

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG

Applicant

And

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

First Respondent

**THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE**

Second Respondent

THE MINISTER OF JUSTICE

Third Respondent

THE NATIONAL MINISTER OF POLICE

Fourth Respondent

WILLEM HELM COETZEE

Fifth Respondent

ANTON PRETORIUS

Sixth Respondent

FREDERICK BARNARD MONG

Seventh Respondent

MSEBENZI TIMOTHY RADEBE

Eighth Respondent

WILLEM SCHOON

Ninth Respondent

FOUNDING AFFIDAVIT

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I, the undersigned

THEMBISILE PHUMELELE NKADIMENG

state under oath as follows:

INTRODUCTION

1. I am an adult female. I am the Executive Mayor of City of Polokwane. I reside at 82 General Viljoen Street, Welgelegen, Polokwane. I am the First Applicant in this matter. I act in the interests of myself and my family and I depose to this affidavit on behalf of my wider family. In this regard I attach the confirmatory affidavits of my mother, Sizakele Ernestina Simelane and my two brothers, Antonio Lungelo Simelane and Junior Mzwandile Nkosinathi Simelane, which are annexed to this affidavit marked **TN1, TN2 and TN3**.
2. This case is about my late sister, Nokuthula Aurelia Simelane, (“Nokuthula”) who was abducted, brutally tortured and enforcedly disappeared by the South African Security Branch (“SB”) of the former South African Police (“SAP”) in 1983. The police case number is: Priority Investigation: JV Plein: 1469/02/1996. More than 30 years later, and notwithstanding countless pleas, my family and I are still waiting for the National Prosecuting Authority (“NPA”) to take a decision whether to prosecute the known suspects or not, or refer the matter to an inquest.
3. Although I only represent myself and my family in this application I submit that this case is representative of most cases arising from South Africa’s conflicts of the past that were submitted by the Truth and Reconciliation Commission (“TRC”) to the first respondent for further investigation and possible prosecution (“the TRC cases”). To the best of my knowledge the bulk of these cases have not been seriously investigated.
4. I submit that this failure represents a deep betrayal of those who gave their lives for the struggle for liberty and democracy in South Africa. It has also added significantly to the emotional trauma and anguish of their families, surviving victims and the wider community. I do not know why the new South African state has turned its back on victims who sacrificed so much, but it appears to me that this approach can only have been the product of a policy or decision to abandon these cases.
5. The supporting affidavits of Frank Dutton, Advocate Dumisa Ntsebeza SC, Alexander Boraine, Advocate Vusi Pikoli and Advocate Anton Ackermann SC are annexed hereto marked **TN4, TN5, TN6, TN7 and TN8**.

- 5.1. The affidavit of Frank Dutton, a private investigator, outlines the inquiries he carried out on behalf of my family and it also includes his assessment of the investigations conducted by the first and second respondents.
- 5.2. The affidavit of Advocate Dumisa Ntsebeza SC, former TRC Commissioner and Investigation Unit Head, confirms that my sister's case was investigated by the TRC's Investigation Unit.
- 5.3. Alex Boraine, former Deputy Chairperson of the TRC, outlines in his affidavit the rationale for the TRC's amnesty process and why justice is necessary.
- 5.4. The supporting and *in camera* affidavits of Advocate Vusi Pikoli, former National Director of Public Prosecutions, set out the political interference that brought an end to the investigation and prosecution of the TRC cases.
- 5.5. Advocate Anton Ackermann SC, former Director of the Priority Crimes Litigation Unit of the NPA, describes in his supporting affidavit the efforts to pursue justice in the TRC cases and how he was stopped from taking these cases forward.
6. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct. Where I make submissions of a legal nature I do so on the advice of my legal representatives.

Organisation of this affidavit

7. The scheme of this affidavit necessitates me setting out –
 - 7.1. An overview of Nokuthula's story;
 - 7.2. The relief sought and the approach of this affidavit;
 - 7.3. A full description of the parties;
 - 7.4. Description of the facts that gave rise to this application, including an overview of the conduct of the authorities under the control of the first to fourth respondents;
 - 7.5. The impact of the failure of the second respondent to investigate Nokuthula's case timeously and of the failure of the first respondent to take a prosecutorial decision.
 - 7.6. The relevant legal framework governing prosecutions and inquests.

- 7.7. The objections to the said delays, including why the delays are unreasonable.
- 7.8. The grounds of the relief which include upholding the interests of justice; as well as grounds of unconstitutionality, which involves dealing with violations of the rights to dignity, life, freedom and security of the person and to equal protection and benefit of the law; as well as the rule of law;
- 7.9. The grounds of review which deals with the fact that the delays are in conflict with the principle of legality; various provisions of the Promotion of Administrative Justice Act (PAJA); the special responsibility arising from South Africa's transition and the TRC process; and South Africa's international law obligations.
- 7.10. The grounds for a final interdict compelling the first respondent to refer my sister's case to an inquest or alternatively to take a prosecutorial decision.
- 7.11. The grounds of urgency.

Overview of Nokuthula's story

8. In 1983 Nokuthula was a twenty-three years old university graduate and was a courier for Umkhonto we Sizwe ("MK"), the armed wing of the African National Congress ("ANC"), moving between Swaziland and South Africa. She was betrayed by one of her own and was abducted and brutally tortured by the Security Branch of the former SAP in September of 1983.
9. Nokuthula was never seen again. We know from the TRC hearings that my sister suffered terribly at the hands of the SB. We know that she refused to collaborate with the forces of Apartheid. For this she paid the ultimate price.
10. Nokuthula's story is rooted in South Africa's bitter and divided past. She devoted her life to resisting the pernicious system of Apartheid. Notwithstanding the fact that Nokuthula's sacrifices helped to lay the basis for South Africa's democracy with its enshrined freedoms, the new South Africa has turned its back on her. My family and I have been searching for answers for more than 30 years. We have pleaded with authorities to take the necessary action to bring closure to this case. These pleas have fallen on deaf ears. Nonetheless, I have always refused to give up the search for the truth and justice.
11. My family and I have not rested since we learnt that my sister went missing. We know the most terrible things about what she suffered. But we don't know how she died, and where her body is today. We have spent three decades looking for Nokuthula. We even appointed private detectives to assist us. Until we find her remains, or get answers about

what really happened to her, we remain trapped in the past.

12. We did not expect the former South African Police to investigate themselves. However we firmly believed that the new democratic South Africa would take the necessary steps. We were wrong. This was the second betrayal of Nokuthula and everything she stood for. This betrayal cut the deepest. It deprived me and my family of closure and our right to dignity. My father went to his grave in 2001 without knowing what happened to Nokuthula. My mother, now sick and old, fears that she will die without knowing; and without burying Nokuthula's remains with the dignity she deserves.
13. In 2001 the Amnesty Committee of the TRC concluded that the white SB officers had lied to the Commission about what had happened to Nokuthula during her unlawful captivity, in particular the torture she sustained. They nonetheless granted amnesty to those officers for Nokuthula's kidnapping. The Amnesty Committee betrayed its own law, which states that amnesty can only be granted in exchange for the truth and full disclosure.
14. In relation to the amnesty process it is noteworthy that nobody applied for amnesty for Nokuthula's murder and not all the perpetrators applied for amnesty for her kidnapping. These included Msebenzi Timothy Radebe, eighth respondent and Willem Schoon, ninth respondent, the latter being the Commander of Security Branch C1 Section, which carried out the offences against Nokuthula.
15. The new police service, the South African Police Service (SAPS) and the NPA could have pursued this case. However, even though a police docket was opened in 1996 little or no official action followed. After the amnesty decision the matter was referred to the NPA. When I approached officials at the NPA's Priority Crimes Litigation Unit ("PCLU"), which was responsible for the TRC cases, they advised me that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. Until this new 'policy' was issued an effective moratorium on pursuing the TRC cases was in place. When the amendments to the NPA's Prosecution Policy emerged in late 2005 it essentially created a backdoor amnesty for perpetrators of so-called political crimes. It gave such perpetrators, like my sister's killers, a second opportunity to escape justice.
16. Together with the widows of the Cradock Four, the young freedom fighters murdered by a police hit squad in 1985, I went to court to challenge the policy in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07) (the Nkadimeng case). The widows of the Cradock Four are also still waiting for justice. In 2008 the High Court in Pretoria struck down the amendments to the Prosecution Policy, declaring it to be absurd and unconstitutional. In response to the argument of the NPA that dissatisfied victims could pursue private prosecutions, Judge Legodi

held at paragraph 16.2.3.3 of the judgment that:

“...crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted.”

17. During this case the National Director of Public Prosecutions disclosed a secret 2004 government report titled “*Report of the Amnesty Task Team*”. This report, to be discussed below, explored ways of promoting impunity for perpetrators of apartheid-era crimes. In my view this report is one of the clearest reflections of the unstated policy of the Government not to energetically pursue justice in respect of cases where amnesty was denied or not applied for. The supporting affidavit of Advocate Vusi Pikoli serves to confirm that political interference effectively stopped the TRC cases. The many years of inaction and the persistent refusal to finalize my sister’s case is entirely consistent with such policy.
18. We thought that the striking down of the amendments to the Prosecution Policy meant that the path was eventually cleared for justice to take its course. Again we were wrong. This time the prosecutors claimed that the police were refusing to provide investigators. Again they said their hands were tied. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010; but the docket had apparently gone “missing”.
19. By the end of 2012, even after finding the docket, there was no progress. It was clear to me that the authorities were not going to investigate the case seriously, let alone prosecute anyone. They even refused to charge those police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, the 30th year of Nokuthula’s disappearance, and 18 years since the opening of the police docket, I gave up on a prosecution and demanded the holding of a judicial inquest into her death. This request was refused. Remarkably, the NPA claimed that their investigations were still not yet complete.
20. My family and I do not believe that the NPA is acting in good faith. Indeed, we have lost all confidence in the prosecutors and police. They have betrayed our trust. Given their past idleness such investigations could drag on indefinitely while witnesses and suspects grow old and die. Since January 2013 my lawyers and I have engaged in extensive communications with the offices of the first and second respondents in an effort to persuade them to finalize their apparent investigations or at least refer the case to a judicial inquest. More than 20 months later these efforts have come to naught.
21. The historic compromise which gave birth to the new South Africa demanded that those perpetrators denied amnesty, or who did not apply for amnesty, would face follow-up. This has not happened. The state

has systematically and deliberately dragged its feet or blocked justice in this case and many others. We know who abducted, tortured and murdered Nokuthula. They were meant to face justice or appear before a judicial inquest. More than 30 years have passed since Nokuthula's disappearance, but neither has happened. We cannot bury her and we can find no peace. The betrayal of my sister, and what she stood for, is almost complete.

