

SUBMISSION TO THE KHAMPEPE COMMISSION OF INQUIRY INTO DELAY IN INVESTIGATION AND PROSECUTION OF TRC CASES.

Introduction

1. I am Carl Martin Kriel the Chief Executive Officer of AfriForum, a non-profit civil rights organisation with approximately 300,000 members.
2. I make this submission on behalf of myself and AfriForum. To this end, I have been duly authorised.
3. I respectfully submit that AfriForum holds a substantial interest in these matters, as an interested party with members who include victims and families of persons who also hold a substantial interest in these matters.

Submission's focus

4. The essence of our submission is to implore the Commission to ensure compliance with the basic principle of justice, namely equality before the law.
5. Our interest in the debate over prosecutions flowing from the recommendations of the Truth and Reconciliation Commission (TRC) dates back to September 2007, when acting on behalf of Mr. Dirk van Eck, we implored the State to either, in the interest of national unity and reconciliation, cease all prosecutions as recommended by the TRC, or to ensure equality before the law to prosecute all those individuals (specifically the so-called ANC 37, who failed to get amnesty) who committed gross human rights violations.

6. We still stand by those submissions today. In order to focus our submission, we have purposefully avoided highlighting any specific aspect. Still, we will be able to do so if invited or during oral evidence before the Commission.
7. I studied the affidavit filed by Mr. Lukhanyo Bruce Matthews Calata in the matter *Calata and Others v The Government of South Africa*, Case no. 5025 - 005245, and in general convinced that the applicants made out a case on the papers that there may have been political interference causing the failure to prosecute the cases and individuals identified by the TRC, particularly those individuals who were found to be responsible for a range of gross human rights violations.
8. We will deliberate in some detail on the terrible facts which expose how Mr Van Eck's wife and two children died as a result of the ANC's campaign to extend the targets of the armed struggle to include civilians.
9. Our summarised submission entails an approach that will allow the closure of the book on the past, or that the Commission include and deliberately focus on the failures and reasons for the failures to prosecute any of the 37 senior ANC members whose amnesty applications were refused in line with the TRC finding that "*... ANC to be responsible for a range of gross human rights violations arising out of unplanned operations; the bombing of public buildings, restaurants, hotels and bars; the landmine campaign in the northern and north-eastern parts of South Africa*" This undoubtedly includes the murder of Mr van Eck's wife and two children using a landmine planted on a private road on his property.
10. In terms of our stated approach, we are less interested in identifying which members of the SAPS or NPA improperly colluded with anyone to prevent the investigation or prosecution of cases identified by the TRC. However, we submit

that if recommendations are made regarding further investigation or prosecution of persons who may have acted unlawfully, they should equally include the senior members of the ANC who failed to obtain amnesty and were found to have committed gross human rights violations.

11. In this regard, although we do not have the details of the allegations, the Ellis Park Bomb of 1988 deserves attention and investigation.
12. I have, in consultation with Adv Paul Fick SC (now 76 years old), who, as a member of the office of the then Attorney-General and later Director of Public Prosecutions, informed me that he and a team of SAPS investigators contemplated prosecuting senior ANC members for this tragedy. He was assigned the task by Dr De Oliveira and had to decide and prepare prosecutions of ANC members.
13. We submit that the ANC at the Consultative Conference held in Kabwe, Zambia, from 16 to 23 June 1985, extended the targets of the armed struggle to include civilians. Operation Cetshwayo was a landmine operation conducted by the ANC from about 1985 to 1987. During this time, there were in the region of 30 landmine explosions in which 24 innocent civilians died and 76 people were injured.
14. Mr Van Eck, his wife, two children and others were on a game drive on his farm when his vehicle detonated a landmine. His wife and two children, aged 2 and 8, died, and the remaining victims were all seriously injured. We acknowledge that the two individuals who planted the landmine were granted amnesty, but none of the senior members who instructed the planting of landmines were ever prosecuted. It is a known fact that the ANC accepted responsibility for this specific tragic murder.

