IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant

STEPHANS MBUTI MABELANE	15th Applicant
THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

NOTICE OF MOTION

TAKE NOTICE THAT on a date and time to be arranged with the Registrar the applicants intend applying to the above Honourable Court for an order in the following terms:

1 Declaring the conduct of the first to sixth respondents in unlawfully refraining and/or obstructing the investigation and/or prosecution of apartheid-era cases referred by the Truth and Reconciliation Commission (**TRC**) to the National Prosecuting Authority (**the TRC cases**), or to otherwise unlawfully abandon or undermine such cases to be:

1.1 a violation of the rights of applicants, and more generally the families of victims and survivors of apartheid-era crimes (**the families**), to equality, dignity and the right to life and bodily integrity in terms of sections 9, 10, 11 and 12 of the Constitution, Act 108 of 1996 (**the Constitution**);

1.2 inconsistent with the constitutional values set out in section 1(a) and the rule of law as enshrined in section 1(c) of the Constitution;

1.3 inconsistent with the principles, values and obligations arising from the Promotion of National Unity and Reconciliation Act, 34 of 1995 read with the postscript to the Constitution of the Republic of South Africa Act 200 of 1993 (**the Interim Constitution**);

1.4 in breach of the duties and obligations contained in the Constitution, the National Prosecuting Authority Act 32 of 1998 and the South African Police Service Act 68 of 1995 to investigate and prosecute serious crime, and not to interfere with legal duties of prosecutors and law enforcement officers; and

1.5 inconsistent with South Africa's international law obligations in terms of sections 231 to 233, read with section 39(b), of the Constitution.

2 The payment of constitutional damages by the first respondent for purposes of affirming constitutional values, vindicating the rights of the applicants and families and deterring future interference in the following amounts:

2.1 R115 261 625.00 (one hundred and fifteen million, two hundred and sixty-one thousand, six hundred and twenty-five Rands) over a five-year period for purposes of enabling families and organisations supporting families to advance truth, justice and closure by assisting them to pursue investigations and research, inquests, private prosecutions and related litigation;

2.2 R8 000 000.00 (eight million Rands) over a five-year period for purposes of enabling families and organisations supporting families to play a monitoring role in respect of the work of the policing and justice authorities charged with investigating and prosecuting the TRC cases; and

2.3 R44 000 000.00 (forty-four million Rands) over a ten-year period for purposes of enabling families and organisations supporting families to pursue commemoration, memorialisation and public education activities around the TRC cases, including the holding of public events, publishing of books and making of documentaries.

3 If the order in prayer 2 is granted, the legal representatives of the applicants are ordered to cause a Trust to be established within three (3) months of this order, in accordance with the provisions of the Trust Property Control Act 57 of 1998, to hold and disburse such funds in furtherance of the purposes set out in prayers 2.1 to 2.3.

4 Declaring the failure and/or refusal by the second respondent (**the President**) to establish a commission of inquiry into the suppression of the investigation and prosecution of the TRC cases (**the decision**) to be:

4.1 inconsistent with his constitutional responsibilities under section 84(2)(f) read with sections 1(c), 7(2), 83(b) and 237 of the Constitution, and

4.2 a violation of the families of victims and survivors of apartheid-era crimes' rights to equality, dignity and the right to life and bodily integrity of the victims in terms of sections 9, 10, 11 and 12 of the Constitution.

5 Reviewing and setting aside the President's failure and/or refusal to appoint a commission of inquiry as described in prayer 4 above.

6 Directing the President to:

6.1 promulgate in the Government Gazette, within thirty (30) calendar days of this order, the establishment of a commission of inquiry in terms of section 84(2)(f) of the Constitution, which commission of inquiry shall be headed by a sitting or retired judge designated by the Chief Justice, and shall be tasked to inquire into:

6.1.1 whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the National Prosecuting Authority and/or the South African Police Service to stop investigating and/or prosecuting the TRC cases;

6.1.2 whether any members of the National Prosecuting Authority and/or the South African Police Service improperly colluded with such attempts to influence or pressure them; and

6.1.3 to make recommendations flowing from its conclusions, for actions to be taken by organs of state, including prosecutions to be instituted against persons found to have acted unlawfully in:

(a) attempting to influence or pressure members of the National Prosecuting Authority and/or the South African Police Service to stop investigating and/or prosecuting the TRC cases, and/or

(b) colluding with or succumbing to such attempts;

6.2 to make the provisions of the Commissions Act 8 of 1947 applicable to the abovementioned commission of inquiry in the aforesaid proclamation in the Government Gazette.

7 In respect of prayers 1 to 3 of this application, the respondents, and any other party who opposes this relief, are ordered to pay the applicants' costs.

8 In respect of prayers 4 to 6 of this application, the second respondent and any other party who opposes this relief, are ordered to pay the applicants' costs.

9 Further and/or alternative relief.

TAKE FURTHER NOTICE that the affidavit of **LUKHANYO BRUCE MATTHEWS CALATA** together with all annexures thereto, and the supporting and confirmatory affidavits of **ALEGRIA KUTSAKA NYOKA**, **BONAKELE JACOBS**, **FATIEMA HARON-MASOET**, **TRYPHINA NOMANDLOVU MOKGATLE**, **KARL ANDREW WEBER**, **KIM**

TURNER, **LYNDENE PAGE**, **MBUSO KHOZA**, **NEVILLE BELING**, **NOMBUYISELO MHLAULI**, **SARAH BIBI LALL**, **SIZAKELE ERNESTINA SIMELANE**, **SINDISWA ELIZABETH MKONTO**, **STEPHANS MBUTI MABELANE**, **THULI KUBHEKA**, **HLEKANI EDITH RIKHOTSO**, **TSHIDISO MOTASI**, **NOMALI RITA GALELA**, **PHUMEZA MANDISA HASHE**, **MKHONTOWESIZWE GODOLOZI**, **MOGAPI SOLOMON TLHAPI**, **DR ZAHEED KIMMIE, DUMISA BUHLE NTSEBEZA**, **YASMIN LOUISE SOOKA**, and **ODETTE HELENA GELDENHUYS** will be used in support of this application.

TAKE FURTHER NOTICE that the applicants have appointed **WEBBER WENTZEL** as their attorneys of record and will accept notice and service of all documents in these proceedings at their undermentioned address. The applicants hereby also consent to electronic service.

TAKE NOTICE FURTHER that in respect of this application:

1 The respondents are called upon, in terms of Rule 53(1)(a) of the Uniform Rules of Court, to show cause why the decision referred to in prayer 5 above should not be reviewed and set aside.

2 The respondents are called upon in accordance with Rule 53(1)(b) to despatch, within fifteen days after service of this notice of motion, to the Registrar the record of the decision sought to be reviewed and set aside (including correspondences, reports, memoranda, documents, evidence and any other information which was before the first and/or second respondent(s) at the time when the decisions were made) together with such reasons as they are by law required or desire to give or make, and to notify the applicants that this has been done.

3 In terms of Rule 53(4) of the Rules of this Court, the applicants intend to amend, add to or vary the terms of their notice of motion and supplement their supporting affidavit after the Registrar has made the record available to them.

4 Any respondent wishing to oppose the relief sought is required within fifteen (15) days after service of this notice of motion or any amendment thereof to deliver notice to the applicants that they intend to oppose the application and shall in such notice appoint an address within 15km of the office of the Registrar at which they will accept notice and service of all process in such proceedings; and within thirty **(30)** days of the expiry of the time referred to in Rule 53(4), to deliver any affidavits as the respondents may desire in answer to the allegations made by the applicants.

DATED AT SANDTON ON THIS THE 17TH JANUARY 2025.

WEBBER WENTZEL
Applicants' Attorneys
90 Rivonia Road
Sandton
Tel: 011 530 5000
Email: odette.geldenhuys@webberwentzel.com;
nkosinathi.thema@webberwentzel.com;
jos.venter@webberwentzel.com
lize-mari.doubell@webberwentzel.com
Ref: O Geldenhuys / 4005095
c/o SAVAGE JOOSTE & ADAMS
5 10th Street
Menlo Park
Pretoria
Tel: 012 452 8200
Email: stephenl@savage.co.za;
erinm@savage.co.za
Ref: W256

TO: **THE REGISTRAR**
Gauteng Division of the High Court
Pretoria

AND TO: **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**
Union Buildings
Government Avenue
Pretoria
0001
By Sheriff

AND TO: **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**
Union Buildings
Government Avenue
Pretoria
0001
By Sheriff

AND TO: **MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**
17th Floor
Momentum Centre
329 Pretorius Street
Pretoria
0001
By Sheriff

AND TO: **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**
VGM Building, Corner of Westlake and Hartley
123 Westlake Avenue
Weavind Park
Silverton
Pretoria
0001
By Sheriff

AND TO: **MINISTER OF POLICE**
7th Floor
Wachthuis Building
231 Pretorius Street
Pretoria
0002
By Sheriff

AND TO: **NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE**
7th Floor
Wachthuis Building
231 Pretorius Street

Pretoria
0002
By Sheriff

COURTESY SERVICE: **STATE ATTORNEY PRETORIA**
SALU BUILDING
316 Thabo Sehume Street
Pretoria
0001
By Sheriff

IN THE HIGH COURT OF SOUTH AFRICA

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GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
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FOUNDING AFFIDAVIT

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I, the undersigned

LUKHANYO BRUCE MATTHEWS CALATA

do hereby make oath and state as follows:

INTRODUCTION

1 I am an adult male journalist, author and filmmaker born on 18 November 1981. I am currently employed as the Political Editor at Newzroom Afrika based in Johannesburg.

2 I am the son of the late Fort Calata who, along with Matthew Goniwe, Sicelo Mhlauli and Sparrow Mkonto, became known posthumously as the Cradock Four. On 27 June 1985 they were abducted, tortured, murdered and their bodies burned by the Security Branch of the erstwhile South African Police.

3 In bringing this application I also represent the interests of Nomonde Liza Calata, my mother and the widow of the late Fort Calata, as well as Dorothy Calata-Dombo and Tumani Pauline Calata, who are my sisters and the daughters of the late Fort Calata. I deal with standing and our interests in more detail later in this affidavit.

4 All the applicants in these proceedings have family members who laid down their lives for our freedom and democracy or are themselves survivors of gross human rights violations. They were murdered, forcibly disappeared or seriously injured. We have been denied justice and closure for the heinous crimes that were committed against us and our loved ones during apartheid due to the suppression of the investigations and prosecutions through political interference (**the interference** or **the political interference**).

5 We bring this application to address, to the extent possible, the grave injustices caused by the interference. We seek to have our constitutional rights to dignity and justice, which were deeply violated by the interference, vindicated. We also seek the truth behind how such brazen interference in the administration of justice occurred to ensure that such injustices never happen again.

6 I am authorised to bring this application on behalf of the applicants. Confirmatory and supporting affidavits are filed evenly with this affidavit in respect of each of the applicants.

7 The facts deposed to in this affidavit are within my personal knowledge, unless otherwise stated or indicated by the context, and are true and correct to the best of my knowledge. Where I make legal submissions, I do so on the advice of my legal representatives, which advice I believe to be correct. Where necessary, confirmatory or supporting affidavits deposed to by those persons with personal knowledge accompany this affidavit.

RELIEF SOUGHT

8 The relief sought by the applicants is summarised below. An order is sought:

8.1 Declaring the conduct of the first to sixth respondents in unlawfully refraining and/or obstructing, the investigation and/or prosecution of apartheid-era cases referred by the Truth and Reconciliation Commission (**TRC**) to the National Prosecuting Authority (**the NPA**) (**the TRC cases**), or to otherwise unlawfully abandon or undermine such cases (**the interference**) to be:

8.1.1 a violation of the rights of applicants, and more generally the rights of survivors and families of victims of apartheid-era crimes (**the**

families) to their constitutional rights of human dignity and equality and the right to life and bodily integrity of the victims in terms of sections 9, 10, 11 and 12 of the Constitution, Act 108 of 1996 (**the Constitution**);

8.1.2 inconsistent with the constitutional values set out in section 1(a) and the rule of law as enshrined in section 1(c) of the Constitution;

8.1.3 inconsistent with the principles, values and obligations arising from the Promotion of National Unity and Reconciliation Act, 34 of 1995 (**the TRC Act**) read with the postscript to the Constitution of the Republic of South Africa Act 200 of 1993 (**the Interim Constitution**);

8.1.4 in breach of the duties and obligations contained in the Constitution, the National Prosecuting Authority Act, 32 of 1998 (**the NPA Act**) and the South African Police Service Act, 68 of 1995 (**the SAPS Act**) to investigate and prosecute serious crime and not to interfere with the legal duties of prosecutors and law enforcement officers; and

8.1.5 inconsistent with South Africa's international law obligations in terms of sections 231 to 233, read with section 39(b), of the Constitution.

8.2 The awarding of constitutional damages for purposes of affirming constitutional values, vindicating the rights of the applicants and families, deterring future interference and to enable families and organisations supporting families to:

8.2.1 advance truth, justice and closure by assisting them to pursue investigations, inquests, private prosecutions and related litigation;

8.2.2 play a monitoring role in respect of the work of the policing and justice authorities charged with investigating and prosecuting the TRC cases; and

8.2.3 pursue commemoration, memorialisation and public education activities, including the holding of public events, publishing of books and making of documentaries.

8.3 The creation of an independent trust in accordance with the provisions of the Trust Property Control Act 57 of 1998 to hold and disburse any funds awarded as constitutional damages in furtherance of the objects set out above.

9 Declaring the failure and/or refusal by the second respondent (**the President**) to establish a commission of inquiry into the suppression of the investigation and prosecution of the TRC cases (**the decision**) to be:

9.1 inconsistent with his constitutional responsibilities under section 84(2)(f) read with sections 1(c), 7(2), 83(b) and 237 of the Constitution, and

9.2 a violation of the survivors and families of victims of apartheid-era crimes' right to equality, dignity and the right to life and bodily integrity of the victims in terms of sections 9, 10, 11 and 12 of the Constitution.

10 Reviewing and setting aside the President's failure and/or refusal to appoint a commission of inquiry as described above.

11 Directing the President to:

11.1 promulgate in the Government Gazette, within thirty (30) calendar days of this order, the establishment of a commission of inquiry in terms of section 84(2)(f) of the Constitution, which commission of inquiry shall be headed by a sitting or retired judge designated by the Chief Justice, and shall be tasked to inquire into:

11.1.1 whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the NPA and/or the South African Police Service (**SAPS**) to stop investigating and/or prosecuting the TRC cases;

11.1.2 whether any members of the NPA and/or the SAPS improperly colluded with such attempts to influence or pressure them; and

11.1.3 to make recommendations flowing from its conclusions, for actions to be taken by organs of state, including prosecutions to be instituted against persons found to have acted unlawfully in:

(a) attempting to influence or pressure members of the NPA and/or the SAPS to stop investigating and/or prosecuting the TRC cases, and/or

(b) colluding with or succumbing to such attempts;

11.2 to make the provisions of the Commissions Act 8 of 1947 applicable to the abovementioned commission of inquiry in the aforesaid proclamation in the Government Gazette.

STRUCTURE OF AFFIDAVIT

12 The scheme of this affidavit necessitates me addressing the following topics:

12.1 First, I provide an overview of this application, and in particular I describe the fundamental betrayal committed by the post-apartheid state against families and victims connected to apartheid-era crimes.

12.2 Second, I describe the parties to the application.

12.3 Third, I set out the applicants' standing to pursue this application and the jurisdiction of this court to deal with these proceedings.

12.4 Fourth, I deal with the background to the political interference, including an overview of apartheid-era violations, the TRC process, early attempts to secure justice, post TRC developments and the dire lack of delivery in the TRC cases.

12.5 Fifth, I address the political interference in the TRC cases, starting with its genesis, the closing down of the cases, the various forms of interference employed, the moratorium imposed and direct interventions to stop the cases, as well as disclosures made in litigation.

12.6 Sixth, I turn to the question of whether the suppression of the TRC cases was the product of a political agreement, and I consider various interactions between senior government officials and former apartheid security personnel regarding an immunity and other arrangements aimed at avoiding prosecutions.

12.7 Seventh, I deal with the post-interference developments, including the efforts to reopen inquests, and litigation the families launched to compel or prompt action on the part of the NPA and the South African Police Service (**SAPS**).

12.8 Eighth, I deal with calls for a specialised unit, such as an investigating directorate, where prosecutors and detectives could work together to tackle the TRC cases; as well as the response of the state declining this approach.

12.9 Ninth, I address the requests for an independent commission of inquiry into the suppression of the TRC cases, the plan by the former Minister of Justice to circumnavigate an independent and open inquiry, and the Ntsebeza inquiry launched by the NPA.

12.10 Tenth, I list the statutory and constitutional provisions that have been violated by the political interference that resulted in the suppression of most of the TRC cases.

12.11 Eleventh, I set out the grounds for the declaratory relief and constitutional damages sought, which includes the impact of the denial of justice on families and survivors, and the violation of the rule of law, various rights and international law obligations.

12.12 Twelfth, I explain the type and form of constitutional damages sought by the applicants and motivate the quantum claimed.

12.13 Thirteenth, I set out the grounds for the declaratory relief setting aside the President’s refusal or failure to establish a commission of inquiry into the suppression of the TRC cases.

12.14 Finally, I set out the grounds for the mandatory order sought compelling the President to establish an inquiry under the Commissions Act.

OVERVIEW

13 The state-sanctioned abduction, torture, murder of my father and the desecration of his body have had a profound effect on me and my family. The inhuman acts of brutality committed against the family members of my co-applicants, and certain of the applicants themselves, have had similarly devastating effects on them. Their stories are told in their supporting affidavits which accompany this application.

14 We had to endure the murders and disappearances of our family members during apartheid. The post-apartheid era of political interference and denial of justice stand as a deep betrayal of their ultimate sacrifices. The interference adds insult to our injuries and exacerbates our emotional and psychological trauma, as well as the pain and suffering we have endured.

15 We are at our wits' end as to why successive post-apartheid governments turned their backs, not only on us, but on our loved ones and so many others who paid the ultimate price for our freedom and democracy.

16 The evidence discloses that decisions were taken at the highest political levels to undermine, and ultimately to block the investigation and prosecution of the cases referred by the TRC to the NPA.

17 The story of the Cradock Four is well known and I will not burden these papers by repeating that story here. The full story, together with our quest for justice, is set out in the legal application I brought against the NPA in 2021 to compel a prosecutorial decision before the Gauteng Division in *Calata and Others vs National*

Director of Public Prosecutions and Others Case Number: 35447/2021. A copy of these voluminous papers can be provided on request.

18 The brutal murders of our family members and the pain that we endure have defined us and our life choices. We have spent decades searching for the truth and struggling to do justice to the lives of our loved ones, which were so brutally cut short. We have done so in the face of the intransigence of the post-apartheid state, which has misled us and treated us with contempt.

19 For most of us, it is too late. Our life-long struggle for accountability has come to naught. Suspects and witnesses have died, bringing an end to any prospect of prosecutions in most cases. These cases can never be resurrected.

20 Family members have also passed on. On 29 August 2020, Nyameka Goniwe, wife of Matthew Goniwe, passed away. Matthew's daughter, Nobuzwe, died on 22 July 2024 at the age of 49. They died before seeing justice done in Matthew's brutal murder. The cruel indifference of the post-apartheid state robbed them of justice, peace and closure. The damage done to us, our families and communities is incalculable. We are deeply scarred and will remain so until our dying day.

The Betrayal

21 Families of apartheid-era victims have conducted themselves with resilience and remarkable patience.

22 We committed ourselves to the historic compromises that were required to move from South Africa's oppressive past to a democratic future. We participated in the TRC process (to be described below) in good faith. This involved having to accept

that perpetrators granted amnesty would not face prosecution or civil damages claims.

23 There was a general expectation founded on the constitutional obligations of the post-apartheid state that the state would prosecute perpetrators who were not amnestied and provide victims with reparations. For this reason, we did not sue the new South African state for the transgressions of the apartheid state.

24 In this regard, according to the TRC Report (Volume 6, section 1 page 36), read with figures released by the Department of Justice (**DOJ**), of the 7112 persons who applied for amnesty (relating to more than 14 000 incidents), some 5034 were rejected on the papers (in chambers) for not meeting the basic requirements for amnesty, while the balance were referred to hearings before the Amnesty Committee. The DOJ's summary of amnesty decisions is annexed hereto marked **FA1**.

25 Some 849 of these applicants were granted amnesty while approximately 358 applications were refused. Murders comprised the biggest category of the crimes for which amnesty was refused, some 189 cases, which involved at least 353 deaths. An excel spreadsheet compiled by my legal team listing the details of each refusal, is annexed hereto marked **FA2**.

26 At that time, we felt it was fundamentally wrong to sue the democratic state in such a context. This was especially the case since state funds were meant to be used for reparations. We gave up our claims, and in so doing, we spared the post-apartheid state from having to pay a vast sum of money.

27 However, the state reneged on both of its constitutional obligations in relation to the post-TRC process. It failed to prosecute and has provided wholly inadequate reparations. Its cruel and misguided “closed list policy” excluded many thousands of victims from the benefits of reparations. R2 billion in the President’s Fund remains unspent. Successive post-apartheid governments have destroyed the social compact struck with us.

28 Had we known at the time the TRC was concluding its operations that the post-apartheid government had no intention of prosecuting those who had not received amnesty, most of us would have pursued civil claims against those perpetrators and the state, in cases where harm was committed by agents of the apartheid state.

29 The bulk of these claims would have been for loss of support since most cases in which amnesty was refused involved murders and enforced disappearances. Many of those killed by state agents were breadwinners. It would be difficult to quantify, but the potential amounts of such claims would have been substantial, probably running into hundreds of millions of rands. Such amounts would be even higher, if one includes the many cases involving perpetrators who committed murders in the course and scope of their employment with the apartheid state, but who did not apply for amnesty.

30 We approach this Honourable Court for constitutional damages, not to compensate us for what we have endured, but for purposes of vindicating the violation of our rights to human dignity and justice visited upon us by the political interference, and to deter future such violations. Such damages will enable us to pursue truth and justice in the cases where this is still possible; help us to monitor and hold to account the authorities going forward; and to commemorate the lives of our loved ones.

31 For several years we have been asking for an independent and open commission of inquiry into the suppression of the TRC cases. President Ramaphosa and the former Minister of Justice, Ronald Lamola, have ignored our requests. The former Minister instead spoke of holding an internal enquiry, which is likely to be carefully stage managed and held largely behind closed doors to spare government the close scrutiny of an open inquiry.

32 We will accept nothing less than a fully transparent commission of inquiry armed with the normal powers of compulsion under the Commissions Act. For this reason, we seek an order compelling the President to establish an independent commission to expose the truth behind how such a monumental miscarriage of justice occurred; and to explore ways of ensuring this never happens again in South Africa.

THE PARTIES

The applicants

33 I am the first applicant. I am the son of the late Fort Calata, one of the Cradock Four. On 27 June 1985, the Cradock Four were abducted, assaulted, murdered and their bodies burned by the Security Branch (**SB**) of the erstwhile South African Police (**SAP**).

34 The second applicant is **ALEGRIA KUTSAKA NYOKA**, the sister of the late student activist and East Rand COSAS (Congress of South African Students) leader, Caiphus Nyoka. Caiphus was killed by members of the SAP Riot Unit and the Benoni SB at his family home in Daveyton on 24 August 1987. A copy of Alegria's supporting affidavit is filed evenly herewith.

35 The third applicant is **BONAKELE JACOBS**, the brother of the late Mxolisi 'Dicky' Jacobs who died while in detention in Upington in 1986. A copy of his supporting affidavit is filed evenly herewith.

36 The fourth applicant is **FATIMA HARON-MASOET** the daughter of the late Imam Haron who was tortured and killed while in SB detention in Cape Town during 1969. A copy of her supporting affidavit is filed evenly herewith.

37 The fifth applicant is **TRYPHINA NOMANDLOVU MOKGATLE**, the eldest sister of the late Zandisile Musi, one of the COSAS Four, who was seriously injured in a bombing orchestrated by the SB on 15 February 1982 and who has subsequently passed away. A copy of Tryphina's supporting affidavit is filed evenly herewith.

38 The sixth applicant is **KARL WEBER**, a survivor of the Highgate Hotel Massacre in East London on 1 May 1993. A copy of his supporting affidavit is filed evenly herewith.

39 The seventh applicant is **KIM TURNER**, one of the daughters of the late academic and anti-apartheid activist Dr Richard 'Rick' Turner. Rick Turner was assassinated by the security forces on 8 January 1978 at his Durban home in the presence of his daughters. A copy of Kim's supporting affidavit is filed evenly herewith.

40 The eighth applicant is **LYNDENE PAGE**, the sister of the late Deon Harris, who was killed on 1 May 1993 in the Highgate Hotel Massacre. A copy of her supporting affidavit is filed evenly herewith.

41 The ninth applicant is **MBUSO KHOZA**, the son of Musawakhe 'Sbho' Phewa. Sbho was an underground Umkhonto we Sizwe (**MK**) operative from Lamontville,

KwaZulu Natal. Sbho was forcefully disappeared and murdered at the hands of the SB in May 1987. A copy of Mbuso's supporting affidavit is filed evenly herewith.

42 The tenth applicant is **NEVILLE BELING** who survived the 1 May 1993 Highgate Hotel Massacre. A copy of his supporting affidavit is filed evenly herewith.

43 The eleventh applicant is **NOMBUYISELO MHLAULI**, an adult female former manager at the South African Social Security Agency and widow of Sicelo Mhlauli, one of the Cradock Four. A copy of her supporting affidavit is filed evenly herewith.

44 The twelfth applicant is **SARAH BIBI LALL** the sister of the late Dr Hoosen Haffejee who was tortured and killed at the Brighton Police Station in Durban in 1977. A copy of her supporting affidavit is filed evenly herewith.

45 The thirteenth applicant is **SIZAKELE ERNESTINA SIMELANE**, the mother of the late Nokuthula Simelane who was abducted, tortured and murdered by the SB in 1983. A copy of her supporting affidavit is filed evenly herewith.

46 The fourteenth applicant is **SINDISWA ELIZABETH MKONTO**, an adult female and former teacher at Masizame Creche in Lingelihle, and widow of Sparrow Thomas Mkonto, one of the Cradock Four. A copy of her supporting affidavit is filed evenly herewith.

47 The fifteenth applicant is **STEPHANS MBUTI MABELANE**, the brother of the late Matthews 'Mojo' Mabelane, who died in detention on 15 February 1977 while under interrogation by the SB at John Vorster Square. A copy of his supporting affidavit is filed evenly herewith.

48 The sixteenth applicant is **THULI KUBHEKA**, the daughter of the late MK operative Ntombikayise Priscilla Kubheka who was abducted, tortured and murdered near Winklespruit by the SB in May 1987. A copy of her supporting affidavit is filed evenly herewith.

49 The seventeenth applicant is **HLEKANI EDITH RIKHOTSO**, the sister of Ignatius 'Iggy' Mthebule. Iggy, a former MK operative, disappeared at the hands of the SB in 1987 in Johannesburg. He was never seen again and is presumed to have been murdered. A copy of Hlekani's supporting affidavit is filed evenly herewith.

50 The eighteenth applicant **TSHIDISO MOTASI**, the son of the late Richard and Busisiwe Irene Motasi. Richard and Busisiwe were shot dead by the SB on 1 December 1987 at the family's Hammanskraal home, in Tshidiso's presence. A copy of Tshidiso's supporting affidavit is filed evenly herewith.

51 The sixteenth applicant is **NOMALI RITA GALELA**, the wife of the late Twasile Champion Galela, one of the Pebco 3. Champion was a member of the Port Elizabeth Black Civic Organisation who was kidnapped by the Port Elizabeth SB and the Vlakplaas unit on 8 May 1985 and murdered days later at Post Chalmers. A copy of Nomali's supporting affidavit is filed evenly herewith.

52 The twentieth applicant is **PHUMEZA MANDISA HASHE**, the daughter of the late Sipho Hashe, one of the Pebco 3. Sipho was kidnapped by the Port Elizabeth SB and the Vlakplaas unit on 8 May 1985 and murdered days later. A copy of Phumeza's supporting affidavit is filed evenly herewith.

53 The twenty-first applicant is **MKHONTOWESIZWE GODOLOZI**, the son of the late Qaqawuli Godolozi, one of the Pebco 3. Qaqawuli was kidnapped by the Port

Elizabeth SB and Vlakplaas unit on 8 May 1985 and murdered days later. A copy of Mkhontowesizwe's supporting affidavit is filed evenly herewith.

54 The twenty-second applicant is **MOGAPI SOLOMON TLHAPI**, the brother of Nicholas Ramatua 'Boiki' Tlhapi. Boiki was forcefully disappeared from the Stilfontein police station while in the hands of the Security Police in March 1986 and is presumed to have been murdered. A copy of Mogapi's supporting affidavit is filed evenly herewith.

55 The twenty-third applicant is the **FOUNDATION FOR HUMAN RIGHTS** (**FHR**), a non-governmental human rights organisation with its principal place of business at Metal Box Building, 7th Floor, 25 Owl Street cnr Stanley Avenue, Auckland Park, Johannesburg. The FHR was established in 1996 by then President of South Africa, Nelson Mandela, and the European Union to address the historical legacy of apartheid and build a culture of human rights. One of its major programmes is the Unfinished Business of the Truth and Reconciliation Commission which supports victims of apartheid-era to pursue justice and closure. A copy of the supporting affidavit of Dr Zaheed Kimmie, Executive Director of the FHR, is filed evenly herewith. A copy of the FHR's Memorandum of Incorporation is attached marked **FA3** and an extract from the minutes of a board meeting authorising the FHR's participation in these proceedings is attached marked **FA4**.

The respondents

56 The first respondent is the **GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA** with its offices located at the Union Buildings, Government Avenue, Pretoria.

57 The second respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** cited in his official capacity. The President's office is located at the Union Buildings, Government Avenue, Pretoria.

58 The third respondent is the **MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** cited in her official capacity, with her office located at the Momentum Centre, 329 Pretorius Street, Pretoria. The Minister of Justice is also cited in terms of section 179(6) of the Constitution, as the cabinet minister responsible for the NPA.

59 The fourth respondent is the **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** cited in her official capacity, with her office located at the VGM Building, Corner of Westlake and Hartley, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. The NDPP is cited in terms of section 179(1)(a) of the Constitution as the head of the NPA.

60 The fifth respondent is the **MINISTER OF POLICE** cited in his official capacity, with his office located at the Wachthuis Building, 231 Pretorius Street, Pretoria. The Minister of Police is cited in terms of section 206(1) of the Constitution as the cabinet minister responsible for the SAPS.

61 The sixth respondent is the **NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE** cited in his official capacity, with his office located on the corner of Park Street and Hamilton Street, Arcadia, Pretoria. The National Commissioner of the SAPS is cited as he is, in terms of section 207 of the Constitution, responsible for the control and management of the SAPS

STANDING

62 The individual applicants being the first to twenty second applicants comprise survivors and families of the victims of the TRC cases.

63 The organisational applicant, being the Foundation for Human Rights, acts in the public interest.

64 This application is brought:

64.1 by me and the second to twenty second applicants acting:

64.1.1 in our own interest as survivors of apartheid-era crimes and family members of victims of apartheid-era crimes as contemplated in section 38(a) of the Constitution. We are directly impacted by such crimes and the subsequent interference that resulted in the blocking of post TRC investigations and prosecutions. Consequently, we have a direct interest in vindicating our rights which were violated by the interference;

64.1.2 in the interests of all survivors of apartheid-era crimes and the families belonging to the group or class of persons whose loved ones perished or were forcibly disappeared in apartheid-era crimes and whose cases were suppressed by the interference, in terms of section 38(c) of the Constitution; and

64.1.3 in the public interest in terms of section 38(d) of the Constitution.

64.2 by the FHR acting:

64.2.1 in terms of s 38(a) of the Constitution since its interests, goals and activities are undermined and adversely affected by the interference;

64.2.2 in the interests of all survivors of apartheid-era crimes and the families belonging to the group or class of persons whose loved ones perished or were forcibly disappeared in apartheid-era crimes and whose cases were suppressed by the interference, in terms of section 38(c) of the Constitution; and

64.2.3 in the public interest in terms of s 38(d) of the Constitution.

65 In bringing this application, all applicants act in the public interest on the basis that the interference is objectively unconstitutional on the grounds set out in this application and, in particular, on the basis that it violated several rights enshrined in the Bill of Rights as well as the principles of the rule of law and the separation of powers.

66 In this regard it is asserted that:

66.1 The general public has an interest in the relief sought in this application, which arises from the principle of the rule of law which is the very fabric of our society.

66.2 Where fundamental rights are infringed, and the rule of law and separation of powers threatened, the interests of the general public are by definition implicated.

66.3 The most effective manner in which to challenge the offending conduct is for the applicants, in particular the institutional applicant, the FHR, which has a

particular duty to advance these constitutional principles, to litigate in the public interest.

66.4 Many of the people affected by the challenged conduct are vulnerable people who have experienced the might of the state at its most brutal and some may not be in a position to bring a challenge of this nature.

66.5 Although it is not known with precision as to how many people are affected by the interference, it is likely that many would be directly or indirectly affected, since the TRC referred a few hundred cases to the NPA, and virtually all remain unresolved.

67 Rule 16A of the Rules of this Honourable Court will also be complied with in order to ensure that all affected persons will have an opportunity to present evidence and/ or argument to the Court.

JURISDICTION

68 This Honourable Court has jurisdiction to determine this application as the respondents are located within the jurisdiction of this Honourable Court.

BACKGROUND TO THE POLITICAL INTERFERENCE

69 The context to the political interference in the TRC cases is set out below.

Apartheid violations

70 The Constitutional Court has held that the practice of apartheid constituted a crime against humanity. There is ample evidence in the public domain substantiating the conclusion that South Africa's pre-1994 order amounted to "*an institutionalised*

regime of systematic oppression and domination by the white racial group over the black racial group" (which is the definition of the crime of apartheid in the Rome Statute). The TRC found that very serious crimes were committed during the apartheid-era. In particular, the TRC Report (Vol 5 Ch. 6, Findings and Conclusions, p 222) found that the security forces of the apartheid state committed a host of gross violations of human rights, including:

70.1 extra-judicial killings in the form of state-planned and executed assassinations, killings following abduction and interrogation, ambushes and entrapment killings;

70.2 the desecration and mutilation of body parts;

70.3 kidnappings and disappearances;

70.4 torture, severe ill treatment, abuse and harassment;

70.5 destruction of homes or offices through arson, bombings or sabotage;

70.6 manipulation of social divisions to turn one group against another, resulting, at times, in violent clashes; and

70.7 establishment and provision of support to offensive paramilitary units or hit squads for deployment internally against opponents of the government.

71 Tens of thousands of anti-apartheid activists were detained without charge or trial. Thousands of political activists were tried, convicted and imprisoned. According to South African History Online some 1,301 political prisoners served time on Robben Island. The total number of political prisoners held at all prisons runs into several thousands.

72 The TRC concluded that under apartheid, the security forces were a law unto themselves. The vast majority of murders and crimes carried out by them were covered up.

73 We did not expect the apartheid police to investigate themselves or other security services. They acted entirely without restraint and without the slightest fear of having to face justice. Compliant investigating officers, prosecutors and magistrates ensured that apartheid security forces enjoyed near total impunity.

74 We did expect the post-apartheid state to pursue justice. However, a near blanket impunity for apartheid era crimes has been extended into the post-apartheid era, mainly through political interference, as is described below.

The TRC process

75 South Africa's ground-breaking transition required a limitation of the fundamental rights of the victims of gross human rights violations during that period. This was justified by the pressing need to promote national unity and reconciliation and to cross the historic bridge between the past of a deeply divided society to a future founded on democracy, equality and peaceful co-existence.

76 The principles set out in the postscript to the Interim Constitution were reflected in the design of the TRC Act. Perpetrators of politically motivated crimes who made full disclosure were eligible for amnesty for those crimes, which included immunity from criminal prosecution and civil law actions. Conversely, those perpetrators who were refused amnesty, or who chose not to apply for amnesty, were meant to face the consequences, namely criminal prosecution.

77 In requiring victims and the wider community to forgo their rights to justice under the rule of law, the state made an effective compact with victims. This compact required the state to take all reasonable steps to prosecute deserving cases in respect of offenders who were not amnestied.

78 I am advised that there is nothing in the constitutional and statutory design of the TRC process which contemplated or authorised the extension of the rights of perpetrators to further leniency or indemnity from prosecution beyond the winding up of that commission.

79 The TRC's Final Report, released on 21 March 2003, stressed that amnesty should not be seen as promoting impunity. The TRC highlighted the imperative need for "*a bold prosecution policy*" in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law (Vol 6, Ch1, p 593, para 24).

80 Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. We did so on the basis that there would be a genuine follow-up of those offenders who spurned the process of truth and reconciliation and those who were refused amnesty. This part of South Africa's historic pledge with victims has not been kept. Contrary to this obligation, in the aftermath of the TRC, the state chose to abandon its obligations by blocking the TRC cases.

81 The political pressure described in this affidavit served to shape the approach or policy of the NPA and the SAPS in relation to the TRC cases, post the winding up of the TRC. This approach is evidenced by various steps aimed at ensuring political control over prosecutorial decisions dealing with these cases.

Early attempts to secure justice

82 Early attempts to secure justice are disclosed in a memorandum dated 24 October 2006, authored by the first head of the NPA's Priority Crimes Litigation Unit, Adv Anton Ackermann SC (**Ackermann**). It was addressed to the then Deputy NDPP, Dr Silas Ramaite. The memorandum is attached as annex RCM12 (at p849) to an affidavit (at pp 796 – 879) filed by Adv Raymond Christopher Macadam (**Macadam**) in the Joao Rodrigues stay of prosecution case in *Rodrigues v NDPP & Others* Case No. 76755/18, Gauteng Division. A copy of the aforesaid Macadam affidavit is annexed hereto marked **FA5**. These early attempts to pursue justice are set out below:

82.1 After the closure of the Commission of Inquiry regarding the Prevention of Public Violence and Intimidation (**the Goldstone Commission**) in 1994 the evidence unearthed by that inquiry was referred to the Transvaal Attorney General, Dr J D'Oliveira. A team of detectives from the SAPS was seconded to his office to conduct the investigations (**the D'Oliveira unit**).

82.2 The D'Oliveira unit was divided into two groups. One focussed on offences committed by apartheid security force members led by Dr D'Oliveira and the other on offences committed by liberation movements and right-wing groups led by Deputy Attorney General Fick, who was supported by police officers Director Nel and Senior Superintendent Britz.

82.3 On 7 November 1996, Dr J D'Oliveira requested the National Commissioner of Police to instruct all his Provincial Commissioners to submit all unsolved criminal dockets dealing with the conflicts of the past to his office.

83 In parallel with the work of the TRC there were attempts to address some apartheid-era crimes. In 1996 the D'Oliveira unit prosecuted former SB commander of Vlakplaas, Eugene de Kock (**De Kock**), on 121 charges including murder and multiple other offences.

83.1 In August 1996 De Kock was found guilty on 89 of the 121 charges against him, including six of murder. In October 1996 he was sentenced to two life sentences plus 212 years' imprisonment.

83.2 The conviction of De Kock should have opened the door to prosecutions of the entire hierarchy in the erstwhile SB of the SAP. This never materialised. To this day De Kock is widely seen as the 'fall guy' for what the trial judge referred to as the "*rotten system*" that permitted such crimes.

84 In a case connected to the De Kock prosecution, SB officers Peter McIntyre, Andries Venter, Jaques Else and Philip de Beer were charged in 1996 with the murder of Sweet Sambo, who died in police custody in 1991. Since the accused had previously been acquitted on other charges in connection with Sambo's death in 1994, they were acquitted.

85 In 1996 the D'Oliveira unit charged Jack Cronjé and Jaques Hechter of the Northern Transvaal SB with 27 counts of murder committed between 1986 and 1987. Both applied for amnesty, which were subsequently granted (Amnesty Decisions AC/99/0031 and AC/99/0030), bringing an end to that case.

86 In 1997, former Vlakplaas commander Dirk Coetzee and four other Vlakplaas operatives were charged with the 1981 murder of lawyer and political activist Griffiths Mxenge in Durban. Coetzee and two others were found guilty in May 1997

but shortly thereafter received amnesty by the TRC (Amnesty Decision no AC/97/0041).

87 In 1998, Ferdi Barnard, an operative of the Civil Cooperation Bureau (**CCB**), a covert unit of the South African Defence Force (**SADF**) was convicted of the 1989 murder of anti-apartheid academic, David Webster, and the attempted murder of Dullah Omar. He was sentenced to life imprisonment and released on parole in 2019.

88 Between 1995 and 1997, the Investigation Task Unit (**ITU**), which had been established by the Police Ministry in 1994 to investigate hit squad activity in the KwaZulu Natal region was involved in the following matters:

88.1 The murder trial of former Defence Minister Magnus Malan, and most of the top hierarchy of the SADF, for the 1987 KwaMakutha massacre in which 13 women and children were shot dead under a secret military operation styled as ‘Operation Marion’.

88.1.1 Notwithstanding an abundance of documentary and witness evidence, all the accused were acquitted in what was widely seen as a bungled prosecution by the then KwaZulu Natal Attorney General Timothy McNally (**McNally**).

88.1.2 In May 2024 the NPA in KwaZulu Natal was asked to consider preferring charges against a former senior military officer who was central to the planning and oversight of Operation Marion, but who had not applied for amnesty and was not previously charged. Substantial information and evidence were provided to the NPA, but nothing further has been heard.

