4 The consequences of the failure to investigate will be placed in the public domain once inquests are held in certain matters or when the decisions not to prosecute are announced that interested parties request access to the material in terms of PAIA.

6.5 A particular case in point is the Nokuthula Simelane matter where a formal inquest before a Judge will be held. It is a fact that evidence will be led of key witnesses being dead and key evidence being unable to be located. It is only to be expected that the Judge would require an explanation as to why this matter was not investigated prior to 2011. In this regard, I attach as **Annexure "C"**, a copy of the affidavit of former NDPP, Adv Vusi Pikoli, and as **Annexure "D"**, a copy of the affidavit of the then

Head: PCLU, Adv Anton Ackermann SC. Both advocates alleged high level political interference aimed at preventing the investigation of TRC cases in their affidavits. These affidavits were filed as part of the application to compel a decision and it is not inconceivable that the victim may call these advocates as witnesses if this issue is in fact raised.

6.6 It is only to be expected that once the decisions are publicly announced and the failure to investigate exposed, that allegations will be made that Government deliberately waited for all the witnesses and accused to die before giving attention to the cases.

7. CONCLUSION

It is recommended that the Honourable Minister note the contents of this memo. I will inform the Minister of the outcome of the individual cases once the investigations have been concluded and decisions made on them.

ADV. S.K. ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE:

NOTED

MS. N. SINDANE
DIRECTOR GENERAL FOR JUSTICE & CONSTITUTIONAL DEVELOPMENT
DATE:

NOTED

MR. J. JEFFERY, MP
DEPUTY MINISTER FOR JUSTICE & CONSTITUTIONAL DEVELOPMENT
DATE:

NOTED

T.M. MASUTHA, MP (ADV)
MINISTER FOR JUSTICE & CORRECTIONAL SERVICES
DATE:

"SKA4"

Kim Benjamin

From: Shaun SK. Abrahams
Sent: 02 September 2015 04:52 PM
To: Kim Benjamin
Subject: FW: Nokuthula Simelane
Attachments: Nkadimeng Draft Consent Order v4.DOCX

Kim

Please print and give it to me. Both Mail and attachment.

Thank you.

Adv. Shaun K Abrahams
National Director of Public Prosecutions
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From: Shaun SK. Abrahams
Sent: 21 August 2015 02:05 PM
To: Kim Benjamin
Subject: FW: Nokuthula Simelane

Dear Kim

Please print.

Thank you.

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From: Moray Hathorn [mailto:moray.hathorn@webberwentzel.com]
Sent: 21 August 2015 09:51 AM
To: Shaun SK. Abrahams
Subject: Nokuthula Simelane

Dear Advocate Abrahams

I have instructions from my client to place before you the attached draft consent order for your consideration.

I have further been instructed to request a 2 to 3 hour meeting with you at any time in the week of 14 September 2015 at which we wish to place before you the evidence for kidnapping and murder charges as contemplated in the attached draft consent order. Our client wishes to attend the meeting with her legal team and Frank Dutton.

In order to allow time for due consideration of the issues at stake our client is willing to postpone the date for the filing of the answering affidavit to 30 September 2015.

Yours sincerely

Moray Hathorn
Partner

WEBBER WENTZEL
in alliance with > Linklaters

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