

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

STATEMENT: APPLICATION TO CROSS-EXAMINE GERHARD NEL

I, the undersigned.

ASMITA THAKOR

do hereby make oath and state that:

1. I am an adult female attorney practising as a Partner at Webber Wentzel at 90 Rivonia Road, Sandton. I am the attorney of record for the families and survivors of apartheid-era crimes (known as the "**Calata Group**") as well as Advocate Anton Ackermann SC.
2. The facts contained in this statement are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.
3. I am duly authorised to depose to this statement on behalf of my clients
4. This statement is made in support of an application in terms of Regulation 8(3) of the Commission's Regulations, read with Rule 3.7 of the Commission's Rules, to cross-examine Mr Gerhard Nel ("**Mr Nel**" or "**Nel**") when he testifies before the Commission on 1 July 2026.
5. Mr Nel filed a statement with the Commission dated 22 June 2026. On 24 June 2026, the Commission informed the parties that Mr Nel's cross examination will follow immediately after his evidence in chief. The parties were requested to submit cross examination applications timeously based on Mr Nel's statement.
6. Our clients wish to question Mr Nel about the following aspects of his statement:
 - 6.1 His legal expertise and his role as legislative drafter and legal advisor with the NPA and other roles and responsibilities.

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- 6.2 Considering the President said that the TRC cases were to proceed according to the normal legal proceedings why in his view was an extraordinary legal process put in place for these cases?
- 6.3 According to Mr Nel the “*process was not supposed to stop investigations or prosecutions*”. However, this happened. The Minister of Justice directed the Acting NDPP to suspend the TRC cases in November 2004 pending the formulation of the guidelines; and even when guidelines were issued in December 2005 the cases remained stuck with no prosecutions enrolled between 2007 and 2016.
- 6.4 The establishment of the Amnesty Task Team (**ATT**); including
- 6.4.1 The purpose of the ATT, including its mandate and the instructions or directions it received;
- 6.4.2 The composition of the ATT;
- 6.4.3 Why its reports were classified secret;
- 6.5 Who was responsible for drafting or compiling the reports and opinions of the ATT?
- 6.6 The concerns of the ATT in relation to the possible negation of constitutional rights, the possibility of private prosecutions and public perceptions around a further amnesty process.
- 6.7 The debate amongst the ATT members around a further amnesty process and the compiling of the draft Indemnity Bill.
- 6.8 Following the first meeting of the ATT on 26 February 2004 the NPA representatives reported to the then NDPP Adv Bulelani Ngcuka (“**Ngcuka**”). When Ngcuka learned that the ATT was developing new criteria for the TRC cases he instructed his representatives¹ to immediately cease their participation in the process. This was because he did not agree with the proposals and there were persons in that meeting concerned about the ANC

¹ Gerhard Nel and Lungisa Dyosi were the NPA representatives

37 case – and further participation would “*compromise us*”.² Did Mr Nel cease his participation in the ATT?

6.9 Whether the documents attached to Nel’s statement are authentic. They are not original documents, and are computer generated and unsigned.

6.10 The 26 February 2004 internal memo addressed to the ATT (p 1989 of Nel bundle) is from “Office of the National Prosecuting Authority”.

6.10.1 It is not clear if this is the office of the NDPP or some other office.

6.10.2 Mr Nel thinks it was from the PCLU. Why would the PCLU send such a memo to the ATT? Why would it communicate with the ATT at this time?

6.10.3 According to Adv Anton Ackermann who was then head of the PCLU he was not aware of the ATT and its deliberations at this time.

6.10.4 At para 2.1(b) it is stated that the “decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community’s confidence in the prosecution system.”

6.10.5 Would the provision of a special process for apartheid-era perpetrators in which additional criteria not to prosecute are provided not have profound consequences for victims and families; and undermine their confidence in the prosecution system?

6.11 This memo is dated 26 February 2004, the same day as the first ATT meeting. Was it addressed to the ATT before or after the first meeting? Did the ATT request it? Was it authorised by NDPP Ngcuka?

6.12 The meeting the Heads of Department Forum³ held with the ATT after the submission of the first ATT Report (dated 4 March 2004).⁴

² Cross examination of Adv Ngcuka on 11-03-26, Day 20 at page 22, available at: <https://www.trc-inquiry.org.za/wp-content/uploads/2026/03/Day-20-Adv.-B.-Ngcuka-cross-examination-11-03-26.pdf>

³ Also known as the Directors-General Forum.

⁴ Referred to in para 1.2 of the FURTHER REPORT: AMNESTY TASK TEAM.