15. Mr Sipho Ngwema, the NPA spokesperson at the time, in a 2004 News24 article by Ms Sonja Carstens, was quoted to have said: “...*the NPA doesn’t know who did what or who gave orders. There is simply not enough evidence to draw up a charge sheet...*” I infer, and discuss this aspect later, that the NPA and the SAPS deliberately refrained from collating the necessary “evidence”. We submit that the failure to investigate is akin to a deliberate failure to prosecute.
16. Interestingly, in 2007, we indicated that if the tendency of selective prosecutions continued, AfriForum would consider private prosecution. In 2017, we created a Unit that currently focuses on private prosecution to ensure that individuals who are sheltered from prosecution due to their political status or connections face prosecution and accountability. We currently hold no brief to prosecute in any of the TRC matters privately. This may change if the NPA continues to prosecute these matters selectively.
17. The TRC indicated in Volume 5 of their final report that, in terms of the obligation conferred by section 29 of the Promotion of National Unity and Reconciliation Act 34 of 1995, they referred a number of cases to the Attorney General (as it was) for investigation and possible prosecution. The list included individuals implicated in gross human rights violations for which no amnesty application was received or where amnesty was refused. This list was later presented to Mr Bulelani Ngcuka, the first National Director of Public Prosecutions.
18. Our focus is not on making submissions regarding the functionaries of the NPA or SAPS who played a role in the failure to prosecute TRC-related matters. Still, we infer from various statements made that the NPA did indeed have the list and specific case dockets, and that in early 2006, then Police Commissioner Jackie

Selebi was concerned that Adv Anton Ackerman (NPA) intended to prosecute the ANC leadership.

Adv Vusi Pikoli stated in his affidavit filed in the matter Nkadimeng and Others v The NDPP and others TPD case 32709/07 at paragraph 30, that: “... *In early 2006, then Commissioner of Police, Mr. J Selebi, objected to Advocate Ackerman’s participation claiming that Ackerman intended to prosecute the leadership of the ANC ...*”

19. Adv Pikoli indicated in this affidavit at paragraph 72, that all the dockets relating to TRC cases, which had been stored at the Office of the Director of Public Prosecutions in Pretoria, had been handed over to the SAPS in early and mid-2004. He continued to explain that he was present, in his capacity as the Director-General of Justice, when representatives from SAPS collected the said dockets.
20. Also, in paragraph 72, Adv Pikoli stated that, “... *I reminded the minister that my predecessor had satisfied himself that there was no basis for the leadership of the ANC to be investigated and that he then briefed the then Minister as well as the President ...*”

We submit that Mr Ngcuka will be best placed to indicate why the “investigation” into the leadership of the ANC was stopped. Here we are not dealing with prosecutions but with an investigation that was ceased.

21. Adv Fick indicated that he was assigned two SAPS members, Nel and Brits, to investigate all the allegations against the ANC and its members who failed to obtain amnesty. He was in possession of the dockets until Mr Ngcuka arrived at his office with a letter ordering that the documents and dockets should be returned

to the SAPS. The dockets were returned with the original letter from Ngcuka indicating that the matters will not be investigated by the NPA any further. According to him, the dockets were removed to the offices of the Security Police. These are the same dockets discussed *supra*.

22. It is thus clear that in early 2004, the NPA had decided not to prosecute any of the matters referred by the TRC. This includes any of the possible case dockets against the ANC leadership who failed to obtain amnesty. The then National Director of Public Prosecutions confirmed it in writing. This letter must still be available at either the SAPS or the NPA. It is essential for any investigation or finding of political interference in the prosecution of these cases to access the letter and ascertain whether any explanation was proffered, as well as to identify the case dockets that were removed.
23. It is now more than 20 years later, and our submission remains precisely the same as the one made in 2007, namely, to ensure equality before the law in the investigation and prosecution of all who failed to obtain amnesty and have been identified as having committed gross human rights violations.
24. A delay in prosecution for more than 40 years will undoubtedly impact the possibility of a successful prosecution. A mere process to investigate those cases where the dockets and evidence are still available will be inherently unfair, and we urge the Commission to establish where the TRC dockets are and who the investigated suspects were in each docket, before a decision is made to recommend prosecution.
25. Adv Dumisa Ntsebeza, in his report on TRC prosecutions in 2024, eloquently expressed himself: “... *The consequences of this failure have manifested*

