

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

**INDEX: CALATA GROUP BUNDLE TO CROSS-EXAMINE DEON RUDMAN**

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TERMS OF REFERENCE OF THE AMNESTY TASK TEAM

The Task Team is to consider and report on the following:

1. What criteria does the National Prosecuting Authority apply in deciding on current and impending prosecution of cases flowing from the conflict of the past.
2. The formulation of guidelines that will inform current, impending and future prosecution of cases flowing from the conflict of the past.
3. Bearing the above-mentioned guidelines in mind, whether legislative enactments are required.
4. Whether any of the two Bills that have already been formulated can be proceeded with, bearing in mind the views of our intelligence agencies.

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**REPORT  
AMNESTY TASK TEAM**

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REPORT: AMNESTY TASK TEAM

1. Background

1.1 A Director-General's Forum, under the chairpersonship of the Director-General, Justice and Constitutional Development on 23 February 2004, appointed a Task Team to consider and report on the following:

- "1. Consideration of the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past.
- 2. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.
- 3. Bearing the above-mentioned in mind, whether legislative enactments are required."

1.2 The Task Team comprises the following members:

- Deon Rudman (Chairperson): Department of Justice and Constitutional Development
- Yvonne Mabule : National Intelligence Agency
- Vincent Mogotlane : National Intelligence Agency
- Gerhard Nel : National Prosecuting Authority
- Lungisa Dyosi : National Prosecuting Authority
- Ray Lalla : South African Police Service
- Joy Rathebe : Department of Defence

1.3 The Task Team was requested to submit its report to the Director-General's Forum by close of business on 1 March 2004. The Task Team met for the first time on 26 February 2004 and again on 1 March

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2004. Commissioner Ray Lalla could unfortunately not attend the first meeting. He did, however, submit his proposals to the Task Team for its consideration.

2. Terms of reference

2.1 At the outset the Task Team discussed its terms of reference in detail. It came to the conclusion that it had to perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003. The President provided the following guidelines:

- (a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.
- (b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process. Among these are--
  - individuals who were misled by their leadership to treat the process with disdain;
  - others who calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel;
  - others who expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases, which did not happen.

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- (c) "Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations."
- (d) "We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing."
- (e) "However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation."
- (f) "This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts."
- (g) "It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today, for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity."
- (h) "This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts."

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- (i) "Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action."
- (j) "Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard."
- (k) "The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments."

2.2 Paragraph 1 of the Task Team's terms of reference relates directly to the abovementioned framework determined by the President. Paragraphs 2 and 3 were added to the Task Team's terms of reference in order to enable it to pursue alternative routes in order to address the concerns expressed by the President should the Task Team deem it necessary.

3. Discussion

3.1 In its deliberations the Task Team also took cognisance of the following factors:

- (a) In terms of section 179(1) and (2) of the Constitution the National Prosecuting Authority (NPA) is an independent constitutional institution and the National Director of Public Prosecutions (NDPP) has full discretion on whether a particular

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prosecution should or should not be instituted The Task Team's recommendations should therefore be consistent with this constitutional requirement

- (b) Any recommendations relating to the granting or refusing of amnesty should be in line with the TRC process which was constitutionally entrenched as a trade-off between the individual's right to seek justice in a court of law, on the one hand, and the imperatives of reconciliation and reparation, on the other.

**3.2 Ad paragraph 1 of terms of reference**

3.2.1 In order to give effect to the "arrangements" contemplated in the President's statement as reflected in paragraph 1 of the Task Team's terms of reference, it is recommended that a Departmental Task Team be appointed comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies
- The South African National Defence Force
- The South African Police Service
- Correctional Services
- The National Prosecuting Authority
- Office of the President

3.2.2 The functions of the proposed Task Team should be the following:

- (a) Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard

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(b) To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—

- (i) the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;
- (ii) the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.

(c) To—

- receive information or representations from victims, perpetrators, legal representatives or any other person or institution regarding any specific matter;
- gather intelligence information;
- investigate the matter;
- consult victims.

(d) To consider the following factors when carrying out its mandate:

- (i) The general criteria governing a decision to prosecute as determined by the NDPP in the Policy Manual attached hereto as Annexure "A".
- (ii) The following specific criteria:
  - o Whether the alleged offence is associated with a political objective committed in the course of the conflicts of the past.

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- o Whether a prosecution can be instituted on the strength of adequate evidence.
- o Whether the case, geographically and politically, reflects the aims and objectives set out in the Promotion of National Unity and Reconciliation, 1995(Act 34 of 1995), and is not in conflict with the requirements of objectivity in prosecutions specified in the Constitution.
- o Whether the offence in question is serious
- o Whether the ill health of or other humanitarian consideration relating to the accused may justify the non-prosecution of the case.
- o Whether the prosecution will lead to the traumatising of victims and conflicts in areas where reconciliation has already taken place.
- o The degree of co-operation on the part of the alleged offender.
- o The credibility of the alleged offender.
- o The alleged offender's sensitivity to the need for restitution.
- o The alleged offender's further endeavours to expose possible further clandestine operations during the past years of conflict.
- o The degree of remorse shown by the alleged offender and his or her attitude towards reconciliation
- o The degree of indoctrination to which the alleged offender was subjected
- o The extent to which the alleged offender carried out instructions or perceived instructions.
- o The disclosure of organisations/individuals, if any, under whose instructions the alleged offender operated.

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- o The alleged offender's role during the TRC process – co-operation, full disclosure and assisting the process in general (if relevant).
- o Renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender.
- o Whether the alleged offender fully disclosed the alleged offences.
- o The views of the NPA.
- o If the accused is in custody, the views of the presiding judge or magistrate.
- o Any other criteria for deciding whether a political offence was committed as set out in the TRC Act
- o Any further criteria, which the Task Team might deem necessary.

(e) To consider—

- (i) the provisions of section 105A of the Criminal Procedure Act, 1977(Act 51 of 1977), relating to plea and sentence agreements and the directives issued by the NDPP in terms of section 105A(11) of the said Act;
- (ii) the provisions of sections 7 of the Criminal Procedure Act relating to the issuing of a *nolle prosequi* certificate and the right of a private person to institute criminal proceedings in terms of the section 8 of the said Act;
- (iii) the provisions of section 18 of the Criminal Procedure Act relating to the lapsing of the right to institute a prosecution for any offence after the expiration of a period of 20 years from the time when the offence was committed, other than the offences of murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child stealing; rape; or the crime of genocide, crimes

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against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002.

- (iv) the possibility of diversion in the case of juvenile offenders;
- (v) possible arrangements settling the matter out of court;
- (vi) the provisions of section 204(2) of the Criminal Procedure Act relating to the discharge of the alleged offender from prosecution for the alleged offence if such offender testified as a state witness and answered all questions frankly and honestly.

3.2.3 If the above proposals are acceptable, it is recommended that the President announces the proposed process and invites full participation by those who may benefit from the process.

3.2.4 The Task Team realises that the proposed process will have the following shortcomings/concerns:

- (a) A possible negation of the constitutional rights of victims, the public at large and alleged offenders.
- (b) The possibility of the institution of private prosecutions.
- (c) The absence of any guarantee that alleged offenders will not be prosecuted. This might mean that they will be reluctant to approach the Task Team and make full disclosure. The concerns relating to persons who have disappeared, the arms caches that have not yet been discovered and the Kwazulu-Natal problem will not be solved.

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(d) Public perception regarding the participation in a further amnesty process by the security services as the public may regard them as perpetrators in the conflicts of the past.

3.3 Ad paragraph 2 of terms of reference

3.3.1 The Task Team is of the view that the only way to address the above concerns adequately would be to provide for a further amnesty process similar to that of the TRC process. This possibility elicited much debate within the Task Team. On the one hand, there were those who rejected this possibility out of hand. They argued that such a process would undermine and discredit the TRC process, further undermine the reconciliation process and not necessarily achieve the desired objectives. They argued that there is no reason why offenders who previously refused to participate in the TRC process will now all of a sudden decide otherwise. Some members of the Task Team, however, placed emphasis on the need to create a further effective opportunity for full disclosure in order to address the concerns referred to in paragraph 3.2.4(c) above. They argued that a substantial number of those individuals who were in the past misled by their leadership and others who expected their political leadership to provide the overall context against which they could present their cases, may make use of a further amnesty process.

3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft Indemnity Bill is attached as Annexure "B" for consideration.

3.4 Ad paragraph 3 of terms of reference

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The recommendations under paragraph 1 of the terms of reference do not require any legislation. Should Government, however, decide on a further amnesty process as discussed in paragraph 3.3, legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court.

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ANNEXURE "B"

REPUBLIC OF SOUTH AFRICA

INDEMNITY BILL

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(Second Draft)  
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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B - 2003]

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REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP VRYWARING

-----  
(Tweede Konsep)  
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(MINISTER VIR JUSTISIE EN STAATKUNIDGE ONTWIKKELING)

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To provide for the granting of indemnity by the President to persons who make full disclosure of all relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the period from 1 March 1960 to the cut-off date; for the said purpose to establish a Committee on Indemnity to consider and investigate applications for indemnity and to make recommendations to the President; and to provide for matters connected therewith.

## PREAMBLE

SINCE the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provided for a law to be adopted by Parliament in terms of which amnesty should be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past;

AND SINCE that law was adopted and the mechanisms and procedures established by that law have run their course and have been concluded;

AND SINCE there remains a need for reconciliation and reconstruction as contemplated in that Constitution;



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# AMNESTY TASK TEAM

## FURTHER REPORT

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## FURTHER REPORT: AMNESTY TASK TEAM

## 1. Background Information

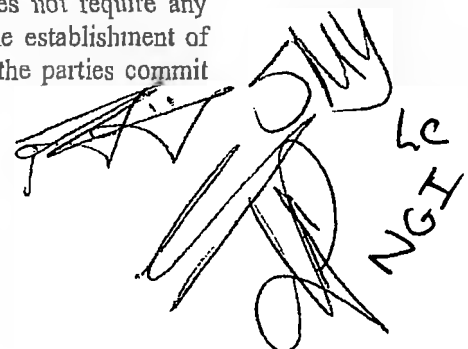
- 1.1 On 3 March 2004 the Amnesty Task Team submitted a Report to a Heads of Department Forum for consideration.
- 1.2 The Heads of Department discussed the Report with members of the Task Team, whereafter they deliberated the Task Team's proposals and recommendations *in camera*. Following these deliberations, the Heads of Department indicated that they prefer the Task Team's recommendations relating to the establishment of a Departmental Task Team (hereinafter referred to as Option 1). They, however, requested the Task Team to give further consideration to the following aspects relating to Option 1:
  - (a) Parallel structures in order to assist the proposed Departmental Task Team, are not acceptable. In performing its functions the proposed Task Team must make use of existing structures.
  - (b) Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the National Director of Public Prosecutions decides not to prosecute? Investigate the possibility and desirability of legislation, if required.
  - (c) The proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee.
  - (d) It is important that the proposed Task Team, the Inter-Ministerial Committee and the National Director, in performing their functions and reaching decisions, should take national interest into account.
  - (e) Advise the Forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court.
  - (f) Advise the Forum on a time line for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.

## 2. Discussion

## 2.1 The establishment of a Departmental Task Team

Before discussing the above aspects, the Task Team once again considered the question whether legislation is required to establish the proposed Departmental Task Team. The Task Team met with two senior State Law Advisers of the Office of the Chief State Law Adviser. They confirmed the Task Team's conclusion in paragraph 3.4 of its Report, namely, that the recommendations pertaining to the establishment of a Departmental Task Team is an administrative process and does not require any legislation. They, however, recommended that the process and the establishment of the proposed Task Team be put into writing and suggested that the parties commit

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themselves to the process in a Memorandum of Understanding. The Task Team supports this proposal of the State Law Advisers

**2.2 Ad paragraph 1.2(a): The involvement of existing structures**

The Task Team supports this proposal of the Forum. However, in order to ensure the effective cooperation of such existing structures it is important that the existing structures, prior to the implementation of the proposed structure, commit themselves and give their full support and cooperation to the proposed process. It is proposed that such existing structures should be parties to the Memorandum of Understanding contemplated in paragraph 2.1 *supra*.

**2.3 Ad paragraph 1.2(b): Consider the possibility and desirability of eliminating private prosecution and civil litigation in cases of no prosecution**

2.3.1 The question whether it is possible or desirable to eliminate private prosecution and civil litigation elicited much debate within the Task Team. The Task Team obtained a written legal opinion from Adv JH Bruwer (attached hereto as Annexure "A") and also discussed the question with the two State Law Advisers referred to in paragraph 2.1 above. They are all in agreement that any legislation eliminating private prosecution and civil litigation will at least affect a person's right to equality (section 9(1) of the Constitution) and the right of access to courts (section 34). They also indicated that it is doubtful whether the motivation for such legislation would meet the requirements of section 36 (limitation clause) of the Constitution, and in case of the enactment of such legislation, an amendment of the Constitution would be required.

2.3.2 The State Law Advisers referred to in paragraph 2.1 above, indicated that they would advise against the enactment of any further legislation, since it would limit the rights of the victims or other interested parties. They further agreed with the Task Team that the proposed legislation, eliminating private prosecution and civil litigation, might be seen as a further amnesty process, which would be inconsistent with the Heads of the Department's view that Option 2 (a further amnesty process) is not an option at all.

2.3.3 In the final instance we wish to draw the Forum's attention to an article in *Rapport* of 7 March 2004 relating to the question of amnesty. During an interview with Archbishop Desmond Tutu, he expressed the view that every person who has not received amnesty through the TRC-process may be prosecuted and any new agreement to stop prosecutions is undesirable, since it will, among others, have the effect of negating the amnesty process of the TRC.

2.3.4 In the light of the above, the Task Team is of the view that private prosecution and civil litigation can only be eliminated by way of legislation and a Constitutional amendment. The Task Team is of the view that such a step would not be desirable.

**2.4 Ad paragraph 2.1(c): The establishment of an Inter-Ministerial Committee**

The Task Team supports this proposal. However, it wishes to point out that the State Law Advisers are of the view that the establishment of such a further structure may constitute a cumbersome process and increase the possibility of conflicting views

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between the various role-players and structures. Furthermore, they pointed out that the process might be seen as an attempt by the Government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision.

2.5 Ad paragraph 2.1(d): National interest should be the paramount objective

The Task Team wholeheartedly agrees with this viewpoint of the Forum.

2.6 Ad paragraph 2.1(e): The involvement of the International Criminal Court

This question was also referred to Adv JH Bruwer for his advice. In paragraph 3 of Annexure "A" he comes to the conclusion that, taking into account the provisions of section 5(1), read with section 5(6) and the definitions of the relevant crimes of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), "it is not inconceivable that a complainant who is prohibited by legislation contemplated in paragraph 1(a) from instituting a private prosecution in the national court may approach the International Criminal Court for relief". The Task Team agrees with this viewpoint.

2.7 Ad paragraph 2.1(e): Setting a time line for the Task Team to complete its work

The Task Team is hesitant to propose a specific time line at the stage when the process is to be announced. The setting of a time line in respect of the TRC process led to expectations and the subsequent extension of the TRC process, although justified and unavoidable, led to fierce criticism. It is 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.

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APPENDIX A**PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES 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 the following:
  - (a) It was recognized 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 part 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 networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.
2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:
  - (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.
  - (b) The constitutional right to life.
  - (c) The non-prescriptivity of the crime of murder.
  - (d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.
  - (e) The *dicta* of the Constitutional Court 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 Peoples 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 constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).
  - (j) 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.
  - (k) 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.
  - (l) 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 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 prosecution.
  - (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 may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a 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 Litigation 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 Service.
  - (c) The Department of Justice & 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 of a section 204 witness and all section 105A plea and sentence agreements.
9. The NDPP may obtain the views of any private or public person 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 that decision must be made public.
11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.
12. The NDPP may make public statements on any matter arising from this 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 representations would be considered according to the NPA prosecuting policy, directives, 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 state agencies, in particular those dealing with the prosecution of 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 a 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 or 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.

<http://www.pmg.org.za/docs/2005/060117advnel.doc>

**fTHE 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 of Miriam Makeba & Helen Joseph Street  
Newtown, Johannesburg

**BEFORE:**

**COMMISSIONERS:**

The Honourable Ms Justice Sisi Khampepe (Judge Ret.) – Chairperson  
The Honourable Mr Justice Frans Diale Kgomo (Judge President Ret.)  
Adv Andrea Gabriel (SC)

**EVIDENCE LEADERS:**

Adv Ishmael Semanya (SC)  
Adv Vas Soni (SC)  
Adv Fana Nalane (SC)  
Adv Nompumelelo Seme  
Ms Baitseng Rangata

**REPRESENTATIVES**

Adv Varney (SC) – The Calata Group  
Adv D Pillay – The Calata Group  
Ms A Thakor – The Calata Group  
Mr J Venter – The Calata Group  
Mr Siphon Tlhaole – The Calata Group  
Mr Rafik Bhana (SC) (for Adv B Ngcuka)  
Adv Mfundo Salukazana (for Adv B Ngcuka)  
Adv Nwabisa Ntshizana (for Adv B Ngcuka)  
Mr Tabata (for Adv B Ngcuka)  
Adv KD Moroka (SC) – DoJ representative  
Adv Gwala (SC) – NPA representative  
Adv Motlalepule Rantho (for SAPS)  
Adv Vivian Rikhotso (for Adv Menzi Simelane)

**11 MARCH 2026**

**DAY 20**

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PROCEEDINGS ON 11 MARCH 2026

CHAIRPERSON: Mr Semenya?

ADV SEMENYA: Chair and Commissioners, we are set down today for Mr Ngcuka's cross-examination.

CHAIRPERSON: Mr Varney?

ADV VARNEY: As the Chair pleases. Chair, just a few quick housekeeping matters, my junior counsel, Ms Senthil Pillay, is not with us today. I excused her because she has to prepare our heads of argument for the review next week and it seems a bit thin and  
10 [indistinct] of time. She is not with us today and...[intervenes]

CHAIRPERSON: Yes.

ADV VARNEY: And I just kind of bring that to your attention.

ADV MOROKA: Excuse us Chair, if Mr Varney could please speak up loud? Some of us are advanced in age, we do not hear so well.

CHAIRPERSON: Yes.

ADV MOROKA: Thank you.

CHAIRPERSON: Yes, Ms Moroka, you must bring your hearing aid.  
[Laughing].

ADV MOROKA: [Laughing]. I could buy it.

20 ADV VARNEY: Well, I express solidarity with Ms Moroka, I share the same drawbacks as she does, being in the same category. Can I be heard now?

ADV MOROKA: Yes.

CHAIRPERSON: Yes, you may.

ADV VARNEY: Okay. One other matter is that of the bundle that we

have provided for this morning's session and I wish to apologise for the duplication in the bundle, it does mean that about half of the bundle has been duplicated and we apologise for the waste of paper.

How that happened Chair was, in the original list we put up, we itemised the full affidavit of Adv Macadam and he had a number of annexures attached to his affidavit, and then we made reference to the different annexures that we were going to be referring to, so when the Commissioner requested a separate bundle, they were all printed including a repeat of those annexures for which we apologise. With

10 the leave of the Commissioner, I can now commence and...[intervenes]

CHAIRPERSON: Yes, you may proceed.

ADV VARNEY: Good morning, Adv Ngcuka, I hope you are doing well this morning.

CHAIRPERSON: Before you proceed may I just remind Adv Ngcuka that you are still under your former oath?

ADV NGCUKA: Thank you. I am well, thank you very much.

CHAIRPERSON: Thank you.

20 ADV VARNEY: That is good to hear and you confirm that you are still under oath?

ADV NGCUKA: Correct.

BULELANI THANDABANTU NGCUKA: still under oath

CROSS-EXAMINATION BY ADV VARNEY: So Mr Ngcuka, I first want to say to you that on behalf of the families, they recognise the significant contribution that you have made to the deliberation of

South Africa and the sacrifices that you incurred in that struggle.

ADV NGCUKA: Thank you.

ADV VARNEY: And I also wish to just give you a sense of what we hope to do this morning and I firstly want to make it clear to you that we are not here to try and catch you out or to try and trick you up, that is certainly not what our intentions are. This is an inquisitorial process, it is about putting facts on the table and reaching the truth and if I recall correctly, in your evidence-in-chief you said that you supported that process and you would do what you could to assist the

10 Commission.

ADV NGCUKA: That is correct.

ADV VARNEY: Ja, so in actual fact the bulk of my questions are going to be about clarification and follow-up. The minority of the questions will be in the category of cross-examination and the way I intend to run this morning session or at least my part of the session, is to ask you various questions in relation to your statement that you provided to the Commission.

ADV NGCUKA: Sure.

20 ADV VARNEY: I will have a few follow-up questions in relation to the evidence-in-chief, the whole evidence that you provided and then I will also ask some questions on the documents that we have provided you and your team.

ADV NGCUKA: Okay.

ADV VARNEY: So those housekeeping matters out of the way, perhaps we can just start with your statement and I assume you do

have a copy of it?

ADV NGCUKA: I do.

ADV VARNEY: So let us start on page 7 of your statement at paragraph 27. And there you speak about establishing the Human Rights Investigation Unit under the leadership of then Adv Vincent Saldanha and in that paragraph 27 you set out why it was that the HRIU was not able to make much headway, including the fact that the amnesty process was still underway and other challenges such as the availability of witnesses and the like. But to be fair to Adv Saldanha as he was at the time and his team, am I right in saying that that unit was only in operation between '99 and 2000, so maybe about a year or just over a year?

ADV NGCUKA: That is correct.

ADV VARNEY: And of course we cannot really expect a unit that is only in operation for about a year, looking at cases, potentially a 100 of cases for the first time to achieve much in one year?

ADV NGCUKA: Well I thought they did a lot, actually.

ADV VARNEY: Yes.

ADV NGCUKA: So I was satisfied with the work that they did, because it was really preliminary work.

ADV VARNEY: Indeed.

ADV NGCUKA: Ja.

ADV VARNEY: Although it has been pointed out that they did not commence with any prosecutions though, so I suppose that is the issue?

ADV NGCUKA: No, that was not their mandate.

ADV VARNEY: Is that so, so they were never meant to bring prosecutions?

ADV NGCUKA: No, no.

ADV VARNEY: Okay, thanks for that clarification. Then let us turn to your next paragraph, that is 28 on the same page. And you say:

“My inclination prior to receiving the HRIU report.”

And perhaps I can just pause for a moment. That report, I am not sure whether it is actually before this Commission?

10 ADV NGCUKA: It was attached to the Calata affidavit.

ADV VARNEY: Oh, I see.

ADV NGCUKA: It was in the Calata documents. I saw the report there.

ADV VARNEY: Okay, we will...[intervenes]

ADV NGCUKA: In one of the bundles.

ADV VARNEY: We will take a look for it. There were certainly many reports compiled by people like Adv Macadam and Ackermann. We will come back to you on that...[intervenes]

ADV NGCUKA: Sure.

20 ADV VARNEY: On that score.

ADV NGCUKA: Sure.

ADV VARNEY: So you said your inclination of getting that report was to farm out the investigation or prosecution of these cases to various DPP offices, but this however changed after you received that report and that is when you decided to centralise matters. So why did

you prefer centralisation after receiving that report?

ADV NGCUKA: Well I wanted to ensure that there was consistency. You see, they identified a number of the shortcomings which I thought that it will be best if they were handled nationally, so that was really the reason for me to do that.

ADV VARNEY: Right and actually in that same paragraph on the next page, you talked about ensuring a coherent and centralised approach and a consolidation was intended to avoid duplication, consolidate resources, promote efficiency, consistency in decision  
10 making and enable a coordinated national strategy for those cases.

ADV NGCUKA: That is correct.

ADV VARNEY: So in that same paragraph, you mentioned that you then decided that all TRC cases should be brought to the Special National Projects Unit, the SNPU, within the Scorpions. Now what motivated your decision to move the cases from I suppose a unit within the NPA to a unit within the DSO, the Scorpions?

ADV NGCUKA: No, that unit was no longer in existence, so once Adv Brink Ferreira and Adv Saldanha handed over the document, they had done what they were supposed to do and so we created  
20 therefore this entity which had investigative capacity. So that is why they were then given to Adv Chris Macadam.

ADV VARNEY: Oh okay, and in fact that was going to be my next question which you have now answered, which the NPA itself did not have investigators...[intervenes]

ADV NGCUKA: No.

ADV VARNEY: But the DSO did, so that was a more appropriate home for the pursuit of these cases simply because the Scorpions had an investigative capacity?

ADV NGCUKA: That is correct.

ADV VARNEY: And then if we can turn to the next paragraph, that is paragraph 29 and you point out that the SNPU operated in approximately 2003, it reviewed and worked on those dockets but it did not institute prosecutions because the amnesty process had not been completed. Would I be right in saying that perhaps at a policy  
10 level that was one of the factors holding you back, that the amnesty process was still running and decisions were still being handed down?