88.2 On 2 June 1996, the ITU submitted a docket to McNally seeking the prosecution of eight senior Inkatha Freedom Party (**IFP**), KwaZulu Police and Government officials, including a homeland cabinet minister on multiple murder charges. The docket was titled "*The case against persons involved in the establishment and perpetration of hit squad activity in Esikhaweni and surrounding areas*." McNally declined to prosecute, and these cases were never taken forward, even after McNally's resignation. In March 2023 the docket was resubmitted to the NPA in KwaZulu Natal, but nothing further has been heard.

88.3 McNally declined to prosecute former IFP operative Philip Powel for possession of illegal firearms and refused to prosecute former KwaZulu Police Commissioner Roy During for obstructing the course of justice in relation to a large arms cache that had been hidden in the KwaZulu Legislative Assembly building.

88.4 The ITU secured seven murder convictions against ANC hit squad members, connected to the Self Defence Units in the Midlands region, particularly in the town of Richmond. On the closure of the ITU these cases were handed over to the National Investigation Task Unit. Later in the 1990s the Murder and Robbery Unit and the Investigation Directorate Organised Crime secured an additional 23 murder convictions against ANC members.

88.5 The ITU also investigated hit squads connected to the IFP's Self Protection Units but realizing that McNally would not act against the IFP, it abandoned this case, and the ITU closed in mid-1997.

89 During the 1990s, post 1994, at least 30 ANC, UDF and UDM aligned persons were convicted of murder and other serious crimes, just in the KwaZulu Natal province.

89.1 This is gleaned from the list of convicted persons recommended for pardon under former President Thabo Mbeki's Special Dispensation for Political Pardons (to be dealt with below) which dealt mainly with convictions secured in the 1990s and thereafter for alleged political crimes.

89.2 The list, a copy of which can be made available on request, disclosed that 81 convicted persons were associated with the ANC, PAC and civic organisations. Eleven were Afrikaner Weerstandsbeweging (**AWB**) and Freedom Front Plus members and 21 were IFP members. Only five were connected to the former National Party or the SAP, (all five convicted of the attempted murder of the Rev. Frank Chikane, to be discussed below).

89.3 These numbers belie claims made by organisations such as AfriForum, and the ironically styled Foundation for Equality before the Law, that only former Apartheid regime personnel have been targeted in the post-apartheid era.

90 In 1997 Colonel Wouter Basson faced 67 charges, including 16 of murder and 24 of fraud, relating to his activities as head of the apartheid government's chemical and biological warfare programme from 1982 to 1992. In April 2002, Basson was acquitted by the Pretoria High Court following a failed attempt by the prosecution to have the presiding Judge recused on grounds of bias. In 2005, the Constitutional Court partly reversed this decision to acquit Basson, holding that crimes committed outside South Africa could be prosecuted within the domestic courts. However, these charges were not pursued.

91 In 2002, two Ciskei Defence Force soldiers, Vakele Archiebald Mkosana and Mzamile Thomas Gonya were acquitted of murder and attempted murder charges for their role in the 1992 Bisho Massacre, with the court accepting their plea of self-defence. Also in 2002, Worcester riot unit member, Michael Luff, was acquitted of the 1985 murder of protestor William Dyasi.

92 The cases described above cannot be referred to as 'TRC cases' as they were pursued independently of the TRC around the same time of the TRC's operations. Notably, these cases took place before the imposition of the political interference.

93 Until the end of President Nelson Mandela's term there did not appear to be political opposition to justice for apartheid crimes. On the occasion of the tabling of the TRC Report in Parliament in February 1999, President Mandela stated that "*accountability does need to be established and where evidence exists of a serious crime, prosecution should be instituted within a fixed time frame*."

94 The two specialised units, the ITU and the D'Oliveira unit, helped to pioneer the approach of prosecution led investigations in South Africa, with prosecutors and investigators working together as teams under one roof, with proven success. As will be seen below, such a specialised approach is desperately needed in relation to the TRC cases, but the government has ignored all pleas in recent years to adopt this model, resulting in the stagnation of most of the cases. A request to the Ministry of Justice to establish a dedicated court to focus on the TRC cases has also fallen on deaf ears.

Post TRC developments

95 According to former TRC commissioners Adv Dumisa Ntsebeza SC (**Ntsebeza**) and Yasmin Sooka (**Sooka**), in October 1998, the TRC prepared a letter addressed to then National Director of Public Prosecutions, Bulelani Ngcuka (**Ngcuka**), which was accompanied by a list of cases which the Commission asked the NPA to investigate further with a view to prosecution. It is likely that the letter and list were transmitted to the NDPP on 27 or 28 October 1998, which was the date of the last full meeting of the Commission before it ceased its official activities. Unfortunately, a copy of the aforesaid letter and list cannot be located, but the NPA may have this correspondence on record. The confirmatory affidavits of Ntsebeza SC and Sooka are annexed hereto marked **FA6** and **FA7** respectively.

96 According to Ackermann, in 1998 the investigation dockets held by the D'Oliveira unit were transferred to the NPA.

96.1 In terms of a directive issued in 1999 by the then NDPP, the TRC related cases were transferred from the then Directorate of Special Operations (**DSO**), and from the various offices of the Directors of Public Prosecutions (**DPPs**) and the SAPS to the office of the NDPP.

96.2 A copy of Ackermann's affidavit dated 7 May 2015 (filed in support of Thembi Nkadimeng's application to compel a prosecutorial decision in the case of the murder of her sister, Nokuthula Simelane), is annexed hereto marked **FA8**. This application was brought in *Nkadimeng v NDPP and Others,* Gauteng Division under case no 35554/2015 (**Nkadimeng 2**). There was an earlier

application in which Thembi Nkadimeng was the lead applicant, which will be dealt with below.

97 In early 1999, a working group called the Human Rights Investigative Unit (**HRIU**) was established within the NPA by the then NDPP, Bulelani Ngcuka, on the initiative of the then Minister of Justice, Dullah Omar. The part-time head of the Unit was Adv Vincent Saldanha, and his deputy was former prosecutor, Adv Brink Ferreira. It was mandated to review, investigate and prosecute TRC cases in which perpetrators had been denied amnesty or in which perpetrators had not applied for amnesty.

98 During February 1999 a meeting took place between the TRC, represented by Commissioners Sooka and Ntsebeza, and the NPA. At this meeting, NDPP Bulelani Ngcuka introduced Adv Saldanha who had been appointed to lead the HRIU. The meeting discussed the process for identifying potential cases for prosecution.

99 On 8 or 9 March 1999, Sooka met with Adv Saldanha to discuss the report prepared by the TRC dated 7 March 1999 titled "Report for the Office of the National Director of Public Prosecutions," a copy of which is annexed hereto marked **FA9**.

99.1 This report indicated that the Commission had "*begun a process of establishing mechanisms for identifying potential cases*." It added that the TRC had "*identified a range of categories and/ or issues around which we believe prosecutions can be considered*" and that there should be "*discussion around these categories to determine viability as well as prioritisation*."

99.2 The report proposed categories and the types of gross human rights violations that should be investigated, including:

99.2.1 Torture;

99.2.2 Post-Caprivi hit squads;

99.2.3 Security force cover-ups;

99.2.4 Unlawful destruction of documents;

99.2.5 Gun-running;

99.2.6 Target identification and assassinations;

99.2.7 Cross-border raids;

99.2.8 Recipients of section 30 notices and persons who were the subject of section 29 investigative enquiries; and

99.2.9 Amnesty applicants who were denied amnesty.

99.3 The report also referred to cases identified by regional offices and attached preliminary work-in-progress lists from the KwaZulu Natal, Eastern Cape and Western Cape regions, copies of which are annexed here to marked **FA10**, **FA11** and **FA12** respectively.

100 On 11 March 1999, Sooka sent a letter to Adv Saldanha seeking feedback on the report "*regarding potential prosecutions*" and undertaking to take steps to procure the information he requested. A copy of this letter is annexed hereto marked **FA13**. The TRC commenced referring cases for potential prosecution to the NPA and also alerted them to sources of possible evidence in relation to the crimes.

101 The HRIU continued operations until 2000, however it instituted no prosecutions. In 2000, the dockets held by the HRIU were transferred to the DSO, more widely known as the Scorpions. A working group was established within the DSO to handle

the TRC cases known as the Special National Projects Unit (**SNPU**), which was headed by Macadam.

102 The NPA, per Adv CB Ferreira, addressed a letter dated 31 August 2000 (but date stamped 11 September 2000) to the TRC in relation to the cases that had been referred for further investigation. We are not in possession of this letter. However, the TRC's legal adviser and evidence leader, Adv PC Prior responded by way of an undated letter (presumably in September 2000) titled "*Human Rights Files and other Relevant Records*". In this letter Adv Prior acknowledged receipt of the NPA's letter and indicated that the TRC would respond in due course. Attached to Adv Prior's letter was a list of 226 TRC cases in table format. This list appears to have been compiled from the TRC Amnesty database. A copy of the letter and table are annexed hereto marked **FA14**.

103 Notwithstanding the above evidence confirming that various lists were handed over to the NPA by the TRC, on 17 September 2024, Adv Rodney de Kock, the Deputy NDPP, stated before a 'TRC matters update meeting' of the Justice and Constitutional Development Portfolio Committee that the NPA had gone through all available TRC information but stressed that no list of cases of perpetrators were referred to the NPA. A copy of the Parliamentary Monitoring Group summary of this meeting is annexed hereto marked **FA15**.

104 It appeared that the NPA devoted few resources to the SNPU. According to the author, Ole Bubenzer (**Bubenzer**) in his 2009 book, *Post-TRC Prosecutions in South Africa*, this was because the NPA was concerned that some cases would have to be withdrawn if amnesties were granted, since at that time the Amnesty Committee was still concluding its work. A copy of Bubenzer's confirmatory affidavit

is annexed hereto marked **FA16**. A copy of Bubenzer's book can be supplied on request.

105 However, according to Bubenzer, there were many cases in which amnesty had already been denied or not applied for, such as the case against former SAP General Izak Johannes "Krappies" Engelbrecht, in which an indictment had apparently been prepared by the D'Oliveira Unit. In 2016, the SAPS responded to an access to information request for a copy of the Engelbrecht docket stating that "*it could not be found*". A copy of the request is annexed hereto marked **FA17**. By 1999 the D'Oliveira Unit had reportedly already prepared about 20 charge sheets. None of these charge sheets would see the light of day in a court.

106 The SNPU operated until 2003, but like the HRIU, it too instituted no prosecutions. On 24 March 2003, the Priority Crimes Litigation Unit (**PCLU**) was created within the NPA by Presidential Proclamation. Under the same proclamation, Ackermann was appointed to head the unit. Macadam was transferred from the DSO to become the Deputy Director at the PLCU. Part of the PCLU's mandate was to deal with the TRC cases.

107 In May 2003, NDPP Ngcuka decided that all TRC-related cases in which amnesty had not been granted were '*priority crimes'* in terms of the PCLU proclamation. According to Ackermann, this resulted in more than 400 investigation dockets being transferred to the PCLU. Official duties commenced during July 2003.

108 According to the NPA's Annual report 2002/2003, the PCLU instituted an audit of all available cases and registered some 459 cases that were handed over from the TRC, the D'Oliveira Unit and DPP offices. About 160 cases were excluded from

further consideration. Sixteen cases were prioritised for prosecution, of which three were prepared almost immediately for indictment.

109 Macadam, in his affidavit filed in the Rodrigues stay of prosecution case, recorded the steps he and Ackermann took to identify which of the TRC cases required attention:

109.1 All the DPPs were visited and invited to hand over TRC cases which they were not in a position to finalise themselves.

109.2 A meeting was held with the Divisional Head of the Detective Services of the SAPS who issued an instruction to his Provincial Heads to refer all outstanding TRC dockets to the PCLU.

109.3 Two former TRC researchers were appointed to trawl the TRC archives in order to identify cases warranting attention.

109.4 Interviews were conducted with former members of the TRC and the D'Oliveira unit.

109.5 Ackermann and Macadam also entertained requests for investigations from victims and other members of civil society. This resulted in other cases being brought to their attention, including the Ahmed Timol matter.

110 The NDPP reported in a document titled "*About PCLU*" released on 23 March 2003 that the NPA is attending to the cases of some 500 persons who had been reported missing by the TRC. A copy of this document is annexed hereto marked **FA18**. A small Task Team evaluated the TRC Report to identify cases for investigation.

According to the NDPP's report approximately 150 cases were identified for immediate investigation.

111 However, before the PCLU could get going, the political interference intervened which prevented the unit from carrying out its mandate in respect of the TRC cases. The few cases the staff managed to get off the ground were the ones that had been previously investigated with largely complete dockets. As will be set out below it became difficult, if not impossible, for the unit to build new cases.

Lack of delivery

112 The NPA has been in possession of various lists of TRC cases from 1998. In 2003, the TRC cases were declared priority crimes by the then NDPP. Accordingly, it may be asked what the NPA and SAPS have delivered in the last 20 to 25 years. The record is a pitiful one.

113 In order not to unduly burden these papers the correspondence and underlying documentation referred to in this section have not been annexed but can be supplied on request.

114 Bubenzer noted that while "*the D'Oliveira Unit of the 1990s constituted a well-equipped team of experienced prosecutors and investigators with strong political support, support for TRC-related prosecutions after 1998 declined drastically.*" Indeed, as will be seen below not only was political support withdrawn and the PCLU denied investigators, but withering political interference was to obstruct the cases from proceeding.

115 We are only aware of the following post-TRC developments in respect of matters that have been launched or concluded in court:

115.1 *S v Khwezi Ngoma and Others*, which involved four APLA cadres who attacked the Willowvale police station in 1994 resulting in the death of a policeman. The accused did not apply for amnesty. They made representation through their attorneys requesting a withdrawal of the charges, but it was rejected, and they entered into plea agreements and received suspended sentences.

115.2 In 2003, the late Eugene Terre' Blanche, former leader of the Afrikaner Weerstandsbeweging, (Afrikaner Resistance Movement), who had been charged with various acts of terrorism under the Internal Security Act entered into a plea agreement and was given a wholly suspended sentence.

115.3 In 2004, former SB officers Gideon Nieuwoudt, Johannes Martin van Zyl, and Johannes Koole were charged with the 1985 kidnapping and murder of three leading anti-apartheid activists, known as the PEBCO 3. This was the first and only case that the PCLU brought in respect of perpetrators who had been denied amnesty.

115.3.1 Nieuwoudt and van Zyl applied to court to review the decisions to refuse them amnesty. The review was delayed by some five years because of the failure or refusal of the DOJ to file answering papers. Nieuwoudt died in August 2005.

115.3.2 In 2009 the High Court ruled that an Amnesty Committee be convened to rehear the application of Van Zyl. Charges were then provisionally withdrawn against Van Zyl and Koole. Inexplicably, the DOJ never convened an Amnesty Committee and the NPA

never reinstated the cases against Van Zyl and Koole, who have both since died.

115.3.3 To date no steps have been taken against the surviving suspects, notwithstanding the urging of family members over many years. Only two remain alive, former Vlakplaas members Gerhardus Cornelius Beeslaar, who is nearly 87 years old and Joseph Tshepo Mamasela who is in his 70s.

115.4 In 2005, Buyile Roni Blani, an ANC supporter, who had been charged in 1985 for his role in the mob killing of two people, but who had fled the country, entered into a plea and sentence agreement and was sentenced to five years imprisonment, four of which were suspended.

115.5 *S v Aron Tyani & Another*, which related to the murder of Stembele Zokwe, an MK cadre, in 1988 by the Transkei Security Police. The accused were convicted and sentenced to terms of imprisonment in 2005.

115.6 During 2007, and in defiance of political instructions, the PCLU went ahead with an attempted murder case against former Police Minister, Adriaan Vlok, former Commissioner of Police, General Johann van der Merwe, Major-General Christoffel Smith, Colonels Gert Otto and Johannes ‘Manie’ van Staden for the 1989 poisoning of Rev. Frank Chikane. On 17 August 2007, this resulted in a plea and sentence agreement being confirmed with wholly suspended sentences. This was one of the factors that precipitated the suspension of the then NDPP, Adv Vusumzi Patrick Pikoli (**Pikoli**), on 23 September 2007, as well as the removal of Ackermann from involvement in the TRC cases.

115.7 In 2015, following the filing of a High Court application by Thembi Nkadimeng to compel a prosecutorial decision in *Nkadimeng 2*, an indictment was issued in 2016 against four former SB members for the kidnapping and the murder of MK operative, Nokuthula Simelane. Two of the accused have since died and one, Willem Helm Johannes Coetzee, claims to be mentally unfit to stand trial. Coetzee's trialability inquiry has been ongoing for more than two years and holding up the trial, some eight years after the indictment was issued.

115.8 Between 2017 and 2023 five apartheid-era inquests were reopened, four of which were at the instance and pressing of the families. These were the inquests into the deaths in SB detention of Ahmed Timol, Neil Aggett, Hoosen Haffejee and Imam Haron. In all these cases, the families' legal representatives had to threaten the NPA and/or the Minister of Justice with legal action in order to get the inquests reopened. Correspondence in this regard can be supplied on request. The inquest courts in all four cases recommended that the NPA pursue perjury and other charges against several former SB officers. To date, with the exception of the late Jao Rodrigues, none have been charged.

115.9 Following the reopened inquest into the death of Ahmed Timol in 2017, which had been spearheaded by the Timol family and their representatives, former police officer Jao Rodrigues was charged with murder in 2018. Rodrigues died in September 2021 before he could stand trial.

115.10 In 2020 family members of the COSAS 4 filed an application with the Krugersdorp Magistrate's Court seeking an order for the disinterment and

forensic examination of the bodies. This prompted the NPA to act and in 2021 kidnapping and murder charges were preferred against two former SB and Vlakplaas members.

115.10.1 Crimes against humanity charges were subsequently added to the indictment, the very first time that such charges had been pursued in South Africa. Various challenges, as well Stalingrad type parallel civil litigation launched by the accused, have delayed the start of the trial. In 2022, at the prompting and intervention by the families, the High Court ordered the SAPS to pay the reasonable legal costs of accused no. 2, Christiaan Rorich.

115.10.2 The application by accused no. 1, Tlhomedi Ephrahim Mfalapitsa, to overturn the refusal to grant him amnesty was dismissed by Judge Stuart Wilson on 11 November 2024. Between 18 and 21 November 2024 the trial court heard the objection of the accused to the crimes against humanity charges. Judgment was reserved and the trial was postponed to 14 April 2025.

115.11 In July 2023 the inquest proceedings into the 1982 death in detention of Ernest Moabi Dipale at John Vorster Square were concluded. The court found that Dipale did not commit suicide, but that the SB was responsible for his death. The court identified SB officers Nicholas Johannes Deetlefs and Joe Mamasela as key suspects whose involvement should be further investigated. Deetlefs died in September 2023.

115.12 In August 2022 murder charges were preferred against three former police officers, Johan Marais, Leon Louis Van Den Berg and Abram Hercules

Engelbrecht, for the 1987 murder of student activist, Caiphus Nyoka. This followed a long struggle by the Nyoka family for justice.

115.12.1 On 9 October 2020, the family's attorneys, Webber Wentzel, placed the Deputy NDPP and the Head of the SAPS' Directorate for Priority Crimes Investigation (**DPCI**) on terms, demanding that the DPCI finalise its investigations and the NPA make a prosecutorial decision, failing which the High Court would be approached for an appropriate order.

115.12.2 A fourth police officer, Pieter Egbert Stander, was indicted in 2024. One of the accused, Johan Marais, pleaded guilty on 12 November 2024. The remaining three co-accused appeared before the Gauteng High Court sitting at Benoni at the start of the trial on 18 November 2024. The trial was postponed to 2 December 2024 when one of the accused terminated his counsel's brief.

115.12.3 On 5 December 2024, Judge Mahomed Ismail ruled that evidence led at the 1988 inquest (GO 112/1988) was "provisionally admissible", holding that not allowing the state to lead that evidence would be "tantamount to suppressing crucial and vital evidence."

115.12.4 The trial was postponed to 12 May 2025.

115.13 In November 2023, former "A" team gang member Wesley Madonsela was sentenced by the Durban Regional Court to 10 years imprisonment for

murdering 17-year-old United Democratic Front activist Siphelele Nxumalo in 1989.

115.14 In relation to the 1987 enforced disappearances of Ntombikayise Kubheka and Musawakhe “Sbho” Phewa an inquest was opened during 2022 but did not proceed; and in November 2023 the DPP KwaZulu-Natal decided to pursue a prosecution of four persons: Hendrik Johannes Petrus Botha, Salmon Johannes Gerhardus Du Preez, Martinus Dawid Ras Jnr and Jakob Albert Coetzer. On 12 November 2024, Lawrence Gerald Wasserman was also charged with murder and all five accused appeared before the Umlazi Magistrate's Court, when the matter was postponed 28 January 2025. Four days later, it was reported that Wasserman had died while traveling on a plane between Durban and Johannesburg on 16 November 2024.

115.15 In January 2024, the NPA indicted four former SB officers for the 1985 murder of Jameson Ngoloyi Mngomezulu. The officers indicted are: Gerhardus Stephanus Schoon, Paul Jacobus van Dyk, Frederick Johannes Louw and Douw Gerbrandt Willemse. No further developments have been released by the NPA, and this case also appears to have stalled.

115.16 In May 2024, then Justice Minister, Ronald Lamola, authorised the reopening of the inquests into the deaths of Chief Albert Luthuli, Griffiths Mxenge and Booi Mantyi, but there appear to be no further developments in these matters. A statement released by the ANC dated 19 October 2024

appeared to indicate that a judge had been appointed to preside over the Mxenge inquest before the KwaZulu Natal High Court.

115.17 In 2023, the NPA indicated to the legal representatives for the families and survivors of the 1993 Highgate Massacre that an inquest will be held. The inquest is set down for hearing from 27 January to 7 February 2025 at the High Court in East London.

115.18 On 1 March 2024, the NPA advised the lawyers for the Turner family that they had requested the Minister of Justice to reopen the inquest into the 1978 murder of Dr Rick Turner in Durban. However, since then all efforts to secure dates for the inquest and a progress report on the investigation have proved fruitless.

115.19 On 7 November 2024, the NPA confirmed in writing that the Minister of Justice had approved the reopening of the inquest into the death of Ramatua Nicholas “Boiki” Tlhapi. In March 1986, Tlhapi, an activist from Ikageng near Potchefstroom, disappeared from the Jouberton police station, while in a seriously injured state and was never seen again. On 13 December 2024, the Minister of Justice requested the Judge President of the North-West Division to designate a judge to preside over the re-opened inquest.

116 The record of delivery is dismal. It amounts to five concluded reopened inquests (between 2017 and 2023), four plea and sentence agreements (all occurred between 16 and 21 years ago) and two concluded criminal trials, one some 18 years ago of Transkei police officials, and the other in 2023 resulting in the conviction and imprisonment of a gang member. There are only five criminal cases before the

courts and all have been the subject of delays, in one matter, for some eight years. In the Nyoka matter, one of the accused has entered a guilty plea. The NPA has released different figures in relation to pending court cases and closed cases, but to date it has not disclosed the names of these cases.

117 According to a presentation made by the NPA to the Portfolio Committee on Justice and Constitutional Development on 17 September 2024, 30 matters had been finalised, but the NPA only disclosed the finalised Aggett, Dipale, Haffejee and Haron inquests. It also made reference to the finalised inquest of Zama Sokhulu, without providing any details.

117.1 In relation to 'matters on the criminal roll' the presentation referred to the COSAS 4, Nokuthula Simelane and Nyoka cases, as well as *S v Botha and Others* (connected to the Khubeka case) and *S v Schoon and Others* (connected to the Mngomezulu case) which were both remanded to November 2024 and described cryptically as "state attorney - legal representation". Under the heading of "Indictments" the NPA refers to three unnamed "*indictments to be served pending verification of addresses of perpetrators*".

117.2 Under the heading 'Notable Inquests' 15 matters are mentioned, but most appear to be stalled. In six cases, judges have apparently not been appointed, five are described as "*shortage of capacity*". One (Cradock 4) was described as a "*challenge with representation*". Only the Mthunsi Njakazi inquest had commenced, while the Oupa Madondo and Highgate Hotel cases were scheduled for November 2024 and January 2025 respectively. The presentation also claimed that memoranda for 10

unnamed inquests were underway. Slides 27 to 32 of this presentation are annexed hereto marked **FA19**.

118 In comparison, other similarly placed countries where truth commissions recommended prosecutions have achieved considerably more, such as the case of Chile:

118.1 Since 1998, Chile's courts have resolved hundreds of cases of dictatorship-era killings, disappearances, and torture, and sent dozens of perpetrators to jail.

118.2 As of July 2023, Chile's Supreme Court had handed down verdicts in more than 530 cases for dictatorship-era crimes against humanity. Another 2,000 cases were still under investigation or awaiting resolution before lower courts.

118.3 Some 234 former regime agents have been imprisoned for their crimes, with dozens more – 57 in 2023 alone – escaping justice only through the '*biological impunity'* provided by death.

118.4 Between October 2022 and October 2023, 67 Supreme Court criminal verdicts were handed down, including the conviction and sentencing to jail of 59 former secret police agents. A copy of the article: Cath Collins, *Chile's 'Pinochet Cases' at 25: an ongoing sea change*, Justiceinfo.net, 16 October 2023 is annexed hereto marked **FA20**.

119 In Argentina, as at the end of 2021, the Office of the Prosecutor for Crimes Against Humanity had investigated 3,525 people for crimes against humanity, of whom 1,044 were convicted (as part of 264 sentences handed down). In Peru, following

the winding up of the truth commission, as at the end of 2019, prosecutors had secured 44 convictions for conflict related crimes. Source materials for these examples can be supplied on request.

120 The main reason for South Africa's woeful performance has been the political interference that effectively suppressed the pursuit of apartheid-era crimes within a few years of the closure of the TRC. The history of the political interference is set out below.

THE POLITICAL INTERFERENCE

121 In May 2021 during an interview in an *Al Jazeera* documentary titled "*My Father Died For This*", ANC legal adviser Krish Naidoo claimed that the Cradock Four case, as with the other TRC cases, "*simply fell through the cracks*." His statement was deeply insulting to our intelligence. A copy of this documentary can be made available on request.

122 In fact, the TRC cases were deliberately suppressed following a plan or arrangement hatched at the highest levels of government and across multiple departments. This is the real explanation for the delay. The interference stands as a deep betrayal of those who laid down their lives for freedom in South Africa, including my father and other fallen comrades.

123 In this section of the affidavit, unless otherwise stated, all factual references are drawn from the affidavits of Advocates Christopher Macadam (**FA5**), Anton Ackermann (**FA8**) and Vusumzi (Vusi) Pikoli (**FA22**).

Opening the door to political interference

124 On 12 March 2003, the TRC Report's final volume (vol 6) was released. On 15 April 2003, President Mbeki made a statement to the National Houses of Parliament and the Nation on the *Occasion of the Tabling of the Report of the TRC* a copy of which is annexed hereto marked **FA21**. In relation to criminal accountability and the TRC's follow-up process President Mbeki stated:

> "Besides the imperatives of managing the transition, an important consideration that had to be addressed when the TRC was set up, was the extent to which the new democratic state could pursue legal cases against perpetrators of human rights violations, given the resources that would have to be allocated to this, the complexities of establishing the facts beyond reasonable doubt, the time it would take to deal with all the cases, as well as the bitterness and instability that such a process would wreak on society.
>
> The balance that the TRC Act struck among these competing demands was reflected in the national consensus around provision of amnesty – in instances where perpetrators had provided the true facts about particular incidents – and restorative justice which would be effected in the form of reparations. Given that a significant number of people did not apply for amnesty, what approach does government place before the national legislature and the nation on this matter?
>
> Let us start off by reiterating that there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past, but also in the creation of a new ethos within our society.
>
> Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases: and this was not to be. This reality cannot be avoided.
>
> Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.

> We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.
>
> However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.
>
> This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts. …
>
> This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.
>
> Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.
>
> Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard."

125 According to Adv Pikoli, who was the NDPP between February 2005 and September 2007, what followed Mbeki's speech in relation to the TRC cases "*was anything but the* '*normal legal processes*." A copy of Pikoli's affidavit that was filed in *Nkadimeng 2* (TN7 at pp 170 – 216) is annexed hereto marked **FA22**.

126 It appears that the seeds of the political interference were laid in the deliberations that led to the strategies that are reflected in Mbeki's speech.

126.1 While Mbeki appeared to disavow another amnesty because of its constitutional implications, he nonetheless made it clear that certain arrangements would have to be made to accommodate the many perpetrators who did not take part in the TRC process.

126.2 He indicated that while the NPA would be permitted to continue with its normal work, it would nonetheless be required to work with "*our intelligence agencies*" to enable those who still wish to speak the truth "*to enter into arrangements that are standard in the normal execution of justice*".

126.3 Mbeki stressed that individuals who still wished to seek justice or take up any human rights violation grievance could approach the courts. He noted the relevant departments were examining the modalities as well as whether any fresh legislation was needed.

127 Mbeki signalled that in relation to the TRC cases it was not going to be business as usual. Unlike other cases involving serious crimes such as murder, the TRC cases were going to be treated differently. Perpetrators in these cases would be offered some form of leniency or alternatives to criminal prosecution. Family members could play a role in these "*legal arrangements*" and if still aggrieved could approach the courts, presumably to pursue private prosecutions or some form of civil litigation against the perpetrators.

128 Mbeki was articulating government policy that effectively said that the pursuit of justice in the TRC cases was not to be prioritised and that special arrangements were going to be put into place. His reference to the involvement of the "*intelligence agencies*" was a portend of what was to follow, in which such agencies came to impose their will on prosecutorial decisions.

Closing down of the TRC Cases

129 Following Mbeki's speech, those wielding power and influence wasted little time in closing down the TRC Cases. Within a few weeks of the speech, attempts by PCLU

prosecutors to commence investigations were blocked when they were refused investigative support by both the DSO and SAPS.

130 As mentioned above, the PCLU was engaged in identifying key TRC cases for further investigation, and they were entertaining requests from family members. One of the requests made to Macadam was from Imtiaz Cajee, nephew of Ahmed Timol who died in security detention in 1971. On 5 May 2003, Macadam sent a letter to Andrew Leask, the Chief Investigating Officer at the DSO (**Leask**) asking him to investigate the Timol case. A copy of this letter is attached to Macadam's aforesaid affidavit (**FA5**) as annex RCM1 (at p807).

131 On 15 May 2003, Macadam submitted a report to the NDPP, the Head of the DSO and the head of DSO operations setting out the TRC cases which had been identified for investigation, which included the Timol case. A copy of this report is attached to Macadam's affidavit (**FA5**) as annex RCM2 (at p809).

131.1 According to Macadam the following cases were being prepared for prosecution:

131.1.1 The murder of four policemen in the Motherwell Bombing. The targets in this investigation were members of the Port Elizabeth SB and the Vlakplaas Unit, including Major General Nick van Rensburg.

131.1.2 The prosecution of Major General Nick van Rensburg for ordering the killing of askari Brian Ngqulunga.

131.1.3 The prosecution of the SB members responsible for kidnapping the PEBCO 3 from the Port Elizabeth Airport in 1985.

131.1.4 The prosecution of AZAPO leader George Wauchope for murder and other charges.

131.1.5 The prosecution of Phillip Powell for possessing hand grenades and other illegal weapons in April 1994.

131.1.6 The prosecution of JM Ngcobo and others for the concealment and possession of an arms cache at the Nqutu Bunker in May 1999.

131.1.7 The prosecution of the CCB members responsible for the bombing of the Early Learning Centre in Athlone.

131.2 The next category of cases was titled “POTENTIAL FURTHER PROSECUTIONS ARISING FROM THE ABOVE” and included:

131.2.1 The murder of the PEBCO 3. It was noted that a kidnapping prosecution could encourage one or more suspects to speak about the murders for a “lesser sentence”.

131.2.2 The murder of the Cradock Four. It was noted that the same suspects behind these murders were also involved in the Motherwell and PEBCO 3 killings, and that prosecutions in those killings could encourage suspects to come forward in the Cradock Four case in order to secure a “lesser sentence”.

131.3 The next category of cases was titled “NEW CASES BEING EVALUATED FOR PROSECUTION PURPOSES” and included:

131.3.1 The murder of the COSAS 4.

131.3.2 The murder of askari Adriano 'Strongman' Bambo, who was allegedly murdered by the SB to prevent him disclosing details about the murder of Nokuthula Simelane and others.

131.3.3 The murder of a detainee on the East Rand by Willem Helm Johannes 'Timol' Coetzee.

131.3.4 The murder of askari Dan Mabolo.

131.3.5 Allegations by an IFP sentenced prisoner to have knowledge of murders in the East Rand from 1988.

131.3.6 447 dockets relating to APLA handed over by SAPS Crimes Against the State Unit.

131.3.7 Six to eight dockets linking the AWB to pre-election bombings previously dealt with by Adv Fick.

131.4 The next category of cases was titled “HIGH INTEREST CASES WHICH REQUIRE ATTENTION IRRESPECTIVE OF THE NATURE OF AVAILABLE EVIDENCE” and included:

131.4.1 The murder of Victoria Mxenge.

131.4.2 The kidnapping, torture and murder of Ntombikayise Khubeka.

131.4.3 The kidnapping, torture and murder of Nokuthula Simelane

131.4.4 The decision by the DPP (Pretoria) not to prosecute SAP General Krappies Engelbrecht.

131.4.5 The un-investigated allegations against SAP General Bassie Smit.

131.4.6 The Ciskei coup d'etat.

131.4.7 The Transkei coup d'etat.

131.4.8 The pre-election train violence in Gauteng.

131.4.9 The murder of Reggie Hadebe.

131.4.10 The murder of Dulcie September.

131.4.11 The refusal of amnesty to 37 high ranking ANC officials.

131.4.12 The decision by the DPP KwaZulu Natal not to prosecute IFP hit squads.

131.5 Other categories were titled "*CASES IN THE PROCESS OF BEING CLOSED*", "ASSISTANCE TO OTHER AGENCIES" and "*REPARATIONS RELATED ACTIVITIES*". Another category dealt with cases that had been put on hold pending the appeal in the Basson case in relation to jurisdiction for conspiracy to commit crimes outside South Africa. These cases included:

131.5.1 The murder of Anton Lubowski.

131.5.2 The Lesotho Raid (also known as the Maseru Raid).

131.5.3 The Botswana Raid (also known as the Gaborone Raid).

131.5.4 The Swaziland Raid.

131.6 Macadam concluded his letter with certain "Policy Considerations":

131.6.1 Prosecutions not to be conducted on a piece meal basis except where special circumstances demand (e.g. witness on point of death, accused about to leave South Africa or engaged in current criminal activities).

131.6.2 Once all the cases earmarked for prosecution have been investigated, a presentation will be given to the NDPP in order for him to confirm the prosecution strategy.

131.6.3 Thereafter prosecutions will be instituted. After convictions have been obtained attention will be given to cases which currently have evidence since convictions may act as incentive for perpetrators to come forward.

132 If only a fraction of the cases listed in Macadam's report had been resolved in the early 2000s it would have brought significant closure for the concerned families and given considerable impetus for the finalisation of the balance of cases.

133 The minutes of the Justice Portfolio Committee meeting on 10 June 2003 in respect of the NPA reflected:

> "Some cases emerging from the Truth and Reconciliation Commission are ready to proceed. In others the NPA awaits rulings from the Supreme Court of Appeal and from the reconvened TRC Amnesty Committee. **The Chair interjected to ask if any legislative change was needed to deal with TRC cases where immunity from prosecution was to be offered**. Mr Ngcuka replied that he could see no need for a change in legislation." (emphasis added)

134 At the DSO, it was Special Director Adv MG 'Geoph' Ledwaba (**Ledwaba**) who made decisions on the opening of new investigations. Accordingly, Ackermann and Macadam met with Ledwaba to ask the DSO to conduct investigations referred to in

the aforesaid report. Ledwaba was firm in his refusal to take on the TRC cases. In his affidavit, Macadam noted the following about that meeting:

> "The meeting was unpleasant as Ledwaba **made it clear in no uncertain terms that the DSO would not investigate any TRC matters** and that these should all be referred to SAPS." (emphasis added)

135 A copy of a letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision is annexed to Macadam's affidavit (**FA5**) as annex RCM3 (at p814). In this letter he instructed Leask as follows:

> "TRC cases
> I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used. Notwithstanding the above decision Adv Tongwane must finalize the Black Cats and Winnie Mandela cases. Due to the fact that NDPP has requested a speedy finalization of the two matters this must be done before 30 July 2003. I have also transferred the two researchers to the PCLU. It may be necessary for your investigators to introduce certain witnesses with whom they have dealt to the SAPS investigators, and you are accordingly authorized to conduct the necessary handovers."

136 This refusal of the DSO to investigate the TRC cases was a remarkable decision, given that the DSO had previously been seized with the TRC cases and just weeks earlier the NDPP had declared the TRC cases to be "*priority crimes*".

The President must decide

137 It is reflected in Macadam's affidavit that he and Ackermann then met with Commissioner Johannes De Beer, the Divisional Head of the Detective Service of the SAPS (**De Beer**) and requested the SAPS to take over the investigations.

137.1 On 26 September 2003, De Beer replied to Ackermann informing him that the request had been discussed with the National Commissioner of the

SAPS, Jacob "Jackie" Sello Selebi (**Selebi**). In his letter De Beer advised that the SAPS would not provide investigators for the TRC cases.

137.2 He indicated that the investigation of the TRC matters was a DSO responsibility and the NDPP would need to approach the President for a decision as to which agency should conduct the investigations. A copy of this letter is attached to Macadam's affidavit (**FA5**) as annex RCM4 (at p816).

137.3 According to Macadam, NDPP Bulelani Ngcuka never approached the President.

138 De Beer explained as follows in his letter:

> "I have discussed your request for the assistance of the South African Police Service, to investigate cases emanating from the TRC processes, with the National Commissioner, It is evident from your letter that the investigation and prosecution of these cases were referred to the National Director of Public Prosecutions, by the President. **Our understanding was that this referral was politically inspired**. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefore understandable that you first endeavoured to have these cases investigated by the Directorate for Special Operations (DSO).
>
> From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking. Your letter only states that: "In March 2002, consideration was given to the issue of a Presidential proclamation, but problems were encountered in this regard. You are aware of the fact that the capacity created for the D 'Oliveira Committee is presently with the DSO.
>
> In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seem to be common cause that the initial understanding was that the DSO would have investigated it, the opinion is held that you, or the National Director should approach the President, and confirm the instruction of the President on who he wants to investigate these cases.

> **If the President indicates that the South African Police Service should be involved in the investigations, the Instruction should be obtained in writing.** Upon receipt of such instruction, the South African Police Service shall of course assist, and the terms of reference, as well as issues such as logistics, number of investigators, command, can be discussed, as well as issues such as logistics, number of investigators, command, can be discussed, as well as other relevant issues.
>
> You are therefor requested to approach the President on the matter, where after we can take the matter further, if necessary." (emphasis added)

139 It is notable that the SAPS regarded the TRC cases as a political issue. It is also noteworthy that the only state entities authorised to conduct official criminal investigations in South Africa both refused to touch the TRC cases. It is highly unlikely that their decisions were spontaneous or mere coincidences. It is apparent that by May 2003 both the SAPS and the NPA were reluctant to take on the TRC cases, and in all probability had been told not to do so from a political level.

140 The fact that the NPA was told to contact the President reflected that the question of investigating the TRC cases was now a purely political one, and a sensitive one at that. It appeared that only the head of state could make that decision, regardless of what the law and Constitution said about investigative authority.

141 It is remarkable that NDPP Ngcuka did not contact the President for a decision on this question. The failure to do so probably suggests that approaching the President was seen as a futile exercise.

No investigations

142 Thereafter Ackermann and Macadam made a last-ditch attempt to persuade Special Director Ledwaba at the DSO to reconsider his decision not to investigate the TRC cases. Ackermann sent Ledwaba a letter (styled as an "Internal Memorandum") dated 11 November 2003 appealing him to appoint investigating officers. It was

pointed out in the letter that "*if the DSO did not provide investigators the PCLU would not be able to deliver on its mandate*." Both the NDPP and Head of the DSO were copied on the letter, a copy of which is attached to Macadam's affidavit (**FA5**) as annex RCM5 (at p818). This letter is reproduced below:

> "1. In the light of current developments, I am constrained to document the history of the above saga.
>
> i) In 2001 the NDPP decided that the DSO was responsible for the investigation and prosecution of the above cases. Both Advocates Sonn and McCarthy made a number of public statements creating an impression that the DSO was making a sincere effort to do justice to the cases. In addition, Advocate Sonn gave the President a full briefing on the matter.
>
> ii) In 2002 the SNPU was established in order to investigate the cases.
>
> iii) In 2003 and in response to the TRC's final report, the President placed the responsibility for the investigation and prosecution of TRC matter on the NDPP.
>
> iv) In May 2003 I gave the NDPP and his Deputies a full briefing on all TRC, cases identified for prosecution.
>
> My prosecution strategy was endorsed and Advocate McCarthy indicated that there would be no problem in having the cases declared in terms of Section 28 of the NPA Act. The NDPP briefed the Minister and Justice Portfolio Committee accordingly.
>
> v) Shortly thereafter and in the same month you were presented with applications in terms of Section 28 relating to the cases.
>
> vi) In July 2003 you verbally informed me that you were not prepared to sign the declarations and were withdrawing the DSO from the further investigation of the cases. A letter to this effect was given to the CIO Leask by you. (Copy attached)
>
> vii) In response thereto I requested Commissioner De Beer to appoint the police to take over the investigations. After a series of meetings with him, he approached the National Commissioner who indicated that the police would only investigate upon written instruction of the President (Copy of De Beer's letter is attached). His primary reason was that the SAPS had transferred all their members with appropriate

experience to the DSO in order to capacitate it to conduct these investigations.

viii) After receipt of De Beer's letter, I made several unsuccessful attempts to contact you to discuss the matter. Eventually I had to report the matter to Dr Ramaite.

ix) On 3 November 2003 you informed me that you would sign the declarations in terms of Section 28(1)(b) and would appoint SSI De Lange to conduct the necessary investigations.

x) On 6 November 2003 Dr Ramaite informed Adv Macadam that he had discussed the matter with Adv McCarthy who indicated that the DSO would investigate.

xi) On 10 November 2003, Adv Macadam presented you with Section 28(i)(b) declarations.

