IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE DATE: 11 November 2024

Case No. 2023-060969

In the matter between:

TLHOMEDI EPHRAIM MFALAPITSA	Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	Third Respondent
DENZIL POTGIETER NO	Fourth Respondent
CHRIS DE JAGER NO	Fifth Respondent
LEAH GCABASHE NO	Sixth Respondent
MAIDE CHRISTINA SELEBI	Seventh Respondent
THANDI CAMIL NHLAPO	Eighth Respondent
TSHEPO MOKGATLE	Ninth Respondent
TRYPHINA MOKGATLE	Tenth Respondent

Summary

Section 20 (3) (f) of the Promotion of National Unity and Reconciliation Act 34 of 1995 discussed and applied.

JUDGMENT

WILSON J:

1 On 15 February 1982, the applicant, Mr. Mfalapitsa, locked four teenage boys in a building on an abandoned mine. The building had been rigged with explosives. Mr. Mfalapitsa had told the boys that he would train them to carry out acts of resistance to the Apartheid regime. He took them to the mine under the pretext of teaching them how to use explosives. He told the boys to wait in the building while he fetched equipment necessary to conduct the lesson. Once he had locked the door, Mr. Mfalapitsa ran. That was the signal for a Mr. Rorich, who is not a party to these proceedings, to detonate the explosives. Three of the boys, Eustice "Bimbo" Madikela, Ntshingo Mataboge and Fanyana Nhlapo, were killed instantly. The fourth, Zandisile Musi, survived with life-changing injuries, but has died in the years since the explosion.

2 These boys became known as the "COSAS Four". After the Apartheid state collapsed in the early 1990s, Mr. Mfalapitsa and Mr. Rorich applied for immunity from prosecution for their part in murdering the COSAS Four. Their application was made under chapter 4 of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Reconciliation Act"), which allowed for amnesty for unlawful acts committed under Apartheid, provided that those acts were "associated with a political objective", and that they were proportionate to that objective. Amnesty would have provided the two men with complete

indemnity for their part in the murder of the COSAS Four. As part of his application, Mr. Mfalapitsa frankly admitted his role in the murder, and sought to persuade the committee that heard his amnesty application that his conduct had a proportionate link to a political objective.

3 The amnesty committee was not convinced that such a link existed. The committee denied Mr. Mfalapitsa's application on 29 May 2001. That left Mr. Mfalapitsa vulnerable to prosecution. But prosecutions for atrocities committed under Apartheid have been a long time coming. Mr. Mfalapitsa's trial on charges of murdering the COSAS Four is set down in this court for 20 November 2024, nearly twenty-three and a half years after his amnesty application was refused, and nearly forty-three years since the boys died.

4 Mr. Mfalapitsa now seeks to review and set aside the amnesty committee's decision to refuse the indemnity he sought. He also asks that I substitute the committee's decision for one granting him amnesty. That would obviously have the effect of permanently preventing his prosecution for the murder of the COSAS Four.

5 Mr. Mfalapitsa's application is hopelessly out of time. However, I have decided to overlook his delay in bringing the review application, and to dismiss the application on its merits. In what follows, I give my reasons for that decision.

Mr. Mfalapitsa, Vlakplaas and the COSAS Four

6 Mr. Mfalapitsa and Mr. Rorich were joined in their amnesty applications by three further individuals: Jan Coetzee, Willem Schoon and Abraham Grobbelaar. These individuals, all of whom are now dead, had varying

degrees of command responsibility for a special unit within the Apartheid state's security apparatus. That unit was known as "Vlakplaas", after the farm at which it was housed.

7 My sense is that Vlakplaas is no longer as notorious as it once was. It is accordingly important to emphasise, in a judgment of this nature, just how macabre the Apartheid state's efforts to sustain itself were. Apartheid was, for the most part, enforced by law. There were the everyday humiliations inflicted on the majority of South Africans through what was known as "petty Apartheid": the segregation of public facilities and private life through a system of legally sanctioned racial preference. There was also the deep structure of economic, social and geographical subordination, known as "grand Apartheid", which was enforced through the pass laws, the Group Areas Act 41 of 1950 (together with its amendments and successor statutes), and the other laws that controlled the jobs Black people could do, the property they could keep, and the places they could live. Those laws also sanctioned the arbitrary arrest, detention, incarceration and execution of the Apartheid regime's opponents. The legacy of these laws, the economic system they created and sustained, and the conduct of the state and judiciary that enforced them, still blight our attempts to build and maintain a free, equal and dignified society.

