

OVERVIEW

CONSTITUTIONAL DAMAGES & COMMISSION OF INQUIRY CASE

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INTRODUCTION

- 1 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. They have been denied justice and closure for the heinous crimes that were committed against them and their loved ones during apartheid due to the suppression of the investigations and prosecutions through political interference (the interference or the political interference).
- 2 They bring this application to address, to the extent possible, the grave injustices caused by the interference. They seek to have their constitutional rights to dignity and justice, which were deeply violated by the interference, vindicated. They also seek the truth behind how such brazen interference in the administration of justice occurred, and they wish to ensure that such injustices never happen again.

APPLICANTS AND RESPONDENTS

- 3 **The 23 Applicants are:** Lukhanyo Bruce Matthews Calata, 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 Godolozzi, Mogapi Solomon Tlhapi and the Foundation for Human Rights.
- 4 **The 6 Respondents are:** The President of South Africa, the Government of South Africa, the Minister of Justice, the National Director of Public Prosecutions, the Minister of Police and the Commissioner of the South African Police Service.

RELIEF SOUGHT

- 5 The relief sought by the applicants is summarised below. An order is sought:
- 5.1 Declaring the conduct of the 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:
- 5.1.1 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;
- 5.1.2 inconsistent with the constitutional values and rule of law as set out in section 1 of the Constitution;
- 5.1.3 inconsistent with the principles, values and obligations arising from the Promotion of National Unity and Reconciliation Act (the TRC Act) read with the postscript to the Interim Constitution;
- 5.1.4 in breach of the duties and obligations contained in the Constitution, the National Prosecuting Authority Act and the South African Police Service Act to investigate and prosecute serious crime and not to interfere with the legal duties of prosecutors and law enforcement officers; and
- 5.1.5 inconsistent with South Africa's international law obligations.
- 5.2 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:
- 5.2.1 advance truth, justice and closure by assisting them to pursue investigations, inquests, private prosecutions and related litigation (in the sum of R115 261 625.00);
- 5.2.2 play a monitoring role in respect of the work of the policing and justice authorities charged with investigating and prosecuting the TRC cases (R8 million); and
- 5.2.3 pursue commemoration, memorialisation and public education activities, including the holding of public events, publishing of books and making of documentaries (R 44 million).
- 5.3 The creation of an independent trust in accordance with the provisions of the Trust Property Control Act to hold and disburse any funds awarded as constitutional damages in furtherance of the objects set out above.
- 6 Declaring the failure and/or refusal by the President to establish a commission of inquiry into the suppression of the investigation and prosecution of the TRC cases (the decision) to be:

- 6.1 inconsistent with his constitutional responsibilities, and
 - 6.2 a violation of the survivors and families of victims of apartheid-era crimes' right to equality, dignity and their right to life and bodily integrity.
- 7 Reviewing and setting aside the President's failure and/or refusal to appoint a commission of inquiry as described above.
- 8 Directing the President to:
- 8.1 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:
 - 8.1.1 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;
 - 8.1.2 whether any members of the NPA and/or the SAPS improperly colluded with such attempts to influence or pressure them; and
 - 8.1.3 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;
 - 8.2 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 THE LEGAL PAPERS

- 9 **Overview of the application**, including the fundamental betrayal committed by the post-apartheid state against families and victims connected to apartheid-era crimes.
- 10 **Descriptions of the parties** to the application.
- 11 **The applicants' standing** to pursue the application.
- 12 **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.
- 13 **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.

- 14 **Whether the suppression of the TRC cases was the product of a political agreement**, including various interactions between senior government officials and former apartheid security personnel regarding an immunity and other arrangements aimed at avoiding prosecutions.
- 15 **Post-interference developments**, including efforts to reopen inquests, and litigation the families launched to compel or prompt action on the part of the NPA and the SAPS.
- 16 **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.
- 17 **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.
- 18 **The statutory and constitutional provisions that have been violated** by the political interference which resulted in the suppression of most of the TRC cases.
- 19 **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.
- 20 **The type and form of constitutional damages sought** by the applicants and motivate the quantum claimed.
- 21 **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.
- 22 **The grounds for the mandatory order** sought compelling the President to establish an inquiry under the Commissions Act.

OVERVIEW

- 23 The overview is in the words of the first applicant, Lukhanyo Calata:
 - 23.1 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.
 - 23.2 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.
 - 23.3 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.

- 23.4 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 NPA.
- 23.5 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.
- 23.6 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.
- 23.7 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.
- 23.8 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

- 23.9 Families of apartheid-era victims have conducted themselves with resilience and remarkable patience.
- 23.10 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.
- 23.11 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.
- 23.12 In this regard, according to the TRC Report, read with figures released by the Department of Justice, 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.
- 23.13 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.

- 23.14 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.
- 23.15 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.
- 23.16 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.
- 23.17 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.
- 23.18 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.
- 23.19 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.
- 23.20 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.