You informed him:

a) That you are not prepared to sign any declarations

b) De Lange would not be appointed despite the fact that it was explained to you that he was part of the initial investigation and familiar with all the witnesses and the facts of the cases.

c) That during the course of 10 November 2003 another Investigator will be appointed.

d) The President should not be approached to involve SAPS.

2. As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted.

There are certain cases which could have been prosecuted which have prescribed. There is both National and International pressure to institute prosecutions (e.g. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the *bona fides* of the National Prosecuting Authority into serious dispute and do irreplaceable damage.

Since I do not have any investigative capacity, I am powerless to deliver on my mandate. For the sake of justice and expediency, I appeal to you to assign De Lange and another investigator to investigate these cases and to sign the declarations in terms of Section 28(1)(b). This chapter in our country's history must be closed without further delay."

143 Ackermann's heartfelt plea fell on deaf ears. Ledwaba was not moved to act, even though he was advised that the NPA was under local and international pressure, and cases were prescribing. Ackermann's warning that the failure to proceed with the TRC cases would bring the NPA into disrepute, and do irreparable harm to its image, was precisely what happened.

144 The DSO persisted in its refusal to appoint investigators, as did the SAPS. According to Macadam this effectively brought an end to the TRC cases as it meant that no new investigations of the TRC matters could be opened.

145 The TRC cases were effectively closed down before the end of 2003, before the PCLU could commence real case work. The few cases taken forward subsequently were those in which investigation dockets had already been completed.

146 On 25 February 2004 Macadam wrote to Imtiaz Cajee, nephew of Timol, advising him of "*negative results*" of the investigation that had purportedly been launched, a copy of which is annexed here to marked **FA23** (also annexed to Macadam's affidavit as RCM9 at p834).

146.1 Macadam did not disclose to Cajee that the investigations into the Timol case and the other TRC cases were blocked before they could even start. The only 'investigation' carried out was the canvassing of an aspect with the late Ivor Powell, a Cape Town based journalist. This singular activity did not constitute an investigation.

146.2 Even if only the most basic investigation had been carried out, key suspects who were still alive could have been held to account. The lead SB

interrogators who tortured and murdered Timol, Captains JZ Van Niekerk and JH Gloy died on 31 October 2006 and 30 July 2012 respectively; while Maj Gen CA Buys, (Head of the SAP CID) who led the cover-up, died on 25 February 2007.

146.3 The NPA had some nine years to act before the last key suspect died. Not only did it not take any action but on 29 November 2006, the NPA in an internal report, titled: "*Report of the Progress made by the Task Team on TRC Cases",* attached to Macadam's (**FA5**) affidavit as annex RCM10 (at p835), confirmed that it had closed the Timol case:

> "The nephew of the deceased requested that an allegation that one of the police officers who had interrogated the deceased had confessed to a journalist be investigated.
>
> The DSO traced and interviewed the journalist who denied the allegation. There was no other evidence to prove that the deceased had definitely been murdered and all other crimes had prescribed.
>
> The matter was therefore closed."

146.4 The above entry was misleading as it did not disclose that no investigation officer was ever appointed, and no other steps were taken apart from contacting the journalist. It was also misleading to suggest that "*no other evidence*" was available since there had been no investigation. In 2017, some 11 years later, the family's legal team was able to assemble sufficient evidence to persuade an Inquest Court that the SB had murdered Timol. However, by then all key perpetrators had died.

147 The refusal by both the SAPS and the DSO to investigate some of the most serious crimes committed in South Africa deeply violated their legal and constitutional obligations.

The Amnesty Task Team

148 A Director-General's Forum chaired by Adv Pikoli, the then Director General of the DOJ, met on 23 February 2004 to consider how to give effect to the President's objectives set out in his speech the year before. Essentially this involved how to deal with the TRC cases, which Pikoli described in his affidavit, as being "*politically sensitive*" (TN7 at pp 170 – 216 in *Nkadimeng 2*). The Forum appointed a Task Team to report on a mechanism to give effect to the President's objectives. This task team was known as the "Amnesty Task Team" (**ATT**).

149 The ATT was required to:

149.1 explore options for the NPA and the intelligence agencies to accommodate persons who still wish to disclose the truth about past conflicts.

149.2 consider a further process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.

149.3 advise whether legislative enactments were required.

150 The original terms of reference for the ATT (as attached to Macadam's affidavit (**FA5**) as annex RCM14 (at p863) were to consider and report on:

150.1 The criteria the NPA applies in deciding on current and impending prosecution of cases flowing from the conflict of the past.

150.2 The formulation of guidelines that will inform current, impending and future prosecution of cases flowing from the conflicts of the past.

150.3 Bearing in mind the abovementioned guidelines, whether legislative enactments were required.

150.4 Whether any of the two Bills that have already been formulated can be taken forward, while taking into account the views of the intelligence agencies.

151 The names of the two bills were not disclosed but presumably one of them was the Indemnity Bill (first 2 pages at RCM13 at p861). The views of the Intelligence Agencies were also not disclosed.

152 The ATT comprised the following members:

152.1 Deon Rudman (Chairperson): DOJ

152.2 Yvonne Mabule: National Intelligence Agency (**NIA**)

152.3 Vincent Mogotloane: NIA

152.4 Gerhard Nel: NPA

152.5 Lungisa Dyosi: NPA

152.6 Ray Lalla: SAPS

152.7 Joy Rathebe: Department of Defence (**DOD**)

153 The ATT was requested to submit its report to the Director General's Forum by close of business on 1 March 2004. The ATT met on 26 February 2004 and again on 1 March 2004.

154 The undated 2004 secret report, titled "*Report: Amnesty Task Team*", which was disclosed during the proceedings in the matter of *Nkadimeng & Others v The*

National Director of Public Prosecutions & Others (TPD case no 32709/07 [2008] ZAGPHC 422) (**Nkadimeng 1**) as annex TN42 at p431. It is annexed hereto marked **FA24**. The report set out the ATT's mandate, background, proposals and concerns.

155 The ATT Report noted that a further amnesty would face challenges because of constitutional issues but nonetheless the team still had to find ways to accommodate those perpetrators who did not take part in the TRC process. In relation to its first task, the ATT recommended the creation of a Departmental Task Team comprising representatives from:

155.1 Department of Justice and Constitutional Development,

155.2 The Intelligence Agencies,

155.3 South African National Defence Force,

155.4 South African Police Service,

155.5 Correctional Services,

155.6 National Prosecuting Authority,

155.7 Office of the President.

156 The functions of the proposed Departmental Task Team would, *inter alia*, be the following:

156.1 Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, it must consider the advisability of the institution of such criminal proceedings and make recommendations to the NDPP.

156.2 To consider applications received from convicted persons alleging that they had been convicted of political offences with a view to making recommendations for their parole or pardon, and in making such recommendations to consider various criteria. Aside from the TRC's amnesty criteria, other considerations included, *inter alia*:

156.2.1 Whether a prosecution "politically" reflects the aims of the TRC Act and is not in conflict with the requirements of objectivity.

156.2.2 Various humanitarian concerns.

156.2.3 Whether a prosecution could lead to conflict and traumatisation of victims.

156.2.4 The perpetrator's sensitivity to the need for restitution.

156.2.5 The degree of remorse shown by the offender and his attitude towards reconciliation.

156.2.6 The degree of indoctrination to which the offender was subjected.

156.2.7 The extent to which to which the perpetrator carried out instructions.

156.2.8 Renunciation of violence and willingness to abide by the Constitution.

156.3 The Task Team noted that their proposals have various shortcomings, including:

156.3.1 A possible negation of the constitutional rights of victims, the public at large and alleged offenders.

156.3.2 The possibility of the institution of private prosecutions.

156.3.3 The absence of any guarantee that alleged offenders will not be prosecuted, meaning that they might be reluctant to make full disclosure.

156.3.4 Public perception regarding the participation in a further amnesty process by the security services as the public may regard them as perpetrators in past conflicts.

157 According to Pikoli in his affidavit in *Nkadimeng 2,* the recommendation of the Interdepartmental Task Team for 'a two-stage process', which would have required its recommendation before the NDPP could prosecute was rejected. This was because it would have been a violation of the NDPP's prosecutorial independence enshrined in section 179 of the Constitution. Although the Task Team's role was meant to be advisory in nature it soon became apparent that the non-NPA members of the team saw their role as supervisory rather than advisory. Indeed, as will be seen below, the 'two-stage process' was reintroduced causing a crisis of conscience for Pikoli.

158 With regard to the ATT's second task, namely, to consider a further amnesty process, the team was of the view that the only way to address the concerns was to provide a further amnesty similar to that of the TRC process.

158.1 Some members argued against another amnesty, pointing out it would undermine the TRC process, while others supported a new amnesty to encourage more disclosures.

158.2 The ATT decided not to make a recommendation on the question of another amnesty but to leave it in the hands of government.

158.3 It attached a draft Indemnity Bill to the report (as annex B) in case government decided to proceed with a further amnesty. The annex was not attached to the report in the version disclosed in *Nkadimeng 2*. However, the first 2 pages of the draft bill were attached to Macadam's affidavit (**FA5**) as RCM13 at p861. It would have provided for a rerun of the TRC's amnesty process.

159 With regard to the ATT's third task, namely, to advise on any legislative steps needed, it noted that its recommendations in relation to the first task do not require any legislation. However, it noted:

> "Should Government, however, decide on a further amnesty process …, legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court."

160 Much of the ATT's report was accepted by government and implemented, as is evident by the 2005 amendments to the Prosecution Policy and the introduction by President Mbeki of a Special Dispensation for Political Pardons in 2007, to be discussed below.

The Secret Further Report of the Amnesty Task Team

161 The secret Further Report of the ATT was disclosed by Macadam in his affidavit (**FA5**) as annex RCM15 at p864. Perhaps more than any other document, the Further Report reveals the real intent of those behind the political interference. The

report is undated, but it would have been generated in 2004 in the weeks or months following the submission of the ATT's first report to the Heads of Department Forum on 4 March 2004.

162 The report reveals that the Heads of Department Forum discussed the first ATT Report with members of the Task Team, "*whereafter they deliberated the Task Team's proposals and recommendations in camera*". Following these deliberations, the Heads of Department Forum indicated that they preferred the Task Team's recommendations relating to the establishment of a Departmental Task Team (referred to as Option I). However, they requested the Task Team to further consider the following aspects:

162.1 In performing its functions, the proposed Inter-departmental Task Team (**ITT**) must make use of existing structures rather than parallel structures.

162.2 Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the NDPP decides not to prosecute; and investigate the possibility and desirability of legislation, if required.

162.3 The proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee.

162.4 It is important that the proposed Task Team, the Inter-Ministerial Committee and the NDPP, in performing their functions and reaching decisions, should take the national interest into account.

162.5 Advise the Forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court (**ICC**).

162.6 Advise the Forum on a timeline for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.

163 Perhaps most revealing was the Forum's instruction to the ATT to explore ways in which private prosecution and civil litigation could be eliminated where the NDPP decides not to prosecute, including the possibility of fresh legislation to achieve this end. This exposes the intent to come up with a means to guarantee maximum impunity for apartheid-era perpetrators.

164 The fear that victims and families could turn to the ICC, in the event that avenues for accountability in South Africa were completely closed, presented a real fear to the Forum.

165 Equally chilling was the desire of the Forum for the ITT to "*work under the direct supervision of an Inter-Ministerial Committee*".

165.1 If there was any doubt that the prosecution process in relation to the TRC cases was to be under the thumb of political overlords, it was dispelled by this requirement. This is in fact what transpired.

165.2 As will be discussed below, towards the end of 2006, the ITT was instructed that it must submit a final recommendation to a "*Committee of Directors General*" in respect of each TRC case, which in turn must advise the NDPP in respect of who to prosecute or not.

165.3 In addition, it emerged that at least by 2007, if not earlier, there was a "*Cabinet Committee on Post TRC matters*", which was a subcommittee of the Justice, Crime Prevention and Security Cluster.

166 The proposal that all players in the process, including the NDPP, should "*take the national interest into account*" when making decisions in relation to the TRC cases was 'shorthand' for the expectation that all involved, particularly the NPA, would be expected to 'do the right thing.'

166.1 Needless to say, no attempt was made to define what the national interest meant in this context, although I am advised that the 'national interest' is not necessarily the same as the 'public interest'.

166.2 The national interest constitutes the interests of the state, usually as defined by its government. Typically, politicians invoke the 'national interest' in seeking support for a particular course of action.

166.3 The public interest on the other hand typically refers to the collective interests of a community or society, in particular when steps are taken on behalf of disadvantaged, marginalised and vulnerable people; as well as the pursuit of objectives that benefit society as a whole, such as the protection of civil liberties.

166.4 I am advised that while the national and public interest may coincide, in this instance it does not. The shielding of perpetrators of serious crimes from scrutiny and justice may have served the narrow or expedient interests of the state at that time, but it hardly served the public interests of victim communities or society more generally.

166.5 It goes without saying that the national interests, as espoused by the ATT, were also diametrically opposed to the 'interests of justice'.

Response of the ATT

167 The ATT then met to work out how to take the Heads of Department Forum's directives forward. They consulted legal experts who advised that setting up the Departmental or ITT Team did not require legislation.

167.1 Only a Memorandum of Understanding would be needed, although all existing structures, such as the NPA, would have to "*commit themselves and give their full support and cooperation*" to the process.

167.2 It was apparent that for this to work, everybody would have to 'play the game'. As it turned out, they could count on almost everybody in all departments to 'play the game,' or at least 'look the other way'.

167.3 However, two key persons in the NPA, Pikoli and Ackermann, were not willing to bow to political instruction. The charade could not work without them playing along. As will be seen below, the former would be shown the door while the latter was sidelined.

168 According to the Further Report, the question of "*eliminating private prosecution[s] and civil litigation in cases of a no prosecution* [ ] *elicited much debate*" within the ATT.

168.1 The ATT spoke to two State Law Advisers and obtained a legal opinion from Adv JH Bruwer, which was attached to the report, although it was not attached to the copy annexed to Macadam's affidavit. There appeared to be agreement that "*legislation eliminating private prosecution and civil litigation will at least affect a person's right to equality and the right of access to courts*".

168.2 They also doubted that "*the motivation for such legislation would meet the requirements of section 36 (the limitations clause) of the Constitution*", which would be "*seen as a further amnesty process*."

168.3 The ATT drew the Heads of Department Forum's attention to an article in the *Rapport* of 7 March 2004 where Archbishop Desmond Tutu was quoted as saying that those who did not receive amnesty should face prosecution and any new initiative to stop prosecutions "*would be seen as negating the amnesty process of the TRC*."

168.4 The ATT advised that the only way to eliminate private prosecutions and civil litigation would be by way of legislation and a Constitutional amendment which "*would not be desirable*."

168.5 It is interesting to note that in *Nkadimeng 1,* the Minister of Justice and the NPA argued that the Prosecution Policy amendments did not promote impunity because families and victims could still bring their own private prosecutions, even though they lacked investigative powers and the resources of the State. Judge Legodi, recognising the absurdity of this claim, noted in his judgment in *Nkadimeng 1* that "*crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted*."

168.6 It is not known if the State Law Advisors and Adv Bruwer were asked to provide an opinion on the constitutionality of the proposed amendments to the Prosecution Policy, which provided for an effective back door amnesty. Archbishop Desmond Tutu filed a supporting affidavit in the legal challenge to the new policy (in *Nkadimeng 1*), where he stated that the efforts of the

State "*represented a betrayal of all those who participated in good faith in the TRC process. It completely undermined the very basis of the South African TRC*." An unsigned copy of the Archbishop's affidavit is annexed hereto marked **FA25**.

169 In relation to the proposed establishment of an Inter-Ministerial Committee it is recorded in the Further Report that "*the Task Team supports this proposal*." The members of the ATT demonstrated their subservience in agreeing with the Heads of Department Forum. However, they were constrained to provide the views of the State Law Advisers who indicated that a further structure could prove cumbersome and "*might be seen as an attempt by the Government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision*."

170 The ATT cast further ignominy on itself when in response to the proposal that the "*national interest should be the paramount objective,*" it responded in servile fashion: "*the Task Team wholeheartedly agrees with this viewpoint of the Forum*." The ATT was more than happy to open the door to the imposition of the dominant political views onto prosecutorial decisions.

171 In relation to the involvement of the ICC, the ATT relied on the advice of Adv Bruwer who concluded that it was "*not inconceivable that a complainant who is prohibited […] from instituting a private prosecution in the national court may approach the International Criminal Court for relief*."

172 In relation to the question of setting a timeline for the Departmental Task Team to complete its work, the ATT declined to propose a timeline but proposed that "*the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into*

account the extent to which its objectives are achieved." Perhaps the ATT realised it should leave this decision in the hands of the office holder who was really calling the shots. In doing so, the ATT confirmed loudly and clearly that the question of the TRC cases was now firmly in the hands of those in political control.

Moratorium on investigating and prosecuting the TRC cases

173 It eventually emerged that between 2003 and 2004 an effective moratorium was placed on the investigation and prosecution of the TRC cases. When complainants such as Thembi Nkadimeng, sister of the late Nokuthula Simelane (who had been abducted, tortured and murdered by the SB) approached the PCLU they were told by prosecutors that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. Until this new 'policy' was issued, an effective moratorium on pursuing the TRC cases was in place. (In this regard see the founding affidavit of Thembi Nkadimeng filed in *Nkadimeng 2*. This affidavit is voluminous, but a copy can be supplied on request).

174 It is not known who authorised the halting of investigations, but since it involved suspending work on a large number of serious crimes, mostly involving murder, it is highly likely that the authority must have come from the very top. In addition, the heads of the NPA, DSO and SAPS must all have acquiesced in this decision, together with the cabinet ministers overseeing those departments.

175 The moratorium was confirmed in a letter from Acting NDPP, Dr MS Ramaite SC (**Ramaite**), dated 31 January 2013 to Nkadimeng, a copy of which is annexed hereto marked **FA26** in which he stated:

> "It is correct that the TRC cases were temporarily put on hold pending the formulation of guidelines. This was because it was deemed important that special considerations applied to these cases."

176 Before the imposition of the moratorium the views of the victims and families were not sought. Those most impacted by this massive suspension of the rule of law were not notified in advance or given an opportunity to make representations. They were kept in the dark, and only learned of it after the fact, when they pressed the PCLU for answers.

177 No time limit was placed on the moratorium. No announcement was made of it in any press statement, nor was it mentioned in any annual report in advance of its imposition, or indeed at the time it was imposed. As far as we are aware, no prior written authorisation was ever issued to authorise the suspension of the cases. It was apparently meant to last until the so-called guidelines were finalised, for which no date had been set. In effect, hundreds of murder cases were placed on ice indefinitely on the strength of unwritten arrangements.

178 I am advised that imposing this moratorium on the pursuit of the TRC cases was a deeply unlawful move by the authorities. There was no legal basis to single out these cases for different treatment to other serious crimes. Indeed, the abandoning of these matters pending future guidelines was particularly egregious since several of the crimes prescribed in this period (such as assault GBH) and, as pointed out by Ackermann, witnesses and suspects were dying.

179 It turned out the guidelines were amendments to the NPA's Prosecution Policy, which were only issued in December 2005. This meant that the moratorium was in place for between two and three years. As will be seen below, the issuing of the

guidelines did not result in the reopening of investigations into the TRC cases. Indeed, the clampdown only tightened.

Direct intervention to stop prosecutions

180 NDPP Ngcuka resigned in July 2004 and Ramaite was appointed as the Acting National Director of Public Prosecutions.

181 Ackermann, in defiance of the moratorium, pursued certain cases during 2004 in which investigations had already been finalised. These were the Blani and PEBCO 3 matters referred to above.

182 Ackermann also decided to prosecute three former SB members for their role in the 1989 poisoning of Reverend Frank Chikane, the former head of the South African Council of Churches. This was because all the evidence implicating them had already been led in the prosecution of Wouter Basson and no further investigations were necessary.

182.1 Basson was formerly the head of South Africa's secret chemical and biological warfare project. The three former policemen were former Major-General Christoffel Smith, Colonels Gert Otto and Johannes 'Manie' van Staden. None had applied for amnesty for this crime.

182.2 According to Ackermann in his affidavit in *Nkadimeng 2* (TN8 at pp 218 – 235 at para 17) (**FA8**), on the morning of 11 November 2004, the police were on the verge of effecting the arrests of three suspects. On the same morning Ackermann received a phone call from the late Jan Wagener (**Wagener**), the attorney for the suspects. Wagener told Ackermann that he would receive a phone call from a senior official in the Ministry of Justice,

and that he would be told that the case against his clients must be placed on hold.

182.3 Shortly thereafter Ackermann received a phone call from an official in the then Ministry of Justice. He was informed by the said official that a decision had been taken that the Chikane matter should be placed on hold pending the development of guidelines to deal with the TRC cases. Ackermann refused to follow this order and told the official that only the NDPP could give him such an instruction. The official told him that he would shortly receive a phone call from Adv Ramaite, the Acting NDPP.

182.4 A few minutes later Ramaite called Ackermann and instructed him not to proceed with the arrests. Ramaite also ordered Ackermann to immediately halt work on all TRC cases. Ackermann indicated in his affidavit that it could be safely assumed that the Acting NDPP was instructed at a political level to suspend these cases.

183 According to an interview conducted by the author Ole Bubenzer with Wagener in Pretoria on 8 May 2006 (reflected at page 130 of Bubenzer's book), when Wagener was advised that the arrests were going to be effected, he immediately intervened politically and put great pressure on the government to stop the proceedings. Wagener claimed that authorisation to suspend the arrests came from President Mbeki "*in an extraordinarily swift move*".

184 Macadam in his affidavit (**FA5**) confirmed that Ackermann advised him that a moratorium on the investigation and prosecution of the TRC cases had been put in place.

185 All TRC related investigations and prosecutions were halted and no TRC case proceeded between November 2004 and August 2007. Another two and a half years were wasted.

Amendments to the Prosecution Policy

186 On 1 February 2005, Pikoli was appointed NDPP by the President. His appointment was for a 10-year term as contemplated in section 12(1) of the NPA Act.

187 In line with the recommendations of the ATT, guidelines were drawn up with the aim of incorporating them as amendments to the Prosecution Policy. Ackermann consulted with Gerhard Nel, senior prosecutor in the DSO, who played a leading role in formulating the proposed amendments.

188 According to Ackermann, the PCLU drew up two legal opinions assessing the constitutionality of the proposed amendments to the Prosecution Policy and submitted these to the NDPP. The opinions pointed out that the amendments amounted to a rerun of the TRC's amnesty process and would not survive constitutional scrutiny. At a number of meetings, Ackermann voiced his opposition to the proposed amendments.

189 Macadam shared the view that the proposed amendments were unconstitutional in that they permitted the NPA not to prosecute perpetrators if they met the criteria for granting amnesty as had been applied by the TRC.

190 During 2005, Ackermann again met with representatives of the family of Nokuthula Simelane who requested him to proceed with various charges against certain suspects and to pursue certain lines of inquiry. The FHR, on behalf of the Simelane family, presented the PCLU with a memorandum dated 18 August 2005 setting out

the basis for the proposed charges. Ackermann again advised them that his hands were tied pending the new guidelines.

191 No victim, family or organisation representing their interests was consulted during the drawing up of the amendments to the Prosecution Policy. However, during an interview with the author Ole Bubenzer on 8 May 2006, Wagener, who acted for several of the perpetrators, said that representatives of the former security police were consulted informally on a very occasional basis (reflected at page 132 of Bubenzer's book).

192 Following the approval by the Minister of Justice, and after consultation with the Directors of Public Prosecutions as required by section 179(5) of the Constitution and section 21 of the NPA Act, amendments to the Prosecution Policy were tabled in Parliament and became effective on 1 December 2005. The amendments were largely based on the recommendations crafted by the ATT. According to the minutes of the Justice Portfolio Committee on 17 January 2006, it was Gerhard Nel who addressed the meeting on behalf of the NPA introducing the amendments to the NPA's prosecution policy.

193 The amendments were contained in Appendix A to the Prosecution Policy and were titled: "PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994" (**the Amendments** or **the Guidelines** or the **amended Prosecuting Policy**), a copy of which is annexed hereto marked **FA27**.

194 The amendments were introduced as having been formulated "*in view of*" the "*essential features*" of the response of the President on behalf of government to the

TRC's final report to the joint sitting of Parliament on 15 April 2003. Ironically, the policy claimed that it was giving due weight to, *inter alia*:

194.1 The human rights culture which underscores the Constitution, and the status accorded to victims in terms of the TRC.

194.2 The constitutional right to life and the non-prescriptivity of the crime of murder.

194.3 The fact that the TRC's amnesty did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused.

194.4 The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

194.5 The NPA represents the community and is under an international obligation to prosecute crimes of apartheid.

194.6 The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice.

194.7 The equality provisions of the Constitution.

194.8 Government did not intend to mandate the NDPP to perpetuate the TRC amnesty process.

195 While the amendments to the policy professed to be pursuing various noble objects, including not perpetuating the TRC amnesty – the maintenance of impunity was what was intended, and is what transpired in practice.

196 Part B of the policy set out the "*procedural arrangements*" for those wanting to make representations to the NDPP in respect of their crimes arising from conflicts of the past and which were committed before 11 May 1994. These included *inter alia*:

196.1 Representations to the NDPP must include full disclosure in relation to the crime for which the applicant seeks a decision not to prosecute.

196.2 Regional DPPs had to immediately transfer all their cases to the Office of the NDPP.

196.3 The PCLU would be assisted in the execution of its duties by a senior designated official from the following State departments:

196.3.1 The National Intelligence Agency.

196.3.2 The Detective Division of the South African Police Service.

196.3.3 The DOJ.

196.3.4 The DSO.

196.4 The NDPP must approve all decisions to investigate or prosecute or not.

196.5 The NDPP may obtain the views of any private or public person or institution, or intelligence agencies and the Commissioner of the SAPS, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.

196.6 The NDPP must inform the Minister of Justice in advance of all decisions he intends taking in respect of matters relating to conflicts of the past.

196.7 The NDPP must speak with the Minister of Justice before making public statements on any matter arising from the conflicts of the past.

196.8 All state agencies are requested not to use any information disclosed by perpetrators in these procedures in any subsequent criminal trial against such persons.

197 Part B was aimed at ensuring a tight grip on the TRC cases. The NPA's work and decisions on these matters would be under the close scrutiny of groups such as the NIA, DOJ and SAPS. The NDPP had to speak with the Minister of Justice before taking any decisions in relation to the cases or making any public statements in connection with them.

198 Part C of the policy set out the criteria that had to be applied when making decisions to prosecute cases from conflicts of the past. A decision not to prosecute could be made on the back of several factors which included:

198.1 Whether the applicant has made full disclosure relating to his crime.

198.2 Whether the crime was "*associated with a political objective committed in the course of conflicts of the past*" and was "*proportional*" to the political objective in question, which were a replica of the TRC's amnesty criteria.

198.3 The degree of the applicant's co-operation and the personal circumstances of the applicant, including:

198.3.1 whether the ill-health of or other humanitarian considerations justified non-prosecution of the case;

198.3.2 the offender's sensitivity to the need for restitution;

198.3.3 the degree of remorse shown and his attitude towards reconciliation;

198.3.4 renunciation of violence and willingness to abide by the Constitution; and

198.3.5 degree of indoctrination to which the offender was subjected.

198.4 The extent to which prosecution or non-prosecution facilitate or undermine "*nation-building through transformation, reconciliation, development and reconstruction within and of our society*".

198.5 Whether the prosecution may lead to conflict or further traumatisation of victims.

198.6 Any further criteria, which might be deemed necessary.

199 The Part C criteria not only provided for a rerun of the TRC's amnesty criteria behind closed doors but also opened the door to practically any excuse not to prosecute. These included whether a prosecution might undermine reconciliation and whether a perpetrator was subjected to indoctrination, which was imposed on all who grew up in Apartheid South Africa. The amendments pretty much guaranteed the perpetuation of impunity, especially if the NDPP in place was willing to play along.

200 Once the amendments came into force, Ackermann again expressed his opposition to them as he felt that they violated the constitutional rights of the complainants and constituted unwarranted interference in the prosecutorial independence of the NPA. He complained to various officials in the NPA, including the NDPP, that the

guidelines were aimed solely at accommodating perpetrators and providing them with avenues to escape justice.

Developments post the amendments to the Prosecution Policy

201 Once the new guidelines had been issued in terms of the Prosecution Policy amendments, this should have brought an end to the so-called moratorium imposed on the TRC cases. This was not to be. The clampdown continued, with renewed vigour.

202 In the NPA Annual Report of 2005/06, Pikoli indicated that he was "*sad to report*" that "*not much has been achieved*" with regard to the TRC cases, despite all their attempts to take them forward:

> "Following Government's response to the final Report of the TRC, and because it is important for the prosecuting authority to deal with these matters on a uniform basis in terms of specifically defined criteria, the National Director, with the concurrence of the Minister for Justice and Constitutional Development and after consultation with the various Directors of Public Prosecutions issued prosecution policy and policy directives in terms of section 179(5)(a) and (b) of the Constitution regarding the handling of such cases arising from conflicts of the past. This prosecution policy and policy directives, which must be observed in the prosecution process, were tabled in Parliament towards the end of 2005 and came into operation on 1 December 2005. During January and February 2006, the NPA briefed the Portfolio Committee on Justice and Constitutional Development and the Committee on Security and Constitutional Affairs of the National Council of Provinces regarding the contents of these directives. **I am sad to report, as at the time of writing this report, that not much has been achieved in this regard despite all the attempts that have been made in taking this matter forward**." (Bold added)

203 Significantly, the annual report also confirmed that the TRC cases had been "*placed on hold*" pending the approval of the prosecution guidelines:

> **"In late 2004, the Acting National Director requested that prosecutions for TRC cases be placed on hold pending the formulation and approval**

> **of prosecution guidelines relating to these matters. The guidelines were only finally approved in early 2006.** The PCLU, as a result of complaints by various persons, identified at least 15 cases which warrant further investigations in order to determine whether prosecutions are justified. On an ongoing basis, the PCLU receives requests from victims to look into cases where amnesty has been refused or not applied for. Where these matters can be followed up without further investigations and where no prosecutions are warranted, they are disposed of. Seven such matters have been dealt with in this manner. In 2006, the Directors of Prosecution: Mthata and Pretoria seconded two Senior State Advocates to the PCLU to assist with these matters." (Bold added)

204 Copies of the relevant pages of this annual report are annexed hereto marked **FA28**. A copy of the full report can be made available on request.

205 While the annual report confirmed on a *post facto* basis that the suspension or moratorium on the TRC cases was imposed in late 2004, in reality it was already in place during 2003, as set out above.

206 Interestingly the decision to halt the TRC cases was styled as a "*request*" by the Acting NDPP. It was not disclosed who this request was directed to.

207 With the exception of the Frank Chikane attempted murder case, which did not require further investigation, the PCLU was unable to pursue any other TRC cases.

208 According to Ackermann, the SAPS and DSO persisted in their refusal to provide investigators. It also proved difficult to even convene meetings of the ITT (referred to in Part B of the amendments) who were "*meant to advise the PCLU on what cases to pursue.*" Pikoli had hoped that the ITT, particularly the SAPS and the NIA would provide investigative and intelligence support for these cases, however, this support was "*never provided*."

209 Once the guidelines were issued in December 2005, Ackermann wished to proceed with the five cases he had identified that had good prosecution prospects and the

11 cases which required substantial investigation. These cases were identified as "*major priorities*" for the PCLU for the 2006 – 2007 period. In addition, during 2006 he was getting more requests from victims' families for further investigations in their cases.

210 According to Pikoli, once the Prosecution Policy amendments became effective in December 2005, he reviewed the available evidence implicating the three suspects in the Chikane attempted murder case, which, in his opinion warranted prosecution. None had applied for amnesty, so he gave the initial instruction to proceed with the prosecution in February 2006.

211 The NPA made a presentation to the Justice Portfolio Committee on 8 March 2006, a copy of which is annexed hereto marked **FA29**. In relation to its performance in respect of the TRC prosecutions it disclosed the following at slide 39:

> "PERFORMANCE AGAINST TARGETS: 2004 / 2005
>
> 1. TRC Prosecutions
>
> - Audit of 300 cases on hand in NPA structures.
> - Closure of 167 cases. No grounds for prosecution.
> - Prosecutions instituted in S v Terreblanche, S v Blani and S v Nieuwoudt & 2 Others.
> - **Further prosecutions put on hold in November 2004 pending the formulation of guidelines.**
> - Assistance provided to reconvene Motherwell amnesty hearing." (Bold added)

212 In the same presentation dealing with performance targets for the year 2005/06 the following was noted at slide 43:

> "PERFORMANCE AGAINST TARGETS: 2005 / 2006

1. TRC Prosecutions

- Failure to finalise guidelines **results in no further prosecutions being instituted.**

- Late 2005 Constitutional Court sets aside TPD and Supreme Court of Appeal rulings in respect of jurisdiction for conspiracies for external crimes in S v Wouter Basson." (Bold added).

213 In March 2006, Ackermann again met with the representatives of the Simelane family, who in addition to the crimes of kidnapping and murder, wished the NPA to charge certain suspects with torture, as a crime against humanity in terms of customary international law, since such crimes never prescribe. Ackermann had to advise them that he was unable to take the case forward "*as there were no investigators attached to the PCLU*", and his requests to the SAPS and the DSO for competent and experienced investigators had fallen on deaf ears.

214 The Simelane family lawyers wrote to Pikoli, the NDPP at the time, requesting him to reach out to the SAPS and the DSO in order to secure competent investigators for the PCLU as a matter of urgency. These efforts were not successful. Thereafter Ackermann urged the family lawyers to seek an inquest rather than a prosecution. This is because he realised that there would be no investigations, let alone prosecutions "*taking place in the political context that prevailed at the time,*" as set out in his affidavit in *Nkadimeng 2* (TN8 at p217) (**FA8**). At that time the family was reluctant to pursue an inquest when the evidence warranted a prosecution.

215 Annex RCM10 (at p835) to Macadam's affidavit (**FA5**) reveals that on 30 October 2004, Ackermann addressed an internal memorandum to Pikoli and Ramaite in order to respond to a request made by the "TRC Committee" on 25 October 2006 to furnish details regarding all the cases closed by the PCLU, and in particular what led to the prosecution of one Blani. The "TRC Committee" was presumably either

the Interdepartmental Task Team or the Inter-Ministerial Committee, referred to above. The memorandum disclosed that some 27 cases had been closed for various reasons. Notable cases on the list included:

215.1 Death in detention of Ahmed Timol.

215.2 Death in detention of Steve Biko.

215.3 Murders committed by IFP aligned Ermelo Black Cats gang in Ermelo.

215.4 Ciskei coup d'état, also known as Operation Katzen.

215.5 General Basie Smit, former SB commander, for various offences.

215.6 Refusal of amnesty to Mbeki and 37 high ranking ANC members.

215.7 IFP Hit Squads in Esikhaweni and elsewhere in KZN.

215.8 Bombing of the Early Learning Centre and other activities of the CCB.

216 In the same memorandum, Ackermann referred to an attempt to resurrect the investigation of the TRC cases, but he objected strenuously to the planned reappointment by the SAPS of Senior Superintendent Karel Johannes 'Suiker' Britz.

> "**The reappointment of Senior Superintendent Britz**
>
> At its last meeting, the Committee was informed by Assistant Commissioner Jacobs that Senior Superintendent Britz would be reappointed to Investigate the dockets in possession of SAPS.
>
> I wish to express my concern at this. Britz was a former member of the SB, who, prior to the PCLU being involved with TRC cases, assisted the OPP: Pretoria with cases involving the Liberation Movement.
>
> Former Police Commissioner General van der Merwe had formed an organization entitled *"The Foundation for Equality before the* Law" which was intended to ensure that no further prosecutions of SB members would take place.

> When I and my staff were appointed to take over the TRC cases in the DPP Office: Pretoria, we gained the firm impression that Britz was not only very sympathetic towards this organization but had regular contact with General van der Merwe.
>
> In particular, Britz tried to persuade me and my Deputy on numerous occasions that there was a provable case of terrorism against President Mbeki arising from the landmine campaign. This was raised in the context that were SB members to be prosecuted, the President would also have to be charged. It was clear that he was against prosecutions of SB members. Despite his claims, he could never produce a docket implicating the President. At one stage, he informed me that the docket was with General van der Merwe and his legal advisor. This raises a very serious question as to how an official police docket could be retained by General van der Merwe, who was not entitled to possess police material after his retirement from SAPS.
>
> When the issue of prosecuting SB members for the Pebco 3 incident was raised with their lawyer, he immediately indicated that he was preparing to submit a docket calling for the prosecution of the President. I can only draw the inference that sharing of information took place between Britz and Van der Merwe.
>
> The issue of the prosecution of the President was raised at the highest level of Government and resulted in enquiries being conducted by Minister Maduna as well as members of the President's office. All parties were satisfied that the NPA had no intention of prosecuting the President. In fact, Mr Ngcuka had been provided with a report that no such case had been established in the TRC records.
>
> This highly embarrassing incident caused Mr Ngcuka to instruct that Britz vacate the offices of the OPP and that all the relevant SAPS dockets be removed. Britz was subsequently relocated in the SAPS Crimes Against the State Unit. He requested the PCLU to provide written confirmation of the fact that the decision had been taken not to prosecute the President. When he received the letter, he tried to persuade the PCLU to reconsider its decision.
>
> I therefore believe that Britz lacks the necessary objectivity to be of assistance to the Committee and that his reappointment may lead to further controversy as well as the potential leaking of information to General van der Merwe."

217 This passage disclosed the attempt of the SAPS to insert an investigator, the late 'Suiker' Britz, who had become known as an apartheid-era fixer, into the TRC cases. The memorandum alleged that Britz was "*sympathetic*" to former members of the SB and opposed their prosecutions. According to Ackermann, Britz had leaked

information and a docket to retired General Johann van der Merwe. In addition, Britz's main preoccupation appeared to be that of agitating for a terrorism charge against Mbeki.

218 I am advised that some 12 years later when there was an attempt to pursue the TRC cases afresh by the DPCI, the late investigator, Frank Dutton (who was then the FHR's private investigator), complained that SAPS had again appointed investigators to the TRC cases who were either former SB members, or sympathetic to the former SB. Correspondence to this effect can be supplied on request.

219 Following Pikoli's decision to proceed with the Chikane attempted murder case, the three suspects made representations to him in terms of the Guidelines for a decision not to prosecute. Pikoli set up a team under Adv JP (Torie) Pretorius to review their representations which concluded after a few months that the three had declined to disclose the full truth. Ackermann refused to participate in this review as he viewed the process as unconstitutional. After considering the review report, Pikoli wrote to the lawyers of the three suspects in July 2006 informing them that their representations were unsuccessful, and he intended to pursue with the prosecution.

220 The decision to prosecute those implicated in the attempted murder of Chikane was the tipping point which saw the complete unravelling of the attempts by the NPA to hold apartheid-era perpetrators accountable for their crimes.

The politicians intervene

221 During 2006, it became increasingly clear to government that NDPP Pikoli and PCLU head Ackermann would pursue TRC cases when they were in a position to

do so. The first complaint levelled by government functionaries against the NPA was that Ackermann was seen as a loose cannon.

222 Pikoli, in his affidavit in *Nkadimeng 2* (TN7 at p 170) (**FA22**), records that in early 2006, SAPS Commissioner Jackie Selebi objected to Ackermann's participation in the TRC cases claiming that he intended to prosecute the leadership of the ANC. This was notwithstanding Pikoli's denial that any such plans were in place. Pikoli reminded Selebi that Ackermann was appointed as PCLU head under Presidential proclamation, and it was not for the SAPS to dictate who should discharge the mandate given to the PCLU.

223 Pikoli then approached the Presidency in order to seek the collaboration of the role-players in the ITT to support the TRC cases. A meeting was arranged in mid-2006 by Reverend Frank Chikane, who was then Director General in the Presidency. Coincidentally this was the same Chikane who was the victim of poisoning by the SB in 1989. The meeting was attended by Chikane, the Directors General of Justice and the NIA, Selebi, the Secretary of the Defence Secretariat, Mr. Loyiso Jafta, Chief Director in the Presidency and Pikoli. Selebi again complained about Ackermann's involvement in the process.

224 Later in 2006, Pikoli was summoned to a meeting which was convened at the home of Minister Zola Skweyiya, then Minister of Social Development. The meeting was attended by the Minister of Police Charles Nqakula, Minister of Defence Mosiuoa Lekota, Thoko Didiza, Acting Minister of Justice (representing Minister Brigitte Mabandla who was indisposed) and Mr. Jafta. The meeting was called by Acting Minister Didiza. Pikoli was advised that the meeting was going to deal with the prosecution in the Chikane matter.