ADV NGCUKA: That is correct and also to add, some of the people had been refused amnesty. They challenged that decision in the High Court and so we could not proceed until those processes had been finalised.

ADV VARNEY: Yes and we certainly saw that for example in the PEBCO Three matter.

ADV NGCUKA: Correct.

20 ADV VARNEY: Ja. Now I want to put to you a passage from the book of Mr Ole Bubenzer, the extracts are in the bundle at page, I believe it is 48.

ADV NGCUKA: Which bundle, sir, 1 of 2, 1 of 1?

ADV VARNEY: Oh okay, yes I apologise for the ocean of paper before you. You probably have a few bundles but there should be

one bundle which has the bundle for this morning, I think...[intervenenes]

ADV NGCUKA: I do not have that.

ADV VARNEY: We just need to double check.

ADV NGCUKA: I do not have the bundle for this morning. The ones you gave me last time, are here.

ADV VARNEY: I see. With the leave of the Commission can we just ask one of my colleagues to check whether he has the bundle? So that bundle Adv...[intervenenes]

10 CHAIRPERSON: It is page 48, Adv Ngcuka.

ADV NGCUKA: Thank you.

ADV VARNEY: It is page 48.

ADV NGCUKA: All right.

ADV VARNEY: And the particular paragraph I want to put to you here is also in bundle 1, that is the founding affidavit of Lukhanyo Calata. That is at paragraph 104 and in that bundle and perhaps we can just use this one because...[intervenenes]

ADV NGCUKA: I am not sure, which bundle are you now referring me to?

20 ADV VARNEY: So you may look at the one that is just being given to you?

ADV NGCUKA: Yes, I do.

ADV VARNEY: You can go to page 4.

ADV NGCUKA: Page 4, not 48?

ADV VARNEY: I was just pointing out that the full extract from the

book are at page 48, but I am only going to put to you one extract and that is, I can refer you to page 4 of the new bundle, at the bottom of the page, paragraph 104.

ADV NGCUKA: Yes.

ADV VARNEY: And I will read it into the record:

10 “Mr Calata said it appeared that the NPA devoted few resources to the SNPU and according to the author, Ole Bubenzer, in his 2009 book *Post-TRC Prosecutions in South Africa*, this was because the NPA was concerned that some cases would have to be withdrawn if amnesty is to be granted since at that time the Amnesty Committee was still concluding its work.”

And actually you have already confirmed that, so let us carry on. And if you turn over to the next page at paragraph 105:

20 “However, according to Bubenzer, there were many cases in which amnesty had already been denied or not applied for, such as the case against former SAP General Izak Johannes Krappies Engelbrecht in which an indictment had already been prepared by the D'Oliveira Unit.”

And I will just read the last sentence:

“In 1999, the D'Oliveira Unit had reportedly already prepared about 20 charge sheets. None of these charge sheets would see the light of day in court.”

So what Mr Bubenzer says in his book is that yes, there

were some amnesty cases that were still being deliberated on by the TRC's Amnesty Committee, but some, some had been concluded. There were denials and in some cases amnesty was not applied for and he gives the example of General Krappies Engelbrecht.

And you may recall that General Engelbrecht in the 1980s he was a senior officer and a period of time he oversaw the work of Vlakplaas where Eugene de Kock was also based for some time. So there was an expectation that after the De Kock matter had been concluded, that you know, there would be cases against his superiors. Did you recall the matter of General Engelbrecht?

ADV NGCUKA: No, I know about General Engelbrecht. I contest that statement, I do not think it is correct.

ADV VARNEY: Okay and just can you elaborate why you disagree?

ADV NGCUKA: Ja, I will tell you why. Chris gave me a report and you will see in all the reports that Chris, which have been tabled, the Engelbrecht case is not in any one of those that were ready for prosecution. Anton did the same thing, Anton Ackermann and none of the Engelbrecht cases appears in all those reports. So this statement from this gentleman, whatever his name is, is definitely incorrect.

ADV VARNEY: Okay. Well yes, I think you are right, that the case of Engelbrecht does feature in some of the reports and we will try to highlight where that happens and perhaps come back to you on that. All right, you can return to your statement. In paragraphs 30 and 31 you refer to the creation of the PCLU, you refer to the appointment of

Anton Ackermann to head up the PCLU and that the SNPU staff and its leader, Chris Macadam, they were transferred to the PCLU.

Then on paragraph 31 at the bottom of the page and yes, you do make the point that the PCLU was also mandated to deal with a number of other cases such as mercenary activities, terrorism and the like. Then at the bottom of the page you point out that you directed all cases arising from the TRC process and which amnesty had been refused and not applied for, to be classified as priority crimes. At the time why did you decide to declare the TRC cases as  
10 priority crimes?

ADV NGCUKA: I thought that would have been self-evident, because these were important cases which needed to be dealt with and they related to what I would call unfinished business of the past, so yes.

ADV VARNEY: And if they were declared priority crimes, then would I be right in saying there would be a better chance that they would receive attention?

ADV NGCUKA: Oh yes.

ADV VARNEY: Ja. You also point out that and in paragraph 32, that  
20 the PCLU identified around 21 cases warranting further investigation. Am I right in saying that in those 21 cases, there was a view that there were some prospects of taking them forward?

ADV NGCUKA: Correct.

ADV VARNEY: At this point let us pause because then the timeline, you know we are now in the first quarter of 2003 and can I just refer

you to a speech of Thabo Mbeki? The extract that I want to rely on is at page 18 of this new bundle. The full speech is at page 47 of that bundle, but I think we can just look at the extract.

ADV NGCUKA: I have got it.

ADV VARNEY: Okay, I think that is at...[intervenes]

ADV MOROKA: Apologies, Chair.

CHAIRPERSON: Yes?

ADV MOROKA: Because of the amount of papers I have indicated previously, we try not get ourselves startlingly confused. Mr Varney  
10 refers to page 18 of the new bundle. Which bundle is this one?

CHAIRPERSON: It is the bundle that we all have.

ADV MOROKA: Chair, that does, that is not very helpful, with respect. We have a speech here that says 558, page 508 which was given to us this morning and I am trying to understand which bundle is Mr Varney referring to and which page.

CHAIRPERSON: Let Mr Salakwazana assist you.

ADV MOROKA: Sorry, sorry, where was I?

MR SALAKWAZANA: [Indistinct].

ADV MOROKA: But he says page 4?

20 MR SALAKWAZANA: Page 18.

COMMISSIONER KGOMO: You switched off your microphones.

ADV MOROKA: Yes, I am trying to understand, Chair. When we started we have got two of them, so I am trying to understand which one we are talking about.

MR SALAKWAZANA: But this is the same as... Ja, I take this is an

extract.

CHAIRPERSON: Are you on the same page now, Ms Moroka?

ADV MOROKA: I am Chair, thank you.

CHAIRPERSON: Thank you.

COMMISSIONER KGOMO: Can you switch off one of the microphones? There is a problem there.

ADV MOROKA: Yes.

ADV VARNEY: Thank you, Chair. So on page 18, there is a reference to the fact that in March 2003, the TRC's final volume that  
10 is volume 6, was released and then on 15 April 2003, President Mbeki made a statement to the Joint Houses of Parliament on the occasion of the tabling of the report of the TRC, so I just want to put certain extracts of his speech to you and seek your response. I will try not to put too many. I will start with the third paragraph on that page. President Mbeki says:

20 "Let us start off by reiterating that there shall be no general amnesty. Any such approach will apply to specific categories of people, regions on the country, fly in the face of the TRC process and subtract from the principle of accountability which is vital, not only dealing with the past but also in the creation of a new ethos within our society."

And then the next paragraph:

"Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take

part in the TRC process.”

In that paragraph he explains why many did not. At the bottom he says:

“This reality cannot be avoided.”

In the next paragraph:

10 “Government is of a firm conviction that we cannot resolve this matter by setting up yet another amnesty process which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human rights violations.”

Just on that score I am putting our legal hats on. Would you agree that in the case brought by the Biko Family and the Nkenke’s, the well-known you know, the *Azapo* case that the Constitutional Court ruled on, and they upheld the amnesty that was in the Truth and Reconciliation Commission and one of the main reasons was that in the proscript to the interim Constitution, constitutional authority for that limited amnesty was provided, but that post the TRC in subsequent years, that would not apply? Would you agree?

ADV NGCUKA: Ja.

20 ADV VARNEY: Ja, so then if we turn to page 19, President Mbeki points out that therefore:

“We have therefore, left this matter in the hands of the National Director of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work

is continuing. However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.”

10 I skip the next paragraph:

“This approach leaves open the possibility for individual citizens to take up any grievance related human rights violations with the courts. Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.”

And then lastly:

20 “Our relevant departments are examining the practical modalities of dealing with this matter and they would also establish where the specific legislation is required in this regard.”

So on the one hand the President is ruling out another amnesty, but he is talking about arrangements that would need to be made with the relevant departments including the NPA, to deal with

those who had not applied for amnesty. What was your response to this speech that there were not going to be special arrangements made to deal with this special class of cases?

ADV NGCUKA: No, I did not think that there would be special arrangements, to be honest with you, but I thought the President what he was referring to, was that whoever came forward and gave information would be dealt with as we normally deal with cases. For one to make a special plea, the one to turn as witnesses, those are the arrangements that would be made in the normal course of our...

10 So I never thought there would be any special arrangements that would have been made other than in the normal course of our work.

ADV VARNEY: So at that time because it appeared that it would just be the normal course and you have raised you know, typical procedures you find in the Criminal Procedure Act...[intervenes]

ADV NGCUKA: Ja.

ADV VARNEY: That that was nothing out of the ordinary, although and we will come to it later, but it does appear that ultimately special arrangements for that category of cases was put into place with the amendments to the prosecution policy which really did single out the  
20 TRC cases for different treatment to other cases.

ADV NGCUKA: Unfortunately I cannot help you there because I was gone by then.

ADV VARNEY: Yes, no, I am aware and we are not trying to attribute any responsibility on your part, you had left. That fact came a year or so later, but I am just asking for your view on the matter,

that it does amount to special treatment.

ADV NGCUKA: No, but it did happen, I mean it just did not happen during my time and so I never had the occasion to consider that.

ADV VARNEY: Ja, I suppose I am only asking you as an experienced lawyer, a former NDPP, that do you make the concession that the amendments put in place a special process for those cases?

ADV NGCUKA: I actually did not read those prosecution policies, those amendments, so I really cannot speak to them.

10 ADV VARNEY: Okay. All right, we will come to them and we will go through them in due course.

ADV NGCUKA: Sure.

COMMISSIONER KGOMO: Sorry Mr Ngcuka, for the layperson there are in paragraphs 18 and 19, President Mbeki puts a scenario and then seems to contradict himself. In your own words what part of this speech do you agree with, which part do you not agree with, in your own words? Now as National Director of Public Prosecutions, this is put before you.

20 ADV NGCUKA: Well I did not have, unfortunately Judge, I did not at that time have to apply my mind to what the President was saying, whether I agreed or did not agree with him, because I was never confronted with the issues that were raised in his speech.

COMMISSIONER KGOMO: Ja, but now it is put before you.

ADV NGCUKA: Well I will have to think about it.

COMMISSIONER KGOMO: And...[intervenes]

ADV NGCUKA: I have to consider it, I will have to consider it, what it really means.

COMMISSIONER KGOMO: Up to now you have not?

ADV NGCUKA: Sorry?

COMMISSIONER KGOMO: Up to now you have not?

ADV NGCUKA: You know what, there was never a need for me to do so, but you are raising it now to say can I think about it, I need to think about it, I need to reflect on it. I do not want to shoot from the hip.

10 COMMISSIONER GABRIEL: Mr Ngcuka, good day.

ADV NGCUKA: Yes, madam.

COMMISSIONER GABRIEL: As I recall your testimony, you said that at some point, I forget the year, it may have been 2004, at some point members of your unit were invited to discuss amendments to the policy and it was your evidence, it might have been Dr Ramaite that went to the meeting, it was, you can correct me now...[intervenes]

ADV NGCUKA: Correct, correct. No, no, sorry.

20 COMMISSIONER GABRIEL: It was your evidence that you agreed with them that there was no need for any amendments to the prosecution policy.

ADV NGCUKA: Absolutely correct.

COMMISSIONER GABRIEL: Are you able to explain that a bit more as compared to what we know came later, which is that there were in fact amendments to the policy which ostensibly arose as a result of

the President's speech?

ADV NGCUKA: Thank you...[intervenes]

COMMISSIONER GABRIEL: Why did you think there was no reason for any amendments to the existing prosecution policy?

ADV NGCUKA: I thought it covered, I thought the policy as it existed, it just covered all the issues that needed to be dealt with. I thought...[intervenes]

COMMISSIONER GABRIEL: This was despite the President's speech?

10 ADV NGCUKA: What I, yes, yes, yes, yes, insofar as I am concerned, I think the President said whoever wants to make arrangements, must go to the National Director and make those arrangements. In my view those fell within the National Prosecuting Authority Act who says people must make representations. If I find those representations at the time that were worth considering, then we looked into them.

COMMISSIONER GABRIEL: Okay.

ADV NGCUKA: And we may then decide as I mentioned, that people will enter into a plea bargain, that people will be used as  
20 witnesses or in certain instances we might decide that maybe we should not bring the charges against those people given whatever the facts that were presented to me at the time. So we would look into those.

COMMISSIONER GABRIEL: Right.

ADV NGCUKA: So I did not think that it was necessary to amend the

prosecution policy.

COMMISSIONER GABRIEL: And that remained your view throughout your tenure?

ADV NGCUKA: Throughout my tenure. In fact...[intervenes]

COMMISSIONER GABRIEL: And notwithstanding the President's speech in May 2003?

ADV NGCUKA: Notwithstanding the President's speech, because as I read the President's speech at the time, he was still leaving that discretion with the National Director.

10 COMMISSIONER GABRIEL: Right, thank you.

ADV NGCUKA: So I was free to do that.

COMMISSIONER GABRIEL: Thank you.

ADV VARNEY: Mr Bulelani, sorry to take you back a little in time, but since we are still in the early days, if we can go back to the work of the Human Rights Investigation Unit, the HRIU, and I would like to refer you to a page in your book, it is at page 227 of the new bundle.

ADV NGCUKA: 227.

ADV VARNEY: 227.

ADV NGCUKA: Sure.

20 ADV VARNEY: And I will just read to you a short extract:

“Shortly after his appointment, Bulelani set up a working group led by Vincent Saldanha which served on the TRC and he went on to serve as a judge in the Western Cape to review all the cases that had been refused amnesty by the TRC. The group drew up criteria to

guide decisions on whether to investigate matters further or to make recommendations for prosecution. Bulelani said he was obliged by law to prosecute where there was enough evidence to make a case, but at the same time part of him asked if it was worth it.”

And I am just going to pause there, we will come back to the paragraph a bit later but the criteria that the HRIU drew up, are you, I do not know whether you and your team are aware, whether that is currently before this Commission, is there a list of criteria that we can refer to?

ADV NGCUKA: No, I cannot.

ADV VARNEY: Okay.

ADV NGCUKA: I cannot recall that, I am sorry.

ADV VARNEY: All right and I do not think we are aware of that. We will of course ask the evidence leaders if they can try and track down those criteria but since the HRIU did develop criteria to guide decisions which I am assuming that you, do you agree with those criteria?

ADV NGCUKA: Ja, certainly.

20 ADV VARNEY: Okay.

ADV NGCUKA: Otherwise I would have said no.

ADV VARNEY: Right, so if they developed those guidelines or criteria, was there really any need for the subsequent Amnesty Task Team which was established to propose new criteria which ultimately saw their way into the amended prosecution policy? And I know

these guys [indistinct] years after you left, but what is your response to that?

ADV NGCUKA: No, maybe let us deal with it now.

ADV VARNEY: Okay.

ADV NGCUKA: Because my representatives went to that meeting, attended the meeting, came back and briefed me, and we discussed it and then we decided that it was, for us, there was no point in us continuing to participate in that process. We did not agree that that is what should happen, but also we can explain in that we were just  
10 concerned that some of the people in that meeting were concerned about what came to be known as the, those 37 cases of the ANC.

And that whole participation in that process would have compromised us, because we would have had to take decisions whether to prosecute or not to prosecute them. And so we felt that it was not necessary for us to participate, in fact it would not have been wise for us to participate in that process, hence my instruction was let us pull out of it, and we did.

ADV VARNEY: And can you recall approximately and I know this is going back many years and I am sorry to put you on the spot, I mean  
20 you have to recollect after so many years but approximately when did you did you give that instruction?

ADV NGCUKA: No, after the first meeting, whenever the first meeting was, probably it was, I think it was in 2003. So after that meeting when they came back to report what had transpired in that meeting, what had happened and so we discussed it and we felt no, it

is not a good idea for us to participate in that forum.

ADV VARNEY: Okay. All right, I think well it was after the first meeting and we should be able to give you a [indistinct]...[intervenes]

ADV NGCUKA: If you can find when the first meeting was, because that is the meeting that was convened by Mr Pikoli.

ADV VARNEY: Oh, so I am advised that the first meeting was on the 26 February 2004 and that comes from the report of the Amnesty Task Team which is at page 201 of that bundle.

ADV NGCUKA: Whatever the timing is, if that was the meeting, that  
10 was the meeting that we attended if that was the first meeting.

ADV VARNEY: Okay.

ADV NGCUKA: I cannot contest that.

ADV VARNEY: So you then say you pulled your representatives from the process?

ADV NGCUKA: Ja.

ADV VARNEY: And I will have to ask my colleagues to check whether in fact the NPA was no longer represented in those meetings, I will...[intervenes]

ADV NGCUKA: During my time.

20 ADV VARNEY: During your time, yes.

ADV NGCUKA: That is correct.

ADV VARNEY: Yes, no we will only deal with...[intervenes]

ADV NGCUKA: Ja.

ADV VARNEY: I suppose from February 2004...[intervenes]

ADV NGCUKA: Until August 2004.

ADV VARNEY: Until August 2004.

ADV NGCUKA: Sure.

ADV VARNEY: Okay and I asked my attorney that question and his response is not clear, so we do not know either.

ADV NGCUKA: Okay.

ADV VARNEY: Let us continue and we will come back to the topic dealing with the process leading up to the amendment, so a bit later but just to mop up a few other matters, and I am returning now to page 9 of your statement.

10 ADV NGCUKA: Okay.

ADV VARNEY: You are talking about the fact that at the end of 2002, this was your paragraph 33, beginning 2003, you reported to parliament that there were some cases emerging and that were ready to proceed to prosecution while others were still waiting rulings from the Supreme Court of Appeal and the Amnesty Committee. And in fact we do know from the evidence that Anton Ackermann had already put before this Commission, that there were a small number of cases that did go ahead, for example the prosecution of Eugene Terre'Blanche, the prosecution of...[intervenues]

20 ADV NGCUKA: Nieuwoudt.

ADV VARNEY: Of the PEBCO Three, Nieuwoudt exactly, although that is still for reasons we are aware of. Another example is that of Ronnie Blani.

ADV NGCUKA: Yes.

ADV VARNEY: You are familiar with that case...[intervenues]

ADV NGCUKA: Yes, I am.

ADV VARNEY: Ja, but according to Anton Ackermann, the only reason why he could proceed with that small group of cases, they were going to others after you left, I think in total, it was six is the number that we have, but the reason that Ackermann put up as to why he could go ahead with those cases is that they were already investigated.

ADV NGCUKA: Correct.

ADV VARNEY: It did not require further investigations, so the ones  
10 that could go ahead, did go ahead. Do you agree with that?

ADV NGCUKA: I do.

ADV VARNEY: Ja. I want to put to you another passage from the book by Ole Bubenzer and this is at page 7 of your bundle, this new bundle. As mentioned, there are several pages from his book, annexed page 48 but we will just stick to the passage on page 7 at paragraph 114. And so there and I will read it into the record:

20 "Bubenzer noted that while the D'Oliveira Unit of the 1990s constituted a well equipped team of experienced prosecutors and investigators with strong political support, support for the TRC-related prosecutions after 1998 declined drastically."

What is your response to that observation by the author Bubenzer?

ADV NGCUKA: No, I disagree with him. I mean he talks about political support.

ADV VARNEY: Okay.

ADV NGCUKA: I, if you think, if he talks about the support that I gave to the TRC cases, if he refers to that as political support, then he is wrong because I set up two units, first the Vincent Saldanha Unit to look into those cases and followed by the Macadam, and then I brought the one whom I considered to be one of the best prosecutors to look into those cases, Anton Ackermann.

So that must give you, that must give you the indication of how serious I took those cases and Chris Macadam had, he was one  
10 of the best prosecutors and he had delivered for us in KZN where he had to deal with serious cases of political violence. And so appointing him to that position, was an indication by me that I am taking the best to deal with these cases.

So that is proof that I was. If he thinks if he is talking to that, but he is talking about political support as political support from government, I do not know what he is meaning by that.

ADV VARNEY: But would you agree with Mr Bubenzer in at least one respect, where he says that the D'Oliveira Unit of the 1990s had experienced prosecutors and here is the nub, and investigators?  
20 Now you took the step of finding the best prosecutors you could locate in the form of Ackermann and Macadam and I think we agree with you, but is Mr Bubenzer not correct that at that PCLU you did not have investigators, let alone experienced investigators?

ADV NGCUKA: Well Chris Macadam's unit had four investigators, experienced investigators, had two researchers in that unit and that is

the unit that Anton inherited and one of the guys who was leading that, was a guy called Andrew Leask. He was the...[intervenues]

ADV VARNEY: Sorry?

ADV NGCUKA: Andrew Leask.

ADV VARNEY: Ja Andrew Leask, yes.

ADV NGCUKA: And he was a very serious, a senior investigator, so Anton inherited that unit that had that capacity. So Chris Macadam was working with those people.

ADV VARNEY: All right, that, sir you were talking about the  
10 SP...[intervenues]

ADV NGCUKA: That is correct.

ADV VARNEY: Unit which at the time...[intervenues]

ADV NGCUKA: Which was then...[intervenues]

ADV VARNEY: Was it the DSO?

ADV NGCUKA: Ja, ja.

ADV VARNEY: Yes. There is evidence on record that Mr Andrew Leask was not transferred over to the PCLU, he remained in the DSO?

ADV NGCUKA: Ja, that is correct but in the DSO, remember these  
20 cases started in the DSO. When Chris Macadam was there, he was working on those cases together with those investigators in the SNPU, whatever that abbreviation is, he was working together with them. That is the point I am making.

ADV VARNEY: Yes indeed, but if we now fast forward to now the creation of the PCLU, because as I understand it, you appointed

Ackermann to run it and then you brought Macadam over...[intervenes]

ADV NGCUKA: That is correct.

ADV VARNEY: The only thing is that, is that Andrew Leask did not come over to the PCLU at that time.

ADV NGCUKA: Yes, that is correct. When Chris took over, there were of course challenges later dealing with the issue of the investigators. We can deal with that if you want us to deal with it now.

10 ADV VARNEY: Yes...[intervenes]

ADV NGCUKA: Your approach was to coming back to it.

ADV VARNEY: Just before we get to the investigators because that is an important issue, Chairperson I note that it is...[intervenes]

CHAIRPERSON: Yes.

ADV VARNEY: Just gone 11:00. Is this an appropriate time for the adjournment?

CHAIRPERSON: Yes, we will take a tea adjournment until 11:20.

ADV VARNEY: As the Commissioner pleases.

INQUIRY ADJOURNS

20 INQUIRY RESUMES

CHAIRPERSON: Mr Varney.

ADV VARNEY: As the chairperson pleases. Mr Ngcuka, just before tea time we were about to talk about investigations and I had to interrupt you. But perhaps we can kick off that discussion by looking at some of the paperwork dealing with the cases and how the Special

National Projects and then ultimately the PCLU wish to take these cases forward. So I would like to refer you to a letter, it is a styled Internal Memorandum, it is at page 102 of the new bundle. I will just wait for you to find it.

ADV NGCUKA: Correct.

ADV VARNEY: Correct. So you see it is from the head of the Special National Projects Unit, that would have been Adv MacAdam. It is addressed to yourself as NDPP, and it is copied to the head of DSO, Head of Operations, as well as Adv MacAdam. So what is  
10 interesting about this memorandum is that it sets out a number of cases that the SNPU was working on, indeed it is titled Audit of TRC Cases, it is under various categories.

And I think it might have been this letter that you were referring to earlier, but you will correct me if I am wrong. So, for example, the first title, the first heading, "Cases being prepared for prosecutions", and a number of matters there, being Motherwell prosecution, sorry, Motherwell bombing, prosecution of SAP General Van Rensburg for ordering the killing of Brian Ngqulunga, PEBCO 3, which we referred to earlier, and the others that I will not list.

