IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/42219

In the matter between:

WILLEM HELM JOHANNES COETZEE	First Applicant
ANTON PRETORIUS	Second Applicant
FREDERICK BARNARD MONG	Third Applicant
THEMBISILE PHUMELELE NKADIMENG	Fourth Applicant

and

THE MINISTER OF POLICE	First Respondent
THE PROVINCIAL COMMISSIONER FOR GAUTENG, SOUTH AFRICAN POLICE SERVICE	Second Respondent

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HEADS OF ARGUMENT FOR THE FOURTH APPLICANT

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OVERVIEW OF THE CASE

1 On 29 March 2017 this Honourable Court made an order joining Thembisile Phumelele Nkadimeng as the Fourth Applicant in this matter.

2 Essentially, this application concerns the unresolved murder of the late Nokuthula Aurelia Simelane ("**Nokuthula**"). In 1983, Nokuthula was a twenty-three year old university graduate and an underground operative of the African National Congress.[1] Nokuthula was the sister of the Fourth Applicant ("**Nkadimeng**").

3 Nokuthula was abducted, viciously tortured and enforcedly disappeared in a failed "*kopdraai*" operation perpetrated by the First, Second and Third Applicants (collectively "**the Applicants**" or "**the Accused**").[2]

4 At that time, the Applicants were members of the Soweto Intelligence Unit of the South African Security Branch ("**SB**") of the former South African Police ("**SAP**").[3] The Unit was concerned with intelligence gathering and controlled various informants and agents.[4]

5 This unit acted under the instructions of Brigadier Hennie Muller ("**Muller**"), who is now deceased and was then Divisional Commander of the Security Branch,

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1 Nkadimeng FA p 138 para 10.

2 Nkadimeng FA p 136 para 2; Admitted De Lange AA to Coetzee FA para 9.

3 Nkadimeng FA p 136 para 2; Admitted De Lange AA to Coetzee FA para 5.

4 Coetzee FA p 7 para 10; Admitted De Lange AA to Coetzee FA para 7.

Johannesburg[5] as well as Brigadier Willem Frederick Schoon ("**Muller**"), who is alive and was the Pretoria HQ Commander of Section C (the section charged with combatting terrorism) of the Security Branch.[6] The First Applicant ("**Coetzee**") was the Operational Unit Commander of the Unit, the Second Applicant ("**Pretorius**") was second in command and the Third Applicant ("**Mong**") was the subordinate of Coetzee (also referred to as "**the accused**").[7]

6 Nokuthula was detained, interrogated, tortured and assaulted by the Applicants for a number of weeks with the intended purpose of recruiting her as an agent for the SB.[8] They did so on the instructions of their commanding officer, Muller[9] and Schoon.[10]

7 The conditions of Nokuthula's captivity were brutal and dehumanizing. She was repeatedly punched, kicked and slapped, repeatedly suffocated with a bag, given electric shocks and denied toiletries and basic medical assistance.[11]

8 When Nokuthula was last seen alive, she could not walk unassisted and her face was so badly swollen that she was unrecognisable.[12] She disappeared while in the Applicants' custody and has not been seen since.[13] It stands to reason that

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5 Coetzee FA p 7 para 8; Admitted De Lange AA to Coetzee FA para 7.

6 Coetzee FA, annex "C8,"p 9, paras 1 – 2.

7 Coetzee FA p 7 para 8; Admitted De Lange AA para 7.

8 Nkadimeng FA p 138 para 11; Admitted De Lange AA to Coetzee FA para 9.

9 Coetzee FA p 7 para 10; Admitted

10 Coetzee FA, annex "C8,"p 9, paras 1 – 2.

11 Nkadimeng FA p 138 para 12.

12 Nkadimeng FA p 138 para 12; Admitted De Lange to Coetzee FA AA para 9.

13 Admitted De Lange AA to Coetzee FA para 9.

she could never be returned to society in such a grim state and would have to be eliminated and disposed of so as to never implicate the police.[14]

9 Thirty-three years after Nokuthula's death, charges for her murder and kidnapping were finally preferred in the indictment of *The State v MT Radebe and 3 Others* (Case No: CC19/16) ("**the indictment**").[15] The Applicants are accused numbers two, three and four in the indictment. Regrettably, this action was only taken after Nkadimeng obtained a court order in 2015 to compel the National Prosecuting Authority ("**NPA**") to either conduct an inquest or prosecute the Applicants.[16]

10 The Applicants accordingly applied to the Second Respondent ("**the Commissioner**") in terms of Police Standing Order 109 for assistance with the payment of the Applicants legal costs in the indictment.[17] On 4 May 2016, Commissioner refused the applications.[18]

11 The Applicants have applied to this Court to review and set aside the decision of the Commissioner to refuse the Applicants' applications for assistance with legal costs in the indictment ("**the Decision**") and declare that they are indeed legally entitled to the assistance applied for.[19] As a result of this refusal the trial of the accused has been further delayed.

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14 Nkadimeng FA p 138 para 12.

15 Nkadimeng FA p 144 para 24; Admitted De Lange AA to Coetzee FA paras 6 and 9.

16 Nkadimeng FA pp 138-9 para 11; Coetzee FA pp 8-9 para 16.

17 Coetzee FA pp 10-2 paras 23, 25 and 29; Admitted De Lange AA to Coetzee FA para 12.

18 Coetzee FA pp 11-2 para 29; Admitted De Lange AA to Coetzee FA para 12.

19 Coetzee FA p 7 para 7(a) and (b).

12 The substratum of the Commissioner's refusal is that the Applicants' conduct amounted to a private frolic. This egregious denial of history denigrates the memory of those who gave their lives for South Africa's democracy and must be seen for what it is – an attempt to justify the abject failure of State institutions to investigate and hold to account the real decision makers behind Apartheid-era crimes as a result of political interference.[20]

13 In consequence, Nkadimeng brought an application to compel the Respondents to pay the Applicants legal defence costs in the indictment.[21] She supports the relief sought by the Applicants insofar as it relates to the obligation of the Respondents to pay the reasonable legal defence costs of the Applicants.[22]

14 This application essentially concerns whether, in the circumstances, the Minister and/or the Commissioner have a legal obligation to pay the criminal defence costs of the Applicants. We submit that the circumstances as we describe them in these submissions justify that the Minister and/or the Commissioner do have the obligation to pay the legal costs of the accused.