8 But Vlakplaas, like the Apartheid state's other clandestine policing and military operations, was something different. It existed beyond the laws that even the Apartheid state could conceive. Vlakplaas was a death squad, charged with

the torture and extra-judicial execution of identified opponents of the Apartheid state.

9 Mr. Mfalapitsa was a foot soldier, or “askari”, in the Vlakplaas apparatus. He had once been in exile, serving in Umkhonto we Sizwe (“the MK”), which was the African National Congress’ military wing. However, he had become disillusioned, or perhaps merely homesick, and decided to return to South Africa. He handed himself in to the authorities. He ended up working for Vlakplaas, presumably because the security police thought that he would be of some use in identifying and eliminating recruits, or potential recruits, to the liberation movement. There is some obscurity on the papers about the extent to which Mr. Mfalapitsa volunteered to work for the security police. Mr. Mfalapitsa says he was essentially dragooned into the Vlakplaas unit. The respondents in this application – consisting of the various state entities responsible for the administration of the Reconciliation Act and for Mr Mfalapitsa’s prosecution; the members of the amnesty committee that considered Mr. Mfalapitsa’s amnesty application, cited in their official capacities; and the families of the COSAS Four – say that the facts suggest a more enthusiastic participation in Vlakplaas than that.

10 Whatever the truth of the matter, Mr. Mfalapitsa soon became involved in attempts to identify and eliminate potential threats to the Apartheid regime. It was in this context that he met and befriended Zandisile Musi. Mr. Musi was a member of COSAS. COSAS was an anti-Apartheid student movement, founded in 1979. It had links with the ANC in exile. It was later to become a prominent member of the United Democratic Front, which was the principal

domestic vehicle for resistance to Apartheid after 1983. Mr. Mfalapitsa knew and was apparently close to Mr. Musi's older brothers, with whom he had served in the MK. There is, again, some obscurity on the papers about whether Mr. Mfalapitsa knew that Mr. Musi was a member of COSAS. Mr. Mfalapitsa initially denied it, and the committee that considered his amnesty application accepted his denial. However, Mr. Mfalapitsa now asks me to accept that he did know that Mr. Musi was a member of COSAS.

11 Mr. Musi told Mr. Mfalapitsa that he and three of his friends wanted to go into exile and train with the MK. Mr. Mfalapitsa dissuaded them from that course of action by telling them that he would train them as resistance fighters himself. He encouraged them to identify targets for potential paramilitary action, and promised to train them in the techniques necessary to carry out that sort of action. The boys obliged by identifying a security police officer, one of their teachers and a local councillor as potential targets. At Mr. Mfalapitsa's urging, they drew up a sketch plan of the targets' houses.

12 All the while, Mr. Mfalapitsa relayed details of his interactions with the boys to Mr. Coetzee. Mr. Coetzee gave the instruction that the boys were to be killed in a manner that could be made to look like an accident. A plan was hatched to lure the boys to an abandoned mine under the pretence of giving them explosives training. They would then be killed in an apparent mishap during the course of that training. That is what led to the 15 February 1982 explosion that killed three out of four of them.

The amnesty committee's decision

13 Faced with these facts, the amnesty committee, consisting of the fourth, fifth and sixth respondents, decided by a majority (the fifth respondent, Mr. De Jager, dissenting) that Mr. Mfalapitsa and his co-applicants had failed to establish that the boys' murder was proportionate to the political objective they sought to achieve. The requirement of proportionality is set out in section 20 (3) (f) of the Reconciliation Act. Applicants for amnesty had to establish that the act or omission for which they sought indemnity had a sufficiently direct, proximate and proportional relationship to the political objective the act or omission was meant to promote.

14 The text and purpose of the Reconciliation Act make clear that the proportionality of the act or omission must be assessed in the context of the evidence as a whole. In other words, whether there was proportionality between a political objective and the act or omission for which amnesty was sought depended critically on the circumstances in which the act or omission took place. While proportionality generally requires a sufficiently close link between means and ends, just how close that link had to be was left up to the amnesty committee seized with a particular application.

15 The majority of the amnesty committee approached the facts on the basis that Mr. Mfalapitsa had made full disclosure of the act for which he sought amnesty (which was itself a requirement of the Reconciliation Act); that his version was to be believed; that the object sought to be achieved by the murder of the COSAS Four was sufficiently "political" to qualify for amnesty; and that Mr.