20 And then there is another category, "Potential further prosecutions arising from the above", and that includes PEBCO 3 and Cradock 4, then the next heading, C, "New cases being evaluated for prosecution purposes", and a number of cases there, seven. These include, for example, the murder of the COSAS 4 and the murder of Askari Strongman Sambo.

And then, D, "The high interest cases which require attention irrespective of the nature of the available evidence", the murder of Victoria Mxenge, your former boss, other well-known cases, Kubeka, Nokuthula Simelane.

I will just highlight the four, the decision by DPP Pretoria not to prosecute SAP General Engelbrecht, because you mentioned, you spoke about General Engelbrecht earlier, uninvestigated allegations against SAP General Basie Smit and others.

And then there are various other headings as well,  
10 "Representations to investigate specific cases", also some well-known cases there, "Death and detention of Ahmed Timol", and others. "Cases in the process of being closed", some well-known cases, I will highlight number five, Steve Biko, crime prescribed in 1997.

So this is an indication from the head of the SNPU that they had a number of matters that were on their books, cases that were actually being prepared for prosecution, cases being potential further prosecutions and cases being evaluated. So it looked like quite an encouraging document, and I imagine that when you read it, you  
20 would have been satisfied with what the SNPU had done.

ADV NGCUKA: That is correct.

ADV VARNEY: Now, as we sit here today, I must put to you that a number of these cases, some of them are very well-known ones, as we sit here today remain unresolved. So, for example, Cradock 4, that case is still before a third inquest. PEBCO 3, that prosecution

never happened, and there is only an attempt now to get an inquest going. COSAS 4, I am pleased to advise there have been indictments in that matter, but only in 2021, and that case has not proceeded for various reasons.

Strongman Bambo, this Commission has heard the evidence of Andrew Leask in relation to that matter, and that has also not gone ahead. So I want to put it to you that, notwithstanding the promising start, that virtually all these cases did not see the light of day as we are looking back into history now. And, yes, I know that you left office  
10 not long after this, but I just want your view, your feelings about that.?

ADV NGCUKA: Obviously, I mean, it is regrettable that is what has happened. Obviously it is something that I do not like and so, ja, I do not feel good about it.

ADV VARNEY: Yes, on that score we certainly share your feelings. So I want to put to you a passage ...(intervenes)

ADV NGCUKA: Sorry.

ADV VARNEY: Yes.

ADV NGCUKA: You see, if you look at this memorandum, you will see nowhere does it say in cases that are ready for prosecution that  
20 General Krappies Engelbrecht, you do not see his case there as being ready for prosecution, which is the point I made earlier on.

ADV VARNEY: Yes, and that is why I highlighted it for your attention.

ADV NGCUKA: Yes.

ADV VARNEY: It is sitting under high interest cases which require attention irrespective of the nature of the available evidence. So I

want to put to you a passage in the Calata affidavit, it is at paragraph 132, and let us just stick to the current bundle. It is at page 25.

ADV NGCUKA: You said page 132 or paragraph?

ADV VARNEY: I am going to read you the paragraph 132.

ADV NGCUKA: I am sorry.

ADV VARNEY: And it is at page 25 of that bundle. So Mr Calata says in that paragraph:

10 "If only a fraction of the cases listed in MacAdam's report have been resolved in the early 2000s, it would afford significant closure for the concerned families and given considerable impetus for the finalisation of the balance of the cases."

Do you agree with that statement?

ADV NGCUKA: Of course, yes.

20 ADV VARNEY: Then let us, while we are on that page, at paragraph 133 reference is made of the Minutes of the Justice Portfolio Committee meeting on 10 June 2003. There is an extract there, but the actual minutes of the Portfolio Committee meeting, I believe, are in the same bundle at pages 178 to 180.

So I just want to read that short paragraph and ask a question arising, and I understand it. So you were present at this meeting of the Justice and Constitutional Development Portfolio Committee on the 10 June 2003, and I am reading from the minutes

put together by the Parliamentary Monitoring Group. The exact extract is on page 180, but it is also reflected here:

"Some cases emerging from the Truth and Reconciliation Commission are ready to proceed. In others the NPA awaits rulings of the Supreme Court of Appeal and from the reconvened TRC Amnesty Committee. The chair interjected to ask if any legislative change was needed to deal with TRC cases where immunity from prosecution was to be afforded. Mr Ngcuka replied that he could see no need for a change in legislation."

So, firstly, what was the immunity from prosecution that was being referred to in this passage?

ADV NGCUKA: Jô, that probably was, what, 26 years. I do not think I can correctly recall what he meant, but I would imagine that it was speaking to the issue that we discussed earlier on, whether there was a need to amend the prosecutorial policy to grant amnesty to those people who had not applied, so I would imagine that is what he was referring to. But as you can see, my position has been very consistent since then. I saw no need then, I see no need now to change any legislation to deal with those cases.

COMMISSIONER GABRIEL: So that goes back to the President's speech, President Mbeki's speech in May 2003.

ADV NGCUKA: That is correct, Commissioner.

ADV VARNEY: We will return to this a bit later, but from what I hear you saying, the normal processes in the Criminal Procedure Act could be invoked, so there was no need to come up with a brand new law?

ADV NGCUKA: That is correct.

ADV VARNEY: So then let us then turn to the issue of actually investigating officers. And if we carry on with the next paragraph, reference is made to the fact that at the DSO, it was Special Director Adv MG Jeff Ledwaba, he made decisions in the opening of new investigations ...(intervenes)

10 CHAIRPERSON: On which page are you, Mr Varney?

ADV VARNEY: So I am still in the Calata affidavit, page 25.

CHAIRPERSON: Oh.

ADV VARNEY: It is the next paragraph, 134.

CHAIRPERSON: Yes.

ADV VARNEY: So it was Ledwaba who made decisions on the opening of new investigations. Accordingly, Ackerman and MacAdam met with Ledwaba to ask the DSO to conduct investigations referred to in that report we have been through, and it appeared that Ledwaba was firm in his refusal to take on the TRC cases. So I just want to  
20 highlight a passage from Adv MacAdam's affidavit, and that is at page 89 of the bundle, and the paragraph in question is on page 92, I believe it starts at paragraph 18.

ADV NGCUKA: Page 92?

ADV VARNEY: Ja, I think the reference is that this paragraph is at page 92.

ADV NGCUKA: Sure.

ADV VARNEY: And just so you know, this is an affidavit that Adv MacAdam put up in litigation arising from the Ahmed Timol matter when Joao Rodriguez, a former security branch officer, was charged with the murder of Ahmed Timol. The affidavit is dated the 1 November 2018, and it was put up as part of the NPA answering papers. So at paragraph 18 MacAdam says:

10 "In terms of the DSO legislative mandate, it was for the special director of the DSO and not the head of the DSO to issue declarations to investigate certain matters. At that stage, the special director was Adv MG Ledwaba."

And in paragraph 19, he writes:

"Ackerman and I met with Ledwaba to arrange for the DSO to conduct the investigation specified in annex RCM2..."

That is the memo we have just been through. He says:

20 "The meeting was unpleasant, as Ledwaba made it clear in non-certain terms that the DSO would not investigate any TRC matters, and that these should all be referred to SAPS."

Can I assume that at that time, Adv Ackerman and MacAdam would have been keeping you abreast of these developments?

ADV NGCUKA: Yes, but at a later stage.

ADV VARNEY: At a later stage, okay.

ADV NGCUKA: Ja, just remember that Adv Ackerman reported to Silas Ramaite, not to me.

ADV VARNEY: Yes.

ADV NGCUKA: So I get to know some of these things when there were problems which they could not resolve.

ADV VARNEY: Okay.

ADV NGCUKA: It would probably not have been at the same time when this happened.

ADV VARNEY: Right, there might have been a bit of a lag in time.

10 ADV NGCUKA: That is correct.

ADV VARNEY: When you heard that Ledwaba, in the words of MacAdam, was making it clear in non-certain terms that the DSO would not investigate any TRC matters, what was your response or your reaction?

ADV NGCUKA: We will come back to that later, but at that time Anton and MacAdam, they went to the police to ask for the investigators, and so I am not aware of this at the time. I only got informed after they were rebuffed also by the police. And so it is at that point when I then called Leonard McArthur, who was the head of the DSO, and  
20 Ramaite to say, come on guys, resolve these issues. If that is the attitude of the police, the DSO must investigate these cases. So I said they must resolve whatever issues they had, so I left it at that at the time.

ADV VARNEY: Okay. According to the timing or sequence, at least on the versions of MacAdam and Ackerman, it appears that they first

approached the DSO. When the DSO refused, they then turned to us (indistinct) ...(intervenes)

ADV NGCUKA: That is correct. So we may as well look at MacAdam's next paragraph, that is paragraph 20 at the bottom of the page:

10 "As a result of this decision by Ledwaba, Ackerman and I met with Commissioner De Beer, the Divisional Head of the Detective Service of SAPS, and requested SAPS to take over the investigations. On 26 September 2003 De Beer replied to Ackerman, informing him that the requests had been discussed with the National Commissioner Selebi.

20 The letter was further to the effect that the investigation of the matters was the DSO's responsibility, and that if it was required that SAPS in fact investigate, then either Ackerman or the NDPP should approach the President and ask him to confirm which agency should conduct the investigations."

And he attaches a copy of that letter. Just to wrap it up from the side of MacAdam, he says he can confirm that neither the NDPP nor Ackerman approached the President. I do want to return to that, and we will come to it, because you actually deal with that in your statement and you give a comprehensive answer.

ADV NGCUKA: That is correct.

ADV VARNEY: But before we get there, let us turn to the next document, and this is, if we can go back to the Calata affidavit. My colleagues will have to tell me, we are at page 135 of the Calata affidavit, and that is page 26 of this new bundle. So there reference is made to a letter addressed by Ledwaba to Andrew Leask. Andrew Leask was, I understand, the chief investigating officer at the DSO.

It is dated the 15 July 2003, and this is at page 107 of the bundle, and on the first page there is a section titled TRC Cases. So  
10 this letter is from Adv MG Ledwaba, it is to CIO Leask, I assume CIO means Chief Investigation Officer.

ADV NGCUKA: Correct.

ADV VARNEY: It is titled SNPU Investigations, and we will just focus on that very first entry. He writes:

"Due to the recent creation of the PCLU, it has become necessary to redefine the mandate and operations of the SNPU as follows:

(i) I have decided that SAPS must take over the investigations of all such cases  
20 handled by you. Your files should be closed off, and all the material given to the PCLU."

Now, I raise this because a bit earlier you had mentioned that Andrew Leask was the officer ...(intervenes)

ADV NGCUKA: Correct.

ADV VARNEY: Who was either with the PCLU or working with them to investigate these cases. So can you see, Mr Ngcuka, that at least by the 15 July Andrew Leask was specifically ordered to close off all his files, hand them over to the PCLU in relation to the TRC cases?

ADV NGCUKA: Oh, ja, sure.

ADV VARNEY: So then I want to put to you a passage in the Calata Affidavit at paragraph 136. I believe that is at page 26, and the passage reads as follows:

10                   "The refusal of the DSO to investigate the TRC cases was a remarkable decision, given that the DSO had previously been seized with the TRC cases, and just weeks earlier the NDPP had declared the TRC cases to be priority crimes."

What is your response to that passage?

ADV NGCUKA: I do not know if I can classify it as "remarkable". The unfortunate part is that I cannot recall what the reasons were that Ledwaba had advanced for taking that decision. But certainly he had not consulted me, and I was not aware that is the decision that he had taken. I became aware of it much later, and as you will come to  
20 realise, I sort of reversed that decision.

ADV VARNEY: So were you in a position to order the DSO to take on those cases?

ADV NGCUKA: Yes, yes.

ADV VARNEY: And when you say you reversed that decision, approximately ...(intervenes)

ADV NGCUKA: I instructed, you will see later when we come to it, when the guys came to me, they would say, look, we have exhausted all these avenues, we need the investigators, we need these cases to be investigated by the DSO, not by the SAPS. I made, I declared that and I instructed the DSO to investigate the cases.

ADV VARNEY: Yes, okay. My attorney, I think, has found that passage. But as you say, that is a later development, that is later in the year, in November. So we will ...(intervenes)

ADV NGCUKA: When we, remember ...(intervenes)

10 ADV VARNEY: We will come to that...

ADV NGCUKA: There was a process before we got to that.

ADV VARNEY: Yes, indeed. So developments in the interim, so now you have the situation where Ackerman and MacAdam are told that they must "knock on the door" of the SAPS. And so an overview of those attempts are set out also at page 26 of the Calata affidavit from paragraph 137.

If one looks at Ackerman's affidavit, if we go back to page 92, and apologies for all the up and down in the pages, but that is unavoidable. In fact, we have dealt with paragraphs 20 and 21. So  
20 they had this meeting with Divisional Head of the Detective Services, Commissioner Johannes De Beer, and essentially they told him, I am not going to repeat what is in paragraph 20.

But perhaps let us take a look at the letter that De Beer addressed to the NPA. No, I believe that letter is at page 296, oh, sorry, it is at 109 rather. So that is a letter from Commissioner

De Beer addressed to Adv Ackerman at the PCLU. I am not going to read the entire letter into the record, but just starting at that first paragraph.

10 "I have discussed your request for the assistance of the SAPS to investigate cases emanating from the TRC processes with the National Commissioner. It is evident from your letter that the investigation and prosecution of these cases were referred to the NDPP by the President. Our understanding was that this referral was politically inspired. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefore understandable that you first endeavoured to have these cases investigated by the DSO."

And then I will just skip some paragraphs and go to the next page:

20 "In view of the nature of the investigation, the fact that the President has referred it to the National Director, and that it seems to be common cause that the initial understanding was that the DSO would have investigated, the opinion that is held by you, the National Director should approach the President to confirm the instruction of the President on who he wants to investigate these

cases."

Then he finishes off:

"If the President indicates that the SAPS should be involved in the investigations, the instruction should be obtained in writing."

So that is quite a remarkable letter, where you have an agency that is empowered under the Constitution and under law to investigate serious cases, like murder, saying to the prosecutors at the PCLU, we want to investigate this because we think it should be  
10 investigated elsewhere, and if you want us to investigate, then we want you to get an instruction from the President in writing. What is your sort of gut reaction to that?

ADV NGCUKA: Well, I do deal with that in my statement. I thought it was unfortunate that Commissioner De Beer took that stance, because the President made it clear what should happen to those cases. And it is in the nature of the work that we used to do that there was cooperation between us and SAPS, we worked very closely with them. Whatever the nature of the investigation was, whenever we appealed to them for assistance, they would ordinarily assist.

20 If you take, for example, that unit you called the D'Oliveira Investigating Unit, all the investigators, they came from SAPS, and I inherited that unit. You talk about most of the investigators in the DSO themselves, they came from SAPS. So I just thought that Commissioner De Beer, the language that he used and what he was saying, that was very unfortunate.

ADV VARNEY: I think you used stronger language in your statement.

ADV NGCUKA: Quite, quite (indistinct) ...(intervenes)

ADV VARNEY: You say this demand by Commissioner De Beer was, with respect, nonsensical.

ADV NGCUKA: That is correct.

ADV VARNEY: Do you want to elaborate on that?

ADV NGCUKA: Well, I thought I have, I just did not want to use that language today.

ADV VARNEY: Okay, all right. My apologies for raising it then. And  
10 I must say, I would have some sympathy with you, because, and if I can use the word, it is a nonsensical response. And one even might go so far as, how dare the head of Detective Services say that, you know, he will not investigate murders. And he already been told that the only other investigating agency in the country that could deal with it, the DSO, says they will not.

Then one would really have expected the SAPS, because they have considerable resources, perhaps much even larger than the DSO, and they are required under law and under the Constitution to investigate serious crimes, murders, kidnapping and the like.

20 ADV NGCUKA: Ja.

ADV VARNEY: So there should have been no need to go and get a higher authority in the form of the President to instruct the police to do their work.

ADV NGCUKA: That is the point I made.

ADV VARNEY: Well, we are in agreement there. But can I put this to

you, on the one hand, it does seem nonsensical to have to get an instruction from the President to tell the SAPS to investigate. But on the other hand, just to break the impasse, it would not have been advisable on your part to have said, well, I do not have to do this, but just to break the impasse and get the cases off the road, I will approach the President.

ADV NGCUKA: Oh, no, the President would have laughed me off and would have thought that I am foolish, and I did not want to appear so.

10 ADV VARNEY: Right. Well, the unfortunate outcome is that the impasse then remained. You do say in your statement and in your evidence that you directed Adv Silas Ramaite and Adv McCarthy to resolve the issue. Are you aware whether they did, and if so, what steps they took?

ADV NGCUKA: No, I am aware that they did not resolve the issue.

ADV VARNEY: Yes.

ADV NGCUKA: They complained, the DSO complained about not having enough investigators. And also that they were working in teams, but it was very difficult to break up the teams because they  
20 were engaged in a number of very serious projects. And so, unfortunately, I then had to intervene and direct that they must investigate these case, which would have been unnecessary.

ADV VARNEY: Yes. So we put that question to the Adv Ackerman when he testified before this Commission last week. We put that statement in paragraph 43 of your affidavit, and he said he was not

aware that Advs Ramaite and McCarthy had been directed to resolve the issue, but as far as he was concerned, it was never resolved.

ADV NGCUKA: No, no, Anton's memory is a bit failing him, he knew that, he knew.

ADV VARNEY: Okay.

ADV NGCUKA: Anton was coming to my office regularly to talk about the frustrations that he was having. And so when they could not, when they could not resolve that issue, he, Anton, drafted that directive. You will see the directive there that I signed, it is not even  
10 in the National Director's letterheads. It is in the letterheads of the PCLU, they drafted it and brought it to me. He did that, and I signed it, so he should have known that is what happened afterwards. That when I made that declaration, so I think he just forgot it.

ADV VARNEY: Yes, well, to be fair to him, he also gave evidence on the declaration, so there is no disagreement there. He was part of that process to try and get those declarations signed, but perhaps let us move on. I just want to put to you certain passages arising from the De Beer letter, and I believe it is at page 27 of the new bundle, the three paragraphs at 139 to 141. Paragraph 139 reads as follows  
20 ...(intervenes)

ADV NGCUKA: One, three, sorry?

ADV VARNEY: Paragraph 139 on page ...(intervenes)

ADV NGCUKA: Thank you.

ADV VARNEY: I think it is page 27 ...(intervenes)

CHAIRPERSON: Twenty-eight.

ADV NGCUKA: It is 28.

ADV VARNEY: Twenty-eight, my apologies. I am actually working off bundle 1 with the time, and I did not know that we would have a fresh bundle. Page 28, paragraph 139:

10 "It is notable that SAPS regarded the TRC cases as a political issue. It is also noteworthy that the only State entities authorised to conduct official criminal investigations in South Africa both refused to touch the TRC cases. It is highly unlikely that their decisions were spontaneous or mere coincidences. It is apparent that by May 2003, both the SAPS and the NPA were reluctant to take on the TRC cases. In all probability, they were told not to do so from a political level."

Your response?

ADV NGCUKA: That is incorrect.

ADV VARNEY: And then the next paragraph:

20 "The fact that the NPA was told to contact the President reflected that the question of investigating the TRC cases was now a purely political one and a sensitive one at that. It appeared that only the head of State could make that decision, regardless of what the law and Constitution said about investigative authority.

Your response?

ADV NGCUKA: No, but I have already dealt with that, Mr Varney.

ADV VARNEY: Okay, all right. And to be fair, you have also dealt with the next paragraph, so I will not put that to you ...(intervenes)

COMMISSIONER GABRIEL: Can I just take you back to paragraph 139?

ADV NGCUKA: Yes, ma'am. 139, yes.

COMMISSIONER GABRIEL: The last sentence, where the deponent says:

10                    "And in all probability had been told not to do so  
                         from a political level."

You say that was incorrect. What are your reasons for that answer?

ADV NGCUKA: Well, I was never told, I was never told not to take these cases.

COMMISSIONER GABRIEL: So you do not, you were never told?

ADV NGCUKA: No, nobody said I must not take the cases. That is why I am saying that is wrong.

20                    COMMISSIONER GABRIEL: Okay, so that is why you say the  
statement is incorrect?

ADV NGCUKA: The person who would have been told at a political level not to take these cases is me. I would have been told by the Minister of Justice or the President, whoever, and that never happened ...(intervenes)

COMMISSIONER GABRIEL: No, I think...

ADV NGCUKA: That is why I am saying the statement is wrong.

COMMISSIONER GABRIEL: Ja, I think the deponent is saying that SAPS and the NPA were reluctant to take on the TRC cases, and in all probability, they had been told not to do so from a political level, ja. Now, do you still maintain that that sentence is incorrect?

ADV NGCUKA: Yes, that is what I am saying, we were never told that (indistinct) ...(intervenes)

COMMISSIONER GABRIEL: They were never told that or you were never told that?

10 ADV NGCUKA: Well, I was the head of the NPA, ma'am.

COMMISSIONER GABRIEL: You were never told that?

ADV NGCUKA: I was never told. So the NPA could only have been told through me.

COMMISSIONER GABRIEL: Okay, but you do not know what had been told to SAPS?

ADV NGCUKA: I do not know what happened in SAPS.

COMMISSIONER GABRIEL: All right, Thank you.

ADV VARNEY: Thank you, Commissioner. Then if we just continue the unfolding story, And also on page 128, paragraph 142.

20 "Thereafter, Ackerman and MacAdam made a last ditch attempt to persuade Special Director Ledwaba at the DSO to reconsider his decision not to investigate the TRC cases."

ADV NGCUKA: I am sorry, I am sorry, I am not with you.

ADV VARNEY: You are not with me. So it is page 28 of the new

bundle.

ADV NGCUKA: Twenty-eight?

ADV VARNEY: Ja.

ADV NGCUKA: Not 128, okay. Yes, and paragraph?

ADV VARNEY: And at the very bottom paragraph ...(intervenes)

COMMISSIONER GABRIEL: Paragraph 142.

ADV NGCUKA: Got it, thanks.

ADV VARNEY: Paragraph 142:

10 "Thereafter, Ackerman and MacAdam made a last  
ditch attempt to persuade Special Director  
Ledwaba at the DSO to reconsider his decision  
not to investigate the TRC cases. Ackerman sent  
Ledwaba a letter styled as an internal  
memorandum dated 11 November 2003,  
appealing him to appoint investigating officers."

And I think let us actually go to that letter, it is at page 111 of  
the bundle. So as you can see, it is from Ackerman to  
Adv Jeff Ledwaba. The parties copied are yourself, as NDPP,  
Dr Ramaite, as well as Adv McCarthy. It is titled "Investigation of  
20 TRC Cases by the DSO". It is a fairly long letter, so we will try not to  
read everything into the record. It starts off:

"Dear Jeff.

In the light of current developments, I am  
constrained to document the history of the above  
saga..."

And in the first paragraph he sets out the background. We have been through that background. I will just highlight (iv):

10           "(iv)    In May 2003 I gave the NDPP its duties, a full briefing on all TRC cases identified for prosecution. My prosecution strategy was endorsed, and Adv McCarthy indicated that there would be no problem in having the cases declared in terms of section 28 of the NPA Act. The NDPP briefed the Minister and Justice Profiler Committee accordingly.

20           (v)    Shortly thereafter, and in the same month you were presented with applications in terms of section 28 relating to the cases. In July 2003, you verbally informed me that you were not prepared to sign the declarations and you were withdrawing the DSO from the further investigation of the cases. A letter to this effect was given to the CIO Leask by you. In response thereto, I requested Commissioner De Beer to appoint the police to take over the investigations."

Okay, we have dealt with that, so I am not going to read it in, but we know the outcome of that, we needed presidential instruction:

- "(viii) After receipt of De Beer's letter, I made several unsuccessful attempts to contact you to discuss the matter. Eventually I had to report the matter to Dr Ramaite.
- (ix) On 3 November 2003 you informed me that you would sign the declarations in terms of section 28(1)(b)A, and would appoint SSI De Lange to conduct the necessary investigations.
- 10 (x) On 6 November 2003 Dr Ramaite informed Adv MacAdam that he had discussed the matter with Adv McCarthy, who had indicated that the DSO would investigate. On 10 November 2003 MacAdam presented you with the section 28(1)(b) declarations.
- 20 You informed him, (a), that you are not prepared to sign any declarations, (b), De Lange would not be appointed, despite the fact that it was explained to you that he was part of the initial investigation and familiar with all the witnesses and the facts of the cases, (c), that during the course of 10 November 2003 another investigator would be appointed, (d), the

President should not be approached to involve SAPS."

2. As at the date of this letter, I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003, no investigations have been conducted."

And then he sort of expresses his alarm in the next paragraph:

- 10 "There are certain cases which could have been prosecuted which have prescribed. There is both national and international pressure to institute prosecutions, for example, Simelane's case. An amnesty hearing for the Motherwell matter has been set down for early March 2004, and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee."

He then raises concerns around:

- 20 "The availability of witnesses and high public interest, that the other cases will be brought to trial as soon as possible. The failure to do so will bring the *bona fides* of the NPA into serious dispute and do irreplaceable damage.

Since I do not have any investigative capacity, I

am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases, and to sign the declarations in terms of section 28(1)(b). This chapter in our country's history must be closed without further delay."

So would you agree that there is a sense of desperation with MacAdam and the PCLU, and that he is now pleading with  
10 Adv Ledwaba to change course?

ADV NGCUKA: That is correct.

ADV VARNEY: And you were copied on that letter, so at the time you would have been familiar with it?

ADV NGCUKA: Yes, but let me just say this.

ADV VARNEY: Yes.

ADV NGCUKA: It is not an excuse, but it is a fact. At the time these things were happening, the NPA was going through a very, very difficult time. For example, that November I was busy with the Hefer Commission in Bloemfontein, where I was dealing with the allegations  
20 that were made against me by Mo Sheikh and Mac Maharaj that I was an apartheid spy, that was one.

Two, I was dealing with the case of the arms deal matter involving the deputy president at the time. Three, I was also dealing with the case of the late Brett Kebble, who had hired a journalist to write nasty articles about me almost every week in the *Business Day*.

Four, I was dealing with serious attempts to discredit the Scorpions by senior members of the ANC, including the Secretary General thereof.

And so I am dealing with all these matters at the same time. So you are dealing with, you are talking to somebody who is not just sitting at the office and waiting for Ackerman. And in a sense I was frustrated that these guys are not dealing with these issues that they should be dealing with, because there I was defending the organisation from all the attacks that it was getting.

10 And some of you may be old enough to remember that there was a period in this country when my name was in every newspaper every other day because of the work that the Scorpions were doing. So I was busy defending the organisation, and I expected my juniors to be able to deal with these matters. So there was a sense of frustration from me too that we are not able to resolve this, but I want you to understand the context or the period in which we were living at the time when these matters were happening. Thank you.

ADV VARNEY: Yes, and we accept, Mr Ngcuka, that you were carrying a lot on your shoulders, you had a lot on your plate. And I  
20 think we should place on record that the allegations made against you were fabricated allegations. But nonetheless, what was set out in the letter, would you agree that was not an unreasonable request?

ADV NGCUKA: No, no.

ADV VARNEY: And, in fact, he was not asking for huge resources.

ADV NGCUKA: No.

ADV VARNEY: He was asking for one detective by the name of De Lange and one other, so he was only asking for two investigators.

ADV NGCUKA: Yes.

ADV VARNEY: So I want to go back to the Calata affidavit and just put certain passages to you to see whether you agree with them. So back in the Calata affidavit at 143, actually it is at page 31 of the new bundle.

10 "Ackerman's heartfelt plea fell on deaf ears. Ledwaba was not moved to act, even though he was advised that the NPA was under local and international pressure and cases were prescribing. Ackerman's warning that the failure to proceed with the TRC cases would bring the NPA into disrepute and do irreparable harm to its image was precisely what happened."

Do you agree with that passage?

ADV NGCUKA: Ja, no, that is correct.

ADV VARNEY: And then the next passage of 144:

20 "The DSO persisted in its refusal to appoint investigators, as did the SAPS. According to MacAdam, this effectively brought an end to the TRC cases, as it meant that no new investigations of the TRC matters could be opened. (145) The TRC cases were effectively closed down before the end of 2003, before the

PCLU could commence real casework. A few cases taken forward subsequently were those in which investigation dockets had already been completed..."

And we have discussed that. So do you agree that MacAdam appears to be saying that, effectively, before the end of 2003, they were stopped from taking, what we can call the "uninvestigated cases" forward, because SAPS and DSO were not providing investigators?

10 ADV NGCUKA: No, no, no, I do not agree with that, I do not agree, That is incorrect.

ADV VARNEY: Okay, can you elaborate?

ADV NGCUKA: That is incorrect, Because I have told you that after he was unsuccessful with Ledwaba, they then came to me, and then I ordered that those matters be investigated, I made that order. And not only did I do it once, I did it twice in respect, the matters that were brought to me in December, the others were brought to me in February, so it can be correct.

COMMISSIONER GABRIEL: Why did you order twice?

20 ADV NGCUKA: It is separate matters.

COMMISSIONER GABRIEL: Separate matters.

ADV NGCUKA: Separate matters, yes.

ADV VARNEY: So we are just struggling to find where you ordered the DSO to investigate. Is that reflected somewhere in a document?

ADV NGCUKA: You will find it in the, I think it is in the MacAdam

affidavit.

CHAIRPERSON: So do I understand your evidence, Adv Nacka, to be saying that TRC cases were not effectively closed down before the end of 2003?

ADV NGCUKA: Absolutely correct, Commissioner.

ADV VARNEY: So I think we have found a document we would like to put to you, and I am advised that it was attached to MacAdam's affidavit before this Commission. And that is not part of the bundle, but perhaps would my learned friends be willing to share that bundle  
10 with the witness?

ADV NGCUKA: Thank you.

ADV VARNEY: Commissioners, I do not know whether you have access to the statement by Adv MacAdam before the Commission. It is his affidavit, it looks like an unsigned version that was signed on the 3 March of 2026. I thank my colleagues for making it available. We just wish to refer to two internal memos. So the first one is an annex to that MacAdam statement before this Commission. It is from the head of Priority Crimes Litigation Unit, it is from the NDPP to the Head of Operations, DSO. It is dated 8 December 2003, it is titled  
20 "Investigation of TRC Cases by the DSO", and it reads:

"I have decided in terms of Section 28(1)(b) of Act  
32 of 1998..." (intervenes)

ADV MOROKA SC: Apologies, Chair. Where are we reading from? We have got the document, mister...

COMMISSIONER KGOMO: You are not audible.

ADV MOROKA SC: Apologies, Chair. I am saying Mr Varney is referring to this document that has just been handed up.

CHAIRPERSON: Yes.

ADV MOROKA SC: And I was just asking for pages?

CHAIRPERSON: 815.

ADV MOROKA SC: Thank you.

ADV VARNEY: To be fair to my learned colleagues, this particular statement of MacAdam is not part of the bundle that we have put up, so that is ...(intervenes)

10 CHAIRPERSON: Yes, but it has been handed up to us.

ADV VARNEY: Yes, it has been handed up to you.

CHAIRPERSON: Yes.

ADV VARNEY: I do not know whether a copy has been handed up to them.

CHAIRPERSON: Yes, it has.

ADV VARNEY: Okay. All right, then I will carry on, it is annex AD13, and I will carry on reading:

20 "I have decided in terms of section 28(1)(b) of Act 32 of 1998 that the following three cases arising from the TRC be investigated by the DSO:

1. Kidnapping, assault and murder of the PEBCO 3.
2. Murder of Brian Ngqulunga.
3. Murder of Motherwell 4.
4. Attempted murder of Reverend

Frank Chikane."

It is signed by the NDPP Ngcuka, dated the 24 February 2004. There does seem to be a difference in the dates between the signature and the date on the top, but do you confirm that you signed this letter authorising those four investigations?

ADV NGCUKA: I do, I do.

ADV VARNEY: And then we want to put another one ...(intervenes)

CHAIRPERSON: How do you explain the discrepancy, Adv Ngcuka, to the date reflected in the internal memorandum, being the  
10 8 December 2003, and the one reflected below your signature, being the 24 February 2004?

ADV NGCUKA: I suppose the 8<sup>th</sup> will be the date when it was prepared.

CHAIRPERSON: Okay.

ADV NGCUKA: And then the 24 is the date when it was approved.

CHAIRPERSON: Yes, when you signed it.

ADV NGCUKA: When I signed it, yes.

ADV VARNEY: And then the other one we want to put to you is over  
20 the page, it is at Annex AD15. It is from the Office of the NDPP, and it is addressed to Adv MG Ledwaba, Head of Operations, and it is dated the 26 February 2004. It is also titled:

"Referral of TRC Cases to the DSO in terms of  
Section 28B of Act 32 of 1998.

I have decided to refer the following matter to the  
DSO for investigation in terms of Section 28 of

Act 32: crimes of murder, attempted murder, conspiracy or incitement to commit murder committed in an organised fashion by Letlapa Mphahlele with reference to the APLA attacks on the St. James Church and Heidelberg Tavern situated in Cape Town."

You confirm that instruction?

ADV NGCUKA: I do, sir.

ADV VARNEY: Okay. So in February of 2004, you had instructed  
10 the DSO to investigate those six matters in total.

ADV NGCUKA: That is correct.

ADV VARNEY: All right, so at that point, in early 2004, you then had an expectation that those six matters would be taken forward by the DSO.

ADV NGCUKA: That is correct.

ADV VARNEY: Now, let us turn back to your statement. In paragraph 41 you have repeated what you have said here in your evidence:

20 "At no stage did I receive, tolerate or act on any instruction designed to shield any individual, organisation or political actor from lawful prosecution."

And the rest of the paragraph deals with sticking to your constitutional mandate. And one of the reasons why we wanted to cross-examine you was to put to you that there were certain

developments that had taken place while you were NDPP. Now, we are not suggesting that anybody picked up the phone to tell you to stop, that is not the allegation.

But we are saying that while you were NDPP, there were other developments taking place, which we would want to suggest amounted to at least an initiation of steps to curtail or control the pursuit of the TRC cases, and I would like to take you through those.

ADV NGCUKA: All right, let us hear you, sir.

ADV VARNEY: So let us then turn to the reference in the Calata  
10 affidavit to the Amnesty Task Team. It is on page 33, and here we are going to be relying on various documents. I will just indicate up front what they are. They are the original Terms of Reference of the Amnesty Task Team, and that is at page 200. We will also be relying on the original secret report of the Amnesty Task Team in 2004, that is at page 201.

And then, finally, we will be relying on the secret further report of the Amnesty Task Team, and that is at page 213. So if we can perhaps start with the Terms of Reference, that is at page 200. So let us just, luckily there is not too many paragraphs here. The  
20 Terms of Reference, at least those that were attached to Adv MacAdam's affidavit says that:

"The Terms of Reference are:

1. The criteria the NPA applies in deciding on current and impending prosecution of cases flowing from the conflicts of the

past.

2. The formulation of guidelines that will inform current, impending, and future prosecution of such cases.

And bearing in mind, the above-mentioned guidelines, whether legislative enactments were required and whether any of the two bills that have already been formulated can be taken forward while taking into account the views of the intelligence agencies."

So I just want to put it to you that, you know, for example, that very first term of reference, the criteria the NPA applies in deciding on current and impending prosecution of those cases, let us call them the "TRC cases", and the formulation of guidelines to deal with the prosecution of those cases. Would you agree that the Terms of Reference are in fact demarcating or proposing possible special treatment or different treatment of those cases?

ADV NGCUKA: Yes, they do.

ADV VARNEY: So then if we move on. Now, there is a reference to two bills. The Terms of Reference do not explain or do not give the names of those bills, although we think that one of them was the Indemnity Bill. Adv Ackerman only attached the cover and the preamble of that bill, and that is at page 154 of your bundle. Perhaps you can just look at the long title of that bill, it is on the next page, 155:

"To provide for the granting of indemnity by the President to persons who make full disclosure of all relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past..."

It gives the dates:

10 "For the said purpose to establish a committee on indemnity, to consider and investigate applications for indemnity, and to make recommendations to the President, and to provide for matters connected therewith."

Were you aware of this, what might be a draft Indemnity Bill at that time?

ADV NGCUKA: No.

ADV VARNEY: And when they made reference to two ...(intervenes)

ADV NGCUKA: And also just to make it clear that I was not a party to those Terms of Reference.

20 ADV VARNEY: Yes, yes indeed, and we are aware of that. So the reference in the Terms of Reference to two bills, and we are speculating that the Indemnity Bill might be one of them, would you have any idea what the other bill might have been?

ADV NGCUKA: No idea.

ADV VARNEY: And then if we turn to the to the Amnesty Task Team itself, and that is on page 202, there is a report, a secret report of the Amnesty Task Team. Now, it is undated, however, if we look at the

next report, the further secret report of the Amnesty Task Team on page 214, at paragraph 1.1 it says:

"On 3 March 2004 the Amnesty Task Team submitted a report to the heads of Department Forum for consideration."

So I think we can assume that it is likely that the first report of the Amnesty Task Team was delivered on that day, the 3 March 2004. And I want to draw your attention to paragraph 1.2:

"The task team comprises the following members:

10 Deon Rudman, Chairperson, Department of Justice.

Yvonne Mabula..."

ADV NGCUKA: Sorry, where are you?

ADV VARNEY: Oh, sorry, I am on page 202.

ADV NGCUKA: 202, sorry. All right.

ADV VARNEY: And we are looking at paragraph 1.2, the composition of the task team:

"Deon Rudman, Chairperson, Department of Justice.

20 Yvonne Mabula, National Intelligence Agency.

Vincent Mogotloane, National Intelligence Agency.

Gerhard Nel, NPA.

Lungisa Dyosi, NPA.

Ray Lalla, SAPS.

Joy Rathebe, Department of Defence."

So you can see that two of the members of the Amnesty Task Team, at least at that time, were NPA members.

ADV NGCUKA: That is correct.

ADV VARNEY: Now, you had mentioned that you had received a report or perhaps you had met with Gerhard Nel and Lungisa Dyosi following their first meeting.

ADV NGCUKA: That is correct.

10 ADV VARNEY: And you will see that the first meeting from paragraph 1.3, at the bottom of the page, the task team met for the first time on 26 February 2004, and again on 1 March 2004.

ADV NGCUKA: Sure.

ADV VARNEY: So it does seem as if those two NPA members were present at both those meetings and then were party to this report.

ADV NGCUKA: As far as I know, they did not attend the second meeting.

ADV VARNEY: They did not attend the second meeting?

ADV NGCUKA: No.

ADV VARNEY: Okay.

20 ADV NGCUKA: My instructions were very clear, that they should not participate any further in the Amnesty Task Team.

ADV VARNEY: Right. Is there a possibility that they might have attended anyway?

ADV NGCUKA: I do not know. It is possible, human beings can act contrary to instructions, but my instructions were very clear.

ADV VARNEY: Yes, so ...(intervenes)

ADV NGCUKA: In fact, not just my instructions, it was a considered view of us in the NPA that it would be unwise for us to participate in that forum, for reasons that I also mentioned earlier.

ADV VARNEY: Okay.

ADV NGCUKA: We thought that some of the people who were participating in this thing, some of the DGs, for example, that it may well be that they may be implicated in the investigation that was being conducted into the ANC 37. And so for us to participate, therefore,  
10 that forum would have caused a conflict.

ADV VARNEY: Yes. And, of course, you make reference to the Director's General Forum, and it was that forum that actually established this task team, the Amnesty Task Team.

ADV NGCUKA: That is correct.

COMMISSIONER KGOMO: Can you just help us to put the searchlight on? If at all you gave your directive in writing, if you could refer it to us?

ADV NGCUKA: No, no, I ...(intervenes)

COMMISSIONER KGOMO: I may have missed it.

20 ADV NGCUKA: No, no, it was not in writing. They gave a report, an oral report, and we discussed it in the office. We agreed that we are not going to participate, that was it.

COMMISSIONER KGOMO: Oh, You are not worried that you give them such pertinent instructions, and they might come and say but you did not ...(intervenes)

ADV NGCUKA: No, this...

COMMISSIONER KGOMO: And then you could refer them to the directive ...(intervenes)

ADV NGCUKA: No, Commissioner...

COMMISSIONER KGOMO: The written directive.

ADV NGCUKA: No, I was working with loyal and trusted people.

COMMISSIONER KGOMO: Okay, Thank you.

ADV VARNEY: And perhaps if we just rewind a little bit. Am I correct in saying that it was a Director's General Forum chaired by the then  
10 DG of the Department of Justice, Adv Vusi Pikoli, who instructed the setting up of this Amnesty Task Team?

ADV NGCUKA: Yes.

ADV VARNEY: And references made to that in the Calata affidavit at paragraph 148. It reads:

"A Director's General Forum chaired by Adv Pikoli, the then Director General of the DOJ met on 23 February 2004 to consider how to give effect to the President's objectives set out in his speech the year before."

20 So that gives the context for the establishment of the Amnesty Task Team. So you have set out your concerns and why you withdrew the NPA from this body. Would I be correct in saying that you had reservations about effectively an executive body meeting to discuss matters that were exclusively the purview of the NPA?

ADV NGCUKA: That is correct.

COMMISSIONER GABRIEL: Explain that? What made you uncomfortable?

ADV NGCUKA: Because they were discussing the criteria that should be applied in deciding who should be prosecuted or not.  
...(intervenes)

COMMISSIONER GABRIEL: And that was (indistinct) ...(intervenes)

ADV NGCUKA: And that was the exclusive domain of the NPA.

COMMISSIONER GABRIEL: Was that made clear to them, can you  
10 recall?

ADV NGCUKA: No, no, I did not participate in that, so those are the reasons for us to pull out.

COMMISSIONER GABRIEL: Okay.

ADV VARNEY: And already by then you had a set of criteria that was developed by the HRIU, the Human Rights Investigation Unit?

ADV NGCUKA: Yes.

ADV VARNEY: And would it be correct in saying that those criteria were consistent with the existing prosecution policy?

ADV NGCUKA: Correct.

20 ADV VARNEY: So perhaps I will, you know, aside from the composition of the DG's Forum and the Amnesty Task Team, let us look at some of the functions of the proposed Departmental Task Team. An overview of that is given in from paragraph 156 onwards, but it is also set out at 206 from paragraph 3.2.2, where it  
...(intervenes)

ADV NGCUKA: Can you bear with me, sir? I need to fix my bundle before it is falling apart.

ADV VARNEY: Yes, of course. Maybe somebody can assist you with that?

ADV NGCUKA: No, no, it will not be necessary. You were saying page?

ADV VARNEY: So it is page 206 of that bundle. So we are now a few pages into the report of the Amnesty Task Team. And at the bottom of page 206, it is paragraph 3.2.2.

10 ADV NGCUKA: All right, got it.

ADV VARNEY: Yes. And my attorney just advises me to highlight the preceding paragraph. It is titled:

"Ad paragraph 1 of Terms of Reference.

In order to give effect to the arrangements contemplated in the President's statement, as reflected in paragraph one of the Terms of Reference."

20 And you will recall that was the developing criteria for these cases. So under 3.2.2.2, or hold on, before we get there. So they recommend that a further body be created and, that is set out in 3.2.1. It is called a Departmental Task Team. At a later stage, it is also called the Interdepartmental Task Team:

"It is recommended that a Departmental Task Team be appointed comprising members of the following departments or institutions:

1. Department of Justice.
2. Intelligence Agencies.
3. South African National Defence Force.
4. South African Police Service.
5. Correctional Services.
6. National Prosecuting Authority; and
7. Office of the President."

And then we turn to the functions at 3.2.2:

10 "Before the institution of any criminal proceedings  
for an offence committed during the conflict of the  
past, to consider the advisability of the institution  
of such criminal proceedings and make  
recommendations to the NDPP in this regard."

Firstly, your response to the creation of a Departmental Task  
Team comprising those individuals, several members of the  
executive, including the Office of the President, and that one of their  
functions would be to advise the NDPP on the advisability of  
instituting criminal proceedings in these cases?

20 ADV NGCUKA: That would have been wrong, unless, of course, you  
have no confidence in your National Director.

ADV VARNEY: All right, aside from that fact, which I am sure was  
not the case, but why would it have been wrong?

ADV NGCUKA: Precisely for the reasons I am saying, that the  
decision whether to prosecute, when to prosecute, what to prosecute  
for are all prerogatives of the National Prosecuting Authority. Now,

you want to fetter that discretion, so why do you need to have an independent institution?

ADV VARNEY: Then if we move to the next page, that is 207 paragraph (b):

10 "To consider applications received from convicted persons alleging that they have been convicted of political offences with a view to making recommendations for their parole or pardon, and in making such recommendations to consider various criteria."

And then those criteria are then listed in the sub-paragraphs that follow. They include the amnesty criteria from paragraph (d). So, ja, those are the amnesty criteria which we are all familiar with, so we will not need to deal with those. And then on the next page, 208, there is a range of proposed criteria, and I am not going to go through all of them, but it does include:

20 "Whether prosecution politically reflects the aims of the TRC Act and is not in conflict with the requirements of objectivity. Whether there are humanitarian concerns. Whether prosecution could lead to conflict and traumatising of victims. The perpetrator's sensitivity to the need for restitution.

The degree of remorse shown by the offender and his attitude towards reconciliation. The

degree of indoctrination to which an alleged offender was subjected. The extent to which the perpetrator carried out instructions. Whether he or she renunciate to violence and a willingness to abide by the Constitution..."

And there are others, we do not have to go through every single one of them. What is your reaction to the proposal that a number of additional criteria, like the ones I have highlighted, are being proposed for these cases?

10 ADV NGCUKA: Well, remember this, at the time when this, I was not there. So you are just asking me for my opinion?

ADV VARNEY: Yes, indeed, just your opinion.

ADV NGCUKA: Well, as I have stated already, I thought that those are matters that should have been left to the discretion of the National Director. I did not see the need for that to happen.

ADV VARNEY: Right.

COMMISSIONER GABRIEL: Mr Varney, can I interrupt you?

ADV VARNEY: Yes.

20 COMMISSIONER GABRIEL: On these cases, can you think of any reason why the National Intelligence Agency would be involved, would want to be involved? I am trying to understand that. I am hoping you can help me.

ADV NGCUKA: I would imagine that it was from a state security angle, that these people would have given information which would have been very important for the National Intelligence Agencies in the

work that they do in protecting the State. So I would imagine, therefore, the thinking was that if these people would go and give information, credible information, it should be of assistance in the intelligence work.

COMMISSIONER GABRIEL: I see, I see. Yes, thank you.

COMMISSIONER KGOMO: So that would have been the reason for the inclusion of Ms Yvonne Mabule?

ADV NGCUKA: Yes, I would imagine so, Commissioner.

COMMISSIONER KGOMO: Yes, I see here, because I see opposite  
10 her name, "National Intelligence Agency". Thank you.

ADV VARNEY: And then if we can just highlight a few other issues that the Task Team alluded to. You can turn to page 210, paragraph 3.2.4. It says:

"The task team realises that the proposed process will have the following shortcomings/ concerns:

A possible negation of the constitutional rights of victims, the public at large, and alleged offenders."

20 Do you agree that the proposal could have impacted the constitutional rights of victims and the public?

ADV NGCUKA: It could have.

ADV VARNEY: And then they say:

"The possibility of the institution of private prosecutions."

So here it seems what they are trying to say is, well, if we implement this, potentially somebody aggrieved could still try to bring a private prosecution.

ADV NGCUKA: That is correct.

ADV VARNEY: And does that indicate to you that the underlying end goal was actually to curtail all prosecutions?

ADV NGCUKA: I am not sure, I do not know.

ADV VARNEY: Okay. All right, let us then turn to secret further report of the Amnesty Task Team, that is at page 213. So I want to  
10 draw your attention to paragraph 1.2. As we have indicated, it makes reference in 1.1 to the first report, which was delivered on 3 March 2004. And then:

"The heads of department discussed the report with members of the task team, where after they deliberated the task team's proposals and recommendations *in camera*. Following these deliberations, the heads of department indicated that they prefer the Task Team's recommendations relating to the establishment of  
20 a Departmental Task Team. They, however, requested the Task Team to give further consideration to the following aspects..."

I want to highlight paragraph (b):

"Consider whether there is a way in which private prosecution and civil litigation can be eliminated if

the NDPP decides not to prosecute. Investigate the possibility and desirability of legislation if required."

So the DG's Forum or heads of departments, they make this remarkable request: is there a way of eliminating private prosecutions and civil litigations in respect to the TRC cases? And if so, do we need a law? What does that say to you about their intentions?

ADV NGCUKA: It is – you are putting me on the spot, because I did not participate in that deliberations, and so I do not know what  
10 motivated them to come to that. But reading between the lines, you could see that they wanted to bring about finality. So there should be no private prosecutions, no approach to the International Court, and that the matter must be brought to an end and that there must be closure. That is what seems to stick out to me from these paragraphs that you have read.

COMMISSIONER KGOMO: And that does not put you on the spot, sir.

ADV NGCUKA: I am sorry, sorry, Commissioner.

ADV VARNEY: And I think, Adv, Ngcuka, it might go a bit further  
20 than that, you know, if there were closure and finality, well, then I suppose we would want to see prosecutions expedited as quickly as possible. But my reading of it is that it goes further than that. One, they are proposing a process in which they would have some involvement, at least, in the decisions of the NDPP.