THE SCHEME OF THESE SUBMISSIONS

15 These submissions are structured as follows:

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20 Nkadimeng RA paras 4-6.

21 Nkadimeng NOM p 129 para 1; Admitted De Lange AA to Nkadimeng FA para 3.

22 Nkadimeng FA pp 136-7 para 5.

15.1 First, and in order to place these submissions in their proper context, we describe the historical background to this application and the context within which it must be understood. In this regard, we also highlight the submissions of expert witnesses as set out in their supporting affidavits; and

15.2 Second, we deal with the legal framework which clearly prescribes the obligation of the Minister of Police to take responsibility for the legal costs of the accused in this case.

HISTORICAL BACKGROUND

Nkadimeng's Efforts to Secure Justice

16 On 11 September 1983, Nokuthula was abducted in the parking garage of the Carlton Centre and thereafter brutally tortured by the SB of the SAP.[23] The SB fell directly under the Commissioner of the SAP.[24] Notwithstanding the extensive efforts of the SB, Nokuthula refused to become an informer, which meant that she could never be released alive.[25]

17 Nokuthula was never seen again. To date Nkadimeng and her family still don't know for certain how Nokuthula died, and where her body is.[26] The police

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23 Coetzee FA para 11; Nkadimeng FA pp 138 para 10.

24 Ntsebeza Affidavit p 176 para 17.

25 Nkadimeng FA pp 138 para 10.

26 Nkadimeng FA pp 140 para 14.

eventually opened an investigation docket in 1996 under case number: **Priority Investigation: JV Plein: 1469/02/1996.** [27]

18 In 2001, the Amnesty Committee of the Truth and Reconciliation Committee ("**TRC**") concluded that the white SB officers (the Applicants in this matter) had lied to the Commission about what had happened to Nokuthula during her captivity, in particular the severity of the torture she sustained and the duration.[28] It is for this reason that they were only granted amnesty for her kidnapping, but were denied amnesty for her torture.[29]

19 After the amnesty decision the matter was referred to the NPA. For years, the NPA did nothing to seriously take the matter forward or bring to book the perpetrators of this heinous crime. Accordingly, in 2005, Nkadimeng's legal representatives requested that the Priority Crimes Litigation Unit of the NPA take various steps to prosecute Nokuthula's case.[30] Their requests were ignored.[31]

20 The NPA's regrettable stance was only the beginning of the ongoing neglect of Nokuthula's case and her family's struggle for justice. In the ensuing years, Nkadimeng and her family were presented with many more obstacles in their pursuit for justice and closure. Consequently, Nkadimeng was forced to:

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27 Nkadimeng FA pp 137 para 7.

28 Nkadimeng FA p 140 para 15.

29 Nkadimeng FA p 140 para 15; Coetzee FA p 8 para 13; Admitted De Lange AA to Coetzee FA para 10.

30 Nkadimeng FA pp 141-2 para 17.

31 Nkadimeng FA pp 142 para 18.

20.1 Challenge the NPA's Prosecution Policy that essentially created a backdoor amnesty for perpetrators of political crimes.[32] In 2008, Legodi J struck down the amendments, declaring them to be absurd and unconstitutional.[33]

20.2 Engage a high-level intervention for an investigating officer to eventually be appointed to Nokuthula's case in 2010.[34]

20.3 Chase after the "*missing*" docket between 2010 and 2012.[35]

20.4 Demand the holding of a judicial inquest into Nokuthula's death in 2013.[36]

20.5 File an application seeking to compel the South African Police Service ("**SAPS**") to finalize their investigations and the National Director of Public Prosecutions ("**NDPP**") to make a decision as to Nokuthula's case in 2015.[37]

21 It was only after Nkadimeng launched the 2015 application, which disclosed evidence of gross political interference in the operations of the NPA, that the NDPP took action by issuing the indictment.[38] The application remains pending in abeyance.

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32 Nkadimeng FA pp 142-3 para 19.

33 *Nkadimeng v National Director of Public Prosecutions* [2008] ZAGPHC 422.

34 Nkadimeng FA p 143 para 20.

35 Nkadimeng FA p 143 paras 20-1.

36 Nkadimeng FA pp 143-4 paras 21-2.

37 Nkadimeng FA p 144 para 23.

38 Nkadimeng FA pp 144-5 paras 25-6.

Further Delay

22 On 26 February 2016, the accused first appeared in the Pretoria Regional Court.[39] They were granted bail of R5,000 each.[40] They have subsequently appeared, with the matter being postponed, on four occasions: 29 March 2016, 25 July 2016, 20 September 2016 and 25 November 2016.[41] The reason for the ongoing postponements was to allow the Applicants time to resolve their dispute with the SAPS, which had refused to pay the Applicants' legal defence costs.[42]

23 On 4 May 2016, the Provincial Commissioner for Gauteng SAPS advised the Applicants that their applications for assistance with legal costs had been refused.[43]

24 Fearing that the dispute would delay the criminal trial, Nkadimeng's attorneys wrote to the prosecutors for Nokuthula's case on 15 September 2016 requesting that they vigorously oppose a long delay.[44] Regrettably, nothing came of this.

25 Nkadimeng's attorneys also wrote to the Minister on 15 September 2016, urging him to pay the reasonable legal costs of the criminal defence of the accused.[45] The Minister did not respond.[46]

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39 Nkadimeng FA p 145 para 27.

40 Nkadimeng FA p 145 para 27.

41 Nkadimeng FA p 145 para 27.

42 Nkadimeng FA p 145 para 27.

43 Nkadimeng FA p 145 para 28.

44 Nkadimeng FA p 146 para 29.

45 Nkadimeng FA p 147 para 32; Annexure TN5 pp 233-5.

46 Nkadimeng FA p 148 para 34.

26 On 24 October 2016, Nkadimeng's attorneys again wrote to the prosecutors requesting that they "*similarly communicate with the Minister of Police*" and urge him to pay the legal costs of the accused.[47] It was also pointed out that the Applicants' review application had not been brought on an urgent, or even a semi-urgent, basis, despite the Applicants describing their complaint as urgent in correspondence with SAPS.[48]

27 On 25 November 2016, the matter was postponed for eight months to 28 July 2017.[49] Nkadimeng accordingly launched an application to intervene in this matter to ensure that justice is done without unreasonable delay.[50]

THE APPLICANTS' ACTIONS WERE AUTHORISED

28 At the outset, it must be emphasised that the Applicants' actions cannot be dissociated from the historical context within which they occurred. They were mere junior officers acting at the behest of a powerful organisation which specifically authorised and condoned their actions.[51] Moreover, the Applicants' actions were wholly consistent with the standard *modus operandi* employed by the SB of the SAP at the time.[52]

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47 Nkadimeng FA p 148 para 35.

