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

**CAS NUMBER: CC70/2021**

In the matter between:

**THE STATE**

and

**TLHOMEDI EPHRAIM MFALAPITSA** First Accused

**CHRISTIAN SIEBERT RORICH** Second Accused

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**LEGAL ARGUMENT ON BEHALF OF THE NHLAPO & MADIKELA FAMILIES**

INVOKING THE INHERENT POWER OF THE COURT IN TERMS OF S 173 OF THE CONSTITUTION TO ORDER THE SAPS TO PAY THE REASONABLE LEGAL COSTS OF THE SECOND ACCUSED

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## Contents

**INTRODUCTION**

1 The Court has called for legal argument on the question of whether it should exercise its inherent power in terms of s 173 of the Constitution to order the SAPS to pay the reasonable legal defence costs of the second accused, Mr Rorich, a former South African Police officer.

2 Taitz describes inherent jurisdiction as "*the unwritten power without which the Court is unable to function with justice and good reason . . . Such powers are enjoyed by the Court by virtue of its very nature as a superior court …*"[1]

3 In these submissions we assert that, in the very exceptional circumstances of this case, the Court is entitled to exercise its inherent power (read with s 342A(3) of the Criminal Procedure Act, 51 of 1977, to the extent necessary) to prevent a grave miscarriage of justice from taking place. We will demonstrate that it cannot be disputed that:

3.1 The COSAS Four families and the accused have substantive rights in ensuring that the criminal trial proceed without further delay.

3.2 The SAPS is under a legal obligation to pay the reasonable legal defence costs of Mr Rorich.

3.3 Forcing Mr Rorich to launch civil proceedings to review the refusal of the SAPS to pay his legal costs will in turn force the suspension of the criminal trial, pending the outcome of the civil proceedings.

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[1] Taitz, *Inherent Jurisdiction of the Supreme Court,* (1985), p.15.

3.4 The civil review proceedings are likely to take around 2 years, if not longer if there are appeals.

3.5 There is a real risk that the accused, who are elderly, may die during the intervening period, thereby bringing an end to the criminal proceedings. (Rorich is 75 years old and Mfalapitsa is aged 68).

3.6 The harm visited upon the families and their communities will be incalculable and irreversible.

***Context***

4 Some 40 years has elapsed since the brutal and callous killings of the COSAS Four. Three of the perpetrators, Jan Carel Coetzee, Abraham Grobbelaar and Brigadier Willem Frederick Schoon (who authorised the operation) have already died before they could face justice.

5 Post the winding up of the Truth and Reconciliation Commission (TRC), the actions of the post-apartheid State have visited a terrible injustice upon the COSAS Four families, as well as other families of victims of Apartheid-era crimes.

6 The COSAS Four case was one of approximately 400 cases referred by the TRC to the National Prosecuting Authority (NPA) for further investigation and possible prosecution (the TRC cases). All these cases involved serious crimes such as murder and kidnapping, in which amnesty had been denied or not applied for.

7 Virtually all these cases were suppressed and abandoned as a result of political pressure that was brought to bear on the NPA and SAPS. Senior officials representing the NPA admitted under oath in 2019 that the Authority succumbed to political interference in respect of the TRC cases in ***Rodrigues v National Director of Public Prosecutions of South Africa***.[2] In that matter former apartheid policeman, João Rodrigues, who had been charged with the murder of Ahmed Timol in 1971, sought a permanent stay of prosecution. The Full Court in that matter expressed its dismay at how such interference could take place in the new constitutional order. [3]

8 In June 2021, the Supreme Court of Appeal, in dismissing the appeal of Rodrigues, noted that it was "*perplexing and inexplicable*" why these cases were subjected to political interference:

> "…the Executive adopted a policy position conceded by the State parties that the TRC cases would not be prosecuted. It is perplexing and inexplicable why such a stance was taken both in the light of the work and report of the TRC advocating a bold prosecutions policy, the guarantee of the prosecutorial independence of the NPA, its constitutional obligation to prosecute crimes and the interests of the victims and survivors of those crimes." [4]

9 Rodrigues died on 6 September 2021 before he could face justice. The vast majority of the TRC cases have been permanently suppressed. They cannot be revived as suspects, witnesses as well as family members have died or are close to death.

10 Concerted action was only taken in the COSAS Four case following the launching of an application by the families in 2020 before the Krugersdorp Magistrate's Court for the uplifting of forensic evidence.

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2 3 All SA 962 (GJ) 2019; (2) SACR 251 (GJ) 2019

3 Para 65. See also paras 21 – 24 and 57 – 64.

4 [2021] 3 All SA 775 (SCA); 2021 (2) SACR 333 (SCA) at para 26.

**SUBSTANTIVE RIGHTS OF THE FAMILIES AND THE ACCUSED**

11 In the circumstances of this case, the families have a substantive right to the expeditious completion of the criminal proceedings, without further undue delay.

12 Under the rule of law, as enshrined in s 1 of the Constitution, they have a right to have the serious crimes perpetrated against their loved ones dealt with expeditiously and without further delay.

13 Further delay would:

13.1 deny the families closure and constitute a deep violation of their entrenched rights to human dignity.

13.2 violate the right to life as further delay would seriously prejudice the prospects of a prosecution of those accused of murdering their loved ones.

13.3 demean and betray the historic obligation arising from the TRC process to ensure that those responsible for serious crimes, who were not amnestied, should face justice.

13.4 violate South Africa's binding obligations under international law, including:

13.4.1 Art 2(3), read with art 2(1), of the International Covenant for Civil and Political Rights ("**ICCPR**") by denying the families an effective criminal justice remedy,

13.4.2 Art 6(1), of the ICCPR by permitting those who have violated the right to life to escape justice and punishment.

14 The accused have a substantive right in terms of s 35(3)(d) of the Constitution to have their trial begin and conclude without unreasonable delay.

**SAPS' OBLIGATION TO PAY LEGAL COSTS IS ESTABLISHED**

15 In the matter of ***Willem Helm Johannes Coetzee & Ors v Minister of Police & Ors***, an unreported judgment of the Gauteng Division of the High Court, Pretoria (5 June 2018, Case No. 72747/2016) per Pretorius J, the Court set aside a decision take by the South African Police Service (*SAPS*) not to fund the legal defence of WHJ Coetzee, A Pretorius and FB Mong.[5]

16 The accused in that matter were members of the former Security Branch (*SB*) of the South African Police (*SAP*) charged with the murder of MK operative, Nokuthula Simelane. Thembi Nkadimeng, the sister of Ms Simelane, intervened and argued that the accused, as former police officers carrying out authorised orders, were entitled to their legal defence being paid by the South African Police Service (SAPS), the legal successor in title to the SAP.

17 In *Coetzee*, the Court characterised the issue for decision as whether the Minister of Police and/or the Provincial Commissioner, had a legal obligation to pay the criminal defence costs of the accused in the criminal trial concerning their conduct in an apartheid-era crime.[6] The accused had applied for legal assistance in terms of Standing

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5 This judgment has been supplied to the Court, the parties and SAPS. It is available online.

6 *Coetzee v Minister of Police* unreported decision of the High Court of South Africa, Gauteng Division, Pretoria (5 June 2018, Case No. 72747/2016) (*Coetzee*) par 10

Order 109.[7] They asserted that they had acted on the instructions of their commanding officers.[8]

18 The Court in *Coetzee* found that:

18.1 The SAPS was the successor in title to the SAP and assumed the latter's liabilities and responsibilities.[9]

18.2 Kidnappings and extra judicial killings carried out by the SB of the SAP were authorised and part of state sanctioned policy and executed by the accused in the course and scope of their employment with the SAP.[10]

18.3 The State had failed the deceased and her family "*abysmally*" due to decades of long delays.[11]

18.4 The refusal of the SAPS to provide legal representation to the accused contributed to further delays, which compounded the suffering of the family.[12]

19 The COSAS Four case is on all fours with that of *Coetzee*. Both involved authorised Security Branch operations to act against persons perceived to be threats to national security. The essential facts described above arise in the present case, and there is no principled distinction between them.

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7 *Coetzee* supra par 13, 25

8 *Coetzee* supra par 23

9 *Coetzee* supra par 52

10 *Coetzee* supra par 66-67

11 *Coetzee* supra par 80

12 *Coetzee* supra par 83, 86

20 The SAPS are accordingly bound by the judgment in *Coetzee* to pay the reasonable legal costs of former police officers in apartheid era crimes. Significantly, the SAPS elected not to appeal the decision of this Court. This is clear indication that it accepted the judgment as binding law on the matter.

**GRAVE INJUSTICE**

21 It would constitute an abuse of both the criminal and civil court processes for the SAPS to now dispute the *Coetzee* judgment when it had ample opportunity to do so in those proceedings. Forcing Rorich to launch fresh civil proceedings to review the refusal of the SAPS to pay his reasonable legal costs is likely to delay the COSAS Four criminal trial for at least 2 years (as occurred in the Simelane case).[13]

22 The accused in COSAS Four are elderly and may very well die during this delay. This would amount to a grave injustice given that the case has already been delayed for decades. In the circumstances, the refusal to pay the legal defence of Rorich, when the SAPS is legally obliged to do so, seriously undermines the interests of justice as it will delay the trial for years.

23 In the Nokuthula Simelane case, two of the accused (Frederick Mong and Timothy Radebe) and two key witnesses died during the delays occasioned by the litigation. If the accused in the COSAS Four case died while the litigation unfolded, it would amount to an entirely avoidable travesty of justice. It scarcely needs to be said that such an injustice would be irreversible.

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13 See Webber Wentzel letter to the Commissioner of Police and others dated 24 February 2022.

24 It is plain to see that the COSAS Four families have endured decades of pain waiting for closure. The conduct of the post-apartheid state in suppressing the TRC cases has permitted most of the perpetrators to pass away before they could face justice. It has also seriously undermined the prospects of justice in respect of the remaining suspects.

25 Suspending the criminal proceedings for several years, to permit a civil review to unfold, would add deep insult to the considerable injuries already suffered by the families.

**THE INHERENT POWER OF THE COURT**

26 Section 173 of the Constitution provides for the inherent power of superior courts as follows:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

27 The Constitutional Court has confirmed that s 173 provides a court with an "*inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice*".[14] And, that s 173 serves to empower a court to "*regulate and manage the procedure to be followed in each case so as to achieve a just outcome*".[15]

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14 *S v Pennington* 1997 (4) SA 1076 (CC) para 22

15 *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) para 42

***Pre-constitutional inherent power***

28 The Court's inherent power predates the Constitution.[16] In ***Ex Parte Millsite Investment Co (Pty) Ltd*** **1965 (2) SA 582 (T)** the Court defined the power as:

> "[A]part from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain any claim or give any order which at *common* law it would be entitled so to entertain or give. It is to that reservoir of power that reference is made where in various judgments Courts have spoken of the inherent power of the Supreme Court … The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation." (Underline added).[17]

29 In ***Chunguete v Minister of Home Affairs and Others*** **1990 (2) SA 836 (W)**, Fleming J noted that the power applies even where there are applicable laws:

> "…an innate or inherent *authority* to hold the scales of justice and, subject to common-law principles of jurisdiction … to do so in any matter and on any issue put before it." (The Court could therefore hold the scales of justice also where laws are to be applied and not only, despite the well-ringing phrase in Ex parte Millsite Investment …. 'where no specific law provides directly'.)" (Underline added).[18]

30 The case of ***Knox D'Arcy Ltd and Others v Jamieson and Others*** **1994 (3) SA 700 (W)** recognised that in certain circumstances "innovative responses" were needed:

> "[T]his Court, knowing that prima facie a scheme to defeat the ends of justice is in operation and likely to continue unless effectual relief is granted to the applicants, will not adopt a *non possumus* attitude. Relief within the principles of our substantive and procedural law must be granted, even if the innovative ingenuity of the respondents calls for an innovative response by the Court." (Underline added).[19]

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16 *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A); *Universal City Studios Inc and Another v Network Video (Pty) Ltd.* 1986 (2) SA 754G-755E

17 At 585F-H

18 At 843F-G

19 709F

31 The jurisprudence on Anton Pillar orders is instructive. In **Shoba**[20] the AD per Corbett CJ quoted with approval from **Universal City Studios**[21] in the context of the Court's inherent power to regulate its procedures in the interests of the proper administration of justice:

> "In a case where the applicant can establish prima facie that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents or things which constitute vital evidence in substantiation of the applicant's cause of action (but in respect of which the applicant can claim no real or personal right), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the stage of discovery, and the applicant asks the Court to make an order designed to preserve the evidence in some way, is the Court obliged to adopt a non possumus attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were to be found that in circumstances such as these the Court were powerless to act. Fortunately, I am not persuaded that it would be. An order whereby the evidence was in some way recorded, e.g., by copying documents or photographing things or even by placing them temporarily, i.e., pendente lite, in the custody of a third party would not, in my view, be beyond the inherent powers of the Court. Nor do I perceive any difficulty in permitting such an order to be applied for ex parte and without notice and in camera, provided that the applicant can show the real possibility that the evidence will be lost to him if the respondent gets wind of the application."[22] (Underline added)

32 While there was disagreement between various courts on the extent and nature of the power, the Appellate Division in ***Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A)*** accepted that the principles were equally relevant for criminal matters, and given the extraordinary nature of the power, it should be invoked sparingly:

> "The Court's inherent power is in any event reserved for extraordinary cases where grave *injustice* cannot otherwise be prevented..."[23]

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20 *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, Maphanga v Officer Commanding, SA Police Murder & Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (AD)

21 *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734

22 755A -E

23 7G-H

***Post-constitutional inherent power***

33 Section 173 of the Constitution was described in ***Hansen v Regional Magistrate, Cape Town and Another*** **1999 (2) SACR 430 (C)** (at 433) as confirming "*a concept of inherent jurisdiction which promotes the interests of justice within the context of the values of the Constitution*."

34 In ***Pohlman v Van Schalkwyk*** **2001 (1) SA 690 (E),** Froneman J emphasised that the power in s 173 allowed for "*flexibility*" and was to be exercised "*in the interests of the proper administration of justice*".[24]

35 In ***National Director of Public Prosecutions and Another v Mohamed NO and Others 2003 (4) SA 1 (CC),*** the Constitutional Court expressly confirmed the link between the pre-constitutional inherent power of the courts and s 173 of the Constitution (para 32).

36 In **S v Lubisi: In re S v Lubisi and Others 2004 (3) SA 520 (T)** it was held that the power broadens the scope for judicial activism where this is in the interests of justice:

> "Although the powers granted to the Court in terms of s 173 of the Constitution still have to be exercised with caution and circumspection, the Constitution has broadened the scope for judicial activism where such appears to be in the interest of justice." (Underline added)[25]

37 The Court in *Lubisi* also confirmed that s 173 may be invoked to ensure that *"the rights of all interested parties and the public are properly protected in the criminal process*

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24 697C-F

25 532E-F

*and are respected …through the speedy application thereof"* and that this was "*clearly in accordance with the spirit, purport and objects of the Bill of Rights.*" [26]

38 The Constitutional Court has set the 'trigger' for the exercise of the power broadly, namely the "interests of justice". In ***South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*** **2007 (1) SA 523 (CC),** (para. 36-37) the Court noted:

> "The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that Courts in exercising this power must take into account the interests of justice."

39 While s 173's reference to the "*inherent power to protect and regulate their own process*" may be construed as placing a procedural ring-fence around the power, the Constitutional Court has taken a broad interpretation of the interests at stake and considered the rights of other parties in the criminal process. For example, in *SABC v NDPP*, Moseneke DCJ, in his dissenting judgment noted (para. 94):

> "Most instances of discretion in the strict sense only affect the parties involved in the dispute. These include a decision to grant a postponement, a decision regarding condonation, a decision regarding security for costs or the discretion regarding the admission of a bail record. In contrast, the discretion exercised in this case affects not only the public broadcaster and the parties involved, but also every member of the public who might wish to observe the criminal appeals. Decisions involving broadcast rights relate to the limitation of fundamental rights and have a substantial impact on the broader public." (Underline added).

**THE APPROPRIATE EXERCISE OF THIS COURT'S POWER**

40 We accept that the Court may only invoke its inherent power in s 173 in exceptional circumstances.[27] We submit, however, that this is an appropriate case for this Court to

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[26] 530F-G

invoke the power to order the SAPS to pay the reasonable legal costs of the second accused. The exceptional circumstances include:

40.1 the inordinate delay already occasioned in resolving this case, lasting for decades,

40.2 the accused are elderly and in the twilight of their lives,

40.3 a court in this division has already held that that the SAPS is liable to to pay the reasonable legal costs of former police officers in apartheid era crimes,

40.4 SAPS has accepted that decision as correct, having elected not to pursue the matter on appeal,

40.5 suspending proceedings for two or three years, or longer, to resolve civil litigation may very well result in a travesty of justice as the accused could die in this period,

40.6 further delay will seriously undermine faith and trust in the administration of justice.[28]

41 The Constitutional Court has confirmed that courts bear a duty to ensure that effective redress is granted where constitutional rights are breached. In ***Mvumvu v Minister of Transport*** **2011 (2) SA 473 (CC)** the Court held that:

> "In our young democracy and because of our history, which was characterised by inequalities and discrimination, constitutional breaches such as the present must be redressed effectively by, where possible, vindicating the infringed rights fully. This Court in Fose v Minister of Safety and Security said:

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27 *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) 462H-463B

28 In terms of s 7(2) of the Constitution and s 237 of the Constitution.

> 'Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.'"[29] (Our emphasis.)

42 The COSAS Four matter is a case in point of how justice delayed amounts to justice denied. Many family members have died after years of anxiety without knowing what happened to their loved ones. The stress and trauma by surviving family members will be considerably amplified by further delays. Moreover, with each passing day witnesses and the accused are getting older. This seriously undermines the prospects of justice, reaching the full truth and holding those responsible to account.

43 The courts have confirmed that they have an *'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice'*[30]. We submit that it is within the inherent power of the Court to ensure that procedural fairness, as well as the rights of the accused are upheld in the trial, and to take the necessary steps to guarantee this outcome. If Mr Rorich is denied adequate legal representation in a trial in which he faces very serious charges it will undoubtedly impact on the procedural fairness of the proceedings.

44 We accordingly submit that there is probably not a clearer case for the exercise of the Court's inherent power to ensure the proper administration of justice.

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29 Para 48.

30 *S v Pennington* 1997 (4) SA 1076 (CC) at para 22

***Invoking s 342A(3) of the Criminal Procedure Act***

45 The exercise of this Court's inherent power in this manner would not amount to the Court exercising a power that it is not entitled to as a matter of law. On the contrary, s 342A(3) of the Criminal Procedure Act, 51 of 1977 (*CPA*) confers this Court with certain powers where there has been an unreasonable delay in a trial as follows:

> "(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice…" (Our emphasis.)

46 The CPA itself authorises the Court to issue any such order it deems fit to eliminate delay and prejudice, if it is satisfied that the completion of the proceedings is being delayed unreasonably. This is consistent with the exercise of this Court's inherent power to direct that the South African Police Service to pay the reasonable legal costs of the second accused.

47 We note that in ***Acting Premier, Western Cape v Regional Magistrate, Bellville*** **2006 (2) SA 79 (C)** the Western Cape High Court held that a magistrate's court could not rely on s 342A of the CPA to direct a state entity to pay the costs of its former employees that had been criminally charged.[31] However, this decision is clearly distinguishable as:

47.1 In *Acting Premier*, the State entity had no legal obligation to fund the accused's legal costs whereas in the present case SAPS' liability to fund the accused's legal costs has been established by *Coetzee* and SAPS' acceptance of that decision.

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31 Para 7

47.2 In *Acting Premier*, the power in s 342A was exercised by a magistrate's court and not a High Court and, as the Court noted, a magistrate's court is a creature of statute and, unlike this Court, has no inherent power to regulate its processes.

48 In the circumstances, we submit that the exercise of this Court's inherent power is not barred by any statutory prohibition. On the contrary, s 342A of the CPA accords with the exercise of the Court's power as described above.

**CONCLUSION**

49 We accordingly contend that the exercise of this Honourable Court's inherent power is necessary and appropriate in the circumstances of this case to prevent a travesty of justice from unfolding.

50 The Court is not only empowered to act in terms of s 173 of the Constitution, read with s 342A of the CPA, but must do so to ensure a just outcome in these proceedings.

51 Accordingly, we contend that the Court is entitled to confirm the *rule nisi* issued on 22 March 2022.

**HOWARD VARNEY**
**THAI SCOTT**

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Chambers,
25 March 2022