IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMTIAZ AHMED CAJEE	Fourth Respondent

FOURTH RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1 These are the second set of heads of argument filed on behalf of the fourth respondent. The fourth respondent filed its initial heads of argument on 25 January 2019 as required by the order of this Court. Those submissions have been incorporated into these heads of argument. The only other party that complied with this Court's order was the second respondent. The applicant and the first respondent simply declined to do so. Unfortunately, this has become a regrettable pattern with these parties choosing not to adhere to the timelines imposed by this Court.

2 This matter deals with an application by the applicant (also referred to as "**the accused**" or "**Rodrigues**") to permanently stay the criminal prosecution against him in respect of the murder charge.[1] He claims that the murder prosecution some 47 years after the death of Ahmed Essop Timol ("**Timol**") undermines his right to a fair trial as upheld by the Constitution.

3 The fourth respondent ("**Cajee**") intervened in these proceedings to prevent a grave injustice being perpetrated upon himself, his family and the wider community. Cajee was granted leave to intervene in these proceedings on 19 December 2018. The Timol family ("**the family**") has been striving for justice and closure over several decades.

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[1] NOM p 2 para 3

4 Rodrigues presumably did not seek a stay of prosecution in respect of the defeating the ends of justice charge ("**defeating charge**")[2] as that charge is premised on the cover-up he pursued before the 2017 Inquest Court (Case Number: IQ01/2017, Gauteng Division) ("**Reopened Inquest**").[3] No complaint of delay, prejudice or violation of fair trial rights can be raised given that the criminal proceedings commenced in 2018.

5 When considering whether section 35(3)(d) of the Constitution, which provides that an accused has a right to have his trial begin and conclude without unreasonable delay, has been violated, we submit that the main period to consider is that between the date of indictment and the commencement and conclusion of trial. This is simply because prior to indictment the individual in question is not an accused. Since Rodrigues was only charged on 30 July 2018 and the only real interruption in the criminal proceedings has been his application for a permanent stay, he cannot complain of a delay in the period post the date of his indictment. This accords with the position adopted by foreign courts, which we refer to in due course.

6 However, the long lapse of time of nearly 5 decades between the date of crime and date of charge cannot simply be ignored. This is because the lapse in time has been undeniably long and because this Court, as well as Rodrigues, the family and the wider public are entitled to know the truth behind the long delay. In addition, the first respondent's (referred to as "**the NPA**") own Prosecution

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2 Notice of Motion, p 2, prayers 2 and 5.

3 See count 2 in Charge Sheet, Annex JR1 to FA, pp 62 – 63.

Policy requires it to consider the period between the committal of crime and the trial date when deciding whether it is in the public interest to prosecute.[4]

7 The NPA, in initial answering papers, conspicuously offered little or no explanation as to what transpired prior to the 2017 Inquest, particularly in the period following the winding up of the Truth and Reconciliation Commission ("**TRC**") and its amnesty process in 2002 ("**the post-TRC period**"). This led the family to conclude that the NPA preferred to conceal or cover-up the real explanation for its inaction during this period. The public statements since made by the NPA's spokesperson on radio and by senior prosecutor Advocate Chris MacAdam before the Mokgoro Commission of Inquiry reinforced this conclusion.[5]

8 It took a second affidavit from Cajee, in which he alleged that the conduct of the NPA's officials amounted to obstructing the administration of justice, for the NPA to finally file affidavits dealing with the post TRC delay period.[6] These affidavits conceded that gross political interference in the operations of the NPA resulted in the blocking of the Timol matter and the other TRC cases.[7]

9 The NPA admitted that it blithely allowed politicians and other functionaries to dictate its approach to prosecuting apartheid era crimes. Such disgraceful

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4 Prosecution Policy issued in terms of s 179(5)(a) of the Constitution (Revision Date: June 2013), p 7. It is noted that this specific requirement was not invoked by Rodrigues in his founding papers. It is further noted that Rodrigues has not sought to set aside the actual decision to prosecute him; nor does he seek to impugn or challenge the Inquest Act 58 of 1959, notwithstanding his complaints about the inquest process.

5 SAA, pp 732 – 749.

6 AA, pp 499 – 497, paras 64 – 65.7; pp 504 – 512, paras 82 – 98, read with annexes IC 4 – 11; SAA, pp 732 – 749.

7 NPA SAA pp 750 – 919.

conduct was in complete disregard for its constitutional obligation to exercise its functions without fear, favour or prejudice.[8] This shameful violation of constitutional and statutory obligations simply cannot be countenanced. Cajee has called for an inquiry into this political interference and into the fitness of the relevant NPA's officials to hold office.[9] This call has been backed by former TRC commissioners who have called upon the President to institute an inquiry and to apologise to victims whose cases were abandoned.[10]

10 The dereliction of duty that occurred within the South African Police Services ("**SAPS**") and the National Prosecuting Authority ("**NPA**") resulted in the abandoning of virtually all the cases referred by the Truth and Reconciliation Commission ("**TRC**") to the NPA ("**the TRC cases**"), including the Timol case. The leadership and senior staff of these bodies shamefully violated their constitutional and statutory obligations in acquiescing to this interference, shutting down the pursuit of justice and maintaining their silence until now.[11]

11 The political interference was done with the specific intent to shield persons responsible for apartheid-era perpetrators, especially senior officers and decision makers, from investigation and prosecution. Rodrigues was a direct beneficiary of this conspiracy to obstruct the course of justice. Other beneficiaries included the lead interrogators and tormentors of Timol, Captains Johannes Hendrik Gloy

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8 Section 179(4) of the Constitution.

9 AA, p 537, para 143.

10 '*No justice for apartheid victims' – Apologise and appoint inquiry, TRC members tell Ramaphosa'*, City Press, 2019-02-06, available at: https://city-press.news24.com/News/no-justice-for-apartheid-victims-apologise-and-appoint-inquiry-trc-members-tell-ramaphosa-20190206

11 AA, pp 499 – 497, paras 64 – 65.7; pp 504 – 512, paras 82 – 98, read with annexes IC 4 – 11.

("**Gloy**") and Johannes Zacharias van Niekerk (**Van Niekerk**) and the investigating officer, Major General Christoffel Andries Buys ("**Buys**"), who was the head of the Criminal Investigation Department and ensured that the investigation was a cover-up from start to end. All were alive in 2003 when Cajee asked the NPA to investigate and all could have been held accountable but for the conspiracy to suppress these cases.[12]

12 Now that the NPA has filed the supplementary answering affidavits of Jacobus Petrus Pretorius and Raymond Christopher Macadam,[13] in which the suppression of the TRC cases, including the Timol case, is admitted, there is no need for this Court to interrogate the mechanics behind such suppression in detail.[14] However, a key question remains: does the delay occasioned by the political interference warrant permanently staying the prosecution of Rodrigues, and indeed all cases delayed by such unlawfulness.

13 We respectfully submit that responsibility for delays in pursuing justice against those who collaborated in the murder of Timol cannot be laid at the feet of the family.[15] The responsibility for pursuing justice rests with the police and prosecutors.[16] It is our submission that the halting of the prosecution of Rodrigues in the light of these circumstances would violate several constitutional

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12 AA, para 142.6.

13 Pretorius supplementary answering affidavit signed 4 February 2019 and Macadam affidavit signed on 1 November 2018 but only filed on 4 February 2019.

14 There is no legal basis for the suggestion in the applicants' heads of argument (para 23) that these proceedings (and all prosecutions) only be adjudicated following the completion of the requested commission of inquir*y.* The suggestion is aimed purely at the further delay of these proceedings and should be rejected.

15 AA, pp 508 – 509 paras 88 – 93.

16 *Nkadimeng v National Director of Public Prosecutions* [2008] ZAGPHC 422 at para16.2.3.3.

rights of the Timol family and deeply implicate wider societal interests. Moreover, it would amount to a gross perversion of the rule of law as it would play into the hands of dark forces that sought total impunity for serious crimes such as murder and torture. It would signal that unlawful efforts to suppress justice are to be rewarded and it would encourage further such machinations going forward. This, we submit, is undoubtedly not in the interests of justice – the test that this Court must apply in assessing whether it should grant a permanent stay of prosecution.

14 The remainder of these heads of argument are organised as follows:

14.1 First, we set out the background to the present matter.

14.2 Second, we deal with the issue of political interference.

14.3 Third, we deal with the applicant's objection to the murder charge.

14.4 Fourth, we describe the legal framework that requires that Rodrigues be prosecuted, and we apply the facts of the present matter to this framework.

14.5 Finally, we conclude, submitting that the application should be refused.

BACKGROUND

15 The background to these proceedings has been set out in considerable detail in Cajee's answering affidavit.[17] Aside from providing a high-level overview we will not burden these submissions by repeating this background.

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17 AA, pp 475 – 502, paras 2 – 3, 10 – 20, 22 – 76.

16 The primary enforcers of the pernicious system of Apartheid were the security forces, especially the former South African Police ("**SAP**") and its notorious Security Branch ("**SB**").[18] The SB, acting under orders from the highest political levels, were required to crush all serious opposition to Apartheid. In doing so, they were a law unto themselves. They acted entirely without restraint and without the slightest fear of having to face justice. The SB perpetrated countless crimes against perceived dissidents, including murder, enforced disappearance and torture. Compliant investigating officers, prosecutors and magistrates ensured that the SB enjoyed near total impunity.[19]

17 The SB could naturally count on their members not only to carry out such crimes, but also to protect each other through cover-ups. This was routine practice in the SB. Rodrigues, a former pay clerk in the SB, dutifully played in his part when called on to do so by his friends and colleagues, Gloy and Van Niekerk. Rodrigues claimed that he was the only person in room 1026 when Timol fell from the 10th floor of John Vorster Police Station on 27 October 1971. This

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18 The Security Branch was the intelligence wing of the former SAP, falling directly under the Commissioner of the SAP and operating in a separate, parallel structure to the Uniform and Detective branches of the SAP. The Goldstone Commission of Inquiry regarding the Prevention of Public Violence and Intimidation described the SB as operating an "*illegal criminal and oppressive system*" and that their "*involvement in violence and political intimidation is pervasive and touches directly or indirectly every citizen in this country*" ('*Report to the International Investigation Team.*' April 1994). The Security Branch served as the 'political wing' of the South African Police. The target of their activities became any person or organisation opposing the government and its policies. Their activities included the close monitoring of the affairs and movements of individuals, the detention of tens of thousands of citizens and the torture of many, as well as trials and imprisonment of suspects. (Cawthra G, *Policing in South Africa*, Zed London, 1993).

19 George Bizos SC affidavit dated 23 June 2017 before the Reopened Inquest, Vol C, pp59 – 89. Also see: Bizos G (1998) *No one to Blame. In Pursuit of Justice in South Africa*, Cape Town South Africa, David Phillip Publishers.

version had the desired effect of sparing Gloy and Van Niekerk (and other SB officers) from scrutiny as to what transpired in the office at the time of the fall.[20]

18 We now know that prior to his murder, Timol was grievously injured following more than 4 days of unrelenting torture at the hands of the SB.[21] The reopened inquest found that Timol did not jump or dive, as alleged by Rodrigues, but was pushed by members of the SB, and that such act amounted to murder.[22] Prior to this historical finding the Timol family had to live with the official finding that Timol had taken his own life – a pain that they had to endure for 46 years.

19 Yet, against all adversity, the Timol family never gave up their quest for justice. They never accepted the finding of the first inquest court.[23]

19.1 Timol's mother participated in the TRC process by testifying at a victim's hearing. She refused to accept the first inquest court finding. She wanted to know who killed her son.[24]

19.2 Cajee waged a campaign for justice. He has written a book profiling Timol and detailing his quest to see justice done for his uncle's death. He conducted his own extensive investigations into Timol's death and

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20 AA, pp 475 – 502, paras 2 – 3

21 *The re-opened inquest into the death of Ahmed Essop Timol* [2017] ZAGPPHC 652 paras 317-318.

22 *Id* at para 335(d).

23 AA pp 487 - 499 paras 40 – 46 and 56 – 63.

24 AA p 487, para 41. Hawa Timol testimony at TRC available at: http://sabctrc.saha.org.za/tvseries/episode3/playlist.htm at 4:40 min and transcript at: http://sabctrc.saha.org.za/hearing.php?id=55646&t=timol&tab=hearings

engaged all individuals and institutions relevant to his uncle's death to push for the reopening of the inquest into Timol's death.[25]

19.3 Timol's brother, Mohammed Timol, learnt of Timol's death during his detention by the SB in Durban. He attended the first inquest daily, only to be bitterly disappointed with the court's finding. He always remained committed to seeing justice done for Timol's death.[26]

Reopened Inquest

20 The Timol family's efforts resulted in the re-opening of the inquest into Timol's death. Both Cajee and Mohammed Timol testified.[27] In its judgment, the Court noted Cajee's testimony recommending *inter alia*:

> *"The energetic and vigorous investigation of outstanding apartheid-era cases before it is too late, which may involve the creation of a dedicated team of carefully selected investigators and prosecutors. All State entities should be required to supply all information at their disposal to this team.*
>
> *All files pertaining to political detainees of the apartheid-era must be made easily accessible to the families seeking answers.*"[28]

21 This Court made history when it found that Timol had been murdered at the hands of the SB. Rodrigues placed himself at the scene of Timol's death and the Court declared him to be party to the cover-up, finding that he had—

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25 AA pp 488 – 493, paras 43, 56 - 61.

26 Affidavit of Mohammed Timol before the Reopened Inquest dated 23 June 2017, Vol C, pp121 – 134.

27 *The re-opened inquest into the death of Ahmed Essop Timol* [2017] ZAGPPHC 652 paras 125-135, 197-202.

28 *The re-opened inquest into the death of Ahmed Essop Timol* [2017] ZAGPPHC 652 para 201.

> *"participated in the cover up to conceal the crime of murder as an accessary after the fact, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution."*[29]

22 Rodrigues was specifically invited and encouraged to appear before the TRC during 1997. He spurned the invitation.[30] He could have participated in the national reconciliation process, unburdened himself and claimed his amnesty in respect of his crimes associated with the murder of Timol. If he had done so he would have earned the respect and appreciation of the family.[31] This would have opened the door to the prosecution of key suspects who were still alive and would have obviated the need for the Reopened Inquest. Rodrigues chose not to participate preferring to keep the family in ongoing pain and anguish for another 20 years. At the Reopened Inquest in 2017 the family extended an open hand to Rodrigues which was again spurned:

> *"We went on record to say that we were only interested in the full truth. We sought no vengeance or retribution. We advised that if the full truth was disclosed we would not seek a prosecution. Our plea was spurned by the police witnesses, particularly Rodrigues."*[32]

23 The delays in pursuing justice since the murder of Timol in 1971, and particularly since the advent of democracy in South Africa, has been dealt with in considerable detail in Cajee's answering affidavit and will not be repeated in any detail in these submissions.[33]

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29 *Id* at para 335(d).

30 Supporting affidavit of Piers Ashley Pigou, pp 695 – 699, paras 7 – 12.

31 AA p 511, para 96.

32 AA p 480, para 19. See also Reopened Inquest Transcript, Vol 16, p 1128.

33 AA, pp 504 – 512, paras 82 – 98, read with annexes IC 4 – 11.

24 In terms of the delay in bringing Rodrigues to justice, during the apartheid era all relevant organs of the apartheid State colluded in covering up Timol's murder.[34] During the TRC's amnesty process it can be assumed that the authorities were waiting to see if perpetrators of apartheid-era crimes would seek amnesty in exchange for full disclosure.[35] However, the first to third respondents initially offered no explanation for their inaction during the post-TRC period in their answering affidavits.

GROSS POLITICAL INTERFERENCE

25 Cajee, in his answering affidavit, relied on documents disclosed in a case brought before this court by Thembisile Nkadimeng, the late sister of Nokuthula Simelane.[36] This case revealed political interference in the TRC cases dating back to 2003 which saw the utterly disgraceful collusion by politicians, the SAPS and NPA in the suppression of investigations of these crimes, including the Timol case.

26 The evidence before this Court included:

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34 NPA AA, pp 317 – 319 paras 2.11 – 2.13; AA, p 504 para 82.

35 Annexure SA1, NPA SAA, pp 795 – 796 paras 4 – 11; AA, pp 487 – 491 paras 40 – 55; p 505 para 83.

36 *Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others*, Gauteng Division Case Number 35554/2015; AA, pp 496 – 497, paras 65.4 – 65.5, read with annexes IC 5 – 7.

26.1 A secret government report that explored ways of avoiding the State's responsibilities to prosecute offenders denied amnesty by the TRC or who had not applied for amnesty.[37]

26.2 An affidavit deposed to by former National Director of Public Prosecutions ("**NDPP**"), Advocate Vusumzi Patrick Pikoli describing how he was subjected to withering political pressure from the highest levels to abandon TRC cases. The affidavit included a secret memorandum he authored concluding that there had been improper interference in the TRC cases that obstructed their progress and impinged on his conscience and oath of office. When Adv Pikoli decided to proceed with prosecuting one such case he was suspended by President Thabo Mbeki on 23 September 2007.[38]

26.3 An affidavit deposed to by former Special Director of Public Prosecutions in the office of the NDPP and former head of the PCLU, Advocate Anton Rossouw Ackermann SC details how he was stopped from pursuing the investigation and prosecution of TRC cases. Following Adv Pikoli's suspension, Adv Ackermann SC was relieved of his duties in relation to TRC cases with immediate effect.[39]

27 Despite the severity of the averments of gross political interference, and the gravitas of the individuals levelling them, the NPA, the second respondent ("**the**

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37 Annex IC4 AA, pp 552 – 563.