48 Nkadimeng FA pp 148-9 para 36.

49 Nkadimeng FA p 149 para 39.

50 Nkadimeng FA p 151 para 43.

51 Ntsebeza Affidavit pp 191-2 para 35.

52 Nkadimeng FA p 140 para 13.

29 In order to provide this Court with accurate information regarding the historical context relevant to Nokuthula's death and the Applicants' actions the expert affidavits of Dumisa Buhle Ntsebeza SC ("**Ntsebeza**") and Frank Kennan Dutton ("**Dutton**") were annexed in support of Nkadimeng's affidavit.

30 The Commissioner states in answer that she does "*not take issue with the factual submissions in relation to the historical context of the matter*".[53] However, this notwithstanding, she asserts that the Applicants "*were not subject to the direction and control of the State when they committed crimes, including the crimes committed against …Simelane*".[54]

31 This is simply a bare denial. It directly contradicts the Commissioner's concession that the historical context of this matter is not disputable. [55] Moreover, it is well established that, in motion proceedings, a bare denial in answer is not sufficient to put factual contentions in dispute.[56] The Commissioner's failure to contest the contents of the affidavits of Ntsebeza SC and Dutton must be construed as an admission of their facts.[57]

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53 De Lange AA to Nkadimeng FA at para 6.

54 De Lange AA to Nkadimeng FA at para 6.

55 Nkadimeng RA para 12.

56 *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para 12, referring with approval to *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E-635C and *Ripoli-Dausa v Middleton* 2005 (3) SA 141 (C) at 151A-153C.

57 Nkadimeng RA para 21.

Expert Affidavit – Dumisa Ntsebeza SC

32 Ntsebeza supports the relief sought by Nkadimeng. Ntsebeza is a Senior Counsel at the Johannesburg Bar and a former Commissioner and Head of the Investigative Unit of the TRC.[58] He has practiced law for more than 30 years and, in 2004, was appointed by the Secretary-General of the United Nations as a member of the International Commission of Inquiry on Darfur.[59] He has founded, served and serves on various legal associations and trusts.[60]

33 Ntsebeza's experience and expertise detail the historical context within which the kidnapping, torture and murder of Nokuthula occurred. Nokuthula's case was investigated by the TRC as part of the amnesty matter with case number: AC/2001/185.[61] The TRC found that Nokuthula was a victim and recommended that the NPA investigate further with a view to prosecution.[62]

34 Nokuthula was kidnapped, tortured and murdered in 1983 at the height of resistance to apartheid South Africa.[63] The South African government perceived the anti-apartheid threat as a revolutionary "*total onslaught*".[64] At this time, particularly between the late 1970s and early 1990s, the State sanctioned extra judicial killings and rampant criminality as a matter of policy.[65] Operations of the

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58 Ntsebeza Affidavit p 170 para 1.

59 Ntsebeza Affidavit p 170 paras 2-3.

60 Ntsebeza Affidavit pp 170-1 para 4..

61 Ntsebeza Affidavit p 173 para 8.

62 Ntsebeza Affidavit p 173 para 8.

63 Ntsebeza Affidavit p 174 para 12.

64 Ntsebeza Affidavit p 173 para 12.

65 Ntsebeza Affidavit p 173 para 11; and p 174 para 13.

sort similar to Nokuthula's case were therefore sanctioned by the highest political structures in the country.[66]

35 It followed that orders to carry out operations involving torture and murder against perceived terrorists were routine police work by the SB.[67] The police frequently engaged in kidnapping, torture and murder that were specifically authorised, not only by their immediate superiors, but also by the commanders of the SB, the commissioner of police, the Minister and the erstwhile Security State Council ("**SCC**").[68] The SB became infamous for the cruel, inhumane and illegal methods it used.[69]

36 This historical context, which is not denied, demonstrates that the Applicants acted in the course and scope of their duties as police officials are addressed by Ntsebeza on four bases:

36.1 First, the apartheid State's general policy of State criminality;

36.2 Second, the general *modus operandi* of the SB of the SAP;

36.3 Third, the conduct of the Applicants' authorising officers in particular;

36.4 Finally, the conduct of the Applicants themselves in particular.

37 In relation to the policy of State criminality:

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66 Nkadimeng FA p 162-3 para 107.

67 Nkadimeng FA p 162 para 107.

68 Nkadimeng FA p 160 para 100.

69 Ntsebeza Affidavit p 176 para 18.

37.1 Senior officials of the erstwhile SAP have testified before the TRC that state criminality was the order of the day during apartheid.[70]

37.2 Members of SAP "*had to move outside the boundaries of the law*" and perform "*illegal acts*" imposing upon them the "*virtually impossible task to judge between legal and illegal actions*".[71]

37.3 The TRC found that during the period in question, the apartheid State committed a host of gross violations of human rights in South Africa, including: extra-judicial killings in the form of state-planned and executed assassinations; attempted killings; the mutilation of body parts; torture; abduction or kidnapping and disappearances; and severe ill treatment, abuse and harassment.[72]

37.4 Senior security police officials testified before the TRC that if SAP members were caught, they were instructed to distance themselves from the political arena. "*If it should be claimed therefore by anyone that the State Security Council was not aware of the actions of the security forces and the security police or of any specific incidents this would not be true*."[73]

37.5 The SCC, of which then President Botha formed part, implemented security policy that expressly permitted the SAP to "*take out*", "*wipe out*", "*eradicate*" and "*eliminate*" political opponents.[74] The TRC found President

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70 Ntsebeza Affidavit p 175 para 14.

71 Ntsebeza Affidavit pp 175-6 para 14.

72 Ntsebeza Affidavit p 176 para 15.

73 Ntsebeza Affidavit pp 181-2 para 21.

74 Ntsebeza Affidavit pp 182-3 para 22.

Botha responsible for ordering the destruction of the head office of the South African Council of Churches and, along with senior officials, ordering acts of sabotage and "*false-flag*" operations that enabled the Apartheid State's armed forced to attack targets in neighbouring countries.[75]

38 In relation to the *modus operandi* of the SB of the SAP:

38.1 Coetzee and Pretorius ultimately fell under the authority of Brigadier Schoon, the head of notorious Section C of the SB of the SAP.[76]

38.2 The *Commission of Inquiry regarding the Prevention of Public Violence and Intimidation* ("**Goldstone Commission**") was established in 1991 to investigate incidents of public violence and intimidation in South Africa.[77] The Goldstone Commission concluded in its "*Third Force*" report that the SB's "*involvement in violence and political intimidation is pervasive and touches directly or indirectly every citizen in this country*" and that "*[t]he whole illegal criminal and oppressive system is still in place and its architects are in control of the SAP*".[78]

38.3 The TRC found in relation to the SB that:[79]

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75 Ntsebeza Affidavit pp 183-4 para 22.6.

76 Ntsebeza Affidavit pp 178-9 para 20.3.

77 Ntsebeza Affidavit p 177 para 19.

78 Ntsebeza Affidavit pp 177-8 para 19.2.

79 Ntsebeza Affidavit p 180 para 20.6-7.

38.3.1 Extra-judicial killings were undertaken by a number of different security branch divisions and by the Special Forces.[80]

38.3.2 Extra-judicial killings were often the end result of a process of operationally directed intelligence collection on targeted individuals, including from section C2 of the SB.[81]

38.3.3 SB officials were responsible for drawing up hit lists of prominent activists for "*elimination*" and the planning of hits.[82]

38.3.4 Senior SB officials routinely covered up crimes.[83]

38.3.5 "*[T]he Security Branch argued, that it was preferable to abduct rather than officially detain, and to kill the abductee once information had been extracted. In some instances, the Security Branch attempted to 'turn' (recruit) the individual; where this proves unsuccessful, killing was regarded as necessary*."[84]

38.3.6 Where SB members had sought to cover up the murder and unlawfully disposal of a deceased's body under the pretence of staging a "*mock escape*", the TRC Amnesty Committee concluded that "*at all relevant times the applicants acted in the*

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80 Ntsebeza Affidavit p 180 para 20.6.1.

81 Ntsebeza Affidavit p 180 para 20.6.2.

82 Ntsebeza Affidavit p 181 para 20.6.4.

83 Ntsebeza Affidavit p 181 para 20.7.

84 Ntsebeza Affidavit pp 184-5 para 23.

course and scope of their duties as members of the Security Branch".[85]

38.3.7 SB officials often covered up the identity of the victims and their final burial places and "*[t]hose who did not co-operate with the police were brutally killed and often buried in secret locations or in unnamed graves in cemeteries*".[86]

38.4 Individual testimonies of SB members also revealed that:

38.4.1 If an individual was identified as an informant this would justify his or her murder.[87]

38.4.2 It was expected of SAP members to stop the onslaught "*at any price even if they acted outside the law as in a war situation*".[88]

38.4.3 SB members frequently desecrated and violated the bodies of their victims to ensure that the remains could never be found and "*give the impression that the person has fled into the neighbouring country*".[89]

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85 Ntsebeza Affidavit pp 185-6 para 25.

86 Ntsebeza Affidavit pp 187-8 paras 29 and 32.1.

87 Ntsebeza Affidavit p 185 para 24.

88 Ntsebeza Affidavit p 185 para 25.

89 Ntsebeza Affidavit pp 186-7 paras 27-8.

39 In relation to the conduct of Brigadiers Muller and Schoon, who were the SB authorising officers responsible for ordering the operation against Nokuthula,[90] the Final Report of the TRC made the following findings:

39.1 Muller was responsible for assaulting and torturing Suliman Saloojee in 1964, who subsequently fell to his death from the 7th floor of SB headquarters.[91]

39.2 Muller authorised the detention of, and was the officer in charge of interrogating Dr Neil Aggett who was tortured and ultimately died in SB detention.[92]

39.3 Muller and Schoon also authorised various false flag or "*credibility operations*" involving bombing attacks on a power station and the railways, which sought to create the impression that such attacks were carried out by the ANC.[93]

39.4 Schoon made multiple applications for amnesty for murder, conspiracy to murder, kidnapping, bombings and perjury.[94] He testified that the SB operated outside the boundaries of the law.[95] Schoon ordered the murder of Peter Dlamini.[96]

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90 Nkadimeng FA p 163 para 108; Ntsebeza Affidavit p 189 para 33.

91 Ntsebeza Affidavit p 185 para 33.1.

92 Ntsebeza Affidavit pp 189-90 para 33.2.

93 Ntsebeza Affidavit p 190 para 33.3.

94 Ntsebeza Affidavit p 190 para 34; Annexure DN1 pp

95 Ntsebeza Affidavit p 190 para 34.1.

96 Ntsebeza Affidavit pp 190-1 para 34.2.

39.5 Along with Coetzee and the Second Applicant ("**Pretorius**"), Schoon was granted amnesty for the murder of a senior MK operative and two ANC members.[97]

39.6 Along with four others, Schoon was refused amnesty for the murder of two persons and an attempted murder of one person arising from a bombing in Krugersdorp.[98]

40 In relation to the conduct of the Applicants in particular, amnesty records reveal that during the 1980s multiple serious crimes were committed by Coetzee and the Second Applicant ("**Pretorius**") in collaboration with Eugene de Kock, under the command of Brigadier Schoon who was in turn authorised by the Commander of the Security Branch, Johannes Velde Van Der Merwe.[99] In particular, they were granted amnesty along with Schoon for the murder of a senior MK operative and two ANC members.[100]

Expert Affidavit – Frank Dutton

41 Dutton also supports the relief sought by Nkadimeng. Dutton is an international policing expert with 38 years of policing experience and was the first operational head of the former Directorate of Special Operations (also known as the Scorpions).[101] He was awarded the Order of the Baobab in Gold by the President

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97 Ntsebeza Affidavit p 191 para 34.3.

98 Ntsebeza Affidavit p 191 para 34.4.

99 Nkadimeng FA p 163 para 109.

100 Ntsebeza Affidavit p 191 para 34.3.

101 Dutton Affidavit pp 199-200 para 2.

of South Africa for his policing work both locally and abroad.[102] A full list of Dutton's qualifications accompanies his affidavit.[103]

42 Dutton supports the conclusion that the Applicants acted under the instruction of their SAP superiors when they kidnapped, tortured and allegedly murdered Nokuthula.[104] He similarly concludes that the kidnapping, torture and murder of Nokuthula was consistent with the typical *modus operandi* of "*kopdraai*" operations which were routinely employed by the erstwhile SB of the SAP and authorised by their high ranking structures.[105]

43 Dutton's insight is gleaned from his personal experiences, including:

43.1 Investigating the murders of political leaders that resulted in an inquiry being ordered into the conduct of senior SAP personnel.[106]

43.2 Being seconded as an investigator to the Goldstone Commission, which concluded that state officials had masterminded a campaign of criminal violence against those opposing apartheid.[107]

43.3 Being seconded to the D' Oliveira Investigation Team, which resulted in Eugene De Kock being convicted on multiple charges of murder and which demonstrated the SAP command's involvement in political violence.[108]

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102 Dutton Affidavit p 200 para 3.

103 Annexure FDK1 pp 213-9.

104 Dutton Affidavit p 201 para 6.

105 Dutton Affidavit p 201 para 6.

106 Dutton Affidavit p 202 paras 8.1-8.3.

107 Dutton Affidavit pp 203-4 paras 8.4-8.6

108 Dutton Affidavit p 204 para 8.7.

43.4 Being appointed as the Commander of the Investigation Task Unit, Natal, in 1994 which exposed the role the military and several police officers in the 1987 KwaMakhutha massacre.[109]

44 These experiences led Dutton to concluded that:

44.1 "*[T]he involvement of the SAP (and other Security Forces) in political violence was sanctioned not only by the most senior commanding officers in the SAP, including Commissioners of the SAP and commanders of the SB, but also by the highest levels of Government*."[110]

44.2 Senior SAP commanders failed to undertake credible investigations into State sponsored political violence and those responsible for such violations remained immune from discipline or criminal investigation.[111]

44.3 Even where direct orders were not given, criminal violence was routinely condoned and encouraged by most senior officers of the SB and SAP.[112]

45 Dutton studied 54 cases of politically motivated murders and kidnappings as disclosed by SB members.[113] The SB perpetrators asserted that these crimes "*were committed either as a result of direct instructions given to them or issued indirectly by the South African Police command structure and Nationalist Party*

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109 Dutton Affidavit p 204 paras 8.8-8.9.

110 Dutton Affidavit p 205 para 9.

111 Dutton Affidavit p 205 para 10.

112 Dutton Affidavit p 205 para 11.

113 Dutton Affidavit p 206 para 12.

leaders".[114] Senior SAP commanding officers were co-applicants for amnesty in a number of these cases.[115]

46 The 54 case studies revealed that certain motives justified the SAP's decision to murder and there were often multiple motivations in each case.[116] These motives include: eliminating a prominent activist or dangerous "terrorist" (30 instances); failed attempt to turn the deceased into a SB agent (9 instances); protecting the informers who played in role in the "capture" of the deceased (9 instances); the need to "protect" information extracted during an interrogation (3 instances); protecting the identities and methodologies of SB members (17 instances); and death during torture (6 instances).[117]

47 The Applicants' state that "*nobody applied for amnesty regarding the death or murder of Simelane, as no policeman was involved in such actions*". The Applicants indicate that had they killed Nokuthula, they "*would have included that in [their] amnesty applications in order to also receive amnesty for the alleged killing*".

48 However, Dutton notes that SB members tended to only apply for amnesty when there was a real possibility of being implicated by other SB operatives who had come clean, alternatively where incriminating information came to the attention of prosecutors through other sources.[118]

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114 Dutton Affidavit p 206 para 13.

115 Dutton Affidavit p 206 para 14.

116 Dutton Affidavit pp 206-7 para 15.

117 Dutton Affidavit pp 206-8 paras 15-6.

118 Dutton Affidavit p 208 para 17.

49 Dutton concludes, as we submit it must be concluded in this application, that the Applicants were acting under instructions in perpetrating crimes against Nokuthula. His reasons are as follows:

49.1 The Applicants testified before the TRC that they were instructed and authorised to kidnap, torture and turn Nokuthula by Brigadiers Schoon and Muller. Schoon and Muller were their direct commanders (supervisors) who were lawfully placed in authority over them. The Applicants were obliged under law to obey orders issued by their superiors.[119]

49.2 Coetzee's testimony before the TRC makes clear that, the Special Intelligence Unit under his command had sought and received authority from Schoon for the kidnapping and torture of Nokuthula for the purpose of "*turning her*". Schoon in fact applied for amnesty in Nokuthula's case, but did not proceed with his application.[120]

49.3 The Applicants' conduct was not out of the ordinary. It fell within the general, approved conduct of of SB members. This included abduction, torture and murder, where a "*kodraai*" operation failed, and where the identities of other informants had to be protected.[121]

49.4 Nokuthula was held captive on a remote farm at Northam, which is 215km from the Protea SB HQ, Soweto over a four to five week period. The Applicants travelled between their offices and Northam frequently to guard and interrogate Nokuthula. All of these costs and claims had to be formally

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119 Dutton Affidavit pp 209-10 paras 20.1-20.2.

120 Dutton Affidavit p 210 para 20.3.

121 Dutton Affidavit p 210 para 20.4.

approved by SAP management, which would only have been given if it was a properly authorised "*official operation*".[122]

49.5 Moreover, the Applicants' frequent and prolonged absences from their work place could not have been sustained unless their supervisors had knowledge of and approved the "*operation*" against Nokuthula.[123]

APPLICABLE LEGAL FRAMEWORK & OBLIGATION TO PAY ACCUSEDS' LEGAL FEES

Standing Order 109

50 At the time of commencement of the SAPS Act, the Constitution of the Republic of South Africa Act 200 of 1993 ("**the Interim Constitution**") was in force. Section 236(7) of the Interim Constitution provides that:

> *"(a) At the commencement of this Constitution the South African Police existing in terms of the Police Act, 1958 (Act 7 of 1958), and all other police forces established by law shall be deemed to constitute the South African Police Service referred to in section 214, and any reference to the South African Police or any such force in the said Act or law shall be deemed to be a reference to the said Service.*
>
> *(b) Any reference in any law to the South African Police or any other police force (excluding a municipal police service) shall, unless the context indicates otherwise, be construed as a reference to the said South African Police Service.*"

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122 Dutton Affidavit p 211 para 20.5.

123 Dutton Affidavit p 211 para 20.6.

51 Section 5 of the SAPS Act provides that SAPS, at its establishment, consists of a force which, by virtue of 236(7)(a) of the Interim Constitution, is deemed to constitute part of the SAPS.

52 The SAPS is therefore the legal successor-in-title to the former SAP and therefore assumes institutional responsibility for the wrongs committed by the erstwhile SAP.

53 At the time of the relevant crimes, **Standing Order (General) 109** was in place.[124] This standing order was promulgated in terms of section 33 of the **Police Act 7 of 1958**, which was the legislation that governed police affairs.

54 SAPS contends that this standing order is not applicable as it has been amended by **Consolidation Notice 9 of 2015**.[125] Notably, the material provisions of the standing order, as amended, reflect those in the original standing order, albeit located in different clauses. For all intents and purposes the distinction between these standing orders does not affect the Applicants' entitlement to legal assistance.

55 Clause 1(a)(i) (clause 4(1), as amended) and (ii) (clauses 4(2), as amended) of the standing order provides that should a member of the police force be tried in a criminal court, he is entitled to request that his defence is conducted by the State Attorney, provided that he:

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124 Annexure TN6 pp 236-46.

125 De Lange AA to Nkadimeng FA para 7.1.

> *"(i) acted in the execution of his duties or bona fide believed that he had done so;*
>
> *(ii) did not exercise his powers in a reckless or malicious manner or did not knowingly exceed them;*"

56 Clause 1(b)(vi) (clause 8, as amended) provides:

> *"An application for State defence will, however, only be considered if it is undertaken that, should the State Attorney at the conclusion of the relevant criminal case decide that the full amount of the legal costs incurred in respect of the defence, must be paid to the State, it would be done.*"

57 Clause 2(d)(i) (clause 4(4)(a), as amended) and (ii) (clause 4(4)(b), as amended) provides:

> *"The State Attorney will be entitled to decline to defend a member if there is evidence indicating that:*
>
> *(i) a crime had been committed and the State is the complainant; or*
>
> *(ii) it will be contrary to the interests of the State or of the public to undertake such defence…*"

58 Clause 2(e) provides:

> *"Although a member may have forfeited the privilege of State defence as described in paragraph (1)(a), the State Attorney may undertake the member's defence at State expense where he, after consultation with the Commissioner or with the Divisional Commissioner concerned, considers it to be in the interests of the State or of the public."*[126]

59 Clause 2(h) provides that where a conflict of interest exists between police officials, SAPS will arrange for a private legal representative to conduct the defence of such member. Clause 4(c) of the amended standing order provides that where such a conflict exists between police officials then the Commissioner may refuse an application for assistance.

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126 This provision is not replicated in the amended standing order.

60 The following process will therefore apply to determining whether an application for assistance should be granted.

60.1 First, it must be assessed whether, in performing the relevant conduct, the official acted in the course and scope of his employment.

60.2 Second, it must be assessed whether, notwithstanding the official having acted in course and scope of his employment, that official is not disqualified by the standing order in that either:

60.2.1 He exceeded his powers or acted recklessly.

60.2.2 The State is a complainant.

60.2.3 Granting the application would be against the State or public interest.

60.2.4 A conflict of interest exists between officials.

61 If these two requirements are met then a member will be entitled to payment by SAPS for legal representation in a criminal matter. As will be demonstrated below, it is our submission that the Applicants indeed meet these requirements and, consequently, their applications for assistance must be approved by SAPS.

The Applicants Acted in the Course and Scope of Employment

62 In terms of clause 1(a)(i) and (ii) of the standing order, a member of the police force will be entitled to a State defence where he acted "*in the course and scope*

of his employment" or *bona fide* believed he was doing so. This provision is replicated in clause 4(1) of the standing order relied upon by the Respondents.

63 In making this determination, the Constitutional Court enunciated that a subjective and objective test will be applied as follows:

> *"The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights."*[127]

64 Should an official meet the requirements of either the subjective or objective test, they will be regarded as having acted in the course and scope of their employment.[128] It is also established that a police officer may act "*within the course and scope of their duties as policemen*" without necessarily acting in terms of the Police or SAPS Act.[129] The two concepts are notionally distinct and deal with different incidents of liability, the former concerning common-law principles of vicarious liability. A determination will depend on the facts and circumstances of each particular case.[130]

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127 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 32.

128 *Macala v Maokeng Town Council* 1993 (1) SA 434 (A) at 440-1.

129 *Masuku v Mdlalose* 1998 (1) SA 1 (SCA) at 10B-C.

130 *Id* at 10I-11B.

65 The subjective test is a matter of fact that requires the Court to consider whether an official intended to further the interests of the police. The objective test is that a "*sufficient connection*" must exist between the act in question and policing work. "*The connection must be reasonably strong, significant and relevant. A tenuous, irrelevant or insignificant connection will not do.*"[131]

66 Courts have held that members of the police will act within the course and scope of their duties as policemen where:

66.1 They are subject to the direction and control of the State;[132]

66.2 They act as servants of the State as opposed to carrying out conduct of a personal or private nature;[133]

66.3 There is sufficient connection between their conduct and the work of the police;[134]

66.4 They themselves intended to do police work and believed they were so doing;[135]

66.5 They were exercising functions for which they were appointed;[136]

66.6 They were carrying out instructions of their superiors;[137] and/ or

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131 *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 156.

132 *Mhlongo NO v Minister of Police* 1978 (2) SA 551 (A) at 570.

133 *Id* at 567; *Minister of Police v Mbilini* 1983 (3) SA 705 (A).

134 *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 156; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 44.

135 *Smit v Minister van Polisie* 1997 (4) SA 893 (T) at 905B-D.

136 *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA) para 5; *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A).

137 *Minister van Veiligheid en Sekuriteit v Kyriacou* 2000 (4) SA 337 (O).

66.7 Their police actions were dictated by what they considered was required of them as policemen.[138]

67 It is clear that, in performing the acts in question, the Applicants' meet the requirements of both the subjective and objective tests:

67.1 The purpose of the Applicants' Unit was to gather intelligence and control various informants and agents and ultimately to prop up the Apartheid regime.

67.2 To achieve these purposes, the Applicants' abducted, viciously tortured and enforcedly disappeared Nokuthula. They attempted to "turn" her into an informant in a failed "*kopdraai*" operation.