Relief sought

22. This application seeks, among other things, an order to:
- 22.1. Compel the first and third respondents to take the necessary steps, within 30 days of the granting of this order, to refer the kidnapping, torture, disappearance and murder of my sister in 1983 to a formal inquest before the High Court in terms of sections 5 and 6 of the Inquests Act 58 of 1959 in the interests of the proper administration of justice and in order to prevent a failure of justice.
- 22.2. Declaring that:
- 22.2.1. the prolonged delay by the first and second respondents in investigating the kidnapping, torture, disappearance and murder of the deceased in 1983;
- 22.2.2. the ongoing failure or refusal of the first respondent to take a decision whether to prosecute or not to prosecute the known suspects (a prosecutorial decision); or,
- 22.2.3. the ongoing failure or refusal of the first respondent to refer the above named case to a formal judicial inquest,
- is a gross violation of my rights to human dignity and equality; and is inconsistent with the rights to life, freedom and security of the person, the rule of law and South Africa's international law obligations to uphold the right to justice and to investigate, prosecute and punish violations of human rights.
- 22.3. Declaring that the conduct referred to in paragraphs 22.2.1 and 22.2.2 above is inconsistent with the provisions of the South African Police Service Act 68 of 1995, the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"), the Prosecution Policy issued in terms of s 179(5) of the Constitution, and the Policy Directives issued in terms of s 21 of the NPA Act and serves to defeat the purposes of said laws, policy and directives in that it prevents the family of the deceased from reaching closure and substantially impairs the prospects of justice being served.
- 22.4. Declaring that the conduct referred to in paragraph 22.2.3 above

is inconsistent with the provisions of the Inquests Act 58 of 1959 (“the Act”) and serves to defeat the purpose of the Act in that it prevents the family of the deceased from reaching closure and substantially erodes the confidence of the public that deaths from unnatural causes will receive attention and be properly investigated.

- 22.5. Alternatively to paragraph 22.1 above, reviewing and setting aside the refusal to take the decisions referred to in paragraphs 22.2.2 and 22.2.3 as unconstitutional and invalid; and compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; alternatively compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.
- 22.6. Alternatively to paragraphs 22.1 and 22.5 above:
- 22.6.1. Reviewing and setting aside the failure or refusal to take the decisions referred to in paragraphs 3.2 and 3.3 above in terms of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”).
- 22.6.2. Compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; alternatively compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.
- 22.6.3. Ordering the public release of the memorandum titled ‘PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES’ dated 15 February 2007 addressed by the then National Director of Public Prosecutions to the then Minister of Justice and Constitutional Development.

Approach of this affidavit

23. Given the nature of this application, I advance certain legal submissions on the advice of my legal representatives. I set out in this affidavit a range of factual matters and submissions all of which serve to demonstrate the basis of this application. I also set out certain factual matters which are contained in the Truth and Reconciliation Commission report concerning the disappearance and murder of

Nokuthula at the hands of apartheid-era security personnel. I also attach certain transcripts of Truth and Reconciliation Commission hearings confirming certain facts concerning the disappearance and murder of Nokuthula.

THE PARTIES

Applicant

24. I am the Applicant. My sister, Nokuthula, disappeared after being abducted by the Security Branch.

Respondents

25. The First Respondent is the National Director of Public Prosecutions (“the NDPP”), appointed by the third respondent in terms of section 10 of the National Prosecution Authority Act 32 of 1998 (“the NPA Act”), and who, in terms of section 5 of the NPA Act, is the head of the Office of the National Director of Public Prosecutions, which in turn is a component of the Single National Prosecution Authority (“the NPA”) established in terms of section 179 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The First Respondent’s address for service is care of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria, Gauteng.
26. The Second Respondent is the National Commissioner of Police acting in her official capacity. The Second Respondent’s address for service is Wachthuis, 7th Floor, 229 Pretorius Street, Pretoria.
27. The Third Respondent is the Minister of Justice, the cabinet member responsible for the administration of justice, who, in terms of section 179(6) of the Constitution, exercises final responsibility over the prosecuting authority, including the First Respondent. The Third Respondent’s address for service is care of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria, Gauteng.
28. The Fourth Respondent is the National Minister of Police acting in his official capacity. The Fourth Respondent’s address for service is Wachthuis, 7th Floor, 229 Pretorius Street, Pretoria.
29. The Fifth Respondent is Willem Helm Coetzee, an adult male with identity number 520409 5090 000 and residing at 28 Augusta Bellini Street, Wilgeheuwel, 001724, Gauteng.
30. The Sixth Respondent is Anton Pretorius, an adult male with identity number 5804075046086 and residing at 20 Duneden, 152 Malcolm Street, President Ridge, Randburg, 2194, Gauteng.
31. The Seventh Respondent is Frederick Barnard Mong, an adult male with

identity number 5805245117004 currently residing at 12 Pecan Place, 831 Mortimer Avenue, Mayville, Pretoria.

32. The Eighth Respondent is Msebenzi Timothy Radebe, an adult male with identity number 5006165718083 and residing at 8 Roma Street, Honeyhills, 1724, alternatively, 36 Stumke Street, Witpoortjie, Roodepoort, 1724, Gauteng.
33. The Ninth Respondent is Willem Schoon, an adult male with identity number 3103015023087, a former Brigadier and Commander of the SAP's Security Branch C1 Section and residing at 689 Verecunda Street, Dorandia Ext 2, 0182, Gauteng.

DETAILED BACKGROUND

34. Nokuthula disappeared after being abducted by the Security Branch on or about 10 September 1983. The brief circumstances of Nokuthula's disappearance which are described in the records of the TRC Hearings are as follows:
 - 34.1. Nokuthula was a student at the University of Swaziland and also a member of MK, the armed wing of the ANC.
 - 34.2. During 1982, Nokuthula joined the Transvaal Urban Machinery ("the TUM") of MK, of which the Chief of Staff was Gilbert Thwala. Nokuthula operated as a courier for one of the MK units within the TUM.
 - 34.3. It was established during the TRC hearings that Nokuthula disappeared while on a mission in Johannesburg after making contact with a certain Norman L Mkhonza at the Carlton Centre.
 - 34.4. It also emerged that in fact she was abducted by the Security Branch with the help of Mkhonza, whom Nokuthula believed was a fellow MK member when in fact he was an apartheid state "*askari*" (a former MK member turned state operative) connected to the Soweto Intelligence Unit of the South African Security Police.
 - 34.5. Having been alerted to the arranged meeting that was to take place between Nokuthula and her colleagues (although apparently not aware of Nokuthula's identity), the commander of the Soweto Intelligence Unit, Willem H Coetzee (the Fifth Respondent), conveyed this information to the overall commander of the Soweto Security Police, the late Brigadier H Muller. Muller ordered that Nokuthula should be abducted with a view to turning her into an agent of the Security Police. Pursuant to this order, Coetzee gathered a group of Security Police officers, including Mkhonza, Anton Pretorius (the Sixth Respondent), J F Williams, J E Ross, Peter Lengene (now deceased), Frederick B Mong (the Seventh

Respondent), M L Selamolela and Msebenzi Timothy Radebe (the Eighth Respondent) and prepared them for the operation.

- 34.6. On the day of the planned meeting, and in accordance with the plan decided upon by the group of police officers mentioned above, Mkhonza lured Nokuthula to the basement of the Carlton Centre where she was apprehended and abducted. She was manhandled, *inter alia* by Radebe, placed in the boot of a police vehicle and transported to the “Custodum” Flats in Norwood, where the Security Police had an operational office in the cleaner's quarters on the roof of the building. Nokuthula was left in one of the police vehicles out of sight of the general public. She was subsequently removed to the operational office where she was kept for a few days.
- 34.7. It appears from the Amnesty Hearing record that Coetzee stated that Willem Schoon was apprised of the abduction and gave authorisation for the '*kopdraai*'. He and Mong accompanied Brigadier Muller (deceased OC of Soweto SB) to Pretoria to brief Schoon on the Saturday afternoon immediately following the Carlton Centre operation.
- 34.7.1. A TRC news release dated 24 June 1999 said that Brigadier Schoon had also applied for amnesty in respect of the crimes committed against Ms Simelane. A copy of this press release is annexed hereto marked “**TN9**” However this application never proceeded.
- 34.7.2. Testifying before another Amnesty Committee hearing Schoon stated that the total onslaught of the ANC/SACP forced the Security Branch to operate outside the boundaries of the law (Amnesty Committee hearing in Pretoria on 14 June 1999 into the murders of K. McFadden and Z. Nyanda in Swaziland during 1983.). Schoon commanded Section C of the Security Branch from 1981 until 1990. Amongst the units under his control was the notorious Vlakplaas unit.
- 34.7.3. The TRC found that Security Branch members were instructed to commit crimes that included murders, cross border raids, kidnappings, poisonings, bombings, illegal detentions, torture and defeating the ends of justice. (TRC Report Volume 5).
- 34.8. It also emerged from the TRC hearings that Nokuthula was kept at the operational office at Custodem, and was interrogated and continuously assaulted by Coetzee, Pretorius, Lengene, Mong, Selamolela, Radebe and MM Veyi (hereinafter referred to as “the perpetrators”). The assaults were of a serious nature and they amounted to torture. (I note that Williams, Ross and Mkhonza had ceased their participation in the incident after the abduction at the

Carlton Centre and Veyi was a new addition to the group after the abduction.)

- 34.9. Nokuthula was subsequently transferred to secluded premises on a farm in the district of Northam in the present North West Province. Here she was detained for a period of approximately 4 to 5 weeks. The interrogation and torture continued on the farm.
- 34.10. Throughout the period of her detention, which lasted approximately 5 weeks, Nokuthula was interrogated and severely assaulted by the perpetrators. The interrogation and the assaults were conducted under the command of Coetzee who was in overall command of the group of Security Police.
- 34.11. Towards the end of her stay on the farm, and as a result of severe torture, Nokuthula's physical condition had deteriorated to such an extent that she could hardly be recognised. She had great difficulty in walking and her physical condition had generally deteriorated severely.
- 34.12. Nokuthula never returned to her family in Swaziland after having been abducted by the South African Security Police and has since disappeared.
- 34.13. It appears from the docket of the police investigation that several witnesses and suspects linked to Nokuthula's disappearance were traced and statements were taken. In particular, the docket indicates that:
- 34.13.1. A number of witnesses stated under oath in their statements that they personally witnessed assaults and/or torture perpetrated against Nokuthula or they saw clear evidence of assault marks on her face and body. These witnesses were all members of the SAP's Security Branch at the time and worked under the direct command of W H Coetzee and A Pretorius. At the time, Coetzee was a warrant officer and Pretorius was a sergeant;
- 34.13.2. While she was kept at the farm in Northam, Nokuthula was interrogated, assaulted and tortured. Nokuthula's hands and feet were cuffed. Her sleep was kept to a minimum. She was kicked and slapped. A bag was pulled over her head. She was given electric shocks. She was thrown into a zinc farm dam, allegedly by Radebe. At times she could no longer stand.
- 34.13.3. A statement made by Veyi and contained in the docket indicates that the last time he saw Nokuthula was near the 4 way stop junction of the Fochville/Carltonville and Johannesburg/Potchefstroom roads. She was in the boot of

Coetzee's vehicle and was alive with her hands cuffed behind her back. Her feet were also cuffed. A few days later, when he asked Pretorius where Nokuthula was, he received the response: "*Moenie [so] baie vrae vrag nie*" (don't ask so many questions). Veyi was told by one of his colleagues, Sergeant Mathibe, that Coetzee and Pretorius had shot, killed and buried Simelane near Rustenburg. Mathibe has since died.

