

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

CASE NO: 86381/18

In the *ex parte* application of:

THEMBISILE PHUMELELE NKADIMENG

Applicant

APPLICANT'S HEADS OF ARGUMENT

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OVERVIEW

- 1 The applicant, Ms Thembisile Nkadimeng, seeks an order that Nokuthula Simelane – the applicant’s sister – be presumed dead, some 36 years after her disappearance while in the hands of the erstwhile Security Branch.¹

- 2 Ms Nkadimeng brings this application in her own interest, as well as that of her family.² They seek closure. Nokuthula’s father died in 2001 without knowing what happened to her and Nokuthula’s mother, Sizakele Simelane (78) is

¹ NOM p 1 para 1.

² FA p 5 para 2.

elderly and not well.³ She has lost all hope that Nokuthula is alive and believes that all the evidence points overwhelmingly to the contrary.⁴ This application represents a meaningful step in the process of their healing as a family.⁵

3 Today, being the return day of the *rule nisi* granted by this Honourable Court on 6 June 2019, is an important step in the journey to close a dark chapter in the lives of the Simelane family.

3.1 A chapter that began in the early 1980s with the struggle of a young idealistic woman with so much hope for herself and her country. Betrayed by one her own, Nokuthula courageously withstood weeks of unrelenting torture. She steadfastly refused to betray the cause for freedom and democracy.⁶

3.2 Post the failed attempt to force Nokuthula to become an ‘askari’ or informer for the Security Branch all the circumstances point to her summary execution by the police and the concealment or destruction of her remains. Indeed, there is no other reasonable inference to draw from the circumstances. This was the standard *modus operandi* of the hated Security Branch in failed *kopdraai* operations.⁷

3.3 It is difficult, and indeed painful, to imagine what went through her young mind as she endured endless days of abuse, involving brutal assault,

³ CA p 32 para 4.

⁴ CA p 32 para 7.

⁵ FA p 29 para 74.

⁶ FA pp 5 – 16, paras 4 – 31.

⁷ Supporting affidavit of Frank Dutton at pp 58 – 102.

repeated suffocation and electric shocks that left her unable to walk and her face unrecognizable.⁸ She would have known that her refusal to collaborate with the stormtroopers of the Apartheid state would condemn her to death. She would have known that the police could never release her in such a desperate physical state. It would have taken the most supreme human spirit to endure her final days and hours. According to the black officers, Nokuthula maintained her dignity till the end. She never broke under torture and refused to be dominated and cowered by her tormentors. The black officers who guarded Nokuthula were in awe of her bravery.⁹

3.4 Nokuthula Simelane died so that we may be free. Notwithstanding her ultimate sacrifice, she and her family have been deeply betrayed by successive post-Apartheid administrations. This betrayal cut the deepest. During apartheid the family did not expect the police to investigate themselves, however they did expect democratic South Africa to pursue justice seriously, particularly in cases where perpetrators had not been amnestied. Not only did this not happen, but politicians, senior prosecutors and police officers shamefully conspired to suppress all the cases referred by the Truth and Reconciliation Commission (TRC) to the National Prosecuting Authority.¹⁰ This political interference has been

⁸ FA pp 5 – 16, paras 4 – 31.

⁹ Evidence of the black officers who guarded Nokuthula at the Norwood Police Barracks and the farm at Northam (Priority Investigation: JV Plein: 1469/02/1996).

¹⁰ Zenzile Khoisan, '*Government interference let killers off hook*', Weekend Argus, 31 May 2015: <http://sbeta.iol.co.za/news/politics/government-interference-let-killers-off-hook-1865612>

admitted under oath by senior members of the NPA in a recent case before a full bench of this Honourable Court.¹¹

3.5 The authorities lied to the Simelane family and pretended they were investigating Nokuthula's case and other TRC cases, when they were not. The only cases to see the light of day, including this one, are those investigated by the families themselves. It was only after an application to court to compel the NPA to make a prosecutorial decision that murder indictments were issued in 2016.¹² However, the case has been marred by delays, one accused has already died, and as we speak the trial has still not commenced. To add insult to injury, only the foot soldiers have been indicted, while the real culprits, those that made the decisions, remain shielded from justice.

3.6 To date, not a single leader or representative of government has acknowledged this massive suppression of justice. None have ordered an investigation or inquiry into the conspiracy that closed down the TRC cases, most of which can never be resuscitated. None have offered an apology to hundreds of families who have been denied justice, truth and closure.¹³ History will judge them harshly.

¹¹ *Rodrigues v National Director of Public Prosecutions of South Africa and Others* (76755/2018) [2019] ZAGPJHC 159 (3 June 2019) at paras 21 – 24 and 55 – 65, available at: <http://www.saflii.org/za/cases/ZAGPJHC/2019/159.html>

¹² *T P Nkadimeng v National Director of Public Prosecutions & Others*, Case No.: 3554/2015, Gauteng Division of the High Court of South Africa, available at: <http://www.southernaficalitigationcentre.org/cases/ongoing-cases/south-africa-challenging-npa-inaction-for-trc-related-prosecutions/>

¹³ 'No justice for apartheid victims' – Apologise and appoint inquiry, TRC members tell Ramaphosa', City Press, 2019-02-06, available at: <https://city-press.news24.com/News/no-justice-for-apartheid-victims-apologise-and-appoint-inquiry-trc-members-tell-ramaphosa-20190206>

PROCEDURAL BACKGROUND

- 4 On 6 June 2019, this Court (per Kubushi J) granted a *rule nisi* calling upon all interested persons to show cause (if any) why an order that Nokuthula Simelane be presumed dead should not be made final.¹⁴
- 5 The applicant's attorney duly complied with this Court's order:
- 5.1 By publishing the order in one edition of the Government Gazette, *Die Beeld* and the *Citizen* newspapers;¹⁵ and
- 5.2 By the Deputy-Sheriff serving a copy of this Court's order on those SB officers that are accused of having perpetrated Nokuthula's murder.¹⁶
- 6 While the Deputy-Sheriff could not serve on Coetzee and Radebe (who died on 15 April 2019),¹⁷ the attorneys of record acting on behalf of the surviving accused, including Coetzee, have consented to the confirmation of the *rule nisi* presuming Nokuthula deceased.¹⁸ Moreover, no interested persons have come forward indicating that they wish to oppose the confirmation of the rule.¹⁹
- 7 On the return day of 8 August 2019, the matter was not heard as my correspondent attorneys had not complied with paragraph 13.9.1.6 of the

¹⁴ Annexed as FA1 to the Applicant's Supplementary Founding Affidavit (SFA).

¹⁵ SFA p 158 para 10.

¹⁶ SFA pp 158-159 paras 11-13, returns of service at annexes FA3.1, FA3.2, FA3.4, FA3.5 and FA3.6.

¹⁷ Ibid. See death certificate at annex FA3.3 to SFA

¹⁸ SFA p 159 para 14, Annexure FA4 p 175.

¹⁹ SFA p 160 para 17.

Practice Manual and the Deputy Judge President duly extended the rule nisi to a fresh return day, 19 August 2019.

FACTUAL BACKGROUND

8 Ms Simelane was a 23-year-old university graduate and an underground operative of the African National Congress.²⁰

9 In September 1983, Nokuthula was abducted, viciously tortured and enforcedly disappeared in a failed “*kopdraai*” operation perpetrated by the Security Branch (“**SB**”) of the former South African Police (“**SAP**”).²¹

10 Nokuthula suffered the most brutal treatment at the hands of the SB, including:

10.1 Nokuthula was persistently tortured and assaulted for several weeks while her sleep was kept to a minimum.²² SB members would assault her by way of punches, kicks and slaps with blows delivered at full force.²³

10.2 Nokuthula was administered electric shocks by way of a hand-held generator for minutes at a time with certain shocks applied to her neck and exposed nipples. These shocks rendered Nokuthula comatose with foam and froth coming from her mouth.²⁴

²⁰ FA p 7 para 11.

²¹ FA p 7 para 12.

²² FA p 10 para 26.1.

²³ FA p 12 para 26.5.

²⁴ FA pp 10-11 para 26.2

- 10.3 Nokuthula was repeatedly suffocated by placing a wet canvas bag over her head and holding it tightly until her body convulsed, often causing Nokuthula to urinate and soil herself.²⁵
- 10.4 Nokuthula was thrown into a zinc dam after bouts of interrogation and was subjected to drowning in the dam.²⁶
- 11 Nokuthula's treatment caused her health to deteriorate significantly. Nokuthula was beaten so badly that her face was barely recognisable; she was unable to perform her own ablutions; could no longer walk unassisted; and developed swellings and bruises all over her body.²⁷
- 12 At the time she was last seen alive,²⁸ Nokuthula's head and face were swollen and distorted. Her legs and ankles were swollen and rubbed raw, and her wrists were lacerated, swollen and painful, from the SB having persistently applied restraints to Nokuthula. Nokuthula could not stand independently and had lost her sense of balance. She could not lift her arms higher than her shoulders.
- 13 Nokuthula's dire state from her unrelenting and vicious treatment at the hands of the SB left her in such a weakened and desperate physical state that she would have died if she was not afforded urgent medical treatment in hospital.²⁹

²⁵ FA p 11 para 26.3.

²⁶ FA p 11 para 26.4.

²⁷ FA pp 12-13 paras 26.7, 26.9-26.10.

²⁸ FA pp 13-14 para 26.11.

²⁹ FA p 16 para 30.

14 Thirty-six years have passed since Nokuthula's disappearance. Throughout this period, her family has persistently searched for her.

14.1 Nokuthula's family attended to the South African / Swaziland border where Nokuthula was last seen and made inquiries at the border, with the ANC in Swaziland, and in neighbouring countries. The family also reported Nokuthula's disappearance to police in Swaziland and South Africa. These efforts came to naught.³⁰

14.2 Nokuthula's case was investigated by the Priority Crimes Unit of the National Prosecuting Authority, but Nokuthula could not be traced.³¹ Dissatisfied with the extent of the investigation, Nokuthula's family had to instruct their legal representatives to bring two separate cases against the NPA to compel the NPA to investigate Nokuthula's disappearance.³²

14.3 Nokuthula's family participated in the TRC process and testified in a "*victims' hearing*" before the Human Rights Violations Committee.³³

14.4 Nokuthula's family appointed private detectives to inquire into Nokuthula's whereabouts.³⁴ These investigations revealed that none of Nokuthula's family members, closest friends and colleagues, including cadres in the underground, had seen or had any contact with Nokuthula following her kidnapping and that she had not been seen since.³⁵

³⁰ FA pp 20-21 paras 45-46.

³¹ FA p 21 paras 47-49, Annexure TN7 pp 106-110, Annexure TN8 pp 111-115.

³² FA pp 24-25 para 58, pp 26-27 para 65.

³³ FA p 22 para 51.

³⁴ FA p 7 para 14, p 8 para 16, p 25 para 60.

³⁵ FA p 25 para 61.

14.5 Nokuthula's case received widespread and consistent media attention, a documentary about Nokuthula has been screened on national television, a statue of Nokuthula has been erected, yet neither Nokuthula nor anyone else has come forward to suggest that she is alive.³⁶

15 Having regard to the extensive period of time that has lapsed; the circumstances in which Nokuthula disappeared and her grave state of health when she was last seen alive; the family's efforts to locate her; and the widespread media publicity, it is overwhelmingly probable that Nokuthula is no longer alive.³⁷

THE COURT SHOULD GRANT A PRESUMPTION OF DEATH

The Law

16 In deciding whether to grant a presumption of death order, a court will consider "*whether what has been put up, coupled with the absence of any additional facts, is sufficiently cogent, as a matter of probability, to presume that death has taken place*".³⁸

17 The High Court judgment in *Ex Parte Govender* (per Didcott J) expanded on the test that a court will apply as follows:

"The Court requested to presume the death of a person will not do so unless it is satisfied that such can rightly and should therefore be

³⁶ FA p 8 para 16, pp 27-28 paras 68-72, p 29 para 73.4.

³⁷ FA pp 28-29 paras 73-74.

³⁸ *Ex Parte Pieters* 1993 (3) SA 379 (D) 381.

*inferred on a preponderance of probability from the evidence adduced in the proceedings. Whether the inference can rightly be drawn in any given case is always a question of fact, the answer to which depends on its own particular circumstances. Over the years judicial accord has developed, however, about the treatment of one set of facts. **It consists simply of the disappearance of the person concerned and his subsequent absence from the scene.** Those circumstances, standing alone, are generally regarded as insufficient to warrant the inference that the explanation for them lies in his death, even when he has been absent for a long time. Something more suggestive of the explanation is required in addition. **That he disappeared in an intrinsically dangerous situation or area, for instance, will usually tip the scales once such is the case.** So will the fact that, although his disappearance remains an unsolved mystery, he can no longer be alive without having reached an age so great that it exceeds any span of life which is realistically imaginable with reference to him.”³⁹ (Emphasis added.)*

18 The elapse of long-time does not itself warrant a presumption of death order.

*“[T]here will always be a reluctance to assume that death alone will serve to explain a disappearance when the pointers to that conclusion are minimal and rest on little else save conjecture”.*⁴⁰ However, this rule is not inflexible and in circumstances where an elapse of thirty-five years had passed and the subject would be of old age, our courts have presumed death.⁴¹

19 Our courts have considered various factors in determining whether to grant a presumption of death order, including:

19.1 The age of the subject at the time of the application.⁴²

³⁹ *Ex Parte Govender* 1993 (3) SA 722 (D) 722-723.

⁴⁰ *Ex Parte Pieters* 1993 (3) SA 379 (D) 382.