67.3 This operation was authorised by two superior officers, Muller and Schoon, who were placed in lawful authority over the Applicants, and whose instructions the Applicants were obliged to obey under law.

67.4 The Applicants' conduct was not out of the ordinary. It fell within the general and approved conduct of of SB members. This included abduction and torture. Where a "*kodraai*" operation failed and where the identities of other informants had to be protected murder was justified.

67.5 Operations of this sort were also sanctioned as a matter of policy by the highest political structures in the country. Indeed, such practices were regarded as routine SB policing work through which the SB became infamous for its cruel, inhumane and illegal methods.

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138 *Tshabalala v Lekoa City Council* 1992 (3) SA 21 (A) at 31.

67.6 The *modus operandi* of the SB of SAP required, as a matter of course, conduct that that extended well beyond the letter of the law, including cover-ups.

67.7 The financial claims of the Applicants' travel between SAP offices in Soweto and Northam would have had to be formally approved by SAP management, which would only have been given if it was a properly authorised "*official operation*".

67.8 The Applicants' frequent and prolonged absences from their work place could not have been sustained unless their supervisors had knowledge of and approved the "*operation*".

67.9 The Applicants' genuinely believed that they were performing police work.

68 The version advanced by the Applicants is consistent with the conclusion that they acted in the course and scope of their employment. The Applicants assert that their operation was unlawful, but nonetheless it was a planned and routine operation, that was authorised by their superiors.

68.1 In their application to the SAPS dated 10 February 2016 the Applicants indicated that the decision to ambush and kidnap Nokuthula was "*[a]t the time… [a] normal and often successful strategy in matters of this nature*" and that it was "*planned*".[139]

68.2 Moreover, the Applicants indicated that their conduct was "*[d]uly authorized by their commander*" and that the operation "*was not a 'frolic of*

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139 Annexure C2 p 32 paras 6.2 and 6.4.

their own', but was duly authorised and for that reason full legal representation was granted by SAPS in respect of the TRC process".[140]

68.3 The Applicants' founding affidavit supports this assertion. In it Coetzee states that the Applicants were authorised by Muller to "*apprehend*" Nokuthula and to "*recruit her as an informer*".[141] Coetzee goes on to state that that he was instructed by Muller to accompany him to "*Head Office*" to meet Brigadier Schoon to secure "*authorisation*".[142]

69 On the Applicants' version, they were ordered to conduct the operation by their lawfully appointed superior officers who were authorised under law to issue orders to the Applicants. In consequence, the Applicants were obliged by law to obey these instructions.

70 The Applicants did no more than was necessary to carry out their orders. Their actions were wholly consistent with the *modus operandi* employed by the SB during apartheid in conducting "*kopdraai*" operations, which routinely involved torture and the elimination of captives who refused to become informers.[143] This *modus operandi* was endorsed and confirmed not just by their commanders but from the political hierarchy, including cabinet ministers.[144]

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140 Annexure C2 p 32 paras 6.3 and 6.10.

141 Coetzee FA p 7 para 10.

142 Annexure C8 p 51.

143 Nkadimeng FA p 162 para 106.

144 Nkadimeng FA p 162 para 106.

71 In conclusion it is clear that the Applicants indeed acted in the course and scope of their employment on an application of the relevant legal principles. It follows that the Applicants are, absent disqualification, entitled under the first requirement to a State funded legal defence under both the 1983 standing order and its subsequent amendment.

72 It must now be assessed whether the Applicants may be properly disqualified under the standing order by virtue of its exclusionary provisions.

The Applicants are not disqualified

73 The Commissioner seeks to disqualify the Applicants' applications for the following reasons:[145]

73.1 The Applicants exceeded their powers when executing their duties.

73.2 It would be against the State or public interest to offer financial assistance.

73.3 There was a conflict of interest existing due to different versions of fact offered by the Applicants.

73.4 The State is a complainant.

73.5 The applications for assistance completed by Coetzee and Pretorius were incomplete and they no longer worked for SAPS. This made the recovery of debt problematic.

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145 De Lange AA to Coetzee FA para 35.

73.6 Mong had obeyed an illegal instruction.

74 It is our submission that there is no merit to any of the grounds advanced by the Commissioner. We deal with each reason in turn.

The Applicants exceeded their powers

75 The Commissioner states that the Applicants "*had been instructed to arrest or detain and interrogate Ms Simelane to obtain intelligence or information on planned acts of terror and/or recruit her. It was not sanctioned and/or authorised that she be tortured and murdered*".[146] The Commissioner goes on to rely on s 205(3) of the **Constitution** and ss 11-14 of the **SAPS Act 68 of 1995** to argue that "*[t]orture and/or murder falls outside of the powers bestowed on members of the SAPS and as such the applicants' conduct or torture and/or murder falls outside the execution of their duties*".[147]

76 The Commissioner's reasoning cannot be sustained:[148]

76.1 The evidence of Ntsebeza SC and Dutton sharply contradicts the factual basis underpinning the Commissioner's reasoning. The Commissioner has not put this evidence into dispute other than to make a bare denial. The Commissioner ought to have taken notice of the *de facto* situation at the time that the Applicants' crimes were committed.

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146 De Lange AA to Nkadimeng FA para 24.

147 De Lange AA to Nkadimeng FA paras 25-6.

148 Nkadimeng RA para 22.

76.2 At the time of the incident, the Applicants' conduct reflected the standard *modus operandi* employed by the SB of SAP. That time in particular was the height of resistance to apartheid South Africa causing the State to sanction extra-judicial killings and rampant criminality as a matter of policy.

76.3 The expert affidavit of Ntsebeza SC makes it clear that it was accepted that members of of SAP "*had to move outside the boundaries of the law*" and perform "*illegal acts*" and that where attempts to "turn" a potential informant failed, killing was regarded as necessary. The *modus operandi* of the SB was to act outside the law and murder those who did not co-operate or presented a risk to the SB.

77 The Commissioner's reliance on the Constitution and the SAPS Act is similarly flawed. The Applicants were not members of the SAPS in 1983 when the crimes were committed, but rather members of the erstwhile SAP. They were therefore not subject to the Constitution or the SAPS Act, neither of which were in force at the relevant time.

78 Neither the erstwhile Constitution of South Africa nor the Police Act 7 of 1958 curtailed the exercise of police functions in the manner that the Commissioner suggests. On the contrary, the Police Act and the Internal Security Act 74 of 1982 conferred the police with extraordinary and draconian powers.