- 34.13.4. It also appears from the docket that Lengene originally made a statement to the investigators while he was still under the direct command of Coetzee. In a subsequent interview with the investigating officer (Captain Leask), Lengene admitted that his "*original statement was not the whole truth.*" Before making his statement he had met with Coetzee and Pretorius who told him that "*it was up to him and [Mkhonza] to save their skins*". Pretorius warned Lengene that they would be provided with a copy of his statement by Dir. Neville Thoms (then Head of Priority Crimes, Gauteng). He also said that the investigating officer would not be able to prove any charges as "*he had no proof of a body*". Lengene stated that after the first interview he had been taken to Coetzee who wanted to know what was said in the interview. He was told to rewrite a statement, which Pretorius vetted and which he was instructed to keep it in a safe place so that it could later be handed to an attorney who was being arranged through the police.
- 34.13.5. Lengene stated that he feared Coetzee and Pretorius very much and "*at no cost must they become aware of my statement*" He has since died.
- 34.13.6. It also appears from the docket that on 10 February 1996 Pretorius and Coetzee secretly met with Mkhonza and coached him regarding his version should Captain Leask approach him. This discussion was secretly taped by the investigation team and I am advised that the tape and/or a transcript thereof are in the possession of the investigators.
- 34.13.7. The docket also contains a statement from one Mokone Sefuthi, a former policeman who indicates that he was posted to guard Nokuthula while she was being held. According to Sefuthi, Coetzee, Pretorius and Mong continuously threatened Nokuthula with death during the interrogations. After Nokuthula had been removed from the farm, Sefuthi asked Pretorius what had happened to her. Pretorius replied that that Sefuthi "*would never see her again*".
- 34.14. I respectfully submit that these facts are all contained in the police docket that was provided to the TRC, or were contained in the

findings of the TRC Amnesty Committee in relation to the amnesty application of the perpetrators (with the exception of Radebe, who did not apply for amnesty), which are dated 23 May 2001 and annexed hereto marked **"TN10"**. I have not annexed all the supporting documentation as it is readily available to the respondents. The purpose of the reference to the various statements is to give an overview of the available evidence (which would have to be tested in a court of law) in order to indicate the circumstances surrounding Nokuthula's disappearance and likely murder and to indicate that known suspects have not been prosecuted or have not appeared before an inquest.

- 34.15. Nokuthula's disappearance and the events that have transpired since the TRC hearings have left me and my family with a deep sense of loss and anguish.
- 34.16. Since her disappearance, we have spared no effort in our search for her or her remains. We enquired at the South Africa / Swaziland border whether she had crossed into South Africa, but there was no record of her.
- 34.17. When it was suggested that she may have been working for the anti-apartheid movement, the family made inquiries with the ANC in Swaziland, and in the neighbouring countries such as Botswana. All these efforts proved fruitless.
- 34.18. Her disappearance was reported to the police, both in Swaziland and, subsequently, in South Africa.
- 34.19. All these efforts proved fruitless until the Sowetan newspaper published two stories about Nokuthula's disappearance on 27 January 1995 and 6 February 1995. Copies of the newspaper reports are annexed hereto marked **"TN11"** and **"TN12"**
- 34.20. The newspaper articles appear to have prompted the police to open an investigation docket. A police investigation under case number CAS1469/02/1996 was opened under the auspices of the Priority Crimes Unit based at John Vorster Square (now Johannesburg Central Police Station). The investigating officer was Captain Leask. The crimes being investigated were murder and kidnapping.
- 34.21. On 19 February 1996 Director Neville Thoms, the Head of Priority Crimes, Gauteng addressed a letter to the Secretariat of Safety and Security and the National Head of Priority Crimes summing up the investigations to date. A copy of the letter is annexed hereto marked **"TN13"**. A further letter, expanding on the contents of this letter was sent to the Divisional Chief of the National Crime Investigation Services in Pretoria on 26 February 1996, and a copy thereof is annexed marked **"TN14"**. As these letters refer to details

of the investigation they are not attached to the founding affidavit but are instead attached to my *in camera* affidavit. I refer to my *in camera* affidavit at paragraph 43 below.

- 34.22. According to the investigation diary in the docket, the case was discussed with Deputy Attorney General Kevin Attwell and Advocate De Vries on 23 February 1996. They recommended that the matter be discussed with Dr D'Oliviera of the Third Force Investigations team. A discussion was then held with Dr D'Oliviera. At this meeting it was decided that all possible evidence must be gathered and the investigation must proceed.
- 34.23. An entry made in the investigation diary on 22 October 1996 by Thoms indicates that the matter was to be held back pending the instructions of the Attorney General. Advocate Ebrahim was reading the statements and exhibits. Captain Leask then filed the investigation notes in the "*respective files*". No instructions from Advocate Ebrahim were recorded in the investigation diary.
- 34.24. The final entry in the investigation diary prior to the amnesty hearings before the TRC on 10 February 1998 reads "*amnesty hearings o/s*". I presume that "o/s" means "outstanding".
- 34.25. On 6 July 1998, Coetzee was warned of his rights in terms of section 35 of the Constitution in respect of Nokuthula's murder. He declined to make a statement. A copy of the warning is annexed hereto marked "**TN15**".
- 34.26. Our family was involved in the TRC process. On 3 June 1997, Matthew Simelane (Nokuthula's and my late father) testified in a "victims' hearing" before the Human Rights Violations Committee. He explained the family's plight and the efforts they had undertaken to try and find the truth, but at the end of the hearing, the chairperson of the Committee said that it was "*in the position very much that you are at the moment and that is to watch and wait for the outcome of the amnesty applications which have been made*". A copy of the transcript of the hearing is annexed hereto marked "**TN16**".
- 34.27. After the amnesty applications were filed, it quickly became clear that some of the perpetrators were willing to comply with the procedure, tell the truth and acknowledge their role in Nokuthula's torture and disappearance. On the other hand, Pretorius, Coetzee and Mong took a confrontational and uncooperative attitude, complying only to the extent that they felt was necessary to obtain amnesty. They refused to apologise to the family or to demonstrate any sense of remorse for the pain caused to the Simelane family.
- 34.28. It appears from the findings of the TRC Amnesty Committee (annexure **TN10** above) that all of those who applied for amnesty

in respect of Nokuthula's abduction were granted amnesty. In addition, Selomolela and Veyi were granted amnesty in respect of her torture.

- 34.29. The TRC Amnesty Committee however, declined to grant amnesty to Coetzee, Pretorius and Mong in respect of the torture of Nokuthula on the basis that they had failed to make "*a full disclosure of all relevant facts*" as required by section 20(1)(c) of the Promotion of National Unity and Reconciliation Act 34 of 1995 (the TRC Act). In particular, the majority of the Amnesty Committee found that:

"[they] orchestrated their testimony in an attempt to minimize their roles in the torture of Ms Simelane. They were evasive and resorted to prevarication and long-winded technical explanations whenever they sensed difficulties or shortcomings in their versions. They studiously failed to furnish direct answers to questions which they regarded as potentially damaging to their case."

and

"we conclude that the evidence of Coetzee, Pretorius and Mong is untruthful insofar as it concerns the duration and extent of Ms Simelane's torture whilst she was in the custody of the Security Police, especially on the farm. Coetzee, Pretorius and Mong have accordingly failed to make a full disclosure of all relevant facts in regard to this aspect of the matter as required by the provisions of Section 20 of the Act. Their applications are accordingly REFUSED on this aspect."

- 34.30. It therefore logically follows that the refusal of Coetzee, Pretorius, Mong's amnesty applications (and the fact that Radebe and Schoon did not apply for amnesty) meant that they should have faced prosecution for their respective roles in the kidnapping and/or torture and/ or the likely murder of Nokuthula.

Attempts to seek justice

35. Since the refusal of Coetzee, Pretorius and Mong's application for amnesty on 23 May 2001, my family and I have made a number of attempts to persuade the NPA to investigate and launch criminal proceedings against them (and Radebe) in respect of Nokuthula's torture, disappearance and possible murder, including meetings with the PCLU.
36. During 2005 the Foundation for Human Rights ("FHR") took up Nokuthula's case and met with members of the PCLU and urged them

to take various steps in the short term, including:

- 36.1. Prosecuting suspects who did not apply for amnesty for kidnapping since kidnapping is listed as one of the exceptions to the 20 year prescription rule in section 18 of Act 51 of 1977. In particular it was pointed out that Radebe placed himself at the scene of Nokuthula's abduction and that other police witnesses implicated him in various acts related to her kidnapping;
 - 36.2. Preferring charges of defeating the ends of justice against two of the senior officers (Coetzee and Pretorius) for intimidating a junior officer (Sergeant Lengene) into making a false statement and for attempting to coach a witness (Norman Mkhonza) into making a false statement.
37. The FHR also presented the PCLU with a memorandum dated 18 August 2005 setting out the basis for the said recommendations, a copy of which is annexed hereto marked "TN17". The PCLU declined to take these proposed charges forward. At the time it was claimed that a suspect like Radebe was a "*small fish*". The suggestion that the pursuing of the 'small fish' could lead to the 'big fish' fell on deaf ears.
38. The PCLU has put up various excuses to me and my representatives over the years as to why they have not been able to take Nokuthula's case forward. These include the following excuses:
- 38.1. Insufficient evidence: In my view cases that are not seriously investigated will always suffer from a lack of evidence. In particular it has been claimed that none of the evidence that was led before the Truth and Reconciliation Commission (TRC) may be used in subsequent legal proceedings. I am advised that this view is entirely without merit. It is based on an erroneous reading of the '*use immunity*' provision contained in section 31 of the TRC Act which, in any event, was not invoked in any of the proceedings before the TRC dealing with Nokuthula.
 - 38.2. Statute of limitations: Initially the PCLU advised that there was sufficient evidence to proceed against certain of the officers on charges of assault to do grievous bodily harm in respect of the physical torture of Nokuthula. However, they advised that they were prevented from proceeding with assault prosecutions as the right to prosecute such offences had prescribed by virtue of the 20 year prescription rule contained in section 18 of the Criminal Procedure Act 51 of 1977. In order to address this legal obstacle during 2006 the FHR presented the PCLU with a legal opinion in which it was concluded that the physical and mental abuse perpetrated against Nokuthula constituted the international crime of torture. I am advised that by 1983 torture was a prohibited and unlawful act in terms of customary international law. South Africa was accordingly obliged to investigate and prosecute

transgressions of customary international law as well as violations of the Geneva Conventions. While the PCLU did not dispute the conclusions of this opinion they did not take the matter forward.

- 38.3. Effective moratorium: Up until 2006, the PCLU advised that their hands were, in any event, tied by an effective moratorium against the prosecution of the so-called political cases of the past. Although it was not clear who had imposed such a moratorium they were not permitted to proceed with any “*political cases*” until a standardized policy had been put in place to deal with such cases. Towards the end of 2005 the Prosecution Policy was duly amended. It provided for an effective back-door amnesty for those responsible for so-called political crimes and who had not previously applied for amnesty. As mentioned above, together with the wives of the Cradock 4, I applied to court to have this policy set aside as unconstitutional.
- 38.4. Bureaucracy: It was difficult for the PCLU to work on these types of cases because it was difficult to convene the multi-departmental Departmental Task Team comprising members of, amongst other departments, the Department of Justice and Constitutional Development, the SAPS and the National Intelligence Agency. This group was apparently required to advise the NDPP and the PCLU which cases to take forward or not.
- 38.5. Litigation: The case I brought against the aforesaid amendments to the prosecution policy, the Nkadimeng case, apparently prevented or stopped investigations into political crimes. No reason has been provided as to why this litigation should have caused the halting of such investigations.
- 38.6. Lack of investigators: Following the striking down of the amendments to the prosecution policy I was advised that the PCLU was still unable to take this matter forward because they lacked police detectives to carry out the necessary investigations. Apparently officials under the control of the second respondent refused or neglected to assign detectives to the so-called political cases.
- 38.7. Inquest more appropriate than prosecution: On several occasions members of the PCLU advised that the family should rather seek an inquest than a prosecution. Until 2013 this proposition was rejected by me and my family as we felt that there was sufficient evidence to warrant prosecutions against some or all of the potential accused.
- 38.8. Lost docket and various administrative issues: In or about 2010 the docket apparently went missing and was rediscovered at some later stage. This and other issues are set out in correspondence attached to this affidavit.