225 At this meeting it became clear that there was a fear that cases like the Chikane matter would open the door to prosecutions of ANC members. In his affidavit in *Nkadimeng 2* (**FA22**), Pikoli quoted from his affidavit filed before the Ginwala Commission as to what transpired at this meeting:

> "The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann's involvement in the process and the issue of whether it was Advocate Ackermann or me who was behind the decision to prosecute.
>
> The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.
>
> The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.
>
> I explained to the Ministers that the decision to proceed with the prosecution rested with me as did all other decisions in regard to post-TRC prosecutions being considered by the PCLU. I assured them that no prosecution would be undertaken without my specific direction and reiterated my concern about the delay in the process particularly in view of the requirement that I report to parliament on these matters.
>
> …
>
> The Minister of Defence appeared satisfied with my explanation that I would exercise the decision as to whether there was a prosecution or not. The Minister of Safety and Security appeared to continue to be worried about the involvement of Advocate Ackermann. I have no recollection of a particular position adopted by the Acting Minister of Justice."

226 This meeting pointed to what was probably the overriding concern of government, namely that pursuing a TRC case, like the Chikane matter, would place pressure on the NPA to pursue cases against ANC members.

227 In 2006 Pikoli was again summoned to a further meeting which took place at the office of the Presidency. At this meeting Pikoli proposed that Dr Silas Ramaite, the

Deputy National Director of Prosecutions, should chair the Task Team, given the adverse views of Ackermann and to get the Task Team working. The proposal was accepted.

228 Subsequent to this meeting, there was a further meeting of Ministers in the security cluster at the office of the Minister of Safety and Security. This was attended by the Minister for Safety and Security, the Minister of Social Development, Acting Minister Didiza, Selebi, various DGs and Mr. Jafta. The proposal for the establishment of a working group was put to the Ministers and it was accepted. After this meeting, in early October 2006, Pikoli again sent letters to the various Directors General, Selebi and the DSO inviting them each to nominate a senior official to serve on the ITT.

229 The ITT met for the first time on 12 October 2006. Pikoli attended the opening session of the first meeting together with his adviser, Ms. Kalyani Pillay, the Directors General of the NIA and Justice and Mr. Jafta from the Presidency. Pikoli did not participate further in the activities of the Task Team. According to Macadam, the NPA representatives on the ITT were Ackermann and Ramaite. Macadam noted in his affidavit (at p 796 at para 30, p801) affidavit (**FA5**) that on occasions when he stood in for Ackermann at meetings of the ITT, that:

> "… the task team was predominantly comprised of members of the intelligence community who were **more intent on cross-examining me as to why matters should be investigated** rather than addressing the issue of all the outstanding cases." (Bold added)

230 It is interesting to note that Mr. Loyiso Jafta, Chief Director in the Presidency, who had an intelligence and security background, was present at the meetings of the ITT. Strictly speaking he should not have been there, as Part B of the Amendments, did not provide for a member of the Presidency to be part of the group assessing

the TRC cases. This indicated that the Presidency intended to have direct involvement in the decisions relating to the TRC cases.

231 Meanwhile Pikoli had received further representations from the suspects in the Chikane matter claiming that they had received indemnity against prosecution in terms of the Indemnity Act 35 of 1990. Pikoli sought an independent opinion from a senior counsel who advised him in November 2006 that the claimed indemnities were no bar to prosecution and that Act 35 of 1990 had been repealed in 1995.

232 Ramaite reported to Pikoli that at the ITT meeting on 25 October 2006, Ackermann had presented an audit report of all the TRC cases in the possession of the PCLU. Ramaite also reported to Pikoli that at the 6 November 2006 meeting of the ITT, Joseph Lekalakala, a senior officer in the SAPS Crime Intelligence Division, stated that National Commissioner Selebi believed that Chikane was not interested in a prosecution. However, Ackermann advised that Chikane had left the matter in the hands of the NPA.

233 In early December 2006 Pikoli was advised by Ramaite that Selebi was insisting that Chikane had not been consulted about the proposed prosecution. This claim was rejected by Pikoli since he knew that Chikane had been extensively consulted. According to Pikoli, he had personally met with Chikane during 2006 and 2007, who advised that while he may have forgiven his perpetrators, insofar as the application of the law was concerned, the matter must take its ordinary course. Pikoli asserted that Chikane said that if a decision was made to prosecute, he would accept that. Although Pikoli was aware that Ackermann had discussed the matter with Chikane as far back as 2004, he instructed Ackermann in December 2006 to once again visit Chikane to confirm his position.

234 According to Ackermann, on 6 December 2006, the PCLU received a letter from the head of the SAPS Legal Support section, Major General PC Jacobs, representing the view of the National Commissioner, which bluntly stated that before any prosecutorial decision could be made in respect of the TRC cases, the Task Team must submit a final recommendation to a Committee of Directors General in respect of each case, which in turn must advise the NDPP who to prosecute or not.

235 Towards the end of 2006 it became clear to Pikoli that "*powerful elements within government structures were determined to impose their will on my prosecutorial decisions*." In this regard in his *Nkadimeng 2* affidavit (TN7 at p 170) (**FA22**), Pikoli quoted from his affidavit filed before the Ginwala Enquiry:

> "In December 2006 Dr Ramaite reported to me in regard to the contention raised by Mr. Selebi through Commissioner Jacobs that it was the function of the Task Team that it should make a final recommendation to a body identified as the "Committee of Directors General" which would in turn make recommendations to me. In essence the proposal made by Mr. Selebi and subsequently supported by the Directors General of Justice and NIA amounted to a reversion to a two-stage process in which my decision on any prosecution would be dependent upon a prior recommendation by an intervening committee of directors general which would be subject to the same constitutional challenge as had led to the rejection of this proposal in 2004.
>
> It became clear to me that there was a material misunderstanding in regard to the role of the Task Team and that unless this was resolved, I would not be able to carry out my functions within the contemplation of the relevant legislation and as envisaged by the Government."

236 The penny finally dropped with Pikoli towards the end of 2006. Up until this point he had operated on a good faith basis that his counterparts in the other departments in the ITT would support him to resolve the TRC cases. In fact, they never had any such intention. It is quite apparent that they saw their role as clamping down on the cases from proceeding. Since it appeared to them that Pikoli might act on an

independent basis, the communication from Maj Gen Philip Jacobs made it abundantly clear that Pikoli was not to act without their permission.

237 It was becoming apparent that the central concern of government leadership was that the pursuit of the TRC cases could precipitate cases against ANC members, and for that reason all cases had to be stopped, even if it meant denying justice to the families of Nokuthula Simelane, the Cradock Four and others.

The axe falls on the TRC cases

238 In early 2007, as a result of the differences in approach that had developed between the NPA and the SAPS, NIA and DOJ, Pikoli advised Selebi and the Directors General that a serious misunderstanding had arisen. Pikoli resolved to approach the Minister of Justice and request her guidance. According to Pikoli, pending such response, "*the functioning of the Task Team was compromised by the uncertainty*" and it held no further meetings until 8 August 2007.

239 On 5 January 2007, Justice Minister Mabandla disclosed in a press statement the need for the development of a policy on presidential pardons for prisoners who alleged that their offences were politically motivated. A copy of this press statement is annexed hereto marked **FA30**. According to the Minister the matter was complex and, since there was no legal precedent, "*a political solution*" was required. The proposal was in line with the recommendations of the ATT. The Minister noted that:

239.1 Some applicants for pardons did not apply for amnesty from the TRC because their political parties did not support the TRC.

239.2 Some of the applicants pleaded ignorance of the TRC processes.

239.3 Some of the crimes committed by the applicants committed took place after the cut-off date for TRC amnesty applications.

240 Towards the end of January 2007, Ackermann and Adv Mthunizi Mhaga (also of the PCLU) reported to Pikoli that they had met with Chikane on 22 January 2007 who confirmed that he was not against a prosecution and that the matter should take its course. Pikoli then wrote to the attorneys of the three suspects on 25 January 2007 and informed them that the matter would now proceed.

241 Around this time, the former Minister of Police, Adriaan Vlok, and the former Commissioner of Police, General Johann van der Merwe, both made representations to Pikoli in terms of the Guidelines. They both admitted to authorising the murder of Chikane and requested Pikoli not to prosecute them in the light of this disclosure. However, according to Pikoli they declined to make full disclosure in response to requests for information and he declined to grant them immunity from prosecution in terms of the Guidelines.

242 On 6 February 2007, Pikoli had a meeting with Minister Mabandla. During this meeting it appeared that she had gained the impression that Pikoli had previously agreed not to pursue the TRC cases.

243 On 8 February 2007, Mabandla addressed a letter to Pikoli titled "TRC MATTERS", a copy of which is annexed hereto marked **FA31** (attached to Pikoli's affidavit as VPP2 at p208), in which she stated the following:

> "I must advise you at the outset that the media articles **alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise**. In our discussions you briefly mentioned to me **that the NPA will not go ahead with prosecutions**. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty." (Bold added).

244 An example of one of the articles in the press is from the Beeld newspaper titled "*Cops up for apartheid crimes*" which was published on 7 February 2007. A copy of this article is annexed hereto marked **FA32** (VPP3 at p209).

245 According to Pikoli, he was at a loss to explain how the Minister reached such a conclusion. Her letter disclosed an assumption that the TRC matters would not be prosecuted. Pikoli in his affidavit in *Nkadimeng 2* (**FA22**) (TN7 at p 170) stated that he:

> "…found this to be a disturbing development as it appeared that at a political level there was an expectation that I would not prosecute the TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear, favour or prejudice."

246 Pikoli decided to prepare a detailed memorandum for the Minister to set out the history behind the policy to the TRC cases and to inform the Minister of the problems experienced in implementing this policy. This "*internal secret memorandum*" was titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007, a copy of which is annexed hereto marked **FA33**. This memorandum (at p134) was annexed to Pikoli's affidavit before the Ginwala Commission marked as "TRC1". It was also attached to Pikoli's supplementary 'in camera' affidavit in *Nkadimeng 2* (at p130).

247 In this memorandum Pikoli bluntly concluded that there had been "*improper interference*" with the work of the NPA in relation to the TRC cases and that he had been "*obstructed from taking them forward*." He complained that such interference impinged upon his conscience and his oath of office. Moreover, he was now unable

to deal with these cases in terms of the normal legal processes and he sought guidance on the way forward. In particular Pikoli pointed out that:

247.1 The problems are "*hindering and obstructing the NPA in fulfilling its constitutional mandate, namely, to institute criminal proceedings without fear, favour or prejudice*".

247.2 The SAPS and NIA had not made dedicated members available to the NPA to gather sufficient and admissible evidence in the TRC cases.

247.3 There were differences in interpretation in relation to the role of the other state departments in relation to the "*prosecutorial decision-making process*".

248 Pikoli concluded by stating that:

> "I have now reached a point where I honestly believe that **there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions** on this particular matter.
>
> It would appear that there is **a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along**. My conscience and oath of office that I took, does not allow that.
>
> Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter." (Bold added).

249 Remarkably, Pikoli never received any response from Minister Mabandla to his memorandum, not even the barest denial that her department was complicit in the improper interference in the work of the NPA. Given the alarming matters he raised and given that the law criminalises obstruction of the work of the prosecuting authority, Pikoli indicated in his affidavit in *Nkadimeng 2* (**FA22**) that he was shocked

he did not get an immediate response from the Minister. This suggested to Pikoli that the Minister preferred for the deadlock between the NPA and the DOJ, SAPS, NIA to remain in place. This meant that the ongoing suppression of the TRC cases would persist.

250 On 3 May 2007, Pikoli and Ackermann appeared before the Justice Portfolio Committee in Parliament. The minutes, a copy of which is annexed hereto marked **FA34**, reflect the following discussion in which Pikoli was remarkably frank about what was stopping the prosecutions of the TRC cases.

> "Discussion
>
> **Mr Joubert asked what was causing the delay in prosecutions of the TRC and when these might be finalised.**
>
> Adv Anton Ackermann, Special Director: NPA, replied that in October 1998 the TRC had recommended prosecutions. A Human Rights division was established in the NPA to evaluate the cases and to prosecute. When the DSO was created in January 2001 the Human Rights Division was disbanded, and its work was transferred to the DSO. Adv Ackermann, when joining the NPA, was given a mandate in March 2003 to declare priority crimes. All 400 TRC prosecutions had been immediately declared as priority crimes. In April 2003 the President had stated that there would be no further amnesty processes and ruled that prosecutions would be instituted and that a number of agencies must assist in the prosecutions. Adv Ackermann personally declined to prosecute 92 cases. Sixteen were identified for investigation and potential prosecution. On 9 November 2004 Adv Ackermann was stopped when trying to arrest three security policemen and charge them with poisoning of identified people. Dr Ramaite had instructed him not to proceed with the arrest, but rather to formulate guidelines how prosecutions should be conducted. This formulation took two years. In early 2006 the guidelines were approved. They did not make provision for a committee but stated that in the execution of the prosecution duties other agencies must assist. A Task Team was established, and a number of meetings were held. Adv Ackermann commented that it was unfortunate that to date no meaningful results had been achieved from these meetings. **The Annual Report of 2006 also noted on page 4 that not much had been achieved, despite all the attempts to take this matter forward. He maintained that the PCLU was not the cause of the delays and he suggested that perhaps the National Director of Public Prosecutions should comment further.**

> **Adv Vusi Pikoli, National Director of Public Prosecutions, added that this was a politically sensitive issue.** The legal processes must solve the problem. **Whenever there was an attempt to charge members of the former Police Services there was political intervention, and effectively the NPA was being held to ransom by the former generals**. On the other side the families of the victims were pressing for prosecution. The guidelines were not universally accepted and some NGOs, including Legal Resources Centre, wished to challenge the constitutionality of the guidelines. There were ongoing discussions as to how best to proceed. The President, in addressing parliament, indicated clearly that the matters would be dealt with, and so this was an ongoing matter.
>
> The Chairperson stated that she was aware of some efforts from the Department of Justice. She asked that Adv Pikoli provide the Committee with a full report on the events to date in writing, so that the Committee could try to assist as this clearly went beyond just the one case cited by Adv Ackermann. It was undesirable that these problems should still be delaying matters." (Bold added).

251 The blunt statement by Pikoli that the prosecution of the TRC cases "*was a politically sensitive issue*" and "*whenever there was an attempt to charge members of the former Police Services there was political intervention, and effectively the NPA was being held to ransom by the former generals*" should have set alarm bells ringing.

251.1 Pikoli was expressing his abject frustration that former apartheid generals seemed to be able to exert extraordinary influence over the justice system; and were able to engineer political interventions when their people were being pursued.

251.2 The fact that the Justice Portfolio Committee, across the political spectrum, did not raise the alarm and call for an independent inquiry into the alleged violation of the rule of law, is nothing less than shameful. After all, this was not anybody making a wild claim, it was the NDPP, South Africa's chief prosecutor.

251.3 Their dereliction of duty cost our country dearly. If they had cast aside their political interests and acted in the interests of equality, justice and the rule of law, much of the damage wrought by the political interference could have been avoided.

252 In July 2007, Thembi Nkadimeng, sister of the slain and disappeared Nokuthula Simelane, together with the wives of the Cradock Four filed an application in the High Court to have the amendments to the Prosecution Policy declared unconstitutional and set aside. They argued that the amendments were designed for the sole purpose of guaranteeing impunity for apartheid-era perpetrators – and ultimately to deny them truth, justice and closure. The proceedings were opposed by the Minister of Justice and the NDPP. These proceedings are referred to as *Nkadimeng 1*. A copy of these voluminous papers can be supplied on request.

253 Also in July 2007, after several months of negotiation between the PCLU and the attorneys of the accused in the Chikane attempted murder case, a plea and sentence agreement was reached. On 10 July 2007, Pikoli sent a memorandum to the Minister informing her of the fact that the case had been set down for hearing in court on 17 August 2007 and that all the accused will plead guilty to a charge of attempting to murder Chikane by means of poisoning. She was also advised that the court would be asked to confirm the plea and sentencing agreement.

254 Around 10 July 2007 Pikoli went on compassionate leave because of the illness and subsequent death of his mother. In his absence, on 17 July 2007, Ramaite and Ackermann were summoned to a meeting with the Minister and reported to her on these developments.

255 On 17 August 2007, those implicated in the Chikane case pleaded guilty in exchange for suspended sentences in terms of section 105A of the Criminal Procedure Act. Vlok and Van der Merwe were sentenced to ten years in prison suspended for five years, while the other three received five-year prison sentences, suspended for five years. A copy of the plea and sentence agreement is annexed hereto marked **FA35**.

256 According to Ackermann, this case ought to have opened the door to the prosecution of General Basie Smit, who succeeded Van der Merwe as Commander of the SB in October 1988, as well as other senior officers of the both the SAPS and the SADF. However, this was now the end of the line. No further cases were pursued which, according to Ackermann, can be attributed wholly to the political interference in the work of the NPA.

257 According to Pikoli in his affidavit in *Nkadimeng 2*, he would have preferred a full prosecution because Adriaan Vlok and Johan van der Merwe only made limited disclosure. They confined their disclosure to facts that for the most part were already in the public domain and declined to reveal information about the compiling of the hit lists and who was behind their compilation. They did not reveal other names on the lists, nor the *modus operandi* of the other hits or the identities of the other masterminds and perpetrators.

258 While a full prosecution would have produced greater truth and accountability, Pikoli was of the view that the political headwinds were too strong. He stated that:

> "there was strong political resistance to this prosecution and the pursuit of the other political cases. It was clear to me that the government, and in particular the then Minister of Justice, did not want the NPA to prosecute those implicated in the Chikane case. This was due to their fear of opening the door to prosecutions of ANC members, including government officials.

> Moreover, I could not rely on the police to investigate this case, and the other political cases, thoroughly. Therefore, a plea and sentence bargain was in my view the most appropriate compromise in the circumstances."

259 Pikoli's concerns proved to be prescient. Within a few weeks he was removed from office and the Chikane case was the last indictment issued in a TRC related case for some 10 years. The TRC cases would remain suppressed until the family of Nokuthula Simelane went to court in 2015 seeking an order compelling a prosecutorial decision (*Nkadimeng 2*).

The knives are out for Pikoli

260 Shortly after the Chikane plea and sentence agreement had been confirmed in court, a newspaper article appeared in the Rapport newspaper of 19 August 2007 in which it was claimed that the NPA was preparing to prosecute ANC leaders. According to Pikoli, the claim was made on the basis of a note that Ackermann had prepared more than four years previously, when he first looked at the universe of possible cases. That note was forged to suggest it was made recently and that Ackermann was targeting the ANC leadership. A copy of this newspaper article is annexed hereto marked **FA36** (VPP4 at p211). The NPA responded by way of a press statement dated 21 August 2007 in which the allegations made in the Rapport were denied. A copy of this press statement is annexed hereto marked **FA37** (VPP5 at p213).

261 At this time, the then Director-General of the Department of Justice, Menzi Simelane, had approached Pikoli and raised concerns about Ackermann's handling of the TRC cases. He asked Pikoli to relieve Ackermann from his duties in respect of those cases. Pikoli declined to do so.

262 After the newspaper article was published, Pikoli was summoned to a meeting of the subcommittee of the Justice, Crime Prevention and Security (JCPS) Cabinet Committee on Post TRC matters, which was held on 23 August 2007. This meeting was attended by several cabinet ministers, directors-general and Selebi. Cabinet Ministers included the Minister for National Intelligence Services Ronnie Kasrils, Minister Mabandla, and Minister Skweyiya amongst others.

263 The fact that there was a special Cabinet Committee on the post TRC cases speaks volumes. The existence of such a high-level committee devoted to a particular class of criminal cases pointed the importance of these cases to Cabinet, and that the cases had become the subject of political intervention.

264 Pikoli's account of this meeting in his *Nkadimeng 2* affidavit (**FA22**), is that the those at the meeting immediately demanded answers from him about TRC prosecutions.

264.1 According to Pikoli, Selebi said to him that the "*gloves are now off*" and that he was "*declaring war*" on him. In response Pikoli told Selebi: "*for once in your life can you tell the truth and shame the devil*".

264.2 Those present were particularly concerned that the NPA was instituting an investigation into certain members of the SAPS, in relation to the fabricated Ackermann letter.

264.3 Minister Mabandla told Pikoli to stop this investigation, to which Pikoli responded that the investigation will proceed.

264.4 Pikoli explained to the meeting that:

264.4.1 the NPA was bound by law to continue with prosecutions of individuals who did not apply for or who were refused amnesty.

264.4.2 the NPA was actively preparing for those prosecutions and that it should not be stopped from doing its job.

264.4.3 it was his role as the NDPP to decide who would be charged.

265 On 28 August 2007, Pikoli received a faxed letter (dated 8 August 2007) from the Minister, which is annexed hereto marked **FA38** (VPP6 at p214). She referred to the meeting held on 23 August 2007 and noted that SAPS held a different view in respect of the forgery of certain NPA documents. She complained that she had not been advised of the decision to investigate and wanted to know the basis thereof.

266 Pikoli responded to the Minister's letter by way of a letter dated 29 August 2007, a copy of which is annexed hereto marked **FA39** (VPP7 at p215). In this letter Pikoli referred to the 23 August 2007 meeting:

> "which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members."

267 Pikoli confirmed that there was no investigation by the NPA "*against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police*". He added that it is:

> "clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored."

268 Pikoli reminded the Minister that his predecessor had satisfied himself that there was no basis for the leadership of the ANC to be investigated and he had briefed

the then Minister of Justice, as well as the President. Pikoli also advised the Minister that all the dockets relating to the TRC cases, which had been stored at the Office of the DPP in Pretoria, had been handed over to the SAPS in 2004. Pikoli in his capacity as then Director General of Justice was actually present in the office of the DPP when representatives from the SAPS collected the dockets.

269 Pikoli concluded his letter by requesting an urgent meeting with the Minister. Pikoli also requested an opportunity to appear before the National Security Council "*to give a true account of this issue*".

270 The Minister did not respond to Pikoli's requests, and the meetings never took place. On 23 September 2007 Pikoli was suspended from office by President Mbeki. Shortly after his suspension he learned that Ackermann had been relieved of his duties in relation to the TRC cases.

271 According to Ackermann, he was summoned to the office of Adv Mokotedi Mpshe, who had been appointed acting NDPP. Mpshe advised Ackermann that he was relieved of his duties in relation to the TRC cases with immediate effect. In his affidavit (**FA8**), Ackermann asserted that he had "*no doubt that Adv. Mpshe received a political instruction to remove me from these cases*." Ackermann advised Mpshe that removing him from the TRC cases "*would not make the cases go away*." That statement has also proved to be prescient.

272 Writing in his 2015 affidavit in *Nkadimeng 2* (**FA22**), Pikoli observed the following:

> "I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of any TRC matter since my suspension and the removal of the TRC cases from Advocate Ackermann.

> The political interference or meddling that I have set out in this affidavit is deeply offensive to the rule of law and any notion of independent prosecutions under the Constitution. It explains why the TRC cases have not been pursued. It also explains why the disappearance and murder of Nokuthula Simelane was never investigated with any vigour and why the pleas of her family and her representatives were ignored."

273 Ackermann concluded similarly in his 2015 affidavit (**FA8**):

> "There is little doubt in my mind that the investigation and prosecution of the TRC cases have been effectively stopped by machinations that took place at a level above that of the NPA. Such interference serves to explain why the Simelane matter, as well the bulk of the TRC cases, have not been seriously investigated or prosecuted.
>
> In so doing the rule of law has been undermined and a deep injustice has been committed against the family of the late Nokuthula Simelane, as well as the families of other victims of apartheid era crimes."

274 Now with Pikoli and Ackermann out of the way, government was in a position to appoint compliant officials to lead the NPA and take charge of the TRC cases. Going forward the TRC cases were now firmly frozen and no amount of lobbying and agitating by families and their representatives would move the new leadership of the NPA to act.

Ginwala Enquiry

275 The years following the suspension from office of Pikoli and the removal of Ackermann from the TRC cases were marked by an almost total absence of activity on the TRC cases.

276 On the same day that Pikoli was suspended on 23 September 2007, the President announced the creation of the Ginwala Enquiry into the fitness of Pikoli to hold the office of the NDPP in terms of section 12(6)(a) of the NPA Act. Dr Frene Ginwala was appointed on 28 September 2007 to head the inquiry.

277 According to Dr Ramaite, then the Acting NDPP, when the President established the Ginwala Commission, "*the SAPS declined to further investigate the matters, pending the conclusion of the Commission*." This was disclosed in his 31 January 2013 letter to Thembi Nkadimeng (**FA26**). The reference to a decision to refuse to "*further investigate*" is a misnomer since the SAPS had already refused to investigate the TRC cases as far back as 2003. There was no legal or other basis for the SAPS to continue refusing to investigate the TRC cases pending the outcome of the Ginwala Enquiry.

278 In the Ginwala Enquiry, the government made a number of complaints against Pikoli, one of them being that Pikoli's handling of the post–TRC cases did not show "*sensitivity to the victims*" and "*an appreciation of the public interest issues that were mandated by the Prosecution Policy*."

279 It was alleged that the NPA concluded plea bargains with Van der Merwe and others (the Chikane case) without discussing them with the ITT or informing the Minister, *"notwithstanding the potential impact on national security"*. The nub of the matter was of course Pikoli's decision to move ahead with the prosecution of Vlok and the others in the face of opposition from the political level.

280 In the evidence tendered by the government, an add-on complaint was the "outrage" expressed by Chikane about the lack of truth revealed by the plea bargain in relation to the apartheid state's clandestine programme of killing through nefarious means, such as poisoning. It is likely that this concern was included to dress up the main complaint with some moral indignation, since the lack of truth of apartheid-era violations was hardly a concern of those behind the removal of Pikoli.

281 Dr Ginwala was moved to say in her finding that:

> This complaint also touches very closely on the **constitutional guarantee of independence of the NPA** to prosecute or not to prosecute, and to do so without fear, favour or prejudice. (Bold added).

282 Nonetheless Dr Ginwala did not take this burning issue further as the government abandoned its complaint against Pikoli in respect of the TRC cases. The likely reason was to curtail closer examination of the role of government in relation to the cases. A copy of the Ginwala Commission Report dated 4 November 2008 can be made available on request. The extracts of her findings on the TRC cases complaint are annexed hereto marked **FA40**.

283 Dr Ginwala concluded that the government had not made out a case that Pikoli was not fit for office by reason of his handling of the TRC cases. Indeed, she concluded more generally in her final report that the balance of grounds advanced by government for his suspension had not been established.

284 Dr Ginwala reserved her harshest criticism for Adv Menzi Simelane, who at the time had been Director General of the DOJ since June 2005. She found that he had given contradictory evidence and had deliberately withheld important information from the Commission, thereby attempting to mislead it. She also impugned his conduct as Director General of the DOJ on various grounds.

Striking down of the Guidelines

285 On 12 December 2008, Judge Legodi in the Pretoria High Court issued his judgment in *Nkadimeng 1* which set aside the amendments to the Prosecution Policy as unconstitutional. The judge found that the amendments amounted to an impermissible rerun of the TRC amnesty process and that most of the Part C criteria

should never feature in prosecutorial decisions. He ruled that the amended policy amounted to "*a recipe for conflict and absurdity*."

286 The NPA Annual Report 2008/09 made the following disturbing report that because the NPA intended to appeal the judgment a further delay in the TRC cases was "*inevitable*" :

> "The TRC Guidelines were declared unconstitutional and invalid by the North Gauteng Provincial Division of the High Court. A decision to appeal the judgment will be made early in 2009. **A further delay in the prosecution of cases emanating from the TRC process is therefore inevitable**." (Bold added)

287 Copies of the relevant pages of this annual report are annexed hereto marked **FA41**. A copy of the full report can be made available on request.

288 The NPA applied for leave to appeal on 7 January 2009, which was opposed by Nkadimeng and the wives of the Cradock Four. The application was dismissed by Legodi J. The NPA did not bother petitioning the Supreme Court of Appeal or approaching the Constitutional Court, presumably because it concluded that there were no prospects of success, or that the objectives of the prosecution policy amendments could be achieved through other ends. As it transpired, the final nail in the coffin of the ill-fated Guidelines did not result in the pursuit of the TRC cases.

Special Dispensation on Political Pardons

289 At a joint sitting of Parliament on 21 November 2007, President Thabo Mbeki announced a special process for the handling of pardon requests made by "*people convicted for offences they claim were politically motivated, and who were not denied amnesty by the TRC*." According to President Mbeki the aim was to assist the nation in resolving the "*unfinished business*" of the TRC. He said:

> “As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this ‘unfinished business.’”

290 Mbeki assured members of Parliament that the new process would be consistent with "*what the nation sought to achieve through the TRC*," and would support the discharge of the President's "*constitutional obligation to consider the requests for pardon from people who have already been convicted for offences they claim belong among the category of offences that were considered by the TRC Amnesty Committee*." The use of the pardon power to accommodate perpetrators who had spurned the TRC amnesty process was in line with the recommendations of the ATT that were made in 2004.

291 Mbeki asked each political party represented in Parliament to appoint a representative, not necessarily an MP, to serve on a Pardons Reference Group (**RG**) charged with considering pardon requests and submitting recommendations to the President. Mbeki pledged that his pardoning decisions would be guided by the values and principles enshrined in the Constitution, as well as the "*principles, criteria, and spirit*" of the TRC.

292 Mbeki announced a window of opportunity for new pardon requests that would open on 15 January 2008 and close on 15 April 2008. Requests would be considered from applicants convicted of offences "*of the nature considered by the TRC during the period up to 16 June 1999*." A copy of Mbeki's address to Parliament is annexed marked **FA42**.

293 On 16 January 2008, the Presidency released a press statement announcing the beginning of the period of applications for political pardons. A copy of this press

statement is annexed marked **FA43**. The deadline for applications was subsequently extended to the end of May. The press statement belied the real reason of the process, as it spoke of applicants being "considered for amnesty" rather than pardon.

294 The RG was formally constituted on 18 January 2008 at its first meeting with President Mbeki, during which the Terms of Reference for the RG were adopted. Dr Tertius Delport was elected Chairperson (**Delport**). On 24 January 2008, the DOJ announced that the twelve-page pardon application forms were available at all courts, prisons, DOJ regional offices and websites.

295 Shortly after the creation of the RG, various civil society organisations such as the Centre for the Study of Violence and Reconciliation (**CSVR**) sought to engage with RG. However, Delport declined to meet with the organisations and refused to disclose the RG's terms of reference (which was only published months after the launch of the process) or the list of persons who had applied for a political pardon. The 2300 strong list was only secured through a PAIA application towards the end of 2008. However, leaks to the media disclosed that the applicants included, amongst others:

295.1 Ferdi Barnard, former CCB operative who murdered Wits academic David Webster;

295.2 Letlapa Mphahlele, the Pan Africanist Congress president who ordered the St James's Church massacre;

295.3 Former apartheid police minister Adriaan Vlok, former police chief General Johann van der Merwe and the three co-accused in the attempted murder of Chikane;

295.4 AWB members who had killed one black person and violently assaulted black people in Kuruman in 1995.

296 The RG ultimately recommended to President Motlanthe, who was Mbeki's successor, that 150 persons be granted a political pardon, including the accused in the Chikane matter and the AWB members referred to above.

297 The civil society organisations were eventually granted a meeting with Delport and some RG members in July 2008 where they complained about the opaqueness of the process and the fact that victims had been entirely excluded from the programme. In a letter dated 7 August 2008, Delport informed the civil society organisations of the RG's conclusion that neither the Terms of Reference nor any law compelled the RG to "call for inputs by the public (in particular the victims)" and the RG accordingly would not accede to requests to incorporate victim input into the process.

298 The civil society organisations made multiple attempts to persuade the RG and the President to change course and incorporate victims into the pardons process without success. The full history of these attempts is set out in the founding papers filed in the matter of *CSVR & Others vs The President*, before the Pretoria High Court in case no. 15320/09, which can be made available on request.

299 In March 2009 several civil society organisations brought an urgent application in the Pretoria High Court seeking to interdict the President from issuing any pardons

until victims and other interested parties were able to participate in the process and make their representations on each pardon application.

300 The civil society organisations submitted in its court papers that the special dispensation on political pardons amounted to an impermissible rerun of the TRC's amnesty process; unlawfully excluded the participation of victims; violated the rule of law; and infringed the rights of victims to dignity, equal treatment and freedom of expression. On 28 April 2009, Seriti J handed down judgment in which he granted an interim interdict restraining the President from handing down any pardons under the special dispensation for political pardons.

301 On 2 June 2009, Ryan Albutt, one of the AWB members convicted for carrying out a campaign of violent terror against black people in Kuruman approached the Constitutional Court to overturn the interim interdict stopping the political pardon process from proceeding. He was joined in this endeavour by President Jacob Zuma. In February 2010, the Constitutional Court ruled that no political pardon could be issued without first affording the victims a hearing. Attempts were made thereafter by the DOJ to resurrect the Special Dispensation on Political Pardons by allowing victims and interested parties to make representations, but the process was eventually abandoned with no political pardons being granted.

TRC cases remain stuck

302 In the PCLU's presentation of its performance for the financial year of 2007 – 2008 to Parliament's Justice and Constitutional Development Portfolio Committee in March 2007, the following was noted by Ackermann in slide 8 on TRC prosecutions:

- "Only partial success was achieved **due to intervening factors beyond the control of the unit.**"
- "Sixteen cases have been identified for investigation and possible prosecution." (Bold added).

303 The cryptic reference to "*intervening factors beyond the control of the unit*" could only have been the political interference alluded to above and to be described in detail below. The sixteen cases were not identified and none of these cases were taken forward. A copy of the presentation is annexed hereto marked **FA44**.

304 With the political suppression of the TRC cases now in full swing, there was a hiatus of activity for several years, notwithstanding the agitation of families for action. The only notable development in this period was the disappearance of the investigation dockets in the Nokuthula Simelane and Cradock Four cases.

305 It can be safely assumed that little or no work was carried out by the NPA, SAPS or DSO on the TRC cases during 2008. Acting NDPP Mpshe had already relieved Ackermann of his responsibilities in respect of the TRC cases. He could hardly be expected to champion the TRC cases going forward, and indeed he did not. Although Ackermann was still the head of the PCLU he was no longer permitted to work on the TRC cases, and the files were left largely unattended. He retired from the NPA in 2013. In any event, at that stage, no investigator within state structures would touch the cases.

306 Macadam records in his affidavit filed in *Rodrigues* (**FA5**), that in early 2009, Mpshe summoned him to his office and showed him a letter written by SAPS indicating that it was withdrawing from the ITT.

306.1 Presumably the SAPS took the view that the TRC cases were dead in the water and there was no point in serving on the task team which in practice was doing no work. In addition, following the judgment of Legodi J, the ITT no longer enjoyed a legal basis with the setting aside of the amendments to the Prosecution Policy in December 2008.

306.2 Since the SAPS had not been investigating the TRC cases their withdrawal did not mean much. However, according to Macadam it would mean that going forward, the TRC matters would again not be investigated because a decision had already been taken to disband the DSO.

306.3 Mpshe asked Macadam to negotiate with SAPS and try to get them to agree to investigate the cases. Mpshe also told Macadam to take over the TRC cases.

307 It is hardly surprising that Macadam concluded his 2018 affidavit with this blunt statement: "*[t]hese documents speak for themselves and go a long way in explaining why from 2003 the PCLU constantly struggled to have TRC cases investigated*."

308 Macadam approached Ackermann for advice, and he disclosed that he had previously closed some matters which had not required investigation and handed over a list of some ten cases. Macadam attached to his affidavit as annex RCM6 (at p821) a trail of emails between himself and various role-players in his attempts to get the remaining TRC cases investigated. He initially met with Rayman Lalla, then Divisional Head of the Detective Service of SAPS, who informed him that the National Commissioner had decided that the cases must be handled by the DPCI.

309 On 18 May 2009, Macadam sent the following email to Deputy NDPP, Adv Willie Hofmeyr (RCM6 at p821), at a time when there was an expectation that Hofmeyr was about to be appointed the new head of the DPCI:

> "I met this morning with Commissioner Lalla concerning the appointment of SAPS investigators to investigate the TRC cases where victims have asked the NPA to look at prosecutions. **We have been taking quite a beating due to the fact that nothing has been done on these matters for a number of years and in fact, in certain cases, the victims are threatening us with *mandamus* applications**. In this regard, Commissioner Lalla asked me to provide him with the names of three/four investigators who had the necessary experience. **We are only looking at a small number of cases, plus minus nine**. Obviously, no progress at all will be made if the investigators do not have previous knowledge of the relevant Apartheid security structures and role players therein.
>
> The only persons I could think of off-hand, were CSI Marion and three/four of his KZN DSO investigators, who were previously involved with the Goldstone Commission and ITU. All these persons have indicated their willingness to transfer to SAPS. **Commissioner Lalla indicated that the TRC investigations would constitute a special tasking and the investigators would be permitted to finalise these cases before taking on other commitments**. He also indicated that he would pay the costs of the investigations from his budget. This would ensure that they could deal with these matters irrespective of whether they are located in DPCI or any other police structure. He asked me to communicate directly with you on this issue." (Bold added).

310 However, Hofmeyr was not appointed to head up the DPCI, so Macadam had to approach the SAPS Commissioner again. On 1 July 2009 he wrote an email (RCM6 (at p822) to Superintendent Colla Bezuidenhout at the SAPS headquarters seeking a meeting with the Commissioner to discuss the TRC cases. He advised in the email:

> "We are under intense pressure and have been called upon to report on progress to the Minister and the Justice Portfolio Committee. **The one matter which requires investigation prescribes on 12 September 2009 and this case must be fully investigated and the family afforded an opportunity to exercise their right to a private prosecution before the crime prescribes**." (Bold added)

311 Macadam was told to meet with Commissioner Anwar Dramat, the newly appointed Head of the DPCI. He then made a number of unsuccessful attempts to secure a meeting with Dramat. During this period, the unidentified case that was due to prescribe on 12 September 2009, prescribed without being taken further. It can be safely assumed that a large number of other crimes associated with the TRC cases prescribed during this period.

312 I am advised that at this time the family of the late Nokuthula Simelane and their representatives were working behind the scenes to persuade the Minister of Police to appoint investigators to take on the TRC cases.

313 Ultimately Macadam met with Assistant Commissioner Godfrey Lebeya on 26 November 2009 where the issue of conducting investigations was discussed resulting in Macadam addressing a letter to Lebeya on 18 January 2010, which is attached to Macadam's affidavit (**FA5**) as annex RCM7 (at p826). The letter is reproduced below:

> "My letter dated 13 July 2009, addressed to Deputy National Commissioner Dramat and Divisional Commissioner Lalla, and our meeting of 26 November 2009 have reference.
>
> The issue related to the appointment of investigators to investigate the 11 matters identified by the NPA, which were itemised in my letter of 13 July 2009. Subsequently, the Acting National Director of Public Prosecutions declined to prosecute in the Lubowski matter and consequently, only the remaining 10 cases on the list required attention.
>
> **Senior Superintendent Bester of your office attended our meeting and informed you that he was in possession of a number of further dockets which he felt also required investigation. On 6 December 2009, I had a meeting with Senior Superintendent Bester and established that these dockets related to cases against the Liberation Movements in respect of which a decision was taken in 2004 by the then National Director not to prosecute. It should be noted that in the main, all the suspects implicated in the dockets had applied for and received amnesty. I therefore informed Senior Superintendent Bester that there was no basis upon which these cases could be reopened**.

> Consequently, only the remaining 10 cases on the list require attention. Since you raised the sensitivity of the matters with me, the National Director of Public Prosecutions was given a full written briefing on the matters. I had a meeting with him today and he indicated that SAPS should in fact investigate all the matters which required investigation. The matters should be referred to my office once the investigations have been concluded. Should you require any guidance as to how the matters should be investigated, you are at liberty to approach me for any such assistance which you might require.
>
> Given the nature of the cases, it may be desirable that we meet to discuss the issues in person and in this regard, I would be grateful if you could indicate when you would be available to meet with me." (Bold added).

314 Senior Superintendent Louis Bester was appointed to oversee the investigations of the ten remaining TRC cases. It appeared that Bester was particularly interested in pursuing cases against members of the former liberation movements. As it transpired, he made no progress in the cases against former apartheid security officers and operatives.

315 On 1 December 2009, President Jacob Zuma appointed Adv Menzi Simelane as NDPP. This was announced in a government press release dated 30 November 2009, ironically titled "*Simelane fit to hold office*." The appointment was made notwithstanding the damning findings made against him by the Ginwala Enquiry.

316 While he was DOJ Director General, Simelane had pressed Pikoli to remove Ackermann from the TRC cases. I can only speculate, but I believe that the probabilities are high that it was also Simelane who asked Acting NDPP Mpshe to remove Ackermann from the TRC cases, following the suspension of Pikoli. The arrival of Adv Simelane at the helm of the NPA was to doom the TRC cases to further neglect.

317 According to Macadam, one of the first steps taken by Adv Simelane was to instruct him to oversee various investigations of corruption cases being conducted by the

DPCI in the Northern Cape. He thereafter appointed Macadam to represent the NPA in two civil matters where decisions of the NPA not to prosecute international crimes (known as the Zimbabwe Torture Docket case) were challenged. Macadam was also deflected with cases in which complaints had been made against the NPA for failing to prosecute current and former heads of state for crimes against humanity. This workload effectively prevented Macadam from returning to the TRC cases, but he nonetheless opened more cases "*due to representations being received in new matters*."