⁴¹ *Ex Parte Pieters* 1993 (3) SA 379 (D) 382, applying *Ex parte Engelbrecht* 1956 (1) SA 408 (E)

⁴² *Ex Parte Pieters* 1993 (3) SA 379 (D) 381, *Ex Parte Govender* 1993 (3) SA 722 (D) 722, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1301.

- 19.2 The general well-being and health of the subject,⁴³ including whether they were in failing health.⁴⁴
- 19.3 The reasons for the subject's disappearance.⁴⁵
- 19.4 The inquiries made to verify the subject's whereabouts.⁴⁶
- 19.5 The reasons why the subject's body, if indeed dead, has not been found.⁴⁷
- 19.6 Whether the subject, on the facts, probably met their death by accident, suicide or homicide.⁴⁸
- 19.7 Whether a press report on the subject's disappearance prompted information on the subject's whereabouts.⁴⁹

Applying the Principles

- 20 When these principles are applied to this application, it is clear that this Court should grant the requested presumption of death.

⁴³ *Ex Parte Pieters* 1993 (3) SA 379 (D) 381, *Ex Parte Govender* 1993 (3) SA 722 (D) 722, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1300-1301.

⁴⁴ *Ex Parte Pieters* 1993 (3) SA 379 (D) 383, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1301, *Ex parte Rungsamy* 1958 (4) SA 688 (D).

⁴⁵ *Ex Parte Pieters* 1993 (3) SA 379 (D) 381.

⁴⁶ *Ex Parte Pieters* 1993 (3) SA 379 (D) 382, *Ex Parte Govender* 1993 (3) SA 722 (D) 722, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1300.

⁴⁷ *Ex Parte Pieters* 1993 (3) SA 379 (D) 382.

⁴⁸ *Ex Parte Pieters* 1993 (3) SA 379 (D) 383, applying *Ex parte Chodos* 1948 (4) SA 221 (N), *In re B R C Cook* 1907 NLR 315, *In re Labistour* 1908 NLR 227, *Ex Parte Dorward* 1933 NPD 17, *Ex Parte Holden* 1954 (4) SA 128 (N), *Ex Parte Govender* 1993 (3) SA 722 (D) 723, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1301.

⁴⁹ *Ex Parte Govender* 1993 (3) SA 722 (D) 722.

- 21 The period of time that has elapsed since Nokuthula's disappearance is thirty-six years.⁵⁰ This period is significant and our courts have ordered a presumption of death after the elapse of similar time periods.
- 22 Nokuthula was in a grave state at the time that she was last seen as a result of her treatment at the hands of the SB.⁵¹ She would not have survived without immediate medical attention and hospitalization, of which there is no record.⁵²
- 23 Nokuthula's was enforcedly disappeared in a "*kopdraai*" operation. Considering the *modus operandi* of the SB and circumstances in which Nokuthula was taken, the overwhelming inference is that she was killed by the SB to cover-up the "*kopdraai*" operation when it ultimately failed.⁵³
- 24 Nokuthula's body has not been found. The testimony of the black SB officers demonstrates that the white SB officers needed to conceal the location of Nokuthula's body in order to cover-up that Nokuthula had been murdered and maintain the falsehood that she had been released to Swaziland as an SB informer.⁵⁴
- 25 Despite significant investigative efforts by the family and widespread media coverage, Nokuthula has not been heard from.⁵⁵

⁵⁰ FA p 28 para 73.1.

⁵¹ FA p 29 para 73.2.

⁵² FA p 16 para 30.

⁵³ FA pp 16-17 paras 33, 35.

⁵⁴ FA p 16 para 31; pp 18-19 paras 37-41.

⁵⁵ FA p 29 paras 73.3-73.4.

CONCLUSION

- 26 In the premises, we submit that having regard to the circumstances set out in the founding affidavit and the supplementary affidavit, the balance of probabilities points overwhelmingly to the conclusion that Nokuthula is deceased.
- 27 The killers of Nokuthula have cruelly denied the Simelane family the opportunity of burying her with the solemn dignity she so deserves. The killers have denied Nokuthula a final resting place that her family can cherish and visit. In the absence of the return of her physical remains, the granting of an order presuming the death of Nokuthula Simelane will amount to her symbolic laying to rest.

**H VARNEY
T SCOTT**

Counsel for the Applicant

Chambers, Sandton
22 January 2020

TABLE OF AUTHORITIES

Ex parte Chodos 1948 (4) SA 221 (N)

Ex Parte Dorward 1933 NPD 17

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Ex Parte Holden 1954 (4) SA 128 (N)

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Ex Parte Stoter 1996 (4) SA 1299 (E)

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