38 Annex IC6 AA, pp 575 – 621.

39 Annexure IC7 AA, pp 622 – 640.

Minister of Justice") and the third respondent ("**the Minister of Police**") simply failed to file affidavits dealing with these allegations.

28 Then, on 16 January 2019, the NPA's spokesperson, Luvuyo Mfaku and a spokesperson for the third respondent, Hangwani Mulaudzi, were interviewed by Ms Joanne Josephs on Radio 702.[40] During this interview, the spokesperson of NPA indicated that:

28.1 Adv Chris Macadam, a senior prosecutor in the NPA's employ, had "*actually filed and deposed an affidavit outlining all the delays*" in prosecuting apartheid era crimes.[41]

28.2 The NPA would "*never contest*" the allegations of political interference contained in the aforementioned affidavits of Advocates Pikoli and Ackermann SC and that "*[i]f they are saying that there was that interference then they have exclusive knowledge of what was happening. I would never contest that*".[42]

29 This prompted Cajee to file a supplementary affidavit[43] pointing out that the NPA – in addition to having flouted the orders of this Court regarding the filing of affidavits – had withheld the affidavit of Adv Macadam.[44] Cajee called on the NPA to file Adv Macadam's affidavit, which explained the NPA's delay in

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40 Annexure IAC1 SAA, pp 739 – 747.

41 SAA, p 735 para 8.2.

42 SAA, pp 735 – 736 para 8.4.

43 SAA, pp 732 – 749.

44 SAA, pp 736 – 737 paras 9 – 10.

prosecuting the applicant. Failure to do so, Cajee submitted, could be construed as obstructing the administration of justice.[45]

30 On 4 February 2019, the NPA finally filed a supplementary answering affidavit, along with an accompanying affidavit deposed to by Adv Macadam.[46] It turned out that Macadam had signed his affidavit on 1 November 2018 and it was available from that date. The Macadam affidavit admitted that the Timol case and the other TRC cases were stopped and he provided details and evidence to illustrate the obstruction.

31 No attempt was made by the deponent of the NPA's supplementary affidavit, J P Pretorius, to explain why the Macadam affidavit was not filed with his answering affidavit on 8 December 2018, even though it was available. Since the Pretorius affidavit filed on 8 December offered no explanation for the post TRC delay, and was entirely silent on the political interference, it must be assumed that the NPA, at that time, held back the Macadam affidavit in order not to reveal the disclosures made therein.

32 The NPA, in its supplementary affidavit, admits for the very first time the political interference and its unlawfulness:

32.1 "*[I]t is clear that the prosecution was delayed as a result of political interference by others*." [47]

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45 SAA, p 737 paras 11 – 12.

46 NPA SAA, pp 750 – 919.

47 NPA SAA, pp 752 – 753 para 2.3.

32.2 "*The first respondent does not deny that the executive branch of the State took what one can describe as political steps to manage the conduct of criminal investigations and possible prosecution of the perpetrators of the political murders such as that of Mr. Timol*."[48]

32.3 **"***The contents of both Pikoli and Ackermann's affidavits give this Court an opportunity to reaffirm the constitutional independence of the National Prosecuting Authority of this country and send a clear message that political office bearers should stop interfering with prosecutorial decisions unless otherwise authorized to do so by law*". [49]

32.4 "*What one sees in Pikoli and Ackermann's affidavits is that the political interference and political pressure brought to bear upon the highest office of the National Prosecuting Authority* ***was far from being authorized by law***." [50] (Emphasis added).

32.5 "*I do not deny that the National Prosecuting Authority was subjected to political interference and political pressure not to immediately prosecute cases such as the present*."[51]

32.6 "*I agree with what the Fourth Respondent says … that the manipulation of the criminal justice system to protect individuals from criminal prosecution serves an ulterior and illegal purpose and that it constitutes bad faith, it is*

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48 NPA SAA, p 756 para 2.11.

49 NPA SAA, p 766 para 2.28.

50 NPA SAA, p 766 para 2.29.

51 NPA SAA, p 766 para 2.29.

irrational, it interferes with the independence of the National Prosecuting Authority and amounts to a gross subversion of the rule of law. …"[52]

NPA's attempt to escape responsibility

33 J P Pretorius suggests in his affidavit that the government can direct the NPA in its prosecutorial decisions because the NPA "*prosecutes on behalf of the State*".[53] This, however, erroneously conflates the concept of the '*State*' with that of the '*government*'. The State in this sense represents higher societal interests as embodied in the state, rather than in the entity of the government:

> *"Public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system."*[54]

34 The State is characterised by broader elements of which government is but one.[55] The State exists independently of the government and is uniform in character. It is submitted that the correct meaning of the phrase "*on behalf of the State*" in section 179(2) of the Constitution does not refer to the NPA acting on behalf of the government (as the State Attorney does when it litigates on behalf of the government), but to the broader community of people that help

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52 NPA SAA, p 766 para 2.30.

53 NPA SAA, pp 778-779 para 2.54.

54 *The Role of Public Prosecution in the Criminal Justice System*, Recommendation Rec (2000)19, Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 at p 4, available at: https://rm.coe.int/16804be55a

55 Article 1, Montevideo Convention (1933); T Baty, "*Can Anarchy be a State?*" (1934) 28 AJIL 444-55 at 444.

constitute the abstract, sovereign normative order at the heart of the South African 'State'".

35 No other attempt is made by the NPA to explain its acquiescence and astonishingly, the NPA asserts that it was not responsible for the suppression of the TRC cases, which was imposed upon it.[56] Rather, the NPA asserts that:

> *"[T]he only conclusion to arrive at is that the delay in prosecuting the applicant was not as a result of the first respondent's [the NPA's] own doing or its malice - it was as a result of the political interference and the 'severe political constraints' to which the first respondent [the NPA] was subjected."*[57]

36 This is an utterly breath-taking claim to make. It defies all logic. Essentially, the NPA appears to be saying that as unfortunate and unlawful as the suppression of the TRC cases may be, it was not the NPA's '*own doing*' and its officials had little or no say in the matter. Once the politicians leaned on them they were obliged to comply with their demands and accordingly cannot be held accountable. That this claim is made by an organisation comprising almost entirely of lawyers makes it even more astonishing in the light of the prevailing law:

36.1 Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the state. In other words, no other person or body may make decisions whether to prosecute or not.[58]

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56 NPA SAA, p 756 paras 2.11 – 2.13.

57 NPA SAA, p 756 para 2.12.

58 See also s 20(1) of the National Prosecuting Authority Act 32 of 1998

36.2 Section 179(4) of the Constitution enjoins the prosecuting authority to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement.

36.3 Section 32(1)(a) the **National Prosecuting Authority Act 32 of 1998** ("**the NPA Act**") requires that:

> "A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law."

36.4 Section 32(1)(b) of the NPA Act requires that:

> "Subject to the Constitution and this Act, **no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority** or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions." *(Emphasis added)*

36.5 Section 32(2)(a) of the NPA Act requires prosecutors to take an oath or make an affirmation that they will:

> "…uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the *Republic* without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law'.

36.6 Section 32(2)(b) of the NPA Act requires that in the case of the *National Director*, or a *Deputy National Director, Director* or *Deputy Director*, the oath be taken before the most senior available judge of the High Court within which area of jurisdiction the officer is situated.

36.7 Section 41(1) of the NPA Act stipulates that any person who contravenes s 32(1)*(b)* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

37 Every constitutional and statutory duty and obligation mentioned above was violated by the NPA and its senior staff members involved in the abandoning of the TRC cases. Although the NPA enjoyed exclusive authority to institute criminal proceedings, on its own version, it allowed others to impose their will on the authority to stop prosecutions that otherwise would have been pursued.

37.1 In so doing the NPA and its responsible officials violated s 179(2) of the Constitution and ss 32(1)(a) and (b) of the NPA Act. [59]

37.2 The responsible officials also violated their oaths of office in terms of 32(2) of the NPA Act and are liable for criminal sanction in terms of s 41(1) of the said Act.

38 In allowing others to effectively take their decisions the responsible members of the NPA failed to act impartially and perform their powers and duties in good faith

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[59] The NPA's Prosecution Policy also requires at p 2 – 3 that the NPA must "*exercise its prosecutorial functions* ***independently***". (Emphasis added); and that prosecutorial decisions be made independently (p 12). These requirements were also violated.

and without fear, favour or prejudice. In acquiescing to the demands of others the officials involved acted partially and displayed no courage.

38.1 Their actions, or inaction, brazenly favoured political elites and perpetrators of apartheid era crimes and severely prejudiced the interests of victims, their families and communities.[60]

38.2 Accordingly, the NPA and the responsible officials violated s 179(4) of the Constitution and ss 32(1)(a) and 32(2) of the NPA Act.