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- 6.13 The instructions the departmental heads provided to the ATT to further consider the following aspects:
- 6.13.1 the use of existing or parallel structures;
 - 6.13.2 whether there was a way in which private prosecution and civil litigation could be eliminated if the NDPP decides not to prosecute;
 - 6.13.3 if the proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee;
 - 6.13.4 that the proposed Task Team, the Inter-Ministerial Committee and the NDPP, in performing their functions and reaching decisions, should take the national interest into account.
 - 6.13.5 whether a person aggrieved by a decision of the NDPP may approach the International Criminal Court (ICC).
- 6.14 The response of the ATT to the requests of the Heads of Department Forum, and in particular:
- 6.14.1 why the ATT recommended that all existing structures, including the NPA, would have to “*commit themselves and give their full support and cooperation*” to the process?
 - 6.14.2 why the question of “*eliminating private prosecution[s] and civil litigation in cases of a no prosecution [] elicited much debate*” within the ATT?
 - 6.14.3 why eliminating private prosecutions and civil litigation by way of legislation and a Constitutional amendment “*would not be desirable*”?
- 6.15 Whether the State Law Advisors and Adv Bruwer were asked to provide an opinion on the constitutionality of the proposed amendments to the Prosecution Policy?
- 6.16 Why the ATT supported the establishment of an Inter-Ministerial Committee?
- 6.16.1 Why did the ATT support this proposal even though it stated that this “*might be seen as an attempt by the Government to put undue pressure*

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on the National Director of Public Prosecutions in reaching an independent decision”?

- 6.16.2 Whether the *Cabinet Committee on Post TRC matters*, (a subcommittee of the Justice, Crime Prevention and Security Cluster) was inspired by the ATT’s suggestion for the creation of an “Inter-Ministerial Committee”?
- 6.17 Why in response to the DG’s Forum suggestion that the “*national interest should be the paramount objective*” in implementing the measure to handle the TRC cases, did the ATT respond that it “*wholeheartedly agrees with this viewpoint of the Forum.*”
- 6.18 What the reaction of the ATT was on receiving the advice of Adv Bruwer who concluded that it was “*not inconceivable that a complainant who is prohibited [...] from instituting a private prosecution in the national court may approach the International Criminal Court for relief*”?
- 6.19 Why the ATT declined to propose a timeline for the Departmental Task Team to complete its work, but proposed that “*the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into account the extent to which its objectives are achieved*”?
- 6.20 The specific recommendations of the Amnesty Task Team; including
- 6.20.1 To insert new prosecution criteria in the NPA’s prosecution policy only in relation to the TRC cases to provide for additional criteria not to prosecute those cases;
- 6.20.2 the composition of the proposed Departmental Task Team; and its role in advising the NDPP of the advisability of prosecutions in the TRC cases before the institution of any criminal proceedings in each case.
- 6.21 Why Mr Nel is of the view that the recommendations of the ATT:
- 6.21.1 Were not aimed at creating avenues for apartheid-era perpetrators to evade justice;

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- 6.21.2 Did not amount to interference with the independence, authority and ability of the NPA to pursue the TRC cases;
- 6.21.3 Were not unlawful and constitutional.
- 6.22 Whether Mr Nel is aware that various recommendations of the ATT were implemented, including:
- 6.22.1 the creation of new criteria for prosecution decisions exclusively for the TRC cases as per the amendments to the Prosecution Policy;
- 6.22.2 the establishment of a Task Team, which included members of the executive, to advise the NDPP on the advisability of instituting a criminal proceedings in each TRC case before a prosecution decision was made;
- 6.22.3 the creation of the Special Dispensation of Political Pardons.
- 6.23 The fact that the courts struck down both the Prosecution Policy amendments and the Special Dispensation of Political Pardons.
- 6.24 The unsigned Cabinet memo (p 1979 of Nel bundle) which reflects the ATT recommendations is dated March 2005. The Cabinet minute of 22 June 2005 reveals that the memo that served before Cabinet was dated 17 May 2005.
- 6.24.1 Why were the guidelines submitted to Cabinet for approval when there was no constitutional or legislative requirement to do so?
- 6.24.2 Why the guidelines should be submitted to Parliament for its consideration in terms of s 21(2) of the NPA Act when that section made no such provision?⁵
- 6.24.3 Why under "Communication Implications" was it stated that this "was this a very sensitive and controversial matter"?
- 6.25 According to Ackermann, during 2005, he consulted with Nel, and the PCLU drew up two legal opinions assessing the constitutionality of the proposed amendments to the Prosecution Policy and submitted these to the NDPP. The

⁵ It only provided that that the first prosecution policy issued under *the Act* shall be tabled in Parliament not later than six months after the appointment of the first *National Director*

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opinions pointed out that the amendments amounted to a rerun of the TRC's amnesty process and would not survive constitutional scrutiny. At a number of meetings, Ackermann voiced his opposition to the proposed amendments.⁶

6.26 According to the undated Notes for the NDPP ("**the Notes**") at page 1986 of the Nel bundle, he addressed the Justice Portfolio Committee on the amendments to the Prosecution Policy. No date is given but according to the report of the Justice Portfolio Committee it was held on 17 January 2006, it was Nel who addressed the meeting on behalf of the NPA.⁷

6.26.1 According to para 9 of Nel's statement and the Notes, when he submitted his presentation to the Chairperson of the Portfolio Committee, she affected changes to make it clear that Cabinet did not "approve" the Amended Policy, but it was merely submitted to Cabinet so as to note the Amended Policy. This was done in order to emphasize that "the NDPP acts independently in determining the Prosecution Policy."

6.26.2 However, Cabinet did in fact approve the amendments to the policy as per para 9.2 of unclassified Cabinet minute dated 22 June 2005, which is included in the Calata Group cross bundle.⁸

6.26.3 Even though not necessary, the submission of the amendments to Cabinet and Parliament was presumably done given the "sensitivity and controversy" surrounding the amendments.

6.27 At para 10 of his statement Nel says there is a distinction between amending the Prosecution Policy (which requires the concurrence of the Minister and consultation with DPPs) and policy directives which are issued at the discretion of the National Director. He then states that the ATT's work focused on policy directives, and not on amending the prosecution policy.

⁶ Calata Group Bundle 3, p 389, para 19.

⁷ Meeting report, JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE, 17 January 2006 PROSECUTION POLICY AMENDMENTS FOR CRIMINAL MATTERS ARISING FROM PRE-1994 CONFLICTS: BRIEFING, available at: <https://pmg.org.za/committee-meeting/6030/> (attached to the cross bundle).

⁸ See also B2 p 58 para 2.2.1 and B4 p 1154 para 2.

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- 6.27.1 It will be put to Nel that he is mistaken on this aspect. Amending prosecution criteria as provided in the policy itself cannot be done by way of policy directives, which are internal in nature.
- 6.27.2 There have been a large number of policy directives issued over the years, unlike the appendix A -- none have been included in the Policy itself.⁹
- 6.27.3 The minutes of the aforesaid Justice Portfolio Committee meeting, reflect Nel stating that the *“amendments proposed by the NDPP were submitted and approved by the Minister of Justice and Constitutional Development, who also submitted them to Cabinet which noted the amended Prosecution Policy. All the Directors of Public Prosecutions also supported the amendments.”*
- 6.28 At para 3 of the Notes, Nel explained to the MPs and journalists at the aforesaid portfolio committee meeting why the guidelines took so long: *“I pointed out that it was a long consultation process where we had to consult with other law enforcement agencies, relevant departments, the Minister, the DPPs and Unit Heads.”*
- 6.28.1 No mention was made of consulting with victims, families, NGOs and the wider community. This was a complaint raised by the Calata Group.
- 6.28.2 Ole Bubenzer who testified before this Commission pointed to an interview he had on 8 May 2006 with Jan Wagener, who acted for several of the perpetrators, who said that representatives of the former security police were consulted informally on a very occasional basis on the proposed changes (reflected at page 132 of Bubenzer’s book). Wagener confirmed to journalist Stephan Hofstatter in 2020 that he was aware that the guidelines were being developed (Hofstatter bundle p 26, line 13). Hofstatter’s affidavit is contained in the cross-examination bundle.

⁹ See section 8A and Appendix A of the Prosecution Policy.

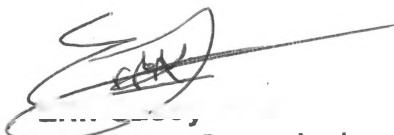
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7. The questions that our clients wish to put to Mr Nel may venture beyond clarification. We therefore apply to cross examine him.
8. The issues that our clients wish to question Mr Nel on lie at the heart of the Commission's terms of reference, namely whether efforts were made to stop the investigation or prosecution of TRC cases.
9. It is in the best interests of the work of the Commission to permit our clients to cross-examine Mr Nel.




ASMITA THAKOR

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Jonannesburg on 29 June 2026, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



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