318 An example of the neglect was the failure of both the DOJ and the NPA to orchestrate the reconvening of an Amnesty Committee to rehear the amnesty applications of Martin van Zyl and Johannes Koole in the PEBCO 3 matter, as had been ordered by the High Court in 2009. The NPA and DOJ jointly arranged the withdrawal of charges against Van Zyl and Koole, pending the outcome of the reconvened Amnesty Committee, which they never established, thereby guaranteeing impunity for the two suspects who went to their graves without facing justice.

319 The NPA Annual Report 2009/10 noted that the TRC cases had to be investigated before prosecutorial decisions could be made but that "*since 2003*" it had "*struggled to secure the necessary cooperation in this regard*":

> "TRC cases: The PCLU is required to advise the NDPP in making decisions whether or not to prosecute in cases arising from the TRC process. Matters need to be fully investigated before any final prosecution decision can be made. **Since 2003, the NPA has struggled to secure the necessary cooperation in this regard.** With the establishment of the DPCI, the responsibility for such investigations was transferred to this unit. **The PCLU had to recommence its negotiations de novo**. Currently, **the DPCI has indicated that it will conduct the necessary investigations, but only after the conclusion of the 2010 FIFA World Cup**, due to the fact that it

> has a number of special responsibilities in connection with this event." (Bold added).

320 The relevant pages from this annual report are annexed hereto marked **FA45**. The full report can be provided on request. It is noted that the DPCI indicated that it would not look at the TRC cases until after the 2010 FIFA World Cup, which only concluded on 11 July 2010. However, even after the World Cup there is little evidence that the TRC cases were taken forward.

321 It is significant that this was the last mention of the TRC cases in the NPA's annual reports until 2016, which reflects the general neglect of these cases during those years. There were only references to the work of the NPA's Missing Persons Task Team (**MPTT**), which had done pioneering work locating the graves of persons killed during apartheid, exhuming and identifying the remains, and facilitating their reburial. The MPTT is not involved in the prosecution of cases.

322 Adv Menzi Simelane appeared before the Justice Portfolio Committee on 12 April 2010 where he confirmed that the NPA was not prosecuting any TRC cases. The minutes, a copy of which is annexed hereto marked **FA46** reflect the following:

> "Adv Simelane said that there were no cases that the NPA was currently prosecuting regarding post TRC matters. The reason being that the dockets were still with the police for investigation."

323 The following year, Adv Simelane appeared before the Justice Portfolio Committee on 20 March 2011 to discuss the NPA's Strategic Plan for 2011. The minutes reflect the following discussion in which Simelane claimed that the issue of the DPCI not assisting the PCLU was now solved:

> "Ms Smuts asked if the NDPP could confirm if the DPCI was not indeed assisting the PCLU in post Truth and Reconciliation (TRC) Unit matters.

> Adv Simelane replied that the DPCI not assisting the PCLU was an old matter as there were no problems now."

324 This was the last time the TRC cases appeared in the minutes of the Justice Portfolio Committee until 2017. This was remarkable given that there was zero progress on the TRC cases in this 6-year period.

325 Following the Supreme Court of Appeal ruling on 1 December 2011 setting aside Adv Menzi's Simelane appointment as NDPP, Adv Nomgcobo Jiba was appointed Acting National Director of Public Prosecutions and held the position until 4 August 2013. It appeared that for certain times during this period, Dr Silas Ramaite also acted in this post.

326 In October 2012, the Constitutional Court confirmed that President Jacob Zuma's appointment of Adv Simelane as NDPP was invalid. In a unanimous judgment the Court held that "*dishonesty is inconsistent with the conscientiousness and integrity required for the proper execution of the responsibilities of the NDPP*."

327 In August 2013, President Zuma appointed Mr. Mxolisi Sandile Oliver Nxasana as NDPP, and he assumed the post on 1 October 2013.

327.1 When Nxasana was appointed as the NDPP, he removed Macadam from his duties at the PCLU in order to act as a dedicated prosecutor in foreign bribery cases.

327.2 Adv Shaun Abrahams, then a Senior State Advocate, was appointed to take the TRC matters over from Macadam. It is evident that Abrahams made little or no progress in the TRC cases while he was leading the PCLU.

327.3 After a protracted enquiry into his fitness to hold office, Nxasana stepped down as NDPP on 1 June 2015 and thereafter Abrahams was appointed NDPP.

The missing Cradock Four docket

328 Macadam filed an affidavit dated 24 May 2021 as part of the NPA's Rule 53 record in the matter of *Calata and Others v NDPP and Others*, Case No. 35447/ 2021 Gauteng Division, a copy of which is annexed hereto marked **FA47** (**Macadam's Rule 53 affidavit**). In this affidavit he indicated that during April 2013, while he was deputy director of the PCLU and Abrahams was the acting head, they received a request for information about the Cradock Four case from a Ms Lepinka who was the personal assistant to Acting NDPP, Adv Nomgcobo Jiba. Abrahams responded to the request. Shortly thereafter, Macadam was asked to hand over the investigation docket, Swartskop CR 13/07/1985, to the Office of the Acting NDPP, which he did.

329 Macadam then avers that at a "*certain stage*", without disclosing a date, that Adv TP Pretorius SC, then Acting Head of the PCLU, asked him for the Cradock Four docket, and he advised Pretorius that "*it had been uplifted from our office*" and was missing. Macadam did not disclose why Pretorius was seeking the docket. This exchange must have happened between 2016, when Macadam returned to his normal duties after working on foreign bribery cases, and April 2019 when he assumed the position of Acting Head of the PCLU.

330 What is evident from the Macadam affidavit is that, at the very least, no investigations on the Cradock Four docket occurred between 2013 and 2019, when

he took steps to assist the investigating officer to reconstruct the docket. This was a period of some six years.

331 It is also evident that in this six-year period, the PCLU leadership took no steps to recover the docket, let alone carry out any work on the case. If no work was happening on one of the most well-known and emblematic cases from our history, it can be safely assumed little or no work was being done on most, if not all of the TRC cases. This suggests that the suppression of the TRC cases was still in place through much of the second decade of this century, alternatively its impact had denuded the will and capacity of the authorities to act.

332 Equally revealing from Macadam's Rule 53 affidavit is the claim that the missing docket only comprised of an enquiry into unfounded rumours around one General Hankel and the inquest and TRC records, which were "*easily re-obtainable*".

332.1 This confirms that prior to 2013, little or no substantive work was conducted in the decades between the Zietsman inquest and the TRC in the early to mid-90s, and the reconstruction of the docket that commenced in 2019. This means there was a suspension of substantive work on the case for more than 20 years.

332.2 The reconstruction of the docket in 2019 only occurred because me and my family instructed the FHR and my attorneys to engage with the NPA and DPCI to get this case off the ground. Indeed, the FHR's private investigator assisted with the reconstruction of the docket.

Simelane family takes legal action

333 Thembi Nkadimeng, sister of the slain Nokuthula Simelane, in her founding affidavit in *Nkadimeng 2*, noted the following:

> "We thought that the striking down of the amendments to the Prosecution Policy meant that the path was eventually cleared for justice to take its course. Again, we were wrong. This time the prosecutors claimed that the police were refusing to provide investigators. Again, they said their hands were tied. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010; but the docket had apparently gone 'missing'."

334 Towards the end of 2012, the family of Nokuthula Simelane realised that the authorities had no intention of pursuing justice in their case, and they now pressed for an inquest:

> "By the end of 2012, even after finding the docket, there was no progress. It was clear to me that the authorities were not going to investigate the case seriously, let alone prosecute anyone. They even refused to charge those police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, the 30th year of Nokuthula's disappearance, and 18 years since the opening of the police docket, I gave up on a prosecution and demanded the holding of a judicial inquest into her death."

335 Nkadimeng looked into the possibility of launching a private prosecution, but although she was supported by pro bono lawyers, she was advised that she would have to raise a considerable sum of money to lodge as security of costs for the legal costs of the accused, which she would have to pay if the accused were acquitted. These costs were unaffordable, and she accordingly wrote a letter to the Acting NDPP on 29 January 2013 requesting that her sister's case be referred to a formal inquest before the High Court (TN20 at p289). A copy of the letter is annexed hereto marked **FA48**. Nkadimeng wrote:

> "If the authorities were going to prosecute this matter such prosecution would have taken place many years ago. This case has dragged on for way too long, and such delay has undermined the prospects for justice and played into the hands of the perpetrators. With every day that goes by without action being taken, the interests of justice are severely eroded. Moreover, and most regrettably, we have lost complete faith in the PCLU to run a successful prosecution."

336 The Simelane family reported the inaction of the South African authorities to the United Nations Special Rapporteur on Enforced Disappearances who in turn corresponded with the government. A copy of the letter received from the Chairperson of the Working Group on Enforced or Involuntary Disappearances dated 24 July 2013 is annexed hereto marked **FA49**.

337 Nkadimeng's request for the holding of an inquest was refused. Remarkably, the NPA claimed that their investigations were still not yet complete. She wrote in her affidavit:

> "My family and I do not believe that the NPA is acting in good faith. Indeed, we have lost all confidence in the prosecutors and police. They have betrayed our trust. Given their past idleness such investigations could drag on indefinitely while witnesses and suspects grow old and die. Since January 2013 my lawyers and I have engaged in extensive communications with the offices of the first and second respondents [the NDPP and the National Commissioner of the SAPS] in an effort to persuade them to finalize their apparent investigations or at least refer the case to a judicial inquest. More than 20 months later these efforts have come to naught.
>
> The historic compromise which gave birth to the new South Africa demanded that those perpetrators denied amnesty, or who did not apply for amnesty, would face follow-up. This has not happened. The state has systematically and deliberately dragged its feet or blocked justice in this case and many others. We know who abducted, tortured and murdered Nokuthula. They were meant to face justice or appear before a judicial inquest. More than 30 years have passed since Nokuthula's disappearance, but neither has happened. We cannot bury her and we can find no peace. The betrayal of my sister, and what she stood for, is almost complete."

338 On 20 May 2015, Nkadimeng brought an application before the High Court in *Nkadimeng 2*. Since these papers are voluminous, they can be supplied on request. Nkadimeng sought an order compelling the NPA and SAPS to finalise their investigations and an order compelling the NPA to take a prosecutorial decision, or to take steps to hold an inquest in the High Court. She also sought an order declaring that her fundamental rights had been violated by the prolonged delay of the authorities to finalise the case.

339 The papers exposed the real reason for the long delay, namely the political interference that resulted in the suppression of the TRC cases. In this regard, supporting affidavits were provided by Pikoli and Ackermann, which are the same affidavits attached to this founding affidavit as **FA22** and **FA8**.

340 The response of the authorities was remarkable to say the least. No answering affidavit was filed disputing the assertions of Nkadimeng, Pikoli or Ackermann. No public statement was made denying that the TRC cases had been suppressed through political interference. Instead, Abrahams contacted Nkadimeng's counsel to commence settlement discussions, which took place. Once the NPA undertook to act, the litigation was placed in abeyance.

341 On 14 March 2016, the NPA charged former SB officers Willem Helm Johannes Coetzee, Anton Pretorius, Frederick Barnard Mong and Msebenzi Timothy Radebe with the murder of Nokuthula Simelane. More than eight years later they have still not stood trial. Mong and Radebe have died and Coetzee claims that he is mentally unfit to stand trial.

NPA under pressure

342 Following the launch of the aforesaid application which generated attention in the media, other families began to agitate for action on their cases, such as the families of detainees who had died in apartheid security detention, including the families of Ahmed Timol and Neil Aggett. They were supported by the FHR who arranged pro bono lawyers to take their cases forward.

343 Macadam states in his affidavit that following the appointment in June 2015 of Abrahams as NDPP, he met with Abrahams and indicated his willingness to return to the TRC cases if he was relieved of his responsibilities with the foreign bribery cases. Abrahams advised that he was thinking of taking all the TRC cases away from the PCLU but did not terminate Macadam's appointment as the foreign bribery prosecutor.

344 According to Macadam the bribery cases were subsequently transferred to another business unit in the NPA, freeing him up to return to the TRC cases. It is apparent that Macadam was beginning to feel the heat. He wrote in his affidavit:

> "**The TRC cases had however become important due to complaints about delays in finalising certain matters. I therefore decided to again give attention to the matters.** One of the matters which I had decided should be investigated was the Aggett-matter which also related to a death in detention. At that stage the Timol-matter was receiving attention in the media and I recall specifically a TV interview with Adv Bizos SC (Bizos) in which he alleged that Mr Timol had been murdered. I therefore considered it appropriate to request the DPCI to re-open the matter and gave various instructions (dealt with hereunder) regarding the further investigation of the case." (Bold added).

345 However, Adv Andrea Johnson who was then the acting Head of the PCLU, instructed Macadam and a colleague to halt work on the TRC cases as they were

going to be removed from the PCLU. Macadam was concerned about this development:

> "I was however concerned that **this would result again in the cases being neglected** resulting in me drafting a Memorandum in January 2016 requesting the NDPP to confirm whether the TRC cases would be dealt with by the PCLU or the DPPs. I did not receive a reply to this Memorandum and at this stage cannot locate my copy thereof." (Bold added).

Historic reopening of the Timol inquest

346 On 19 January 2016, the late Frank Dutton and representatives of the Timol and Aggett families, including Advocates Howard Varney and the late George Bizos SC, made a presentation to the NDPP, senior head office members and the PCLU urging the reopening of the inquests in these two cases. Dutton presented considerable evidence, including important witness testimony, that was not led before the original inquests. A copy of Dutton's presentation can be provided on request.

347 On 21 June, 8 July, 11 and 23 August 2016; Webber Wentzel, representing the Timol family, threatened legal action against the NPA if a decision was not taken timeously to reopen the inquest. In these letters the attorneys pointed out that witnesses were elderly and sickly and could pass away at any moment. On 25 October 2016, the PCLU confirmed in a letter that the NDPP had written to the Minister of Justice requesting him to approach the Judge President of the Gauteng High Court to appoint a Judge to reopen the inquest in the interest of justice. Copies of the aforesaid letters can be supplied on request.

348 Between June and August 2017, the historic reopened inquest (IQ01/2017) into the death in detention of Ahmed Timol was held in the High Courts of Johannesburg and Pretoria. Judge Mothle handed down his judgment on 12 October 2017 ([2017]

ZAGPPHC 652). He found that prior to his death Timol was grievously injured following more than four days of unrelenting torture at the hands of the SB. The reopened inquest found that Timol did not jump or dive, as alleged by the police, but was pushed by members of the SB, and that such act amounted to murder. Prior to this finding the Timol family had to live with the fraudulent finding of the first inquest that Timol had taken his own life – a pain that they had to endure for 46 years.

349 In his judgment Judge Mothle supported the call by the Timol family for:

> "**The energetic and vigorous investigation of outstanding apartheid-era cases before it is too late, which may involve the creation of a dedicated team of carefully selected investigators and prosecutors.** All State entities should be required to supply all information at their disposal to this team.
>
> All files pertaining to political detainees of the apartheid-era must be made easily accessible to the families seeking answers." (Bold added).

350 Judge Mothle found that former police officer Joao Rodrigues "*participated in the cover up to conceal the crime of murder as an accessary after the fact and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution*."

351 On 30 July 2018 the NPA charged Rodrigues with the murder of Timol as well as with obstructing the course of justice by providing false evidence to the reopened inquest in order to mislead that court. A copy of the indictment can be supplied on request.

Rodrigues permanent stay application

352 On 18 October 2018, Rodrigues filed an application in the Gauteng Division of the High Court (Case No. 76755/2018) seeking a permanent stay of his prosecution on

the claimed grounds that the long delay in prosecuting him violated his rights to a fair trial. Since Rodrigues had not cited the Timol family as an interested party they were forced to intervene in the proceedings and were admitted as the Fourth Respondent. A full set of the papers in the permanent stay proceedings can be provided on request.

353 In the Timol family's answering papers, Imtiaz Cajee, Timol's nephew, explained the lapse of time between the murder of Timol in 1971 and the bringing of criminal charges in 2018. He explained that during apartheid the police and organs of the apartheid State colluded in covering up the crimes committed against Timol. During the TRC's amnesty process no action was taken as the authorities were probably waiting to see if perpetrators of apartheid-era crimes would seek amnesty in exchange for full disclosure. It was the inaction in the post-TRC period that needed to be explained. However, the NDPP and the Ministers of Justice and Police offered no explanation in their answering affidavits.

354 Cajee in his answering affidavit explained that the delay in the post-TRC period was attributable to the political interference in the TRC cases. He relied on the documents disclosed in *Nkadimeng 2* and attached these to his affidavit including the secret ATT report and the affidavits of Pikoli and Ackermann and their annexes.

355 Despite the severity of the averments of gross political interference, the state respondents chose to remain silent and did not file further affidavits. Then, on 16 January 2019, the NPA's spokesperson, Luvuyo Mfaku and a spokesperson for the Minister of Police, Hangwani Mulaudzi, were interviewed by Joanne Josephs on Radio 702. A copy of the transcript of this interview was attached to Cajee's

supplementary affidavit and can be made available on request. During this interview, the NPA spokesperson indicated that:

355.1 Macadam had "*actually filed and deposed an affidavit outlining all the delays*" in prosecuting apartheid era crimes.

355.2 The NPA would "*never contest*" the allegations of political interference contained in the aforementioned affidavits of Pikoli and Ackermann and that "*[i]f they are saying that there was that interference then they have exclusive knowledge of what was happening. I would never contest that*".

356 Indeed, in the affidavit filed by Adv Pretorius SC on behalf of the NPA on 8 December 2018, he referred to annexing Macadam's affidavit, but it was not attached. The Radio 702 interview prompted Cajee to file a supplementary affidavit on 25 January 2019 pointing out that the NPA had withheld the affidavit of Macadam. Cajee called on the NPA to file Macadam's affidavit and asserted that withholding it amounted to obstructing the administration of justice.

357 On 4 February 2019, Adv Torie Pretorius SC, on behalf of the NPA, filed a supplementary answering affidavit, along with the Macadam affidavit and annexes. It turned out that Macadam had signed his affidavit on 1 November 2018, and it was available from that date. As pointed out above, the Macadam affidavit admitted that the Timol case and the other TRC cases were suppressed, and he provided details and evidence to illustrate the obstruction.

358 No attempt was made by Pretorius SC to explain why the Macadam affidavit was not filed with his answering affidavit on 8 December 2018, even though it was available from 1 November 2018. Cajee assumed that the Macadam affidavit was

held back in order not to reveal the disclosures made therein. It is apparent that even as late 2018 the NPA was attempting to withhold information about its role in the suppression of the TRC cases. In its judgment, the Court saw fit to censure the NPA for its attempt to withhold the affidavit of Macadam, noting that:

> "The suggestion that it was deliberately withheld from this Court is difficult to refute especially given its seriousness and the detailed allegations contained therein of political interference."

The NPA admits to the political interference

359 By early 2019 it appeared that the NPA had come to the view that the game was up, and it was time to admit that the organisation had succumbed to political pressure. Adv Pretorius SC in his supplementary affidavit of 4 February 2019 admitted, on behalf of the NPA, for the first time, the political interference and its unlawfulness. A copy of this affidavit (at p752 of the Rodrigues record) is annexed hereto marked **FA50** (excluding the annexed Macadam affidavit, which is already attached to this affidavit).

360 Significantly, Pretorius SC, in his supplementary affidavit, specifically states that he does not deny the contents of the Pikoli and Ackermann affidavits. The NPA admitted to the political interference in the following extracts from the Pretorius SC affidavit:

> "I strongly deny that the first respondent [NPA] is responsible for the delays upon which the fourth respondent [Cajee] seeks to rely. **Even on the evidence upon which the fourth respondent relies, it is clear that the prosecution was delayed as a result of political interference by others**. (Bold added) (para 2.3)
>
> When regard is had to the nature of the crime, **it should not be surprising that the government of the day may have taken steps to find a political solution to the political murders which were perpetrated by agents of the pre-1994 government.** It is irrelevant as to what one calls such steps.

The fourth respondent calls them political interference with the National Prosecuting Authority. (Bold added) (para 2.10).

The first respondent does not deny that the executive branch of the State took what one can describe as political steps to manage the conduct of criminal investigations and possible prosecution of the perpetrators of the political murders such as that of Mr. Timol. When regard is had to what advocates Pikoli, Ackermann and Macadam say in their affidavits confirming political interference with the first respondent's prosecutorial decision-making processes, it is clear that it is in fact not the first respondent who stalled the investigations and prosecution of cases such as the present. For this reason, no purpose would be served by throwing stones at the first respondent. (Bold added) (para 2.11).

When regard is had to what the fourth respondent says in paragraph 84, **the only conclusion to arrive at is that the delay in prosecuting the applicant was not as a result of the first respondent's own doing or its malice – it was as a result of the political interference and the "*severe political constraints*"** to which the first respondent was subjected. (Bold added) (para 2.12).

[Cajee] relies on certain incidents which he says constitute evidence of political interference. **None of these incidents were created by the first respondent**. On fourth respondent's own version, "*the NPA and its officials dealing with my uncle's case … became subjected to severe political constraints …*" There is no doubt that the National Prosecuting Authority and its officials could not have subjected themselves to the "*severe political constraints*" referred to by the fourth respondent. (Bold added) (para 2.13).

It is important that I highlight some of the contents of Pikoli's affidavit **which clearly indicate that the [NDPP] and its officials were indeed, as alleged by fourth respondent, subjected to severe political constraints** as a result of which, on [Cajee's] version, it was "*extremely difficult, if not impossible, for them to carry out their responsibilities under law.*" (Emphasis added) (para 2.21).

The contents of both Pikoli and Ackermann's affidavits give this Court an opportunity to reaffirm the constitutional independence of the National Prosecuting Authority of this country and **send a clear message that political office bearers should stop interfering with prosecutorial decisions** unless otherwise authorized to do so by law. (Bold added) (para 2.28).

What one sees in Pikoli and Ackermann's affidavits is that **the political interference and political pressure brought to bear upon the highest office of the National Prosecuting Authority was far from being authorized by law.** This being the case, there can be no rational basis to use such unlawful political interference and political pressure to justify the permanent stay of criminal prosecution which the applicant seeks in this application. (Bold added) (para 2.29).

> I agree with what the fourth respondent says in paragraph 88 of his answering affidavit that the manipulation of the criminal justice system to protect individuals from criminal prosecution serves an ulterior and illegal purpose and that it constitutes bad faith, it is irrational, it interferes with the independence of the National Prosecuting Authority and amounts to a gross subversion of the rule of law. This, however, does not justify the granting of the permanent stay of criminal prosecution which the applicant seeks in this application. (para 2.30).
>
> When regard is had to the contents of Chris MacAdam's affidavit, **it is clear that he did all he could under the political environment which prevailed at the time which, as the fourth respondent himself has indicated in his answering affidavit, was clearly not in favour of prosecuting cases** such as the present. For this reason, the insinuation against Chris MacAdam is wholly misplaced. (Bold added) (para 2.38).

361 Pretorius SC painted the NPA as an unfortunate victim of circumstance. He stressed that the NPA was not the source of the interference; and asked the Timol family not to "*throw stones at the NPA*" when it was simply on the receiving end of the political interference. Pretorius implied that the NPA was powerless to stand up to the interference and assert its independence.

362 Pretorius SC even suggested that the NPA had little choice in the matter because the NPA "*prosecutes on behalf of the State*".

362.1 However, I am advised that he erroneously conflates the concept of the '*State*' with that of the '*government*'. The NPA does not represent the government as the State Attorney does. It should never take instructions from government in relation to prosecutorial decisions.

362.2 The State represents higher societal interests. Public prosecutors act on behalf of society and must act in the public interest. They must apply the law without fear, favour or prejudice particularly when serious breaches of the law carry a criminal sanction.

362.3 In this case, with the exception of Pikoli and Ackermann, the NPA as a whole were happy to take instructions from government in exercising prosecutorial discretion. They acted timidly and shamefully in the face of a government seeking to impose its will on them.

363 Pretorius SC asserts that the halting of investigations and prosecutions of the TRC cases was not the result of its "*own doing or its malice*". It was the "*result of the political interference and the 'severe political constraints' to which the first respondent* [the NPA] *was subjected*". This attitude explains how the NPA was so easily 'captured' in relation to the TRC cases, and then subsequently in respect of the cases dealing with systemic political corruption.

364 Effectively, the NPA leadership states that once the politicians leaned on them, they were obliged to comply with their demands and accordingly cannot be held accountable. However, this claim flew in the face of the prevailing law, as was pointed out by the Timol family's submissions in the Rodrigues stay of prosecution case. While the pressure brought to bear on the NPA was exerted by outside forces, the institution and its officials were under a clear legal duty to reject such improper interference and obstruction. The various constitutional and statutory lapses committed by the NPA and those behind the interference will be dealt with later in this affidavit.

365 While the NPA has admitted that it succumbed to political interference, those organs of state who actually applied the pressure remain conspicuously silent. To their discredit, to date, neither the President nor any member of cabinet, past or present, have expressed any regret or remorse, or offered an apology for the deep betrayal of victims of past atrocities.

366 In its judgment, the full court in *Rodrigues v NDPP & Ors* [2019] 3 All SA 962 (GJ) dismissed the application for a stay of prosecution and concluded that:

> "[21] What occurred in the period from about 2003 and 2017 was that all investigations into TRC cases and other crimes of the past were stopped as a result of an executive decision taken at a high level that purported to interfere with the National Prosecuting Authority's prosecutorial decision making."

367 The Court expressed its dismay at the political interference and dismissed the NPA's attempt to portray itself as a victim and directed that those complicit should be brought to the NDPP's attention for action. It also directed that the Executive and NPA provide a public assurance that such interference will never occur again and called on them to specifically indicate what measures will be put in place to prevent such recurrence. The full bench rejected the attempt of the NPA to paint itself as a victim and called for an investigation:

> "[64] Of course, it may well be asked, what was the NPA required to do in the face of high-level political interference? Rather than simply succumb to it, it was open and incumbent upon the NPA to have brought this interference into the open. Victims of those crimes where investigation and prosecution was being suppressed certainly had the right to know what was happening and why such cases were not being prosecuted. **Society as a whole had an ongoing interest in the work of the TRC and the follow-up that the government had committed itself to**. Parliament, which ultimately represents the legislative authority of the state, had a right to know when the letter and spirit of legislation that it had passed was being deliberately undermined. None of this occurred and **the NPA must accordingly accept the moral and legal consequences of this most serious omission and dereliction of duty on its part**.
>
> [65] It is also for these reasons that **the conduct of the relevant officials and others outside of the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted**." (Bold added)

368 Rodrigues approached the Supreme Court of Appeal, which in *Rodrigues v The National Director of Public Prosecutions and Others* [2021] 3 All SA 775 (SCA)

dismissed his appeal stating that it was "*perplexing and inexplicable*" why the TRC cases were suppressed:

> "It was during this 14-year period [2003 – 2017] that the Executive adopted a policy position conceded by the State parties that 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.
>
> All these considerations, either viewed individually or collectively, should have stood in the way of any such a moratorium on the prosecution of TRC era cases. That it happened despite the constitutional, legal and other considerations suggests disdain for those important considerations and interests. The Full Court rightly recommended a proper investigation into these issues by the NDPP and a determination whether any action in terms of section 41(1) of the National Prosecuting Authority Act 32 of 1998 (NPA Act) was necessary".

369 Rodrigues filed an appeal to the Constitutional Court, but he died on 7 September 2021 bringing an end to the efforts to hold him to account.

WAS THERE A POLITICAL AGREEMENT NOT TO PROSECUTE?

370 While the evidence uncovered points to a desire on the part of the government to close down the TRC cases in order to protect ANC members from prosecution, there have also been public statements raising the possibility of an agreement or 'informal agreement' between political stakeholders not to prosecute apartheid-era crimes.

371 In a parliamentary question (NW2290) put to the Minister of Justice on 10 November 2020, Mr G Hendricks of the Al Jamah-Ah party asked for the reasons why no perpetrators of Apartheid-era killings of leaders such as Imam Haron, Steve Biko, Suliman 'Babla' Saloogee and hundreds of others had been prosecuted. He asked in particular, if the reason was the result of any "*agreement, secret or otherwise*"

and "if so, was the agreement legal or political?" The Minister replied as follows: "*The NPA is unaware of such an agreement*."

372 On 5 July 2021, the FW de Klerk Foundation released an editorial titled "The NPA's Decision to Prosecute 'Apartheid Era' Crimes", a copy of which is annexed hereto as **FA51**. The editorial referred to an 'informal agreement' not to prosecute apartheid era crimes:

> "Because of an informal agreement between the ANC leadership and former operatives of the pre-1994 government, the NPA suspended its prosecutions of apartheid era crimes."

373 In response to this editorial, Good Party secretary general Brett Herron said in a media article (Tymon Smith, A Renewed Commitment to the TRC Cases, Mail & Guardian, 26 July 2021) that De Klerk's reference to the agreement "*confirms one of South Africa's most disgraceful secrets*" and that it:

> "further confirms that the NPA was captured long before the term 'state capture' rose to the prominence it has, and that the ANC had accomplices in the genesis of our current capture pandemic, the party of apartheid led by De Klerk".

374 Herron described the editorial as "*a thinly veiled threat to the NPA to stay in its lane or the ANC will face consequences*". He added that "*what the De Klerk Foundation really wants is for the terms of its informal amnesty deal with the ANC to be upheld by the NPA*". A copy of this article is annexed hereto marked **FA52**.

375 The meeting report of the Justice Portfolio Committee meeting of 8 December 2021, disclosed that Hendricks asked Minster Ronald Lamola whether the government "*had been hampered by decisions taken at the Convention for a Democratic South Africa (CODESA) not to prosecute the TRC cases*." He said, "*Minister Lamola had*

to be honest with South Africa." The Minister said he "*was not aware of any agreements which provided that there would be no prosecutions of TRC matters*." The relevant extracts of this meeting report are annexed hereto marked **FA53**.

Deliberations on a further immunity

376 During July 1998, former SADF Generals called for a blanket amnesty for all sides. See the SAPA press release dated 14 July 1998 annexed hereto marked **FA54**.

377 In March 1999, the TRC denied the amnesty application of 37 ANC leaders, which included then Deputy President Mbeki.

377.1 The application was denied since it did not disclose any individual offences. See the SAPA press release dated 4 March 1999 annexed hereto marked **FA55**.

377.2 Shortly thereafter, Mbeki informed Parliament that government was considering further amnesty proposals that had been put forward by SADF generals. See the article titled *'Generals, ANC members talk about amnesty'* dated 1 January 2002, annexed hereto marked **FA56**.

377.3 Mbeki also sought to adjust the TRC legislation to allow for the grant of amnesty for collective responsibility, without the need for individual disclosure. An ANC spokesperson suggested that the SADF generals had promised to "come clean" but only if they were guaranteed amnesty. See the SAPA press release titled "*Mbeki wants changes to TRC rules on amnesty*" dated 22 May 1999 annexed hereto marked **FA57**.

378 Bubenzer in his book in a chapter titled "*Bargaining Over the TRC's Legacy*" detailed secret consultations between the ANC government and representatives of the SADF and the security police from 1998 until early 2004. The main aim appeared to be to reach agreement on a legislative solution on how to avoid prosecutions in the wake of the TRC. A copy of the relevant extracts from Bubenzer's book are annexed hereto marked **FA58**.

379 According to an interview conducted by Bubenzer with former police commissioner and head of the Foundation for Equality Before the Law (**FEL**), Johann van der Merwe, in Pretoria on 5 May 2006, former President F.W. de Klerk assumed a central role in the consultations. According to Bubenzer:

379.1 De Klerk often consulted with President Mbeki directly or with other high-ranking members of the government.

379.2 The FEL's aim was to find a solution to avoid the prosecution of former members of the SAP who had not received amnesty.

379.3 Since a general amnesty was not politically or constitutionally feasible, the FEL proposed an indemnity procedure based on admission of the crime committed, but without the need to make full disclosure.

379.4 The talks continued until 2004, without an agreement being reached.

380 However, the approach proposed by FEL in relation to the '*admission of crimes but no full disclosure*' was adopted by the Pardons Reference Group established by President Mbeki under the Special Dispensation for Political Pardons in 2007.

381 According to an interview conducted by Bubenzer with former SADF General Jan Geldenhuys (**Geldenhuys**) in Pretoria on 10 May 2006, consultations between government and a group of high-ranking former generals of the SADF commenced during 1998.

381.1 Former Chief of the SADF, General Constand Viljoen was approached by Jacob Zuma, then Deputy President of the ANC with the aim of discussing questions of criminal accountability arising from the past. Viljoen referred Zuma to Geldenhuys and the Contact Bureau (known in Afrikaans as the Kontak Buro).

381.2 As with the police negotiations, these talks were aimed at finding a mutual arrangement to avoid post TRC trials through a new indemnity mechanism. The government was represented by Jacob Zuma, who became Deputy President of South Africa in June 1999 (**Zuma**).

381.3 The talks were mediated and facilitated by Johannesburg businessman Jürgen Kögl, who was closely connected to leading ANC members. Apart from Zuma, other high-ranking members of the ANC, such as Penuell Maduna (then Justice Minister), Mathews Phosa, Sidney Mufamadi and Charles Nqakula also participated from time to time. On various occasions Thabo Mbeki was also present, initially in his capacity as Deputy President, and later as President.

381.4 The SADF was represented by Geldenhuys and other generals. Both sides had legal advisers present. The talks continued until early 2003, with a few follow-up meetings held in 2004.

381.5 Bubenzer explored the motivation of the government in reaching out to the SADF generals in two interviews conducted with Jürgen Kögl on 12 May 2006 and 14 June 2006. Apparently, the government was, for amongst other reasons, interested in persuading the generals to come clean on its past third force operations in KwaZulu Natal and in particular to disclose the sites of arms caches, which could be used in future political violence.

382 On 21 December 2019, investigative journalist and author, Michael Schmidt, conducted an interview in Hartbeespoort with Major-General Dirk Marais (**Marais**), former Deputy Chief of the Army and the Convenor of the SADF Contact Bureau. Schmidt's confirmatory affidavit is annexed hereto marked **FA59**. Schmidt writes in his book 'Death Flight' that, according to Marais, the government was seeking a *quid pro quo*. Copies of the relevant extracts from 'Death Flight' are annexed hereto marked **FA60**. Marais claimed that Mbeki indicated in their discussions that:

> "They don't want us to be charged – and they don't want them to be charged"

383 Marais said in the interview that on his side at the talks were former Defence Minister General Magnus Malan, former Chiefs of the Defence Force Generals Constand Viljoen and Jannie Geldenhuys, and former Chief of the Army General Kat Liebenberg – although sometimes they brought in other generals such as former Surgeon-General Niël Knobel, or one of the former Chiefs of the Air Force, as required.

384 Marais told Schmidt that on the ANC/Government side, Mbeki's team usually consisted of the "security cluster", which initially included Minister of Defence Joe Modise, Minister of Safety and Security Sydney Mufamadi and Minister of Justice

Dullah Omar. According to Schmidt, when Mbeki became President, Zuma's "security cluster" team would most likely have included Minister of Defence Mosiuoa Lekota, Minister of Justice Penuell Maduna (replaced by Brigitte Mabandla in Mbeki's second Cabinet), Minister of Intelligence Joe Nhlanhla (replaced by Ronnie Kasrils), and Minister of Safety and Security Steve Tshwete (replaced by Charles Nqakula).

385 On 5 May 2020, former Minister of Intelligence Kasrils emailed Schmidt regarding the ANC-SADF talks advising that he had 'no knowledge of virtually all the meetings and developments arising from such talks.' Schmidt no longer has a copy of this email.

386 Schmidt notes in his book, that during the interview, Marais showed him an unsigned handwritten letter he prepared for the signature of the former Chiefs of the SADF in early 2004. Marais permitted Schmidt to take photographs of the letter. The letter was addressed to Deputy President Zuma, and it recalled the initiation of the series of secret, high-level talks between the government and former SADF Generals, a copy of which is annexed hereto marked **FA61**. The letter stated *inter alia*:

> "A process of communicating between the ANC initially and the government lately with the former chiefs of the SA Defence Force was initiated by the Deputy President of South Africa Mr T. Mbeki when he approached General C.L. Viljoen in 19? (sic). General Viljoen after consultation with the former Chiefs of the Defence Force within the structure of the SADF Contact Bureau conveyed our preparedness to communicate with Mr Mbeki in his capacity as Deputy President and President of the NEC of the ANC.
>
> A convenor, Mr J. Kögl, apparently empowered by Mr Mbeki, arranged for a meeting at his house in Johannesburg. That meeting was in the form of discussions followed by a dinner hosted by Mr Kögl. It was attended by Mr Mbeki and various of his ministers as well as the Premier of Mpumalanga Mr M. Phosa, [leader of an ANC lobby arguing that its members be protected from prosecution], and by us the former Chiefs of the SADF.

> There was enthusiastic agreement that the commenced communication should be continued and that more meetings should follow. We, the former Chiefs of the SADF, being aware of the Deputy President's tight work schedule, suggested that he appoint one of his ministers to represent the ANC in future deliberations. Mr Mbeki, however expressed the opinion that the process of communication, which was mutually agreed to, was so important to him that he preferred to remain the prime representative of the ANC in future deliberations.
>
> Many deliberations followed and mutual agreements were reached. When Mr Mbeki could not attend, he authorised somebody, usually a minister, and later on when he became president in 1999, you [Deputy President Jacob Zuma] represented him.
>
> In execution of mutual decisions, much effort was put in by the Contact Bureau and some of your ministers to prepare papers and submissions for acceptance by the Deputy President and later on the President. …..
>
> In similar fashion, we the former Chiefs of the SADF as members of the forum were flown to Cape Town for discussions with Ministers Maduna and Nqakula and thereafter with you on 17 February 2003."

387 Former Premier of Mpumalanga, Mr Mathews Phosa, in a telephonic call to Schmidt on 2 June 2020, denied the claim of Marais that he had been involved in an ANC lobby pursuing protection from prosecution.

388 Bubenzer writes that Geldenhuys and Kögl advised him that by the end of 2002, the consulting parties had agreed on a detailed proposal for the enactment of a legal mechanism which amounted to a new amnesty. It envisaged an amendment to the Criminal Procedure Act to allow for a new kind of special plea based on the TRC's amnesty criteria, followed by an inquiry by the presiding judge.

389 By late 2002 the proposal and draft legislation had been finalised by the Justice Department and was ready to be presented to Parliament for enactment. However, it first had be approved by President Mbeki, who ultimately rejected it in early 2003. Nonetheless, as has been set out above, the essential ideas remerged in the subsequent amendments to the Prosecution Policy.

390 At the ANC's 51st national conference in December 2002 in Stellenbosch, a discussion of guidelines for a broad national amnesty, possibly in the form of presidential pardons, was scheduled. According to the head of the ANC presidency, Smuts Ngonyama, the ANC supported the idea of introducing a new amnesty law. He added that his party was generally against running trials in the style of the Nuremberg trials, since this would occur at the cost of nation-building. I attach hereto a copy of a news article marked **FA62**.

391 Prior to Mbeki's rejection of the amnesty legislation in early 2003, the SADF generals appeared to be on the brink of a breakthrough. Marais advised Schmidt in the aforesaid interview that after 7 years of negotiations, the generals and the Cabinet's security cluster had agreed on a legal framework for a post-TRC amnesty process. According to Marais the government arranged for "*a law writer in Cape Town*" to come up with the new legislation.

392 On 17 February 2003, a delegation of SADF generals led by Geldenhuys met with Justice Minister Penuell Maduna and Police Minister Charles Nqakula in Cape Town. The law drafter (a state official in the Department of Justice) was called in to read out the proposed legislation. Marais indicated to Schmidt:

> "… and when he finished, we said 'But that's got nothing to do with us'… because they [said] they will grant amnesty to everyone who will make a full statement of his [crimes committed] so General Geldenhuys said 'No, we don't need that. All our people who wanted to make statements and ask for forgiveness already went to the TRC. Our other people … don't have to do that, so this means nothing to us …. The whole thing collapsed there …. This whole conversation collapsed…" (At page 146 of Death Flight).

393 According to Schmidt, the differences between the sides were now irreconcilable: the generals wanted a post TRC law granting a new blanket amnesty with no

disclosure required – but the government appeared only willing to offer an amnesty based on full disclosure to be decided on a case-by-case basis.

394 The talks between the SADF Generals and the government came to a close during 2004, without resolution, as was evident from Marais' 2004 letter to Deputy President Zuma referred to above:

> "In spite of such submissions and apparent acceptances, little notable implementation was effected by the ANC or government. …
>
> Agreement on outstanding matters was again confirmed, yet more than a year later, no sign of implementation has become apparent, neither was there any effort on your behalf to inform us of any progress which could lead to eventual implementation.
>
> In view of the above, you are requested to inform us of the desirability from your point of view to keep the door open for further co-operation."

395 Deputy President Zuma did not respond to the letter.

Compilation of dockets and threats of private prosecutions

396 At least two organisations largely representing the interests of the former regime, the FEL and AfriForum, have called for prosecutions of ANC and PAC members, and threatened private prosecutions against ANC members and civil litigation if their members are prosecuted. Examples of such public statements are annexed hereto marked **FA63**. It appears that such threats may have played a role in shaping the approach of the government to the TRC cases.