79 At the time of the crimes committed against Nokuthula, the **Republic of South Africa Constitution Act 32 of 1961** ("the 1961 Constitution") was in force. That Constitution was entirely silent as to the conduct of the erstwhile SAP. Indeed

no reference was made to the police at all. While s 199(6) of the current Constitution stipulates that "[n]*o member of any security service may obey a manifestly illegal order*" no such constitutional provision was provided for in the 1961 Constitution.

80 It follows that the Commissioner erred in disqualifying the Applicants on this ground.

Against State or public interest

81 The Commissioner asserts that because the crimes set out in the indictment were "*perpetrated under the apartheid regime*" and are "*exceptionally serious*" it would be against the State or public interest to approve the application of the accused for legal assistance.[149] The Commissioner's reasoning in this regard is reductionist and plainly incorrect.

82 It fails to consider that justice is not done by refusing accused access to legal representation. On the contrary, section 35(3) of the Constitution enshrines the right of every accused person to a fair trial, which includes the rights "*to choose, and be represented by, a legal practitioner*" and "*to have a legal practitioner assigned to the accused person by the state at state expense if substantial injustice would otherwise result*".

83 Moreover, the refusal to pay the reasonable costs of the Applicants' defence prolongs the already delayed criminal trial and undermines the prospects of a fair

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149 De Lange AA to Nkadimeng FA paras 28 and 35.

trial, as contemplated in section 35(3)(d) of the Constitution. The Commissioner's refusal undermines constitutional rights, the interests of Nkadimeng and her family, and the wider community. In fact, it is the Commissioner's refusal that is against the public interest.

The Applicants have advanced different versions

84 The Commissioner contends that an application may be refused if it shows "*a conflict of interest exists due to different versions of fact offered by employees in the same incident*" to "*ensure that applicants for assistance are fully truthful with the SAPS by disclosing all relevant facts*".[150] This is because the Applicants' statements contradict those of Messrs Sephuthuli, Selamolela and Veyi who were also involved in the incident.[151]

85 The Commissioner has misconstrued this requirement:[152]

85.1 It is not peremptory that applications for legal assistance must be refused where a conflict of interest arises due to differing versions of employees.

85.2 Moreover, this provision must be interpreted through the prism of the Constitution, in particular the rights of the accused not to incriminate themselves.

85.3 If all the policemen referred to in paragraph 37 of the Commissioner's answer were standing trial with the Applicants in the indictment then a

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150 De Lange AA to Nkadimeng FA para 17.

151 De Lange AA to Nkadimeng FA para 37.

152 Nkadimeng RA para 17.

conflict of interest may arise. However, this is not the case, and the Applicants' versions, as between themselves, are congruent and non-contradictory.

86 No conflict of interest can possibly arise in these circumstances. None of the employees who offered differing versions are the accused in the indictment. The SAPS is accordingly not called upon to support employees who contradict each other.

The State is a complainant

87 The Commissioner contends that "*[i]n casu, the State is the complainant, and not the fourth applicant despite her having instituted an application to compel the National Prosecuting Authority to make a decision in Ms Simelane's case. It was ultimately the State that had elected to prosecute*".[153]

88 The Commissioner's reasoning cannot stand as a matter of logic. If she is correct that the State is the complainant in every matter where the NPA elects to prosecute. In such circumstances, the SAPS would be entitled to decline all requests for assistance from its members in every criminal prosecution since the State would always be the complainant. This would completely defeat the purpose behind the Standing Order.[154]

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153 De Lange AA to Nkadimeng FA para 39.

154 Nkadimeng RA para 27.

89 In law, the complainant is the person lodging the complaint. In this case, Nkadimeng is the complainant. S 179(2) of the Constitution mandates the NPA to institute and conduct criminal proceedings on behalf of the State. The NPA's performance of its constitutional function does not make the State the complainant.

90 It is submitted that this requirement could only have anticipated the lodging of a criminal complaint against police officials by an organ of State. We are not dealing with such an instance and the Commissioner accordingly misdirected herself in excluding the Applicants applications for this reason.

Incomplete application

91 The Commissioner asserts that the Applicants' applications were incomplete as Commander Muller did not complete the applications. This notwithstanding, the Commissioner goes on to state that "*it was not the reason for disapproval of the applications for assistance*" and that "*[i]t was merely noted*" of relevance to SAPS' ability to recover debt from them.[155] In view of this concession, this point is academic and cannot be construed as a valid ground of refusal.

Recovery of debt

92 The Commissioner's claims that Coetzee and Pretorius do not qualify for assistance since they are not employees of the SAPS cannot be taken seriously. The definition of "employee" in clause 2(b) of the Standing Order can only be

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155 De Lange AA to Nkadimeng FA para 44.

read to mean an employee in the employment of the Service at the time the offences in question were allegedly committed.

93 The Commissioner's claim that "*the recovery of debt [from the Applicants] would have been problematic*" is pure speculation.[156] No allegation is made, and no evidence was put up to suggest that Coetzee and Pretorius are men of straw with no assets.

94 Finally, a reading of clause 8 of the amended standing order (relied upon by the Commissioner) makes plain that the inability to recover debt is not a prerequisite to granting the Applicants' applications. The Commissioner has impermissibly elevated the provisions in clause 8 to a jurisdictional requirement when they do no more than confer a right of recourse upon SAPS *subsequent* to an application being granted.

Mong obeyed an illegal instruction

95 The Commissioner essentially repeats her earlier contention that the Applicants exceeded their powers, only now it is framed as Mong impermissibly obeyed an illegal order.[157]

96 We have submitted that the Applicants' applications have to be assessed in terms of the *de facto* situation at the time of the commission of the offences in question. The Interim Constitution and the Constitution were not in force. Nor at

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156 De Lange AA to Nkadimeng FA para 46.

157 De Lange AA to Nkadimeng FA paras 48-50.

that time was there a constitutional requirement to not obey a manifestly illegal order. On the contrary, the State sanctioned criminality and the failure to comply with such an order would be seen as insubordination.[158]

CONCLUSION

97 In the light of the above, we accordingly submit that a proper case has been made out for the relief sought in Nkadimeng's notice of motion. Accordingly, it is submitted that this application should succeed with costs, including those of two counsel.

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22 January 2020

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158 Nkadimeng RA para 36.