

**IN THE COMMISSION OF INQUIRY INTO STOPPED TRC
INVESTIGATIONS AND/OR PROSECUTIONS**

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**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
ADV. V. PIKOLI CROSS-EXAMINATION**

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2.	Transcript of Khampepe Commission proceedings, dated 12 March 2026 (Adv Vusi Pikoli)	https://www.trc-inquiry.org.za/wp-content/uploads/2026/03/Day-21-Adv.-Ackermann-cross-examination-12-03-26.pdf
	Transcript of Khampepe Commission proceedings, dated 13 March 2026 (Adv Vusi Pikoli)	https://www.trc-inquiry.org.za/wp-content/uploads/2026/03/Day-22-Adv.-V.-Pikoli-13-03-26.pdf
3.	Transcript of Khampepe Commission proceedings, dated 5 March 2026 (Adv Anton Ackermann)	https://www.trc-inquiry.org.za/wp-content/uploads/2026/03/Day-17-Adv.-Ackermann-04-03-26.pdf
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**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 Centre, corner Mirriam Makeba & Helen Joseph Street,
Newtown, Johannesburg

BEFORE THE COMMISSION:

The Honourable Justice Sisi Khampepe (Judge RTD) – Chairperson

The Honourable Justice Frans Diale Kgomo (Judge President RTD)

Adv Andrea Gabriel (SC)

**NOTICE OF APPLICATION IN TERMS OF RULE 3 TO CROSS-EXAMINE ADV.
VUSUMZI PATRICK PIKOLI**

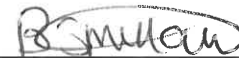
KINDLY TAKE NOTICE THAT the Minister of Justice and Constitutional Development hereby makes application to the above Honourable Commission in accordance with Regulation 8(3) of the Commission's Regulations read with the Rules of the Commission, for an order in the following terms:

1. That the Commission grant leave to the representatives of the Minister to cross-examine Adv Vusi Pikoli.

2. That the Commission grant condonation for any non-compliance with the Rules of the Commission, insofar as the timing of the filing of this application is concerned;
3. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **JOSEPH MULAUZDI** will be used in support of this application together with the annexure(s) thereto.

DATED AT PRETORIA ON THIS THE 17th DAY OF APRIL 2026.



THE STATE ATTORNEY

(Attorneys for Minister of Justice & Constitutional Development)

SALU Building

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PRETORIA, 0002

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**TO: SECRETARY OF THE COMMISSION
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AND TO: WEBBER WENTZEL

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REF: A Thakor/4005095

**THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING
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BEFORE THE COMMISSION:

The Honourable Justice Sisi Khampepe (Judge RTD) – Chairperson

The Honourable Justice Frans Diale Kgomo (Judge President RTD)

Adv. Andrea Gabriel (SC)

**STATEMENT IN SUPPORT OF AN APPLICATION TO CROSS-EXAMINE
ADV. VUSUMZI PATRICK PIKOLI**

I, the undersigned,

JOSEPH MULAUDZI

do hereby make the following statement, and under oath that:

N.S.
B.S.

A. INTRODUCTION

1. I am the attorney of record for the Minister of Justice and Constitutional Development (**the Minister**), practising as such at the Office of the State Attorney, situated at Salu Building, Ground Floor, 316 Thabo Sehume Street, Pretoria, Gauteng Province.
2. The facts contained in this statement are within my personal knowledge, unless the context indicates otherwise, and are to the best of my knowledge and belief, true and correct. I am authorised to make this statement on behalf of the Minister.
3. Where the facts are not within my personal knowledge, they are based on information emanating from the Commission's proceedings and the advice of the Minister's legal representatives, which advice I accept.

B. PURPOSE OF THIS STATEMENT

4. This statement is made according to the Commission's regulatory framework, in support of an application for leave to cross-examine Adv. Vusimzi Patrick Pikoli (**Mr. Pikoli**), in terms of Regulation 8(3) of *the Regulations of the Judicial Commission of Inquiry to inquire into allegations regarding efforts or attempts having been made to stop the investigation or prosecution of Truth and Reconciliation Commission cases (Commission's Regulations)* read with Rules 3.7 and 11.2 of the *Rules of the Judicial Commission of Inquiry to inquire into allegations regarding efforts or attempts having been made to stop the investigation or prosecution of truth and reconciliation commission cases (Commission's Rules)*.

21.5

BS

C. BASES OF THE APPLICATION

5. Mr Pikoli has submitted statements before this Commission dated 6 May 2015 and 5 November 2025 and subsequently testified before this Commission on 12 and 13 March 2026.

6. The following are some of the allegations and testimony of Mr Pikoli which implicate the Minister(s) of Justice and Constitutional Development (**Minister(s) of Justice**) and/or Department of Justice and Constitutional Development (**DoJ&CD**). The allegations and/or suggestions of political interference by the Minister(s) of Justice are as follows:
 - 6.1 That the DoJ&CD's role in structures concerned with TRC cases amounted to political interference;

 - 6.2 That the National Prosecuting Authority (**NPA**), over which the Minister exercises final responsibility, was politically compromised, and that he as National Director of Public Prosecutions (**NDPP**) could not take independent decisions on TRC cases;

 - 6.3 That a blanket and further amnesty was imposed in respect of the relevant post-TRC cases;

N.B

BS

- 6.4 That the DoJ&CD and various Minister(s) of Justice interfered with the functions and decision-making of the NDPP;
- 6.5 That the desire to remove Adv. AR Ackermann from prosecuting the TRC cases was untoward and/or unlawful;
- 6.6 Mr Pikoli testified that:
- 6.6.1 there was improper interference with his work;
 - 6.6.2 there was political resistance to the prosecution of the Chikane case and the pursuit of other political (TRC) cases;
 - 6.6.3 former Minister Bridgett Mabandla (**Minister Mabandla**) did not want the NPA to prosecute those implicated in the Chikane case;
 - 6.6.4 there was a general expectation on the part of the DoJ&CD that there would not be prosecutions of the TRC cases; and
- 6.7 His pursuit of the TRC cases contributed to his suspension as NDPP, and the breakdown of his relationship with Minister Mabandla.
7. Flowing therefrom, the Minister seeks to put questions to, solicit answers from, and probe Mr Pikoli on:

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- 7.1. His role in the different fora that were established following President Mbeki's speech in 2003, including but not limited to the DG's Forum, the Amnesty Task Team, and the Inter-Ministerial Committee;
- 7.2. His understanding of the interplay between his role as NDPP and that of the Minister in terms of applicable legislation;
- 7.3. His account of his interaction(s) with former Minister Mabandla, and the alleged reasons for the breakdown of his relationship with her;
- 7.4. The basis of his allegations of improper and/or political interference by DoJ&CD and relevant Minister(s) of Justice in the prosecution of TRC cases.

D. CONDONATION

8. Rule 3.3.6.3 of the Commission's Rules provides that if the Commission's Evidence Leader intends to present a witness whose evidence implicates or may implicate another person, it must notify the implicated person in writing before the witness gives evidence that if he or she wishes to cross-examine the witness, he or she must within two weeks from the date of the notice, apply in writing to the Commission for leave to do so.
9. Rule 3.4 of the Commission Rules further provides that the application must be submitted in writing to the Secretary of the Commission within fourteen calendar days from the date of the notice referred to in Rule 3.3, and that the application must be accompanied by a statement from the implicated person responding to the witness' statement in so far as it implicates him or her.

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10. The above rules deal with an application for leave to cross-examination a witness based on the witness's statement. There is no prescribed timeframe for bringing an application to cross-examine a witness after the witness has testified or given oral evidence.
11. However, should the Commission be of the view that this application does not strictly comply with any prescribed time-period, then the Minister seeks condonation for any such determined non-compliance.
12. The delay in bringing this application was not overly undue, nor was it occasioned by any disregard for the Commission's Rules or the authority of the Commission.
13. Furthermore, this application will not prejudice Mr Pikoli, given that he was notified at the conclusion of his evidence on 13 March 2026 that there may be applications brought to cross-examine him, he has agreed to submit himself to any cross-examination which may be required, and no date has been set for his cross-examination.
14. It was necessary for the Minister's legal representatives to consider not only Mr Pikoli's written statement, but also the full body of evidence placed before the Commission, including his oral testimony and that of other witnesses.
15. There is no prejudice to any party and granting condonation will enable a full and fair ventilation of the issues.
16. By contrast, refusing condonation would limit the ability of the Minister to respond to Mr Pikoli's evidence, and will be contrary to the mandate of this Commission.

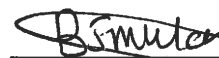
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17. In the circumstances, it is in the interests of justice that condonation be granted.

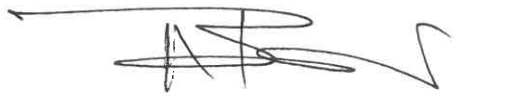
E. CONCLUSION

18. The questions sought to be posed to Mr Pikoli in cross-examination fall within the Commission's Terms of Reference.
19. It is necessary and in the best interest of the work of the Commission that Mr Pikoli be cross-examined on the issues as set out herein.
20. Accordingly, it is submitted that a proper case has been made out for the Commission to grant leave to the representatives of the Minister to cross-examine Mr Pikoli.