Mfalapitsa's application otherwise complied with the requirements for amnesty set out in the Act.

16 Even assuming all this in Mr. Mfalapitsa's favour, however, the majority of the committee could not accept that, when evaluated in context, Mr. Mfalapitsa's participation in the murders was proportionate to the objective sought to be achieved. The majority of the committee found that the COSAS Four had essentially been entrapped by Mr. Mfalapitsa and lured to their deaths. There was, the majority found, no evidence that the boys were about to carry out paramilitary action except at the behest of Mr. Mfalapitsa himself. Mr. Mfalapitsa and his commanders at Vlakplaas had in fact created the threat they then sought to eliminate. The mere fact that the boys wanted to join the MK in exile was not enough to make their killing proportionate to Vlakplaas' objectives, and the only way that they could otherwise have carried out any paramilitary action would have been with Mr. Mfalapitsa's encouragement and assistance. Even with Mr. Mfalapitsa's support, the boys were nowhere near carrying out the operations they had outlined to him. It was accordingly unnecessary to kill them to prevent such operations from being carried out, and the decision to do so was wholly disproportionate to the political objective it was meant to achieve.

17 In his minority decision, Mr. De Jager agreed with the majority's view that all the requirements for the grant of amnesty short of proportionality had been met. However, on the facts, he found that the proportionality requirement had been met too. Although it does not expressly say so, the gravamen of the minority decision appears to be that, in the context of widespread political

unrest, the mere identification of the boys as “supporters of the liberation forces” was sufficient to create a proportionality between the political objective of maintaining the Apartheid state and the decision to kill them (see page 7 of the minority decision).

18 I now turn to Mr. Mfalapitsa’s review.

The lateness of the review

19 Mr. Mthembu, who appeared for Mr. Mfalapitsa, contended that the review application was brought in terms of the common law. In this he was mistaken. Except perhaps when dealing with some decisions of private bodies which do not entail the exercise of a public power, a court’s powers of review have long been governed by section 1 (c) of the Constitution, 1996, and, where the decision sought to be reviewed is administrative action, by the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

20 It seems plain to me that the decision of the amnesty committee constitutes administrative action within the meaning given to that term under PAJA. The committee’s decision was rendered shortly after PAJA came into effect. It was plainly an exercise of a public power in terms of legislation that had an adverse, direct and external legal effect on Mr. Mfalapitsa’s rights. The principal reported judgments dealing with reviews of amnesty committee decisions confirm that the amnesty committees established under the Reconciliation Act were administrative bodies making decisions of an administrative nature (see *Simelane v Minister of Justice* 2009 (5) SA 485 (C), especially paragraphs 11 and 40; *Derby-Lewis v Chairman, Amnesty Committee* 2001 (3) SA 1033 (C) at 1056D and 1065E-F; and *Nieuwoudt v*

Chairman, Amnesty Subcommittee 2002 (3) SA 143 (C) at 155D-E. See also *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC), paragraph 83).

21 Section 7 (1) (b) of PAJA requires a review to be brought within 180 days of the applicant becoming aware of the administrative action and the reasons for it, or within 180 days of the point at which the applicant ought reasonably to have been aware of the act and the reasons.

22 The amnesty committee's decisions were rendered on 29 May 2001. There is no serious dispute that Mr. Mfalapitsa became aware of the majority decision on or shortly after that date. However, Mr. Mthembu contended in his written submissions that Mr. Mfalapitsa only became aware of the minority decision on 4 May 2023. At the hearing, I engaged counsel on the question of whether, if that is true, Mr. Mfalapitsa could be said to have acquired knowledge of the reasons given for the amnesty committee's decision before 4 May 2023, because the reasons for the amnesty's committee's decision must be the reasons of the minority as well as the majority. Both Mr. Deeplal, who appeared together with Mr. Masitenyane for the Minister of Justice and the prosecutorial authorities, and Mr. Varney, who appeared for the families of the COSAS Four, argued that Mr. Mfalapitsa need only have known about the reasons for the majority decision to have "become aware" of the amnesty committee's decision and the reasons given for it.

23 I am not sure that is correct, but I need not decide the issue. This is because the version that Mr. Mfalapitsa lacked knowledge of the minority decision until 4 May 2023 is nowhere confirmed under oath by Mr. Mfalapitsa himself.

Absent an explanation from Mr. Mfalapitsa of how he came to overlook the minority decision despite becoming aware of the majority decision published simultaneously with it, I cannot accept the contention that the minority decision only recently came to his attention.

24 Mr. Mfalapitsa's review was instituted on 11 July 2022, over twenty-one years after the amnesty committee published its decision, and well over twenty years after the period for instituting a PAJA review of that decision expired. Mr. Mfalapitsa seeks what he calls "condonation" of that delay in his notice of motion, but it was accepted at the hearing that this was in substance an application for an extension of time under section 9 (1) of PAJA. I can grant such an application if the interests of justice so require.

25 Mr. Mfalapitsa's explanation for the delay is extremely weak. It boils down to the proposition that he expected that he would never be prosecuted for his role in the murder of the COSAS Four, and that this expectation hardened as the years went by. It was also contended that Mr. Mfalapitsa lacked the resources necessary to secure legal representation, but next to nothing is said about the steps he took to secure such representation in the two decades he had to find it. Accordingly, I reject the contention that legal representation could not have been obtained if Mr. Mfalapitsa had sought it. It seems clear to me that Mr. Mfalapitsa's interest in challenging the amnesty committee's decision was only excited once he was charged with murdering the COSAS Four.

26 Strong prospects of success on the merits of a review will often compensate for a weak explanation for delay, but I do not think that Mr. Mfalapitsa's prospects are so strong as to justify overlooking a two decade delay.

27 Nevertheless, I think that it is, overall, in the interests of justice that I consider the merits of the review application. If the review application is good, then the prosecution should not be allowed to proceed. However, if the application is bad, then it should not be allowed to cast a shadow over the legitimacy of Mr. Mfalapitsa's long-delayed prosecution. The interests of justice accordingly require that the application be considered on its merits, so that the prosecution shortly to be pursued may either be discontinued or placed on the firmest footing possible.

28 In argument, Mr. Deeplal and Mr. Varney readily conceded that the unusual facts of this case warrant the consideration of the review on the merits. I think that concession entails the proposition that it is in the interests of justice to extend the time available to institute the review in order for those merits to be considered. There is no other reason not to consider the merits. While a Rule 53 record was neither filed by the Minister nor formally waived by Mr. Mfalapitsa, Mr. Mthembu urged me to find that the material necessary to dispose of the application was all before me. In addition to the parties' affidavits and the amnesty committee's decision, I was also given a transcript of the amnesty committee's hearing. There is no suggestion that I lack the material necessary to make a just decision on the merits of the review. Although Mr. Mfalapitsa's application was not explicitly pleaded under PAJA,

there is no real obstacle to my dealing with the application under that statute, and no prejudice to the parties if I do so.

29 The time available to institute the review will accordingly be extended to 11 July 2023.

The merits of the review

30 Though they are not a model of precision, if they are read sympathetically for their substance, Mr. Mfalapitsa's affidavits advance the simple proposition that the majority of the amnesty committee was legally mistaken in applying the proportionality requirement as it did, and that the looser and more forgiving approach of the minority is to be preferred. In substance, the attack is really one of error of law under section 6 (2) (d) of PAJA.

31 So construed, I think that attack is misguided. Section 20 (3) (f) of the Reconciliation Act requires an examination of "the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued". This entails a granular analysis of the particular context of the act for which indemnity is sought, and an assessment of whether, in that particular context, there was a proportionality between the act and the objective.

32 The majority decision provides exactly that sort of analysis. It carefully isolates Mr. Mfalapitsa's situation and the circumstances that he was presented with. The majority found that there were courses of action open to him, and to the other applicants for amnesty before it, short of the murders and maiming that

they committed. The essence of the proportionality enquiry is to identify the best way reasonably open to a person of achieving a particular objective in a given set of circumstances. An act that does significantly more than it needs to in order to achieve a particular end is generally disproportionate. In the context of this case, killing the COSAS Four was substantially more than was required in order to eliminate any threat they posed to the Apartheid regime in general or to the identified objects of their paramilitary plans in particular.

33 To the extent that it may be contended that Mr. Mfalapitsa had to kill the boys because he was commanded to do so, I think the majority of the amnesty committee was right to point out that he played a critical role in talking up the threat they posed and in provoking the order to kill that he eventually received. Mr. Mfalapitsa encouraged the boys to become the threats that he was later ordered to eliminate. He was his commanders' only source of information about the boys and their activities. I think that the majority decision was correct to point out that the boys had not yet become a source of any imminent threat. But even if they had, it was only because Mr. Mfalapitsa had made them so. In these circumstances, Mr. Mfalapitsa can hardly be heard to complain that he had no choice but to carry out the order to kill them. He took active steps which he must have known would create the context in which the order was very likely to be given. There was no evidence before the amnesty committee that he was compelled to take any of those steps.

34 The minority decision takes account of none of this. It instead takes the view that, in the fog of war, atrocities are committed on both sides, and that too close a relationship between means and ends ought not to be required. In the

words of the minority decision, there was “an ongoing war between the security forces and the liberation movements . . . the killing of supporters of the liberation forces by one combating party is as far remote or as proximate to that cause, as the killings by the opposition party of their counterparts are to their cause” (see page 7 of the minority decision).

35 This is precisely the kind of bland equivocation that section 20 (3) (f) rules out. Section 20 (3) (f) makes clear that a killing is not just a killing. It is a conscious act performed in a particular set of circumstances. Section 20 (3) (f) recognises that, even in the context of war, or widespread civil unrest, the protagonists can and do deliberate over the proper and most effective courses of action to take, and that they generally have the space in which to pursue more or less destructive methods to achieve their objectives. In order to obtain indemnity for what even the Apartheid state would officially have deemed criminal offences, section 20 (3) (f) requires that a proportionality between a political objective and a specific act or omission be shown. There is no reason to doubt that the majority of the amnesty committee was correct in deciding that Mr. Mfalapitsa had shown no such proportionality.

36 This conclusion means that it is unnecessary to consider whether Mr. Mfalapitsa was forced to join Vlakplaas, or whether he knew that Mr. Musi was a member of COSAS. Even if I were to accept, as Mr. Mfalapitsa urges, that he was an unwilling recruit, and that he knew of Mr. Musi’s COSAS membership, that would make no difference to my evaluation of the decision to refuse him amnesty.

37 There was, finally, a suggestion in the papers, which was not pursued with any vigour in argument, that Mr. Mfalapitsa believed that the COSAS Four had been planted by his commanders to assess his honesty and effectiveness as an askari. The suggestion seems to have been that he could not act to protect them for fear of exposing himself as unreliable, or as a traitor, to his commanders. In my view, that contention is fanciful. It is inconsistent with the role Mr. Mfalapitsa himself played in identifying and grooming the COSAS Four as Vlakplaas targets.

38 Other than by relying on the minority decision, Mr. Mfalapitsa takes no significant issue with the reasoning and conclusions of the amnesty committee's majority decision. It seems to me that the majority decision was reasonable, factually accurate and entirely consistent with the applicable law. The review application must fail.

Costs

39 Both Mr. Varney and Mr. Deeplal were fiercely critical of the decision to bring this application. They painted it as frivolous, and doomed to predictable failure. They were right to point out that the application was very weak, and that it was inartfully pursued. The reasons I have given for entertaining the application on its merits have less to do with its inherent strength than with the need to ensure that the prosecution Mr. Mfalapitsa now faces can proceed on a proper footing without delay.

40 Nevertheless, Mr. Varney accepted that, notwithstanding these unfortunate features of the case, and given that Mr. Mfalapitsa is represented by a public defender at Legal Aid South Africa, who has had scant exposure to civil

litigation, it would be inappropriate to mulct Mr. Mfalapitsa in costs. Indeed, Mr. Mthembu frankly admitted that he was arguing his first civil case in the High Court before me, and appeared not to be fully acquainted with the procedures applicable to PAJA reviews.

41 Mr. Deeplal sought costs despite these features of the case. However, I do not think that a costs order should be made. The most compelling reason for that view is that these proceedings are so closely associated with a criminal prosecution – in which there is generally no question of ordering costs against an accused – that mulcting Mr. Mfalapitsa in costs would not be appropriate. In addition, and despite his inexperience, Mr. Mthembu's good-natured and earnest pursuit of the application on Mr. Mfalapitsa's behalf was far from vexatious. Each party will pay their own costs.

Order

42 Accordingly –

42.1 The time available to institute this application is extended to 11 July 2023.

42.2 The application is dismissed, with each party paying their own costs.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 11 November 2024.

HEARD ON:	15 October 2024
DECIDED ON:	11 November 2024
For the Applicant:	I Mthembu Instructed by Legal Aid SA
For the First to Third Respondents:	N Deeplal S Masitenyane Instructed by the State Attorney
For the Seventh to Tenth Respondents:	H Varney (Heads of argument drawn by H Varney and G Snyman) Instructed by the Legal Resources Centre