397 In an interview conducted by Bubenzer with Johann van der Merwe in Pretoria on 5 May 2006, the latter claimed that the FEL, represented by attorney Jan Wagener, had compiled dockets for the prosecution of top ANC members, including President Mbeki. Adv Jaap Cilliers SC, who had represented Wouter Basson, apparently

evaluated the dockets and claimed that the dockets contained sufficient evidence to support criminal charges. The PCLU requested the FEL to hand over the dockets for their consideration, but FEL refused to do so, claiming that would only be used if apartheid era officials were targeted for prosecution. The claimed dockets have never been handed over to the authorities.

398 Wagener, during his interview with Bubenzer in Pretoria on 8 May 2006, claimed that the threat of the FEL dockets played a role in persuading President Mbeki and the government not to proceed with the arrests in 2004 of the suspects behind the poisoning of Chikane.

399 According to Bubenzer, General Jan Geldenhuys told him at an interview in Pretoria on 15 May 2006, that the former SADF generals were also of the view that the issue of potential criminal liability of ANC members was "*a major consideration for the government*" and the former military would take the same steps as FEL if they were charged.

400 This is one of the key questions that only an independent commission of inquiry can resolve.

Former President Mbeki denies involvement in political interference

401 In an article titled "*Long-awaited NPA report gives no answers on ANC govt's alleged blocking of apartheid trials*" published by News24 on 21 February 2024, journalist Karyn Maughan pointed to uncontested evidence from various court cases demonstrating that "*powerful Mbeki administration officials blocked the prosecution of apartheid cases*". A copy of this article is annexed hereto marked **FA64**. Former

President Mbeki was approached for comment, but his foundation, the Thabo Mbeki Foundation (**TMF**), referred enquiries to the current government.

402 However, on 1 March 2024, the TMF released a statement titled "*Statement by former President Thabo Mbeki on allegations of NPA interference by the Executive*", a copy of which is annexed hereto marked **FA65**. In this statement Mbeki strenuously denied any involvement in the suppression of the TRC cases:

> "During the years I was in government, we never interfered in the work of the National Prosecuting Authority (NPA). The executive never prevented the prosecutors from pursuing the cases referred to the NPA by the Truth and Reconciliation Commission.
>
> I insist on this despite a 2021 Supreme Court of Appeal judgment which found, on the strength of uncontested submissions by former National Director of Public Prosecutions (NDPP), Advocate Vusi Pikoli, that the NPA "investigations into the TRC cases were stopped as a result of an executive decision" which amounted to "interference with the NPA."
>
> I repeat, no such interference ever took place. If the investigations Adv Pikoli referred to were stopped, they were stopped by the NPA and not at the behest of the Government as alleged by the Advocate. There is no record of a single instance when the NPA stopped investigating and prosecuting any case on account of the so-called "executive interference" – at least not during the period 1999 - 2008."

403 Former President Mbeki asked why the NPA succumbed to political pressure and challenged the NPA to produce any illegal instruction from his government stopping the TRC cases:

> "There are some questions which the NPA must answer honestly.
>
> Who in the executive instructed the NPA not to do its work? Will the NPA publish this 'instruction' which, presumably, will be in its archives? Why did the NPA accept and respect what would have patently been an illegal instruction?
>
> Instead of propagating falsehoods, the NPA must investigate and prosecute the cases referred to it by the TRC.

> I also recall that the same Pikoli who allegedly buckled under pressure of "executive interference" concerning the TRC cases, earned a lot of respect by portraying himself as an independent and principled NDPP who defied an "all too powerful" President Mbeki, who was supposedly hell-bent on stopping him from investigating and arresting the late former National Commissioner of Police, Jackie Selebi.
>
> The question arises, what happened to his cherished independence and commitment to principle when he acquiesced to 'members of the executive' on the TRC cases?"

404 Mbeki claimed that he and his administration always acted in accordance with the Constitution, and he called on the NPA to demonstrate integrity by apologising to victims for not prosecuting the TRC cases:

> "Conveniently, some people forget that the ANC was the principal architect of the Constitution of the Republic. During the years when I served as Deputy President and President of the Republic, I, together with my colleagues in Government, always bore this in mind and acted knowing that the Constitutional prescripts we helped to negotiate were binding on us.
>
> There was never any Minister of Justice during those years who was ever authorised to instruct any NDPP to act in one way or another. No NDPP, including Pikoli, ever approached me to complain that he/she had been instructed by a Minister, or any other official, to violate the independence of the NPA as prescribed by the Constitution.
>
> The NPA must demonstrate enough integrity by apologising for not processing the TRC cases, rather than engage in dishonourable behaviour of trying to hide behind a fig leaf which is nothing more than pure fabrication."

405 The denials of former President Mbeki are not consistent with the brazen suppression of the TRC cases that occurred during his administration, and which has been set out above. It is for an independent commission of inquiry to consider and test the veracity of the denials of former President Mbeki.

DEVELOPMENTS POST THE POLITICAL INTERFERENCE

406 It is difficult to pin a date on when the political interference came to an end. According to the SCA in *Rodrigues* the political interference took place between 2003 and 2017. However, given the ongoing delays in taking the TRC cases forward, suspicions linger that the obstruction and interference of the past have been difficult to shake off.

407 In order not to unduly burden this affidavit, most of the reports, minutes and other documents referred to in this section are not annexed but can be made available on request. In the electronic version of these papers, where available, hyperlinks are provided to these documents.

408 It should be stated that as far as we can ascertain there has been no mention of the TRC cases in the SAPS Annual Reports. (The SAPS Annual Reports prior to 2002, and those between 2004 and 2007 are not available online). There is also no mention of the TRC Cases in the DOJ Annual Reports which only deals with the question of reparations for those on the TRC's closed victims' list.

409 It is perhaps significant that the minutes of the Justice Portfolio Committee in Parliament recorded no mention of the TRC cases between 2011 and 2016. As mentioned above there was also no mention of the TRC cases during this period in the NPA's Annual Reports. There was only reference to the work of the MPTT.

410 For example, the NPA Annual Report of 2012/ 2013 made no mention of the TRC cases, just stating that the:

> "PCLU continued to execute its mandate as outlined in the Proclamation issued by the President and primarily focused on the management and

direction of investigations and prosecutions of crimes which impact on national and international security …"

411 Between 2016 and 2018, the only TRC case that was mentioned in the NPA Annual Reports was the Timol case, which as mentioned above, materialised though the efforts of the Timol family and their representatives.

412 Oddly enough, there was no mention of the Nokuthula Simelane case. As mentioned previously, in 2015 the Simelane family had filed papers in the High Court, in which the political interference was exposed in detail. This resulted in an indictment being issued in early 2016. None of this appeared in the NPA Annual Reports for those years. I suspect that the NPA maintained its silence on this matter to avoid having to deal with political interference, which was detailed in those papers.

413 Emboldened by the outcome of the reopened Timol inquest in 2017; Webber Wentzel, in a letter dated 18 January 2018, called upon the authorities to pursue 22 emblematic cases from the past (including the murders of the Cradock Four, PEBCO 3, and Richard and Irene Motasi). A copy of this letter is annexed hereto marked **FA66**. In late January 2018, a meeting was held with the NPA and DPCI (also referred to as **the Hawks**) at which the late investigator, Frank Dutton, outlined the available evidence in all these cases and the need to take expeditious action.

414 Both the NPA and DPCI agreed to prioritise these cases.

414.1 Although the Hawks appointed investigating officers, it was subsequently discovered that at least one officer was a former SB member, and another had a prior connection to the Motasi murder case.

414.2 In that case, Richard Motasi had accused the officer in question of assaulting him and had sued him and others for damages, which according to the family, prompted his murder in 1987. Following complaints, the two officers were removed from the investigations, but it left deep suspicions about the bona fides of the DPCI in respect of their commitment to justice in respect of the TRC cases. Correspondence in this regard can be supplied on request.

414.3 Subsequently, the DPCI, at management level, has refused to engage with the FHR and its lawyers and private investigator in respect of the TRC cases, unless a power of attorney is provided in each case. This is even where there are clear links between such cases and matters where lawyers had received specific instructions from the families of the victims involved.

414.3.1 An example is the 1991 murder of Adriaano Louis Bambo by the SB. Bambo was an informer for the SB. He was killed, allegedly to prevent him from exposing the role of the SB in the murder of Nokuthula Simelane and others.

414.3.2 Bambo had been one of Simelane's guards following her abduction and would have observed the treatment meted out to her. Two of the accused in the Nokuthula Simelane case, Willem Helm Johannes Coetzee and Anton Pretorius, were Bambo's handlers and are implicated in the Bambo murder.

414.3.3 Notwithstanding the clear link between the Bambo and Simelane cases, the DPCI and the NPA have been reluctant to cooperate with

the Simelane family lawyers, Webber Wentzel, since they do not have a power of attorney from the Bambo family.

414.3.4 The conduct on the part of the DPCI and the NPA speaks volumes about their approach and lack of sensitivity to the TRC cases. It also heightens the need for a specialised approach to these cases.

414.4 More than six years after the January 2018 meeting, of the 22 highlighted cases, only the Aggett, Haffejee, Dipale and Haron inquests have been concluded.

415 The meeting report (prepared by the Parliamentary Monitoring Group) of the Portfolio Committee meeting held on 4 October 2017 to consider the NPA's Annual Report for 2016/17 recorded the following:

> "Adv L Mpumlwana (ANC) [condemned] the NPA. There was a feeling in South Africa that justice was for the rich and for white people. It had been like that for a long time. When a white lady's car was hijacked, a helicopter had been sent and the car was found and returned within an hour. He remembered when New Zealander visitors had been raped. Ten helicopters had hunted down the rapists and they had been sentenced within two years. He complained about the association of whites with value and blacks with no value....
>
> **There was the Truth and Reconciliation Commission (TRC) and some people had not gone to the TRC. Where were those cases rotting? TRC was like a staged thing. They had tried to be very kind and let people come but some did not come and others did not make full statements. Was there a way of checking on those who had not got amnesty? Was there no movement towards prosecution?"** (Bold added).

416 In January 2019, the NPA implemented a decentralisation policy in relation to the TRC cases in which the cases were transferred from the PCLU to the provincial offices of the various DPPs. This is reflected in the NPA Annual Report of 2019/20:

> "The PCLU underwent fundamental restructuring at the beginning of the period under review, and Adv Chris Macadam was appointed acting head of the unit. After an audit of the PCLU's workload, the organisation decided to adopt a decentralised model whereby prosecutions are conducted by prosecutors in the areas where the crimes were committed, with the PCLU performing a managerial or support role. The NPA has reaffirmed the original mandate of the PCLU, and all matters falling outside of the mandate were returned to the DPP offices with jurisdiction. The adoption of a decentralised model required that the DPPs appoint nodal points to manage the PCLU matters in their divisions. The nodal points were trained to enable them to properly manage PCLU cases, and a monthly reporting system was installed."

417 The NPA Annual Report of 2019/20 also noted that its hands were tied since the investigation of the TRC cases was the responsibility of the DPCI:

> "**In the S v Rodrigues TRC matter, the court found that the NPA had acted in breach of its duty in not resisting political interference by other departments and the executive. The NDPP was directed to investigate these matters further, and this investigation is still ongoing**.
>
> **It must be emphasised that the primary issue lies with the investigation of these matters, which is a responsibility of the DPCI. Due to the nature of the cases, it is difficult to access all the relevant information needed to make informed decisions.** The PCLU has undertaken a number of initiatives to prioritise cases. This includes commencing with a review of all the death in detention cases from 1963-1990, reviewing certain decisions not to prosecute and grouping cases to establish the existence of a *modus operandi*.
>
> **Efforts are being made to establish a research capacity to retrieve all historical information required for the proper investigation of TRC cases.** Initiatives to increase efficiency of the nodal points were interrupted by the COVID-19 crisis, which is preventing the holding of workshops, training seminars and other meetings." (Bold added)

418 The first comment by a cabinet minister on the interference that we are aware of was made by the former Minister for Justice, Ronald Lamola during his address to Parliament on the Budget Vote Debate of the DOJ on 16 July 2019 (a copy of which can be supplied on request):

> "Furthermore, we've noted the recent judgment on the Rodrigues matter related to TRC cases. We assure victims with similar cases that interference with prosecutorial independence of the NPA will not be tolerated. We continue towards a durable and sustainable solution to all TRC related cases including consideration of interest of victims."

419 Between April and August 2019, several suspects and witnesses in apartheid-era cases died before the trials or inquests could commence. These included Sergeant Msebenzi 'Vastrap' Radebe, an accused in the Nokuthula Simelane murder case; Lieutenant Stephen Whitehead, lead interrogator of Neil Aggett; Ernest Matthis who saw Timol fall and was expected to testify in the murder trial of Jao Rodrigues; and Colonel James Taylor, who was involved in the arrest and brutal interrogation of Dr Hoosen Haffejee.

420 The minutes of the Justice Portfolio Committee meeting on 9 July 2019 on the NPA's Annual Performance noted:

> "Key service delivery initiatives of the NPA include restoring NPA credibility and public confidence, the successful establishment of the Investigative Directorate, ongoing staff development and training, recruitment of specialised skills, the resuscitation of the Aspirant Prosecutor Programme which will deploy 90 new prosecutors to district courts; **as well as ensuring that the Truth and Reconciliation Commission (TRC) prosecution cases are dealt with adequately**.
>
> Unfortunately, the NPA faces a massive credibility challenge and is seriously divided. There is a lack of confidence in the NPA. It has severe budgetary restrictions and will have to reduce its staff complement by 500 over the Medium-Term Expenditure Framework to remain within budget. It has a shortfall of R1.7 billion over the next three years. A deep-seated skills shortage plagues the NPA and it has an average 20% vacancy rate." (Bold added).

421 The Justice Portfolio Committee Report of 12 July 2019 reflected the following:

> "**In June 2019, the South Gauteng High Court found that the NPA had breached the Constitution by allowing political interference to stall the prosecution of cases in which the TRC either did not grant amnesty or there was no application for amnesty made to the TRC. The NDPP was**

> **asked to consider charging those who had prevented the prosecution of these cases. In addition, the families of victims have also formally requested that a commission of inquiry be established**. For now, the NPA is in the process of establishing a task team to look into all cases of deaths in detention. The Committees regrets [sic] the delays in finalizing these cases and will monitor progress."

422 The minutes of the Justice Portfolio Committee meeting on 11 September 2019 noted the following comment by its chairperson:

> "The Chairperson referred to the TRC Report and said it had been 21 years since the finalisation of the report. There could not be a process that lasts more than 20 years. By the end of this term this had to be completed."

423 The minutes of the Portfolio Committee meeting of 4 March 2020 on the NPA's performance in the second and third quarters of 2019/20 reflected the following intent in relation to the TRC cases:

> "The Truth and Reconciliation Commission (TRC) prosecutions were a new focus area – the Timol case had been finalised lately. There were many cases in process but between 1963 and 1990 there had been 69 deaths in detention. The approaches to the NPA by families were only in respect of a few deaths. The NPA wanted to do a joint inquest of all deaths with common factors, for example, all deaths in a particular police station. That meant that there was a delay in moving cases forward. The Hawks had promised to follow up as rapidly as possible because people were dying. Rodrigues, who had been involved and convicted in the Timol case, had gone to court to apply for a permanent stay of execution. He had lost the case, but the judgement found that the NPA was guilty of preventing certain cases from going forward. The judgement required that the NPA investigate those NPA officials who were involved in delaying the cases.
>
> Adv Batohi said that the judgement referred to broader government officials and not just NPA officials."

Timol inquest follow-up

424 In the reopened Timol inquest, Judge Mothle found in his 2017 judgment that former SB officers, Warrant Officer Neville Els and Colonel Seth Sons, had lied under oath and that they should be investigated on perjury charges. It took Acting DPP

(Gauteng Division, Pretoria) Adv George Baloyi more than 30 months to decide not to charge them.

425 On 22 June 2020 the Timol family took this decision on internal review to the NDPP. In these submissions the following was placed on record:

> "We have to place on record that it has taken the NPA more than 2.5 years to make this decision. **The time taken to reach this decision leaves a sense of shock and dismay**. This matter can hardly be described as complex or unwieldy. ... Moreover, there was a real urgency given the circumstances. Ahmed Timol was murdered in 1971 and the suspects and witnesses in this matter are all elderly. Accordingly, the NPA was acutely aware that time was a pressing factor. Yet the NPA dragged its feet notwithstanding the persistent and frequent enquiries made by Cajee with multiple NPA officials. … In our respectful submission, such delay in these circumstances is inexcusable. …" (Bold added).

426 The submissions, a copy of which can be supplied on request, concluded with the following depressing observations:

> We are of the respectful view that none of the reasons put up by the Acting DPP for declining to prosecute in this matter withstand scrutiny. **Regrettably we have come to the view, that even after a 2.5-year delay, no serious investigation was launched into these two cases.**
>
> We repeat our concern, that failing to hold former SB officers accountable for misleading courts and lying under oath, will simply invite others to do the same. It will also extend the total impunity SB officers enjoyed under apartheid to the new democratic order. (Bold added).

427 Notwithstanding the tardiness of Acting DPP Baloyi it took another two and half years for NDPP Batohi to overturn this decision, by which time a key elderly witness had become too ill to testify, effectively bringing an end to the case against Els. Such long delays cast serious doubt on the NPA's commitment to the TRC cases.

Reopened inquests: Neil Aggett and Dr Hoosen Haffejee

428 In the Aggett case, the family had been pressing the NPA to reopen the inquest into the death in detention of Neil Aggett since January 2016.

428.1 The Aggett family attorneys, threatened the NPA with litigation to compel them to reopen the inquest through correspondence on 21 June 2016, 8 July 2016 and 11 August 2016. On 23 August 2016, the attorneys sent the NPA a letter of demand placing them on terms:

> "In the circumstances we hereby demand that the necessary recommendations to the Minister of Justice in terms of section 17A of the Inquest Act 58 of 1959 to reopen the aforesaid inquests be made by no later than 30 September 2016."

428.2 Lieutenant Stephen Whitehead, lead interrogator and tormentor of Aggett, died on 22 April 2019. He was only 62 years old.

428.3 On 29 July and 15 August 2019 lawyers acting on behalf of the families of the late Neil Aggett and Hoosen Haffejee threatened the Minister of Justice with an urgent High Court application if he did not instruct the judge presidents of the Gauteng and KwaZulu Natal Divisions to reopen the inquests.

428.4 On 16 August 2019, the Minister of Justice released a press statement announcing that the inquests into the deaths of Aggett and Haffejee would be reopened. Copies of the aforesaid correspondence can be made available on request. In the family's closing submissions in the Haffejee reopened inquest, it was stated that "*families should not have to take drastic steps like this*."

428.5 SB Colonel James Taylor, who led the brutal interrogation of Dr Hoosen Haffejee died on 19 August 2019, just days after the announcement of the Minister of Justice to reopen the inquest.

428.6 Whitehead could have been held to account if the authorities had acted expeditiously. More than 3 years elapsed between the original request for an inquest in January 2016 and his death in April 2019. The inquest only commenced on 20 January 2020.

428.7 It was noted in the Aggett family closing arguments in the Reopened Inquest that "*perpetrators of apartheid era crimes have taken their lead from the State's inaction. They know they have nothing to fear*." The submissions noted that SB officers continued with their "*charade of innocence*" as they did before inquests under apartheid:

> "It is as if nothing has changed. They do not have the slightest concern of having to face the music for their lies and deceit. This is the price that we must pay for the readiness of our law enforcement authorities to trash the rule of law at the behest of powerful political forces."

428.8 On 4 March 2022, Judge Makume handed down his judgment which overturned Magistrate P Kotze's decision of nobody to blame and held that Aggett's death was attributable to foul play by the Security Branch. Judge Makume found that former SB officers Nicolaas Johannes Deetlefs, Johannes Nicolaas Visser, Joseph Petrus Woensdregt, Daniel Elhardus Swanepoel, Roelof Jacobus Venter and Magezi Eddie Chauke had persisted with their cover-up in the reopened inquest and committed perjury. He recommended that they be investigated with a view to prosecution.

428.9 Some 2.5 years later the NPA has still not taken a decision. Deetlefs died in September 2023. In October 2024 the prosecutor assigned to the Aggett case left the NPA before completing her work on the case. To date no new prosecutor has been allocated to the case.

428.10 The Hoosen Haffejee reopened inquest ran between August and September 2021 at the Pietermaritzburg High Court, while closing arguments were heard in October 2022 and judgment was handed down on 13 September 2023. Judge Zaba Nkosi found that Haffejee had been brutally tortured and murdered by the Security Branch and called for a murder investigation against one surviving SB officer.

429 I am advised that the Timol, Aggett and Haffejee families are grateful to State Advocate Shubnum Singh for the dedication to justice she displayed in these cases. Although she did not appear in the Haffejee inquest, her meticulous preparation led to the reopening of that inquest. Tribute must also be paid to former State Advocate, Jabulani J. Mlotshwa, of the NPA's Johannesburg office for his dedication and sterling contribution to the Aggett and Cosas 4 cases.

COSAS 4 families take legal action

430 In September 2019, the families of the COSAS 4 requested the NPA and DPCI to investigate the callous entrapment murders of the four teenagers by the SB in 1982. After a year of perceived inaction, the families decided to take matters into their own hands and on 2 September 2020 they filed an application with the Krugersdorp Magistrates' Court seeking an order for the disinterment and forensic examination of the bodies.

431 In her founding affidavit, Maide Christina Selebi, the sister of Eustice "Bimbo" Madikela, one of the COSAS 4, noted that her legal representatives had three meetings with the NPA and DPCI as well as written multiple communications, several of which were ignored. She noted that several high-ranking suspects had already died and that it had "*fallen on the families to bring this application*." She recalled that "*the COSAS 4 matter was handed over by the TRC to the NPA in 1999*" and that the families "*bring this application to find peace and closure*."

> "We have been forced to take matters into our own hands. We can no longer be expected to wait for the NPA and SAPS, who have already delayed this matter for some 21 years, to act."

432 Once the application had been filed, and to the credit of both the NPA (Gauteng Local Division, Johannesburg), in particular Adv Jabulani Mlotshwa, and the DPCI, expeditious investigations were thereafter launched and the post-mortem reports recovered. On 23 August 2021, former Askari Thlomedi Ephraim Mfalapitsa was charged with kidnapping and murder, and subsequently similar charges were preferred against former SB explosives expert Christiaan Siebert Rorich.

433 On 19 November 2021, historic crimes against humanity charges were added to the indictment, including apartheid as a crime against humanity, which was the first time such charges had been pursued in South Africa. Credit must be given to the Johannesburg office of the NPA for the courage in taking this important step. Crimes against humanity charges correctly characterises the systemic and widespread nature of these brutal crimes. Prosecutors in the Nokuthula Simelane and Caiphus Nyoka cases refused to include crime against humanity charges in those cases.

434 Thereafter the trial was delayed for more than two years, mainly because of the refusal of the SAPS Commissioner to pay the legal fees of former SB officer Rorich,

even though a judgment arising from the Nokuthula Simelane case, compelled him to do so.

435 Lawyers for the families intervened and litigated and ultimately secured a court order issued by Mokgoatlheng J on 4 May 2022 compelling the SAPS to pay Rorich's legal costs. The SAPS belatedly took this order on appeal, which was opposed by the families. On 5 December 2022 the FHR sent an open letter to the Minister of Police asking him to change course on the question of legal costs. Leave to appeal was dismissed on 12 January 2023. The SAPS then petitioned the SCA but abandoned its appeal in April 2023. The 'Stalingrad' tactics adopted by the defence teams have, to date, prevented the trial from proceeding.

436 As mentioned above, the application by accused no. 1, to overturn the refusal to grant him amnesty was dismissed by the High Court in November 2024, and in the same month the trial court heard the objection of the accused to the crimes against humanity charges, with judgment reserved and the criminal trial postponed to April 2025.

Cradock Four families take legal action

437 In July 2019, my attorneys at Cliffe Decker Hofmeyr (**CDH**) and FHR's private investigator retired Brigadier Clifford Marion (**Marion**) began liaising with both the NPA and DPCI to get the Cradock Four case off the ground.

438 This included helping to reconstruct the investigation docket that had gone missing from the head office of the NPA. Between July 2019 and June 2021 there were more than 140 interactions between Marion, my attorneys and the NPA and DPCI. The vast bulk of these interactions consisted of communications aimed at providing

information, documents and leads to support and enable the investigation. These are outlined in a chronology attached to my application in Case No. 35447/2021, which can be supplied on request.

439 I was particularly concerned about the missing investigation docket, given that it was well known that under apartheid the disappearance of an investigation docket generally pointed to a cover-up. After receiving no satisfactory response as to what happened with the missing docket, I decided to open a criminal complaint of theft in relation to the disappearance of the Cradock Four docket. My attorneys addressed several letters in this regard in September 2019, April and August 2020 to the NPA, which can be made available on request.

440 On 11 September 2020, I attended at the Cape Town Central police station to open a criminal complaint, but the officers there refused to accept my complaint saying that I had to report the case in Silverton, Pretoria. On 1 October 2020, one of my attorneys from CDH attended at the Silverton Police Station, but they also refused to accept the complaint saying that she had to go to the Independent Police Investigative Directorate of South Africa to investigate a docket that went missing from the NPA.

441 Out of sheer frustration, on 4 October 2020, my attorneys addressed a letter to the Minister of Police and National Commissioner of the Police seeking their intervention. A copy of this letter can be supplied on request. This eventually resulted in the DPCI confirming in a communication on 23 October 2020 that a criminal case had been opened for defeating the ends of justice and theft of a docket as per Silverton CAS 88/10/2020.

441.1 My attorneys followed up several communications to the DPCI in March and May 2021 asking for progress reports in the investigation. On 19 May 2021, my attorneys were copied on an email which Brigadier Louw of the DPCI addressed to Colonel Hennie De Jager requesting him to give the investigation attention. It became apparent to us that our complaint was not being taken seriously.

441.2 Some two years after liaising with the NPA and DPCI and twice placing them on terms during 2020 to finalise their investigations, it became clear that the NPA and DPCI were making little headway. Copies of this correspondence can be made available on request. The Cradock Four families instructed our lawyers to launch an application to court for an order compelling the authorities to finalise the missing docket investigation and take a decision on the murder case. This application was launched on 20 July 2021, the 36th anniversary of the burial of the Cradock Four.

441.3 On 5 October 2021, Colonel Hennie de Jager of the DPCI advised my attorneys that all possible locations had been searched, and the docket could not be found and that accordingly the investigation into the missing docket had been closed. The communication was silent as to who might have been responsible for the docket going missing.

442 The review process disclosed the dire state of the investigations. It did, however, force the prosecution and investigation teams to engage closely with my representatives to ascertain what case could be salvaged at that late stage. The aforesaid application and correspondence can be supplied on request.

443 Even before launching the aforesaid application in July 2021, more than ten suspects in the Cradock Four case had died, including all members of the SB hit squad, and since launching the application another five persons of interest passed away. With the death in May 2023 of the last remaining suspect, Hermanus Barend du Plessis, against whom there was a *prima facie* case, we had to accept that a prosecution was no longer possible.

444 In August 2023 we agreed to the holding of a third inquest, which was announced on 5 January 2024, and which was meant to start on 2 September 2024, but collapsed as result of the Eastern Cape NPA notifying the witnesses too late and failing to make timely arrangements for the legal costs of the legal teams of the persons of interest, thereby forcing a long adjournment to 2 June 2025. We fear that the last remaining witnesses will die before the inquest can proceed.

445 In early December 2024 we learned that the SANDF and SAPS had declined the applications of the former army and police officers for legal support at the inquest. All attempts to secure the expeditious intervention at ministerial level to resolve the impasse have failed. Unless resolved, this is likely to lead the indefinite postponement or permanent collapse of this inquest and all future reopened inquests involving apartheid era officials.

Imam Abdullah Haron reopened inquest

446 On 4 December 2019, the Haron family's lawyers made detailed written representations to the NDPP providing new evidence and setting out the grounds for the re-opening of the 1970 inquest into the death in detention of Imam Abdullah Haron in terms of section 17A of the Inquests Act.

447 After more than two years had elapsed without a decision, Webber Wentzel placed the NPA and the Minister of Justice on terms in September 2021 and again in April 2022 demanding that a decision be taken. In the family's closing arguments, it was stated that "*such steps should not have been necessary*."

448 On 31 May 2022, some two and a half years after the family's representations to the NDPP, the Minister of Justice requested the Judge President of the Western Cape Division of the High Court to designate a Judge to re-open the inquest, which was held in November 2022. On 9 October 2023 the inquest court handed down judgment which found that Imam Haron had been tortured to death by members of the SB.

CALL FOR CHANGE IN APPROACH TO APARTHEID-ERA PROSECUTIONS

449 Since the decentralisation policy introduced by the NPA in January 2019, in terms of which the TRC cases were transferred from the PCLU to the provincial DPPs, had failed to deliver any tangible results in 18 months, the FHR called for an urgent change of direction.

450 In September 2020 it provided a memorandum to the President, NPA, SAPS and various Ministers titled '*Proposed New Approach to Apartheid Era Prosecutions*', which can be made available on request. This memorandum provided comparative research into the approaches adopted by several countries dealing with crimes committed in past conflicts. The FHR found that those countries which created dedicated capacities to investigate and prosecute such crimes were the most successful, whereas those that did not, invariably failed to deliver adequate justice.

451 The minutes of the Portfolio Committee meeting of 7 October 2020 on the NPA's quarterly performance recognised considerable challenges with the TRC cases, most notably a disjunct between the investigative and prosecution functions:

> "TRC cases
> This is a huge priority for the NPA and an aspect which is seriously concerning. **The NPA is not an investigative agency. The DPCI is an investigative agency but without the requisite investigative and prosecutorial capacity in order to do this**. More people are needed to do this work, and where an investment is made, there should be a showing that it has in fact translated to results. **The NPA is struggling as potential witnesses, loved ones and suspects are dying without justice being served. The NPA is engaging with the DPCI, however there needs to be a push from a higher level**." (Bold added).

452 The FHR followed up with a legal opinion dated 13 January 2021 titled "*Exploring Legal Options for the Establishment of a Special Capacity to Investigate & Prosecute Apartheid Crimes*" which was supplied to the NPA and the Minister of Justice. A copy of the legal opinion can be made available on request.

452.1 This opinion considered the experiences of the multi-disciplinary approaches of the Specialised Commercial Crimes Unit and the Sexual Offences and Community Affairs Unit as well as various Investigating Directorates. These units, which brought prosecutors, investigators and analysts together in teams, had proved reasonably successful in tackling serious crime.

452.2 The opinion proposed establishing an Investigating Directorate or a specialised unit under a Special Director to deal with the TRC cases. This proposal did not find favour with the NPA, the Minister of Justice or SAPS.

453 The minutes of the DPCI briefing presentation to the Police Portfolio Committee meeting on 5 May 2021, reflected a decision to recruit more officers to deal with the TRC cases:

> "The following recruitment process will be finalised during the 2021/22 financial year.
>
> - 104 Contract workers were appointed with effect from 2021/04/01 to deal with the backlog of cases such as Truth and Reconciliation Commission and Steinhoff cases."

454 In June 2021, the NPA and the DPCI issued a joint press statement. They announced a new approach to the investigations and prosecutions of the TRC cases, namely the establishment of a dedicated capacity:

> "… a TRC investigation strategy has been adopted by the NPA and DPCI to create dedicated and sustainable capacity to investigate and prosecute apartheid era atrocity crimes. The NPA is in the process of setting up a specialist unit to deal exclusively with these matters and will be appointing former experienced prosecutors in offices which require additional capacity. A dedicated national office capacity will provide specialised advice, coordination, and monitoring and support.
>
> The Directorate for Priority Crime Investigation also embarked on the process to establish a dedicated team by a recruitment drive to re-enlist a number of competent and highly skilled former police officials with wealth of knowledge in the detective environment. Thirty-four (34) of these members who were appointed from the 01 April 2021 for a contractual period of three years, are assigned to these cases."

The NDPP, Adv Batohi, added to the statement saying that:

> "Time is not in our side. We have a small window to address this; loved ones need to see justice being done; and justice will not be served until we act decisively against those that the NPA was once powerless to hold to account".

455 While the joint press statement spoke of establishing "a dedicated capacity" and or "a specialist unit" we are not aware of a specialist unit ever being established.

455.1 We are aware of an entity which has been referred to as the "TRC Component" (**the Component**). However, it remains opaque. It remained nameless for several months. We are only aware of one full time state

advocate serving in the Component. It does not appear anywhere on the NPA's website, and no contact details are offered to the general public.

455.2 While the Component reports to the Deputy NDPP and head of the National Prosecution Service, Adv Rodney de Kock, it has no full-time dedicated head. Given De Kock's onerous responsibilities for the entire prosecution service, he cannot be expected to devote adequate time to these cases.

455.3 From what we can see, in respect of the TRC cases, the buck does not stop with anyone. Queries in relation to cases are bounced around between the Component and the DPPs. Nobody seems to be able to take full and final responsibility for the cases. Prosecutor turnover on cases also seems to be high.

455.4 While we are familiar with the TRC Component coordinator, Adv Shubnum Singh, we are not aware of the staff compliment or the nature of the work they do.

455.5 While "dedicated" prosecutors have been appointed in the provinces, they do not report to the Component but to the DPP in question, who may have other priorities. The TRC Component maintains an arm's length from the cases. It enjoys no authority over provincial prosecutors and seems to be a largely toothless and ineffectual body.

456 According to a press statement dated 8 December 2021, issued by the Justice Portfolio Committee, the committee requested the NPA to provide quarterly progress reports on TRC cases, reflecting a desire on their part to play a greater supervisory role, given the lack of delivery:

> "The Portfolio Committee on Justice and Correctional today resolved to meet on a quarterly basis with the National Prosecuting Authority (NPA) in order to receive regular updates on progress regarding Truth and Reconciliation Commission (TRC) matters.
>
> The undertaking comes after the committee noted last week that the NPA missed the deadline to provide information on whether to prosecute in the matter of the so-called "Craddock Four". The families of some of the Craddock Four have taken the NPA to court in order to get a firm commitment with timeframes for a resolution to the matter.
>
> The committee today received a briefing from the Ministry of Justice and Correctional Services and the NPA on why the 2 December 2021 deadline was missed for issuing a prosecutorial decision for apartheid-era officials and ministers implicated in the 1985 murder of the Cradock Four. Committee members across the political spectrum expressed concern that these matters have been delayed for so long. More than two decades into democracy, families like those of the Craddock Four still do not have closure. The committee further expressed its disappointment at how the matter was handled, as families were not informed prior to the deadline that it would not be met, as further investigations are required."

457 The NPA Annual Report of 2021/22 reported the following about the TRC cases:

> "Bringing justice to the victims of crimes committed during the apartheid era is a priority for the new leadership of the NPA. These heinous crimes remain a scar on our country and the NPA owes it to victims to ensure that justice is delivered, despite the long passage of time. To move forward on these complex cases, the NPA has created dedicated capacity and additional posts to deal with TRC cases. Thirteen additional prosecutors were appointed to assist with these cases. In total, the NPA has 23 dedicated prosecutors working on these matters in collaboration with the 34 dedicated DPCI investigators who were recently appointed. From 53 cases at the beginning of April 2021, the component had 115 cases at the end of March 2022, almost doubling the number of matters for investigation in one year. The cases have been identified from sources such as the TRC report, evidence presented at the TRC, reports received from family members of deceased persons and from all deaths in detention."

458 The minutes of the Justice Portfolio Committee meeting held on 25 October 2022 noted a decision by the NPA to appoint counsel to assess its work on the TRC cases:

> "Regarding section 32(1)(b), the NPA was in accordance with the Rodrigues judgement. **The NPA had informed the Minister that it would be**

> **appointing counsel to look at all of the initiatives and efforts that the NPA was making to deal with the Truth and Reconciliation (TRC) matters, and any possible interference in the work of the NPA**." (Bold added).

459 On 24 October 2022, the NPA and DPCI announced in a joint statement the opening of four inquests into the apartheid-era crimes involving murders and disappearances of ANC activists and MK operatives committed in Kwa-Zulu Natal: Ntombikayise "Ntombi" Kubheka, Musawakhe "Sbho" Phewa, Zamukwenzani Bright Mlobeli/Sokhulu and Jameson Ngoloyi Mngomezulu.

459.1 Representatives of some family members suggested that the NPA may have been too quick to refer these cases to inquests as prosecutions may have been viable in some cases. Some families expressed a concern that referrals to inquests had become a default position of the NPA in respect of the TRC cases. Correspondence in this regard can be supplied on request.

459.2 I am advised that recently a decision has been taken to proceed with a prosecution in the Kubheka and Phewa matters.

460 In his report to the Justice Portfolio Committee on 25 November 2022, the Deputy NDPP, Adv De Kock announced that the NPA had hired 25 prosecutors to work on the TRC cases, while the DPCI had hired 40 investigators to work on the 129 apartheid-era cases that were under active investigation. In a media statement on the outcome of this meeting the Portfolio Committee noted that the failure to act in the past meant that the NPA was under pressure because witnesses were old and dying:

> "Mr Magwanishe said the committee will continue to monitor the progress and meet regularly with the NPA on the matter. "The nation needs closure on these matters. One of the lessons we must learn, **when you don't act on time, is that you are bound to act under unreasonable pressure. In**

> **this case, some witnesses have died and some now claim they can't follow proceedings. We should have acted earlier and this should serve as a lesson to all of us**." (Bold added)

461 The NPA Annual Report of 2022/23 highlighted various challenges with the TRC cases:

> "**These are very old matters – dockets and inquest records are largely either destroyed or missing, and witnesses/suspects/persons of interest are often deceased or untraceable**. Another major challenge is that evidence and records remain in the control or possession of stakeholders and government organisations. A concerted effort has been made to trace and make available all records and evidence to enable investigators to properly conduct investigations."

462 The minutes of the Portfolio Committee meeting on the NPA and SIU Annual Performance Plans on 12 May 2023 claimed progress in the TRC cases:

> "It is the first time that the NPA is making progress in terms of accountability for the TRC cases. The entity has also brought in a lot of new capacity, with over 700 young professionals through the Aspirant Prosecutor Programme and this was the biggest intake through the programme since it was relaunched."

463 However, in the minutes of the Justice Portfolio Committee meeting on 11 October 2023 the NPA admits that it has been slow in finalising TRC cases:

> "Despite these successes, the NPA admitted that it has been slow in finalising TRC-related cases and **had only finalised 10 matters since September 2021. A further 135 matters were under investigation."**

464 It is noticeable that the NPA chose not to disclose the names of the 10 cases apparently finalised in the preceding year, nor did it identify the 135 cases that were apparently under investigation.

465 In the same meeting the following was reflected in the minutes:

> "Mr Dyantyi also appreciated the progress made by the NPA in the year under review, and he encouraged it to improve its performance going

forward. Afterwards, he mentioned that he had a few questions to pose and comments to make to the Authority.

One, **he suggested that the Committee be briefed on a separate occasion by the NPA on the work it has done on TRC cases, as he was not pleased that the entity had struggled to finalise these matters after nearly 30 years."** (Bold added)

NPA presentation to Justice Portfolio Committee in November 2023

466 On 21 November 2023, DNDPP Adv De Kock made a presentation to the Justice Portfolio Committee and disclosed that amongst other challenges were the turnover in prosecutors and destruction of documents:

"Highlighting the matters that were reopened and under investigation, he said in October 2023, the NPA had 137 matters under investigation and 18 matters were finalised with either the decisions to prosecute, conduct an inquest or not to proceed with the matter due to the lack of evidence. Additionally, there were 13 matters on the court roll. Many families were requesting for a formal inquest to be held with evidence being presented before the court.

Highlighting the challenges on the TRC matters, he said there was a capacity constraint, and prosecutors were employed on a contract basis. A deviation was obtained from the Department of Public Service and Administration (DPSA) for the creation of posts. There was a drastic exodus to the private sector. Within a year, the NPA lost ten dedicated prosecutors. New prosecutors meant the loss of [rapport] with families because the new prosecutors had to start from scratch to familiarise themselves with the investigator, families and investigations.

The other challenges included the lack of dockets and inquest records as records were destroyed after ten years, meaning the evidence was lost. Documents were also destroyed post-1994. There was also a lack of access to TRC records and other documents which other government departments controlled. Additionally, the witnesses, accused, suspects and persons of interest were deceased or old. The witnesses were unwilling or afraid to cooperate with the Investigating Officers and the NPA. The government departments in possession of documents responded slowly in handing over the documents. The investigators had some challenges with the vehicles.

Some areas were inaccessible and required appropriate vehicles to access victims and families. Obtaining experts and building a database of reputable service providers was also challenging, and utilising private experts was expensive. Additionally, the accused persons used delay tactics and last-

> minute applications were made by legal counsels, resulting in matters languishing on court rolls…."

467 Under the list of challenges facing the NPA outlined by De Kock was a slide that stated:

> "Interference by private investigators, persistence by some to access list of matters under investigation to client hunt / name dropping / legal representation."

468 No detail was provided on the nature of the alleged interference, nor was it explained how seeking names of past crimes under investigation constituted a challenge for the NPA. As only the FHR has employed a private investigator to look into the TRC cases, and the FHR provides pro bono legal support to families, and it has requested the names of the murder cases being investigated, the accusations can only have been directed at the FHR.

469 It is quite apparent that De Kock and the NPA view the work of the FHR, its private investigator and its pro bono lawyers as unwelcome. It is likely that this antipathy is driven by the past litigation brought by the families to compel action in the Nokuthula Simelane, COSAS 4 and Cradock Four cases which exposed disturbing inaction on the part of the NPA and SAPS.

470 In our view the real reason why the NPA refuses to disclose the names of the closed cases and the 137 cases under investigation is because it does not wish to be held to account for its performance in these matters.