39. I have even appointed private detectives. I have reported the inaction of the South African authorities to the United Nations Special Rapporteur on Enforced Disappearances who in turn corresponded with the government. A copy of the letter received from the Chairperson of the Working Group on Enforced or Involuntary Disappearances dated 24 July 2013 is annexed hereto marked “TN18”. Nokuthula’s case has been covered in the media (an example is my opinion piece in the City Press dated 26 December 2013, a copy of which is annexed hereto marked “TN19”). A documentary about my sister’s story was made and screened on TV (“*Betrayal*”, SABC, Grey Matter Media, Johannesburg: Film Resource Unit [distributor], ©2006.). A copy can be made available to this honourable Court on request. A statue was erected in her memory in Bethal. However the authorities charged with delivering justice appear to be impervious to any and all persuasion and we are still without answers.

The request for a formal judicial inquest

40. During January 2013 I met with the investigating officer, Captain Masegela. He advised me that he had submitted his investigation report to Advocate Chris Macadam at the PCLU during July 2011. In this report he proposed that this matter be dealt with in an inquest. I assume that this report was submitted in compliance with section 4 of the Inquest Act.
41. By the beginning of 2013 I had lost all faith in the ability of the first and second respondents to deal competently with sister’s case. I looked into the possibility of launching a private prosecution but was advised that I would have to raise a considerable sum of money to lodge as security of costs for the legal costs of the accused, which I would have to pay if the accused were acquitted. I could not afford such costs. I accordingly wrote a letter to the Acting NDPP on 29 January 2013 requesting that my sister’s case be referred to a formal inquest before the High Court, a copy of which is annexed hereto marked “TN20”. I wrote:

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

42. Between January 2013 and February 2014 my representatives and I entered into a period of intensive communications with the first and second respondents and responsible officials within their departments. Copies of these communications, inclusive of correspondence, emails

and notes, are referred to in the timeline set out below.

43. During the aforesaid period we attempted to persuade the first respondent to refer my sister's case to a formal inquest; alternatively to finalize its investigations speedily and make a prosecutorial decision. These attempts proved fruitless. The first and second respondents defended the delays and the ongoing investigation. An account of these exchanges is included in the investigative timeline, set out below, and in the affidavit of Frank Dutton, annexed hereto as "TN4". Since the annexes referred to in the investigative timeline include correspondence between my attorneys and the NPA and SAPS, as well as extracts from the police docket, certain of these annexes are not attached to this affidavit but are attached to my *in camera* affidavit marked "TN21" which is contained in the *in camera* record. The documents which are attached to this affidavit are numbered TN21.1 to TN21.23. They appear in the rows in the table below shaded grey.

Investigative Timeline

Date	Action	Reference
11 Sept. 1983	Nokuthula Simelane is kidnapped by member of the Security Branch of the South African Police.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane. (Annex TN10)
11 Sept. to about mid-October 1983	Nokuthula Simelane is secretly kept captive in a store room on a farm at Northam where she is persistently tortured by members of the Security Branch.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane.
About mid-October 1983	Nokuthula Simelane is secretly taken from the farm at Northam by members of the Security Branch and has not been seen again.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane.
27 January 1996	Sowetan newspaper published a story about Nokuthula's disappearance and made an appeal for information.	Sowetan newspaper dated January 1996 (Annex TN11)
January/February 1996	Former Security Branch policeman Sergeant M M Veyi provided evidence to the TRC Amnesty Committee about the abduction, torture and disappearance of Ms. Simelane	1. TRC Amnesty Hearing AC/2001/185 – 2. Evidence of former Sergeant Veyi. (Annex TN22) 3. Sowetan news report.

February 1996	In consequence to the disclosures by former Sergeant Veyi CAS1469/02/1996 Murder case docket was opened and investigated by "Priority Crimes Unit" based at John Vorster Square (now Johannesburg Central Police Station). The case was assigned to Captain Leask. Initial investigation made progress but before its conclusion the case was transferred to the D'Oliviera Team towards the end of 1996. Little or no further investigation is undertaken.	<ol style="list-style-type: none"> 1. Extracts of from docket. (Annex TN21.1) 2. Letter from PCLU, 5 December 2013 (Para 5.1.6) (Annex TN21.2)
1996/97	Police (D'Oliviera Team) investigation put on hold pending the TRC process.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 3. (Annex TN21.3)
3 June 1997	Commencement of Amnesty Hearing of TRC into the disappearance of Nokuthula Simelane. Following persons make applications for amnesty for abduction, torture and other related crimes. None of the applicants applied for amnesty in respect of the murder of Ms Simelane. W H Coetzee (TRC ref. AM4122/96) A Pretorius (TRC ref. AM4389/96) J F Williams (TRC ref. AM4375/96) J E Ross (TRC ref. AM4377/96) F B Mong (TRC ref. AM4154/96) N L Mkhonza (TRC ref. AM5420/97) M M Veyi (TRC ref. AM5421/97) M L Selamolela (TRC ref. AM5419/97)	TRC Amnesty Hearing AC/2001/185
1998	NDPP Ngcuka establishes TRC component within NPA Head Office to attend to prosecution matters arising from TRC.	Letter from PCLU, 5 December 2013. Para 5.1.6 (Annex TN21.2)
February 1999	Meeting between TRC and NPA to discuss a process of establishing mechanisms for identifying potential cases.	"Report for the Office of the National Director of Public Prosecutions dated 7 March 1999. (Annex TN23)

11 March 1999	TRC commences referrals for potential prosecution to NPA – alerting them to sources of evidence to crimes. Correspondence does not specify any particular cases.	“Report for the Office of the National Director of Public Prosecutions dated 7 March 1999. (Annex TN23)
30 June 2000	Final session of Amnesty Hearing of TRC into the disappearance of Nokuthula Simelane	TRC Amnesty Hearing AC/2001/185
23 May 2001	TRC Decision issued in this Simelane matter. All applicants are granted amnesty for the abduction of Ms Simelane; applicants W.H Coetzee, A Pretorius and F B Mong are refused amnesty for torture; applicants M M Veyi and M L Selamolela are granted amnesty for the torture of Ms Simelane.	TRC Amnesty Hearing Decision AC/2001/185 (Annex TN10)
29 August 2001	The TRC Amnesty Committee decision in the Simelane matter is gazetted.	Proc 31. Justice 29/08/2001
12 March 2003	Volumes 6 and 7 of the TRC Report are published.	TRC Report
12 March 2003	Specific mention is made in the TRC Report on Nokuthula Simelane’s abduction, torture and disappearance. Volume 2, Chapter 3 para 278 - 280; 287 – 292 Volume 6, Chapter 1 para 194 – 206 Volume 6, Chapter 2 para 50 – 71 Volume 7, Victims list	TRC report . (Extracts annexed as TN24 - 27)
23 March 2003	PCLU is created by Presidential Proclamation. Officials assume duty July/ August.	1. Presidential Proclamation (Annex TN28) 2. Letter from PCLU, 5 December 2013. (Annex TN21.2)

2003	The South African President directed the NDPP to give attention to the cases of 500 persons who had been reported missing by the TRC. NPA established a Task Team to evaluate the TRC report and to identify cases for investigation. 150 cases were identified for immediate investigation.	About PCLU (Annex TN29)
2003	NPA TRC Unit is converted into Priority Crimes Litigation Unit (PCLU)	Letter from PCLU, 5 December 2013. (Annex TN21.2)
2003	The NDPP give attention to the cases of some 500 persons who had been reported missing by the TRC. A Task Team evaluates the TRC Report to identify cases for investigation. Approximately 150 cases were identified for immediate investigation. The disappearance of Nokuthula Simelane is one of these cases.	About PCLU (Annex TN29)
2003	The PCLU requests all outstanding cases to be referred to it. .	Letter from PCLU, 5 December 2013 (Annex TN21.2)
2003	NPA and PCLU place TRC cases "on hold" awaiting formation of policy on the TRC cases.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 6. ((Annex TN21.3)
November 2004	Foundation for Human Rights makes submission on behalf of family re: prosecutions of persons refused amnesty.	Letter from PCLU, 5 December 2013, para 5.1.4. (Annex TN21.2)
2004 and 2005	Several discussions between FHR and PCLU (Advocate Anton Ackerman) about charges arising from the alleged torture of Ms. Simelane (in terms of International Law); the prosecution of Sergeant Radebe on kidnapping charges and the possibility of holding an Inquest into this matter.	Letter from PCLU, 5 December 2013, para 5.1.5. (Annex TN21.2)
1 December 2005	NPA issues Guidelines for TRC cases in terms of National Prosecution Policy sec.179(5) of the Constitution	Appendix A, National Prosecution Policy dated 1 December 2005. (Annex TN30)
23rd September 2007	Establishment of Ginwala Enquiry into the fitness of Advocate Pikoli to hold the office of NDPP	Ginwala Enquiry Report dated 4 November 2008 (Available on request)

2007/8	Decision by the SAPS not to investigate TRC cases pending conclusion of Ginwala Commission.	Letter from Dr. Ramaite, Acting NDPP, 31 January 2013, para 8. (Annex TN21.3)
4 November 2008	Ginwala Enquiry into NDPP finalised and issues report.	Ginwala Enquiry Report dated 4 November 2008 (Available on request)
2 December 2008	Amendments to Prosecution Policy struck down	Judgment, Nkadimeng & Others v The National Director of Public Prosecutions & Others, T.P.D. Case no. 32709/07. (Available on request)
Early 2010	Advocate Macadam appointed by Acting NDPP to take over TRC matters and to liaise with the General Dramat Commander of DPCI.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 10. (Annex TN21.3)
March 2010	Duplicate Docket and TRC material requested from State Archives and made available to PCLU.	Letter from Acting NDPP, Adv Jiba, 13 August 2013, p3 (Annex TN21.4)
25 March 2010	<ol style="list-style-type: none"> 1. Duplicate Case Docket forwarded to Superintendent Bester of DPCI by PCLU requesting investigation to determine availability of witnesses; confirmation of statements; and other matters. 2. Police Captain Masegela of DPCI was appointed to investigate matter 	<ol style="list-style-type: none"> 1. Letter from Advocate Macadam of NPA, Deputy Director of Public Prosecutions and Deputy Head of PCLU to Senior Superintendent Louis Bester, dated 25 March 2010 (Annex TN21.5) 2. Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 12. (Annex TN21.3)
October 2010	Captain Masegela of DPCI returns duplicate docket and other files and material to Advocate Macadam	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 12. (Annex TN21.3)