But they are also looking at ways of stopping matters that

would be beyond their control, and so private prosecution and civil litigation, that is potentially beyond their control. So now they are saying are there ways of eliminating those two measures, and if so, we need a law. So it seems as if it is not just a question of reaching closure, it is a question of stopping those kinds of measures which could be pursued without their involvement ...(intervenes)

COMMISSIONER GABRIEL: In other words, denying rights ...(intervenes)

ADV NGCUKA: It could well be so. Sorry, sorry, ma'am.

10 COMMISSIONER GABRIEL: I am sorry, I interrupted you.

ADV NGCUKA: Sorry, sorry, go ahead, Commissioner.

COMMISSIONER GABRIEL: In other words, denying whatever rights might be available to the citizens, affected citizens ...(intervenes)

ADV NGCUKA: It could well be so.

COMMISSIONER GABRIEL: Would you agree with that?

ADV NGCUKA: It could well be so.

ADV VARNEY: Then let us look at the next two paragraphs:

20 "The proposed task team should work under the direct supervision of an Inter-Ministerial Committee."

And then paragraph D:

"It is important that the proposed task team, the Inter-Ministerial Committee and the national director, in performing their functions and reaching decisions, should take the national

interest into account."

So, one, they are saying the task team in turn must be directly supervised by the Inter-Ministerial Committee. And then all these bodies, the task team itself, the Inter-Ministerial Committee and the NDPP, when dealing with these cases, must take the national interest into account. What would, in your view, and again, I am only asking for your opinion, what would that national interest be?

ADV NGCUKA: Well, probably the decision that would have led to public violence and caused a massive uprising in the country, you  
10 know. I do not know, that is what I think.

ADV VARNEY: All right. Well, I think that is probably debatable, but let us move on. And I want to make a reference to the fact that they approached the State law advisers. We will just find the reference there. And actually, before we move on, and just to finish off on 214, paragraph (e):

"Advise the forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court."

20 So, would you agree that they were concerned that even if they managed to curtail prosecutions at a local level, there might be a danger that an aggrieved person may go international, to the ICC?

ADV NGCUKA: Yes.

ADV VARNEY: And then if we can move to page 215, at paragraph 2.4. And that is dealing with:

"The establishment of an Inter-Ministerial

Committee. The task team supports this proposal. However, it wishes to point out that the State Law Adviser is of the view that the establishment of such a further structure may constitute a cumbersome process and increase the possibility of conflicting views between the various role players and structures. Furthermore they pointed out that the process might be seen as an attempt by the government to put undue pressure on the NDPP in reaching an independent decision."

Would you agree with the opinion of the State Law Adviser?

ADV NGCUKA: Yes.

ADV VARNEY: So just to wrap up the work of this Amnesty Task Team, and, of course, we speak with the proviso we know that you were not involved, and it is your evidence that you pulled your NPA members from that task team, And we have heard your evidence in relation to it.

So bearing that in mind, which we accept, Nonetheless, while you were NDPP, there was this outside body in the form of the DG's Forum and this amnesty task team that were putting together proposals to effectively ensure a measure of control over the TRC cases. Do you at least accept that that was happening and that constituted an attempt to undermine the independence of the NPA?

ADV NGCUKA: I am not sure. I know there were attempts, I know

there were attempts. I am not sure if that was the intention. I think that what they were trying to do was to resolve what they considered to be a problem that they had. But the method in which they went about it, I think it was, or the result that came out of it was not correct, and so, ja.

ADV VARNEY: Yes. Well, I think you might be a little generous, but let us leave it at that. And we are going to, in fact, turn to the actual amendments that were introduced later following your departure from the NPA to see what was the result of the work of these bodies. But

10 CHAIRPERSON: Commissioner, I see it, it is almost lunchtime. Would this be an appropriate time to take the lunch break?

CHAIRPERSON: Yes. How long are you going to be with Adv Ngcuka, Mr Varney, if we may just get an indication?

ADV VARNEY: If I were to guess, I would think about an hour.

CHAIRPERSON: About an hour?

ADV VARNEY: Ja.

CHAIRPERSON: We will take a lunch adjournment until 2 o'clock.

ADV VARNEY: As the Commission pleases.

INQUIRY ADJOURNS

20 INQUIRY RESUMES

CHAIRPERSON: Mr Varney?

ADV VARNEY: As the Chairperson pleases. Mr Ngcuka, just before we adjourned for lunch, we had wrapped up a discussion on the work of the Amnesty task team and the various proposals that they had made.

ADV NGCUKA: Yes sir.

ADV VARNEY: Great, you can hear me?

ADV NGCUKA: Yes, I can.

ADV VARNEY: Great.

ADV NGCUKA: Thank you.

ADV VARNEY: Just before lunch, I said I would make reference in passing to what the outcome of their deliberations were. One of the main products that emerged were in fact the amendments to the prosecution policy. And I just want to refer you to it. Unfortunately, It is not in that new bundle, but it is in bundle 1, that I believe is on your desk. The amended prosecution policy is at page 634 of bundle 1. Sorry, I beg your pardon, page 537 of bundle 1. It says FA27 in the corner as well. So bundle 1 would be the...

ADV NGCUKA: Bundle 1 of 1 is, for me, It is up to page 300.

ADV VARNEY: Page 537.

ADV NGCUKA: So let me check on this one. Yeah. 537?

ADV VARNEY: Yes.

ADV NGCUKA: Got it.

ADV VARNEY: And is that the one that says FA27 and then it says Appendix A?

ADV NGCUKA: Appendix A, got it.

ADV VARNEY: Yes, okay. So those are the amendments to the prosecution policy in relation to the TRC cases. And I will just draw your attention, if you could turn to page 539, and then at the bottom of the page, there is a paragraph 6, and this falls under part B, which is

titled procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. And you will see in paragraph 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, and then those organisations we are familiar with, National Intelligence Agency, Detective Division SAPS, Department of Justice, and Director of Special Operations.

10 And we know from the evidence of Anton Ackerman as well as other documentation that is before the Commission that another task team, sometimes referred to as the interdepartmental task team, was set up comprising those individuals as well as sometimes individuals from other departments. And then if I can draw your attention to part C on the next page, that is page 540, and that is titled criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past. And it says, you know, apart from the general criteria set on paragraph 4 of the prosecution policy, that being the existing policy, the following criteria determined for the prosecution of cases arising from the past.

20 And if we go to the next page, that is page 541, you will see that many of the proposals suggested by the amnesty task team are included. So for example, the TRC criteria at the top of the page. And then if we look at around the middle of the page, D, under personal circumstances, it includes humanitarian considerations, the offender's sensitivity to the need for restitution, degree of remorse

shown, attitude towards reconciliation, renunciation of violence, a willingness to abide by the constitution, degree of indoctrination to which the offender was subjected.

Then at F, the extent to which prosecution or non-prosecution will facilitate or undermine the national project of nation building through transformation and reconciliation and so on. And then the last, there is even a catch-all criteria at the next page, 542 at J, any further criteria which might be deemed necessary by the prosecuting authority for reaching a decision.

10           So do you agree that you can see quite a big overlap between what was proposed by the amnesty task team and what was ultimately proclaimed in the amendments to the prosecution policy?

ADV NGCUKA: Yes, I do see that now.

ADV VARNEY: And again, this is not a criticism of you, but you accept that what has happened here with the amendments is that a different regime has been set up in relation to prosecution decision-making, in relation to that category of cases?

ADV NGCUKA: Yes.

20           ADV VARNEY: Then we just want to deal with a few matters that arose this morning before we proceed. And I want to direct your attention again to those two declarations in which you identified four cases and then another two cases. And the instruction was that the DSA should investigate those cases.

So my first enquiry is, any reason why you were not able to, or you decided not to issue a declaration that the DSA investigate all

the TRC cases?

ADV NGCUKA: I am trying to think why. I suppose that was the advice I received from the people who are involved, that those are the ones that they wanted to deal with at that particular point in time. Okay.

ADV VARNEY: And then just looking at the six cases, we obviously were interested to see what had happened to them. And some of them, they're quite well-known, so we do know what happened. So for example, the PEPCO 3, there was quite a lot of publicity.

10           There was a review of the amnesty decision, and then unfortunately that stilled, but that was all post your term. In relation to the Chikane matter, we know that one went ahead. There was a plea- and sentence agreement, but I want to, and that took place in 2007, again, post your term.

          But I want to draw your attention to a reference that McAdam made to the investigation of that case, and that is at page 93 of the new bundle in his affidavit. So we can abandon bundle 1 for the moment and go back to the new bundle. Sorry, it is at page 93, and it is at paragraph 26 of his affidavit.

20           I am told that the live stream is not running. Is there a way of repairing that? Anyway, I am sure that the technicians will deal with that.

          So paragraph 26 at the bottom of page 93, McAdam says,  
          "At a certain stage, Ackerman informed me that he  
          intended prosecuting three former security branch

members for their role in the poisoning of Reverend Frank Chikane.”

This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary. We heard that evidence also from Ackerman, so they appear to be saying that in that case, it did not need to be investigated. It was already investigated in the Wouter Basson case.

ADV NGCUKA: Yes.

10 ADV VARNEY: Then if we turn to the Motherwell 4 case, that was a little more difficult to get to the bottom of, but we did establish that there had been convictions of certain accused in 1996, and that there were applications by nine applicants in 1999, and this included people such as Gideon Nieuwoudt, Wynand du Toit. You're probably familiar with those names.

ADV NGCUKA: Yes, I am.

ADV VARNEY: And they were all refused. And then it looks like Du Toit went to court to review the refusal, and it looks like the court ordered the reinstatement of the Amnesty Committee, and from what  
20 we can establish, Du Toit was granted amnesty in 2005, Nieuwoudt was refused. That is all we were able to find out on that case.

In relation to, Ingelunga, and that was an investigation against, so the suspects there were General Engelbrecht and General Nick van Rensburg. Unfortunately, we have not been able to find anything. We searched high and low, so it is not clear whether that

investigation proceeded or not, and if so, what the outcome was.

And then lastly, the investigation that you directed to happen in relation to the massacres that took place at various hotels in the Western Cape, St James and, I do not have the other one with me right now, but I'd like to refer you to page 150 of the new bundle. It was the St James Hotel and the Heidelberg Tavern.

ADV NGCUKA: Yeah, got it.

ADV VARNEY: So there is a report on that case, in the document, it commences at page 142, and it is prepared by Advocate Ackerman.

10 It is directed to Dr Emmes Ramaite, subject is Audit of cases emanating from the TRC process. Date is 24 October 2006, so some years after you had left.

ADV NGCUKA: Yes.

ADV VARNEY: And at page 150, at the bottom of that page.

ADV NGCUKA: Page of, page?

ADV VARNEY: So it is 150 of the same bundle.

ADV NGCUKA: Okay.

ADV VARNEY: So Ackerman is now reporting to Ramaite about progress in various cases, and he then deals with the Heidelberg  
20 Tavern and St James massacres at 411, Lethlape Methlathlele and then he refers to the two places. And I will just skip to paragraph 411.3.

“As soon as an investigator is appointed for the case, a decision will be made on whether to prosecute or not.”

So on the face of it from that statement, it may be that an investigator was not appointed to that particular case, because the allegation is that in 2006 they were waiting for an investigator to be appointed.

Anyway, so I just wanted to let you have the outcome of those six cases, something of a mixed bag. And in fact, I suppose the only real successful outcome was that of Chikane. Anyway, let us move on.

And I want to... Hold on. Before we go any further, I  
10 reminded myself that there might be a few things arriving from your evidence-in-chief, and there are just a couple of short ones.

In the late 1990s, during your oral testimony, you made reference to the fact that in relation to a number of, I suppose, priority crimes, for example, political violence in KZN around Richmond, you decided to bring investigators, prosecutors and analysts under one roof, and that the investigations in the KZN Midlands were very successful. I have the same recollection being from KZN myself.

Would I be right in saying that most of those investigated, prosecuted, and I know there were several convictions as well, that  
20 most of those were actually of ANC members?

ADV NGCUKA: That is correct.

ADV VARNEY: Because there has been an allegation put up or suggested by organisations such as Afriforum that post 1994, there were few, if any, cases against organisations such as the ANC. Would you agree those investigations and convictions suggest

otherwise?

ADV NGCUKA: Indeed.

ADV VARNEY: In your evidence in chief, you highlighted the Biko case, Steve Biko, who died in detention. You said you wanted to take that case ahead, but you did not have sufficient evidence, and that if you had gone ahead, they would have been acquitted. The Biko family would like more information, and if you and your team are in possession of any reports, documents or opinions relating to the Biko matter, would you be willing to disclose those to the family?

10 ADV NGCUKA: Oh, certainly. But unfortunately, I no longer have. But I think what I can do is to make them contract Vincent and Chris McAdam, people who reviewed those files.

ADV VARNEY: Thank you. I do recall a reference, and I forget where it is, maybe my team can help me, where it mentioned that the crimes had prescribed.

ADV NGCUKA: That is correct. The culpable homicide ones had prescribed.

ADV VARNEY: Culpable homicide?

ADV NGCUKA: Yes.

20 ADV VARNEY: Although presumably murder itself, that does not prescribe?

ADV NGCUKA: Yes, that is the one we could not succeed in prosecuting, because the evidence was not sufficient. I think you will find in one of the bundles, there is reference made to that. I think it would be Chris McAdam's report. I cannot remember exactly where it

is, where he states categorically these are the challenges. There was only one doctor who remained and there were problems with his evidence. I think it is in one of the bundles, I cannot recall which one. But I think it will be in one of the reports that were submitted to me.

COMMISSIONER KGOMO: You could not call Ms Helen Zille to give evidence in the BICO matter?

ADV NGCUKA: Sorry, Commissioner, I did not get you.

COMMISSIONER KGOMO: I said in the BICO matter, you could not call Ms Helen Zille to give evidence.

10 ADV NGCUKA: Unfortunately, she did not have any credible evidence that you could rely on.

COMMISSIONER KGOMO: Yes, okay.

ADV VARNEY: So we have found a reference in one of the documents, I think one party by McAdam, it is at page 105 of the bundle and it is from, yes, it is from McAdam to the deputy head of the DSO, copied to Leask, and he, page 105, he says Steve Biko, crime prescribed in 1997. And I think there are also some other references which we will look at. But if there is any information that you and your team have that could assist the Biko family?

20 ADV NGCUKA: I do not have any independent information other than what I received from the team.

ADV VARNEY: Thank you. And then, also in your evidence-in-chief, in a similar vein, you outlined the various practical and evidential challenges of pursuing, I suppose we could call them old cases or cold cases. And I think investigators and lawyers are familiar that the

older the case, the more difficult it becomes to investigate.

ADV NGCUKA: Yes.

ADV VARNEY: So we certainly recognise that, but we want to put it to you that, yes, they are difficult. It is difficult to find witnesses who are alive and who can testify. It is difficult to find documents. But we want to put it to you that, with the help of thorough, rigorous investigation and particularly forensic investigation, even cold cases can be solved many years later, sometimes even decades later.

ADV NGCUKA: That is true.

10 ADV VARNEY: So for example, the Ahmed Timo case before the reopened inquest in 2017, that case managed to be resolved. Same with Neil Agat case, which was before an inquest in 2021, the Hussein Hafeji matter and the Imam Harun matter, which were also held in recent years. And all those inquests managed to get to the bottom of what happened to those detainees.

ADV NGCUKA: Yeah, I agree with you. And then lastly, from your evidence-in-chief, you were giving some numbers of investigators, lawyers, and accountants. And I just wanted to check. I was assuming that you were talking about the DSO. Just to remind you,  
20 you mentioned 300 investigators, 55 lawyers, and five accountants. Was that the rough staff complement of the DSO?

ADV NGCUKA: Approximately, yes.

ADV VARNEY: Okay, if we can then, or perhaps we can deal with this now since my attorney has drawn it to my attention. And we will just have to quickly go back to President Mbeki's speech. And it is a

sentence in question I have already read to you. So I will just read the one sentence again.

“However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to cooperate in unearthing the truth.”

And so on. Now, the reference to intelligence agencies, did  
10 you have an idea of what the president had in mind? Or did you perhaps approach him to find out?

ADV NGCUKA: No, no, I did not.

ADV VARNEY: Okay.

ADV NGCUKA: No, I did not. I suppose it speaks to the issue that was raised by the Commissioner before lunch. Why would you involve the national intelligence? In some of the difficult cases that I have dealt with, we relied on the intelligence that we received from them, which we were then able to convert into evidence. So I would imagine that is the reason why the president was referring to.

20 ADV VARNEY: Yes, indeed. And I suppose that the NPA is entitled to gather evidence from wherever, leads and the like. So if it is simply a question of the intelligence agencies helping with the investigation, giving you facts.

ADV NGCUKA: With the investigation.

ADV VARNEY: So that would be no issue. Although as we have

seen from subsequent developments, it went further than that. It was not just a question of handing over information. It was sitting on committees. Anyway, we have dealt with that. We won't go down that particular road.

ADV NGCUKA: Sure.

ADV VARNEY: But perhaps what I think what I will do though is quote what McAdams said in relation to the role of the NIA on those committees. And we will just find it. That is part of the bundle, the McAdam affidavit. So we just have to find that, if you bear with us.

10 Okay, so it is in page 94. And yeah, he is referring to that task team that got created after the amendments were put in place. So page 94 at paragraph 30. He says:

20 “Advocate Pikoli was appointed as the NDPP. I was informed by Ackerman that Pikoli had set up an interdepartmental task team that would advise Pikoli on making decisions in TRC matters. Ackerman and Ramaite were the NPA representatives on the task team. On one or two occasions, I stood in for Ackerman in meetings on the task team when he was not available. I noticed that the task team was predominantly comprised of members of the intelligence community, who were more intent on cross-examining me as to why matters should be investigated rather than addressing the issue of all the outstanding cases.

So from McAdam's perspective, he was not getting support. They were intent on establishing why McAdam wanted to go ahead with these cases.

ADV NGCUKA: This probably would strengthen the decision that we took earlier.

ADV VARNEY: Yes.

ADV NGCUKA: Not to participate in that forum.

ADV VARNEY: Yes, indeed.

ADV NGCUKA: If this is what happened to Chris McAdam.

10 ADV VARNEY: It certainly reinforces that decision. And while we are on McAdam, I will just put one last paragraph to you. It is on page 98 at paragraph 47 at the bottom of the page. And this is on the question of investigations. McAdam spends a few pages setting out the attempts he and Ackerman made to get investigations on the TRC cases. And so his penultimate paragraph, he says:

These documents speak for themselves and go a long way in explaining why from 2003, the PCLU constantly struggled to have TRC cases investigated.

20 So he seems to be confirming that some years later, towards 2009, 2010, they were still battling to get investigators onto these cases. But again, post your term.

ADV NGCUKA: Yes.

ADV VARNEY: All right, then let us move to an internal memo. That is at page 267 of this new bundle. And this is a secret internal memo

that Advocate Ackerman addressed to Advocate Pikoli, who was then NDPP. It is dated 16 May 2006. And the subject is National Intelligence Agency Incidents. If I can draw your attention to paragraphs 13 and 14, at page 271, because your name appears.

So I will just read these into the record and then you can respond to them.

ADV NGCUKA: You said paragraph 13?

ADV VARNEY: Yeah, I will start reading at 13 just to give it a bit of context.

10 ADV NGCUKA: Just a minute, just a minute.

ADV VARNEY: It is at page 271.

ADV NGCUKA: Thank you, got it.

ADV VARNEY: Okay.

20 “Due to the difficulties encountered with the DSO, my two deputies and I met with Commissioner Lalla to inform him of my unit’s mandate and to request him to channel any intelligence relating to the cases to my unit. During the course of these discussions, I did express my dissatisfaction with the DSO and informed him of the allegations being made against the president. McAdam also asked his assistance concerning the Motherwell case, where the accused were alleging that the deceased had been killed because they were MK operatives. As I subsequently discovered, this

conversation was clandestinely recorded both on audio and video.”

Just so you know, this meeting took place in August of 2003.

And then in paragraph 14:

10 “At a later stage, my two deputies and I were at short notice summoned to a meeting with Mr Ngcuka. Mr Ngcuka informed me that Commissioner Selebi had addressed a meeting of the Directors General and alleged that Mr Ngcuka was preparing to have the president and six  
generals arrested and charged with terrorism. Mr Ngcuka further informed me that Commissioner Selebi was in possession of a video recording in which I had admitted that the president was due to be arrested. I was then shown the video recording of my meeting with Commissioner Lalla. And this is how I learned that the meeting had been recorded.”

20 Perhaps let us also do, since It is connected, we will do 15 as well.

“Mr Ngcuka further informed me that Commissioner Selebi had complained about the NPA being in possession of SAPS dockets. Apparently, the allegation was that these dockets contained the evidence that would be used to

prosecute the president and other high-profile ANC leaders. I denied the existence of both an attempt to arrest the president and others, as well as the existence of the so-called relevant police dockets against them. Mr Ngcuka then made arrangements for you and the three police commissioners to be present at Advocate Mpshe's office the next day for an inspection of the dockets to be carried out."

10 Do you recall any of these developments?

ADV NGCUKA: Yes, I do.

ADV VARNEY: And is this roughly an accurate portrayal of what transpired?

ADV NGCUKA: Yes. You want me to comment on it?

ADV VARNEY: If you can offer comment, then please go ahead.

ADV NGCUKA: No, no, indeed, it is true. What Anton here says is true. And I heard him testify that I was quite annoyed with him. That indeed is an understatement. I was angry. These things happened in August. And you will recall that I earlier testified about the period,  
20 what we are going through during that period. And for Anton to go and badmouth us to the police who were refusing at that time to cooperate with us, I found that to have been an act of betrayal. And so the people who had gone to see the video and some of my guys in the office were very angry and just like me. And wanted us to take disciplinary action against Anton. I said, no, people must be allowed

to gossip about their leaders. And you too, I am sure you do gossip about me when you sit in shiencie with your friends.

I did not hire Anton to love me. And he must continue as long as he does the good work. I am not going to take any action against him. And that is why he remained there. I had good respect for him, and as far as I am concerned, my attitude never changed to him because he did that. That is it.

ADV VARNEY: Indeed, it was Advocate Ackerman's evidence before this Commission that he was very lucky not to have been suspended.

10 On the question of the clandestine recording of that meeting, did you take that up with Commissioner Selebi?

ADV NGCUKA: Oh, no. No, not at all. We knew these are the things that were happening. These are the texts that were directed to the organisation. It would have been futile to go and talk to him about something that I knew he knew about. So, no.

ADV VARNEY: Okay. Then let us carry on. I think we are going to go up to paragraph 18. Sorry, paragraph 16.

ADV NGCUKA: Sorry, sorry. I closed my bundle.

ADV VARNEY: Oh, you closed it.

20 ADV NGCUKA: Where, page 260?

ADV VARNEY: You can turn to page 272.

ADV NGCUKA: 272, Thank you. Thank you.

ADV VARNEY: So, paragraph 16:

Advocate Mpshe's, at Advocate Mpshe's office,  
Mr Ngcuka invited SAPS to identify the dockets

relating to the president and others, which they were unable to do. Mr Ngcuka then instructed the SAPS commissioners to have all the SAPS dockets removed forthwith, and for the two SAPS members working with Advocate Fick to vacate their offices at the DPP's premises.”

You recall that?

ADV NGCUKA: Correct.

ADV VARNEY: In paragraph 17:

10 “Shortly thereafter, Minister Maduna personally visited Mr Ngcuka and myself and McAdam, and was fully briefed on all these developments. McAdam had compiled a report to Mr Ngcuka, in which he had expressed the opinion that having perused all the relevant TRC material, there was no case against the president or the other prominent ANC members who had been refused amnesty. A copy of the report is attached hereto.”

Unfortunately, it is not attached to our version.

20 “Minister Maduna also satisfied himself and said that the allegations made by Commissioner Selebi were untrue and undertook to inform the president accordingly.”

Do you have a recollection of that?

ADV NGCUKA: Yes, I do. It is correct.

ADV VARNEY: And then, paragraph 18:

“While I was absent from the office, I was informed by McAdam that Mr Ngcuka had summoned him to a meeting with Mr Billy Masetla.”

I believe at that time, Mr Masetla was the DG of National Intelligence.

ADV NGCUKA: That is correct.

10 “I was further informed that the purpose of the meeting was to satisfy the office of the president that there was no intention to prosecute the president. McAdam finally advised me that he had given Masetla a copy of his report and that he was satisfied with the manner in which the manner had been dealt with.”

Is that correct, to the best of your recollection?

ADV NGCUKA: That is absolutely correct.

ADV VARNEY: Now, again, we are dealing with events post your term of office, but did you then get to hear about the forged letter that Ackerman discovered had been put up in his name?