471 De Kock claimed that the NPA could not disclose the names of the deceased in the 137 cold cases under investigation because of security concerns in all cases. We doubt that there can be pressing security concerns in all cases. We suspect that

the NPA wishes to avoid legal and investigative support being offered to those families, in order to avoid scrutiny in relation to those cases.

472 There is considerable irony in the NPA's approach, given that it was the work of family lawyers and private investigators that led to the reopening of the inquests of Timol, Aggett, Haffejee and Haron, and which contributed significantly to the prosecutions in the cases of Nokuthula Simelane, COSAS 4 and Caiphus Nyoka that are pending before the criminal courts.

473 In most societies serious about resolving old murder cases concerted efforts are made to reach out to the public for help and leads. This is standard practice, particularly in relation to cold cases and is often how such cases are solved. Yet the NPA chooses not to take this basic step in relation to the TRC cases. Reaching out to the public would also enable the families to secure pro bono legal help from organisations such as the FHR, but it seems that the NPA wishes to avoid this at all costs. It seems that the NPA would rather forego the leads that the general public might provide, even if it means eroding the prospects of solving the cases in the short time that is left.

474 In line with the NPA's preference to exclude private lawyers from the process, De Kock mentioned in his presentation that in the upcoming inquests, family members will be primarily represented by the NPA. Adv De Kock appeared to overlook the fact that the NPA represents the State not individuals.

475 The NPA may not take instructions from any party in any criminal proceeding. The interests of individuals do not always coincide with those of the State. Indeed, the NPA has ignored or turned down or ignored the bulk of the requests and proposals put to them by family members over the years.

476 Notwithstanding this limitation, the NPA publicly states that it will be the lawyers of the families in the TRC cases. In so doing, the NPA acts unethically, as it misleads the families into believing they will be getting the same type of legal support as that offered by private attorneys and counsel.

477 The report of the NPA was roundly criticized by members of the Justice Portfolio Committee (**JPC**). DA MP Glynnis Breytenbach insisted that the next meeting should be held in person and that family members should be present. ANC MP Nomathemba Maseko-Jele asked why there was not a special unit dealing with the TRC cases, just like the Investigating Directorate that investigates corruption.

478 Notwithstanding the call for family members to be present at the next JPC meeting on the TRC cases, a meeting was held on 17 September 2024 without extending an invitation to families or the organisations representing them. In this regard, I point out that on 23 June 2023, following the last minute and abrupt cancellation by the NPA of a long-awaited meeting with the Cradock 4 families, I wrote a letter to the JPC, a copy of which is annexed hereto marked **FA67**, asking that families be permitted to participate in future meetings. In this letter I noted:

> "So far only the NPA has been invited to provide briefings. We believe it is high time for the Portfolio Committee to hear the side of the victims and the families."

479 My letter was ignored. At the 17 September 2024 meeting, the NPA stated that 104 unnamed new investigations had been opened since late 2021 and that a total of 126 unnamed cases were under investigation, down from the 137 cases mentioned at the JPC meeting in November 2023. The presentation was replete with operational graphs, flow charts, best practices, SWOT analyses and pointed to multiple 'accountability sessions' and trainings. It disclosed that the NPA had

deployed 16 dedicated prosecutors to the TRC cases, while the DPCI had 24 dedicated investigators (down from 25 prosecutors and 40 investigators in November 2022). A copy of the NPA's full PowerPoint presentation, dated 17 September 2024, can be supplied on request.

480 In concluding this section, I note that while the political interference may have come to an end around 2017, its impact appears to linger. The NPA and the DPCI have been unable to build an effective capacity to pursue these cases. This lack of capacity has its roots in the political interference that took place from 2003, which helped to open the door to the subsequent period of rampant state capture. It seems that law enforcement organisations have not fully recovered from these devastating periods.

481 Regardless, it has been a frustrating and uphill battle for families to make progress in the TRC cases. Every small step forward has been hard fought.

482 Given the dire limitations in capacity, it is indeed regrettable that both the NPA and DPCI, and the State in general, choose not to take the bull by the horns and set up a truly specialised TRC unit or investigating directorate with both investigative and prosecutorial capacity. Instead, we are left with the disjointed and ineffectual decentralised approach with a TRC Component that has little or no impact on the cases.

THE CALL FOR AN INDEPENDENT COMMISSION OF INQUIRY

483 On 5 February 2019, ten former commissioners of the TRC addressed a letter to the President calling upon him to appoint a commission of inquiry into the political interference that has stopped the investigation and prosecution of virtually all the

cases referred by the TRC to the NPA. They also called on the President to apologise to victims of apartheid-era atrocities who were denied justice and continue to suffer trauma. A copy of this letter is annexed hereto marked **FA68**.

484 The Commissioners wrote that the "families feel justifiably betrayed by South Africa's post-apartheid state which, to date, has turned its back on them. We owe them answers and we owe them an apology." They pointed out that instead of a standalone commission, and since the political interference has taken the form of state capture the President could instruct the then Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (also referred to as the **Zondo Commission**) to carry out the inquiry. Further alternatively the Commissioners suggested that the President could expand the mandate of the Mokgoro Commission of Inquiry – which was already seized with a probe into the NPA, to handle this inquiry. Aside from an acknowledgment, the President did not respond to the substance of this letter.

485 Since the President was not moved to act, I decided to make a direct approach to the Zondo Commission. I asked my lawyers to prepare comprehensive representations to that Commission to demonstrate that the NPA and SAPS had been captured in relation to the TRC cases, warranting the attention of the Commission.

Approach to the Zondo Commission

486 On 17 April 2019 my lawyers handed over my representations to the Commission, which were addressed to the Chairperson, Deputy Chief Justice Zondo; the Acting Secretary of the Commission, Peter Pedlar; the Head of Investigation, Terence

Nombembe; and the Head of the Legal Team, Paul Pretorius SC. A copy of the cover letter is annexed hereto marked **FA69**. I have not attached the representations as they largely repeat what is contained in this affidavit, but they can be supplied on request.

487 I made these representations on behalf of the Cradock Four families as well as the following families, who supplied supporting affidavits:

487.1 Thembi Nkadimeng, the sister of Nokuthula Simelane who was abducted, tortured and murdered by the SB in 1983.

487.2 Imtiaz Cajee, the nephew of Ahmed Timol who was tortured and murdered by the SB at John Vorster Square in 1971.

487.3 Lasch Mabelane, the brother of Mathews Mabelane who was tortured and killed while in SB detention at JVS in 1977. Lasch has since passed away, without closure. The reopened inquest into the death of his brother has still not been held.

487.4 Jill Burger, the sister of Neil Aggett, who was tortured and killed while in SB custody in JVS in 1982.

487.5 Fatima Haron-Masoet and Muhammed Haron, the daughter and son of Imam Abdullah Haron who was tortured and killed while in SB detention in Cape Town in 1969.

487.6 Sarah Lall, the sister of Dr Hoosen Haffajee, who was tortured and killed by the SB at the Brighton Police Station in Durban in 1977.

488 On 28 May 2019 the Acting Secretary of the Zondo Commission addressed a letter to me, a copy of which is annexed hereto marked **FA70**, in which he indicated that the Chairperson was of the view that the matter might fall outside the terms of reference of the Commission, but that the Commission would only decide that issue after we had delivered our comments or representations. On 12 June 2019, my attorney responded with our representations, a copy of which is annexed hereto marked **FA71**. These representations pointed out that:

488.1 The subject matters of state capture, corruption and fraud were "not confined purely to conduct, or abuse of power aimed at financial gain but also for undue or illegal advantage."

488.2 "Any form of inducement or for any gain of whatsoever nature" would include the shielding of suspects from investigation and prosecution through inducing members of the NPA and SAPS to drop the TRC cases.

488.3 The Prevention and Combating of Corrupt Activities Act 12 of 2004 (**PRECCA**) defined 'gratification' as including the avoiding of punishment, while the offence of corruption includes an abuse of a position of authority; or the violation of a legal duty which is designed to achieve an unjustified result.

488.4 PRECCA proscribed any conduct that required public officers to not adequately perform any official function; delay, hinder or prevent the performance of an official act; or exert any improper influence over the decision making of any person performing functions in a public body. It also specifically outlawed conduct aimed at:

488.4.1 interfering with, hindering or obstructing the investigation of an offence.

488.4.2 not adequately performing a function relating to the institution or conducting of criminal proceedings;

488.4.3 delaying, hindering or preventing the performance of a prosecutorial function;

488.4.4 showing any favour or disfavour to any person relating to the institution or conducting of criminal proceedings; or

488.4.5 exerting any improper influence over the decision making of any person, including another member of the prosecuting authority or a judicial officer.

488.5 It was pointed out that the conduct of those who imposed their will on the NPA and SAPS to stop the investigation and prosecution of several hundred murder cases may fall within the scope of corruption as provided for in PRECCA. The same could be said of the prosecutors and police officers who acquiesced in the suppression of these cases.

488.6 It was asserted that an inquiry into the suppression of the TRC cases fell within the scope of the Commission's investigation launched on 11 April 2019 into the capture of the state's law enforcement agencies. It was pointed out that even though there have been leadership changes at the NPA and SAPS these institutions could not be expected to vigorously investigate themselves. In this regard it was noted that State Advocate, Torie Pretorius SC, in the Rodrigues stay of prosecution case admitted that

the NPA had succumbed to outside political interference but claimed that the NPA was an innocent party.

489 The representations concluded with the following:

> "Perhaps more than any other class of cases, the suppression of the TRC cases, has been almost total in its impact. Virtually all the 400 cases were blocked. The impact this has had on the families of those murdered, their communities and on the fabric of society, is incalculable. This in itself demands an expeditious, thorough and credible inquiry into the machinations that resulted in such a massive denial of justice."

490 A call for a commission of inquiry, as well as an apology, were also made in a letter to President Ramaphosa on 23 June 2019 by the families of Chief Albert Luthuli, Steve Biko, the Cradock Four, Nokuthula Simelane, Ahmed Timol, Neil Aggett, Imam Abdullah Haron, Matthews Mabelane, Dr Hoosen Haffejee, Ashley Kriel, Caiphus Nyoka and several other families. A copy of this letter is annexed hereto marked **FA72**. They expressed their deep pain and anguish at having been denied truth and justice in the new South Africa. The families followed-up again a year later, and on 23 June 2020 they again wrote to President Ramaphosa imploring him to act. Their letters were ignored. A copy of this letter is annexed hereto marked **FA73**.

491 After nearly a year, I learned that the Commission's senior investigator, the late Frank Dutton and his team were taking affidavits from various witness. They also sought an affidavit from me which I supplied during August 2020. I have not attached my affidavit since it largely repeats what I have set out in this founding affidavit, but it can be supplied on request. My attorneys also provided the Commission with a list of persons of interest as well as a chronology of the political interference. That chronology has not been attached as it amounts to a repeat of what has been set out in these papers but can be supplied on request.

492 This was, however, all to no avail as the 30 June 2021 closure of the Commission was looming. During the first quarter of 2021, we were informed informally that the Commission had run out of time and would not be able to complete its investigation into the political interference, which was abandoned.

Placing the President on terms

493 As a result, the former TRC commissioners, together with 18 civil society organisations, again pressed President Ramaphosa for a decision on a standalone commission of inquiry. A copy of this letter dated 25 March 2021 is annexed hereto marked **FA74**. In this letter, the former commissioners abandoned their call for an apology and focussed on the need for a commission of inquiry. They pointed out that the interference cut across multiple government departments and that:

> "It is accordingly not sufficient for there to be separate internal or departmental inquiries by the different institutions. Such inquiries will not be able to deliver the full history of the interference as it unfolded over time [and] over multiple entities. Moreover, such inquiries will not be able to compel the production of testimony and evidence from other departments. In any event, there appears to be considerable resistance to carrying out meaningful investigations at these levels; and it goes without saying that departmental officials should not be investigating themselves or their colleagues."

494 The commissioners set out why the subject matter of the proposed commission was a matter of great public concern, including that:

> "… there is a critically important need to restore public confidence in the institutions implicated in the suppression of the TRC cases. This is particularly the case in respect of the families of victims of apartheid-era crimes and their communities who have lost all trust and confidence in the SAPS and NPA.
>
> A further objective of the proposed commission is to reveal the truth pertaining to the suppression of the TRC cases, which gives it a deeper public purpose. This is necessary given the extent of disquiet and discontent around such serious lapses by public organs meant to uphold the rule of

law. There can be little doubt that such lapses have provoked much anxiety and worry amongst many South Africans who regard the suppression of these cases as a matter of great public interest and importance.
…

The TRC cases have been treated differently from other serious criminal cases for purposes of serving undisclosed political and ulterior ends. Such brazen arbitrariness should have no place in South Africa's constitutional order."

495 The commissioners attached to the letter draft terms of reference for the proposed commission, which are annexed hereto marked **FA75**. The proposed terms of reference included the following suggested issues to be probed:

"1.1 Whether, and to what extent and by whom efforts or attempts were made through any form of persuasion or inducement for any purpose, advantage or gain of whatever nature to influence or pressure members of the NPA and/ or the SAPS to refrain or stop investigating and/ or prosecuting apartheid-era cases referred by the TRC to the NPA, or to abandon or undermine such cases.

1.2 Identify the role played in the alleged interference by any person within or outside government, including any current or former members of the National Executive, office bearers and /or functionaries in any state institution or organ of state, including but not limited to the Department of Justice and Correctional Services, the Presidency, the National Intelligence Agency, the Department of Defence and the former Directorate of Special Operations.

1.3 Whether, and to what extent, any current or former member or functionary of the NPA and SAPS colluded in the alleged interference, or agreed, acquiesced, or succumbed to the alleged interference.

1.4 The nature and extent of the interference, if any, including:

1.4.1 the reasons or motivation behind the interference;

1.4.2 whether any person within or outside government issued formal or informal, written, or unwritten instructions or directions for the interference to proceed;

1.4.3 whether any formal or informal arrangements or agreements were made between persons within and/ or outside government to carry out the interference;

1.4.4 how the interference was imposed on the NPA and the SAPS; and

1.4.5 how members of the SAPS and NPA were persuaded, influenced, or forced to cooperate in the interference.

1.5 Whether any person breached or violated the Constitution, any law, guideline, or ethical code by engaging in or facilitating the interference or failing to stop or expose such interference.

1.6 Whether any conduct committed during the interference, *prima facie*, amounts to the crime of defeating or obstructing the course of justice, or a crime in terms of the National Prosecuting Authority Act 32 of 1998, or the crime of corruption, particularly as framed in sections 9 and 19 of the Prevention and Combating of Corrupt Activities Act, 12 of 2005 or a crime under any other law.

1.7 The impact, if any, on victims, families, communities, the rule of law, the criminal justice system and related institutions, and South Africa as a whole.

1.8 The steps, measures and reforms needed to prevent a recurrence of the interference."

496 The TRC commissioners requested that the proposed commission be imbued with the necessary powers under the Commissions Act 8 of 1947 to compel the production of testimony and evidence. The commissioners concluded their letter with a quote from the late former President of the Constitutional Court and Chief Justice of South Africa, Justice Arthur Chaskalson, who said a few months after South Africa's democratic elections in 1994:

> "We need to remember that the first incursion into rights is often the most damaging; that once inroads are permitted, the will to resist subsequent incursions is lessened."

497 The commissioners advised that if they did not hear from the President by 30 April 2021, they would refer this matter to their attorneys, who would be instructed to vindicate the constitutional rights of families of apartheid-era crimes by bringing an appropriate application to court.

498 On 6 May 2021, Mr Geofrey Mphaphuli, the Acting Head: Legal and Executive Services in the Presidency wrote to former TRC commissioners Yasmin Sooka and Dumisa Ntsebeza SC acknowledging receipt of their letter and advising that the matter had been referred to the DOJ for "*further attention and reply*." A copy of this letter is annexed hereto marked **FA76**. The DOJ never responded to the letter of the former commissioners.

499 On 8 June 2021 my attorneys addressed a letter to President Ramaphosa, copied to the then Minister of Justice, Ronald Lamola, placing him on terms. A copy of this letter is annexed hereto marked **FA77**. The letter noted that no response had been received from the Minister of Justice as per the Presidency's letter of 6 May 2021. The letter indicated the following:

> "We have been furnished with an opinion from eminent senior counsel indicating that the issue in question is one of significant public concern; and that in these specific circumstances, your failure to make a decision, or your refusal to appoint a commission, is susceptible to review under the legality principle as well as a Bill of Rights challenge.
>
> We have now been instructed by several families of apartheid-era victims (including members of the Cradock Four and Biko families) as well as multiple organisations to prepare an application to court for the appropriate relief. Counsel has been duly briefed in this regard.
>
> Our instructions are to place you formally on terms. Should we not hear from you within 10 days of receipt of this letter we will proceed to launch an application to court for an order compelling you to fulfil your obligations under the Constitution and to appoint a commission to inquire into the suppression of the TRC cases."

500 No specific response was received to this letter. Since the Justice Ministry appeared to be taking steps towards an inquiry, the litigation was placed on hold. The steps and their shortcomings are set out below.

Justice Minister's plan for an internal inquiry

501 On 23 June 2021, Minister Lamola announced that the NPA will pursue an investigation into the alleged political interference and that the investigation will be overseen by a retired judge. Specifically, the investigation will consider whether the conduct of officials and others warrants any action in terms of section 41(1) of the NPA Act. I annex hereto marked **FA78** a News24 article dated 23 June 2021 reflecting the Minister's statement.

502 No details of the proposed inquiry were released. The Minister did not see fit to consult or engage with families and civil society organisations who had uncovered the interference and called for an independent investigation.

503 On 5 November 2021, the Minister, in his address to the Inaugural Fort Calata Foundation Memorial Lecture, indicated that he had appointed an inquiry to investigate the suppression of the cases referred by the TRC to the NPA. He indicated that the investigation would be presided over by a judge.

504 The Minister did not disclose the terms of reference of the inquiry or the identity of the selected judge. No indication was given as to how the Judge would be appointed and under what legal authority. When I asked the Minister at the lecture whether the inquiry would be open or closed, he said he would have to discuss this with the Judge. He declined to give his own view on the matter stating it "*would amount to a policy statement*". A recording of this lecture can be supplied on request.

505 Since the President was not involved in this process and no mention was made of the Commissions Act, it became clear that the envisaged inquiry was intended to be an internal inquiry, which are typically held behind closed doors. In my view, if it was

intended to be an open and transparent inquiry, the Minister would have not hesitated to say so. It also raised eyebrows that the Minister wished to involve a judge in an internal enquiry conducted by an executive department.

506 On 9 November 2021, the former TRC commissioners, several family members and 13 civil society organisations, including the Nelson Mandela Foundation and the Desmond and Leah Tutu Legacy Foundation issued a press statement titled "*Call for an Independent Public and Open Commission of Inquiry into the Suppression of the TRC Cases.*" I was also a signatory to this statement. We expressed our concern at the Minister's plans, which appeared aimed at damage control and circumventing a public inquiry. A copy of this statement is annexed hereto marked **FA79**.

507 In our statement, we pointed out that since 2019 the President and Minister had ignored four requests from the TRC commissioners and the Apartheid Era Families' Victim Group (**AFVG**), and it seemed more than evident that government was anxious to avoid holding a public and open commission of inquiry in order to escape public scrutiny:

> "It appears that the State wishes to avoid an open and public inquiry into the suppression of the TRC Cases. This may be for purposes of damage control to ensure that the truth behind the suppression is carefully managed by a closed-door inquiry, away from the glare of public scrutiny. This is unsurprising given the role of senior members of the executive, NPA and SAPS in the suppression of the TRC Cases. Since a closed inquiry will be viewed with great suspicion, the inescapable conclusion to be drawn is that a judge is being asked to oversee an effective secret investigation to give it an air of respectability.
>
> Typically, a commission of inquiry includes public hearings, the power to subpoena witnesses and documents, the calling of witnesses, cross examination and the participation of victims and other stakeholders. While it is possible that attempts will be made to deflect criticism by allowing victims to make submissions and requiring the Judge to issue a report, it will remain a closed inquiry. There will be no public hearings and no

> opportunity for victim representatives to ask tough questions to those who shut down justice. Victims, the media and the public will be effectively shut out of this inquiry.
>
> An inference will almost certainly be drawn that the inquiry has been so designed to protect powerful elements in society and shield them from scrutiny and embarrassment."

508 We expressed our concern that the government wished to stage manage the process and the proposal would amount to the executive investigating the executive:

> "The Minister is appointing an executive inquiry to investigate members of the executive. The suppression of the TRC cases involved multiple entities and individuals across the public sector, including the Department of Justice, the National Intelligence Agency, the NPA, the SAPS and the Department of Defence. The available evidence suggests that politicians, cabinet ministers, senior civil servants, police officers and prosecutors were all involved in efforts to ensure that the TRC cases never saw the light of day.
>
> An internal inquiry cannot hope to get to the bottom of a problem of this magnitude and sensitivity. An internal investigation will not be able to deliver the full history of the interference as it unfolded over time over multiple departments and within and outside government.
>
> An internal inquiry, unlike a commission of inquiry, will have no power to compel the production of testimony and evidence and will have to rely on requests and cooperation of individuals and different government departments.
>
> The track record of the SAPS and NPA in relation to the TRC Cases speaks for itself. It is well known that there remains considerable resistance to carrying out meaningful investigations of the TRC Cases, let alone investigations into the suppression of the cases. In these circumstances it is disturbing that the Minister has seen fit to reject a public commission of inquiry in favour of an internal investigation. Members of the executive will be expected to investigate their own colleagues. Such an inquiry will have little or no credibility in the eyes of the public, and the gloss of an 'oversight' role of a judge will not change this."

509 We expressed concern that the Minister was abusing the judiciary by requiring a Judge or retired Judge to offer a semblance of gloss to an internal inquiry, which in practice would be firmly in the hands of the executive.

> "It is particularly disturbing that a Judicial Officer is required to lend judicial legitimacy to an investigation conducted by the executive. Not only is such an expedient function well outside the functions of the judiciary, but it is also harmful to that institution and is a breach of the separation of powers principle, rendering such an appointment unconstitutional, as the Constitutional Court has ruled."

510 In respect of the dire need for a commission of inquiry, we pointed out that there is no longer any dispute that the political interference happened, given that the NPA had admitted that it succumbed to the interference, and that in *Rodrigues* both the High Court and SCA had expressed their dismay at how such interference could take place in the new constitutional order. We noted that:

> "While some evidence has been uncovered in the *Nkadimeng* and *Rodrigues* matters, the reasons behind the suppression of the cases are not known and the sources of such interference remains opaque. It is not known if arrangements and agreements were struck with individuals and entities outside government. The full means by which the will of outsiders was imposed on institutions such as the NPA and the SAPS is yet to be exposed. It is not known how institutions with firm constitutional and statutory obligations to uphold justice so easily abandoned their duties in respect of these cases."

511 We pointed out that the subject matter is of great public concern:

> "Perhaps more than any other class of cases, the suppression of the TRC cases has been almost total in its impact. Virtually all the cases were blocked. Most of the cases cannot be resuscitated as many perpetrators, witnesses and family members have died over the past 20 years. The impact visited on the families of those murdered, their communities and on the fabric of society is incalculable. The harm done to the families and our society demands an expeditious, thorough, and credible inquiry into the machinations that resulted in such a massive denial of justice.
>
> There is a critically important need to restore public confidence in the government as a whole and the institutions implicated in the suppression of the TRC cases. This is particularly the case in respect of the families of victims of apartheid-era crimes and their communities who have lost trust in the government, especially the SAPS and NPA. An investigation held behind closed doors is likely to destroy all confidence and trust in the state.
>
> A closed-door inquiry will undermine the effort to reveal the full truth behind the suppression of the TRC cases. This will add considerable anxiety to

> the affected families and communities who have been waiting decades for the truth. The suppression of the TRC Cases deeply violated their rights to human dignity, equality and the rule of law. The refusal to hold an open and public commission of inquiry only exacerbates the violation of these rights."

512 Since we were aware that there was some 'commission fatigue' given the experience of the State Capture Commission which had cost R1 billion and which was extended eight times, we pointed out:

> "It will no doubt be argued that the country is suffering 'commission fatigue' and cannot afford yet another commission of inquiry, particularly after the State Capture Commission which cost some R1 billion. Such an argument is deeply insulting to the families who endured apartheid-era crimes. Their loved ones laid down their lives for our democracy and its enshrined freedoms. Not only has the post-apartheid state turned its back on them and suppressed their cases, but in raising such an argument, it says they are not worthy of a rigorous public inquiry. It is also insulting to the families given the readiness of state officials to squander billions on mismanagement, corruption and nepotism.
>
> In any event, the State Capture Commission cannot be compared to an inquiry into the suppression of the TRC Cases. Unlike the State Capture Commission, there is an extremely limited set of witnesses and a very limited set of facts to explore. Whereas the State Capture Commission required years to complete its work, a commission into the suppression of the TRC Cases could be wrapped up in few months."

513 We concluded with a call for a public and open commission of inquiry with the necessary powers of compulsion under the Commissions Act:

> "The post-apartheid state engineered multiple incursions into the rights of victims of apartheid-era crimes over the last 20 years. The holding of a closed-door inquiry will constitute yet another incursion into their rights. This cannot be allowed to happen.
>
> The families of apartheid-era victims deserve nothing less than a fully open, public and transparent inquiry. This must include public hearings, the power to subpoena and compel the production of evidence, and the right of victims to be represented in the commission and to lead evidence and put questions to witnesses. Only a commission of inquiry can allow provide for such accountability.
>
> Accordingly, we the undersigned former TRC Commissioners, families and organisations again call on you to work with the President to speedily

> appoint an independent and public commission of inquiry into the suppression of the TRC cases in terms of the Commissions Act 8 of 1947, with the necessary powers to compel the production of testimony and evidence."

514 It was hoped that the publicity and lobbying would move the government to do the right thing. It did not. While the Minister of Justice appears to have abandoned his plans for an internal inquiry there was no movement towards establishing a credible inquiry.

The Ntsebeza Inquiry

515 On 13 January 2023, the NPA issued a press statement titled "*NPA Further Enhances Efforts to Ensure Effective Handling and Prosecution of TRC Cases*". A copy of this statement is annexed hereto marked **FA80**. In this statement, the NPA asserted that "over the last couple of years" it had "focused on reopening and pursuing priority cases and enhancing its internal capacity and processes both to ensure effective handling of these cases and to prevent any undue political influence." It then announced an inquiry, which it stated was in line with the requirements set out in *Rodrigues*:

> "As part of this effort, the NPA has appointed Adv D Ntsebeza SC to review the measures that have been adopted to deal with and prosecute TRC matters and to provide recommendations as needed. This is in line with the remarks made by the Full Bench in Rodrigues v National Director of Public Prosecutions of South Africa and Others 76755/2018) (2019) in the South Gauteng High Court in 2019 where the court held:
>
> > "It is also for these reasons that the conduct of the relevant officials and others outside the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted. Finally, there must be a public assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. In this regard they should indicate the

> measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution."
>
> The Senior Counsel will conduct a thorough assessment and make recommendations, if necessary, to strengthen the NPA's handling of TRC cases. Further, if Counsel finds evidence or information that could amount to a violation of Section 41(1) of the NPA Act, such issues will be escalated to the National Director of Public Prosecutions (NDPP) to take forward as appropriate. If necessary, the NPA will refer relevant matters for criminal investigation.
>
> Senior Counsel has three months to finalise his report and recommendations. The NPA will provide the necessary support to ensure that this timeline is kept and relevant interventions and improvements are implemented without delay.
>
> The NPA has engaged with the Executive as appropriate on this matter. The Executive is expected to release its own statement in due course, as per the remarks by the Court highlighted above."

516 I am advised that Adv Dumisa Ntsebeza SC indicated to interviewees, such as the FHR representatives, that he interpreted his mandate primarily as reviewing the measures adopted by the NPA to deal with and prosecute TRC matters. He did not anticipate investigating the political interference as that would require an investigation across multiple departments, not just the NPA, and he enjoyed no powers to compel testimony or the production of evidence.

517 Ntsebeza SC submitted his report to the NPA on 30 June 2023, but the NPA did not release it to the public. On 11 October 2023, 29 family members and 13 civil society organisations, including the Southern African Catholic Bishops' Conference and the Centre for Applied Legal Studies, called for the public release of the Ntsebeza Report. A copy of their statement is annexed hereto marked **FA81**.

518 Some 7 and a half months later, on 15 February 2024, the NPA eventually released the Ntsebeza Report, a copy of which can be supplied on request. Some of its key findings and recommendations are set out below.

518.1 The NPA and the PCLU were swayed from their constitutional and statutory duties in relation to the TRC cases.

518.2 The Ntsebeza Inquiry could not investigate the political interference given the narrow ambit of its terms of reference, and its lack of an investigative arm.

518.3 A commission of inquiry “is the only sensible way forward in order to get to the bottom of why the TRC cases were never investigated or prosecuted with zeal.”

518.4 A commission of inquiry must be established to investigate the extent and rationale behind the political interference and should look into the roles of multiple state entities as well implicated individuals.

518.5 It must be a public inquiry and be empowered to hold hearings and conduct a proper investigation, including the exercise of powers of subpoena and search and seizure.

President placed on terms again

519 We hoped that the President would act on the recommendations set out in the Ntsebeza Report, and the litigation was again held back to permit the President and his line departments time to digest the report and take action.

520 We understand from questions that were answered in Parliament in April 2024 that the former Minister of Justice, Ronald Lamola, considered the recommendations of Ntsebeza SC. However, by the expiry of the sixth administration's term at the end of May 2024, the Ntsebeza recommendations had not been implemented.

521 Following the general elections in May 2024 and the establishment of the seventh administration, and in light of the appointment of Thembisile Simelane MP, the sister of the late Nokuthula Simelane, as the new Minister of Justice, it was decided to permit the new government more time to change course.

522 Accordingly, on 10 July 2024, we instructed our attorneys to again write to the President demanding the appointment of a commission of inquiry. In this letter we sought an answer from the President by 31 July 2024, failing which would take legal action.

523 We also advised in the letter that we were seeking constitutional damages against the government to vindicate our constitutional rights which had been breached by the suppression of the TRC cases. We proposed that the government meet with us in order to commence negotiations on the nature, extent and quantum of such damages. A copy of this letter is annexed hereto marked **FA82**.

524 On 13 August 2024, Mr. Geofrey Mphaphuli, Acting Head of the Legal and Executive Services in the Presidency sent a letter to my attorneys. He acknowledged receipt of my attorneys' letter dated 10 July 2024 and advised that the Department of Justice and Constitutional Development was requested to consider the matter and advise the Presidency. He indicated that the Presidency would revert to my attorneys once it is in "receipt of the report/advice" of the said department. A copy of this letter is annexed hereto marked **FA83**.

525 Since nothing further was heard from the President or Minister of Justice we were forced to launch these proceedings.

VIOLATIONS OF THE LAW

526 I am advised that before I set out the basis for the relief we seek, I must set out the statutory and constitutional provisions that have been violated by the political interference that resulted in the suppression of most of the TRC cases.

527 I am advised that the State has a constitutional duty to address crime, which arises *inter alia*, from its duty in section 7 of the Constitution to "*respect, protect, promote and fulfil the rights in the Bill of Rights*". In addition, the State must, in terms of section 237 of the Constitution, perform this duty diligently and without delay.

528 Any agreement or arrangement not to hold to account and punish those who have committed the most heinous of crimes is at direct odds with the most basic feature of South Africa's constitutional order, namely, the rule of law.

529 Those who imposed their will on the NPA and the SAPS to stop or undermine the TRC cases from proceeding, as well as those within those organisations who acquiesced to these demands, violated multiple constitutional and statutory provisions. These are set out below.

529.1 Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the state. In other words, no other person or body may make decisions whether to prosecute or not. This exclusive power is also highlighted in section 20(1) of the NPA Act.

529.2 Section 179(4) of the Constitution enjoins the prosecuting authority to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement.

529.3 Section 205(3) of the Constitution, which states that the “objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law”.

529.4 Section 32(1)(a) the NPA Act requires that:

> “A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.”

529.5 Section 32(1)(b) of the NPA Act prohibits interference in the prosecution function:

> “Subject to the Constitution and this Act, **no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority** or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.” (Bold added).

529.6 Section 32(2)(a) of the NPA Act requires prosecutors to take an oath or make an affirmation that they will:

> “…uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law'.

529.7 Section 32(2)(b) of the NPA Act requires that in the case of the NDPP, or a DNDPP or DPP, the oath be taken before the most senior available Judge of the High Court within which area of jurisdiction the officer is situated.

529.8 Section 41(1) of the NPA Act stipulates that any person who contravenes section 32(1)*(b)* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

529.9 The potential violations of PRECCA have been described above and will not be repeated here.

529.10 The NPA's Prosecution Policy made in terms of s 179(5)(a) and (b) of the Constitution, read with section 21(1) of the NPA Act, requires that the NPA must "*exercise its prosecutorial functions independently*". The preface to the Prosecution Policy asserts:

> "Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.
>
> Offenders must know that they will be arrested, charged, detained where necessary, prosecuted, convicted, and sentenced."

529.11 The NPA's Prosecution Policy stresses that:

> "The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole."

530 Every constitutional and statutory duty and obligation mentioned above was violated by those who imposed their will on the NPA, as well as the NPA leadership and its senior staff members involved in the abandoning of the TRC cases. Although the NPA enjoyed exclusive authority to institute criminal proceedings, on its own version, it allowed others to impose their will on the authority to stop prosecutions that otherwise would have been pursued.

530.1 In so doing, the NPA and its responsible officials violated section 179(2) of the Constitution.

530.2 The Government officials and Executive Members who imposed their will, or attempted to impose their will on the NPA, and the NPA leadership and its senior staff members involved in the abandoning of the TRC cases, violated sections 32(1)(a) and (b) of the NPA Act.

530.3 The responsible officials also violated their oaths of office in terms of section 32(2) of the NPA Act and are potentially liable for criminal sanction in terms of section 41(1) of the Act.

531 In allowing others to effectively take their decisions, the responsible members of the NPA failed to act impartially and perform their powers and duties in good faith and without fear, favour or prejudice.

531.1 Their actions brazenly favoured political elites and perpetrators of apartheid era crimes, and severely prejudiced the interests of victims, their families and communities.

531.2 Accordingly, the NPA and the responsible officials violated section 179(4) of the Constitution and section 32(2) of the NPA Act.

532 The NPA, and its responsible officials, permitted other organs of state, alternatively members or employees of organs of state and/or other persons to improperly interfere or obstruct their authority in carrying out their powers, duties and functions. These violations, in turn, amounted to a violation of the rule of law itself, enshrined as a founding value in section 1(c) of the Constitution, which upholds the supremacy of the Constitution and the rule of law.

533 The violations also amounted to a betrayal of the constitutional compact of truth, reconciliation and justice that our democracy was predicated upon, and which sought to provide the closure and healing that our nation required to move beyond the past, as enshrined in the preamble of the Constitution.

534 The entire scheme of the TRC Act presupposed that perpetrators of crimes in the apartheid era who did not apply for amnesty or who were denied amnesty would be prosecuted by the NPA. The violations described above accordingly were also violations of the TRC Act.

The NPA was required to resist political pressure

535 While pressure was brought to bear on the NPA, its officials were under a clear legal duty to reject such improper interference and obstruction. With a few exceptions, the leadership of the NPA did the bidding of the politicians and acquiesced with the political meddling in its work. Not only was the NPA required to reject such interference, but it was also required under law to stop such unlawfulness by:

535.1 Investigating, and where necessary, prosecuting those unlawfully interfering with the criminal justice process and obstructing the course of justice;

535.2 Exposing the interference by bringing it to the attention of Parliament's Portfolio Committee on Justice and/or the Public Protector; and

535.3 Taking steps to restrain and stop such interference and, if needs be, through seeking appropriate remedies, such as injunctive relief from the courts.

536 While Pikoli and Ackermann pushed back against the interference, as well as bringing it to the attention of the Justice Portfolio Committee, the balance of the NPA

leadership over the period of the interference took no such steps and shamefully succumbed to the pressure.

537 The NPA's responsible officials permitted other organs of State, alternatively members or employees of organs of state and/or other persons to improperly interfere, hinder or obstruct the Authority in carrying out its powers and duties and functions. The actions of the responsible persons, both within and outside the NPA and SAPS warrant investigation into whether their conduct:

537.1 violated the aforesaid provisions of the Constitution and the NPA Act, in particular sections 32(1)(a) and (b) and 41(1);

537.2 amounted to the crime of defeating or obstructing the course of justice, in that these officials took active steps to supress the TRC cases in the face of a legal obligation to do otherwise;

537.3 amounted to the crime of corruption, particularly as framed in section 9(2) of PRECCA; and

537.4 where relevant officials are officers of the court, whether such officials are fit to serve as such in light of their conduct.

GROUNDS FOR DECLARATION AND CONSTITUTIONAL DAMAGES

538 The suppression of the TRC cases has been almost total in its impact. Virtually all the approximately 300 cases referred by the TRC to the NPA were blocked from proceeding from around 2003. This suppression lasted for a period of at least 15 years. Its effects are ongoing. The impact on the families of those murdered, their communities and on the fabric of society is incalculable.

Denial of justice

539 The bulk of the apartheid-era cases have come to an end because suspects and witnesses have died, not to mention family members. The primary reason behind this monumental failure of justice has been the political interference which effectively killed off the TRC cases. Those behind these machinations knew that this would be the outcome. They must be held to account.

540 The vast majority of cases cannot be resurrected at this late stage. In my father's case, my legal team identified some 49 persons who were associated in one form or another with the Cradock Four case. Virtually all of them have died.

540.1 All six members of the police hit squad who murdered the Cradock Four have died. All the masterminds, against whom there was a *prima facie* case have died. Most of the members who sat on the State Security Council between 1984 and 1985 have died.

540.2 Since we launched our application to compel the NPA and SAPS to finalise their investigations in July 2021, the following persons of interest died: Eric Winter (former Cradock SB Commander), FW de Klerk (former State President), Johannes Velde van der Merwe (former SAP Commissioner) and Adriaan Vlok (former Minister of Police).

540.3 Most recently, Hermanus Barend du Plessis, former head of SB Black Affairs in Port Elizabeth died on 16 May 2023. He was the mastermind behind the gruesome murders of the Cradock Four, the PEBCO 3 and Sipiwo Mtimkhulu, Topsy Madaka, and Gcinisizwe Kondile amongst others.

All were tortured and abused before their deaths. It is unforgiveable that the authorities allowed Du Plessis to go to his grave without facing justice.

540.4 While a third inquest into the Cradock Four case was belatedly announced on 4 January 2024, we have had to accept that after 39 years of waiting, 30 of them in the post-apartheid era, we will not see justice done in this case.

540.5 As mentioned above, the third inquest, which was due to commence in September 2024 collapsed because the NPA failed to give the witnesses sufficient notice of the inquest, who were not able to arrange funding for their legal costs in time. This was a remarkable lapse given that the same issue had emerged in all previous reopened inquests, pointing to the poor management of these cases and the failure to learn from past experience. The inquest was postponed to June 2025. There is a high probability that the remaining key witnesses, who are all in the twilight of their lives, may not testify, either through death or infirmness. They include:

540.5.1 88 years old Gerrit Nicholas Erasmus, former Lt General and head of the Port Elizabeth Security Branch.

540.5.2 84 years old Izak Johannes “Krappies” Engelbrecht, former Major General and head of the SAP’s Counter-Intelligence department.

540.5.3 82 years old Christoffel Pierre “Joffel” van der Westhuizen, former Lt General in the SADF and former Officer Commanding Eastern Province Command. His legal representative has disclosed that he is in poor health. An attempt to take his evidence on commission

has been stymied because the SANDF refuses to pay his legal costs.

540.5.4 75 years old Craig Michael Williamson, former head of Security Branch Intelligence.

540.5.5 75 years old Lukas Daniel “Neil” Barnard, former Director of the National Intelligence Service, who died on 13 January 2025.

540.5.6 75 years old Eugene Alexander de Kock, former head of the Security Branch’s Vlakplaas Unit.

541 More than 10 years ago, on the 30th anniversary of Nokuthula Simelane’s disappearance, her sister, Thembi Nkadimeng penned an opinion piece in the City Press titled ‘My sister’s heart’ dated 26 December 2013, a copy of which is annexed hereto marked **FA84**. The piece sums up the impact of the suppression of that murder case on the Simelane family. It is a story of deep betrayal. I have included the following extracts below:

> “The story of my sister, Nokuthula Simelane, is about freedom and betrayal. My sister believed in freedom with every fibre of her being. It was her unshakeable dedication to freedom that took her to the Carlton Centre in Johannesburg on the morning of September 8, 1983. ….
>
> Instead of a scheduled rendezvous with a comrade, she was met by members of South Africa’s hated security police, who shoved her into the boot of a vehicle. This betrayal was to condemn Nokuthula to a choice between life and death. An informant’s life – a betrayal that would crush her spirit – or death with her dignity intact. In reality, there was no real choice for Nokuthula.
>
> Her commitment to what she loved most dearly made the first option unthinkable. My sister’s death was not swift, and it was not painless.… Her torturers were convinced that with enough force this young, inexperienced woman would break and become an informant.

They believed that it was just a question of more violence and more fear: a few more vicious blows to her head, to her face and her body, or perhaps a few more near-drownings in an icy dam. Maybe more days of solitary confinement shackled in handcuffs and leg irons in filthy conditions would push her over the edge.

The black police officers who testified before the Amnesty Committee of the TRC reported that after weeks of torture, my sister was unrecognisable. Her face was an appalling mess of bruises and swelling. She was too weak to walk. The last time they saw her was when she was being pushed into the boot of one of the white officer's vehicles.