themselves in the vast number of cases that have now become irredeemable – memories have faded, witnesses have died, evidence that should have been archived has, over time got lost or destroyed ...” He is obviously correct. We are concerned that the evidence against ANC 37 has been deliberately lost or destroyed.

26. A deliberate withdrawal of support to ensure the prosecution of implicated senior ANC members should receive the same attention as those requested for in the Calata matter.
27. Unfortunately, as a consequence of the deliberate delay in finalising the investigations, Messrs. Nel and Brits passed away and are no longer available to provide details of the investigations and the location of the dockets. It is perhaps worth establishing if the documentation that was removed and handed over to the SAPS contained minutes of meetings where senior ANC members discussed, ordered or authorised attacks that included civilians as targets to be eliminated.
28. We understand the desire of families to reopen inquests that have been decided without taking into account evidence that was not available at the time of death. In this regard, without having researched all matters, we alert the Commission to the murder of Mr Van der Merwe on 1 November 1978. The TRC included this matter as one of the disappearances/killing cases where the victim was never located, and dealt with the suffering caused by the lack of closure. There was no amnesty application for this killing. Still, indeed, the ANC and uMkhonto we Sizwe command and extension of the armed struggle should be investigated as a cause of the killing.

Conclusion

29. We submit that the Commission will be unable to fulfil its mandate without a proper evaluation and publication of the TRC list of cases, as well as an analysis of which case dockets are still available. This list is undoubtedly one of the most important documents produced by the TRC and must be available for analysis.

30. Upon the creation of the Commission, President Cyril Ramaphosa emphasised the importance of its task:

“As this government, we are determined that those individuals responsible for apartheid crimes and who were not granted amnesty by the TRC be held to account. This Commission of inquiry is an opportunity to draw a line under a painful period in our country’s history. It is an opportunity to establish the truth and take steps, to the extent possible, to put right what may have gone wrong.”

The President’s sentiments must extend to all the individuals who committed atrocities and failed to get amnesty.

31. We hold no direct brief on behalf of any security force members being probed, but we strongly believe in the principles of fairness and equality before the law. This includes fair investigation and prosecution of all parties that may have committed atrocities, including murder. We cannot remain silent about the transparent failure to treat the atrocities committed by everyone equally. The “excuse” that the dockets against the ANC leadership do not contain enough evidence to prosecute is a transparent attempt to mask the inequality of treatment of TRC cases by the State.

32. Without condoning the conduct of any party to the armed struggle, the perception exist that the Apartheid state, for the most part, targeted specific individuals it deemed to be a threat to the regime, while the ANC and other such parties' campaigns were later during the struggle, indiscriminate, and included the killing of innocent civilians and families, such as the case of Mr. Van Eck.
33. It seems patently unjust that the Apartheid state operatives responsible for the heinous crimes committed against political activists be prosecuted, while political activists who coordinated and ordered heinous acts to be committed against civilians, including children, escape accountability.
34. All parties had an equal opportunity to seek indemnity and avoid prosecution. Those who failed should all be investigated and prosecuted. If this has become impossible, the only alternative is to close the book of the past as far as criminal prosecutions are concerned.
35. As an inalienable principle of equality before the law, we implore the Commission to ensure that any recommendations made also benefit the victims of gross human rights violations committed by the ANC and other groups that participated in the armed struggle.

SIGNED AT PRETORIA ON 10 OCTOBER 2025



CARL MARTIN KRIEL