DEPONENT

I hereby certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on the 17th day of April 2026, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

**COMMISSIONER OF OATHS
NSUKU BALOYI
Practising Attorney
Nsuku Baloyi Attorneys
Suite No 712, JSL Towers
255 Pretorius Street, Pretoria
Cell: 079 351 5408**

V P 23

Ref: NDPP

The Minister of Justice
& Constitutional Development
Private Bag X 276
Pretoria
0001

23 January 2006

Confidential

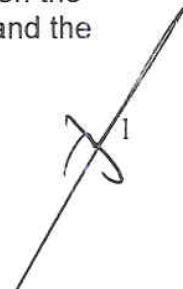
Dear Minister

ISSUES OF CONCERN

I am writing you this letter with mixed feelings. It is on a matter that I have agonized over for quite some time now. This relates to my appointment as National Director of Public Prosecutions, an appointment that took me by complete surprise because I had never ever imagined myself as a prosecutor let alone being National Director. I was extremely humbled by the appointment and I will always remain so. I am certain that there are many other people who could have been appointed and who could even do a better job. I accepted it because I took it as a deployment and I still do. I must state upfront that I love my job and am very passionate about it and am committed to do my best without fear, favour or prejudice.

I am appointed in terms of Chapter 8 of our Constitution, more particularly in terms of s179(1)(a) and am fully cognisant and supportive of s179(6) on the Minister's final responsibility over the prosecuting authority. The National Prosecuting Authority Act No.32 of 1998 as subsequently amended gives effect to S179(7) and s10 gives effect to s179(1)(a) of the Constitution whilst s33 seeks to do the same insofar as s179(6) is concerned. I have in terms of s32 taken an oath of office to "uphold and protect the Constitution and enforce the law of the Republic without fear, favour or prejudice in accordance with the Constitution and the law".

There are two issues of serious concern that I wish to address in this letter. The first one is the performance contract between the Minister and the National Director of Public Prosecutions and the



V.P.

second one is the working relationship between the Director-General and the NDPP.

Performance Contract

I would like to sit down with the Minister to hear the Minister's view on this matter. I have got my own views on it. Without pre-empting the discussions, I would request that the discussions take into account s179 as well as ss9,10,12,17,22, 33 and 35 without being limited thereto . A distinction will have to be drawn between a Director-General of a State Department and a National Director of Public Prosecutions with due regard to inter alia the accounting functions and responsibilities and employment contracts .Being of this view does not mean that I am against some form of written arrangement on the performance but what is important is what goes into it which of course must never be seen to be comprising on the independence, integrity, professionalism and impartiality of the National Prosecuting Authority. Regard must also be had to best international practices.

Working Relationship with the DG

I have a generally good working relationship with the DG. Having said that I want to hasten to add that there are certain areas that need to be sorted out as matter of urgency. S36 (3) (a) and (b) makes it clear that the DG of Justice and Constitutional Development is the **Accounting Officer** and one expects that, that function will be carried out with due regard to the fact that there is a **Head of the National Prosecuting Authority**. Unfortunately, an impression is being created that there are two Heads of the NPA or there is co-management. This manifests itself in members of the NPA engaged in core business being called by the DG without me being requested or informed. I find this untenable and am not going to allow it to continue any longer.

I have always favoured partnerships and co-operation and I still do but an impression must never be created that the DG is my manager or I account to him. It is the Minister of Justice and Constitutional Development who in law and fact exercises final responsibility over the NPA in terms of s33 of the NPA Act and the NPA in turn accounts to Parliament in terms of s35(1) of the NPA Act. If I am to succeed in my job, I cannot be told by the DG as to what a scarce resource is and the competency profile of staff in my office, I find it annoying, undermining and totally unacceptable. .

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V.L.

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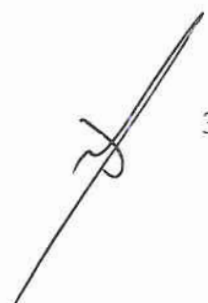
Conclusion

I have taken this extraordinary step of formally writing you because in my meetings with you there is no time to raise some of these issues which are pertinent and fundamental in strengthening one of the essential components of our criminal justice system that is vital for our democracy. This letter can easily be misconstrued as smacking of arrogance and self-importance. I would like to assure you that what has moved me to write is my newly found strong love and passion for my job. All I want is to be allowed to do my job to the best of my ability and for those who appointed me to have trust and confidence in my ability and judgment. Despite all the challenges I face as the NDPP and how this has changed and affected my life and that of my family, the passion and commitment I have for prosecution will sustain and strengthen me.

2006 will surely test our resolve and commitment to the rule of law, we dare not be found wanting. We need to hold each other's hands and work closely together and strengthen the criminal justice system.

I remain committed to serve with humility, dignity and integrity.

Vusumzi Patrick Pikoli
National Director of Public Prosecutions
Date:



3 V.P.

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

Case no. 32709/07

SIGNATURE <i>W. J. J. J.</i>	DATE <i>12/12/07</i>
(1) REPEATED YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO <i>/</i>	
(3) REVISED	
DEFENDANT'S CLAIM IS NOT APPLICABLE	

In the matter between:

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

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

JUDGMENT

Judgment reserved: 24 November 2008

Judgement handed down: 12/12/08

LEGODI J,

INTRODUCTIONS

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

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

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

3. Alternatively to prayer 2 above

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

- 3.2 *To the extent that it is required, condoning the applicants' non-compliance with the time period set out in section 7(1) of PAJA*
4. *Ordering that such of the respondents as may oppose the matter pay the applicants costs.*
5. *Granting the applicants further and/or alternative relief.*

PARTIES

2. This application was instituted by the first five applicants and other applicants, whose particulars and interests are briefly set out hereunder as follows:
- 2.1 The first applicant is the sister to one Nokuthula Aurelia Simelane (hereinafter referred to as Nokuthula) who disappeared after being abducted by the then Security Branch. In the early eighties she operated as a courier for Umkhonto We Sizwe, the armed wing of African National Congress).
- 2.2 During the Truth and Reconciliation Commission (TRC), it was established that Nokuthula disappeared while on a mission in Johannesburg after meeting with one Norman Mkhonza, who was apparently working with the Security Branch.
- 2.3 It emerged during the TRC proceedings that she was abducted by the Security Branch with the help of Mkhonza. To date, Nokuthula has not been found nor has her remains been found.
- 2.4 During the TRC, evidence emerged that implicated a number of people in the possible abduction, assault and or killing of Nokuthula. No one has however been charged. The first applicant is challenging the

prosecution policy amendments in question as the sister of Nokuthula.

- 2.5 The second and fifth applicants are challenging the policy as the widows of what is commonly referred to as the "Cradock four".
- 2.6 Their husbands were on the 27 June 1985 scheduled to attend a meeting in Port Elizabeth. This was a meeting which was arranged by the United Democratic Front (UDF).
- 2.7 On the way, they were apparently, intercepted and or stopped by the security branch members. Few days thereafter, their bodies were found burnt, mutilated and spread all over a wide area in the Redhouse or Bluewater Bay, on the outskirts of Port Elizabeth.
Their bodies and especially their faces were deliberately dosed with petrol and set on fire with the intention or rendering them unrecognisable and not identifiable.
- 2.8 During the TRC, several security branch officials were implicated, some of them are still alive. These people who were implicated many of them have not been prosecuted yet.
- 2.9 The second to the fifth applicants are challenging the prosecution policy amendments referred to in paragraph 1 above. They are challenging these policy amendments as the widows of the Cradock Four.

3. The sixth to the eighth applicants are non-governmental organizations challenging the prosecution policy and directives concerned as interested parties in the protection of the constitution.
4. In terms of section 179(5) (a)(b) of the Constitution, the first respondent with the concurrence of the second respondent, and after consulting with the Directors of Public Prosecutions, must determine prosecution policy which must be observed in the prosecution.
5. Section 21(2) of the National Prosecuting Authority Act 32 of 1998 provides that the first prosecution policy issued under the Act shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first National Director.
6. The first prosecution policy was issued some time before 2005. The applicants are challenging the amendments to the first prosecution policy issued by the first respondent.

BACKGROUND

7. During or about 2005, the first respondent produced amendments to the prosecution policy. In terms of the amendments paragraph 8A was added to the first prosecution policy.
8. In terms of the addition, the first respondent purporting to act in terms of section 179(5) of the Constitution, introduced prosecution policy and directives in Appendix A (hereinafter referred to as policy amendments), to deal with prosecution of cases arising from conflicts of the past which were

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

APPENDIX A

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

A. INTRODUCTION

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

- (a) It was recognised that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.
- (b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take party in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.
- (c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.
- (d) Therefore, persons who had committed crimes before 11 May 1994, which emanate from conflicts of the past, could enter into agreements

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

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

- (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.
- (b) The constitutional right to life.
- (c) The non-prescriptivity of the crime of murder.
- (d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed political motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.
- (e) The dicta of the Constitution justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See **Azanian People Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC**).
- (f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.
- (g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.
- (h) The dicta of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See **The State v Wouter Basson CCT 30/03**).

- (i) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations and for them to be dealt with.
 - (j) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.
 - (k) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.
3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President include the following:
- (a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.
 - (b) Section 105A of the Criminal Procedure Act, 1977, which makes the provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.
 - (c) Section 179(5) of the Constitution in terms of which the NDPP, among others-
 - (i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process:

- (ii) must issue policy directives to be observed in the prosecution process; and
 - (iii) may review a decision to prosecute or not to prosecute.
 - (d) The above process would not indemnify such a person from private prosecution or civil liability.
4. The NPA has a general discretion not to prosecute in cases where a prima facie case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:
- (a) The fact that the victim does not desire protection.
 - (b) The severity of the crime in question.
 - (c) The strength of the case.
 - (d) The cost of the prosecution weighed against the sentence likely to be imposed.
 - (e) The interests of the community and the public interest.

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

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

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

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

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

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above, (the applicant) must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.
2. The NDPP must confirm receipt of the affidavit or affirmation and my request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The applicant may also mero moto submit further written sworn affidavit or solemn affirmation to the NDPP containing representations.
3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.
4. The Priority Crimes Litigations Unit (PCLU) in the office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.
5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.
6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:
 - (a) The National Intelligence Agency.
 - (b) The Detective Division of the South African Police Services.
 - (c) The Department of Justice and Constitutional Development.
 - (d) The Directorate of Special Operations.

7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.
8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status a section 204 witness and all section 105A plea and sentence agreements.
9. The NDPP may obtain the vies of any private or public or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.
10. A decision of the NDPP not to prosecute and the reasons for the decision must be made public.
11. In accordance with section 179(6) of the Constitution, the NDPP must inform the Minister of Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this proceeding policy relating to conflicts of the past.
12. The NDPP may make public statements on any matter arising from the policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.
13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representatives, guidelines and established practice. The victims must, as far as reasonably possible be consulted in any such further process and be informed should the accused's representations be successful.
14. The NDPP may provide for any additional procedures.
15. All stage agencies, in particular those dealing with the prosecution of all alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the

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

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

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

1. The alleged offence must have been committed on or before 11 May 1994.
2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.
3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to prosecute or not;
 - (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.
 - (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered.
 - (i) The motive of the person who committed the act, commission or offence.
 - (ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.

- (iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or supporter.
- (iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued but does not include any act, omission or offence committed-
 - (aa) for personal gain; or
 - (bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.
- (c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose-
 - (i) the truth of the conflicts of the past, including the location of the remains of victims; or
 - (ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.
- (d) The personal circumstances of the alleged offender, in particular-
 - (i) whether the ill-health of the other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;
 - (ii) the credibility of the alleged offender;
 - (iii) the alleged offender's sensitivity to the need for restitution;

- (iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;
- (v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and
- (vi) the degree of indoctrination to which the alleged offender was subjected.
- (e) Whether the offence in question is serious.
- (f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.
- (g) Whether the prosecution may lead to the further or renewed traumatising of victims and conflicts in areas where reconciliation has already taken place.
- (h) If relevant, the alleged offender's role during the TRC process, namely in respect of co-operation, full disclosure and assisting the process in general.
- (i) Consideration of any views obtained for purposes of reaching a decision.
- (j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

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

9.1 that the policy amendments introduce a prosecutorial indemnity;

- 9.2 that such prosecutorial indemnity is in breach of the Constitution on various grounds including:
- 9.2.1 infringement of the rule of law;
 - 9.2.2 infringement of various constitutional rights,
 - 9.2.3 non-compliance with international law, etc. All of the rights challenged as aforesaid are set out in details in paragraphs 42 and 43 of the applicants' founding affidavit,
 - 9.2.4 that the prosecutorial indemnity is inconsistent with the right to just administrative action contained in section 33 of the Constitution and the requirements of Administrative Justice Act 3 of 2000,
 - 9.2.5 that the applicants seek to review the policy amendments in terms of section 6 of PAJA.
10. The respondents resist these challenges on the basis that the policy amendments do not allow the respondents to make a decision not to prosecute on the basis of the criteria in A, B and C of the policy amendments referred to above, where there is sufficient evidence to support prosecution. Secondly, that even if the policy allows this, it does not amount to an effective indemnity from prosecution, because the perpetrators would still be exposed to private prosecutions and civil remedies.
11. Further, the defence raised by the respondents appears to be that, until such time as a decision not to prosecute is made on the basis of the policy amendments, the challenge is not justifiable at the instance of the applicants. Lastly, the defence is that the applicants' claim is not justified because the first respondent does not intend to ever implement the

policy amendments in the manner complained by the applicants.

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

ISSUES RAISED

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

- **Whether the application is academic, unripe and having no material effect to the applicants?**
- **Whether the policy amendments allow for an amnesty, indemnity or a re-run of the TRC? Or**
- **Whether the policy amendments in relation to a decision not to prosecute will have the effect of allowing for an amnesty or indemnity equivalent to a re-run of the TRC?**

DISCUSSIONS, SUBMISSIONS & FINDINGS

14. I find if necessary to deal with the two latter issues identified in paragraphs 13 above.
- 14.1 In a somewhat introduction to the issue, counsel for the respondents in paragraph 30 of his written heads of argument stated as follows:
- “30. As stated above, the policy amendments were adopted with the object to achieve the Constitutional mandate placed on the NDPP, which mandate is the prosecution of crime. If the applicants’ case is not about the intentions of the NPA, in relation to the application of the policy amendments, or mala fide on the part of the NDPP, then it must be accepted that when the amendments to the prosecution policy were adopted, they were adopted in accordance with constitutional mandate placed on him by the Constitution with the objective of the prosecution of crime. Therefore, the applicants’ contention that the policy amendments were adopted for an ulterior purpose is without merit”.*
- 14.1.1 Surely, the intention by the first respondent (NDPP) to comply with its constitutional mandate to prosecute crimes is one thing. But the issue as I see it is, whether such intention is implicit in the policy amendment? If not, the next issue is whether the policy amendments should be allowed to exist in their apparent contrast to the intention and constitutional mandate and obligation of the first respondent.
- 14.1.2 It appears therefore, that one should look closely at the policy amendments, with a view to find in them,

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

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

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

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

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

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

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

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

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

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

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

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

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

- *Whether the applicants have demonstrated the existence of a prima facie case on which factors enumerated in part C of the policy amendments were relied upon in taking a decision to grant prosecutorial indemnity?*
- *Whether parts A, B and C confer a power not to prosecute where a prima facie case is established? And if so,*
- *Which provisions of the policy amendments empower the first respondent, a power not to prosecute, where prima facie is established?*

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

“It says so, much explicitly. It says what it means”

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

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

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

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

- 15.3.1.1 In my view, the representations envisaged in paragraph 1 of part B of the policy amendments are not covered and sanctioned by the Constitution. Such representations as sanctioned in section 179(5)(d), are for a review of a decision, the review being in respect of a decision previously taken to prosecute or not to prosecute. For example, if a decision was previously taken not to prosecute A on a charge of murder of B, but later review such a decision and decide to charge A on the murder of B, A might be required to make representations in terms of section 179(5)(d), as to why the initial decision not to prosecute should not be reviewed.
- 15.3.1.2 Invitation for representations in terms of paragraph B.1 of the policy amendments are in my view, in respect of those who are facing possible prosecution, where a decision is not taken on their fate. Secondly, the representations relate to those persons in respect of whom their cases have already been received by the first respondent, but a decision is not taken to prosecute or not to prosecute them in respect of offences relating to the conflict of the past and committed before 11 May 1994.
- 15.3.1.3 In terms of paragraph A1 (c) of the policy amendments as part of the normal legal processes and in the national interest, the first respondent working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements, that are standard in the normal execution of justice and prosecuting mandate and are accommodated in the existing legislations (my own emphasis). During the discussion

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

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

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

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

- 15.4 In my view, there is no need in the light of detailed first prosecuting policy to introduce and adopt a procedure as set out in parts A and B of the policy amendments. Of course, this has to be seen in the light of the ultimate policy amendments as contained in part C thereof. This should then bring me to deal with the interpretation of part C of the policy amendments as fully set out in paragraph 9 of this judgment.
- 15.4.1 Remember, when Mr Marcus on behalf of the applicants, was quizzed by the court, whether his understanding was that the prosecution can in terms of the policy amendments decline to prosecute in the face of a prima facie case, he stated as follows”
“It says so, much explicitly. It says what it means”
- 15.4.2 Part C, of the policy amendments sets out criteria that should be followed for the prosecution of cases arising from conflicts of the past. Paragraphs C1 and C2 thereof

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

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

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

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

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

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

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

- 15.5 In paragraph 14.3 of this judgment, I quoted paragraph 2.1 of the applicants' written heads of argument. At the risk of repetition, the applicants aver that it is not their case that the policy amendments expressly allow for an amnesty, indemnity or a re-run of the TRC, rather that the application of the policy amendments in relation to a decision not to prosecute will have this effect. This submission should be seen in the light of paragraph C 2 read with C 3 of the policy amendments.
- 15.5.1 This submission on behalf of the applicants, suggests a broader interpretation or construction of the policy amendments. I do not intend referring to legal principles and case laws dealing with the manner of interpretation, where a literal meaning does not seem to make sense or does not properly reflect the intention of the legislature, in the instant case, the intention of the respondents who produced the policy amendments. The policy amendments have the effect of legal binding.
- 15.5.2 The many criteria referred to in paragraph C3 are to enable the first respondent in deciding whether or not to prosecute offences committed before 11 May 1994 arising from conflicts of the past. However, many of these criteria in my view, are not relevant in deciding whether or not to prosecute. Remember, these criteria as contained in paragraph C3 are subject to two factors. Firstly, the offence or offences must have been committed on or before 11 May 1994. (**See paragraph C1**). Secondly,

