

Constitutional Damages Litigation - Media briefing notes

Date: 22 January 2025

1. What is the litigation about?

Background

- Twenty-five survivors and families of those forcibly disappeared or killed during South Africa's struggle for democracy have filed a court application against the President and the government, seeking constitutional damages. The application challenges the government's failure to adequately investigate and prosecute apartheid-era crimes following the Truth and Reconciliation Commission (TRC) that operated between 1996 and 2002.
- The suppression of post-TRC accountability efforts has allowed witnesses and perpetrators to pass away, effectively eliminating the possibility of prosecutions in most of those cases. These are cases that can never be revived. As a result, the government has denied survivors and victims' families their fundamental rights to justice, truth, and closure.
- The application is brought by 22 individual applicants (representing survivors and families)¹ and the Foundation for Human Rights, a South Africa-based human rights organisation, as an institutional applicant. Likhanyo Calata, representing the families of the Cradock 4 activists, is acting as the main applicant.

2. What does it mean that it is a constitutional damages application and not a class action?

- Legally, there is a distinction between a class action and constitutional damages application. Constitutional damages are awarded where a court recognises that there have been egregious ongoing infringements of constitutional rights by the state. It is an award of monetary damages, which is aimed to enforce or protect rights in the Bill of Rights. Since it is a last resort measure, it will only be granted where other remedies would not achieve the constitutional purpose. The class actions are delictual claims on the part of all those belonging to a particular class. A claim in constitutional damages is not a delictual claim.
- Note that the co-applicants are acting not only in their individual interest but also in the public interest and in the interest of a broader group of people i.e. the survivors and victims' families of apartheid-era gross human rights violations who have received no justice.

¹ Tryphina Nomandlovu Mokgatle (5th Applicant) represents the family of the late Zandisile Musi as well as other COSAS Four families, including the families of Eustice 'Bimbo' Madikela, Ntshingo Matabane and Fanyana Nhlapo, hence the number of applicants is 22. However, the case is brought by 25 survivors and families of victims.

3. What do the families and survivors hope to achieve through this court application?

The applicants are seeking three types of relief:

- a. **A declaration that the conduct of the respective governments in power from 2003 was a violation of the rights of the families and survivors** to equality, human dignity and the rule of law, in suppressing the investigation and/ or prosecution of the TRC cases.
- b. **Payment of constitutional damages** to affirm constitutional values and vindicate the rights of applicants by supporting their pursuit of inquests, private prosecutions, and related litigation, as well as enabling commemoration, memorialisation, and public education on TRC cases through events, publications, and documentaries, among others.
- c. **A declaration** that the President's refusal to set up a commission of inquiry into the suppression of the TRC cases is unconstitutional and violates the rights of families and survivors, and **for an order directing the President to establish a commission of inquiry.**

4. How will this application benefit the families, survivors and the general public?

- A formal acknowledgment that the fundamental human rights of survivors and families of victims of apartheid-era gross human rights violations have been violated by the government's failure to investigate and prosecute, will become a matter of public record.
- Setting up of an independent trust, which will hold and distribute funds to support investigations, prosecutions and inquests as well as the memorialisation and educational activities around the TRC cases. The application envisages that both individual families and CSOs will be able to access funds from the trust for the relevant TRC-related activities.
- Setting up of a presidential commission of inquiry to investigate the political interference and the suppression of the TRC cases in the period 2003-2017. In particular, the commission of inquiry would investigate the reasons behind the political interference and identify the individuals responsible for those decisions. It would also make recommendations on the reforms necessary to ensure that similar interference does not happen in the future.
- The application also carries significant symbolic value, providing survivors and families with an opportunity to share their stories of betrayal, frustration, lost hopes, and ongoing struggle — experiences deeply tied to the prolonged delay in achieving justice and closure. All applicants share their personal stories in the supporting affidavits attached to the main application. While these are only brief summaries of their pain and suffering, they will become part of the public record, serving as an acknowledgment of their struggles.
- Note that the application does not seek individual compensation for the applicants or other survivors and victims' families. The victims and families will not receive personal financial support from the trust for themselves or their loved ones. Instead, the trust will provide access to funds for purposes such as commemorating their loved ones, organising lectures or exhibitions, or supporting their legal cases.

5. Political interference and suppression of the TRC cases

Background

- In its Final Report released on 21 March 2003, the TRC stressed that amnesty should not be seen as promoting impunity. It highlighted the imperative of ‘a bold prosecution policy’ in not amnestied cases, to avoid any suggestion of impunity, or of South Africa contravening its obligations in terms of international law. The survivors and families of victims reasonably expected that the state would act on its promises and would investigate and prosecute those who did not receive or did not apply for amnesty.
- Even though the TRC handed over a list of several hundred cases to the NPA with the recommendation that they be investigated further (with a view to prosecution), virtually none of these cases have been pursued post-2003.
- It is no longer in dispute that there was political interference resulting in the government and NPA decision to neither investigate nor prosecute any of the several hundred serious TRC cases in which amnesty had been denied or not applied for.² However, while some evidence has been uncovered in the previous court cases (i.e. *Nkadimeng* and *Rodrigues* matters), the full reasons behind the suppression of the TRC cases are not known, and the sources of such interference remain opaque.
- The former TRC commissioners, families of victims and CSOs have repeatedly called on the President to appoint a commission of inquiry to investigate the political interference and identify those responsible, within and outside the NPA and SAPS, for suppressing the TRC cases. These calls have fallen on deaf ears.
- Advocate Dumisa Ntsebeza was appointed in early 2023 to review the reforms within the NPA regarding the investigations and prosecutions of the TRC cases. He submitted the final report to the NPA on June 30, 2023. The NPA made a report public seven months later, on 18 February 2024. The report makes important recommendations. Most importantly, it urges the President to set up an independent, public and open commission of inquiry to look into the political interference and the suppression of the TRC cases by the Executive in the period 2003-2017. Many of the Ntsebeza recommendations follow the 2023 FHR detailed submissions made to the Ntsebeza inquiry.

6. Constitutional damages litigation v reparations

- Reparations are not part of this case, as they differ from constitutional damages. Reparations are intended to address the harm suffered by victims due to the gross violations of their human rights during apartheid. Under South Africa's current regulations, victims of apartheid-era human rights violations—identified by the TRC (those with a TRC number)—and their dependants or relatives are eligible for some reparations. These are administered by the relevant government departments under the oversight of the TRC Unit within the Department of Justice and Constitutional Development.
- The South African Coalition for Transitional Justice’ (SACTJ) is a network of civil society organisations and individuals challenging the government’s current approach to reparations and advocating for the effective

² High profile NPA officials have provided affidavits to this effect during the 2015 legal proceedings launched by Thembu Nkadimeng, who sought to compel the NPA to make a prosecutorial decision in the 1983 murder of her sister, Nokuthula Simelane. This was confirmed under oath by senior officials representing the NPA in 2019 and 2021 Rodrigues’s stay of prosecution proceedings with the High Court and the Supreme Court of Appeal expressing their dismay at how such interference could take place in our new constitutional order.

and meaningful reparations for all victims of apartheid era gross human rights violations as defined by the TRC Act and not only those who have been recognised as such by the TRC.

- The President's Fund, which has been established under the Promotion of National Unity and Reconciliation Act in 1998, holds almost R2 billion ring-fenced for reparations. The constitutional damages litigation does not intend to access these funds for the purpose of the current litigation or in any other way.
- Unlike reparations, which aim to remedy the harm suffered by victims as a result of specific apartheid-era gross human rights violations (e.g. torture, murder, enforced disappearance), this case seeks to address the government's grave failure to pursue investigations and prosecutions of TRC cases.
- The government remains under the obligation to implement reparations recommended by the TRC.