39 The NPA, and its responsible officials, permitted other organs of state, alternatively members or employees of organs of state and/ or other persons to improperly interfere, hinder or obstruct the authority in carrying out its powers and duties and functions.

39.1 In so doing the NPA violated s 32(1)((b) of the NPA Act and its responsible officials are accordingly liable for criminal sanction in terms of s 41(1) of the said Act.

39.2 These violations, in turn, amounted to a violation of the rule of law itself, enshrined as a founding value in section 1(c) of our constitution.[61] They also amount a betrayal of the constitutional compact of truth, reconciliation

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60 In this regard note the requirement laid down in the NPA's Prosecution Policy at p 5:

"*The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole.*"

61 Section 1(c) of the Constitution provides that "*The Republic of South Africa is one, sovereign, democratic state founded on the following values… Supremacy of the constitution and the rule of law.*"

and justice that our democracy was predicated upon, and which sought to provide the closure and healing that our nation required to move beyond our past, as enshrined in the preamble of the Constitution.[62]

Collusion by the NPA in supressing TRC cases

40 Notwithstanding the admission of political interference in its operations, the NPA denies colluding with political forces to suppress apartheid-era cases.[63] The NPA asked Cajee to provide proof of this allegation, failing which it should be withdrawn.

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62 The preamble of the Constitution provides that:

"*We, the people of South Africa,*

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—

> *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*
>
> *Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*
>
> *Improve the quality of life of all citizens and free the potential of each person; and*
>
> *Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.*

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika."

63 NPA SAA, p 767 para 2.33.

41 In our respectful submission, Cajee need go no further than point to the NPA's conduct in this case. The contradictions in the supplementary affidavit of J P Pretorius and the detail set out in the affidavit of R C Macadam speak volumes.

42 The NPA only admitted to political interference after considerable pressure was placed upon it with the filing of Cajee's supplementary affidavit on 25 January 2019 which called for the filing of the Macadam affidavit. The Macadam affidavit was finalised on 1 November 2018[64] – some two weeks before the NPA was meant to file its initial answering affidavit on 14 November 2018.[65] It can be safely assumed that the NPA withheld Macadam's affidavit from this Court despite its clear relevance and its existence at the time of being ordered by this Court to file its answering papers.

43 Macadam's affidavit is particularly instructive, and he is to be commended for making available relevant facts to this Court that explains the post-TRC delay. It is however most regrettable that Adv. Macadam chose only to speak up towards the end of 2018, on the eve of a new NDPP assuming office. Had he acted earlier much damage to the administration of justice could have been prevented.

44 The following passages in Macadam's affidavit reveal the inglorious roles of the NPA, Directorate of Special Operations ("**DSO**") and SAPS:

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64 Annexure SA1, NPA SAA, pp 794 – 804.

65 SAA, p 736 para 9. The NPA's answering affidavit was only filed on 8 December 2018.

44.1 After submitting a report on 15 May 2003 to the NDPP and the DSO setting out the TRC cases which had been identified for investigation, including the Timol case:

> *"Ackerman and I met with DSO Special Director Adv MG Ledwaba (Ledwaba) to arrange for the DSO to conduct the investigations specified in Annexure RCM2.* ***The meeting was unpleasant as Ledwaba made it clear in no uncertain terms that the DSO would not investigate any TRC matters*** *and that these should all be referred to SAPS."*[66] *(Emphasis added)*

44.2 Ackerman and Macadam then met with Commissioner De Beer, the Divisional Head of the Detective Service of SAPS, and requested the SAPS to take over the investigations. Subsequently in September 2003 De Beer advised in writing that the TRC cases was the responsibility of the DSO not the SAPS; and the SAPS would only investigate if instructed by the President.[67]

44.3 Attempts by Ackermann and Macadam to persuade Ledwaba to reconsider his refusal to investigate the TRC cases fell on deaf ears.[68] A letter was addressed to Ledwaba "*appealing to him to appoint investigating officers and pointing out that, in the absence thereof, the PCLU would not be able to deliver on its mandate*".[69] According to Macadam:

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66 Annexure SA1, NPA SAA, p 797 para 19. See also letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision (Annex RCM3 pp 812 – 813).

67 *Id*, p 797 para 19. See letter of De Beer (Annex RCM4 pp 814 – 815).

68 *Id*, p 798 para 22. See letter of Ackermann to Ledwaba (Annex RCM5 pp 816 – 818).

69 *Id*.

> *"The DSO however did not appoint investigators as requested and* ***consequently none of the TRC matters requiring investigation could be taken further****."*[70] *(Emphasis added)*

44.4 Macadam recalls Ackermann advising him that he intended prosecuting three former Security Branch members for their role in the attempted murder of Reverend Frank Chikane by poisoning. This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary. However, he was instructed by the then acting NDPP not to arrest and prosecute the suspects. [71]

44.5 Macadam confirms that a moratorium was placed on all TRC investigations and prosecutions are placed on hold (not that any were being investigated) pending the adoption of guidelines to deal with this class of cases. [72] He advised that he and Ackermann were of the view that the guidelines (amendments to the Prosecution Policy) "*were unconstitutional in that they made provision for the NDPP not to prosecute perpetrators if they met the criteria for granting amnesty as had been applied by the TRC*".[73]

44.6 When Macadam represented the NPA on the 'inter-departmental task team' set up to deal with the TRC cases:

> *"I noticed that the task team was* ***predominantly comprised of members of the intelligence community who were more intent on***

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70 *Id*, p 798 para 23.

71 *Id*, pp 798 – 799 paras 26 – 27.

72 *Id*, p 799 para 27.

73 *Id*, p 799 para 28.

> ***cross-examining me as to why matters should be investigated*** *rather than addressing the issue of all the outstanding cases."*[74] (Emphasis added)

44.7 Macadam confirms that there was no investigation in the Timol case but that:

> *"…. If memory serves me correct* ***Leask had informed me that as a result of the decision taken by Ledwaba that the DSO would not investigate TRC cases he was unable to comply with my original request for investigations.*** *Since he was however traveling to Cape Town on other investigations he contacted Ivor Powell and questioned him regarding the confession apparently made by the Applicant in this matter. The allegation was however denied by Powell and Mr Cajee was informed accordingly."*[75] (Emphasis added)

44.8 Macadam refers to various documents he discovered in December 2017 including:

44.8.1 A second draft Indemnity Bill authorising the President to grant indemnity to persons committing politically motivated crimes.[76]

44.8.2 The terms of reference of the Amnesty Task Team ("**ATT**") dealing with criteria which the NPA applies to TRC cases, the formulation of Guidelines and whether legislative enactments are necessary, and it concludes by deferring to the views of the intelligence agencies.[77]

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74 *Id*, p 799 para 30.

75 *Id*, p 802 para 44. This is in stark contrast to Macadam's Sworn Affidavit before the Reopened Inquest (dated 15 August 2017, exhibit Q1) where he gave the impression that there had been an investigation and made no mention that his request for an investigation had been firmly refused. See also: AA, pp 493 – 494, paras 61 – 63; pp 536 – 537, paras 142.4 – 143, read with annex IC 3.

76 *Id*, p 803 para 46.1, annex RCM13 pp 859 – 860.

77 *Id*, p 803 para 46.2, annex RCM14 p 861.

44.8.3 A further report of the ATT *inter alia* looking into whether private prosecutions and civil litigation could be eliminated where a decision not to prosecute is taken and whether a person aggrieved with a decision not to prosecute may approach the International Criminal Court (ICC).[78]

44.8.4 A letter dated 8 February 2007 addressed *to* Pikoli by the then Minister of Justice expressing her concern that the NPA was proceeding with TRC prosecutions as she was under the impression that the NPA would not.[79]

44.8.5 A secret memorandum addressed by Pikoli to the Minister of Justice by Pikoli objecting to the interference with the TRC matters by other Government departments and concluding that he is "*obstructed from carrying out my functions*".[80]

44.9 Macadam concludes that "*[t]hese documents speak for themselves and go a long way in explaining why from 2003 the PCLU constantly struggled to have TRC cases investigated*." [81]

45 While the pressure brought to bear on the NPA was of a political nature and was exerted by other organs of state, including police and intelligence services, and members, employees and cabinet ministers of other organs of state, as set out

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78 *Id*, p 803 para 46.3, annex RCM15 pp 862 – 865.

79 *Id*, p 803 para 46.4, annex RCM16 p 866.

80 *Id*, p 803 para 46.5, annex RCM17 pp 867 – 877.

81 *Id*, p 803 para 47.

above, the NPA and its officials were under a clear legal duty to reject such improper interference and obstruction.

46 Our courts have affirmed these obligations in numerous judgments. Most recently, in *Nxasana*,[82] the Constitutional Court drew the nexus between these obligations and fulfilling the NPA's mandate as follows:

> *"This Court has said of the NPA's independence '[t]here is… a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts'. The reason why this guarantee of independence exists is not far to seek. The NPA plays a pivotal role in the administration of criminal justice.* ***With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds.*** *Equally, functionaries within that prosecuting authority may – as CASAC submitted – 'be pressured…. into pursuing prosecutions to advance a political agenda'.* ***All this is antithetical to the rule of law, a founding value of the Republic. Also, malleability, corruption and dysfunctionality are at odds with the constitutional injunction of prosecuting without fear, favour or prejudice. They are thus at variance with the constitutional requirement of the independence of the NPA.***
>
> *At the centre of any functioning constitutional democracy is a well-functioning criminal justice system.* ***In Democratic Alliance Yacoob ADCJ observed that the office of the NDPP 'is located at the core of delivering criminal justice'. If you subvert the criminal justice system, you subvert the rule of law and constitutional democracy itself.*** *Unsurprisingly, the NPA Act proscribes improper interference with the performance of prosecutorial duties. Section 32(1)(b) provides:*
>
> > *'Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.'*
>
> ***Improper interference may take any number of forms.*** *Without purporting to be exhaustive,* ***it may come as downright intimidation.*** *It may consist in improper promises or inducements****. It may take the***

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82 *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 (10) BCLR 1179 (CC).

> ***form of corruptly influencing the decision making or functioning of the NPA. All these forms and others are proscribed by an Act that gets its authority to guarantee prosecutorial independence directly from the Constitution.***" (Emphasis added.)

47 With a few exceptions, the leadership of the NPA acquiesced with the political meddling in its work. Not only was the NPA required to reject such interference it was required under law to address and stop such unlawfulness by:

47.1 Investigating, and where necessary, prosecuting those unlawfully interfering with the criminal justice process and obstructing the course of justice;[83]

47.2 Taking steps to restrain and stop such interference, if needs be through seeking an appropriate restraining and/ or declaratory order from the High Court, and if necessary from the Constitutional Court;

47.3 Exposing the interference by bringing it to the attention of Parliament's Portfolio Committee on Justice.

48 None of the above steps were taken by the NPA's leadership. In the absence of such steps there is only one conclusion to draw from the common cause facts: the NPA agreed or effectively agreed not to pursue justice in the TRC cases. In

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83 Aside from the criminal liability arising from s 41(1) of the NPA Act, soliciting a prosecutor by unlawful means not to prosecute constitutes the crime of obstruction the course of justice (*S v Burger* 1975 (2) SA 601 (C) at 607) ; See *R*. v *Field* (1964) 3 All E. R. 270 at 271, 281 (quoted by Baker R in *S v Burger* 1975 (2) SA 601 (C) at 616): "*Held: A conspiracy to obstruct the course of justice was different from, and might be far more reprehensible than, a conspiracy to obstruct the police in the execution of their duty*…" and may amount to "*a grave crime*". Where a person, knowing that police investigations are based on a suspicion that a crime may have been committed, obstructs the police in their investigations, it is no defence to claim that he did not foresee the possibility of a prosecution (*S v Greenstein* 1977 (3) SA 220 (RA) at 224). The crime of obstructing the course of justice may be committed by means of mere *omissio*, such as where an official refrains from passing material information to a law enforcement officer (*S v Gaba* 1981 3 SA 745 (O)).

the circumstances, Cajee was well within his rights to assert that the NPA had colluded with political elements to suppress justice. This is why Cajee has called for a full inquiry into this shameful period in the NPA's history.[84]

49 The NPA, and its responsible officials, permitted other organs of State, alternatively members or employees of organs of state and/ or other persons to improperly interfere, hinder or obstruct the authority in carrying out its powers and duties and functions. The actions of the responsible officials, both within the NPA and SAPS, as well as the Ministers of Justice and Police, and indeed the government itself, warrants investigation into whether their conduct:

49.1 amounts to the crime of defeating or obstructing the course of justice in that these officials took active steps to supress the TRC cases in the face of a legal obligation to do otherwise;[85]

49.2 amounts to the crime of corruption, particularly as framed in section 9(2) of the Prevention and Combating of Corrupt Activities Act, 12 of 2005 ("**PCCA**"); and

49.3 where relevant officials are officers of this Court, whether these officials are fit to serve as such in light of their conduct.

50 To date the NPA, the Ministers of Justice and Police, and indeed the government itself, either maintain their silence, or continue to deny that they violated their constitutional and statutory obligations. No expression of regret, remorse or

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84 AA, p 537, para 143.

85 *S v Burger* 1975 (2) SA 601 (C); *Bazzard* 1992 (1) SACR 302 (NC);

apology has been offered by any of these role-players for their deep betrayal of victims of past atrocities.

APPLICANT'S OBJECTION TO THE MURDER CHARGE

51 Rodrigues makes repeated and strenuous objections throughout his affidavit to the fact that he has been charged with murder when the Reopened Inquest Court made no explicit finding that he murdered Timol. [86]

52 Aside from the fact that aforesaid Court never excluded the possibility that Rodrigues was involved in the murder, it is noteworthy that Rodrigues does not explicitly deny or refute that Timol was murdered. His main complaint is that he has been personally implicated in the murder in the indictment. Given that, on his own version, he was with Timol in the moments before he met his demise such an explicit objection ought to have been front and centre of his denials. Indeed, if Timol had not been murdered, there would have been absolutely no need to deny personal involvement in an act, which did not happen.

53 In any event, the objections of Rodrigues have a shrill tone in light of the fact that the uncontested forensic and scientific evidence led by the family in the Reopened Inquest demonstrated that his version of what transpired on 27 October 1971 was physically impossible.

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86 FA, pp 14 - 16, paras 15 – 17.3; p 27, paras 27 – 29.

54 Moreover, on his own version, he withheld evidence of the cover-up before the first inquest;[87] and most significantly, on his own evidence before the Reopened Inquest, he inadvertently admitted to the murder of Timol on the basis of *dolus eventualis.*[88]

55 Rodrigues agreed, under cross examination, that an ambulance and emergency medical care should have been immediately summoned; and he agreed that he and the other officers should not have moved Timol while in the garden.[89] Rodrigues also conceded under cross examination before the Reopened Inquest that in the position Timol lay before he was moved, he was ideally placed only a few metres from the road, where an ambulance could have stopped and medical personnel could have gained quick access to him. [90]

56 We submit that the conduct of Rodrigues in not picking up the phone in room 1026 and calling an ambulance can only be consistent with the desire on his part to kill Timol and prevent a proper inquiry into the cause of death. The same can be said for the conduct of Rodrigues in moving a critically injured person, with likely spinal and neck injuries. Timol was moved on a blanket from the garden up to the 9th floor.

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87 AA, p 500, para 73.3.

88 AA, pp 485 - 486, paras 35 - 37.

89 *Id*.

90 Reopened Inquest Transcript, Vol 10, p 792 - 794. Rodrigues also admitted that the actions of the police in immediately moving Timol prevented a crime scene investigation.

57 Rodrigues, on his own version, knew better than anyone else that Timol had fallen 10 storeys. It was overwhelmingly obvious to Rodrigues that Timol needed urgent medical assistance.[91] As a police officer, and as the only person, on his version, who saw Timol exit the window, he was under a compelling legal duty[92] to seek emergency medical attention. Rodrigues deliberately chose not to obtain medical assistance for Timol.[93]

58 Rodrigues must have foreseen, and by implication did foresee, that there was a reasonable possibility that Timol would die if not medically treated and if moved by the police.[94] He refrained from calling an ambulance and he moved Timol as he intended for Timol to die. Rodrigues subjectively reconciled himself with the foreseen consequences and is accordingly liable for Timol's murder on the basis of *dolus eventualis*.[95] He, and the other police officers involved, had the requisite intention to kill in the form of *dolus eventualis*.

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91 See the analogous case of: *S v Van Aardt* 2008 (1) SACR 336 (E) at 346b and 346c.

92 *Minister of Safety and Security v Craig NNO* 2011 (1) SACR 469 (SCA)*:* Officials who have prisoners in their charge should see to their well-being, and courts should be vigilant to ensure that officials, who have in their charge those whose freedom of movement have been restricted, comply with the obligation to ensure their well-being. Police standing orders place an obligation on members of the police, to whom it appears that detainees are in distress and are therefore injured or ill, to obtain the necessary medical assistance for them. (Paragraphs [60] and [61] at 480*a–d*.). See also: *Minister Van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA).

93 *S v Van Aardt* 2008 (1) SACR 336 (E) at 345a – b

94 *Id* at 346f - j

95 In *S v Sigwahla* 1967 (4) SA 566 (A) the following was stated at 570B - E: "*The expression 'intention to kill' does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as dolus eventualis, as distinct from dolus directus. …. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn*…."

59 Rodrigues is liable for the murder of Timol on this basis alone, even without any of the other forensic and circumstantial evidence, which is equally compelling. We submit that it is not for a court hearing an application for permanent stay to test the evidence. The evidence must be tested at the criminal trial.

THE OBLIGATION TO PROSECUTE AND THE RULE OF LAW

60 The right to life, protected by section 11 of the Constitution, has two components – a material and a procedural component.[96] The material component means that every person has the right to be free from the arbitrary deprivation of life. The procedural component requires proper investigation and accountability where the arbitrary deprivation of life is suspected or has occurred. A failure by the State to ensure accountability for the arbitrary deprivation of life is a violation of the right to life and undermines the rule of law.

61 The Constitutional Court when considering whether the quashing of charges gave rise to a constitutional matter held:

> *"In a constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights, through, amongst other things, the policing and prosecution of crime. The constitutional obligation upon the State to prosecute these offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework … By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective."*[97] (Emphasis added)

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96 United Nations General Assembly Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns A/HRC/26/36 (1 April 2014).

97 *S v Basson* 2005 (1) SA 171 (CC) paras 31-33.

62 The obligation to prosecute offences is not limited to offences that were committed after the Constitution came into force but applies to all offences committed before it came into force.[98] The NPA established in terms of the Constitution has the power to institute criminal proceedings on behalf of the State.

63 Section 179(4) of the Constitution and the National Prosecuting Authority Act, 32 of 1998 ("**NPA Act**") require members of the NPA to carry out their duties without fear, favour or prejudice, subject only to the Constitution and the law. A well-functioning criminal justice system is at the centre of any functioning constitutional democracy, and a subversion of the criminal justice system is a subversion of the rule of law and constitutional democracy itself.[99]

64 In deciding whether or not to institute criminal proceedings, prosecutors assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution.[100] Once it has been established that there is sufficient evidence, a prosecution should follow unless the public interest demands otherwise.[101] Where there is sufficient evidence to prosecute, the NPA must comply with its constitutional obligation.[102]

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98 *S v Basson* 2005 (1) SA 171 (CC) para 37.

99 *Corruption Watch NPC v President of the Republic of South Africa*; *Nxasana v Corruption Watch NPC* 2018 (10) BCLR 1179 (CC) para 20.

100 NPA Prosecution Policy Revised June 2013 p 5 (issued in terms of section 21 of the NPA Act).

101 *Id* at p 6. When considering whether it is in the public interest to prosecute all relevant factors must be considered including the nature and seriousness of the offence, the interests of the victim and broader community, and the circumstances of the offender.

102 *Nkadimeng v National Director of Public Prosecutions* (32709/07) [2008] ZAGPHC 422 (12 December 2008) para 15.4.4.

65 The historic compromises made during our negotiations for a peaceful transition also demand that justice be pursued for serious apartheid-era crimes.[103] This was encapsulated in the postscript to the *Constitution of the Republic of South Africa Act* 200 of 1993 ("**the Interim Constitution**") and subsequently in the Promotion of National Unity and Reconciliation Act 34 of 1995 ("**the TRC Act**").

66 The conditional amnesty was authorised for the specific objective of facilitating a peaceful transition towards a democratic order. The constitutional and statutory design of the TRC process specifically envisaged that criminal investigations, and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or had failed to apply for amnesty. This lay at the heart of the compact struck with victims. The compact required the State to take all reasonable steps to prosecute deserving cases of offenders who were not amnestied.

67 In its Final Report released on 21 March 2003 the TRC stressed that the amnesty provision should not be seen as promoting impunity; and highlighted the imperative of "*a bold prosecution policy*" in those cases where amnesty has not been applied for in order to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.[104]

68 Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on

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103 AA, pp 489 - 491, paras 47 – 55.

104 Volume 6, Section 5, Chapter 1 at paragraph 24

the basis that there would be a genuine follow-up of those offenders who spurned the process and those who did not qualify for amnesty.

69 It is within the context of these constitutional, statutory and international law obligations that this matter must be decided.

THE APPLICATION FOR A PERMANENT STAY MUST BE REFUSED

70 The accused seeks to escape prosecution by applying to this Court to declare the criminal proceedings instituted against him to be an infringement of his constitutional rights and for a permanent stay of the prosecution in respect of the charge of murder.

71 The relief sought by the accused has been described by the Constitutional Court as *"radical, both philosophically and socio-politically".*[105] To bar the prosecution before the trial begins prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct, and will seldom be warranted in the absence of significant prejudice to the accused.[106] As such, it will be granted sparingly and only for the most compelling reasons.[107]

72 The Constitutional Court in deciding whether there had been an unreasonable delay in the prosecution of a matter held that the right to a speedy trial protects three kinds of interests – the right to liberty, the right to security, and trial-related

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105 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 38.

106 *Id*.

107 *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA).

interests.[108] In assessing whether there has been a trial within a reasonable time, an objective and rational assessment of relevant considerations is required.[109] The amount of elapsed time is central to the enquiry, bearing on other considerations and, in turn, being coloured by them.[110]

73 The other relevant factors that a court will consider when making a determination on whether to grant a permanent stay are:[111]

73.1 The nature, gravity and extent of the prejudice suffered by the accused;

73.2 The gravity, nature and complexity of the case;

73.3 Systemic delay (and the role of the accused); and

73.4 The interests of justice.

Prejudice suffered by the accused

74 An assessment of the nature of the prejudice suffered by an accused is considered on a continuum, from incarceration through restrictive bail conditions, trial prejudice and anxiety.[112] The most invasive prejudice suffered by a person

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108 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 20. The matter was decided in terms of section 25(3)(a) of the interim Constitution. The comparable provision in the final Constitution is section 35(3)(d).

109 *Id* at para 27.

110 *Id* at para 28 and *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 6.

111 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) paras 31-35, *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 6.

112 *Van Heerden v National Director of Public Prosecutions* [2017] 4 All SA 322 (SCA) para 51, referring to *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 31.

pending trial is pre-trial incarceration.[113] The more serious the prejudice, the shorter the period within which the accused is to be tried.[114] Rodrigues has not been incarcerated pending trial and has not alleged restrictive bail conditions.

75 Trial-related prejudice is the prejudice suffered by an accused because of witnesses becoming unavailable and memories fading because of delay, which may prejudice an accused in the conduct of their trial.[115] The accused alleges that his fundamental rights have been infringed because of the:

75.1 Long lapse in time in beginning the prosecution;

75.2 Alleged loss of evidentiary material, unavailability of witnesses and the fading memory of witnesses, including himself; and

75.3 Risk to his state of health.[116]

76 We submit that the accused will not be prejudiced in the conduct of his trial because:

76.1 It is the NPA that bears the onus of establishing the accused's guilt beyond a reasonable doubt. The absence of witnesses, evidence and records thus places a greater burden on the NPA than it does on the accused.[117] In assessing trial-related prejudice, the Supreme Court of Appeal ("**SCA**")

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113 *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 6.

114 *Id*.

115 *S v Dzukuda; S v Tshilo* 2000 (11) BCLR 1252 (CC) para 51.

116 FA p 56 - 60 paras 60-66.

117 AA p 531 para 134.2.

has expressed the view that handicaps relating to the availability of witnesses and their recollection of events 15 years later are likely to render the prosecution's task more difficult.[118]

76.2 The Court, per Farlam J, concluded that the listed grounds of prejudice were not sufficient to justify the far-reaching remedy of an indefinite stay and that the points would have a bearing on the question of proof beyond a reasonable doubt to be brought to the attention of the jury (of the American court hearing the matter).[119] The onus and the presumption of innocence are mechanisms that serve to protect the rights of the accused.

76.3 Any prejudice that the accused claims arising from an absence of evidence may also be remedied by a section 174 discharge application at the end of the prosecution's case.[120]

76.4 Judicial officers are trained to assess the credibility and reliability of witness testimony, and to assess it holistically.[121]

76.5 It is open to the accused to adduce expert and forensic evidence in rebuttal, regardless of the delay.[122]

77 The accused's concern regarding his memory and ability to recall is without basis. Particularly when his version of the events surrounding Timol's death has

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118 *McCarthy v Additional Magistrate Johannesburg* [2000] 4 All SA 561 (A) para 46.

119 *Id*.

120 AA p 516 para 105.2 (under the Criminal Procedure Act 51 of 1977).

121 AA p 516 para 105.3.

122 AA p 534 para 138.3.

largely remained consistent from 1971 through to 2017,[123] even if untrue, and where no evidence or medical records of the accused's *"fragile health"* have been provided.[124] Accordingly, his claim of ill health is an entirely bald claim. In any event, we submit that advanced age is not a basis to escape liability. The message that ought to be sent to perpetrators of serious crime, such as murder, should be that they have to account for their actions, no matter their age.[125]

78 It is not true that the accused at all relevant times cooperated with the NPA and/ or the investigating team.[126] In reality Rodrigues maintained a wall of silence for 46 years. This was particularly egregious since on his own version, at least since the appearance of Timol's mother before the TRC in 1996, he was well-aware of the plight of the family but chose to remain silent and condemn them to decades more suffering.[127] If Rodrigues had in fact been cooperative and truthful the question of Timol's death could have been resolved years, if not decades, earlier. In this respect he has been an agent of delay.[128]

79 The prejudice alleged by the accused is purely speculative. He has failed to prove actual prejudice or an infringement of his fundamental rights. If it were to be found that the accused has suffered prejudice due to the delay (which is denied), we

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123 NPA AA p 336 para 3.22.

124 AA p 516 para 107.

125 AA p 517 para 109.

126 FA p 45 para 47.

127 AA pp 532 - 533 paras 135 - 136.

128 *Van Heerden v National Director of Public Prosecutions* [2017] 4 All SA 322 (SCA) para 52.

submit that the accused only has himself to blame for his situation and that such prejudice does not justify the relief sought.

The nature of the case

80 The gravity, nature and complexity of the case should be considered against the context of the time lapse and any prejudice to the accused.[129] The accused faces serious charges of murder and defeating the administration of justice. The seriousness is illustrated by the fact that the crime of murder does not prescribe. In evaluating the crime of murder, the SCA said:

> *"The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the state as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime."*[130]

81 It took the family 46 years to find out the truth of what happened to Timol, namely that he had been viciously tortured and murdered by the police to cover up the torture.[131] It took almost five decades for the family to prove what they knew all along, that Timol had not jumped to his death.

82 Over this time, Rodrigues continued with his life much as before, unaffected by the events, while knowing exactly what took place but refusing to speak the truth.

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129 *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 7.

130 *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA) para 21.

131 AA p 498 para 70.

The 2017 Inquest Court was particularly scathing of him, finding material contradictions in his evidence and concluding that

> *"[T]here is no merit or credibility in the evidence of Rodrigues… the version was clearly fabricated to conceal the real truth as to what caused Timol to fall. The Court rejects this version".*[132]

83 The accused's application cannot succeed when regard is had to the seriousness of the charges against the accused, the painful history of this matter and his appalling conduct.

Delay

84 When considering the question of delay, a balancing test is undertaken whereby the conduct of the prosecution and of the accused are considered against the length of the delay; the reason assigned by the State to justify the delay; the accused's assertion of the right to a speedy trial; and prejudice to the accused.[133]

85 Systemic factors such as resource limitations that hamper the effectiveness of investigations or prosecutions and delay caused by court congestion are also considered.[134] These factors do not form a definitive checklist and each case should be decided on its own facts.[135]

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132 AA p 499 para 73.

133 *Bothma v Els* 2010 (2) SA 622 (CC) para 36.

134 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 35.

135 *Bothma v Els* 2010 (2) SA 622 (CC) para 37.

86 In assessing the reasons for the delay in prosecuting this matter over the past 47 years, and the reasons assigned to justify the delay, it is of assistance to consider the time periods in four broad categories:

86.1 First, the inaction between 1971 and 1994 is due to the fact that under apartheid, the police generally, and the Security Branch, in particular, could not have been expected to investigate themselves.[136] Murders and crimes carried out by the Security Branch were routinely covered up, with magistrates and prosecutors often turning a blind eye to the truth. This was the order of the day.

86.2 Second, the TRC and its amnesty process was in place from 1995 until 2002, constituting another substantial delay in this matter.[137] Although the law enforcement authorities should have pursued justice in this time period most cases were put on hold pending possible amnesty applications.

86.3 It is the third period, from 2002 until the decision to reopen the Inquest in October 2016, which requires an explanation. Unfortunately, until the recent filing of the NPA's supplementary affidavits, it chose not to explain the bulk of this extended period. Instead, it focused on the period governed by section 35(3)(d) of the Constitution (the period between the issuing of an indictment and the commencement of a trial).[138]

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136 AA p 504 para 82.

137 AA p 505 para 83.

138 AA p 535 para 142.

86.4 While the NPA's interpretation of section 35(3)(d) cannot be faulted, it is wrong of the NPA to ignore the period leading up to the decision to institute criminal proceedings.[139] As we have already submitted, the failure to act by NPA and the SAPS in this period constitutes a violation of their obligations and duties under the Constitution, their enabling Acts and the NPA's Prosecution Policy.[140] It may also very well constitute the crimes of wilful obstruction of justice and corruption. Even during 2016 the NPA had to be threatened with litigation in order to secure the decision to reopen the inquest.[141] It is now known that it was the unlawful efforts by political elements and others to suppress the TRC cases that was the actual reason for the post-TRC delay in this matter.[142]

86.5 The fourth period concerns the decision to prosecute and charge the accused. There has been no delay from the arrest of the accused on 30 July 2018 until the launch of this application in October 2018. If anything, this application brought by the accused is the only real factor that has delayed his prosecution to date.

87 We submit that Rodrigues has directly benefitted from the unlawful interference with the independence of the NPA and was protected from investigation and prosecution in the post-TRC years.[143] He now seeks to use the same delay to

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139 *Id*.

140 AA p 536 para 142.3.

141 AA pp 537 - 539 paras 143-144.

142 AA pp 493 – 495 paras 61-65; NPA SAA, pp 752 – 753 para 2.3; p 756 para 2.11; p 766 para 2.29.

143 AA p 508 paras 88-89.

permanently stay his prosecution. To stay the prosecution in such circumstances would amount to near total impunity for apartheid era crimes. Moreover, it would be deeply offensive to our constitutional order and be in violation of South Africa's international law obligations.[144]

88 While the delay of more than 47 years in prosecuting the accused is unfortunate and regrettable,[145] it must be considered in context. During apartheid there was complete impunity for crimes of this nature. With the advent of democracy in 1994, and the establishment of the TRC, it was open to Rodrigues to come forward and come clean about his role and claim amnesty.[146] Instead he chose to remain silent ignoring the invitations for closure, only testifying in the re-opened Inquest under subpoena.[147]

89 Despite the lapse of time, the obligation on the State to ensure accountability remains. There is considerable precedent for bringing prosecutions in respect of serious crimes even many decades later, particularly in post conflict societies.[148]

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144 These include Art 2(3) of the International Covenant on Civil and Political Rights, *U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171;* Articles 4(m) and (o), Constitutive Act of the African Union, OAU *Doc. CAB/LEG/23.15, Adopted by the 36th Ordinary Session of the Assembly of Heads of State and Governments on 11 July 2000 at Lomé, Togo, entered into force May 26, 2001: Articles 4 and 11 of the* Basic Principles and Guidelines on the Right to a Remedy*, G.A. Res. 60/147, U.N. Doc. A/Res/60/147* (Dec. 16, 2005). Adopted unanimously by the UN General Assembly.

145 AA p 510 para 95.

146 AA p 511 para 96.

147 AA p 527 para 129.

148 AA pp 512 – 514 paras 99-100.

Interests of justice

90 Even if it is found that the various delays are unreasonable, when determining the appropriate relief, a value judgment is required that strikes a balance between competing societal and individual interests.[149]

91 The Constitutional Court explained in making that judgment:

> *"[C]ourts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. Particularly when the applicant seeks a permanent stay of prosecution, this interest will loom very large. The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structured legal system; a system which requires the prosecution to prove its case in a public forum. We also have to be prepared to pay a price for our membership to such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused. … The question in each case is whether the burdens borne by the accused as a result of delay are unreasonable."*[150]

92 We know now that prior to his murder, Timol was probably fatally or seriously injured following more than four days of unrelenting torture and interrogation at the hands of the Security Branch – policemen charged with the duty to protect. The act of torture is a heinous crime, prohibited as an international norm of *jus cogens.* The torture was followed by the crime of murder and a cover-up lasting 46 years.

93 It is not only the victims and their families that have a substantial interest in seeing crimes of this nature prosecuted; there is a significant public interest as

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149 *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 9.

150 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 36.

well. It is not only the accused that has a legitimate interest in a trial commencing and concluding it in a reasonable time. Not only is the public interest served but so too is the special interest of complainants.[151] On an evaluation of the circumstances of this case, we submit that it is in the interests of justice that the accused be prosecuted.

Comparative Law

94 Section 39(1)(c) of the Constitution provides that:

> *"(1) When interpreting the Bill of Rights, a court, tribunal or forum—*
>
> *…*
>
> *(c) may consider foreign law.*"

95 In *Fetal Assessment Centre*, the Constitutional Court indicated that the effect of the section is that this Court "*may have recourse to comparative law but is not obliged to follow it*".[152] Applying its earlier judgment in *K v Minister of Safety and Security*, the Court affirmed that despite the non-binding effect of foreign law—

> *"[i]t would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further… The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the Courts and our law will benefit. If it is not, the Courts will say so, and no harm will be done.*"[153]

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151 *Id at* para 37.

152 *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 28 and 31.

153 *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 28, applying *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 34-35.

96 In the United States, the Sixth Amendment to the United States Constitution guarantees the right to a speedy trial. US courts have interpreted the right to a speedy trial as not only a right that accrues to an accused,[154] but one that serves the interests of defendants and society alike.[155]

96.1 In *Beavers*,[156] the US Supreme Court held that the right to a speedy trial is neither "*unqualified*" nor "*absolute*" and that the right "*does not preclude the rights of public justice*". The Court ruled that the right to a speedy trial is "*necessarily relative*" "*consistent with delays and depend[ent] upon circumstances*".[157]

96.2 In *Barker*,[158] the prosecution of an accused was delayed pending the conviction of an accomplice whose testimony the prosecution sought to use against the accused. The delay entailed 16 continuances. More than five years passed between the time of the accused's arrest and his conviction. The US Supreme Court held that, like the test applied by South African courts, a four-pronged balancing test would be applied that considered the length of the delay, the reason for the delay, the accused's assertion of his right and the prejudice to the accused.[159]

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154 See *United States v Ewell*, 383 U.S. 116, 120 (1966) which held the Sixth Amendment to be—

"*an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself.*"

155 See *Barker v Wingo*, 407 U.S. 514, 519 (1972) which held that—

"there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused."

156 *Beavers v. Haubert,* 198 U.S. 77 (1905)

157 *Beavers v. Haubert,* 198 U.S. 77, 198 (1905)

158 *Barker v. Wingo,* 407 U.S. 514 (1972)

159 *Id at* 530

96.3 The Court made the following findings that are relevant to the present matter:

96.3.1 The length of delay must be weighed against the seriousness of the crime, with serious, complex crimes justifying a greater delay.[160]

96.3.2 Where witnesses are missing this is a valid reason that "*should serve to justify appropriate delay*".[161]

97 In *R v Jordan*,[162] the Supreme Court of Canada had to consider whether the lapse of five years between the date upon which an accused was charged and the end of the accused's trial amounted to an unreasonable delay in that infringed section 11(b) of the Canadian Charter of Rights and Freedoms ("**the Canadian Charter**").[163]

97.1 The Court held that the relevant time period under consideration was from the day of the charge to the actual or anticipated end of trial and not when the crime was committed, or the charge had been laid.

97.2 The Court introduced a presumptive ceiling beyond which delay – from the date of charge to the actual or anticipated end of the trial – is presumed to

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160 *Id*

161 *Id at* 531

162 *R v Jordan* (2016) 1 SCR 631

163 Section 11(b) of the Canadian Charter provides that:
"*Any person charged with an offence has the right*
…
(b) to be tried within a reasonable time."

be unreasonable unless exceptional circumstances provide otherwise. The ceiling was set at 18 months between the time that the charges were laid to the end of the trial in provincial courts and 30 months in higher courts.

98 In the United Kingdom, the common law principle is that a court is not empowered to stay a prosecution unless the accused can demonstrate that he or she would suffer serious prejudice, in the sense that no fair trial could be held, if the stay were not granted.[164] This is also the position in Scotland, where a plea in bar on the grounds of delay the question is whether there was significant prejudice to the prospects of a fair trial.[165]

99 In *R v Her Majesty's Advocate*,[166] the lords of the Judicial Committee of the Privy Council confirmed these principles and held that a stay is not always the appropriate remedy to cure delay:

> *"In a preconviction case the remedies may include a declaration, an order for a speedy trial, compensation to be assessed after the conclusion of the criminal proceedings, or a stay of the proceedings. Where there has been a breach of the reasonable time guarantee, but a fair trial is still possible, the granting of a stay would be an exceptional remedy. In marked contrast to the fair trial and independence guarantees there is therefore no automatic consequence in respect of the breach of a reasonable time guarantee."*[167]

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164 *Attorney-General's Reference* (No 1 of 1990) [1992] QB 630

165 *McFadyen v Annan* 1992 JC 53.

166 *R v Her Majesty's Advocate* [2002] UKPC D3 (28 November 2002)

167 *Id at para* 11.

100 In *Acquaviva*,[168] the European Court of Human Rights ("**ECHR**") had to consider an application brought by the parents of a man who had been killed in 1987. At the time of his death, the deceased was a militant nationalist on the run. Of relevance to the present proceedings, the ECHR held that:

100.1 only delays attributable to the State may justify a finding that a "*reasonable time*" has been exceeded;[169] and

100.2 although State authorities must act with with diligence taking special account of the interests and rights of the defence, the political context cannot be disregarded, as in this instance, it has an impact on the course of the investigation. Such a situation may justify delays in proceedings.[170]

101 From a conspectus of comparative foreign law, the following is apparent:

101.1 When a crime is of a serious nature, a longer delay is countenanced in contrast to less serious crimes. In this matter the seriousness of the crime of murder and defeating the ends of justice is accentuated by the fact that Rodrigues is accused of the murder of a detainee who was in his protection and to whom he owed a legal duty of care as a police officer.

101.2 Where witnesses are unavailable or unwilling to come forward, this will justify a longer delay. In the present case, the accused refused to co-

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168 *Acquaviva v France* no 19248/91 (ECtHR, 21 November 1995)

169 *Id at* para 61.

170 *Id at* para 66.

operate with the TRC investigation process and the key witness responsible for the re-opening of the first inquest (Prof Essop) had escaped from South Africa after serving more than three years of his banning order and had eventually settled in the United Kingdom.[171]

101.3 The right to a fair or speedy trial entails consideration of the delay period from the time of the arrest to the conclusion of the trial, not the period from the time of the committal of the crime. In the present case, this period is negligible.

101.4 The accused must demonstrate serious prejudice that he stands to suffer as a result of delays, which the accused has failed to do in the present case.[172]

101.5 This Court should have regard to the prevailing political context that may impact on a subsequent investigation. The political interference clearly contributed to the delay in the present case.

CONCLUSION

102 Decisions in matters of this kind are fact specific. Whether a breach of a right has occurred and whether the relief is justified is to be determined by a court after appraisal of all the facts on a case-by-case basis.[173]

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171 *The re-opened inquest into the death of Ahmed Essop Timol* [2017] ZAGPPHC 652 para 90, Annexure JPP3 418-419.

172 AA pp 515-516 para 105, pp 517-518 paras 111-112.

173 *Van Heerden v National Director of Public Prosecutions* [2017] 4 All SA 322 (SCA) para 70.

103 Rodrigues has failed to establish sufficient, or indeed any prejudice sufficient to warrant the drastic remedy of a permanent stay of prosecution. Instead, we submit that his behaviour, past and present, illustrates a general unwillingness to go to trial and to be held accountable.

104 Although the lapse in time between the murder of Timol and the indictment of Rodrigues has been extraordinarily long, the time involved is not necessarily a decisive factor in itself.[174] Moreover, it is largely attributable to political factors in the form of the apartheid government's general suppression of justice, followed in the democratic era by political interference in the work of the SAPS and NPA.

105 A conspectus of the content of s 35(3)(d) of the Constitution in light of foreign case law also indicates that the primary period to be considered, when evaluating fair trial rights, is the period between indictment and the commencement of trial, which has not been unduly long.

106 Upholding the relief sought would compound the suffering faced by the Timol family and unjustly reward the accused's persistent refusal to cooperate. Rodrigues has made his choices. Having elected not to participate in the TRC process, he reconciled himself to the possibility that an independent investigation would expose his role in Timol's untimely demise and open himself to prosecution. That reckoning has now come. History demands that such reckoning be allowed to take its course.

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174 *Bothma v Els* 2010 (2) SA 622 (CC) para 40.

107 Moreover, the disgraceful behaviour of the NPA and SAPS, in succumbing to political interference, should not be exploited for the benefit of perpetrators. The failure to prosecute apartheid era crimes is inconsistent with the State's constitutional duties, seriously implicates the rule of law, and violates South Africa's international law obligations.

108 The accused has mechanisms of protection at his disposal. If the judicial officer is unable to make a clear determination of guilt due to the lapse of time, the presumption of innocence will ensure his acquittal. The effect of the lapse of time results in the State facing the same (if not more) prejudice as the accused, the extent of which can only be properly measured by the trial court hearing all the relevant evidence.[175]

109 Weighing all the factors in this case and considering the seriousness of the nature of the offence, the public and the complainants' interests far outweigh that of the accused. The family seeks no injustice or revenge against Rodrigues. Their interest is closure and justice. In the circumstances, the criminal proceedings should proceed. We submit that this is a crime that will not go away.[176]

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175 *Naidoo v National Director of Public Prosecutions* [2003] 4 All SA 380 (C) 392.

176 *Bothma v Els* 2010 (2) SA 622 (CC) para 77.

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