My family and I have not rested since we learnt that my sister went missing. We know the most terrible things about what she suffered. But we don't know how she died and where her body is today. We have spent three decades looking for Nokuthula. We even appointed private detectives to assist us. Until we find her remains, or get answers about what really happened to her, we remain trapped in the past.

We did not expect the former South African Police to investigate themselves. However, we firmly believed that the new democratic South Africa would take the necessary steps. We were wrong. This was the second betrayal of Nokuthula and everything she stood for.

This betrayal cut the deepest. My father went to his grave without knowing what happened to Nokuthula. My mother, now sick and old, fears that she will die without knowing – and without burying Nokuthula's remains with the dignity she deserves. ….

The police and the prosecutors could have taken up the matter. However, they chose not to, though a police docket was opened in 1996. When I approached [the NPA], they advised me that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. When the new prosecution policy emerged in late 2005, it essentially created a backdoor amnesty.

It gave perpetrators, like my sister's killers, a second opportunity to escape justice. Together with the widows of the Cradock Four, the young freedom fighters murdered by a police hit squad in 1985, I went to court to challenge the policy. In 2008 a Pretoria High Court judge struck down the policy, declaring it to be absurd and unconstitutional.

We thought this meant that the path was eventually cleared for justice to take its course. Again, we were wrong. This time the prosecutors claimed that the police were refusing to provide investigators. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010 – but apparently the docket had gone "missing".

Three years later, even after finding the docket, there was no progress. It was clear to me that the authorities were not going to investigate the case seriously, let alone prosecute anyone. They even refused to charge those

police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, I instructed my lawyers to demand the holding of a judicial inquest into her death.

This request was refused. After 17 years of idleness, the prosecutors advised us that their investigations were still not yet complete. We do not believe them.

We have lost all faith in the prosecutors and police. They have betrayed our trust. They now claim that they are occupied with inquiries, which could conceivably drag on indefinitely while witnesses and suspects grow old and die.

We do not know why the authorities in the new South Africa would turn their backs on one of their own. Nokuthula's ultimate sacrifice helped to pave the way for the freedom and democracy we now enjoy.

We cannot bury her, and we can find no peace. The betrayal of my sister, and what she stood for, is almost complete."

542 As mentioned above, Thembi Nkadimeng applied to court in 2015 for an order compelling the NPA and SAPS to take action (in *Nkadimeng 2*). This resulted in an indictment being issued in early 2016. Families should not have to go to court to get the authorities to do their jobs.

543 Eight years since the indictment for the murder of Nokuthula Simelane was issued, the criminal trial has still not started.

543.1 Two of the four accused have died since the issuing of the indictment. Timothy Radebe, died during 2019 and Frederick Mong died during 2021.

543.2 At least eight witnesses and family members have died since 2016.

543.3 On 6 June 2022, the very day that the belated trial was to begin against the two-remaining accused, the legal team representing the commander of the SB squad, Willem Coetzee, produced a flimsy two-page doctor's report claiming that Coetzee was mentally unfit to stand trial, requesting a

postponement of the trial, which was granted, with no opposition from the NPA. More than 2.5 years later, this issue remains unresolved.

543.4 The presiding Judge in the Simelane case refused to hear or entertain representations from the family on the question of delay.

543.5 A graphical depiction of the delays in the Simelane case prepared by the FHR is annexed hereto marked **FA85**.

543.6 During 2016, the family requested the NPA to include crimes against humanity charges, including the crimes of apartheid and enforced disappearance on the charge sheet. It took some 5 years for the NPA to reach a final decision on this question towards the end of 2021. Ironically, the NDPP refused to include the charges on the grounds that it might delay the trial.

544 But for the political interference, this case could have proceeded in the early 2000s. If it had, it would have spared Nkadimeng, her mother, Ernestina Simelane, and family the agony of the last 20 odd years. Ernestina turns 85 this year.

545 More than 42 years has elapsed since four teenagers, known as the COSAS 4, were lured into a trap by the SB and cruelly blown up on 15 February 1982.

545.1 Three of the senior perpetrators, Jan Carel Coetzee, Abraham Grobbelaar and Willem Schoon (who authorised the operation) died before they could face justice.

545.2 Zandisile Musi, the only surviving member of the COSAS 4 who was severely injured in the 1982 blast, died in June 2021.

545.3 Maide Christina Selebi is the sister of the late Eustace Madikela, one of the COSAS 4 who died on the scene. Maide is the only surviving member of the Madikela family. Her parents, siblings and husband have all passed on.

545.4 In 2021, the last two living perpetrators, both elderly, were charged with kidnapping and murder, and at the urging of the families, also with crimes against humanity, including apartheid as a crime against humanity. It was the first time that such international crimes had been brought in South Africa.

545.5 As mentioned above, the trial was delayed for years by the refusal of SAPS to pay the legal fees of the second accused, a former SB officer. The families had to intervene in order to force the SAPS to pay, while the NPA and the accused took a back seat in the matter. 'Stalingrad' type tactics employed by the accused's' legal teams in launching parallel civil litigation delayed the trial further and it has been postponed to April 2025.

546 In the PEBCO 3 case, three leading civic activists, Sipho Samuel Charles Hashe, Twasile Champion Galela and Qaqawuli Godolozi, were abducted in May 1985 from the Port Elizabeth airport in a joint Vlakplaas and SB operation. The activists were taken several hundred kilometres away to the remote Post Chalmers farm where they were viciously tortured and murdered.

546.1 Most suspects have died including Vlakplaas commander, Jan Hattingh 'Jack' Cronje, who deployed a hit squad to the Eastern Cape. Vlakplaas unit members, Johannes Koole and Kimani Peter Mogoai, have also passed on.

546.2 All the Port Elizabeth SB members are deceased, including Gideon Nieuwoudt, Johannes Martin ‘Sakkie’ Van Zyl, Gerhardus Jacobus Lotz, HB Du Plessis and Harold Snyman.

546.3 Former Vlakplaas Colonel Roelf Venter apparently died of “natural causes” on 28 July 2024.

546.4 Only 2 members of the Vlakplaas unit involved in the PEBCO 3 hit remain alive today. Former Vlakplaas Warrant Officer, Gerhardus Cornelius Beeslaar, is about to turn 87 years old; and Joseph Tshepo 'Joe' Mamasela is in his 70s.

546.5 The sands of time are fast running out. Notwithstanding the urgency, the NPA has still not responded to a detailed 147-page memorandum dated 30 November 2023 submitted by the families which set out the evidence against the last surviving suspects.

546.6 Despite multiple follow up communications by the families’ lawyers, they were only able to meet with the NPA on 3 December 2024. To the dismay of the families, the prosecutors said they were not ready to respond to the analysis of the evidence and recommendations of our lawyers, even after being in possession of the document for more than a year. More detail is provided in the supporting affidavit of Nomali Rita Galela filed evenly herewith.

547 According to the police version, Soweto Students Representative Council member, Matthews Mabelane, who was detained at JVS, fell to his death while attempting to escape out the window from a 10th floor interrogation room on 15 February 1977.

The Mabelane family do not believe the official version that nobody was to blame for his death and have been pushing to reopen the inquest for several years, without success.

547.1 This struggle was spearheaded by Matthews' father, Philip Mabelane and his brother, Lasch Mabelane. Philip died on 9 May 2018, while Lasch died on 6 August 2020, without reaching closure.

547.2 On 1 August 2024, the family's legal team submitted detailed representations to the NPA seeking the reopening of the inquest. The representations included two expert forensic reports which explained why the police version was untenable.

547.3 More than 6 months later the NPA have still not made a decision.

548 In the Highgate Hotel Massacre, a group of balaclava-masked men shot dead five patrons at the hotel bar in East London and injured seven others on 1 May 1993. The families and survivors of the massacre have been seeking the truth for decades. Nobody applied for amnesty and no arrests were made. No inquest was ever held. Neville Harris, father of Deon Harris who was one of the five murdered, died in July 2023. He had been struggling for the truth for decades. Ongoing delays means that he has been deprived the opportunity to participate in the inquest, which is set down for hearing in late January 2025 in the High Court in East London.

549 In May 1987, Sbho Phewa a UDF activist, was abducted by askaris and handed over to the SB at Winklespruit in KwaZulu Natal. He was never seen again, and his body has not been recovered. At least three of the perpetrators, including the notorious Andy Taylor, died before they could face justice. As mentioned above,

Lawrie Wasserman, who was charged with murder on 12 November 2024, died 4 days later.

550 Anti-apartheid youth activist Mxolisi ‘Dicky’ Jacobs was arrested by the SB in Upington in June 1986 and spent 129 days in detention until he was found hanging in his cell on 22 October 1986. Some 38 years later his family is no closer to the truth of what happened to him.

551 Richard and Irene Motasi were shot dead by Northern Transvaal SB operatives at Temba on 1 December 1987.

551.1 They were murdered in the presence of their 3-year-old son Tshidiso Motasi. He was callously left unattended throughout the night with the bodies of his parents.

551.2 Nobody has ever been prosecuted for these horrendous crimes even though several of the killers did not apply for amnesty. At least three of the killers have died, including the notorious Jaques Hechter who died on 20 July 2023.

551.3 Hechter was refused amnesty for his role in murdering Irene Motasi. When he appeared before the Amnesty Committee he testified that he had *“strangled, burned, shot, kicked and blew up 35 people*.” Hechter was allowed to go to his grave without facing justice for the Motasi murders.

551.4 Gloria Hlabangane, the mother of Irene Motasi, is 92 years old. She is hoping to see justice done in her daughter’s case, but time is not on her side. Two of the surviving suspects are well into their 80s.

552 Dr Rick Turner, an anti-apartheid activist and academic was a leading figure in the 'Durban Moment', in the 1970s. Shortly before his banning order was about to expire, Turner was shot dead in his Durban home. He died in the arms of his daughters, 13-year-old Jann and 8-year-old Kim.

552.1 Evidence emerged in the reopened inquest into the death of Dr Hoosen Haffejee that the Turner house was being monitored round the clock by the SB until the day before the murder. The Turner family has been searching for the truth for decades. Nobody has been held to account.

552.2 Captain James Taylor of the Durban SB, who was implicated in the murder, died in 2019. The Turners have sought to reopen the inquest, without success so far.

553 It is not surprising that apartheid-era perpetrators, witnesses and family members are dying on a frequent basis given that most of the offences took place between the 1960s and 1980s and most of those responsible for these crimes were born between the 1930s and 1950s. They are typically in their 70s and 80s, or older. It is a race against time, but we see little urgency on the part of the authorities.

554 The denial of justice is further depicted in the supporting affidavits of my co-applicants that are attached to this founding affidavit. Each of these supporting affidavits tell the story of victims and survivors of apartheid era crimes, which were abandoned by the post-apartheid authorities. For most of them, justice remains out of reach thirty years into our democracy. Sadly, there are many more stories that have not been told in these papers.

555 The political interference has been primarily responsible for the almost total denial of justice and closure in the TRC cases. The prejudice visited upon the families and their communities has been irreversible and incalculable. We have suffered considerable pain, suffering and indignity.

Violated Rights

556 I submit that accountable governance and social trust are built upon decision making by public officials that is reasonable and responsive. The political interference which suppressed the TRC cases or severely undermined the prospects of justice in those cases, has denied us our substantive rights and entitlements under the Constitution, which are set out below.

Rule of law

557 The fact that serious crimes committed under apartheid have been deliberately suppressed implicates the rule of law, enshrined in section 1 of the Constitution. As survivors and family members of victims of such crimes we were entitled to have these crimes properly investigated.

558 Crime, particularly serious crime, undermines the fabric of our society and violates, amongst other rights, the right to life, the right to freedom and security and the right to dignity.

559 Serious crime committed by agents of the State should be viewed in a particularly serious light. The perpetrators of such crime are often shielded from justice. During apartheid, the perpetrators of state sponsored crime enjoyed almost total impunity. The failure of the post-apartheid state to timeously investigate such cases,

particularly those cases which were not amnestied, points to political deal making or tolerance of such crimes for ulterior purposes.

560 The rule of law requires that the laws creating crimes must be obeyed. Prosecution decisions may not be subject to favouritism. The interference in the TRC cases displayed blatant favouritism for the perpetrators of crimes by those in high office, at the expense of victims.

561 This violation of the rule of law is exacerbated by the refusal or failure to get to the bottom of the suppression of these cases, through a credible, independent and open inquiry.

Principle of Legality

562 I am advised that the interference also implicates the principle of legality, which is central to the rule of law. The constitutional principle of legality requires that a decision-maker exercise the powers conferred on him or her lawfully, rationally and in good faith. Such decisions may not be arbitrary and must be rationally related to the purpose for which the power was given.

563 I submit that the past conduct of the Executive, the NPA, SAPS and other organs of state in the shameful colluding or acquiescing in the suppression of the TRC cases is not only arbitrary and irrational but also an act of bad faith.

564 During the period of interference, the TRC cases were not pursued by the SAPS and NPA notwithstanding repeated requests and pleas over many years. Such conduct is not rationally connected to the purpose for which investigative and prosecutorial powers were granted, namely the combating of crime, particularly the

most serious crimes. There can be little doubt that the decisions behind the interference were irrational.

Human Dignity

565 The interference has violated our right to human dignity. The suppression of the cases and the ongoing delays have denied us, our families and our communities of our intrinsic worth as human beings.

566 The conduct of the responsible officials behind the interference has denied us justice within a reasonable time, or at all. In so doing they have exacerbated and prolonged our pain and trauma. We have been denied the possibility of closure of a most painful past. This conduct has breached our rights to human dignity.

567 The refusal or failure to take expeditious steps to investigate the known suspects behind the crimes against our loved ones has disrespected our rights as victims.

568 Ultimately, the interference infringes upon our rights to dignity in that it:

568.1 protects the perpetrators responsible for the heinous crimes against our family members, and/ or ourselves;

568.2 causes suffering to us and our families by denying us justice;

568.3 prevents us from reaching closure;

568.4 dishonours the respect, dignity, and value of ourselves and our families in the wider community; and

568.5 demeans South African society as a whole by betraying the constitutional compact made with victims as enshrined in the epilogue to the Interim

Constitution and by undermining the purpose and spirit behind the TRC's amnesty process.

Right to life

569 The right to life as protected in section 11 of the Constitution is infringed as the interference has closed down justice in most of the cases or has severely undermined the prospects of a successful investigation and prosecution of the perpetrators who murdered our family members.

570 The political interference has also devalued the lives and memory of our loved ones.

Right to freedom and security of the person

571 The interference violates the right to freedom and security of the person enshrined in section 12 of the Constitution by closing down or undermining the investigations of the perpetrators who violated the bodily integrity of our family members by subjecting them to torture, assault, attack and other cruel and inhuman treatment.

Right to equality

572 The interference and the failure to take forward the crimes of the past violates the right to equal protection and benefit of the law enshrined in section 9 of the Constitution by unjustifiably discriminating against the survivors and families of victims of this class of crimes. The victims of the crimes committed in the TRC cases have been effectively treated as second-class citizens. Their cases were specifically selected for abandonment and neglect.

573 Once the TRC's amnesty process was concluded there should have been no reason to treat apartheid era crimes any differently from other serious crimes. Perpetrators

of apartheid-era crimes have been treated more favourably than perpetrators of far less serious crimes. The effect of such differentiation is discriminatory, and because of its deleterious impact on victims of apartheid era crimes, it is also unfair.

Violation of South Africa's international law obligations

574 I am advised that the interference is substantively unconstitutional and invalid in that it constitutes an infringement of South Africa's international law obligations as set out in sections 231 to 233, read with section 39(b), of the Constitution, to uphold the right to justice and to investigate, prosecute and punish violations of human rights under the following treaties ratified by South Africa:

574.1 Article 2(3), read with article 2(1), of the International Covenant for Civil and Political Rights (**ICCPR**) by denying victims and their families an effective criminal justice remedy.

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

574.3 Article 7 of the ICCPR by contravening the duty to hold the perpetrators of torture or cruel, inhuman or degrading treatment or punishment responsible for their actions.

574.4 Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**) by failing to give effect to the requirement that all acts of torture must be punishable by appropriate penalties.

574.5 Article 7 of CAT by failing to give effect to the requirement that all acts of torture must be submitted to the competent authorities for the purposes of prosecution.

574.6 Article 12 of CAT by failing to ensure that competent authorities promptly investigate, wherever there are reasonable grounds to believe that an act of torture has been committed.

575 The conduct of the authorities described above is also inconsistent with:

575.1 Article 3(g) of the Constitutive Act of the African Union (**Constitutive Act**) by failing to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights.

575.2 Articles 4(m) and (o) of the Constitutive Act by failing to reject impunity and uphold the rule of law.

575.3 Article 11 of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (**Right to a Remedy Guidelines**) by not affording us “equal and effective access to justice”.

575.4 Article 4 of the Right to a Remedy Guidelines by suppressing and undermining the TRC cases instead of investigating and prosecuting violations caused by crimes committed during apartheid.

576 I have set out earlier in this affidavit the principles, values and obligations arising from the TRC process, as well as the duties and obligations enshrined in the

Constitution and various statutes not to interfere in the work of prosecutors and the police. I rely on these assertions for our grounds of relief but will not repeat them here.

577 In the circumstances I have set out sufficient grounds to warrant the declaration sought in the notice of motion that the interference:

577.1 violated the rule of law as well as our fundamental rights as set out above;

577.2 was in breach of the duties and obligations contained in the Constitution and the NPA Act and SAPS Acts to investigate and prosecute serious crime, and not to interfere with the legal duties of prosecutors and law enforcement officers;

577.3 was inconsistent with the principles, values and obligations arising from the TRC process read with the postscript to the Interim Constitution; and

577.4 was inconsistent with South Africa's international law obligations.

578 I submit further that I have demonstrated sufficient grounds for the granting of constitutional damages in the amounts, which are set out below.

CONSTITUTIONAL DAMAGES AND QUANTUM

579 Before setting out the amounts we seek by way of constitutional damages, I am advised that I need to describe the nature and character of the damages we claim.

580 Firstly, declaratory relief on its own will not suffice having regard to the long history of neglect visited upon the TRC cases.

580.1 The interference was not transitory, it was systemic and particularly egregious.

580.2 The abandonment of the cases was not by mere negligence but as a result of deliberate decision and planning. Even when the so-called ‘moratorium’ period was over, state organs maintained their obstructionist approach and ensured that the cases would not proceed.

580.3 To this day, families are still struggling to see justice done in their cases. Accordingly, something more effective than the mere clarification of our rights is needed.

581 To be clear, we are not seeking delictual damages. An action in delict or any other private or public law remedy will not serve to vindicate the deep violation of our rights over decades.

581.1 Where our cases have collapsed, or have been severely undermined because of such neglect, no delictual remedy will ever resurrect or salvage those cases at this late stage.

581.2 The damage has been done. There is no way to turn back the clock. We have to look forward.

581.3 Accordingly, we do not seek compensation to redress the wrongs endured. The amounts sought are not for the personal use of anyone.

581.4 In saying this, we note that government bears the responsibility of providing reparations to victims of apartheid-era crimes. The reparations provided so far have been wholly inadequate, and many thousands of victims of gross

human rights violations have been excluded by virtue of the government's cruel and unjustifiable closed list policy. In this regard we note with dismay that more than R2 billion remains unspent in the President's Fund, more than 20 years after the winding up of the TRC.

581.5 However, the question of reparations is beyond the scope of this application and no such relief is sought in these proceedings.

582 We are also not seeking an award of punitive damages. We see no point in punishing government. While we seek truth, accountability and justice there is nothing to be gained from penalising the state.

582.1 Any awards are ultimately borne by the taxpayer and the public at large, rather than by those actually responsible. For the same reason, a punitive damages award will do little to deter future bad conduct.

582.2 Since there is great demand for scarce public resources, we seek rather to employ any damages awarded in a forward-looking, community-orientated and constructive manner, to be described below.

583 Accordingly, we seek damages for the purposes of formal acknowledgement of what we have endured, meaning the vindication of our violated rights and to enforce constitutional values going forward. Ultimately, we aim to use any funds awarded to directly address the issues that caused the problems, and which may give rise to future wrongs. This would, in our view, constitute the only meaningful and effective vindication of the violation of our rights.

584 In the circumstances we seek constitutional damages for the following purposes, which is to enable families to:

584.1 Advance truth, justice and closure by assisting them to pursue investigations, inquests, private prosecutions and related litigation in those cases that can still be taken forward.

584.2 Play a monitoring role in respect of the work of the policing and justice authorities charged with investigating and prosecuting the TRC cases.

584.3 Pursue commemoration, memorialisation and public education activities around the TRC cases.

585 Each head of damage will be dealt with in turn.

Advancing truth, justice and closure

586 Under this head of damage, we aim to pursue the few remaining cases where there is still a prospect of justice by way of public or private prosecutions, or inquests. This would be done through private investigations, legal work, research and analysis and supporting the work of detectives and prosecutors.

587 We note that the vast majority of cases can no longer be pursued by way of a prosecution, and in these cases, we aim to establish inquests or pursue other truth-seeking endeavours.

588 In particular, we would like to pioneer the use of structural investigations in South Africa, which involves interdisciplinary research into the organizational structures behind apartheid crimes. This includes investigating context, the *modus operandi* of the perpetrators, chains of command and links between cases in order to identify suspects and provides leads and technical assistance to the SAPS and NPA.

589 We have demonstrated that where families, together with their legal representatives and private investigators, get involved in the investigation of cases, those are typically the matters that result in prosecutions or the reopening of inquests. This has been the case in respect of the reopened inquests into the deaths of Ahmed Timol, Neil Aggett, Hoosen Haffejee and Imam Haron; as well as the prosecution of the Nokuthula Simelane, COSAS 4 and Caiphus Nyoka murder cases.

590 The bulk of this work has been done by a small number of lawyers, investigators and experts working either pro bono or on considerably reduced human rights rates. By way of example, the lead counsel on the TRC cases has spent more than 100 days in court acting pro bono, not counting time in preparation. Just one of the law firms, the Pro Bono department at Webber Wentzel has devoted 9 654.53 hours to the TRC cases, which would have amounted to R23 233 247.00 in attorneys' fees, if the firm had been charging for its time. In this regard, see the supporting affidavit of Odette Helena Geldenhuys, the head of the Webber Wentzel pro bono team, is filed evenly herewith.

591 This is not sustainable going forward. Nonetheless, given the results, the experience has demonstrated that this was time well spent. It can be expected that more sustained support for such work will produce greater results. Such outcomes serve the ends of truth seeking, accountability and closure in the most tangible way, which has great meaning and value to the affected families and communities.

592 In estimating the amounts under this head of constitutional damages, we have relied on the records of time spent on the TRC cases by the law firm Webber Wentzel (see the supporting affidavit of Odette Helena Geldenhuys) as well as the support provided to the TRC cases over many years by the Foundation for Human Rights.

In this regard see the supporting affidavit of Dr Zaheed Kimmie. See in particular annex **ZK** to Dr Kimmie's affidavit, as well as **table 2** to that annex, which sets out the specific costs associated with the provision of investigative, legal and other support to families pursuing inquests and prosecutions.

593 Accordingly, under this head of damage we seek a total amount of **R115,261,625.00**, calculated in accordance with Uniform Rules of Court 67A(3) and 69 (Scale A), and based on the anticipated support required to advance the TRC cases over the next 5 years, comprising the following amounts:

593.1 We anticipate that some 20 inquests will take place over the next 5 years and that each inquest will on average cost R3,843,875.00 which includes investigative, legal, expert and general support to the families of the deceased. This amounts to a total of R76,877,500.00

593.2 We estimate that some 10 cases will proceed to trial, incurring a total cost of R15,122,500.00. On average, the support provided to families of the deceased victims is expected to cost approximately R1,512,250.00 per case, including investigative and legal support, possible civil litigation or *amicus curiae* intervention, as well as disbursements.

593.3 We project that 15 cases will require comprehensive investigations but will not necessarily progress to inquests or prosecutions. The total estimated cost for these activities is R14,188,125.00 with each case costing an average of R945,875.00 including investigative, expert and attorneys' fees, possible civil litigation and disbursements.

593.4 We estimate 3 cases may necessitate private prosecutions, with an anticipated total cost of R9,073,500.00 with each case costing approximately R3,024,500.00. We have assumed that private prosecutions require twice the funding of typical prosecutions to account for the need to provide security for costs.

594 As the window of opportunity for the finalisation of TRC cases is fast closing, we seek such amounts over a 5-year period, although the inquests and private prosecutions will likely be stretched over a considerably longer period. This amounts to R23,052,325.00 per year over the next 5 years.

Monitoring

595 This head of damages is aimed at enabling families and organisations to monitor the performance of the policing and justice authorities charged with investigating and prosecuting the TRC cases. They will also be required to monitor the role of those carrying out political and parliamentary oversight. Their tasks will include highlighting any shortcomings and proposing solutions, particularly in relation to any perceived interference.

596 The following amounts are sought:

596.1 One researcher and one communications/advocacy specialist at an average cost of R700,000.00 per person over 5 years [R7 million].

596.2 Logistical and administrative support [R1 million].

597 A total amount of **R8 million** is sought in respect of this function. This amounts to R1.6 million per year over the 5-year period.

Memorialisation, commemoration and public education

598 This head of damages is aimed at enabling families and organisations to honour those who made the ultimate sacrifice for South Africa. It is aimed at assisting families and communities preserve the memories of their loved ones through commemoration, memorialisation and public education activities.

599 Such activities could include the holding of public events, publishing of books, making of documentaries and films, conducting seminars, trainings, intercommunity dialogue, social and cultural projects and exchange programs.

600 The ultimate aim of these functions would be to:

600.1 facilitate greater understanding of our past, promote the diminished voices of victims, transcend fault lines in society and promote the goal of “never again”.

600.2 Involve participation of communities, in particular the youth.

600.3 Promote inter-generational dialogue about our past and encourage social exchange between communities.

600.4 Assist families to reclaim and affirm their violated rights; and to dignify the memories of victims.

601 The following amounts are sought for the proposed activities:

601.1 Fifteen memorialisation/ commemoration activities per year at R100,000.00 per activity for 10 years [R15 million].

601.2 Ten films/ documentaries at R1,000,000.00 per film [R10 million].

601.3 Twenty books or publications at R200,000.00 per publication [R4 million].

601.4 Ten public education programmes at R1,500,000.00 per programme [R15 million].

602 These amounts are consistent with the amounts that the FHR has granted for similar projects over past years. In this regard I refer to the supporting affidavit of Dr Zaheed Kimmie.

603 A total amount of **R44 million** is sought in respect of these functions. This amounts to R4.4 million per year over the 10-year period.

604 The grand total sought for all the activities under the three heads of constitutional damages is R167,261,625.00 over a ten-year period.

605 It should be made clear, that should any constitutional damages be awarded, it will be open to all victims, families and organisations to apply to the proposed trust for funds for projects and cases that fall within the ambit described above, regardless of whether they were applicants in this case or not.

Proposed Trust

606 Should constitutional damages be awarded we propose that the court direct the creation of an independent trust to hold and disburse such funds, in accordance with the provisions of the Trust Property Control Act 57 of 1998.

607 It is proposed that the trustees be comprised of:

607.1 Two representatives from the families of victims in the TRC cases.

607.2 One representative from the South African Coalition for Transitional Justice (**SACTJ**).

607.3 One former commissioner or committee member of the TRC.

607.4 An attorney or advocate who has specialised in human rights law with at least 15 years' experience.

607.5 A recognised academic specialising in transitional justice or history from a South African university.

607.6 A chartered accountant with at least 15 years' experience and registered with the South African Institute of Chartered Accountants (**SAICA**).

608 It is further proposed that the trustees be:

608.1 granted the necessary powers and discretions to effectively manage the trust and to decide on the location and administration of the trust,

608.2 empowered to make all operational decisions about the disbursement of funds,

608.3 audited annually and be required to publicly report on its activities once a year.

GROUNDS FOR COMMISSION OF INQUIRY RELIEF

609 In this part of the application, we set out our grounds for the relief declaring the failure or refusal of the President to establish a commission of inquiry into the suppression of the TRC cases to be:

609.1 inconsistent with his constitutional responsibilities, and

609.2 a violation of the families of victims of apartheid-era crimes' rights to equality and human dignity.

610 In addition, we seek an order setting aside the President's decision and directing him to:

610.1 Promulgate the establishment of a commission of inquiry within thirty days of the grant of such an order; and

610.2 Make the provisions of the Commissions Act 8 of 1947 applicable to the aforesaid commission.

610.3 Request the Chief Justice to designate a sitting or retired judge to head the inquiry.

Commissions and the search for truth

611 I am advised that the highest court in our land has stipulated that the work of a commission is to "*search for truth*", which "*also serves indispensable accountability and transparency purposes*." The Court held that *"not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too*."

612 As victims and family members we are entitled to the truth behind the closing down of the cases of our loved ones. The country is also entitled to know.

613 The Constitutional Court has also observed that commissions investigating matters of public concern, in addition to the function of advising the President, have "*a*

deeper public purpose" particularly during times of "disquiet and discontent". The Court noted that public hearings are held "*in order to restore public confidence*" in the relevant institutions, where the focus is to "*reveal the truth to the public pertaining to the matter that gave rise to public concern*."

614 We ask for a public accounting for the deep miscarriage of justice that we have endured since the advent of our democracy.

Duty on the President to establish a commission of inquiry

615 I am advised that while section 84(2)(f) of the Constitution, which grants the President the power to appoint commissions of inquiry, is an original and discretionary power, there are circumstances in which the President is obliged to exercise the power. Indeed, presidential powers are never entirely unfettered, and typically such powers are coupled with duties.

616 Accordingly presidential powers must be exercised within the constraints that the Constitution imposes. In deciding whether or not to appoint a commission of inquiry the President must:

616.1 act in good faith;

616.2 not misconstrue his powers;

616.3 not infringe any provision of the Bill of Rights; and

616.4 not act arbitrarily and his decision must be rationally related to the purpose for which the power was given.

617 We do not have evidence suggesting that the President has acted *mala fide* or for an ulterior purpose in not appointing a commission. However, we are concerned that since such an inquiry will have to probe the role of the government, and quite likely personalities who played leading roles in government, that political considerations may have crept into his decision. It is exceedingly difficult to shake this perception, which only grows with the ongoing refusal to get to the bottom of the suppression of the TRC cases.

618 We are the of the firm view that in declining to appoint a commission of inquiry into this question, the President has exercised his power under the Constitution improperly and misconstrued the nature of his powers. In doing so, he has also violated several of our rights protected in the Bill of Rights, as set out above.

619 While the Constitution does not constrain the subject matter of any commission of inquiry that the President may appoint, the Commissions Act limits commissions of inquiries to matters of "*public concern*". A central inquiry as to whether the President's decision was irrational or arbitrary is whether the interference is a significant matter of public concern demanding the appointing of a commission to get to the truth. I submit that it is.

Irrational or arbitrary decision

620 In the letters addressed to the President on 5 February 2019 (**FA68**) and 25 March 2021 (**FA74**) the former TRC commissioners pointed out that the approximately 400 cases suppressed by political interference comprised some of the most serious crimes in South Africa's history, including murder, kidnapping, torture and various crimes against humanity.

621 An aggravating factor is that most of the TRC cases will not be able to be revived as suspects and witnesses have died. This means that the damage to the associated families and their communities is permanent and irreversible. An additional aggravating factor is that, to date, negligible progress has been made on the few cases that can be taken forward.

622 The former TRC commissioners pointed out that:

622.1 there was considerable evidence of the suppression of the TRC cases in court papers;

622.2 senior NPA officials had admitted under oath in *Rodrigues* that the NPA had succumbed to political pressure;

622.3 the full court in *Rodrigues* called for the NPA and the Executive to take steps to enquire into the suppression, which to date has not happened;

622.4 appropriate action to prevent recurrence can only be based on a full and thorough inquiry;

622.5 an inquiry is needed to uncover:

622.5.1 the reasons behind the suppression of the cases;

622.5.2 the sources of the interference;

622.5.3 the arrangements and agreements struck between individuals and entities within and outside government; and

622.5.4 how the will of outsiders was imposed on the NPA and the SAPS;

622.6 the available evidence pointed to the involvement of:

622.6.1 multiple entities and individuals across the public sector, including the Department of Justice, the National Intelligence Agency, the NPA, the SAPS, the Department of Defence and the Presidency; and

622.6.2 persons possibly implicated included politicians, cabinet ministers, senior civil servants, senior police officers and prosecutors;

622.7 potentially serious common law and statutory crimes may have been committed;

622.8 families of victims of apartheid-era crimes and their communities have lost all trust and confidence in the SAPS and NPA;

622.9 the suppression has provoked much anxiety amongst many South Africans who regard the suppression of these cases as a matter of great public interest and importance;

622.10 the suppression of the TRC cases has deeply offended the human spirit and dignity of the families and their communities; and

622.11 the rights of the families to equality before the law has been grossly disrespected in that their cases were treated differently from other serious criminal cases for purposes of serving undisclosed ends.

623 The former TRC commissioners also pointed out the historical significance of pursuing the TRC cases, as well as the legal and moral obligations arising from South Africa’s transition from apartheid to democracy.

624 The letters dated 23 June 2019 and 23 June 2020 (**FA72** and **FA73**) addressed to the President by the families of Chief Albert Luthuli, Steve Biko, the Cradock Four, Nokuthula Simelane, Ahmed Timol, Neil Aggett, Imam Abdullah Haron and 14 other families expressed their deep pain and anguish at having been denied truth and justice in the new South Africa.

625 The subject matter clearly constitutes a matter of deep public concern at different levels:

625.1 The suppression of hundreds of serious criminal cases, mostly murders, constitutes a massive subversion of the rule of law.

625.2 Families have been impacted from across the country in all provinces.

625.3 The anguish they have experienced is evident from their letters to the President.

625.4 Several organisations have expressed their public concern at the failure to investigate and prosecute the TRC cases, and in this regard:

625.4.1 family members have established the Apartheid-Era Victims' Families Group to fight for justice.

625.4.2 Eleven organisations have formed the SACTJ to secure the rights of victims of apartheid-era violations.

625.4.3 The Foundation for Human Rights has established a specific programme called 'The Unfinished Business of the TRC', to focus on justice and accountability.

626 The subject matter is without question an important one, and one that has provoked considerable anxiety amongst many people across the country, qualifying it as a matter of significant public concern. The President's refusal or failure to appoint a commission of inquiry:

626.1 Shuts down the search for the truth behind the massive denial of justice to hundreds of families.

626.2 Further undermines confidence in the implicated institutions and raises deep suspicions that these institutions have much to hide.

626.3 Gives rise to the impression that the implicated persons and institutions are above the law and are being shielded from scrutiny and protected from embarrassment.

626.4 Serves to heighten and exacerbate the already existing widespread disquiet and discontent.

627 Accordingly, there can be little doubt that the suppression of the TRC cases provokes considerable anxiety amongst many South Africans and is a matter of both historical and national importance. This warrants a properly empowered inquiry to uncover the truth to alleviate victim and public discontent, formulate corrective measures and restore confidence in the implicated institutions.

628 The President’s failure or refusal to appoint a commission is irrational since the refusal or failure to appoint a commission is not rationally related to the purposes for which the power was given. His decision falls to be set aside.

Irrational process or means

629 There is an additional ground of irrationality, which is related to process. The failure of the President and the former Minister of Justice to:

629.1 respond in substance to the four letters from the TRC commissioners and the victims' families' letters;

629.2 provide reasons for his refusal, which *prima facie* makes his decision an arbitrary one; and

629.3 make and communicate a formal decision.

630 This conduct has served to obstruct, delay and undermine an investigation into the interference. It has also served to prolong and exacerbate the harm visited upon the families and their communities.

631 The refusal or failure to make and communicate a formal decision also offends section 237 of the Constitution which provides that "*all constitutional obligations must be performed diligently and without delay*". It is also a violation of:

631.1 one of the founding values of the democratic South Africa as enshrined in section 1(d) of the Constitution which requires the state to "*ensure accountability, responsiveness and openness*"; and

631.2 section 195 of the Constitution, which requires the President to act in accordance with various basic values governing public administration, including the need to be transparent and respond to people's needs.

632 Since South Africa is a constitutional state in which the principles of fairness and accountability are fundamental, the President is under a duty to act fairly. Indeed, a heightened duty to act fairly arises from the context which I have described. The President's conduct has fallen well short of this standard.

633 In addition, the attempt by the former Minister of Justice to set up an internal inquiry, as described above, would have amounted to asking one of the impugned departments to investigate itself.

634 Accordingly, the process or means adopted by the President and the former Minister to date has also been irrational.

Violation of the rule of law and Bill of Rights

635 I have set out the violations of the rule of law and the Bill of Rights endured by the families arising from the interference in the section dealing with our claim for constitutional damages. Those submissions apply equally in respect of our grounds for an order compelling the President to appoint a commission of inquiry. That detail will not be repeated here. It suffices to say:

635.1 The President's decision and/or the failure to take a decision is an affront to the human dignity of the families. In affording those behind the suppression of the TRC cases further opportunities to escape scrutiny, the intrinsic worth of the victims and families is degraded.

635.2 The President's decision violates the rights of survivors, victims and their families to life, human dignity and freedom and security of the person by:

635.2.1 declining or failing to authorise an inquiry into the suppression of the investigations of perpetrators who infringed our rights by committing acts of murder, enforced disappearance, torture, assault and other cruel and inhuman treatment, and

635.2.2 failing to give value to the lives of victims of apartheid-era crimes.

Sufficient grounds

636 I respectfully submit that sufficient grounds have been set out for the relief declaring the failure of the President to appoint a commission of inquiry to be inconsistent with his constitutional responsibilities, and a violation of our rights; and for an order setting aside his decision and directing him to appoint a commission.

637 We specifically ask that the Court require that the provisions of the Commissions Act be made applicable to the aforesaid commission.

637.1 This is because a commission without the powers imbued by the Act could turn into a farcical exercise. It would not have the necessary powers to investigate effectively, and it could conduct its affairs behind closed doors.

637.2 An inquiry under the Act comes with extensive powers, equivalent to those of the High Court, including the power to lead evidence under oath, to summon witnesses, to require the production of documents and to criminalise conduct which may obstruct or prevent a proper investigation.

637.3 The Act also requires the hearings of the commission to be public unless the chairperson decides otherwise.

638 We also ask this Court to require the President to request the Chief Justice to designate a sitting or retired Judge to head the inquiry.

638.1 This is necessary in order to protect the proprietary and integrity of the commission. The Office of the President, as well as the Ministry of Justice and other government departments are implicated in the interference. It would accordingly be undesirable for such parties to be directly involved in the selection of the commissioners.

638.2 While the power to appoint the head of the commission is vested exclusively with the President, and he could decline to accept the designation of the Chief Justice, we believe he would be most ill-advised to do so.

GROUNDS FOR A MANDAMUS

639 I set out below our grounds for an order compelling the establishment of a commission of inquiry to investigate the suppression of the TRC cases.

Clear right

640 I submit that I have demonstrated the unlawfulness of the President's refusal or failure to appoint a commission of inquiry into the interference with the TRC cases. I have also demonstrated the serious impact that the interference has had on our lives, in addition to this issue being a matter of national public concern with huge implications for the rule of law in our country.

641 I have demonstrated further that an independent commission of inquiry is the only effective way in which we may learn the full extent of the interference, how it was

imposed, the source of the interference, the identities of those responsible for it; and how to prevent it from occurring again.

642 In the circumstances, I have established a clear right for an order compelling the President to establish a commission of inquiry into the interference.

Injury actually committed or reasonably apprehended

643 I submit that I have demonstrated that the President's refusal or failure to establish a commission of inquiry infringed our constitutional rights and that further delay will seriously prejudice my rights and that of the families.

644 The stress and trauma that we have endured for decades will be considerably magnified by the failure to establish an open and transparent inquiry with the proper powers.

645 In the absence of a commission of an inquiry, the persons behind the interference will not be held to account. The nature and extent of their involvement will continue to remain unknown. Those responsible may remain in positions of influence where they can continue to perpetrate interference on the TRC Cases.

646 These factors further prejudice my rights and that of the families. It further prevents us from reaching closure. I have accordingly established a reasonable apprehension of injury.

No alternative remedy

647 I submit that that we have no other viable or alternative remedy. We have exhausted all avenues of persuasion. Many years of knocking on doors and pleading for action to establish the truth behind the interference have fallen on deaf ears.

648 The relevant departments and functionaries cannot be expected to investigate themselves. The only way to address the interference is through an independent, open and thorough investigative process in the form of a commission of inquiry. No other remedy can deliver the truth, accountability and closure that we and many South Africans seek.

CONCLUSION

649 I am advised that on the basis of the '*Biowatch'* principle, should we be unsuccessful in our application against the state, we ought not to be mulcted with a costs order, as this is an application in which we seek to enforce and vindicate our constitutional rights. We humbly ask this Court to apply this principle if some or all of the relief sought is refused.

650 In the circumstances, I submit that a proper case has been made for the relief sought and I pray for the orders as set out in the Notice of Motion.

_____

LUKHANYO BRUCE MATTHEWS CALATA

Signed and sworn to before me at _____ on this the ____ day of _____ **2025**, the deponent having acknowledged in my presence that he knows and understands the contents of this affidavit, the provisions of Government Gazette R1478 of 11 July 1980 as amended by Government Gazette R774 of 20 April 1982, concerning the taking of the oath, having been complied with.

_____

COMMISSIONER OF OATHS

FULL NAMES:
PHYSICAL ADDRESS:
DESIGNATION: