



## **Terms of Reference**

### **A consultant to research possible strategies for litigation to compel the South African government to implement a comprehensive reparations policy for apartheid-era gross human rights violations**

The South African Coalition for Transitional Justice (SACTJ) is seeking to appoint an individual or organisation to conduct research on potential litigation strategies, to ensure that the South African government implements a comprehensive reparations policy for apartheid-era gross human rights violations; and to provide a preliminary assessment of the feasibility of such options.

In April 2023, the OSF-Africa awarded SACTJ a grant to implement a project titled “Civil Society Mobilization towards Comprehensive South African Reparations for Apartheid-Era Gross Human Rights Violations.”

The key objectives of the research into legal strategies around reparation are:

- to examine the existing legal framework and problems encountered within that framework; and
- to identify and assess the feasibility of strategies for litigation by civil society and transitional justice stakeholders which would hold government accountable to commitments for reparation, redress and justice for all those who suffered apartheid-era gross human rights violations.

#### **1. Background to the SACTJ’s Reparation Project**

Individuals and communities who suffered gross human rights violations during apartheid have a right to reparation both under international and South African law. Yet, the South African government has failed to fully implement the recommendations for reparations made by the Truth and Reconciliation Commission (TRC).

Today, twenty years after the close of the TRC, most victims of apartheid-era gross apartheid human rights violations have still not received redress or reparation. Government has had no mandated policy guiding reparations, instead implementing administrative regulations which have failed to provide redress. Despite the relatively comprehensive reparation policy recommended by the TRC and international obligations to implement reparations, the state has failed the victims of apartheid-era gross human rights violations at numerous levels. These include an arbitrary decision to decrease amounts paid as compensation; a failure to implement community rehabilitation projects and housing benefits; limited implementation of educational and medical benefits; and unlawful limitations imposed by the government on the category of victims who can claim reparations.

## **2. Purpose of the SACTJ's Reparation Project**

SACTJ is currently implementing an OSF-Africa-funded two-year project, which aims to mobilise civil society and stakeholders to develop a mandated policy and process that is inclusive, victim-centred and human rights based, that will recognise and provide redress for persons who suffered gross human rights violations under apartheid. SACTJ's proposed intervention is built on its members' experience and capabilities.

SACTJ's project on reparations includes:

- a) Research activities, which will inform both civil society strategy on reparations going forward and the development of a draft reparations policy.
- b) Provincial consultations and a national conference on reparations, which will inform the draft policy on reparations.
- c) Vindicating the rights' of victims in courts. Should the government fail to engage with advocacy efforts concerning reparations policy, , SACTJ will pursue strategic litigation to enforce the rights of victims.
- d) Media and communications. The intervention will be accompanied by the full-fledged media strategy aimed at raising awareness amongst victims and society at large on the issues related to reparations, and building public support.

The failure by the government to adopt a fully fledged reparations policy until now has led to the mobilization of civil society to make this happen. SACTJ's strategy aims to ensure that government meaningfully engages with civil society on the issue of reparations. Using the information gained through research and consultation, SACTJ will propose a mandated policy on reparations.

## **3. The aims and objectives of research into litigation strategies:**

The consultant(s) will:

- Research the existing legal framework in South Africa for reparations for apartheid era human rights violations, including current law, regulations and administrative practice;
- Collect and collate information on proposed and attempted litigation around reparations that has been produced to date;
- Identify different possible areas/strategies for litigation, including: pursuing individual cases; seeking redress for categories of people left out of current reparations; constitutional challenges to the existing legal and regulatory framework; challenging administrative failures in the pay out of reparations; and seeking redress within international legal frameworks;
- Consider the different types of legal action which could be brought, including whether the claim should be brought via a class action;
- For each of the strategies outlined above, assess the different types of relief available to claimants;

- Assess potential for success/failure of the different strategies identified above (including providing estimates of time frames, costs and resources etc, and potential outcomes).

#### **4. The role of the consultant(s)**

In order to assist the SACTJ in developing its strategy around reparations, the consultant will be required to design and conduct research as per the detail below. In particular, the consultant will be required to:

- a) Prepare an overview of the existing legal framework for reparations, including the governing Act(s), regulations and administrative practice; which would form the basis for litigation.
- b) Collect and collate all information and documents arising from the contemplated 2015 Khulumani/LRC case, and assess the feasibility of a litigation strategy using the arguments that were considered by the legal team.
- c) Explore potential litigation strategies to challenge the failure of the state to provide effective reparation, including constitutional and international challenges.
- d) Explore potential litigation challenges concerning administrative and procedural unfairness.
- e) Provide a preliminary assessment of the feasibility of the various litigation strategies in terms of the likelihood of success, the risks and benefits of litigation, weighing up potential outcomes and problems, as well as timeframes and resources required. This assessment will include analysis of potential difficulties or barriers which are likely to be posed due to the passage of time, prescription of causes of action or any other issue related to the proposed timeline of issuing legal proceedings concerning this matter within the next two to five years.
- f) Consider what arguments could be put forward to overcome the issue of delay in initiating legal proceedings.
- g) Report to the SACTJ on the options for litigation, potential risks and, where appropriate, recommendations on the next steps.
- h) Prepare a summary of the legal opinion of not more than 10 pages written in plain and simple language.

#### **5. Requirements of the research**

- a) The consultant will engage with government, the DOJ, and SACTJ members who have worked on these issues, to collect information on the existing legal framework.

- b) The consultant will work with SACTJ organisations to review previous steps taken on litigation around reparation, and will consider all legal opinions and other documents available relating to those previous efforts.
- c) The consultant will coordinate with and share information with researchers within the SACTJ OSF project addressing the provision of reparations, and the President's Fund.

## **6. Reporting**

- a) The consultant will report to the SACTJ's Reparation Task Team. The consultant will be required to regularly liaise with the Task Team concerning the research and shall harness the knowledge and experiences of the Task Team and SACTJ members.
- b) The SACTJ's Task Team reserves a right to make inputs, comments and changes to any material or research output, in particular the report and the summary report. The consultancy is considered as delivered only after all inputs/comments have been considered and incorporated by the consultant.
- c) The consultant will work with and share relevant information with other researchers working on the SACTJ OSF project. An inception meeting will be organised to introduce the three researchers to one another, and to set up a system for information sharing to avoid duplication.
- d) Where possible, the report shall be written in a non-academic, simple and accessible language.

## **7. Deliverables**

- a) A full assessment of the current legal framework for reparations;
- b) A report on options for litigation;
- c) A summary written in plain language.

## **8. Consultant's Profile**

The consultant should have<sup>1</sup>:

- A degree in law
- Experience in human rights and constitutional law litigation in South Africa
- Excellent drafting skills
- A very good knowledge of transitional justice in South Africa

Experience as a practising advocate or attorney would be desirable.

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<sup>1</sup> This applies to the individual consultant or to the team leader leading research on behalf of an organisation.

## 9. The application process

The application process is open to SACTJ members and external applicants. To apply, candidates should send the following documents:

- a) An updated CV clearly demonstrating relevant experience for the consultancy
- b) Expression of interest stating the consultant's proposed research approach, methodology and reasons for applying (maximum of 3 pages)
- c) Unedited writing sample (e.g., a previous report, article or other document on a relevant subject written by the applicant and not edited).

Only complete applications will be considered. Applications should be sent to: Jessie Waldman, Administrative Coordinator, SACTJ [jessiewaldman@sactj.org.za](mailto:jessiewaldman@sactj.org.za)

Deadline for applications: 7 August 2023, however applications will be considered on a rolling basis and a selection may be made before the closing date should a suitable candidate be identified. Therefore interested candidates are encouraged to apply as soon as possible.

## 10. Costs and timelines

The duration of the assignment is two to three months. A timeline for the submission of the final report and summary report will be agreed with the consultant who is selected.

The overall maximum costs of the assignment is **ZAR 50,000**, which includes the consultant's fee and disbursements (i.e., costs of data and airtime, transport costs, etc.).