20 ADV NGCUKA: No, I was not aware of the letter. I just saw it in the bundles. I had never been told about it. That happened after my time.

ADV VARNEY: Yes, it happened after your time. In 2006, according to Advocate McAdam, this letter was forged to suggest that he was about to go ahead with the arrests or prosecutions of the ANC

leaders. Did you get to hear about that?

ADV NGCUKA: No.

ADV VARNEY: Can we then turn to a few pages from your book?

The book is part of a bundle. At page 227, it is titled, Bulelani and Ngcuka, The Sting in the Tail. The author is Marion Sparg. I just want to put a passage to you, halfway down the page. And this is at the time when you had set up the working group under Vincent Saldana.

And it reads:

10                   “Bulelani said he was obliged by law to prosecute  
                      where there was enough evidence to make a case.  
                      But at the same time, part of him asked if it was  
                      worth it. Part of him wanted to go for them, but  
                      another part asked whether these apartheid  
                      perpetrators, many of whom were broken or about  
                      to die, were really a threat to society.”

So that passage piqued our attention, because in your evidence-in-chief, you made it clear that you did want to go after these perpetrators.

ADV NGCUKA: Of course.

20   ADV VARNEY: So can I have your response to the passage in the Mandewina book that at the same time, you were asking whether it was worth it. That these apartheid perpetrators, many who were broken about to die, were really a threat to society?

ADV NGCUKA: Yes. That is true. These are some of the things that went through my mind at the time. We are thinking about it. Wanted

to go for them. Really did. But at the same time, there was this nagging at the back of my head. Should we spend the mega resources that we have going for these people who are already old, who might die during the prosecution, or shortly thereafter? What do we do? But at the end of the day, I said, no, let us go ahead. Let there be accountability. And let us follow what the law is. Of course, I had those doubts in my head.

ADV VARNEY: And on that score, I am sure you appreciate that for the families attempting to still pursue justice at this late stage, 10 perpetrators have died. Many are ill, unable to appear in court. And some, of course, end up dying just before they can make their appearance.

ADV NGCUKA: Indeed. I think those were the concerns that I had.

ADV VARNEY: Ja. Although, from the perspective of the families, you had those concerns in the late 1990s. And here we are some 25 years later, even more years later, and the families are still wishing to pursue. And the challenges they face are even greater because with the passage of time, there will be fewer and fewer suspects and witnesses left.

20 ADV NGCUKA: Certainly. But as you would know, at no point in time did I tell my people that they must not do these cases because of what I was thinking. So it did not influence whatever the guys were doing. All those doubts that I had in my head. And I would never have acted without consulting the victims. Whatever decision I may have taken at the end of the case. It would have been a matter that

would have involved consultations with the victims.

ADV VARNEY: Thank you, Mr Nkuku. I am just looking at whether there is anything else we need to... perhaps I can draw attention to 229. And I would like to read the bottom two paragraphs to you:

10            “In 2006, an insider noted that the unit’s ability to handle TRC cases was severely hampered by a standoff between the Scorpions and the SAPS about who was going to investigate the cases. And said that this matter had not been resolved at the time but Bulelani resigned in August, 2004. The PCLU itself did not have any investigators.”

You make reference to an insider noted. Any chance you can tell us who the insider is?

ADV NGCUKA: No, I do not know. But the truth of the matter is what we have been discussing here. That these were the challenges that we had at the time. The refusal to second the investigators either from the Scorpions or from the, from SAPs at the time, those were the challenges that we had.

ADV VARNEY: Yes, then the next paragraph:

20            “After Bulelani had quit the NPA, acting NDPP Silas Ramaite, called a moratorium on TRC-related cases. Bulelani's successor, Vusi Pikoli, complained later about improper interference in his work on the TRC cases and said, legally, I have reached a dead end. The failure of the NPA to

prosecute TRC-related crimes remains a sore point for many families and comrades of those who died at the hands of apartheid security forces.”

So, on that score, I just want to turn to what Silas Ramaite and Vusi Pikoli had to say. And let us start with Sias Ramaite. His statement is in this bundle from page 240. And I just want to bring to your attention a paragraph in Advocate Ramaite's statement in relation to a moratorium that got imposed on the TRC cases, again, post your term of office. So, paragraph 32:

10 I advised Advocate Ackerman SC, that it would be better to wait and have a better understanding of what was happening.

Just to give you the context, this was after an attempt had been made to carry out the arrests of certain suspects in the Frank Chikane matter. And what had happened is that the attorney for the suspects had gotten hold of Advocate Ackerman and asked him to not carry out the arrests. When Ackerman declined, he was then called by somebody within the Department of Justice. And then, ultimately, he was called by Advocate Ramaite and he was told not to  
20 pursue with the case at that time, pending the formulation of guidelines, eventually the amendments to the prosecution policy.

So, Ramaite says:

Shortly after I'd spoken with Advocate Ackerman, I received a telephone call from the Minister of Justice, Mrs Bridget Mabandla. She told me that there is a task team which was appointed by the

Director's General Forum to develop a mechanism to deal with the TRC cases. I expressed to the Minister my concern that any process or mechanism which involves the executive or the justice and security cluster would amount to encroaching in prosecutorial decision-making and would be a violation of prosecutorial independence as enshrined in Section 179 of the Constitution. The Minister nevertheless insisted that the prosecution of all TRC-related cases must be put on hold until the development and adoption of guidelines.

10 So, that is the context in which I want to put his concluding paragraphs to you to see if you agree with Advocate Ramaite. So, if you could turn now to page 254. And I am going to read those final four paragraphs:

I regard the imposition of a moratorium by the executive or a member of the executive on the prosecution of TRC cases purely on the basis of developing and adopting guidelines to deal specifically with these cases as a form of political interference.

20 51. The development and formulation of prosecution guidelines by a committee consisting of Directors General of the security clusters inconsistent with Section 179(5)(A) and (B) of the Constitution and Section 22(1) of the NPA Act and is unlawful.

52. I also regard the attempt to involve a body

consisting of Directors General to make recommendations on who to prosecute and who not to prosecute as an encroachment into prosecutorial independence.”

And lastly:

“There is no doubt in my mind that the effective investigation and prosecution of TRC cases was severely hampered by political interference.”

Do you agree with the sentiments of Advocate Ramaite?

10 ADV NGCUKA: Sorry? Oh, I thought you were saying something, Commissioner.

CHAIRPERSON: No, it was a question, do you agree with the statement of Ramaite.

ADV NGCUKA: No, no, I heard something emanating from your side, Commissioner, so I thought there was something. Ja, if...ja. I said yes.

ADV VARNEY: You agree with those paragraphs?

ADV NGCUKA: Ja.

20 ADV VARNEY: And then lastly, let us turn to what Vusi Pikoli said in an internal memorandum that he addressed to Minister Bridget Mabandla. And I believe that is at... I think it starts at page 256. It is a secret internal memorandum addressed by then NDPP Advocate VP Pikoli to Minister of Justice Ms BS Mabandla. The subject is Prosecution of Offences Emanating from Conflicts of the Past, Interpretation of Prosecution Policy and Guidelines. It is a long

memo, so I am not going to read all of it into the record, but let us just deal with the purpose of the memorandum in paragraph 1:

10           “The purpose of this memorandum is to inform the Minister about the NPA's understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past, committed on or before 11 May 1994. Inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines, and then propose a way forward.”

So Advocate Pikoli then, in that memorandum, he sets out in nuts and bolts fashion the history of the challenges that he had faced, as well as the PCLU, in particular that he was expected to wait for a recommendation from the DG's forum before he could proceed with prosecution on the TRC cases. And so ultimately, under his conclusion and way forward, and this is now on page 266, he says the following, in paragraph 5.2:

20           “I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and obstructed from carrying out my functions on this particular matter. Legally, I have reached a dead end. It would appear that there is a general expectation on the part of the Department of Justice for Development,

SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took does not allow that.

Based on the above, I cannot proceed further with these TRC matters in accordance with the normal legal processes and prosecuting mandate of the NPA as originally envisaged by government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the state, I am awaiting government's direction on this matter.”

10

As a former NDPP, reading such extracts from the then NDPP, what response do you have?

ADV NGCUKA: You know, I hesitate to comment about decisions that were taken by the guys who followed after me, because it is going to be difficult. You do not know the circumstances under which they were operating. One is not in possession of all the full facts. And I do not want to be seen to be critical of my successors. But let me say this. I cannot find any reason why the National Director can say he does not know what to do. The law is clear. You take the decision. You prosecute. You do not ask for the advice from other people. That would have been my view. And I thought I explained this. But most of the time, you get approached by various people who want you to change your decision and want you to behave in a particular fashion, be it politicians, be it business people, ordinary people. It happens all the time. But at the end of the day, it is your

20

decision alone.

So I do not know what caused my colleague to take that decision. But at the end of the day, he should have been the one to say no. That is my view.

ADV VARNEY: Well, you probably are aware that not long after that, later in the same year, he was suspended. And you might also be aware that Anton Ackermann, who was still the head of the PCLU, he was relieved of his duties in relation to the TRC cases by acting NDPP Mpshe. Does that not indicate an approach that the two of  
10 them, at least that government was taking, that the two of them should not be involved in these cases?

ADV NGCUKA: I am not qualified to comment on those. Because indeed, I do not know what were the pertinent facts which led to their suspension or to Anton being relieved of his duties. I am not aware of the facts.

ADV VARNEY: Okay. I am not going to press you further on that. Just for clarification, he was not relieved of his duties generally, just in relation to the TRC cases.

And then lastly, Minister Bridget Mabandla, she was  
20 appointed Minister of Justice on 29 April 2004. So a few months before you resigned from office. Did you have any discussions with her prior to your departure on the question of the prosecution of the TRC cases?

ADV NGCUKA: I may have. I may have. Because I reported to the Minister regularly and we had a very good working relationship. So

not just on the TRC cases, in my normal reports to the Minister, I may have mentioned these TRC cases.

ADV VARNEY: But you're unable to recollect the nature of the discussion?

ADV NGCUKA: No, no. I would have given the report about what is happening. What are we doing? Where are we with these cases? Where are we with respect, in respect of many other issues that we are dealing with?

ADV VARNEY: Right. My attorney has just reminded me of one  
10 further matter. And then we promised the Commissioners one hour and then we will pause from our side.

When I asked you somewhat earlier about, or rather I put to you what Laconia Calata had said in his affidavit, that in all likelihood, a direction was coming from a political level in relation to these cases. And your response was that that was not so, or that was unlikely or something to that effect?

ADV NGCUKA: I said that was not so, during my time.

ADV VARNEY: Certainly not in your time?

ADV NGCUKA: Yes.

20 ADV VARNEY: But would you agree that from the perspective of SAPS, the fact that their response was that they would only investigate if the President directed them in writing, that from their perspective, it had to come from a political level?

ADV NGCUKA: [Speaker 2]

Not necessarily so, not necessarily. You must remember that we had

these problems of turfs between us and between the police and the Scorpions. And the police had taken a view that it was not necessary for the President to have established the DSO, that they were capable of doing all these cases.

And so writing that note, in my view, from Commissioner DPA, was to say, go and tell the President that you do not have capacity to do these cases. And so it had nothing to do with political interference at all, in my thinking. It was purely to say, the President must trust us, we can do this work other than you guys.

10 ADV VARNEY: We, on that score, Mr Ngcuka, we will be submitting at the appropriate time that, that was yet further evidence of the fact that at a very high political level, these cases were receiving attention and that an entity like the SAPS were not willing to get involved without that kind of political instruction. That is what we will be submitting to the Commission.

ADV NGCUKA: Sure, ja.

ADV VARNEY: Mr Ngcuka, many thanks for your time and the support that you have given this Commission. No further questions, Commissioners.

20 CHAIRPERSON: Thank you, Mr Varney. You have been true to your undertaking that it will take you an hour to conclude your cross-examination. We commend you on that one.

ADV VARNEY: Thank you Commissioner.

CHAIRPERSON: Mr Semanya?

ADV SEMENYA: Chair, I do not know if there won't be any

clarificatory questions asked of the witness before I come.

CHAIRPERSON: No, this is cross-examination. There are no clarificatory questions allowed.

ADV SEMENYA: Mr Ngcuka, good afternoon to you.

ADV NGCUKA: Good afternoon, sir.

ADV SEMENYA: You have been very emphatic within the meaning of the terms of reference that there was never any external effort or attempts at making the prosecutions of TRC cases to be stopped. I am right, eh?

10 ADV NGCUKA: That is correct. And we have trawled through the papers and could not see any suggestion that during your tenure any effort was done to stop the prosecution of these TRC cases. That we can accept?

ADV NGCUKA: That is correct, sir.

ADV SEMENYA: There is a small area which I want to test with you, and I have listened throughout to the questions put to you on behalf of the Calata Group. For ease of reference, I have given a document that is A-15, which is supposed to be a media release.

20 ADV NGCUKA: Just bear with me, I had it here. I must have swapped it in this files. Ah, I have got it, thanks.

ADV SEMENYA: All right. That purports to be an MPA media release. You would see it is dated 13 May 2004.

ADV NGCUKA: That is correct. And it is on its reading issued by Sipho Ngwenya, Executive Manager, MPA Communications.

ADV NGCUKA: Correct.

ADV SEMENYA: I just want to read the first paragraph and then have a conversation with you about it.

ADV NGCUKA: Sure.

ADV SEMENYA: It reads:

The National Prosecuting Authority, NPA, has decided not to launch any investigation into 37 ANC leaders who were refused amnesty by the TRC. Do you see that?

ADV NGCUKA: Correct.

10 ADV SEMENYA: Were you familiar with this press release at the time?

ADV NGCUKA: Correct.

ADV SEMENYA: It would have emanated from your office?

ADV NGCUKA: I authorised it.

ADV SEMENYA: You authorised it. What I did try to establish was whether that decision ever was made in writing outside of this media release.

ADV NGCUKA: Whether the decision was?

ADV SEMENYA: Was in writing.

20 ADV NGCUKA: The recommendation was in writing. It came from that unit, the PC, Anton Ackerman's unit.

ADV SEMENYA: Yes. But their decision itself was never in writing if I understand Mr McAdam. It says it was a decision that was made after they gave you a briefing.

ADV NGCUKA: No, they both, they wrote a report which they sent to

my office, which was accompanied by a briefing. And so the statement was then drawn out of that.

ADV SEMENYA: Or he might just be mistaken to think that the briefing was verbal, where he uses the word oral. He might be mistaken. There was something in writing.

ADV NGCUKA: Yes, there was. There was a report that they have controlled all the files and they cannot find any evidence whatsoever to proceed.

ADV SEMENYA: Yes, I have seen.

10 ADV NGCUKA: That report was initially submitted. McAdam prepared the report and he gave it to Anton, who then confirmed it and gave it to me. And then they came to brief me about it and we agreed that we need to release the press statement.

ADV SEMENYA: Both may be consistent with one another. I am alive to the fact that the advocates had written down documents suggesting there is no evidence against the ANC 37.

ADV NGCUKA: Yes.

ADV SEMENYA: Now, one of the recommendations that would have come from the TRC was that investigations of those matters must  
20 happen.

ADV NGCUKA: Correct.

ADV SEMENYA: And by 13 May, the decision was that there is no evidence. I am interested to enquire what investigation had happened between the release of this TRC recommendation for the investigation of these matters, and the decision not to investigate.

ADV NGCUKA: These cases were investigated prior to coming to my office. They were in the TBP's office in Pretoria and there had been a thorough investigation, which was done. And so what my office did was to go through the dockets which were there and they followed up with the people who were mentioned in the dockets. I cannot recall now. I think there was an entity that called Equality before the Law. I cannot remember. Followed with them to say, please give us the information that you have and others. So there was that investigation that was done and there was not enough evidence to even declare

10 that in terms of Section 28.

ADV SEMENYA: What I am trying to establish is, would the investigations have also included things like warning statements of the 37?

ADV NGCUKA: I am not, I would imagine so, Counsel, but I personally, of course, the dockets. I think Chris and Anton will be able to assist you there.

ADV SEMENYA: Yes, we will engage them about that. There are dockets that are said to be at Visagie offices in Pretoria. You do not know about those, do you?

20 ADV NGCUKA: There is no office in Visagie, as far as I know. This would have been either in the DPP's office or in my office.

ADV SEMENYA: All right.

ADV NGCUKA: And those dockets that were in the DPP's office are the ones that were taken over to my office.

ADV SEMENYA: Yes. Okay, I will take that journey with the two

advocates when they come. What could have been in those dockets to sustain the conclusion that is reflected in this media report?

ADV NGCUKA: Sure.

ADV SEMENYA: I have no further questions to you.

CHAIRPERSON: Thank you.

COMMISSIONER GABRIEL: Mr Nuka, I have a hypothetical question.

ADV NGCUKA: All right.

10 COMMISSIONER GABRIEL: Given the important role that you played in our country as the NDPP, if you had taken a decision to prosecute one of these TRC matters, and subsequently the Committee of Directors General was put together to advise you after you had taken the decision to prosecute, would you, in your role, have regarded that as an effort or an attempt to influence or to pressure you to stop prosecuting?

ADV NGCUKA: Yes, I could have regarded it as such, but in my case, I would have listened to them.

COMMISSIONER GABRIEL: You would have listened, and you...  
(intervenes)

20 ADV NGCUKA: I would have listened to them.

COMMISSIONER GABRIEL: And your response to them would have been?

ADV NGCUKA: Thank you very much.

COMMISSIONER GABRIEL: Goodbye.

ADV NGCUKA: Thank you.

COMMISSIONER GABRIEL: Okay, thanks. You have made your position perfectly clear. Thank you.

CHAIRPERSON: Mr Bhana?

MR BHANA: We have no questions, clearly for (indistinct), or by way of re-examination.

CHAIRPERSON: Thank you. Mr Ngcuka, we thank you for having availed yourself to come and give evidence before this Commission, given your hectic schedule. We appreciate it. You are now excused as a witness.

10 ADV NGCUKA: Thank you. Thank you, Commissioner.

CHAIRPERSON: These proceedings are adjourned until tomorrow at 10:00.

INQUIRY ADJOURNS TO 12 MARCH 2026

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## CERTIFICATE OF VERACITY

We, the undersigned, hereby certify that **as far as it is audible**, the foregoing is a true and correct transcript of the digitally recorded proceedings in the matter of:

### JUDICIAL COMMISSION OF INQUIRY INTO TRC

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**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 APPLICATION IS NOT APPLICABLE	

In the matter between:

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

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

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JUDGMENT

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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 Semanya 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

For the Applicants  
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## CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/09  
[2010] ZACC 4

RYAN ALBUTT

Applicant

and

CENTRE FOR THE STUDY OF VIOLENCE AND  
RECONCILIATION

First Respondent

KHULUMANI SUPPORT GROUP

Second Respondent

INTERNATIONAL CENTRE FOR TRANSITIONAL  
JUSTICE

Third Respondent

INSTITUTE FOR JUSTICE AND RECONCILIATION

Fourth Respondent

SOUTH AFRICAN HISTORY ARCHIVES TRUST

Fifth Respondent

HUMAN RIGHTS MEDIA CENTRE

Sixth Respondent

FREEDOM OF EXPRESSION INSTITUTE

Seventh Respondent

and

PRESIDENT OF THE REPUBLIC OF SOUTH  
AFRICA

Eighth Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL

DEVELOPMENT	Ninth Respondent
GERHARDUS JOHANNES TALJAARD	Tenth Respondent
AREND CHRISTIAAN DE WAAL	Eleventh Respondent
WILLEM JACOBUS PETRUS JACOBS	Twelfth Respondent
HANS JACOB WESSELS	Thirteenth Respondent
RYNO ADRIAAN ROSSOUW	Fourteenth Respondent
JOHANNES BENJAMIN VAN DER WESTHUIZEN	Fifteenth Respondent

Heard on : 10 November 2009

Decided on : 23 February 2010

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## JUDGMENT

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NGCOBO CJ:

*Introduction*

[1] This case concerns the power of the President to grant pardon under section 84(2)(j) of the Constitution to people who claim that they were convicted of offences which they committed with a political motive. Section 84(2)(j) provides that the

President is responsible for “pardoning or repleving offenders . . .”. The question we are asked to decide is whether the President is required, prior to the exercise of the power to grant pardon to this group of convicted prisoners, to afford the victims of these offences a hearing. This case arises out of an application for leave to appeal directly to this Court and an application for direct access brought to this Court by the applicant, Mr Albutt.

[2] The application for leave to appeal is directed at an order of the North Gauteng High Court, Pretoria (High Court)<sup>1</sup> granting an interim interdict. That interdict prevented the President from granting any pardon under section 84(2)(j) pursuant to a special dispensation process for presidential pardon for political offences, pending the finalisation of the main application foreshadowed in Part B of the Notice of Motion.<sup>2</sup> The application for direct access is for an order declaring invalid section 1 of the

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<sup>1</sup> *Centre for the Study of Violence and Reconciliation and Others v President of the Republic of South Africa and Others* Case No 15320/09, North Gauteng High Court, Pretoria, 29 April 2009, as yet unreported.

<sup>2</sup> In Part B of the Notice of Motion the first to seventh respondents in this application sought the following:

- “1. The first respondent is interdicted from granting any pardon in terms of the ‘*Special dispensation for Presidential pardons for political offences*’.
2. (Alternatively to paragraph 1) The first respondent is interdicted from granting any pardon in terms of the ‘*Special dispensation for Presidential pardons for political offences*’ unless and until the victims of the offence(s) in question, and other persons who were affected by such offence(s):
  - 2.1 have been given access to the relevant application for a pardon and the proceedings and recommendations of the Pardons Reference Group in that regard; and
  - 2.2 have been given an opportunity to make representations in that regard to the first respondent.
3. The first respondent is ordered (and the second respondent is ordered, only in the event of his opposing this application, jointly and severally) to pay the costs of this application.
4. Further or alternative relief.”

Promotion of Administrative Justice Act, 2000 (PAJA).<sup>3</sup> This relief is sought in the event this Court finds that, upon its proper construction, section 1 of PAJA<sup>4</sup> defines administrative action to include the exercise of the power to grant pardon under section 84(2)(j).

[3] The President and the Minister for Justice and Constitutional Development (the Minister) support both applications. For convenience I shall refer to the President and the Minister as “the state”. A coalition of non-governmental organisations (the NGOs) resists both applications. In these proceedings they are the first to the seventh respondents.<sup>5</sup>

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<sup>3</sup> 3 of 2000.

<sup>4</sup> Section 1 of PAJA provides:

“In this Act, unless the context indicates otherwise—

‘administrative action’ means any decision taken, or any failure to take a decision, by—

- (a) an organ of state, when—
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—
  - (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution”.

<sup>5</sup> In order of appearance they are: the Centre for the Study of Violence and Reconciliation, the Khulumani Support Group, the International Centre for Transitional Justice, the Institute for Justice and Reconciliation, the South African History Archives Trust, the Human Rights Media Centre and the Freedom of Expression Institute.

*Factual background*

[4] On 21 November 2007, former President Mbeki announced a special dispensation for applicants for pardon who claimed that they were convicted of offences that were politically motivated. This dispensation was aimed at dealing with the “unfinished business” of the Truth and Reconciliation Commission (the TRC).<sup>6</sup> This “unfinished business” included “the question of amnesty for many South Africans who had not participated in the TRC process for a number of reasons”.<sup>7</sup> As the former President explained:

“As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this ‘unfinished business’.”<sup>8</sup>

[5] The former President also announced the establishment of a multiparty Pardon Reference Group (the PRG) which would assist him in the discharge of his constitutional responsibility to consider requests made for pardons by offenders who fall within the special dispensation process. Persons who qualified for pardon under this process were “[p]ersons who were convicted and sentenced solely on account of allegedly having committed politically motivated offences before June 16, 1999” and who had not applied

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<sup>6</sup> Address by President of South Africa, Thabo Mbeki to the Joint Sitting of Parliament to Report on the Processing of some Presidential Pardons, Cape Town, 21 November 2007 available at <http://www.thepresidency.gov.za/president/sp/2007/sp11211540.htm> (accessed on 15 December 2009).

<sup>7</sup> Id.

<sup>8</sup> Id.

for amnesty by the TRC.<sup>9</sup> Originally, requests for pardons pursuant to this process had to be made between 15 January and 15 April 2008, but this period was later extended to 31 May 2008. The PRG was formally constituted on 18 January 2008. Pursuant to its Terms of Reference, one of its responsibilities was to “[c]onsider each application for pardon and make recommendations to the President.”<sup>10</sup> And the PRG had the power to develop its own rules and procedures.<sup>11</sup> The PRG had a limited lifespan which did not extend beyond 30 November 2008.

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<sup>9</sup> Item 7 of the Terms of Reference for a Special Dispensation on Presidential Pardoning Process Relating to Certain Offenders sets out who qualified for pardons:

- “7.1 Persons who were convicted and sentenced solely on account of allegedly having committed politically motivated offences before June 16, 1999; and
- 7.2 Comply with the pre-determined criteria and procedures as set out in the application form, may apply to the President for pardon in the prescribed manner.
- 7.3 A person will only qualify for consideration for pardon if—
  - (a) he or she
    - (i) is presently serving a sentence of imprisonment;
    - (ii) was sentenced to a term of imprisonment or a fine for an offence which arose from or is related to, an act or omission associated with a political objective committed in the course of the conflicts of the past;
  - (b) the offence referred to in paragraph (a) was committed on or before the date of the inauguration of the President on 16 June 1999; and
  - (c) his or her application for pardon is accompanied by a prescribed affidavit or affirmation deposed to or affirmed by a person authorized by a political party or organization, institution, liberation movement or body, in which it is confirmed that the act or omission which constituted the offence in question, occurred under the instruction of, or in the execution of an order, instruction, command, direction, advice, plan or project of, or on behalf of, or with the approval of, or in furtherance, promotion or achievement of the policies, objectives or interests of, the said party, organization, institution, liberation movement or body of which the applicant was a member, agent or a supporter.”

<sup>10</sup> Item 2.3 of the Terms of Reference for the PRG.

<sup>11</sup> The NGOs attached to their founding affidavit an undated document, which is apparently part of a larger document. The part that is attached deals with criteria, rules and procedures for making recommendations to the President. According to this document the only means of verifying the version of an applicant for pardon is “a copy of the judgment” which “is . . . discussed as a verification tool in order to compare and contrast the version

[6] In announcing the special dispensation, the President also explained how he would deal with applications for pardon, stating that he would “seriously consider the recommendations made to him by the Reference Group”.<sup>12</sup> However, he emphasised that he would “form an independent opinion on the basis of the facts/information placed before him” to decide whether to grant or refuse a pardon.<sup>13</sup> He stated that in so doing he would—

“be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation; and, uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process”.<sup>14</sup>

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submitted by the applicant.” See para 4.1 no. 6 Criteria, Rules and Procedure Used for Purposes of Making Recommendation in each Application for a Pardon. This document does not make any provision for the victims to be heard. In addition, this document sets out the main criteria for making recommendations to the President, namely, whether the applicant is indeed a political offender and whether the release of the applicant would not endanger society. In addition, it lists the Norgaard Principles that would be taken into account in determining the two main criteria. C(i)–(v) of the Norgaard Principles are as follows:

- i. The motive of the offender – i.e. was it a political motive (e.g. to change the established order) or a personal motive (e.g. to settle a private grudge).
- ii. The context in which the offence was committed, especially whether the offence was committed in the course of or as part of a political uprising or disturbance.
- iii. The nature of the political objective (e.g. whether to force a change in policy or to overthrow the Government).
- iv. The legal and factual nature of the offence, including its gravity (e.g. rape could never be regarded as a political offence).
- v. The object of the offence (e.g. whether it was committed against Government property or personnel or directed primarily against private property or individuals).<sup>12</sup>

<sup>12</sup> President Mbeki’s Address above n 6.

<sup>13</sup> Id.

<sup>14</sup> Id.

[7] The Explanatory Memorandum, which the Department of Justice and Constitutional Development issued to explain the special dispensation process, reiterated that the President would be guided by these principles, values, criteria and objectives in considering applications for pardon. Neither the statement by the former President, nor the Terms of Reference for the PRG and the Explanatory Memorandum, dealt with the question whether the victims of offences in respect of which a pardon was sought under the special dispensation were entitled to make representations.

[8] Beginning in February 2008, the NGOs made numerous attempts to secure the participation of the victims in the special dispensation process. These attempts were finally rejected by the PRG during August 2008 when it told the NGOs that neither its Terms of Reference nor any law compelled it to call for input from the public, in particular, from the victims. The PRG referred the NGOs to the President as the “custodian of the [pardon] process” who could take such considerations into account.<sup>15</sup> Subsequent approaches to the Minister and the President were also unsuccessful. During March 2009, the Office of the President in effect declined the request for victim participation in the special dispensation and refused to furnish any undertaking in this regard. Litigation ensued.

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<sup>15</sup> Letter from Dr JT Delpont, Chairperson of the PRG to Dr Hugo van der Merwe, Transitional Justice Programme Manager, Centre for the Study of Violence and Reconciliation, 7 August 2008.

[9] The NGOs launched an urgent application in the High Court for an interdict preventing the President from granting any pardons in terms of the special dispensation process until the finalisation of the main application. The NGOs challenged the exclusion of victims from participating in the special dispensation process mainly on the grounds that it was inconsistent with section 33 of the Constitution,<sup>16</sup> the provisions of PAJA and the common law duty to act fairly. The application was resisted by the state on various grounds, including that the NGOs lacked standing and that the victims had no right to be heard when the President exercises the power to grant pardon under section 84(2)(j). The applicant and six other convicted prisoners<sup>17</sup> sought, and were granted, leave to intervene. They resisted the application on the same grounds as the state, but included non-joinder of other applicants for pardon as an additional ground.

### *High Court*

[10] The High Court found that the NGOs had standing because they were acting on behalf of victims who could not act in their own name, in the interests of victims, and

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<sup>16</sup> Section 33 of the Constitution of the Republic of South Africa, 1996 provides in relevant part:

- “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

<sup>17</sup> The applicant and the interveners were co-accused in a trial arising from certain events that took place in Kuruman in the Northern Cape in 1995. Municipal workers who were on a peaceful strike were severely assaulted with lethal weapons. The applicant and the interveners indiscriminately smashed cars of innocent bystanders and pursued and assaulted other black persons who had nothing to do with the striking workers. Among those assaulted were women and elderly persons. See *S v Whitehead and Others* 2008 (1) SACR 431 (SCA) at para 12. They were sentenced to various terms of imprisonment. Another intervener was Mr JB van der Westhuizen who had been convicted in connection with a bomb blast in a Worcester supermarket on Christmas Eve in 1996 that killed four people and injured 67. All the interveners had applied for political pardon. The interveners did not take part in the proceedings in this Court.

also in the public interest. On the non-joinder issue, the High Court held that non-joinder was not fatal to the application. It reasoned that it was not necessary to serve the papers on all applicants who had applied for pardon prior to the hearing of the matter. Only those applicants for pardon who had been recommended for pardon had to be served. As the NGOs did not know the identity of those applicants, it was not possible to serve the papers on them. The High Court accordingly ordered the government to provide the NGOs with a list of applicants who had been recommended for pardon; that the NGOs serve the papers on those applicants for pardon; and that the Minister make the other applicants for pardon aware of the proceedings.<sup>18</sup>

[11] On the central issue of whether the victims had the right to participate in the special dispensation process, the High Court answered this question in the affirmative. Its conclusion rests on at least three legs: (a) upon a proper construction, section 1 of PAJA defines administrative action to include the exercise of the power to grant pardon under section 84(2)(j),<sup>19</sup> and hence the President is subject to the procedural requirements imposed by PAJA; (b) the effect of parole and pardon is the same and there is no justification for allowing victims of crime to be heard prior to a prisoner being released on parole but to deny victims a hearing when a prisoner is being considered for pardon;<sup>20</sup>

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<sup>18</sup> *Centre for the Study of Violence and Reconciliation* above n 1 at 33.

<sup>19</sup> *Id* at 25-6.

<sup>20</sup> *Id* at 27.

and (c) the President was bound by his commitment to be guided by the principles of the TRC.<sup>21</sup> The Court reasoned:

“[T]he President prior to releasing a prisoner on pardon, must have considered all the relevant information relating to the said prisoner. The said information should include, *inter alia*, the prisoner’s application, the inputs of victims and/or families of that particular crime and any other relevant information which might come from any interested party. The inputs from the other interested parties will enable the President to verify the facts stated by the applicant in the [pardon] application form.”<sup>22</sup>

[12] The High Court concluded that the victims of crime have a right to be heard prior to the exercise of the power to grant pardon under section 84(2)(j).

[13] The High Court accordingly granted an order interdicting the President from granting any pardons in terms of the special dispensation pending the finalisation of the main application. The state sought leave from the High Court to appeal to the Full Court of the High Court, alternatively, to the Supreme Court of Appeal. This application, which is apparently still pending in the High Court, prompted the applicant to seek leave from this Court to appeal directly to it. As indicated earlier, the applicant has also launched an application for direct access to this Court.<sup>23</sup>

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<sup>21</sup> Id at 30.

<sup>22</sup> Id at 27-8 with the substitution of “pardon” for “parole”.

<sup>23</sup> Above at [1].

[14] These proceedings are a sequel.

[15] It is convenient to consider first the application for leave to appeal.

*Procedural and preliminary issues*

[16] The central issue presented in the application for leave to appeal is whether the victims of the offences for which pardon is sought under the special dispensation process are entitled to be heard prior to the exercise of the power to grant pardon. However, to reach this issue we must first decide whether—

- a) condonation should be granted to the applicant for the late filing of his application for leave to appeal and to the NGOs for the late filing of their answering affidavit;
- b) leave to appeal directly to this Court should be granted;
- c) the NGOs have standing; and
- d) the High Court should have non-suited the NGOs for failure to join the applicants for pardon under the special dispensation.

[17] I propose to deal with the procedural and preliminary issues first.

*Should condonation be granted?*

[18] The application for leave to appeal was late by some nine days. The explanation for this delay is that initially the applicant was content to proceed with the main

application. However, when the President sought leave to appeal to the Full Court of the High Court or the Supreme Court of Appeal, he became concerned about the delay this might entail and decided to appeal directly to this Court. The NGOs do not persist with their objection to the granting of condonation to the applicant. The NGOs were late by one day in filing their answering affidavit to the application for leave to appeal, and their application for condonation is not opposed by the applicant and the state.

[19] In the case of the applicant, the period of delay is minimal, there is a satisfactory explanation for the delay and there is no suggestion of prejudice. In the case of the NGOs, the delay is minimal. In these circumstances, condonation should be granted to both the applicant and the NGOs. An order to this effect will therefore be made.

*Should leave to appeal be granted?*

[20] The question whether leave to appeal should be granted depends upon whether (a) the application raises a constitutional matter and (b) it is in the interests of justice to grant leave. The application raises questions of considerable constitutional importance concerning the powers of the President to grant pardon under section 84(2)(j). Indeed, the NGOs do not contest that the application raises a constitutional matter. However, the NGOs contend that it is not in the interests of justice to grant leave to appeal.

[21] The NGOs made much of the non-appealability of the High Court order, since it took the form of an interim interdict. They submit that it lacked the three attributes of an

appealable order, that (a) it must be final in effect, and not susceptible to alteration by the court of first instance; (b) it must be definitive of the rights of the parties; and (c) it must have the effect of disposing of at least a substantial portion of the relief sought in the main application.<sup>24</sup> The NGOs submit that it is well-established that the granting of an interim interdict is not appealable under the Supreme Court Act, 1959.<sup>25</sup> While acknowledging that the test for leave to appeal to this Court does not require the satisfaction of these criteria, they submit that this Court should not entertain appeals against orders which have no final effect on the dispute between the parties. They submit that the order sought to be appealed against is such an order.

[22] What must be emphasised at the outset is that the interim nature of the order is not in itself determinative of whether it is in the interests of justice to grant leave to appeal. It is a factor that is relevant to the overall enquiry into the interests of justice. This is so because section 167(6)(b) of the Constitution prescribes the interests of justice as the standard for granting leave to appeal directly to this Court.<sup>26</sup> The question for

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<sup>24</sup> See *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 6 and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J.

<sup>25</sup> 59 of 1959.

<sup>26</sup> Section 167(6) provides:

“National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—

...

(b) to appeal directly to the Constitutional Court from any other court.”

See also section 16(2) of the Constitutional Court Complementary Act Amendment Act 79 of 1997, which provides:

“The rules shall, when it is in the interests of justice and with leave of the Court, allow a person—

(a) to bring a matter directly to the Court; or

(b) to appeal directly to the Court from any other court.”

determination, therefore, is whether it is in the interests of justice to grant leave to the applicant to appeal against the order of the interim interdict pending the finalisation of the main application.

[23] What is in the interests of justice must be determined in the light of the facts of each case.<sup>27</sup> The policy considerations that inform the non-appealability of interlocutory orders under the common law and section 20 of the Supreme Court Act are relevant, but not decisive, in this enquiry.<sup>28</sup> However, it will not generally be in the interests of justice for this Court to entertain appeals against interlocutory rulings which have no final effect on the dispute between the parties.<sup>29</sup> There are sound policy considerations for this. It is indeed “undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance.”<sup>30</sup> This consideration must of course be balanced against the fact that a final determination of the main dispute between the parties, which decisively contributes to its final resolution, might be more expeditious and cost-effective.

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See also *Khumalo* above n 24 at para 7 and *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC) at para 6.

<sup>27</sup> *TAC (No 1)* above n 26 at para 8 and *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

<sup>28</sup> See *Khumalo* above n 24 at para 8; and *TAC (No 1)* above n 26 at para 8.

<sup>29</sup> *Khumalo* above n 24 at para 8.

<sup>30</sup> See *TAC No 1* above n 26 at para 9 and *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59.

[24] Ultimately, when determining whether it is in the interests of justice to grant leave to appeal against an interim interdict, the following considerations, while not exhaustive, are relevant:

- a) the facts of the case;
- b) the nature of the interim order and, in particular, the effect of upholding the interim order on the main application;
- c) the desirability of having the views of an appellate court on the matter;
- d) whether the matter is appealable;
- e) the importance of a determination of the constitutional issues raised in the interim order;
- f) whether the issues raised by the interim order require urgent resolution; and
- g) the prospects of success.<sup>31</sup>

[25] The NGOs submit that the order of the High Court is clearly interlocutory and has no final effect on the dispute between the parties. Our courts have held that, in determining whether an order is final in effect, what matters is not only the form of the order “but also, and predominantly[,], its effect”.<sup>32</sup> An interim interdict has a final effect if it disposes of any issue or portion of an issue in the main application; put differently, if it “anticipates or precludes some of the relief which would or might be given at the

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<sup>31</sup> See *Khumalo* above n 24 at para 10.

<sup>32</sup> *Metlika Trading Ltd and Others v Commissioner for SARS* [2004] 4 All SA 410 (SCA) at para 23; *Zweni* above n 24 at 532H-I and *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H.

hearing”.<sup>33</sup> An examination of the issues raised in the interim interdict proceedings and the manner in which they were dealt with may help to determine whether the court meant to express a final decision on those issues, that is, whether it intended to dispose finally of those issues or any part thereof.<sup>34</sup>

[26] The order made by the High Court rests mainly on two findings of law: (a) the exercise of the power to grant pardon constitutes administrative action; and (b) the victims of crime have a right to be heard prior to the President’s decision to grant pardon under section 84(2)(j). These definitive findings of law by the High Court dispose of the issue whether victims have a right to be heard prior to the exercise of the power to grant pardon, an issue foreshadowed in the alternative relief sought by the NGOs in the main application. The order of the High Court is therefore final in effect; it is definitive of the rights of the victims to be heard prior to the decision whether to grant pardon; and it has the effect of disposing of the alternative relief claimed by the NGOs in the main application, although in theory it remains susceptible to alteration by the High Court.<sup>35</sup>

[27] There are further considerations which weigh in favour of the granting of leave to appeal. There is significant public interest in determining whether the President should hear victims of political offences prior to granting pardon in relation to those offences.

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<sup>33</sup> *Metlika Trading* above n 32 at para 21 citing *Pretoria Garrison Institutes v Danish Variety Products (Pty.), Limited* 1948 (1) SA 839 (A) at 870. See also *Zweni* above n 24 at 532J-533A with the substitution of “any” for “substantial”.

<sup>34</sup> *African Wanderers Football Club (Pty.) Ltd. v Wanderers Football Club* 1977 (2) SA 38 (A) at 46C.

<sup>35</sup> See *Zweni* above n 24 at 532I-533A and *Pretoria Garrison Institutes* above n 33 at 870.

This is so because of the close relationship between the TRC process and the special dispensation process. There are some 2 114 applications for pardon in respect of political offences that are pending. There are, no doubt, other applications for pardon in relation to other offences that are pending. The record indicates that some of the applications for pardon in respect of political offences have been pending since 2002. While there is no right to a pardon, the applicants for pardon are at least entitled to have their applications considered without delay.<sup>36</sup>

[28] In addition, the decision of the High Court has cast grave doubt over the power of the President to decide applications for pardon without calling for the views of victims. It is clear from the judgment of the High Court that its conclusion on section 84(2)(j) goes beyond the special dispensation process and relates to the exercise of the power under section 84(2)(j) in general. It is desirable and in the public interest that this issue be resolved as soon as possible to enable the President to carry out his constitutional obligations without delay. While the views of the Supreme Court of Appeal or the Full Court of the High Court would no doubt have been of benefit to this Court, delays caused by the appeal process would be prejudicial to the public interest.

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<sup>36</sup> Section 237 of the Constitution. See *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25 (30 September 2009), as yet unreported, at para 30.

[29] Moreover, this is not a case where the prospects of success are necessarily determinative of the interests of justice.<sup>37</sup> The issue raised in the application for leave to appeal is of considerable constitutional importance concerning the powers of the President to grant political pardon under section 84(2)(j). It is an issue which goes to the “unfinished business” of nation-building and national reconciliation. It is an issue which calls for an early and definitive decision of this Court.

[30] For all these reasons, I am satisfied that it is in the interests of justice that leave to appeal be granted to the applicant to appeal directly to this Court. An order to this effect will therefore be made.

[31] There are two additional preliminary issues to address before considering the main issue in the appeal. The one relates to standing, and the other relates to the non-joinder of other applicants for political pardon.

### *Standing*

[32] The applicant makes a qualified concession in relation to standing. While accepting that the NGOs have standing, he nevertheless contends that they were only entitled to seek declaratory relief and were not entitled to seek an order preventing the President from granting pardons. In support of this contention, the applicant submits that

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<sup>37</sup> See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12 and *Fraser v Naude and Others* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10.

each application for pardon must be considered individually to determine whether it should be allowed to proceed. This is necessary, so the argument goes, because certain victims and perpetrators may well have become reconciled and victims might want their perpetrators to be pardoned. The applicant submits that in these circumstances it would be unfair to prevent all special dispensation pardons from being granted.

[33] The concession that the NGOs have standing was properly made. Our Constitution adopts a broad approach to standing,<sup>38</sup> in particular, when it comes to the violation of rights in the Bill of Rights.<sup>39</sup> This is apparent from the standing accorded to persons who act in the public interest. This ground is much broader than the other grounds of standing contained in section 38.<sup>40</sup> The NGOs have standing on at least two grounds.<sup>41</sup>

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<sup>38</sup> See, for example, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 229.

<sup>39</sup> Section 38 of the Constitution provides:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

<sup>40</sup> See *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 15.

<sup>41</sup> Organisations similar to the NGOs have been found to have standing before this Court. See, for example, *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at paras 20-2 and *Lawyers for Human Rights* above n 40 at paras 14-8.

[34] First, they are litigating in the public interest under section 38(d) of the Constitution. The NGOs contend that the exclusion of victims from participation in the special dispensation process violates the Constitution, in particular, the rule of law. They submit that, as civic organisations concerned with victims of political violence, they have an interest in ensuring compliance with the Constitution and the rule of law. Second, they are litigating in the interest of the victims under section 38(c). The victims whose interests the NGOs represent were unable to seek relief themselves because they were unaware that applications for pardons affecting them were being considered. The process followed by the President made no provision for the victims to be made aware of the applications for pardons, nor to be given the opportunity to make representations.

[35] The primary purpose of the litigation is to safeguard and vindicate the asserted right of the victims of the offences in respect of which pardons are sought to have an opportunity to be heard. A declaratory order without an interdict would not have been effective in protecting the rights of victims, in particular, those who might want to oppose the granting of a pardon. Having regard to the interests which the NGOs seek to protect, and the basis for their standing, there is simply no reason for limiting the relief they could seek to a declaratory order. I conclude that the NGOs have standing to seek the interim order interdicting the granting of pardons.

*Non-joinder*

[36] The applicant does not pursue the issue of non-joinder. He properly conceded that the interests of other applicants seeking pardon, who are not before this Court, were adequately looked after. Indeed, the interest that the applicant has in this case is identical to that of other applicants for pardon who are not before this Court.

[37] With these preliminary issues out of the way, I now turn to consider the central question presented in this appeal, namely, whether the victims of political offences in respect of which pardons may be granted under the special dispensation are entitled to a hearing prior to the exercise of the power to grant pardon.

*The contentions of the parties*

[38] The NGOs contend that the victims of the offences in respect of which pardons are sought under the special dispensation process are entitled to be heard. They challenge the decision to exclude the victims from participating in the special dispensation process on three main grounds. First, they contend that the decision to exclude the victims from participating in the special dispensation process is irrational. They submit that it is not rationally related to the objectives which the dispensation seeks to achieve, namely, national unity and national reconciliation. Second, they contend that the context-specific nature of the special dispensation process requires the President to give the victims an opportunity to be heard prior to making a decision to grant a pardon. Third, they contend that the exercise of the power to grant pardon constitutes administrative action under section 1 of PAJA and that this attracts the duty to afford the victims a hearing.

[39] The applicant and the state challenge the right of victims to be heard when the President exercises the power to grant pardon. First, they deny the charge of irrationality pointing out the differences between the amnesty process and pardon. Second, they contend that the exercise of the power under section 84(2)(j) is executive action and does not constitute administrative action. They submit that, properly construed, the definition of administrative action in section 1 of PAJA excludes the power to grant pardon. Third, confronted by what was described as incoherence in section 1 of PAJA, and, in the event of this Court finding that, upon a proper construction, section 1 of PAJA defines administrative action to include the exercise of the power to grant pardon, counsel for the applicant submit that PAJA is unconstitutional. This submission forms the basis of the application for direct access. The argument advanced by the state was substantially the same.

[40] In the course of oral argument the applicant also advanced two contentions which it will be convenient to dispose of before addressing the main questions presented in the case. The first concerned compliance with section 101(1)(b) of the Constitution,<sup>42</sup> and the other raised the question whether the President had in fact taken a decision to refuse to afford the victims a hearing.

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<sup>42</sup> Section 101(1) of the Constitution provides:

“A decision by the President must be in writing if it—  
...  
(b) has legal consequences.”

*The argument based on section 101(1)(b)*

[41] The applicant submits that we should not pay any attention to what the former President said in Parliament because it was not in writing and, accordingly, has no legal consequence under section 101(1)(b). For purposes of disposing of this argument, it is not necessary to explore the meaning and scope of section 101(1)(b). Suffice it to say that, after announcing the special dispensation process, the President took concrete steps to give effect to this process.

[42] He established the PRG; its terms of reference were adopted in writing; the PRG adopted its criteria and procedures for making recommendations to the President; an Explanatory Memorandum was issued to inform the public of the special dispensation process, its objectives and the criteria, principles and the values that would guide the President in considering the applications; and the PRG has indeed made recommendations to the President. Apart from this, neither the President nor the Minister has taken up this point. On the contrary, former President Motlanthe, who deposed to an affidavit in these proceedings, declared under oath that he “intend[ed] to deal with applications for pardon . . . in line with the approach outlined by the then President [Mbeki].”

[43] In these circumstances, it can hardly be suggested that this Court should ignore what the President not only said, but also did to give effect to his speech. Whatever the

meaning and scope of section 101(1)(b), I am satisfied that this Court can rely on what the President said in order to determine the issues raised in this case. The argument of the applicant based on section 101(1)(b) must therefore be rejected.

*Did the President take a decision to deny the victims a hearing?*

[44] In the course of oral argument, there was some assertion by the applicant, albeit in a faint tone, that the President had not taken a decision to deny the victims a hearing. As I understand the argument, it was based on a statement in the affidavit of former President Motlanthe to the effect that although the PRG had refused to receive representations from the victims, this did not mean that the President would not allow representations from the victims. This statement, which was argumentative in tone, was not accompanied by an offer to afford the victims the opportunity to make representations.

[45] This argument faces two insurmountable hurdles. The first is that it ignores the tenor of the letter dated 13 March 2009 from the Office of the President. That letter was in response to a request to allow victims to participate in the special dispensation process. It is clear from this letter that the victims were not going to be allowed to make representations. Were it to be otherwise, it would have been an easy matter for the Office of the President to inform the victims that they would be allowed to make representations. This did not happen. On the contrary, and this is the second hurdle, both

in the High Court and in this Court, the state took the stance that the victims were not entitled to make representations.

[46] The matter must thus be approached on the footing that the Office of the President took the decision that the victims would not be allowed to make representations. It is this decision which the NGOs are challenging.

*Questions presented*

[47] This decision is challenged on three main grounds, namely that—

- (a) the decision to exclude the victims from participating in the special dispensation process is irrational;
- (b) the context-specific features of the special dispensation process requires the President to give the victims a hearing; and
- (c) the exercise of the power to grant pardon constitutes administrative action and therefore triggers the duty to hear people affected.

[48] I will consider each of these issues in turn.

*Is the decision to exclude the victims from participating in the special dispensation process irrational?*

[49] It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the

rule of law.<sup>43</sup> More recently, and in the context of section 84(2)(j), we held that although there is no right to be pardoned, an applicant seeking pardon has a right to have his application “considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality”.<sup>44</sup> It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.

[50] All this flows from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants.<sup>45</sup> To pass constitutional muster therefore, the President’s decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process.<sup>46</sup> If it is not, it falls short of the standard that is demanded by the Constitution.

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<sup>43</sup> See *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 38 and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 32.

<sup>44</sup> *Chonco* above n 36 at para 30 (footnote omitted). See also *SARFU* above n 43 at para 148 and *Fedsure* above n 43 at paras 56-8.

<sup>45</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 116 and *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 12.

<sup>46</sup> *Fedsure* above n 43 at para 58 and *Affordable Medicines* above n 43 at para 49.

[51] The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under section 84(2)(j).

[52] The applicant very properly concedes that this Court has the constitutional authority to examine whether the means adopted by the President are rationally related to the objective sought to be achieved by granting pardons to those convicted prisoners who claim to have committed offences with a political motive. I did not understand the state to contend otherwise. Nor is there any issue about the constitutional authority of the President to exercise his power to grant pardon as contemplated in the special dispensation process. Indeed under section 83(c) of the Constitution, the President has a duty to promote “the unity of the nation and that which will advance the Republic.” The question for determination is reduced to whether the decision to exclude victims from

participating in the special dispensation process is rationally related to the objectives that the President set out when he announced the process.

[53] When former President Mbeki announced the special dispensation process, he outlined its objectives and the criteria and the principles that would guide the decision-making process. The objectives that the special dispensation sought to achieve were national unity and national reconciliation. These objectives were to be achieved through the application of the “principles and values which underpin the Constitution”, including the “principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process”.<sup>47</sup> But what are the principles, criteria and spirit that inspired and underpinned the amnesty process?

[54] These emerge from the fundamental philosophy of our negotiated transition to a new democratic order. It was recognised early on, during the negotiation process, that the task of building a new democratic society would be very difficult because of our history, and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. The epilogue to the interim Constitution expresses this philosophy:

“The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. . . . In

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<sup>47</sup> President Mbeki’s Address above n 6.

order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives”.<sup>48</sup>

[55] It is apparent from both the address by former President Mbeki and the Explanatory Memorandum that the special dispensation process had the same objectives as the TRC, namely, nation-building and national reconciliation. While the TRC process sought to achieve this through amnesty, the special dispensation seeks to achieve these objectives through pardons. As former President Mbeki explained when he announced the special dispensation process: “consideration has therefore been given to the use of the Presidential pardon to deal with [the] ‘unfinished business’ [of the TRC].”<sup>49</sup> The submission on behalf of the state that the NGOs are mistaken when they contend that the special dispensation was designed to deal with the “unfinished business” of the TRC cannot, therefore, be sustained.

[56] The participation of victims was fundamental to the amnesty process. The process encouraged victims and their dependants “to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones”.<sup>50</sup> But the truth of what really happened could only be known if those who were responsible for gross violations of human rights were encouraged to disclose it with the incentive that they would not be

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<sup>48</sup> Constitution of the Republic of South Africa Act 200 of 1993, under the title “National Unity and Reconciliation”.

<sup>49</sup> President Mbeki’s Address above n 6.

<sup>50</sup> *Azanian Peoples Organisation (Azapo) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 17.

punished. Thus, the participation of both the victims and the perpetrators was crucial to the achievement of the twin objectives of rebuilding a nation torn apart by an evil system and promoting reconciliation between the people of South Africa.

[57] Indeed, as this Court observed in *Azanian Peoples Organisation (Azapo) and Others v President of the Republic of South Africa and Others*:

“With [the] incentive [that the perpetrator will not receive punishment] what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the ‘reconciliation and reconstruction’ which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.”<sup>51</sup>

[58] In its report, the TRC emphasised the importance of the participation of victims and perpetrators in the achievement of national reconciliation:

“By telling their stories, both victims and perpetrators gave meaning to the multilayered experiences of the South African story. These personal truths were communicated to the broader public by the media. In the (South) African context, where value continues to be attached to oral tradition, the process of story telling was particularly important. Indeed, this aspect is a distinctive and unique feature of the legislation governing the Commission, setting it apart from the mandates of truth commissions elsewhere. . . . The

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<sup>51</sup> Id.

stories told to the Commission were not presented as arguments or claims in a court of law. Rather, they provided unique insights into the pain of South Africa's past, often touching the hearts of all that heard them.

By providing the environment in which victims could tell their own stories in their own languages, the Commission not only helped to uncover existing facts about past abuses, but also assisted in the creation of a 'narrative truth'. In so doing, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless.”<sup>52</sup>

[59] The participation of victims is not only crucial to establishing the truth of what happened, but is also crucial to the twin objectives of nation-building and national reconciliation. In this regard, the TRC makes the following comment in its report: “In some cases . . . the Commission assisted in laying the foundation for reconciliation. Although truth does not necessarily lead to healing, it is often a first step towards reconciliation.”<sup>53</sup>

[60] What is plain from what I have said above is that the victims of gross human rights violations were at the centre of the TRC process. As the TRC observed:

“One of the unique features of the Act was that it provided guiding principles on how the Commission should deal with victims. These principles constituted the essence of the Commission's commitment to restorative justice. The Act required that the Commission help restore the human and civil dignity of victims 'by granting them an opportunity to

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<sup>52</sup> The Truth and Reconciliation Commission *Truth and Reconciliation Commission Report Volume 1* (Juta & Co Ltd, Cape Town 1998) 112.

<sup>53</sup> Id at 107.

relate their own accounts of the violations of which they are the victim'. Through the public unburdening of their grief – which would have been impossible within the context of an adversarial search for objective and corroborative evidence – those who were violated received public recognition that they had been wronged.”<sup>54</sup> (Footnote omitted.)

[61] Excluding victims from participation keeps victims and their dependants ignorant about what precisely happened to their loved ones; it leaves their yearning for the truth effectively unassuaged; and perpetuates their legitimate sense of resentment and grief. These results are not conducive to nation-building and national reconciliation. The principles and the spirit that inspired and underpinned the TRC amnesty process must inform the special dispensation process whose twin objectives are nation-building and national reconciliation. As with the TRC process, the participation of victims and their dependants is fundamental to the special dispensation process.

[62] Counsel for the state sought to justify the exclusion of victim participation on the grounds that there are important differences between the amnesty process and the special dispensation process. Much effort and time was spent on this aspect. One of the differences that was drawn to our attention is that in the case of a pardon, victims already had the opportunity to participate in the criminal proceedings. By contrast, the TRC process by and large dealt with individuals who had neither been tried and convicted nor sentenced in respect of the offences for which amnesty was sought. The state argues that

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<sup>54</sup> Id at 128.

there was therefore no prior victim participation, and precisely for this reason, the amnesty process required the participation of victims.

[63] There are difficulties with this submission. First, it is premised on the assumption that the amnesty process dealt only with perpetrators who had not been convicted. This premise is false. The amnesty process dealt with both persons who had not been tried and those who had been convicted and sentenced. One need only look at the provisions of the Promotion of National Unity and Reconciliation Act, 1995<sup>55</sup> (the Truth and Reconciliation Act) that deals with convicted persons.<sup>56</sup> Indeed, once it is accepted, as it must be, that the amnesty process also dealt with persons who had been convicted and sentenced, the submission loses its force.

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<sup>55</sup> 34 of 1995.

<sup>56</sup> Section 20(8) provides:

“If any person—

- (a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or
- (b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted,

the criminal proceedings shall forthwith upon publication of the proclamation referred to in subsection (6) become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.”

Section 20(10) provides:

“Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.”

[64] Second, it does not pay sufficient attention to the fundamental difference between criminal proceedings and the pardon process. The question in a criminal trial is whether the accused is guilty of the crime charged and, if so, what sentence should be imposed. By contrast, in the pardon process the question is whether, notwithstanding the conviction and sentence, the applicant should be granted a pardon. In particular, the question in the context of the special dispensation process is whether the offence in respect of which a pardon is sought was committed with a political motive.

[65] Third, it misconceives the rationale for victim participation in the TRC amnesty process. Victims participated in the amnesty process not because they did not have a prior opportunity to participate in any criminal proceedings, but because their participation was fundamental to the objectives of the TRC process, namely, nation-building and national reconciliation. Indeed, it is difficult to fathom how these objectives could be achieved if the victims of gross violations of human rights were excluded from the amnesty process. The amnesty process encouraged victims to come forward to tell their stories and to help them to discover the truth by encouraging the perpetrators, in return for amnesty, to disclose the truth of what they did. This was crucial to “creating the emotional and structural climate essential for the ‘reconciliation and reconstruction’ which inform[ed] the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue [to the interim Constitution]”.<sup>57</sup>

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<sup>57</sup> *Azapo* above n 50 at para 17.

[66] Finally, the argument based on the differences between the amnesty process and the special dispensation process misconceives the argument advanced by the NGOs. The NGOs do not contend that the amnesty process and the special dispensation are similar. They contend that the President made a commitment to apply the principles, criteria and spirit that inspired and underpinned the TRC process, especially as they relate to amnesty, including the principles and objectives of nation-building and national reconciliation. They submit that the President must be held to these principles which former President Mbeki said would guide him in deciding whether to grant or refuse pardons. The NGOs submit that it is these principles which require victim participation in the special dispensation process.

[67] Apart from these difficulties with their argument, the differences identified by the applicant and the state do not explain why, having undertaken to apply the principles and values which underpinned the amnesty process, it was decided to disregard those principles and values. The differences between the amnesty and pardon processes were known at the time when the former President made his speech in Parliament. Despite these differences, the President decided that the principles and values that underpinned the amnesty process would be applied to the special dispensation process. These differences therefore provide no basis for disregarding the values and the principles that the former President had stated would be applied to the special dispensation process.

[68] Once it is accepted, as it must be, that the twin objectives of the special dispensation process are nation-building and national reconciliation and that the participation of victims is crucial to the achievement of these objectives, it can hardly be suggested that the exclusion of the victims from the special dispensation process is rationally related to the achievement of the objectives of the special dispensation process.

[69] In my view, the address of former President Mbeki to Parliament itself evidenced and indeed recognised that, given our history, victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity. It follows therefore that the subsequent disregard of these principles and values without any explanation was irrational. On this basis alone, the decision to exclude the victims from participating in the special dispensation process was irrational.

*Do the special features of the special dispensation process require the President to hear the victims?*

[70] Before the President decides whether to grant pardon, he must establish the facts in accordance with the criteria set out in the special dispensation process, namely, whether the offence was committed with a political motive. To establish the facts the President must hear both the perpetrators and the victims of the crimes in respect of which a pardon is sought. It is difficult to fathom how the President can establish the truth about the motive with which a crime was committed without hearing the victim of that crime.

Decisions based on the perpetrators' versions and their supporting political parties are more likely to be arbitrary, considering the President's objective of determining whether a pardon applicant qualifies for a pardon for an allegedly politically motivated crime. It is not inconceivable that a victim may want to make representations to demonstrate that the crime committed was not of a political nature, but due to other motives.

[71] A process which permits political party representatives and their members, to the exclusion of the victims, to consider whether a pardon should be granted in an offence with a political motive is entirely inconsistent with the principles and values that underlie our Constitution. Some of the principles and values that underpin our Constitution are the principles of accountability, responsiveness and openness.<sup>58</sup> And one of the principles that underpinned the amnesty process was the participation of victims in seeking to achieve national unity and national reconciliation. It is these principles and values that must underpin the special dispensation process as former President Mbeki stated. To do otherwise is to undermine the TRC process and is contrary to the objective of promoting national unity and national reconciliation.

[72] In these circumstances, the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that the

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<sup>58</sup> See section 1(d) of the Constitution.

victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.

[73] The NGOs also advance an attractive argument for the proposition that, having regard to the objectives of the special dispensation process, the common law duty to act fairly requires the President to afford the victims of crimes in respect of which a pardon is sought a hearing before a decision to grant a pardon.<sup>59</sup> In the light of the conclusion that I have already reached, it is not necessary to deal with this argument.

[74] For all these reasons, I conclude that the decision to exclude victims of the crimes in respect of which pardons were sought under the special dispensation process was irrational. The victims of these crimes are entitled to be given the opportunity to be heard before the President makes a decision to grant pardon under the special dispensation.

[75] Lest there be a misunderstanding of the scope of this conclusion, I had better stress the obvious. This case is concerned with applications for pardon under the special dispensation. What I have said in this judgment therefore applies to this category of applications for pardon only. What distinguishes this category from others not before us is that the crimes in respect of which pardons are sought are alleged to have been committed with a political motive; the objective of these pardons is to promote national

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<sup>59</sup> See, for example, *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) (Ngcobo J dissenting) at paras 172-207.

unity and reconciliation; and the crimes concerned were committed in a particular historical context. Different considerations may very well apply to other categories of applications for pardon. This judgment does not therefore decide the question whether victims of other categories of applications for pardon are entitled to be heard. That question is left open.

[76] It is this category of pardons that was before the High Court. The High Court does not appear to have paid attention to the fundamental difference between the category of pardons in issue in this case and other categories of applications for pardon. Its conclusion, as I have pointed out above, went beyond this category and purported to deal with applications for pardon in general. In doing so, the High Court erred. So too, when it relied upon the provisions of PAJA to hold that the victims of the crimes in respect of which pardons are sought are entitled to a hearing before the decision whether to grant a pardon is made. These findings by the High Court were not necessary and cannot be allowed to stand.

[77] Finally, the applicant contends that, if the NGOs obtained the relief they sought, the resulting procedural requirements would impractically encumber the special dispensation process. This is incorrect. This judgment does not imply or entail that, in affording a hearing to the victims of those applying for pardon under the special dispensation process; the President is bound to replicate the procedures, investigations and hearings of the TRC. The final relief the NGOs sought was merely “an opportunity

to make representations”.<sup>60</sup> Their counsel expressly concede that, after the names of those pardon applicants who had been recommended for approval were made known, a general notice inviting submissions to the President from victims of the offences in question might suffice. It is abundantly established that what the opportunity to make representations requires depends on the context,<sup>61</sup> and it is not necessary to try to signify in advance what the opportunity for representations will require. It is enough to say that cumbersome impediments to the due despatch of the pardon process are not entailed.

[78] The next question is whether, in the light of this conclusion, it is desirable that we should reach the question whether the exercise of the power under section 84(2)(j) constitutes administrative action.

*Should we reach the argument based on PAJA?*

[79] One of the grounds upon which the NGOs urge us to find that the victims are entitled to a hearing is that the exercise of the power to pardon constitutes administrative action. This is one of the bases upon which the High Court made its order. The applicant and the state challenge this finding by the High Court, contending that upon its proper construction, section 1 of PAJA does not include the exercise of the power to pardon as administrative action. If it does, they maintain, then section 1 of PAJA is inconsistent

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<sup>60</sup> Above n 2.

<sup>61</sup> See, for example, *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 113-4 and *SARFU* above n 43 at para 219 and cases cited therein.

with the Constitution. For their part, the NGOs submit that Parliament may extend a right granted by the Constitution and, in doing so, does not trespass into the province of the executive. We have had the benefit of the submissions of the parties on PAJA and its constitutionality.

[80] If one has regard to our jurisprudence, there is a substantial measure of doubt as to whether the exercise of the pardon power constitutes administrative action.<sup>62</sup> Yet if this question is decided in the negative, a more difficult question arises, namely, whether PAJA, upon its proper construction, includes within its ambit the exercise of the power to grant pardon. And if the answer to this question is in the affirmative, more complex questions arise. Those questions are whether: (a) PAJA merely regulates the exercise of the power or whether in effect it reclassifies executive action as administrative action; and (b) whether it is constitutionally permissible for the legislature to do either of these. The question that must be answered on this score is whether having answered the central question presented in this case, we should now venture into all of these difficult questions.

[81] What must be stressed here is the point that I have already made: this case concerns applications for pardon that are brought under the special dispensation, the question being whether the victims of the crimes that fall under this category of applications for pardon are entitled to a hearing. Once this question is answered in the

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<sup>62</sup> *SARFU* above n 43 at paras 145-6.

affirmative in the light of the context-specific features of the special dispensation, it is not necessary to consider the question whether the exercise of the power to grant pardon under section 84(2)(j) constitutes administrative action. That broad general question was not before the High Court, which should not have posed and answered it, and we need not answer it in this case. Nor should we reach the question whether PAJA, upon its proper construction, includes within its ambit the exercise of the power to grant pardon under section 84(2)(j).

[82] Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so. There may well be cases, and they are very rare, when it may be necessary to decide an ancillary issue in the public interest. This is not such a case. It may well be said that the President is anxious to know whether the exercise of the power to grant pardon constitutes administrative action and whether PAJA applies to applications for pardon. The anxiety of the President should adequately be addressed by what I have said above, namely, that the High Court erred in reaching these questions.

[83] In the event, I conclude that it is not necessary for us to reach the question whether the exercise of the power under section 84(2)(j) constitutes administrative action and whether upon its proper construction, PAJA includes within its ambit the power to grant pardon under section 84(2)(j). These questions must be left open for another day when a proper occasion to determine them is presented.

[84] In the result no order should be made on the application for direct access which was conditional upon us reaching PAJA. In respect of that application, I consider it just and equitable that each party should bear its own costs.

#### *Costs*

[85] The issues that were raised in both the application for leave to appeal and the application for direct access are matters of considerable importance. As I have said, earlier, they concern the exercise of the power to grant pardon, in particular, the question whether the victims of the offences in respect of which the special dispensation process applies, are entitled to a hearing before a decision is made to grant pardon. The NGOs have succeeded in relation to the application for leave to appeal. They are entitled to their costs. The applicant entered the fray to safeguard his interest and those of other applicants seeking pardons who were not in court. In doing so, the applicant helped to put before the Court the perspective of the applicants for pardon. The applicant has,

however, not succeeded. I think it would not be just and equitable to require him to pay the costs of the NGOs. That leaves the state to pay the costs of the NGOs.<sup>63</sup>

[86] I have already concluded that no order should be made on the application for direct access and that each party must pay its own costs.

### *Order*

[87] In the event the following order is made:

- (a) Condonation is granted to the applicant for the late filing of the application for leave to appeal.
- (b) Condonation is granted to the first to seventh respondents for the late filing of their answering affidavit.
- (c) The application for leave to appeal is upheld.
- (d) The appeal is dismissed.
- (e) The President and the Minister for Justice and Constitutional Development are ordered to pay the costs of the first to seventh respondents. These costs will include costs consequent on the employment of two counsel.
- (f) No order is made on the application for direct access.

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<sup>63</sup> See, for example, *Affordable Medicines* above n 43 at para 138 and *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 22-3.

(g) There will be no order as to costs on the application for direct access.

Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Van der Westhuizen J concur in the judgment of Ngcobo CJ.

FRONEMAN J:

[88] I respectfully concur in the Chief Justice's judgment and only wish to add some comments in further support of his judgment. The judgment builds upon the fundamental understanding that under the Constitution, the President must always act in accordance with the rule of law, even when exercising executive functions.<sup>1</sup> It extends our understanding of what the rule of law requires of the President in the particular circumstances of this case. It does so, in the main, by determining the impact and meaning of the rule of law in the context of our recent history – the political strife that preceded and accompanied the birth of our democracy – and in particular the amnesty

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<sup>1</sup> See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC); *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 25; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

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process put in place to assist in achieving national unity and reconciliation. The judgment draws its essence from the participatory process of the Truth and Reconciliation Committee (TRC). In so doing it gives content to the exercise of pardon in a manner which distinguishes it from notions of the nature and exercise of executive pardon powers elsewhere.<sup>2</sup>

[89] Some would find the broadened understanding of what the rule of law requires of us in these circumstances unpersuasive merely for the reason that it goes beyond the understanding of executive pardon powers elsewhere. Others might find those historical notions expedient in advancing a conception of executive power unconstrained by the rule of law. In my view it will contribute to a deeper understanding and acceptance of the rule of law if the content given to it in the main judgment also finds resonance, not only in our recent history, but also in pre-colonial history and in our own conception of democracy. And it does.

[90] This Court has held that the democracy our Constitution demands is not merely a representative one, but is also, importantly, a participatory democracy.<sup>3</sup> That holds true even for the executive function at stake here. Promoting national unity is an ongoing

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<sup>2</sup> See, for example, *de Freitas v Benny* [1976] AC 239 (PC); *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 (HL); *Burt v Governor-General* 1992 (3) NZLR 672 and *Biddle v Perovich* 274 US 480 (1927).

<sup>3</sup> *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 121 and *Matatiele Municipality and Others v President of the RSA and Others (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at para 40.

process in terms of the Constitution.<sup>4</sup> While it may be necessary for this process of national unity “not to punish those who have flagrantly violated the law”,<sup>5</sup> it needs to be remembered that this flies in the face of what is conventionally associated with the rule of law.<sup>6</sup> In this regard the presidential pardon power in relation to offences that may have an impact on national unity have characteristics similar to the amnesty process, where individual participation of victims was the only rational means of attempting to effect that purpose. Counsel for the applicant argued that the requirement of victim participation was met through the process set in place by the President which involved all the political parties represented in Parliament. Put differently, the argument was that representative democracy was sufficient in the circumstances. It is not. It would be irrational to treat similar processes relating to past violations of the law for a political motive – amnesty and “national unity” pardons – differently, by regarding individual victim participation as essential to the one process, but not to the other.

[91] The notion of participatory democracy is also an African one. Victim participation was the norm in deciding the proper “punishment” for offenders in traditional African society. It was an expression of the participatory democracy practiced in those societies. That is my understanding of African tradition.<sup>7</sup> The main judgment therefore finds

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<sup>4</sup> See section 83(c) of the Constitution.

<sup>5</sup> *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC) at para 23.

<sup>6</sup> *Id.*

<sup>7</sup> There is much literature on the subject, but a personal expression on the matter can be found in Mandela *Long Walk to Freedom, The Autobiography of Nelson Mandela* (Macdonald Purnell (Pty) Ltd, Randburg 1994) 20. See

support in the African legacy of participation of citizens in affairs of the society, not as direct authority for its particular application to the facts of this case, but as further legitimisation that it accords with a tradition that runs deep in the lives of many people in this country. It is indeed difficult to escape the conclusion that this remarkable tradition of participation and capacity for forgiveness in African society also underlay, at a deeper level, the amnesty process. Without it the amnesty process would have been impossible, or at least it would have been immeasurably more difficult than it was. The same can be said for the ongoing duty to promote national unity.

[92] In the main judgment it is emphasised that the ruling does not in any way speak to pardon issues beyond the confines of the facts of this case. The same goes for these additional comments. I consider it important to demonstrate that the “pervasive demands for participatory living”<sup>8</sup> is one with deep roots in pre-colonial history, not that its past application should bind us in finding what is required for the present:

“We do not have to be born in a country with a long democratic history to choose that path today. The significance of history in this respect lies rather in the more general understanding that established traditions continue to exert some influence on people’s ideas, that they can inspire or deter, and they have to be taken into account whether we are moved by them, or wish to resist and transcend them, or . . . want to examine and

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also, for example, the description of the Gacaca courts of Rwanda in Amnesty International, *Rwanda Gacaca: A question of justice*, AI Index AFR 47/007/2002 and Villa-Vicencio “Transitional justice and human rights in Africa” in Bösl and Diescho (eds) *Human Rights in Africa* (Macmillan Education Namibia, Windhoek 2009) 41-3.

<sup>8</sup> Sen *The Idea of Justice* (Harvard University Press, Cambridge 2009) 322.

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scrutinize what we should take from the past and what we must reject, in the light of our contemporary concerns and priorities.”<sup>9</sup>

Cameron J and Van der Westhuizen J concur in the judgment of Froneman J.

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<sup>9</sup> Id at 332.

For the Applicant:

Advocate NB Tuchten SC, Advocate N Riley and Advocate M Witz instructed by Snaid & Edworthy Attorneys.

For the First to Seventh Respondents:

Advocate G Budlender SC, Advocate Karrisha Pillay, Advocate H Varney and Advocate L Kubukeli instructed by the Legal Resources Centre.

For the Eighth and Ninth Respondents:

Advocate MTK Moerane SC, Advocate IV Maleka SC and Advocate L Gcabashe instructed by the State Attorney.

For the Fifteenth Respondent:

Advocate TJ Botha instructed by Lombards Attorneys.