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

- 15.5.2.1 As I said, once criteria C 2 presents itself in a particular case, the first respondent is constitutionally bound to prosecute. The many factors referred to in C3 are factors which in my view, should be considered when the first respondent decides to enter into negotiations or agreement in terms of section 105A. Section 105 A, has nothing to do with the decision to prosecute or not to prosecute. It can only be invoked once a decision to prosecute has been taken and an accused person is on trial. It is a provision which is under judicial consideration. Decision to prosecute or not to prosecute is not. Many factors as set out in C3 in my view, are relevant and important in deciding whether a sentence agreed upon in terms of section 105A is appropriate or not, but not in deciding whether to prosecute or not to prosecute.
- 15.5.2.2 As I said earlier in this judgment, section 204 is a process which is followed on the strength of a state's case and on whether a particular individual who participated in the commission of the offence is prepared to assist in successfully prosecuting his or her co-perpetrators. The section does not require representations and I do not think it is necessary for such representations to be made. The question again arises, why then representations as envisaged in paragraph B1 of the policy amendments if not to give indemnity other than in terms of section 204?
- 15.5.3 Looking at what is envisaged in paragraph B 1, one sees a recipe for conflict and absurdity. What is conspicuous in

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

- 15.5.3.1 If indeed representations in terms of B1 are intended to enable the first respondent to take a decision to prosecute, and not to grant indemnity, how does it hope to have a full disclosure as intended in B1? Surely, unless it intends not to prosecute those who make a full disclosure, in terms of paragraph B1, it cannot hope that any person who runs the risk of being prosecuted by his or her own full disclosure will come forward as envisaged in B1. Remember, this full disclosure as envisaged in B1 is emulation of a full disclosure as it was in terms of the TRC guidelines.
- 15.5.4 The whole procedure as envisaged in part B1, is a recipe for conflict and absurdity, because on the one hand it does not provide protection for such a disclosure. On the other hand, the first respondent says it is not indemnity or amnesty. It is a recipe for conflict, for example, the first respondent may wish to use the representations once it has decided to prosecute and the person who made such representations is on trial. It is a recipe for absurdity, because the first respondent insists that it does not intend to grant indemnity. The need for the procedure does not prevail, unless the intention is to grant indemnity or amnesty. Broad interpretation or construction of parts A, B, and C of the policy

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

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

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

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

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

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

- 2.1 There is no evidence that any one has been arrested in connection with the victims of the cases cited in the applicants' papers (Nokuthula Aurelia Simelane; Mathew Goniwe, Sicelo Stanley Mhlauli; Sparrow Thomas Mkhonto and Fort Calatha).*
- 2.2 The applicants have furnished no evidence indicating that the police have secured sufficient evidence to mount a prima facie case against anyone in respect of the victims on whose behalf the application is launched;*
- 2.3 There is no basis offered by the applicants that the first respondent has taken any decision to grant "prosecutorial indemnity/immunity" to anyone;*
- 2.4 More importantly, the applicants have not shown any concrete facts which meet the facts cited in the prosecutorial policy to inform the decision whether to prosecute or not to prosecute. For instance, whether there is "adequate evidence" whether there has been full disclosure of all relevant factors alleged in the offences; whether the offences were associated with political objectives" the motive of persons who committed the acts; the personal circumstances of the offender" or whether the offences are serious". All of these factors must be first established before the applicants can contend for the "effective indemnity".*

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

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

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

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

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

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

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

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

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

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

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

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

COSTS

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

CONCLUSION

18. Consequently I make the order as follows:

- 18.1 The policy amendments to the National Prosecution Policy dated the 1 December 2005 is hereby declared to be inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid.
- 18.2 The first respondent to pay the costs of the application for the first to fifth applicants.

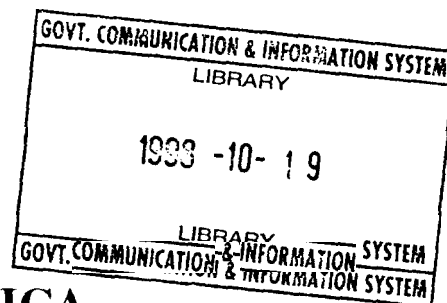

M F LEGODI
JUDGE OF THE HIGH COURT

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REPUBLIC OF SOUTH AFRICA



GOVERNMENT GAZETTE

STAATSKOERANT

VAN DIE REPUBLIEK VAN SUID-AFRIKA

Registered at the Post Office as a Newspaper

As 'n Nuusblad by die Poskantoor Geregistreer

Vol 397

CAPE TOWN, 3 JULY 1998

KAAPSTAD, 3 JULIE 1998

No. 19021

OFFICE OF THE PRESIDENT

No. 892.

3 July 1998

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No. 32 of 1998: National Prosecuting Authority Act, 1998.

KANTOOR VAN DIE PRESIDENT

No. 892.

3 Julie 1998

Hierby word bekend gemaak dat die President sy goedkeuring gegee het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 32 van 1998: Wet op die Nasionale Vervolgingsgesag, 1998.

ACT

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

PREAMBLE

WHEREAS section 179 of the Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996), provides for the establishment of a single national prosecuting authority in the Republic structured in terms of an Act of Parliament; the appointment by the President of a National Director of Public Prosecutions as head of the national prosecuting authority; the appointment of Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament;

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

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

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

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

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

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

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

CHAPTER 1

Introductory provisions

Definitions

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1. In this Act, unless the context otherwise indicates—

- (i) “*Constitution*” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996); (v)
- (ii) “*Deputy Director*” means a Deputy Director of Public Prosecutions appointed under section 15(1); (ii)

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- (iii) “*Deputy National Director*” means a Deputy National Director of Public Prosecutions appointed under section 11(1); (iii)
- (iv) “*Director*” means a Director of Public Prosecutions appointed under section 13(1); (iv)
- (v) “*Investigating Director*” means a Director of Public Prosecutions appointed under section 13(1)(b) as the head of an *Investigating Directorate*; (x) 5
- (vi) “*Investigating Directorate*” means an Investigating Directorate established under section 7(1); (xi)
- (vii) “*Minister*” means the Cabinet member responsible for the administration of justice; (viii) 10
- (viii) “*National Director*” means the National Director of Public Prosecutions appointed in terms of section 179(1)(a) of the *Constitution*; (ix)
- (ix) “*Office of the National Director*” means the Office of the National Director of Public Prosecutions established by section 5; (vii)
- (x) “*prescribed*” means prescribed by regulation made under section 40; (xvi) 15
- (xi) “*prosecuting authority*” means the single national prosecuting authority referred to in section 2; (xv)
- (xii) “*prosecutor*” means a prosecutor referred to in section 16(1); (i)
- (xiii) “*Public Service Act*” means the Public Service Act, 1994 (Proclamation 103 of 1994); (xiv) 20
- (xiv) “*Republic*” means the Republic of South Africa, referred to in section 1 of the *Constitution*; (xii)
- (xv) “*Special Director*” means a Director of Public Prosecutions appointed under section 13(1)(c); (xiii)
- (xvi) “*this Act*” includes the regulations. (vi) 25

CHAPTER 2

Structure and composition of single national prosecuting authority

Single national prosecuting authority

2. There is a single national prosecuting authority established in terms of section 179 of the *Constitution*, as determined in *this Act*. 30

Structure of prosecuting authority

3. The structure of the single *prosecuting authority* consists of—

- (a) the *Office of the National Director*; and
- (b) the offices of the *prosecuting authority* at the High Courts, established by section 6(1). 35

Composition of national prosecuting authority

4. The *prosecuting authority* comprises the—

- (a) *National Director*;
- (b) *Deputy National Directors*;
- (c) *Directors*; 40
- (d) *Deputy Directors*; and
- (e) *prosecutors*.

Office of National Director of Public Prosecutions

5. (1) There is hereby established the National Office of the *prosecuting authority*, to be known as the Office of the National Director of Public Prosecutions. 45

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

- (a) *National Director*, who shall be the head of the Office and control the Office;
- (b) *Deputy National Directors*;
- (c) *Investigating Directors* and *Special Directors*;
- (d) other members of the *prosecuting authority* appointed at or assigned to the Office; and 50
- (e) members of the administrative staff of the Office.

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

Offices of prosecuting authority at seats of High Courts

6. (1) There is hereby established an Office for the *prosecuting authority* at the seat of each High Court in the *Republic*.
- (2) An Office established by this section shall consist of—
- (a) the head of the Office, who shall be either a *Director* or a *Deputy Director*, and who shall control the Office; 5
 - (b) *Deputy Directors*;
 - (c) *prosecutors*;
 - (d) persons contemplated in section 38 (1); and
 - (e) the administrative staff of the Office. 10
- (3) If a *Deputy Director* is appointed as the head of an Office established by subsection (1), he or she shall exercise his or her functions subject to the control and directions of a *Director* designated in writing by the *National Director*.

President may establish Investigating Directorates

7. (1) (a) The President may, by proclamation in the *Gazette*, establish not more than three Investigating Directorates in the *Office of the National Director*, in respect of specific offences or specified categories of offences. 15
- (b) A proclamation referred to in paragraph (a) shall be issued with the concurrence of the *Minister* and the *National Director*.
- (2) A proclamation referred to in subsection (1) (a) must specify the offences or the categories of offences for which an *Investigating Directorate* had been established. 20
- (3) The head of an *Investigating Directorate* shall be an *Investigating Director*, and shall perform the powers, duties and functions of the Directorate subject to the control and directions of the *National Director*.
- (4) (a) An *Investigating Director* shall be assisted in the exercise of his or her powers and the performance of his or her functions by— 25
- (i) one or more *Deputy Directors*, to perform, subject to the control and directions of the *Investigating Director*, any functions of the *Investigating Director*;
 - (ii) *prosecutors*; 30
 - (iii) officers of any Department of State seconded to the service of the Directorate in terms of the laws governing the public service;
 - (iv) persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the Directorate; and
 - (v) any other person whose services are obtained by the *Investigating Director* for the purposes of a particular inquiry. 35
- (b) For the purposes of subparagraphs (iv) and (v) of paragraph (a)—
- (i) any person or body requested by the *Investigating Director* in writing to do so, shall from time to time, after consultation with the *Investigating Director*, furnish him or her with a list of the names of persons, in the employ or under the control of that person or body, who are fit and available to assist the *Investigating Director* as contemplated in the said subparagraph (iv) or (v), as the case may be; and 40
 - (ii) such a person or body shall, at the request of the *Investigating Director* and after consultation with the *Investigating Director*, designate a person or persons mentioned in the list concerned so to assist the *Investigating Director*. 45

CHAPTER 3

Appointment, remuneration and conditions of service of members of the prosecuting authority

Prosecuting authority to be representative 50

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

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

- 9.** (1) Any person to be appointed as *National Director, Deputy National Director or Director* must—
- (a) possess legal qualifications that would entitle him or her to practise in all courts in the *Republic*; and
 - (b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.
- (2) Any person to be appointed as the *National Director* must be a South African citizen.

Appointment of National Director

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

Appointment of Deputy National Directors 15

- 11.** (1) The President may, after consultation with the *Minister* and the *National Director*, appoint not more than three persons, as Deputy National Directors of Public Prosecutions.
- (2) (a) Whenever the *National Director* is absent or unable to perform his or her functions, the *National Director* may appoint any *Deputy National Director* as acting *National Director*.
- (b) Whenever the office of *National Director* is vacant, or the *National Director* is for any reason unable to make the appointment contemplated in paragraph (a), the President may, after consultation with the *Minister*, appoint any *Deputy National Director* as acting *National Director*.
- (3) Whenever a *Deputy National Director* is absent or unable to perform his or her functions, or an office of *Deputy National Director* is vacant, the *National Director* may, in consultation with the *Minister*, designate any other *Deputy National Director* or any *Director* to act as such *Deputy National Director*.

Term of office of National Director and Deputy National Directors 30

- 12.** (1) The *National Director* shall hold office for a non-renewable term of 10 years, but must vacate his or her office on attaining the age of 65 years.
- (2) A *Deputy National Director* shall vacate his or her office at the age of 65.
- (3) If the *National Director* or a *Deputy National Director* attains the age of 65 years after the first day of any month, he or she shall be deemed to attain that age on the first day of the next succeeding month.
- (4) If the President is of the opinion that it is in the public interest to retain a *National Director* or a *Deputy National Director* in his or her office beyond the age of 65 years, and—
- (a) the *National Director* or *Deputy National Director* wishes to continue to serve in such office; and
 - (b) the mental and physical health of the person concerned enable him or her so to continue,
- the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a *National Director's* term of office shall not exceed 10 years.
- (5) The *National Director* or a *Deputy National Director* shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).
- (6) (a) The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—

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

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

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

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

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(e) The *National Director* or a *Deputy National Director* provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.

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

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

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

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

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

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

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

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Appointment of Directors and Acting Directors

13. (1) The President, after consultation with the *Minister* and the *National Director*—

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

- (b) shall, in respect of each *Investigating Directorate*, appoint a Director of Public Prosecutions as the head of such an *Investigating Directorate*; and
- (c) may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the *Gazette*. 5

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

(3) The *Minister* may from time to time, but subject to the laws governing the public service and after consultation with the *National Director*, from the ranks of the *Deputy Directors* or persons who qualify to be appointed as *Deputy Director* as contemplated in section 15 (2), appoint an acting *Director* to discharge the duties of a *Director* whenever the *Director* concerned is for any reason unable to perform the duties of his or her office, or while the appointment of a person to the office of *Director* is pending. 10

Term of office of Director 15

14. (1) Subject to subsection (2), a *Director* shall vacate his or her office on attaining the age of 65 years.

(2) A *Special Director* may be appointed for such fixed term as the President may determine at the time of such appointment, and the President may from time to time extend such term. 20

(3) The provisions of section 12(3), (4), (6), (7), (8) and (9), in respect of the vacation of office and discharge of the *National Director*, shall apply, with the necessary changes, with regard to the vacation of office and discharge of a *Director*.

Appointment of Deputy Directors

15. (1) The *Minister* may, subject to the laws governing the public service and section 16 (4) and after consultation with the *National Director*— 25

- (a) in respect of an Office referred to in section 6(1), appoint a Deputy Director of Public Prosecutions as the head of such Office; and
- (b) in respect of each office for which a *Director* has been appointed, appoint Deputy Directors of Public Prosecutions. 30

(2) A person shall only be appointed as a *Deputy Director* if he or she—

- (a) has the right to appear in a High Court as contemplated in sections 2 and 3(4) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995); and
- (b) possesses such experience as, in the opinion of the *Minister*, renders him or her suitable for appointment as a *Deputy Director*. 35

(3) If a vacancy occurs in the office of a *Deputy Director*, the *Minister* shall, after consultation with the *National Director*, as soon as possible appoint another person to that office.

Appointment of prosecutors

16. (1) *Prosecutors* shall be appointed on the recommendation of the *National Director* or a member of the *prosecuting authority* designated for that purpose by the *National Director*, and subject to the laws governing the public service. 40

(2) *Prosecutors* may be appointed to—

- (a) the *Office of the National Director*;
- (b) Offices established by section 6(1); 45
- (c) *Investigating Directorates*; and
- (d) lower courts in the *Republic*.

(3) The *Minister* may from time to time, in consultation with the *National Director* and after consultation with the *Directors*, prescribe the appropriate legal qualifications for the appointment of a person as *prosecutor* in a lower court. 50

(4) In so far as any law governing the public service pertaining to *Deputy Directors* and *prosecutors* may be inconsistent with *this Act*, the provisions of *this Act* shall apply.

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

17. (1) The remuneration, allowances and other terms and conditions of service and service benefits of the *National Director*, a *Deputy National Director* and a *Director* shall be determined by the President: Provided that— 5

- (a) the salary of the *National Director* shall not be less than the salary of a judge of a High Court, as determined by the President under section 2 (1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989);
- (b) the salary of a *Deputy National Director* shall not be less than 85 per cent of the salary of the *National Director*; and 10
- (c) the salary of a *Director* shall not be less than 80 per cent of the salary of the *National Director*.

(2) If an officer or employee in the public service is appointed as the *National Director*, a *Deputy National Director* or a *Director*, the period of his or her service as *National Director*, *Deputy National Director* or *Director* shall be reckoned as part of and continuous with his or her employment in the public service, for purposes of leave, pension and any other conditions of service, and the provisions of any pension law applicable to him or her as such officer or employee, or in the event of his or her death, to his or her dependants and which are not inconsistent with this section, shall, with the necessary changes, continue so to apply. 15 20

(3) The *National Director* is entitled to pension provisioning and pension benefits determined and calculated under all circumstances, as if he or she is employed as a Director-General in the public service.

(4) The President may, whenever in his or her opinion it is necessary and after consultation with the *Minister* and the *National Director*, transfer and appoint any *Director* to any Office contemplated in section 6 (1) or *Investigating Directorate*, or as a *Special Director*. 25

Remuneration of Deputy Directors and prosecutors

18. (1) Subject to the provisions of this section, any *Deputy Director* or *prosecutor* shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the *Minister* after consultation with the *National Director* and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the *Gazette*. 30

(2) Different categories of salaries and salary scales may be determined in respect of different categories of *Deputy Directors* and *prosecutors*. 35

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

(4) The first notice in terms of subsection (1) shall be issued as soon as possible after the commencement of *this Act*, and thereafter such a notice shall be issued if circumstances, including any revision and adjustment of salaries and allowances of the *National Director* and magistrates since the latest revision and adjustment of salaries of *Deputy Directors* or *prosecutors*, so justify. 40

(5) (a) A notice issued in terms of subsection (1) shall be tabled in Parliament within 14 days after publication thereof, if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session. 45

(b) If Parliament by resolution disapproves such a notice or any provision thereof, that notice or that provision, as the case may be, shall lapse to the extent to which it is so disapproved with effect from the date on which it is so disapproved. 50

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

- (i) the validity of anything done under the notice or provision up to the date on which it so lapsed; or
- (ii) any right, privilege, obligation or liability acquired, accrued or incurred as at that date under or by virtue of the notice or provision. 55

(6) The salary payable to a *Deputy Director* or a *prosecutor* shall not be reduced except by an Act of Parliament: Provided that a disapproval contemplated in subsection

(5)(b) shall, for the purposes of this subsection, not be deemed to result in a reduction of such salary.

Conditions of service of Deputy Directors and prosecutors, except remuneration

19. Subject to the provisions of *this Act*, the other conditions of service of a *Deputy Director* or a *prosecutor* shall be determined in terms of the provisions of the *Public Service Act*. 5

CHAPTER 4

Powers, duties and functions of members of the prosecuting authority

Power to institute and conduct criminal proceedings

20. (1) The power, as contemplated in section 179 (2) and all other relevant sections 10
of the *Constitution*, to—

- (a) institute and conduct criminal proceedings on behalf of the State;
- (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
- (c) discontinue criminal proceedings, 15

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

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

(3) Subject to the provisions of the *Constitution* and *this Act*, any *Director* shall, 20
subject to the control and directions of the *National Director*, exercise the powers referred to in subsection (1) in respect of—

- (a) the area of jurisdiction for which he or she has been appointed; and
- (b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the *National Director*. 25

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

- (a) the area of jurisdiction for which he or she has been appointed; and
- (b) such offences and in such courts, as he or she has been authorised in writing 30
by the *National Director* or a person designated by the *National Director*.

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

(6) A written authorisation referred to in subsection (5) shall set out— 35

- (a) the area of jurisdiction;
- (b) the offences; and
- (c) the court or courts,

in respect of which such powers may be exercised.

(7) No member of the *prosecuting authority* who has been suspended from his or her 40
office under *this Act* or any other law shall be competent to exercise any of the powers referred to in subsection (1) for the duration of such suspension.

Prosecution policy and issuing of policy directives

21. (1) The *National Director* shall, in accordance with section 179(5)(a) and (b) and 45
any other relevant section of the *Constitution*—

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

which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in *this Act* or 50
any other law.

(2) The prosecution policy or amendments to such policy must be included in the report referred to in section 35(2)(a): Provided that the first prosecution policy issued

under *this Act* shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first *National Director*.

Powers, duties and functions of National Director

22. (1) The *National Director*, as the head of the *prosecuting authority*, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the *prosecuting authority* by the *Constitution*, *this Act* or any other law. 5

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

- (a) must determine prosecution policy and issue policy directives as contemplated in section 21; 10
- (b) may intervene in any prosecution process when policy directives are not complied with; and
- (c) may review a decision to prosecute or not to prosecute, after consulting the relevant *Director* and after taking representations, within the period specified by the *National Director*, of the accused person, the complainant and any other person or party whom the *National Director* considers to be relevant. 15

(3) Where the *National Director* or a *Deputy National Director* authorised thereto in writing by the *National Director* deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one *Director* be investigated and tried within the area of jurisdiction of another *Director*, he or she may, subject to the provisions of section 111 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other *Director*. 20

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to the *National Director* by section 179 or any other provision of the *Constitution*, *this Act* or any other law, the *National Director*, as the head of the *prosecuting authority*— 25

- (a) with a view to exercising his or her powers in terms of subsection (2), may—
 - (i) conduct any investigation he or she may deem necessary in respect of a prosecution or a prosecution process, or directives, directions or guidelines given or issued by a *Director* in terms of *this Act*, or a case or matter relating to such a prosecution or a prosecution process, or directives, directions or guidelines; 30
 - (ii) direct the submission of and receive reports or interim reports from a *Director* in respect of a case, a matter, a prosecution or a prosecution process or directions or guidelines given or issued by a *Director* in terms of *this Act*; and 35
 - (iii) advise the *Minister* on all matters relating to the administration of criminal justice; 40
- (b) shall maintain close liaison with the *Deputy National Directors*, the *Directors*, the *prosecutors*, the legal professions and legal institutions in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in respect of the *prosecuting authority*;
- (c) may consider such recommendations, suggestions and requests concerning the *prosecuting authority* as he or she may receive from any source; 45
- (d) shall assist the *Directors* and *prosecutors* in achieving the effective and fair administration of criminal justice;
- (e) shall assist the *Deputy National Directors*, *Directors* and *prosecutors* in representing their professional interests; 50
- (f) shall bring the United Nations Guidelines on the Role of Prosecutors to the attention of the *Directors* and *prosecutors* and promote their respect for and compliance with the above-mentioned principles within the framework of national legislation;
- (g) shall prepare a comprehensive report in respect of the operations of the *prosecuting authority*, which shall include reporting on— 55
 - (i) the activities of the *National Director*, *Deputy National Directors*, *Directors* and the *prosecuting authority* as a whole;

- (ii) the personnel position of the *prosecuting authority*;
- (iii) the financial implications in respect of the administration and operation of the *prosecuting authority*;
- (iv) any recommendations or suggestions in respect of the *prosecuting authority*; 5
- (v) information relating to training programmes for *prosecutors*; and
- (vi) any other information which the *National Director* deems necessary;
- (h) may have the administrative work connected with the exercise of his or her powers, the performance of his or her functions or the carrying out of his or her duties, carried out by persons referred to in section 37 of *this Act*; and 10
- (i) may make recommendations to the *Minister* with regard to the *prosecuting authority* or the administration of justice as a whole.

(5) The *National Director* shall, after consultation with the *Deputy National Directors* and the *Directors*, advise the *Minister* on creating a structure, by regulation, in terms of which any person may report to such structure any complaint or any alleged improper conduct or any conduct which has resulted in any impropriety or prejudice on the part of a member of the *prosecuting authority*, and determining the powers and functions of such structure. 15

(6) (a) The *National Director* shall, in consultation with the *Minister* and after consultation with the *Deputy National Directors* and the *Directors*, frame a code of conduct which shall be complied with by members of the *prosecuting authority*. 20

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

(7) The *National Director* shall develop, in consultation with the *Minister* or a person authorised thereto by the *Minister*, and the *Directors*, training programmes for *prosecutors*. 25

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

- (a) if no other member of the *prosecuting authority* is available, authorise in writing any suitable person to act as a prosecutor for the purpose of postponing any criminal case or cases; 30
- (b) authorise any competent person in the employ of the public service or any local authority to conduct prosecutions, subject to the control and directions of the *National Director* or a person designated by him or her, in respect of such statutory offences, including municipal laws, as the *National Director*, in consultation with the *Minister*, may determine. 35

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

Powers, duties and functions of Deputy National Directors

23. Any *Deputy National Director* may exercise or perform any of the powers, duties and functions of the *National Director* which he or she has been authorised by the *National Director* to exercise or perform. 40

Powers, duties and functions of Directors and Deputy Directors

24. (1) Subject to the provisions of section 179 and any other relevant section of the *Constitution*, *this Act* or any other law, a *Director* referred to in section 13(1)(a) has, in respect of the area for which he or she has been appointed, the power to— 45

- (a) institute and conduct criminal proceedings and to carry out functions incidental thereto as contemplated in section 20(3);
- (b) supervise, direct and co-ordinate the work and activities of all *Deputy Directors* and *prosecutors* in the Office of which he or she is the head; 50
- (c) supervise, direct and co-ordinate specific investigations; and
- (d) carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of *this Act*.

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

- (a) institute an action in any court in the *Republic*; and 5
- (b) prosecute an appeal in any court in the *Republic* emanating from criminal proceedings instituted by the *Investigating Director* or the person authorized thereto by him or her:

Provided that an *Investigating Director* or the person authorized thereto by him or her shall exercise the powers referred to in this subsection only after consultation with the *Director* of the area of jurisdiction concerned. 10

(3) A *Special Director* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the *National Director*: Provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20(1), they shall be exercised, carried out and performed in consultation with the *Director* of the area of jurisdiction concerned. 15

(4) In addition to any other powers, duties and functions conferred or imposed on or assigned to him or her by section 179 of the Constitution, *this Act* or any other law, a *Director* referred to in section 13 (1)— 20

- (a) shall, at the request of the *National Director*, submit reports to the *National Director* or assist the *National Director* in connection with a matter referred to in section 22(4)(a)(ii);
- (b) shall submit annual reports to the *National Director* pertaining to matters referred to in section 22(4)(g); 25
- (c) may, in the case of a *Director* referred to in section 13(1)(a), give written directions or furnish guidelines to—
 - (i) the Provincial Commissioner of the police service referred to in section 207(3) of the *Constitution* within his or her area of jurisdiction; or
 - (ii) any other person who within his or her area of jurisdiction— 30
 - (aa) conducts investigations in relation to offences; or
 - (bb) other than a private prosecutor, institutes or carries on prosecutions for offences; and
- (d) shall, subject to the directions of the *National Director*, be responsible for the day to day management of the *Deputy Directors* and *prosecutors* under his or her control. 35

(5) Without limiting the generality of subsection (4)(c) and subject to the directions of the *National Director*, directions or guidelines under that subsection may be given or furnished in relation to particular cases and may determine that certain offences or classes of offences must be referred to the *Director* concerned for decisions on the institution or conducting of prosecutions in respect of such offences or classes of offences. 40

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

(7) Where a *Director*— 45

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

the *Director* may request the Provincial Commissioner of the police service referred to in subsection (4)(c)(i) for assistance in the investigation of that matter and where the *Director* so requests, the Provincial Commissioner concerned shall, so far as practicable, comply with the request. 50

(8) The powers conferred upon a *Director* under section 20(1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings. 55

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

(b) A power, duty or function which is exercised, carried out or performed by a *Deputy Director* is construed, for the purposes of *this Act*, to have been exercised, carried out or performed by the *Director* concerned. 60

Powers, duties and functions of prosecutors

- 25.** (1) A *prosecutor* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her—
- (a) under *this Act* and any other law of the *Republic*; and
 - (b) by the head of the Office or *Investigating Directorate* where he or she is employed or a person designated by such head; or
 - (c) if he or she is employed as a *prosecutor* in a lower court, by the *Director* in whose area of jurisdiction such court is situated or a person designated by such *Director*.
- (2) Notwithstanding the provisions of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), or any other law, any *prosecutor* who—
- (a) has obtained such legal qualifications as the *Minister* after consultation with the *National Director* may prescribe; and
 - (b) has at least three years' experience as a *prosecutor* of a magistrates' court of a regional division,
- shall, subject to section 20 (6), have the right to appear in any court in the *Republic*.

CHAPTER 5

Powers, duties and functions relating to Investigating Directorates

Definitions

- 26.** (1) In this Chapter, unless the context otherwise indicates—
- “inquiry” means an inquiry in terms of section 28 (1);
 - “specified offence” means any offence which in the opinion of the *Investigating Director* falls within the category of offences set out in the proclamation referred to in section 7(1) in respect of the *Investigating Directorate* concerned.
- (2) This Chapter only relates to the *Investigating Directorates* established under section 7(1) of *this Act*.

Laying of certain matters before Investigating Director

- 27.** If any person has reasonable grounds to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may lay the matter in question before the *Investigating Director* by means of an affidavit or affirmed declaration specifying—
- (a) the nature of the suspicion;
 - (b) the grounds on which the suspicion is based; and
 - (c) all other relevant information known to the declarant.

Inquiries by Investigating Director

- 28.** (1) (a) If the *Investigating Director* has reason to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may hold an inquiry on the matter in question, whether or not it has been laid before him or her in terms of section 27.
- (b) If the *National Director* refers a matter in relation to the alleged commission or attempted commission of a specified offence to the *Investigating Director*, the *Investigating Director* shall hold an inquiry, or a preparatory investigation as referred to in subsection (13), on that matter.
- (c) If the *Investigating Director*, at any time during the holding of an inquiry on a matter referred to in paragraph (a) or (b), considers it desirable to do so in the interest of the administration of justice or in the public interest, he or she may extend the inquiry so as to include any offence, whether or not it is a specified offence, which he or she suspects to be connected with the subject of the inquiry.
- (2) (a) The *Investigating Director* may, if he or she decides to hold an inquiry, at any time prior to or during the holding of the inquiry designate any person referred to in section 7 (4) to conduct the inquiry, or any part thereof, on his or her behalf and to report to him or her.

(b) A person so designated shall for the purpose of the inquiry concerned have the same powers as those which the *Investigating Director* has in terms of this section and section 29 of *this Act*, and the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act No. 66 of 1975), in respect of commissions of inquiry shall apply with the necessary changes in respect of such a person. 5

(3) All proceedings at an inquiry shall take place *in camera*.

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

(5) The proceedings and evidence at an inquiry shall be recorded in such manner as the *Investigating Director* may deem fit. 10

(6) For the purposes of an inquiry—

(a) the *Investigating Director* may summon any person who is believed to be able to furnish any information on the subject of the inquiry or to have in his or her possession or under his or her control any book, document or other object relating to that subject, to appear before the *Investigating Director* at a time and place specified in the summons, to be questioned or to produce that book, document or other object; 15

(b) the *Investigating Director* or a person designated by him or her may question that person, under oath or affirmation administered by the *Investigating Director*, and examine or retain for further examination or for safe custody such a book, document or other object. 20

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

(a) be in the prescribed form; 25

(b) contain particulars of the matter in connection with which the person concerned is required to appear before the *Investigating Director*;

(c) be signed by the *Investigating Director* or a person authorized by him or her; and

(d) be served in the prescribed manner.

(8) (a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person in terms of subsection (6): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge. 30

(b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (10)(b) or (c), or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955). 35

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

(a) may be assisted at his or her examination by an advocate or an attorney; 40

(b) shall be entitled to such witness fees as he or she would be entitled to if he or she were a witness for the State in criminal proceedings in a magistrate's court.

(10) Any person who has been summoned to appear before the *Investigating Director* and who— 45

(a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the *Investigating Director* from further attendance;

(b) at his or her appearance before the *Investigating Director*—

(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce; 50

(ii) refuses to be sworn or to make an affirmation after he or she has been asked by the *Investigating Director* to do so;

(c) having been sworn or having made an affirmation— 55

(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her;

(ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true,

shall be guilty of an offence. 60

(11) The *Investigating Director* may, whether or not he or she holds an inquiry, and,

if he or she does hold an inquiry, at any time prior to, during or after the holding of the inquiry, if he or she is of the opinion that the facts disclose the commission of an offence by any person, notify the *Director* of the area of jurisdiction concerned accordingly.

(12) Upon the completion of an inquiry, the *Investigating Director* shall furnish the *National Director* with a report on his or her findings and recommendations, if any, and send a copy of the report to the *Director* of the area of jurisdiction concerned. 5

(13) If the *Investigating Director* considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1)(a), the *Investigating Director* may hold a preparatory investigation. 10

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

Entering upon premises by Investigating Director

29. (1) The *Investigating Director* or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an inquiry at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that inquiry is or is suspected to be, and may— 15

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary; 20

(b) examine any object found on or in the premises which has a bearing or might have a bearing on the inquiry in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object; 25

(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the inquiry in question, and request from any person suspected of having the necessary information, an explanation of any entry therein; 30

(d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the inquiry in question, or if he or she wishes to retain it for further examination or for safe custody. 30

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

(a) a person's right to, respect for and the protection of his or her dignity; 35

(b) the right of a person to freedom and security; and

(c) the right of a person to his or her personal privacy.

(3) No evidence regarding any questions and answers contemplated in subsection (1) shall be admissible in any subsequent criminal proceedings against a person from whom information in terms of that subsection is acquired if the answers incriminate him or her, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (12). 40

(4) Subject to subsection (10), the premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified. 45

(5) A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating— 50

(a) the nature of the inquiry in terms of section 28;

(b) the suspicion which gave rise to the inquiry; and

(c) the need, in regard to the inquiry, for a search and seizure in terms of this section, 55

that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

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

(a) it has been executed; 60

(b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or

(c) the expiry of three months from the day of its issue,

whichever may occur first.

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

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

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

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

(a) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises;

(b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

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

(i) if the person who is competent to do so consents to such entry, search, seizure and removal; or

(ii) if he or she upon reasonable grounds believes that—

(aa) the required warrant will be issued to him or her in terms of subsection (4) if he or she were to apply for such warrant; and

(bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.

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

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

(12) Any person who—

(a) obstructs or hinders the *Investigating Director* or any other person in the performance of his or her functions in terms of this section;

(b) when he or she is asked in terms of subsection (1) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading,

shall be guilty of an offence.

Preservation of secrecy and admissibility of evidence

55

30. (1) Notwithstanding any other law, but subject to subsection (3), no person shall without the permission of the *Investigating Director* disclose to any other person—

- (a) any information which came to his or her knowledge in the performance of his or her functions in terms of *this Act* and relating to the business or affairs of any other person;
- (b) the contents of any book or document or any other item in the possession of the *Investigating Director*; or 5
- (c) the record of any evidence given at an inquiry,
- except—
- (i) for the purpose of performing his or her functions in terms of *this Act*; or
- (ii) when required to do so by order of a court of law. 10
- (2) Any person who contravenes subsection (1) shall be guilty of an offence. 10
- (3) A person from whom a book or document has been taken under section 28(6)(b) or 29(1)(d) shall, as long as it is in the possession of the *Investigating Director*, at his or her request be allowed, at his or her own expense and under the supervision of the *Investigating Director*, to make copies thereof or to take extracts therefrom at any reasonable time. 15

Compensation regarding expenses

31. The Director-General: Justice may in his or her discretion, on the recommendation of the *Investigating Director* and with the concurrence of the Minister of Finance, order that the expenses or any part of the expenses incurred by any person in the course of or in connection with an inquiry be paid from State funds to that person. 20

CHAPTER 6

General provisions

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

32. (1) (a) A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law. 25
- (b) Subject to the *Constitution* and *this Act*, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions. 30
- (2) (a) A *National Director* and any person referred to in section 4 must, before commencing to exercise, carry out or perform his or her powers, duties or functions in terms of *this Act*, take an oath or make an affirmation, which shall be subscribed by him or her, in the form set out below, namely— 35
- “I 35
(full name)
do hereby swear/solemnly affirm that I will in my capacity as *National Director/Deputy National Director* of Public Prosecutions/*Director/Deputy Director* of Public Prosecutions/*prosecutor*, uphold and protect the *Constitution* and the fundamental rights entrenched therein and enforce the Law of the *Republic* without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the *Constitution* and the Law. (In the case of an oath: So help me God.)” 40
- (b) Such an oath or affirmation shall— 45
- (i) in the case of the *National Director*, or a *Deputy National Director*, *Director* or *Deputy Director*, be taken or made before the most senior available judge of the High Court within which area of jurisdiction the Office of the *National Director*, *Director* or *Deputy Director*, as the case may be, is situated; or
- (ii) in the case of a *prosecutor*, be taken or made before the *Director* in whose Office the *prosecutor* concerned has been appointed or before the most senior judge or magistrate at the court where the *prosecutor* is stationed, 50

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

Minister's final responsibility over prosecuting authority

33. (1) The *Minister* shall, for purposes of section 179 of the *Constitution, this Act* or any other law concerning the *prosecuting authority*, exercise final responsibility over the *prosecuting authority* in accordance with the provisions of *this Act*. 5

(2) To enable the *Minister* to exercise his or her final responsibility over the *prosecuting authority*, as contemplated in section 179 of the *Constitution*, the *National Director* shall, at the request of the *Minister*— 10

- (a) furnish the *Minister* with information or a report with regard to any case, matter or subject dealt with by the *National Director* or a *Director* in the exercise of their powers, the carrying out of their duties and the performance of their functions;
- (b) provide the *Minister* with reasons for any decision taken by a *Director* in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions; 15
- (c) furnish the *Minister* with information with regard to the prosecution policy referred to in section 21(1)(a);
- (d) furnish the *Minister* with information with regard to the policy directives referred to in section 21(1)(b); 20
- (e) submit the reports contemplated in section 34 to the *Minister*; and
- (f) arrange meetings between the *Minister* and members of the *prosecuting authority*.

Reports by Directors 25

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

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

(3) A *Director* may, at any time, submit a report to the *National Director* with regard to any matter relating to the *prosecuting authority*, if he or she deems it necessary. 30

Accountability to Parliament

35. (1) The *prosecuting authority* shall be accountable to Parliament in respect of its powers, functions and duties under *this Act*, including decisions regarding the institution of prosecutions. 35

(2) (a) The *National Director* must submit annually, not later than the first day of June, to the *Minister* a report referred to in section 22(4)(g), which report must be tabled in Parliament by the *Minister* within 14 days, if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing session. 40

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

Expenditure of prosecuting authority

36. (1) The expenses incurred in connection with— 45

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

shall be defrayed out of monies appropriated by Parliament for that purpose. 50

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

(3) The Director-General: Justice shall, subject to the Exchequer Act, 1975 (Act No. 66 of 1975)—

- (a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the *prosecuting authority*;
- (b) cause the necessary accounting and other related records to be kept.
- (4) The records referred to in subsection (3)(b) shall be audited by the Auditor-General. 5

Administrative staff

37. The administrative staff of—
- (a) the *Office of the National Director*;
- (b) the Offices of the *Directors*, including *Investigating Directorates*; and
- (c) the Offices of *prosecutors* as determined by the *National Director*, in consultation with the *Director* concerned, 10
- shall be persons appointed or employed under the *Public Service Act*.

Engagement of persons to perform services in specific cases

38. (1) The *National Director* may in consultation with the *Minister*, and a *Deputy National Director* or a *Director* may, in consultation with the *Minister* and the *National Director*, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases. 15
- (2) The terms and conditions of service of a person engaged by the *National Director*, a *Deputy National Director* or a *Director* under subsection (1) shall be as determined from time to time by the *Minister* in concurrence with the Minister of Finance. 20

Disclosure of interest and non-performance of other paid work

39. (1) The *National Director*, a *Deputy National Director* and a *Director* shall give written notice to the *Minister* of all direct or indirect pecuniary interests that they have or acquire in any business whether in the *Republic* or elsewhere or in any body corporate carrying on any such business. 25
- (2) The *National Director*, a *Deputy National Director* and a *Director* shall not, without the consent of the President, perform any paid work outside his or her duties of office.

Regulations

40. (1) The *Minister* may make regulations, not inconsistent with *this Act*, prescribing— 30
- (a) matters required or permitted by *this Act* to be *prescribed*;
- (b) the steps to be taken to ensure compliance with the code of conduct referred to in section 22(6); or
- (c) matters necessary or convenient to be *prescribed* for carrying out or giving effect to *this Act*. 35
- (2) Any regulation made in terms of subsection (1) which may result in the expenditure of State monies shall be made in consultation with the Minister of Finance.

Offences and penalties

41. (1) Any person who contravenes the provisions of section 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment. 40
- (2) Any person convicted of an offence referred to in section 28(10), 29(12) or 30(2) shall be liable to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment. 45

Limitation of liability

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

CHAPTER 7

*Transitional arrangements***Transitional arrangements**

43. (1) (a) Anyone holding office as an attorney-general in terms of the Attorney-General Act, 1992 (Act No. 92 of 1992), shall, subject to paragraph (b), be deemed to have been appointed as a *Director* in terms of *this Act*, and shall continue to function in terms of the laws applicable to his or her Office. 5

(b) The President shall, as soon as reasonably possible after the commencement of this section, appoint each attorney-general referred to in paragraph (a) as a *Director* at the Office that, and for such term as the President, after consultation with the attorney-general concerned, may determine, but such term shall not extend beyond the date on which the attorney-general concerned will attain the age of 65 years. 10

(c) The provisions of section 12(4) shall apply with the necessary changes in respect of a *Director* referred to in paragraph (b): Provided that the reference in section 12(4) to the age of 65 years shall be construed as a reference to the date on which the *Director's* term of office as contemplated in paragraph (b) expires. 15

(d) If the term of office of a *Director* appointed under paragraph (b) expires before he or she has attained the age of 65 years, he or she shall be entitled to pension benefits determined and calculated under all circumstances as if he or she was employed as a Director-General in the public service, who served as a Director-General for five years. 20

(2) Anyone holding office as an attorney-general in terms of a law other than the Attorney-General Act, 1992, or holding an appointment as acting attorney-general, shall be deemed to have been appointed as an acting *Director* under *this Act* at the office where he or she holds such office or appointment, and shall continue to function in that capacity until otherwise determined under *this Act* or any other law. 25

(3) (a) Any person who immediately before the commencement of this section was employed by the State as a deputy attorney-general shall continue in such employment and shall be deemed to have been appointed as a *Deputy Director* in terms of section 15(1). 25

(b) Any person who immediately before the commencement of this section was employed by the State as a state advocate or prosecutor and who has been delegated in terms of any law to institute criminal proceedings and to conduct any prosecution in criminal proceedings on behalf of the State— 30

- (i) shall continue in such employment as a *prosecutor*; and
- (ii) shall be deemed to have been authorised to exercise the powers referred to in section 20(1): Provided that no *prosecutor* shall, by virtue of this section, have more powers than he or she would have had under the delegation concerned. 35

(4) Criminal proceedings which have been instituted before the commencement of *this Act*, must be disposed of as if the decision to institute and prosecute in such criminal proceedings had been taken by a member of the *prosecuting authority* appointed in terms of *this Act*. 40

(5) Any attorney-general, deputy attorney-general, state advocate or prosecutor who continues in office in terms of this section must, within three months after the commencement of *this Act*, take the oath or make the affirmation referred to in section 32(2). 45

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

(7) (a) As from the date of the commencement of this section— 50

- (i) the Office for Serious Economic Offences established by section 2 of the Investigation of Serious Economic Offences Act, 1991 (Act No. 117 of 1991), shall become an *Investigating Directorate*, which shall be deemed to have been established by the President under section 7 and which shall be known as the Investigating Directorate: Serious Economic Offences; 55
- (ii) subject to the provisions of *this Act*, the Director and staff of the Office for Serious Economic Offences referred to in section 3 of the Investigation of

Serious Economic Offences Act, 1991, shall remain in office and continue their functions under *this Act*; and

(iii) all pending matters pertaining to the Office for Serious Economic Offences shall be dealt with as if *this Act* had at all times been in force.

(b) Notwithstanding the repeal of the Investigation of Serious Economic Offences Act, 1991, the regulations made under section 10 of that Act shall remain in force pending the repeal or amendment thereof under section 40 of *this Act*. 5

(c) The President may, on the request of the *National Director* and by proclamation in the *Gazette*, further specify the categories of offences in respect of which the Investigating Directorate: Serious Economic Offences must exercise its functions. 10

(8) Subject to the *Constitution* and *this Act*, all measures which immediately before the commencement of this section were in operation and applied to attorneys-general, deputy attorneys-general, state advocates and prosecutors, including measures regarding remuneration, pension and pension benefits, leave gratuity and any other term and condition of service, shall continue in operation and to apply to the said attorneys-general, deputy attorneys-general, state advocates and prosecutors until amended or repealed by *this Act*: Provided that no such measure shall, except in accordance with an applicable law or agreement, be changed in a manner which affects such attorneys-general, deputy attorneys-general, state advocates and prosecutors to their detriment. 15

(9) Notwithstanding the commencement of *this Act*, all measures regulating the institution and conducting of prosecutions in any court shall remain in force until repealed or amended under *this Act* or by any competent authority. 20

Amendment or repeal of laws

44. The laws mentioned in the Schedule are hereby amended or repealed to the extent indicated in the third column thereof. 25

Interpretation of certain references in laws

45. Any reference in any law to an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a *Director* or *Deputy Director* appointed in terms of *this Act*, for the area of jurisdiction of that Court. 30

Short title and commencement

46. This Act shall be called the National Prosecuting Authority Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

(Laws amended or repealed by section 44)

Number and year of law	Title	Extent of amendment or repeal
Act No. 51 of 1977	Criminal Procedure Act, 1977	<p>(a) Repeal of sections 2 and 5.</p> <p>(b) Amendment of section 111 by the deletion of subsection (1) and the substitution for subsections (2), (3) and (4) of the following subsections:</p> <p>“[(2)](1) (a) The direction of the [Minister] National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), shall state the name of the accused, the relevant offence, the place at which (if known) and the [attorney-general] Director in whose area of jurisdiction [the offence was committed and the attorney-general in whose area of jurisdiction] the relevant investigation and criminal proceedings shall [commence] be conducted and commenced.</p> <p>(b) A copy of the direction shall be served on the accused, and the original thereof shall, save as is provided in subsection [(4)](3) be handed in at the court in which the proceedings are to commence.</p> <p>[(3)](2) The court in which the proceedings commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court.</p> <p>[(4)](3) Where the [Minister] National Director issues a direction [under] contemplated in subsection (1) after an accused has already appeared in a court, the original of such direction shall be handed in at the relevant proceedings and attached to the record of the proceedings, and the court in question shall—</p> <p>(a) cause the accused to be brought before it, and when the accused is before it, adjourn the proceedings to a time and a date and to the court designated by the [attorney-general] Director in whose area of jurisdiction the said criminal proceedings shall commence, whereupon such time and date and court shall be deemed to be the time and date and court appointed for the trial of the accused or to which the proceedings pending against the accused are adjourned;</p> <p>(b) forward a copy of the record of the proceedings to the court in which the accused is to appear, and that court shall receive such copy and continue with the proceedings against the accused as if such proceedings had commenced before it.”.</p>
Act No. 117 of 1991	Investigation of Serious Economic Offences Act, 1991	The whole
Act No. 92 of 1992	Attorney-General Act, 1992	The whole