27 October 2010	Letter from Advocate Macadam to Captain Masegela (together with duplicate case docket; other files and material) with a directive for extensive further investigations.	Letter from Advocate Macadam of NPA, Deputy Director of Prosecutions and Deputy Head of PCLU dated 27 October 2010 (Annex TN21.6)
October 2010 (date not specified)	Missing Persons Task Team (MPTT) requested to explore the farm at Northam for possible exhumation and to check mortuary records for possible leads in respect of remains of Ms. Simelane.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 17.3 (Annex TN21.3)

Late 2010 (date not specified)	Original docket located	Letter from NPA, Acting NDPP, Advocate Jiba dated 13 August 2013 page 3 sub paragraph vii. (Annex TN21.4)
July 2011	The investigating officer, Captain Masehela, submitted his report to Adv Macadam recommending an inquest.	Thembi Nkadimeng discussion with Captain Masegela
October 2012 (date not specified)	Exploration by MPTT of farm at Northam completed and they conclude there is no possibility of an exhumation in the absence of specific evidence of a burial site. MPTT report issued on 25 January 2013.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 17.5 (Annex TN21.3)
22 January 2013	<ol style="list-style-type: none"> 1. Captain Masegela returns docket and provides report in terms of Sec. 4 of the Inquest Act to Adv. Macadam 2. NPA denies that the docket was returned with the required certificate for an Inquest and claims that docket was returned with a substantial amount of the original investigations incomplete, and no evidence establishing that Ms. Simelane had been murdered. 	<ol style="list-style-type: none"> 1. Information supplied by Captain Masegela to Thembi at a meeting 2. Letter from Dr. Ramaite NDPP dated 31 January 2013, para 16 (Annex TN21.3).
25 January 2013	Letter from NPA claiming matter has been diligently attended to and investigations are continuing.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 17.5 (Annex TN21.3)
25 January 2013	Letter from NPA claiming matter has been diligently attended to and investigations are continuing. MPTT report made available to PCLU on exploration of Northam farm and finding that exhumation is not possible unless there is specific evidence of the precise burial place.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 17.5 (Annex TN21.3)
29 January 2013	The holding of an inquest is requested by family as authorities are not making progress in their investigation into determining circumstances of death.	Inquest Request – letter from T.P. Nkadimeng to NPA dated 29 January 2013 (Annex TN20)
31 January 2013	NDPP says that Adv. Macadam is perusing docket and resubmit to investigating officer.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 (Annex TN21.3)

11 February 2013	Letter pointing out that this matter has not been diligently attended to and calling for a prosecution or an inquest. To this end a meeting has been arranged between family representatives and Adv. Macadam to discuss and determine how the investigation can be completed and to set a reasonable deadline for this work to be completed.	letter from T.P. Nkadimeng NPA dated 11 February 2013 (Annex TN21.7)
12 February 2013	NDPP reasserts that a decision can only be taken once investigation has been completed and refers to the upcoming meeting on 18 February 2013 between members of his staff and families representatives to discuss the investigative steps that are being taken.	Letter from Dr. Ramaite Acting NDPP dated 12 February 2013 (Annex TN21.8)
13 February 2013	Adv Macadam of PCLU instructs Col Xaba of DPCI to undertake various investigations:	Letter from Adv. Macadam Colonel Xaba of DPCI dated 13 February 2013 (Annex TN21.9)
18 February 2013	Meeting between Adv. Macadam (PCLU) Susanne Bukau (PCLU) Colonel Xaba (Hawks) Captain Masagela (DPCI) and Adv. Palmer, Alan Wallis (SALC) (the last two mentioned representing family). Agreement that investigative tasks as set out in PCLU letter to DPCI dated 27 October 2010 is incomplete but there will be an endeavour to conclude investigation by end of May 2013.	<ol style="list-style-type: none"> 1. Letter from NPA, 13 August 2013 (Annex TN21.4) 2. Minutes of Meeting (Annex TN21.10)
6 March 2013	Again pointing out the considerable delays that have occurred in this matter by providing a timeline; raising concerns about some of the investigative tasks mentioned at the meeting of 18 February 2013 and in the letter to Colonel Xaba – also that not all tasks agreed to at the meeting have been included in the letter. Emphasizing those outstanding investigations are concluded as agreed by 30 May 2013.	Letter from Thembi Nkadimeng to NPA dated 6 March 2013 (Annex TN21.11)

13 March 2013	Adv. Macadam notes concerns about serious inaccuracies and unreasonable demands made in the letter of 6 March 2013 from Thembi Nkadimeng. He undertakes to do his best to finalise investigation by 30 May 2013.	Email from Adv. Macadam to Adv. Robin Palmer dated 13 March 2013. (Annex TN21.12)
27 March 2013	Captain Masegela informs Thembi Nkadimeng telephonically that the skeletal remain of a young woman has recently been found by construction workers at the site of a new mall in Brits.	
6 April 2013	Response by Adv. Palmer to Adv. Macadam concerning the issues he raised in his email of 13 March 2013.	Email from Adv. Robin Palmer to Adv. Macadam dated 6 April 2013. (Annex TN21.13)
15 April 2013	<p>Raising concern that the contents of some communications between the family's legal representatives and NPA have been disclosed to the Sunday Times.</p> <p>Investigation into Sergeant Radebe's alibi is continuing. Checks are also being conducted on the mortuaries in areas relevant to the investigation for any records which might correspond with the missing person.</p>	Email from Adv. Macadam to Adv. Robin Palmer dated 15 April 2013. (Annex TN21.14)
2 May 2013	Adv. Palmer asked for an update on the current status of the investigation to which Adv. Macadam replied that there were no new developments.	Email between Adv. Macadam and Adv. Palmer dated 2 May 2013. (Annex TN21.15)
17 May 2013	Adv. Macadam informs Adv. Palmer that investigation will not be concluded by end of May 2013 and reports on various aspects.	Emails between Adv. Macadam and Adv. Palmer 17 May 2013 (Annex TN21.16)

26 June 2013	<p>Canvasses the following issues:</p> <ul style="list-style-type: none"> • Whereas it was indicated that a decision would be made by the end of May 2013 on this matter -this date has now passed and there is still no indication on what further investigative steps are envisaged before the NPA will be in a position to either make a decision to prosecute, or to refer the matter for a formal inquest. • The emotional toll the delays are having on the family and friends of Nokuthula Simelane • Request specific indications of remaining investigative steps together with target dates. 	Letter attached to email from Adv. Robin Palmer to Adv. Macadam dated 26 June 2013. (Annex TN21.17)
31 July 2013	This letter expresses frustration at the lengthy delay in completing the investigation and demands that this matter be urgently resolved by means of a prosecution or an inquest.	Letter from Legal Resource Centre (LRC) (representing family) to NPA dated 31 July 2013 (Annex TN31)
5 August 2013	Letter from LRC to Acting NDPP disputing further reasons for delay	Letter dated 5 August 2013 responding to Adv Macadam email dated 31 July (Annex TN32)
13 August 2013	Skeletal remains have been found and DNA testing is being conducted.	Letter from NPA, Acting NDPP, Advocate Jiba dated 13 August 2013 page 3 sub paragraph vii. (Annex TN21.4)

5 December 2013	<ul style="list-style-type: none"> • DNA sample from Brits skeletal remains did not contain sufficient material for DNA extraction. A second sample to be obtained and sent to a specialist DNA Laboratory in Bosnia. • Facial reconstruction is being done in an effort to identify the remains. • The plot at Westonaria to be inspected by an anthropologist to determine feasibility of exhumations. • Four mortuary entries fit the criteria set these entries are however illegible. SAP Recovery Unit has been directed to find these graves and obtain a DNA sample from each for comparison purposes. • Plan and map to be submitted. • Additional TRC statements found and these need to be investigated. 	Letter from PCLU, 5 December 2013. (Annex TN21.2)
16 January 2014	<p>The family feels no closer to resolution despite the elapse of yet another year. The protracted delays with no action prior to 2010 are again pointed out. Family not satisfied with investigation progress since 2010 either.</p> <p>DNA and Exhumations – queries link between skeletal and other remains with Ms. Simelane and requests specifically what the links are to exclude “shots in the dark” as delaying tactics.</p> <p>Westonaria Plot- a possible exhumation of this plot should not cause delays in finalisation - unless there is specific evidence of a burial site.</p> <p>Requests a meeting with the acting NDPP to discuss these issues</p>	Letter from Legal Resource Centre (representing family to NPA dated 16 January 2014 (Annex TN21.18)
16 January 2014	Acknowledges letter dated 25 September 2013 and will provide a comprehensive report on investigations into DNA of skeletal remains found at Brits by end of January 2014.	Letter from General Dramat, National Head of DPCI dated 16 January 2014 (Annex TN21.19)

10 February 2014	<p>In respect of DNA comparisons of skeletal remain found at Brits the testing has to be done at a specialist laboratory abroad which is expensive – procurement policies have to be followed for the authorisation of the expense. Such authorisation is awaited before proceeding with further sampling and testing.</p> <p>An expert in craniofacial superimposition was unable to make an identification.</p> <p>The Forensic Science Laboratory will follow up on the four remains identified in mortuary records and with a determination of possible exhumations at the Westonaria plot.</p> <p>Pending forensic results the investigator will continue the investigations identified by Adv. Macadam.</p>	<p>Letter from General Dramat, National Head of DPCI dated 16 January 2014 (Annex TN21.19)</p>
26 February 2014	<p>Family is concerned to note that the SAPS does not accept responsibility of investigation delays over the past four years. It is also noted that investigation has not been prioritised by DPCI and the end of investigation is not yet in sight. The nexus between the skeletal remains and mortuary remains are queried and do not provide a reason to delay finalisation of case. Two questions are posed: 1. Have investigation been conducted diligently? 2. Did the discovery of the skeletal remains halt or delay investigations?</p>	<p>Letter from Legal Resource Centre (representing family to General Dramat of DPCI dated 26 February 2014 (Annex TN21.20)</p>
February to July 2014	<p>No responses received to LRC letters to NPA dated 16 January 2014 and to the DPCI dated 26 February 2014. No other reports received.</p>	

10 July 2014	<p>Letter from LRC to the NDPP (copied to Adv. Abrahams and Macadam) noting that:</p> <ul style="list-style-type: none"> • No response had been received to LRC's letter of 14 January 2014 and assuming that the NDPP did not wish to meet with the applicant and her legal representatives; • No monthly progress reports had been supplied by the PCLU as previously promised; • Applicant had not been advised of the DNA test results. <p>The letter assumed that there was no real intention to make a decision to prosecute or not; and moreover that there is no intention to refer this case to an inquest. It accordingly reserved the rights of the applicant.</p> <p>No response was received from the NDPP.</p>	Letter from LRC to the NDPP dated 10 July 2014 (Annex TN33)
10 July 2014	<p>Letter from LRC to Lt-Gen. A Dramat, National Head: Directorate for Priority Crimes Investigation (DPCI), SAPS noting that:</p> <ul style="list-style-type: none"> • No response had been received to LRC's letter of 24 February 2014 and assuming that the DPCI has no response and that no progress has been made in this investigation; • Applicant had been promised notification of the DNA test results but heard nothing; • There was no intention to finalize this matter expeditiously, or at all and reserving rights of the applicant. 	Letter from LRC to National Head: DPCI dated 10 July 2014 (Annex TN34)

17 July 2014	<p>Letter from National Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014 and:</p> <ul style="list-style-type: none"> • alleging contact between applicant and investigating officer (IO); • notifying that the laboratory in Bosnia had completed the DNA tests and that the IO had been advised on 14 July 2014 that the results were negative; • alleging that extensive investigations had been conducted and the docket had been submitted to the NDPP for consideration and further instructions, if necessary; • Suggesting a meeting with the investigating officer's commanding officer Col Xaba to resolve any outstanding issues. 	Letter of 17 July 2014 from Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014 (Annex TN21.21)
31 July 2014	<p>Meeting attended by Colonel Xaba (Director, Directorate for Priority Crime Investigation –SAPS), Captain Masegela (Investigating Officer), Thembi Nkadimeng, Frank Dutton (the family's private investigator); Carien Van Der Linde (instructing attorney, LRC) and Angela Mudukuti (Southern African Litigation Centre).</p> <p>The meeting followed mostly a question and answer format with Frank Dutton asking for details about the investigation. The docket was handed to the PCLU of the NPA on 14 July 2014 and Captain Masegela and Colonel Xaba are of the opinion that investigations are complete.</p>	Minutes of meeting dated 31 July 2014 (Annex TN21.22)
11 August 2014	Letter from Colonel Xaba , Commander, Crimes Against the State, DPCI to LRC seeking an affidavit from the family's private investigator setting out what investigation he had conducted.	Letter from Colonel Xaba , Commander, Crimes Against the State, DPCI to LRC dated 11 August 2014 (Annex TN35)
9 September 2014	In a letter dated 9 September 2014 the LRC advised Col Xaba that Frank Dutton took no statements.	Letter from the LRC to Col Xaba dated 9 September 2014 (Annex TN36)

10 September 2014	Col Xaba indicated that the National Prosecuting Authority (NPA) claimed it could not make a decision without the requested affidavit from Frank Dutton.	Letter from Col Xaba to the LRC dated 10 September 2014 (Annex TN37)
16 September 2014	Frank Dutton supplied the requested affidavit to Col Xaba	Email with attachment from LRC (on behalf of Frank Dutton) to Col Xaba (Annex TN21.23)
25 September 2014	Col Xaba requests information on Thembi's family members who were studying in Swaziland	Letter from Col Xaba to the LRC dated 25 September 2014 (Annex TN38)
22 October 2014	Col Xaba requested further information and an affidavit from the applicant	Letter from Col Xaba to the LRC (Annex TN39)
20 January 2015	The applicant hands her affidavit to Captain Masegela	Email from the applicant
26 February 2015	Col Xaba indicated that investigations are ongoing.	Email sent from Col Xaba to the LRC and SALC (Annex TN40)
9 April 2015	Lt Col M S Mahlangu, Commander, Crimes Against the State, Directorate for Priority Crime Investigation advises that the case docket has been forwarded to the NPA for decision	Letter from the DPCI to the LRC (Annex TN41)

44. It is evident from the correspondence entered into with the first respondent that no decision has been taken to prosecute or not to prosecute the known suspects. It is also evident that no decision has been taken to refer my sister's case to a formal inquest. Although the police have advised that the docket has been referred to the NPA I have no faith in the NPA taking a decision timeously or at all.

Political constraints

45. I submit that the first and second respondents and their respective officials dealing with my sister's case, as well as other so-called political crimes, have been subject to certain political constraints or pressures. Such constraints and pressures have served to shape the approach or policy of the first and second respondent and their responsible officials in relation to the so-called political cases. Indeed, it is my submission that such political pressure made it extremely difficult, if not impossible, for them to carry out their responsibilities under law. This in turn rendered their conduct, in relation to my sister's case and other so-called political cases, questionable, if not unlawful. It also serves to explain the inordinate delay in finalizing the investigation of my sister's case.
46. This policy or approach is evidenced by the following steps aimed at ensuring a measure of political control over prosecutorial decisions dealing with so-called political cases arising from the past:
- 46.1. The undated 2004 secret report, titled "Report: Amnesty Task Team", which was disclosed during the proceedings in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07), annexed hereto marked "**TN42**", revealed that:
- 46.1.1. The government Director-General's Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed an "Amnesty Task Team" ("ATT") to consider and report on, amongst other things, a future process for the "*consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past*".
- 46.1.2. The ATT was concerned about "*the absence of any guarantee that alleged offenders will not be prosecuted*" (Report of the task team, 3.2.4(c));
- 46.1.3. The Amnesty Task Team recommended the creation of a Departmental Task Team comprising members of the Department of Justice and Constitutional Development, the Intelligence Agencies, the South African National Defence Force, the South African Police Service, Correctional Services, the National Prosecuting Authority and the Office of the President. The functions of the proposed Task Team would be to:
- 46.1.3.1. consider the advisability of the institution of criminal proceedings for an offence committed during the conflicts of the past and make recommendations to the National Director of Public Prosecutions;

- 46.1.3.2. consider applications received from convicted persons alleging that they had been convicted of political offences with a view to making recommendations for parole and pardon;
- 46.1.3.3. evaluate prosecution decisions in relation to crimes arising from conflicts of the past and make recommendations to the president in terms of a proposed "Indemnity Act" (Report of the task team, 3.2.2, R441 – R445, read with "annexure B" thereto).
- 46.2. Some of the ATT's report was accepted by government and implemented, as is evidenced by the 2005 amendments to the Prosecution Policy made under section 179 of the Constitution and the introduction by President Mbeki of a Special Dispensation for Political Pardons in 2007. The amendments to the Prosecution Policy incorporated certain of the recommendations of the ATT. The amendments specifically allowed for the involvement of the executive in the decision-making of the prosecution authorities. Paragraph 6 of Part B stated that "*the PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA: (a) the NIA; (b) the Detective Division of the SAPS; (c) The Department of Justice; and (d) the DSO*". In addition, the NDPP was required to inform the Minister of Justice of any decision taken (Amended policy, Part B, para 10).
47. While the amendments to the Prosecution Policy were found by the courts to be manifestly unconstitutional and unlawful, they nonetheless firmly signalled to the first and second respondents, and their officials, the approach or policy of government. This approach indicated in no uncertain terms that the so-called political crimes, regardless of how serious, were not to be treated in the same way as other serious crimes. It is submitted that few with an eye on the future would have defied the government in this regard.
48. The apparent rationale behind the government's approach was disclosed during the proceedings of the Ginwala Commission of Inquiry into the fitness of the then NDPP, Advocate. Vusumzi Patrick Pikoli ("Pikoli"), to continue in office. During May 2008 Adv. Pikoli filed an affidavit with the Ginwala Commission which in part dealt with the cases referred by the TRC to the NPA. Pikoli relayed how cabinet ministers and the then National Commissioner of Police were concerned that the then head of the PCLU, Adv Anton Ackermann would launch cases against ANC members. The relevant extracts of Adv. Pikoli's affidavit filed before the Ginwala Commission is annexed hereto marked "**TN43**". A full copy of his affidavit before the Ginwala Commission can be supplied on request. This is an unsigned copy of the final version but Adv. Pikoli confirms that this version served before the Ginwala

Commission. In particular Adv. Pikoli gave an account of a meeting that took place in 2006 attended by himself and various cabinet ministers at paragraph 247 of his affidavit:

“Some time later a meeting was convened at the home of Minister Skweyiya, the Minister of Social Development. The meeting was attended by the Ministers of Safety and Security and Defence, Minister Thoko Didiza (Acting Minister of Justice and Constitutional Development representing Minister Mabandla who was indisposed) and Mr Jafta. The meeting was called by Acting Minister Didiza and I was told that it related to the prosecution in the Chikane matter. It was originally suggested that Advocate Ackermann accompany me to the meeting but I elected to go on my own in order to establish what the concerns were.

It transpired at the meeting that:

The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann’s involvement in the process and the issue of whether it was Advocate Ackermann or me who was behind the decision to prosecute.

The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.

The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.

49. In his supporting affidavit (annexed hereto as **TN7**) and in his *in camera* affidavit (contained in the *in camera* record), the former NDPP, Advocate Pikoli, confirms that there was political interference that effectively barred the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including my sister’s case. The former head of the PCLU, Advocate Anton Ackermann SC, confirms in his supporting affidavit (annexed hereto as **TN8**), that he was effectively stopped from pursuing the TRC cases, inclusive of Nokuthula’s case. Both Advocates Pikoli and Ackermann state that it was no coincidence that there has not been a single prosecution of any TRC matter since Adv. Pikoli’s suspension from office and the removal

of the TRC cases from Adv. Ackermann SC in September 2007.

50. The underlying rationale of the Government's opposition to the pursuit of the so-called political cases is disturbing. I submit that such manipulation of the criminal justice system for the purpose of protecting "cadres" from prosecution, serves an ulterior purpose, constitutes bad faith, is irrational and amounts to a subversion of the rule of law.

Public release of the Pikoli Memorandum

51. Advocate Pikoli has filed both an open court affidavit and an *in camera* affidavit. Attached to the latter affidavit is a memorandum in question is titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 ("the memorandum"). It was annexed to Adv. Pikoli's affidavit before the Ginwala Commission.
52. In this memorandum, which was addressed to the then Minister of Justice, Adv. Pikoli concluded that there had been improper interference in relation to the TRC cases and that he had been obstructed from taking them forward. He complained that such interference impinged upon his conscience and his oath of office. He indicated that he was no longer able to deal with these cases in terms of the normal legal processes and sought guidance on the way forward.
53. As Adv. Pikoli had marked this memorandum as an "*internal secret memorandum*" it is currently not attached to his open court affidavit. It is attached to an *in camera* affidavit that is annexed to the supporting affidavit of Adv. Pikoli, which will be filed separately and served only on the first and third respondents as they are already in possession of the memorandum. The Registrar of this Honourable Court will requested not to make the *in camera* affidavit available to the public, unless this honourable Court authorizes its release.
54. I submit that it ought to be made available to the other respondents, as well as the public, for the following reasons:
- 54.1. The issues and complaints raised in the memorandum have already been discussed in the body of Adv. Pikoli's affidavit filed before the Ginwala Commission, which has been part of the public record since 7 May 2008, and which was also part of the court record in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07).
- 54.2. There is nothing in the memorandum that implicates or impairs national security.

- 54.3. Since the memorandum demonstrates unlawful conduct it cannot be prejudicial to the security or other interests of the Republic.
- 54.4. The disclosure of the memorandum is warranted since it reveals evidence of a substantial failure to comply with the law and the Constitution. The public interest in the disclosure of the memorandum far outweighs any contemplated harm, inconvenience or embarrassment.
- 54.5. The interests of justice demands the disclosure of the memorandum, not only to the other respondents, but also to the public at large.

LEGAL FRAMEWORK GOVERNING PROSECUTIONS AND INQUESTS

55. This section briefly sets out the relevant legal framework governing prosecutions and inquests in South Africa and seeks to determine whether a duty rested upon the NPA to take a decision in my sister's case and when such a decision should be taken.
56. Section 179(1) of the Constitution establishes a single national prosecuting authority in the Republic. Subsection (2) provides that "*The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.*" The relevant statute is the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"), which must be read together with Chapter 1 of the Criminal Procedure Act ("the CP Act").
57. The prosecution policy issued in terms of section 179(5)(a) and (b) of the Constitution read with section 21(1) of the NPA Act must be observed in the prosecution process. The preface to the Prosecution Policy asserts, *inter alia*:
- Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.**
- Offenders must know that they will be arrested, charged, detained where necessary, prosecuted, convicted and sentenced.**
58. While emphasising the need for prosecutorial discretion in every case, the Prosecution Policy sets out the relevant considerations which should inform any decision to institute or review a prosecution or to discontinue proceeding. The Policy Directives issued in terms of s 179(5)(b) of the Constitution and s 21(1)(b) of the NPA Act do not specifically set out any timelines or guidelines as to when decisions to prosecute or not should be taken. Part 17 does, however, note a prosecutor's obligation to ensure the accused is tried without unreasonable delay.

59. Paragraph 4(c) of the Prosecution Policy provides that once a prosecutor is satisfied that there is sufficient evidence to provide reasonable prospects of a conviction a prosecution should normally follow, unless the “public interest demands otherwise”. The policy further provides that when considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender.
60. In my sister’s case, the NPA has failed to take a decision whether to prosecute or not. Moreover it has failed to take a decision on whether to institute an inquest. The taking of such decisions would have addressed the rights of me and my family and commenced the process of closure. The failure to take such decisions over such prolonged period of time has destroyed whatever confidence we once had in the NPA in particular and the criminal justice system in particular.

Inquests

61. Inquests in South Africa are governed by the Inquests Act 58 of 1959 (“the Act” or “the Inquests Act”) which also governs the procedure when a death or alleged death occurs. In terms of section 4, a policeman investigating the circumstances of death or alleged death must submit a report to the public prosecutor who may call for additional information if necessary.
62. The Act provides at section 5 that “*If criminal proceedings are not instituted in connection with the death, or alleged death, the public prosecutor referred to in section 4 shall submit those statements, documents, and information submitted to him to the magistrate of the district concerned.*”
63. The prosecutor who received the report from the investigating officer has essentially two options: either to institute criminal proceedings or to submit the information to the magistrate of the district. There is no time period specified for these decisions.
64. If it appears to the magistrate that the death occurred due to unnatural causes the magistrate must ensure that an inquest is held by a judicial officer in terms of section 6. According to section 16(2), the judge or magistrate must make a finding as to the identity of the deceased person, the cause or likely cause of death, the date of death and whether the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of any person.
65. If the judicial officer finds that the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of the any person, the judicial official has a duty to “*cause the record of*

proceedings to be submitted to the attorney general.”

66. In terms of section 17(2) of the Act the NDPP has a discretion to order the judicial officer to re-open the inquest to take further evidence or to open criminal proceedings against any person suspected of being criminally responsible for the death. The Minister may, in terms of section 17A, and also on the recommendation of the NDPP request a judge president to designate a judge of the SCA to re-open the inquest.
67. Under section 21(1) of the Act an inquest cannot take place, if a criminal prosecution has been instituted or the judicial officer has knowledge that a prosecution is to be instituted. However, as spelt out in s 21(2), an inquest does not preclude a prosecution from taking place at a later stage and the outcome of an inquest may provide information necessary to initiate a prosecution. Section 21(2) of the Inquests Act allows inquest proceedings to be stopped if criminal proceedings have been, or will be instituted.
68. I am advised that, contrary to the repeated assertions of the first respondent, section 5 of the Act does not require that a final decision not to prosecute be made before a matter is referred to an inquest. This follows as a matter of logic and law as per the scheme of the Act.
69. Ultimately the purpose of an inquest is to promote public confidence in the administration of justice and to reassure the public that all deaths from unnatural causes will be properly investigated. Inquests are also aimed at ensuring that appropriate measures can be taken to prevent similar deaths from taking place in the future. Finally, inquests are conducted so that the perpetrators of such deaths may, as far as possible, be brought to justice.

THE DELAY IS UNREASONABLE

70. My sister disappeared more than 30 years ago and the investigation docket has been in existence for some 18 years. The docket has been with the NPA for nearly 14 years and with the PCLU for some 11 years. It was referred to Advocate Chris Macadam in the PCLU in 2010 and has been under his control for some 4 years. It appears from correspondence received from the SAPS and the NPA during 2013 that here has been little or no investigation for the bulk of all these time periods. There can be no doubt that the delays have seriously undermined the prospects not only of a successful prosecution, but also the prospects of getting to the truth and recovering of Nokuthula's remains.
71. While I accept that my sister's case presented some challenges for investigators I am advised that such challenges were not unduly complex; and certainly did not justify the prolonged delay in taking a prosecutorial decision or referring to an inquest. In this regard I refer this honourable court to the affidavit of Frank Dutton annexed hereto as

“TN 4”.

72. In this matter the first respondent points to another body, namely the SAPS, for failing to timeously perform its investigative functions. However Nokuthula’s case, as with the other TRC cases, was referred to the NPA and it is the NPA that has the ultimate responsibility to take a decision and it should have taken the necessary steps in order to place itself in a position to do so within a reasonable time. After such long periods of delay neither the NPA nor the SAPS may put up systemic causes to explain their dereliction of duty.
73. It has been 18 years since the docket was opened in this matter. It may have been justifiable to have held back the investigation or decision while the TRC amnesty process was ongoing and before an amnesty finding had been made. However, more than 13 years have elapsed since the amnesty decision was handed down on 23 May 2001. The fact that this matter has been outstanding for more than three decades speaks to the gross neglect of the relevant authorities and the unreasonableness of the delay.
68. I submit that in the circumstances of my sister’s case the matter ought to have been investigated years, if not decades ago. Similarly a prosecutorial decision or a referral to an inquest should have taken place many years ago. A prolonged and ongoing failure to take a decision, as in my sister’s case, results in the *de facto* situation that criminal proceedings are not instituted, which satisfies the threshold set out in the Inquest Act.
69. A prolonged and ongoing failure to either prosecute or refer to an inquest serves to defeat the objects and underlying rationale of the power to prosecute under the Constitution, the Prosecution Policy, the Policy Directives and the power to refer to an inquest in terms of the Inquest Act.
70. Such delays reinforce the view held by me, my family and in many communities that serious crimes of the past do not receive any diligent attention from the authorities and indeed have been singled out for neglect. It also reinforces the likely views of the perpetrators that they need not fear any repercussions for crimes such as murder, so long as they have a political flavour.

GROUNDINGS FOR RELIEF

71. I submit that my family and I have a right to have my sister’s case referred to an inquest, alternatively to a prosecutorial decision. I submit that I furthermore have a right to one or other of such decisions within a reasonable time period. My rights are premised upon the following grounds:
- 71.1. The interests of justice and the need to prevent a grave injustice;

- 71.2. The constitutional obligation to act without delay;
- 71.3. My entitlement under the Constitution to have various rights respected, including our rights to human dignity and equality;
- 71.4. The rule of law, incorporating the principle of legality;
- 71.5. Various provisions of PAJA;
- 71.6. The special responsibility to pursue cases arising from the TRC process;
- 71.7. South Africa's international law obligations

The interests of justice

- 72. I am advised that the superior courts of South Africa have certain inherent powers to be exercised in the interest of the proper administration of justice. This includes when it may be necessary to act in order to prevent a grave injustice.
- 73. I submit that the exceptional circumstances of this case warrant the exercising of the Court's inherent powers to order the holding of a formal inquest before the High Court. This is because there was a clear duty of the NPA to refer this matter to an inquest in the context of an inordinate delay. This delay was the product of the wilful or negligent inaction or obstruction by the State's prosecutorial and policing authorities. The delay was compounded by the failure of the said respondents to conclude its criminal investigation despite clear evidence that the investigation was not capable of further progress.

Constitutional obligation to act without delay

- 74. I am advised that there is a constitutional obligation on the NPA and the SAPS to perform their duties without delay. Section 237 of the Constitution provides "*All constitutional obligations must be performed diligently and without delay.*" Both the decision to institute a prosecution and the decision to not prosecute involve the exercise of constitutional powers and therefore constitute constitutional obligations.
- 75. I submit that accountable governance and social trust are built upon decision making by public officials which are reasonable and responsive. The failure to afford me and my family a basic investigative process followed by a reasonable prosecutorial decision making process has denied us our substantive rights. These rights are set out below.

Human Dignity

- 76. The unreasonable delay in investigating this case and the prolonged delay in taking a prosecutorial decision; or referring the case to an inquest has violated my right to dignity. Such lapses have denied me and my family, as well as that of our wider community, the

acknowledgement of our intrinsic worth as human beings.

77. The conduct of the responsible officials in the departments controlled by the first and second respondents have denied me a prosecutorial decision or an inquest within a reasonable time period. In so doing they have denied me and my family the possibility of closure of a most painful past. This conduct has breached our rights to human dignity.
78. The inordinate delay in taking steps to investigate the known suspects responsible for my sister's torture and disappearance has disrespected my family's rights as victims. The conduct of the NPA and SAPS and at times, the express statements of the NPA, indicate that the matter in this case has not been attended to with any urgency. No adequate explanation has been provided for these lapses.
79. Moreover the allegations made by the perpetrators who abducted my sister that she was turned and became an informant remain unsettled. Such scurrilous claims ought to be the subject of an official investigation and an official finding. The delay in making such a finding has seriously offended my human dignity and that of my family.
80. Ultimately, the prolonged delay infringes upon my right to dignity and that of my family in that it:
- 80.1. protects the perpetrators responsible for the kidnapping, torture and enforced disappearance of my sister at the expense of me and my family;
- 80.2. causes suffering to me and my family by denying us justice without undue delay;
- 80.3. prevents me and my family from reaching closure;
- 80.4. dishonours the respect, dignity and value of my family in the wider community
- 80.5. demeans South African society as a whole by betraying the constitutional compact made with victims as enshrined in the epilogue to the Constitution of the Republic of South Africa Act 200 of 1993 ("the Interim Constitution") and by undermining the purpose and spirit behind the TRC amnesty process.

Right to life

81. The right to life as protected in section 11 of the Constitution is infringed as the prolonged delay has severely undermined the prospects of a successful investigation and prosecution of the perpetrators who infringed this right by committing acts of murder and enforced disappearance. The delay has also devalued the life of the disappeared person.

Right to freedom and security of the person

82. The prolonged delay violates the right to freedom and security of the person enshrined in Section 12 by undermining and retarding the investigation of perpetrators who violated the freedom and security of Nokuthula; by committing acts of torture, assault and other cruel and inhuman treatment.

Right to equality

83. The prolonged delay, and failure to take forward the so-called political cases of the past, including Nokuthula's case, violates the right to equal protection and benefit of the law enshrined in Section 9 by unjustifiably discriminating against the victims of this class of crimes.

Rule of law

84. The fact that serious crimes from the past, such as the kidnapping, torture and likely murder of my sister, have not been treated with any seriousness, implicates the rule of law, upheld in section 1 of the Constitution.
85. Crime, particularly serious crime, undermines the fabric of our society and violates, amongst other rights, the right to life, the right to freedom and security and the right to dignity. The State has a constitutional duty to address crime which arises from its duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights'
86. Serious crime committed by agents of the State should be viewed in a particularly serious light. The perpetrators of such crime are often shielded from justice. During apartheid the perpetrators of state sponsored crime enjoyed almost total impunity. The failure of the new South African State to timeously investigate such cases, particularly those cases in which amnesty was denied or not applied for, gives rise to an appearance of political deal making or tolerance of such crimes.
87. The rule of law requires that the laws creating crimes must be obeyed; and that there cannot be favouritism exercised for the prosecution or non-prosecution for any breach of the law.
88. I submit that in the light of the fact that so few victims of serious crimes arising from past conflicts have seen justice done through the courts, it is essential that on those occasions when such crimes can be prosecuted, that they be pursued effectively and expeditiously.

Principle of Legality

89. I am advised that the failure by the NPA to take a decision is subject to the principle of legality. The constitutional principle of legality requires

that a decision-maker exercises the powers conferred on him lawfully, rationally and in good faith. Such decisions may not be arbitrary and must be rationally related to the purpose for which the power was given.

90. I submit that the conduct of the first respondent and its officials in respect of my sister's case is not only irrational but may have been mala fides or deployed for ulterior purposes.
91. The NPA is granted the power to make decisions whether to prosecute in order to ensure that justice is done for victims, victim's families and the wider community. My sister's case was not pursued by the first respondent and his officials, notwithstanding repeated demands, requests and pleas over many years. Such conduct is not rationally connected to the purpose for which the prosecutorial power was granted.
92. Since 2013 further delays have been caused by the NPA's insistence that it wait for the apparent completion of all aspects of the investigation. This insistence, together with its failure to demand results from the SAPS is at odds with the aforesaid purpose. The latest delay jeopardises the possibility of a successful conviction. There can be little doubt that in these circumstances the delay is both excessive and irrational.
93. There are extremely important policy reasons for taking a decision to prosecute or not within a reasonable time. This obligation is not only inferred as part of rational decision-making but is required in terms of the NPA's own Prosecution Policy which states that the maintenance of law and order within a human rights culture requires "*effective and swift prosecution*".
94. In the circumstances the gross delay in making a prosecutorial decision constitutes an improper exercise of the NPA's discretion.
95. Aside from the irrationality of the delay it appears that such delay may be the result of conduct or decision making exercised in bad faith or for an ulterior purpose. As mentioned above under the heading "Political constraints" the State put in place measures in order to manipulate, control or obstruct prosecutorial decisions dealing with the political cases of the past. Aside from such measures constituting a gross encroachment on the independence of the NPA they serve to explain why the TRC cases or the political cases from the past have been treated so differently from non-political cases; and have suffered such terrible neglect.

The delay is in conflict with PAJA

96. The delay and failure to take a decision are inconsistent with the following provisions of Promotion of Administrative Justice Act 3 of 2000 (PAJA):

- 96.1. section 6 (2) (f) (ii) of PAJA in that they are not rationally related to the purpose of the first respondent's, namely the effective prosecution of crime without fear, favour or prejudice.
- 96.2. section 6 (2) (h) in that they are unreasonable, alternatively, irrational. This is so because the effect of such conduct is to assist the perpetrators to escape justice.
- 96.3. section 6 (2) (c) in that such conduct was procedurally unfair. This is so because the first and second respondents strung me and my family along over many years giving us the impression that they were doing their legally mandated jobs when they were not.
- 96.4. section 6 (2) (d) in that such conduct was materially influenced by an error of law insofar as agents of the first respondent claimed that they were obliged to suspend action on all of the so-called political cases while a standardized policy on such cases were being developed (the amendments to the Prosecution Policy issued in December 2005). In fact there was no legal authority for the suspension of such cases.
- 96.5. section 6 (2) (e)(ii) and (iii) in that such conduct was carried out for an ulterior purpose or motive; or because irrelevant considerations were taken into account or relevant considerations were not considered. This is so because it appears from the section titled "Political constraints" that political or irrelevant considerations interfered with the approach of the first respondent to the TRC cases resulting in their neglect or abandonment.
- 96.6. section 6 (2) (e)(iv) in that such conduct was carried out as a result of the unauthorised or unwarranted dictates of another person or body, in that it appears from the section titled 'Political constraints', that persons outside the NPA brought considerable pressure to bear on the first respondent and/ or officials within the NPA to treat the so-called political cases differently from other cases, resulting in their neglect.
- 96.7. section 6 (2) (e)(v) and (vi) in that such conduct was carried out in in bad faith; or arbitrarily or capriciously. This is so because it appears from the section titled 'Political constraints' that political interference in relation to the so-called political cases resulted in both the first and second respondents not treating such cases with any urgency or diligence. In so doing they acted in bad faith or capriciously.
- 96.8. section 6 (2)(h) in that the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person

could have so exercised the power or performed the function. This is so because my sister's case involves very serious crimes of kidnapping and murder; is more than 30 years old; and the first and second respondents, and/ or their responsible officials, have known since the mid-1990s who the perpetrators are. Nonetheless they saw fit to evade their legal responsibilities and only commenced with serious investigations in early 2013 when I sought the immediate holding of an inquest.

97. I am advised that section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 provides that the "*failure to take a decision*" as a specific ground of judicial review. As I have demonstrated above the first respondent has a duty to take a decision whether to prosecute or not; or refer to an inquest. Indeed whenever the NPA is in possession of a docket, particularly a docket involving a serious crimes such as kidnapping and murder, it has a duty to take a decision, as described above.
98. Although no law prescribes a period within which the first respondent is required to take such decisions I have also demonstrated that the delay has been grossly unreasonable in the circumstances, which is a further ground of review provided for in section 6(3) of PAJA.
99. I am advised that in terms of section 7 (1) of PAJA, judicial review proceedings brought in terms of section 6 (1) must be instituted within 180 days after the date upon which the person concerned "was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and reasons. I submit that the impugned action is ongoing in that the delays complained of and the failure to make decisions persist to this day. Accordingly this application complies with section 7(1).

Obligations arising from the TRC process

100. Initially, my family and I were very positive about the TRC process and its implications for reconciliation in South Africa. At the time, we felt that it did not matter if the perpetrators were not prosecuted, as long as they told the truth and showed remorse for what they did and helped my family to find Nokuthula's remains so that we could bury her properly.
101. As mentioned above we were disappointed with the amnesty process of the TRC. Nonetheless we assumed that the refusal of Coetzee, Pretorius, Mong's amnesty applications meant that they would be investigated for their role in Nokuthula's torture and likely murder.
102. The historic compromises that gave birth to our democracy with its enshrined freedoms required certain sacrifices, particularly on the part of victims. These sacrifices were demanded in order to advance national unity and reconciliation. Perpetrators were given an opportunity

to escape justice, both criminal justice and civil liability, as long as they came clean. Victims would have to accept these outcomes. This compact was reflected in the postscript to the *Constitution of the Republic of South Africa Act 200 of 1993* (“the Interim Constitution”) as well as the TRC Act. However where perpetrators offered only lies, deceit, half-truths and a wall of silence they were meant to face consequences. Accordingly, both a moral and legal obligation arose to follow up such cases. In this regard I refer to the affidavits of Alexander Lionel Boraine and Dumisa Ntsebeza filed evenly herewith.

103. My family and I accepted the necessary and harsh compromises that had to be made in order to cross the historic bridge from apartheid to democracy. We did so on 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. This part of South Africa’s historic pledge with victims has not been kept in Nokuthula’s case and indeed in most of the arising from the conflicts of the past. This failure has served to defeat the purpose behind South Africa’s historic compromises and has rendered largely meaningless the entire truth for amnesty program. It has become an effective or *de facto* blanket amnesty. It stands as a betrayal of all of us who participated in good faith in the TRC process.

Violation of South Africa’s international law obligations

104. The delays and failure to take a decision are substantively unconstitutional and invalid in that they constitute an infringement of the international law obligations of the Republic of South Africa, as set out in sections 231 to 233 read with section 39(b) of the Constitution, to uphold the right to justice and to investigate, prosecute and punish violations of human rights.
105. The delays and failure to take a decision violate the following international law instruments:
- 105.1. Article 2(3), read with article 2(1), of the International Covenant for Civil and Political Rights (“ICCPR”) by denying victims and their families an effective criminal justice remedy;
- 105.2. Article 6(1), of the ICCPR by permitting those who have violated the right to life to escape justice and punishment;
- 105.3. Article 7 of the ICCPR by contravening the duty to hold the perpetrators of torture or cruel, inhuman or degrading treatment or punishment responsible for their actions;
- 105.4. Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) by failing to give effect to the requirement that all acts of torture must be punishable by appropriate penalties;

- 105.5. Article 7 of CAT by failing to give effect to the requirement that all acts of torture must be submitted to the competent authorities for the purposes of prosecution;
- 105.6. Article 12 of CAT by failing to ensure that competent authorities promptly investigate, wherever there are reasonable grounds to believe that an act of torture has been committed;
- 105.7. Article 13 of CAT by failing to uphold the right of those who allege torture to have their cases promptly and impartially examined by competent authorities;
- 105.8. Article 14 of the Declaration on the Protection of all Persons from Enforced Disappearance (Adopted by General Assembly resolution 47/133 of 18 December 1992) by failing to bring the perpetrators behind my sister's disappearance before the competent authorities for the purpose of prosecution and trial.
- 105.9. Article 3(g) of the Constitutive Act of the African Union by failing to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights; and articles 4(m) and (o) of the said Constitutive Act by failing to reject impunity and uphold the rule of law.
- 105.10. Article 11 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/Res/60/147 (Dec. 16, 2005) by not affording me and my family "equal and effective access to justice"; as well as article 4 by not investigating my sister's case and prosecuting those responsible.

COMPELLING THE FIRST RESPONDENT

106. I submit that I have demonstrated the unlawfulness of the delays and the ongoing failure to make a prosecutorial decision or to refer Nokuthula's case to an inquest. I have also demonstrated the serious undermining of the prospects of justice and the reaching of the truth with every day that goes by. In the circumstances I have established a clear right to the making of a prosecutorial decision in Nokuthula's case, alternatively a clear right to have her case referred to a formal inquest.
107. I submit that I have demonstrated that the delays and the failure to take the said decisions have infringed my constitutional rights and that further delay will seriously prejudice my rights and that of my family. I have accordingly established a reasonable apprehension of injury.
108. The stress and trauma that we have endured for decades will be considerably magnified by any further delays. My mother is elderly and is troubled by ill-health. Witnesses and potential accused are getting

elderly and some may not live for much longer. In the circumstances, I submit that I have amply demonstrated that the balance of convenience favours me and my family and that we will suffer irreversible harm by any further delays.

109. I submit that that I have no other viable or alternative remedy. I have exhausted all avenues of persuasion. Many years of knocking on doors and pleading for action has fallen on deaf ears. No civil remedies can deliver the justice and the truth that my family and I seek.

SHORTENED TIME PERIODS

110. My family and I have exercised considerable patience and restraint over the last three decades. Once the docket had been opened by the SAPS, and particularly when the amnesty applications of the perpetrators had been finalized, and the matter handed over to the NPA, we expected action to be taken. We lived in hope that the next week or the next month, or failing that the next year, would yield some resolute action on the part of the authorities.
111. We did not wish to go the huge effort of launching an application to court needlessly. This is why we have waited so long. However, we cannot wait any longer. If the responsible agencies cannot or will not make a prosecutorial decision after such a long effluxion of time then we should be allowed to reach closure by being granted a formal inquest before the High Court.
112. With every day that goes by the prospects of justice or reaching the full truth and finding the remains of Nokuthula are seriously undermined. My mother is now elderly and not well. Witnesses and possible accused are also elderly and some may be approaching their last years. This ground alone justifies urgency or at least shortened time periods for the purposes of filing of papers and the hearing of this matter.

Wherefore I pray that the Honourable Court grants the relief as set out in the Notice of Motion.

THEMBISILE PHUMELELE NKADIMENG

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at _____ on this the _____ day of _____ 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS