

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 76755/18

SARAH LALL o.b.o Haffejee Family

APPLICANT

In an application as *amicus curiae*

In the matter between:

JOAO RODRIGUES

APPLICANT

AND

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS OF SOUTH AFRICA**

FIRST RESPONDENT

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

SECOND RESPONDENT

THE MINISTER OF POLICE

THIRD REPENDENT


FILING NOTICE

**TO : THE REGISTRAR OF THE HIGH COURT
PRETORIA**

S I R S

KINDLY TAKE NOTICE that the Applicant herein files its Heads of Arguments
evenly herewith.

DATED AT LADYSMITH ON THIS 14 DAY OF DECEMBER 2018.



A S JESSOP
ATTORNEY FOR APPLICANT

(Duly authorised in terms of
Section 4 (2) of Act No. 62 of 1995)

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HEADS OF ARGUMENT

INTRODUCTION

1.

The Accused stands arraigned before this Honourable Court on a charge of murder relating to the death of the Late Ahmed Essop Timol, who died on or about the 27th October 1971.

2.

The Accused has approached the Honourable Court for a declaratory order (The Main Application) that the criminal proceedings against him be permanently stayed because he alleges that it constitutes an unfair trial as envisaged in Section 35(3) read with section 12 of the Constitution of the Republic of South Africa, Act 108 of 1996. He also makes the submission that Section 342A of the Criminal Procedure Act 51 of 1977 may also be relevant.

3.

Further that the National Director of Public Prosecutions be prohibited from proceeding with the criminal prosecution against him and that the National Prosecuting authority be ordered to withdraw the criminal proceedings against him.

4.

The launching of this Application necessitated the intervention of various interested parties. In the circumstances, we, on the basis and grounds referred to in our papers in which we asked this Honourable Court to permit us to participate in these proceedings as an intervening party envisaged in Section 38(a) and (d) of the

Constitution, filed papers on 08 November 2018.

5.

Having so filed our papers in the capacity so referred to in the immediately preceding paragraph, it occurred to us as a result of meetings held in the Chambers with the Honourable Judge, together with all relevant parties that despite our capacity referred to above, we got the impression that we may be regarded as *amicus curiae*. In the circumstances, the following heads of argument will be couched as such and such heads will be divided accordingly, the one being in respect of the application to be admitted as an intervening party whilst the other will be for admission as *amicus curiae*.

6.

The matter now stands adjourned for the presentation of Heads of Argument and Argument for determination whether such intervening interested parties be admitted to deal with and address issues if necessary when called upon by the Court at a stage when the Application for the orders mentioned in paragraphs 1 – 6 of the main application is to be heard. The following are such heads.

7.

It is important to us to point out that these Heads are prepared without sight of the other parties opposing papers to the main application as well as their heads of argument. For the sake of convenience we start with those relating to the application to be admitted as an intervening party.

8.

8.1 In these Heads the following topics will be dealt with in the following order: -

- a) application as intervening party (Section 38 of the Constitution, Act 108 of 1996); and
- b) application as *amicus curiae*.

8.2 The Main Application;

8.3 Rule 16A and condonation for non-compliance;

- 8.4 The Role *Amicus Curiae*;
- 8.5 Constitutional Issues;
- 8.6 The crux of the Main application;
- 8.7 Applicants Interest in the Proceedings;
- 8.8 Applicants submissions ought to be accepted;
- 8.9 The Obligation to consider International Law;
- 8.9 Binding International Law on South Africa;
- 8.10 African Charter on Human Rights and Peoples Rights;
- 8.11 United Nations General Assembly Resolution 60/147 of 16 December 2005;
- 8.12 Constitutional Democracy and the Rule of Law;
- 8.13 Conclusion

9.

Application for admission as intervening party in terms of section 38 of the Constitution:

9.1 Locus standi:

9.1.1 It is a requirement that a party bringing this application demonstrate that it has *locus standi*. Section 38 of the Constitution reads:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) 'anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.”

10.

10.1 It is the Applicant's respectful submission that she in terms of paragraphs (a) and (d) of this section of the Constitution, has the required *locus standi*, as set-out in paragraphs 14 and 14.1 to 14.8 of her founding affidavit.

10.2 It is respectfully submitted that this matter should be regarded as unique in the sense that in addition to being part of a long history of injustice perpetrated in the name and spirit of the apartheid system, it is different from any type of crime committed ordinarily in our society in that it not impacts on the individual, but also the greater section of the public.

11.

In this regard, it is respectfully submitted that Public interest standing, specifically provided for in section 38(d) of the Constitution, creates the opportunity for any individual or group to approach a court if moved by a desire to benefit any portion of the public.

The South African Law Commission project: the recognition of class actions and public interest actions in South African Law R 8/1988 26 at 2.2.1; C Loots “Locus Standi to Claim Relief in the Public Interest in matters Matters Involving the Enforcement of Legislation” (1987) 104 *South African Law Journal* 131.

12.

The Constitutional Court has recently confirmed that issues do not have to be important to all citizens to be deemed to be of general public importance; they need only be of importance to a sufficiently large section of the public.

Mokone v Tassos Properties CC and Another 2017 5 SA 456 (CC) at para 17

Infringement or threatened Infringement of a Right in the Bill of Rights

The Right to Equality

13.

It is respectfully submitted that the threatened infringement of a Right relates to the Right to Equality as protected by section 9 of the Constitution.

14.

It is submitted further that the Right to Equality and benefit of the law allows victims

to ensure that they benefit from the prosecution of crimes committed against them. In general this right to Equality deals with the protection of equality as against inequality.

15.

Crimes of gross human Rights violations were committed at a time when individuals were discriminated against and perpetrators acted above the law and were not prosecuted for these atrocities. The laws which are meant to protect or advance persons disadvantaged by unfair discrimination are in place but that is not sufficient because the enforcement of these laws need to be given effect to for the benefit of the larger society.

16.

The Right to Human Dignity

The applicant submits that a permanent stay of the prosecution will infringe upon the rights to inherent dignity which ought to be respected and protected. On the contrary the refusal of the application will send out the wrong message and will be seen to be protecting the perpetrators of gross human rights violations at the expense of victims and their families.

It will also have the following effect:

- a) cause suffering to victims or prolong their suffering by denying them justice;*
- b) prevent victims and victims' families from reaching closure or resolution of past injustices;*
- c) dishonour and disrespect, dignity value and acceptance of victims families in their wider community;*
- d) Demean and undermine not only the criminal Justice System but South African Society as a whole;*
- e) Defeat the object and purport of the Constitution which is the foundation on which civil society is based; and*
- f) Fail to give effect to the preamble of the Constitution which is the cornerstone of Democracy.*

Constitution, section 10

17.

It was held that in affording perpetrators of the most serious crimes further and open-ended opportunities to escape justice at the expense of their victims, the intrinsic worth of the victims is degraded;

S v Makwanyane 1995 3 SA 391 (CC) per O'Regan J at par 44

18.

Application to be admitted as *Amicus Curiae* :

General Principles

The Rules pertaining to the admission of a party to High Court proceedings on *Amicus Curiae* are set out in Rule 16A of the Uniform Rules.

19.

Applicant, representing the family of the Late Hoosen Haffajee who died in custody at the Brighton Beach Police Station on the 3rd August 1977, seeks to intervene in the main application for the purposes of making submissions relating to the Application for a declaratory order read with Section 342A of the Criminal Procedure Act 51 of 1977.

The Main Application

20.

The Applicant has instructed her Legal Representative to intervene in these Proceedings on a *pro bono* basis.

21.

The primary mission of the applicant is to promote the interest of the public and to ensure the protection of public interest, particularly the families of the victims who suffered and lost their lives as a result of gross human rights violations committed by members of the Security Branch during the Apartheid era and to promote and give

effect to the principles contained in the preamble to the Constitution which is the foundation on which an open and democratic South Africa is established. It seeks to promote the interest of Justice and foster transparency, accountability and retribution.

22.

Rule 16A and Condonation for Non-Compliance

Rule 16A provides as follows:-

- 22.1 A person raising a constitutional issue shall give notice containing a clear and succinct description of the constitutional issue to the Registrar at the time of filing the relevant affidavit or pleading, which notice shall be placed on a notice board designated for that purpose and which shall remain for a period of Twenty (20) days.
- 22.2 Any interested party, may with the consent of all parties to the proceedings given not later than twenty (20) days after the filing of the Affidavit or Pleading in which the constitutional issue was first raised, be admitted therein as

amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties. These may be amended by the Court. Such written consent shall within five (5) days of it having been obtained, be lodged with the Registrar and the *amicus* shall, in addition to any other provision, comply with the times agreed upon for the lodging of the argument.

22.3 If a potential *amicus curiae* is unable to obtain the aforementioned written consent, he or she may, within five (5) days of the expiry of the twenty (20) day period prescribed in the sub rule, apply to Court to be admitted as an *amicus* in the proceedings, which Application shall : -

22.3.1 Briefly describe the interest of the *amicus curiae* in the proceedings;

22.3.2 Clearly and succinctly set out the submissions which will be advanced by the *amicus curiae*, the relevance thereof to the proceedings and his or her reasons for believing that submissions will assist the Court and are different from those of the other parties, and

22.3.3 be served upon all parties to the proceedings.

23.

- 23.1 Any party who wishes to oppose such application shall file an Answering Affidavit within five (5) days of the service of such Application upon such party clearly and succinctly setting out the grounds of such opposition.
- 23.2 The Court hearing our Application for admission as *amicus curiae* may refuse to grant the Application upon such terms and conditions as it may determine and may dispense with any of the requirements of this rule if it is in the interest of Justice to do so.

24.

It is common cause that the Notice contemplated in Rule 16A (1) (a) was not given.

25.

It is also common cause that the Application for amicus admission was not made in terms of the time limits prescribed as envisaged in terms of Rule 16A.

26.

The provision of the notice is a procedural requirement. The Honourable Court can condone non-compliance with the notice. It is respectfully submitted that during the meetings held in the Chambers with the Honourable Judge and all relevant parties, no formal objection to the Application was made and the understanding amongst all parties is that all interested parties who have interest in the main Application to do so as *amicus curiae*.

27.

It is further respectfully submitted that the absence of such notice cannot be an impediment to a party seeking to be admitted as an *amicus* in a matter.

28.

Moreover, given the nature of the main Application and the ambit of documents being sought by the Amicus would only have been able to properly assess whether as *amicus curiae* it was able to be of any assistance to the Court once Answering Affidavits have been filed.

29.

The Role of *Amicus Curiae*

- 29.1 The provisions contained in rule 16A and which regulates the content of our Application to be admitted as *amicus curiae* are the same as those contained in Rule 9(6) of the Constitutional Court Rules which deals with *amicus curiae* in that Court.
- 29.2 In both instances where admission as *amicus curiae* is sought by way of Application, admission is entirely in the discretion of the Court. In the exercise of its discretion a Court will consider whether the submissions sought to be advanced by the *amicus curiae* will be of assistance to it.
- 29.3 It is submitted that the case law which has developed around Section 9 of the Constitutional Court Rules is directly applicable to the interpretation of Rule 16A. the following principles have emerged: -

29.3.1 An *amicus curiae* has a special duty to the Court, to provide cogent and helpful submissions regarding questions of law or fact to which attention would otherwise not be drawn and which assist the Court;

29.3.2 It must not repeat arguments made but must raise new contentions and generally these contentions must be raised on the date already before the Court;

29.3.3 An *amicus* is not a party to litigation, but believes the Courts decision may affect its interest;

29.3.4 *Amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter.

29.3.5 An *amicus curiae* joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into litigation and thus compelled to incur costs.

30.

It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs.

**Hoffman v South African Airways [2000] ZACC 17; 2001(1) SA
1(CC) at Para 63**

31.

CONSTITUTIONAL ISSUES

31.1 It is respectfully submitted that the issues raised in the Founding Affidavit of the applicant in the main application are *inter alia* of a constitutional issue, particularly his rights to a fair trial as envisaged in Section 35, read with section 12 of the Constitution;

- 31.2 The Constitution itself does not lay down a specific definition of constitutional issues;
- 31.3 Section 167(3) of the Constitution refers to the phrase "constitutional matters" this it is respectfully submitted, is synonyms to the "constitutional issues" referred to in Rule 16A;
- 31.4 It is therefore submitted that Rule 16A applies each time "constitutional issues" are raised in the High Court.

The Constitutional Court held that constitutional matters were extensive and included : -

- a) disputes as to whether any law or conduct is inconsistent with the Constitution;*
- c) issues concerning the status, powers and functions of an organ of State;*
- d) the interpretation, application and upholding of the constitution;*
- e) whether the interpretation of any legislation or the development of the*

common law promotes the spirit, purport and objects of the Bill of Rights.

S V Boesak 2001(1) SA 912 (CC)

32.

It is therefore respectfully submitted that an *amicus* may be allowed as an interested party if it were able to show that : -

- 32.1 It has a direct substantial interest in the particular outcome of the proceedings such that it would have the necessary standing to intervene as a party.

33.

It is respectfully submitted and as pointed out by the Constitutional Court that the role of an *amicus* is to promote the public interest in two key ways : -

- 33.1 *first, "by ensuring that Courts consider a wide range of options and are well informed"; and*

33.2 *second, “by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues.*

**Children’s Institute v Presiding officer, Children’s Court,
Krugersdorp, and Others 2013 (2) SA 620 (CC) at para 26.**

34.

The role of the *amicus* is therefore to help Courts protect constitutional rights. The manner in which this is done is to provide an opportunity for any party interested in a constitutional issue raised in existing proceedings to be admitted as *amicus* to make factual and/or legal submissions that put the Court in a better position to adjudicate on these issues than would be the case were the admission denied.

35.

It is respectfully submitted that the submissions made are: -

35.1 relevant to the proceedings;

35.2 will assist the Court in deciding the main application in a manner that promotes and protects public interest, and

35.3 are sufficiently different from those of the other parties to justify its admission on *amici*.

36.

The Crux of the Main Application

36.1 As set out in para 1- 6 of the main application its purpose is to seek, *inter alia*, an order permanently staying the prosecution on the basis, *inter-alia* that the accused's rights as envisaged in Section 35(3) read with section 12 of Act 108 of 1996 are being infringed.

37.

The Applicant's Interest in the Proceedings

- 37.1 The Applicant's interest in the constitutional issues raised in the main Application are set out in her Founding Affidavit Para 14 – 15.
- 37.2 The Applicant is a victim of atrocities and gross human rights violations. She and her family have suffered as a result of the death of her late brother who died in custody under similar circumstances as that of the deceased in this matter.
- 37.3 the applicant and her family have waited for a number of years without knowing the truth of what happened to her brother. Most of her family member's died having pursued justice but in vain.
- 37.4 the perpetrators involved in the death of her brother have never been brought to justice to answer for their actions;

- 37.5 The applicant is also aware, like her family, there are many other families who lost loved ones arising out of the conduct of members of the apartheid government;
- 37.6 the applicant submits that she has a substantive interest not only in the outcome of the litigation or its particular subject matter but also an interest in the development and application of the law dealing with applications for a permanent stay of the proceedings and the constitutional rights of victims which undoubtedly will have a profound impact particularly on unique matters of this nature.
- 37.4 The legal submissions by the Applicant are likely to assist this Court in considering the impact of its decision not only to the Applicant in the main application, but also in relation to the broader public.

38.

The Applicants submission ought to be accepted

The Constitutional Court in *Children's Institute*, explained the important purpose that may be served by the High Court exercising its discretion to permit *amicus* to adduce new evidence.

"[A] proper interpretation of Rule 16A that permits the adducing of evidence is consisted with both textual reading of the Rule as well as its underlying purpose. It also provides invaluable space for friends of the Court in public interest matters and, by doing this, promote access to the Courts and ensures that Courts are well informed of public interest matters when making decisions.

39.

The core issue in this Application is whether the Accused's rights to a fair trial as envisaged by Section 35(3) read with section 12 of the Constitution has been violated so as to render the trial process unfair and whether the rights of interested persons particularly those affected by crimes committed by members of the Security

Branch during the Apartheid era will be undermined by the granting of the orders prayed for in the main Application.

40.

The concern is that the values enshrined in the Constitution namely the right to equality, dignity, access to justice and the principles on which the foundation of the preamble to the Constitution is based will have no force and effect if there is a failure to take these rights into consideration.

41.

It will undermine the credibility and integrity of the South African Criminal Justice System.

42.

This will result in a constitutional violation of the rights of affected persons.

43.

The practical result will be that South African victims will struggle to obtain the justice they seek and lose hope in even achieving the justice they seek which will result in a failure of justice.

44.

The Obligation to consider International Law

International law is relevant for several reasons: -

44.1 In terms of Section 223 of the Constitution:

“When interpreting any legislation, every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

44.2 Moreover, when interpreting the Bill of Rights, S39 (1) (b) of the Constitution mandates Courts to consider international law.

44.3 The Constitutional Court stressed the importance of the international law in determining the context of the Bill of Rights, particularly S7(2). It held that our international obligation does not only exist on the international plane :

"Our constitution appropriates the obligation for itself and draws it deeply into its heart, by requiring the State to fulfil it in the domestic sphere"

"Section 39(1) (b) states that when interpreting the Bill of Rights a Court "must consider international law." The impact of this provision is clear, and direct. What reasonable measures does our Constitution require the State to take in order to protect and fulfil the rights in the Bill of Rights. That question must be answered in part by considering international law"

Glenister V President of the Republic South Africa and Others [2011] ZACC 6; 2011 (3) SA 347 (CC). 2011 (7) BLLR 651 (CC).

Government of the RSA v Grootboom and others 2001 (1) SA (CC) para

26

44.4 *The Constitutional Court considered the application of International law and specifically emphasized the 'need to take account of South Africa's international obligations in respect of upholding principles of international humanitarian law'.*

S v Basson 2005 (1) SA 171 (CC) para 171

44.5 *the court further stated that:*

....."there can be no doubt that the use of state to murder captives long after resistance had ceased would in the 1980's, as before and after, have grossly transgressed even the most minimal standards of international law.

S v Basson (supra) 179-180

44.6 *the court further held:*

".....the State's obligation to prosecute offences is not limited to offences which were committed after the constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that international law obliges the state to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes".

S V Basson (*supra*) para 37 at 189E-G

45.

45.1 It is submitted that whilst Courts are not compelled to consider comparative law, they are permitted to do so when interpreting the Bill of Rights.

Section 39(1) (c) of the Constitution, Act 108, of 1996

46.

Binding International Law on South Africa

46.1 There are four (4) treaties that are binding on South Africa: -

- a) The International Covenant on Civil and Political Rights (ICCPR);
- b) The International Covenant on Economic, Social, and Cultural Rights (ICESCR);
- c) The Covenant on the Protection and Promotion of the Diversity of the Cultural Expressions, and
- d) The African Charter on Human and Peoples' Rights.

46.2 Of most relevance to this argument is the International Covenant on Civil and Political Rights (ICCPR), and

46.3 The African Charter on Human and Peoples' Rights.

47.

47.1 Article 2(3) of the ICCPR reads:

[ARTICLE 2(3)]

- 3) *Each State party to the present Covenant undertakes: -*
- a) *to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.*
 - b) *to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial administrative or legislative authorities, or by any other competent authority provided for by the legal system of that State and to develop the possibilities of judicial remedy.*

48.

African Charter on Human Rights and Peoples' Rights

Article 4

48.1 *Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this Right.*

49.

The United Nations General Assembly resolution 60/147 of 16 December 2005

49.1 The resolution provides for the relevance of victims' rights to equality in relation to the issue of prosecution of the perpetrators of human rights violations in the following manner:

49.1.1 Scope of the obligation

“3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia the duty to:

- a) take appropriate legislative and administrative and other appropriate measures to prevent violations;*
- b) investigate violations effectively, promptly, thoroughly and impartially and, where appropriate take action against those allegedly responsible in accordance with domestic and International law;*
- c) provide those who claim to be victims of a humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation;*
- d)”*

49.1.2 Access to justice

“a victim of gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law.....Obligations arising under international law to secure the right to access justice and fair impartial proceedings shall be reflected in domestic laws.....”

para 12 of the resolution

49.1.3 Victims of gross violations of international law and serious violations of international humanitarian law

“.....Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious

violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.

para 8 of the resolution

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 Law

Resolution 60/147 of 16 December 2005

50.

Constitutional Democracy and the Rule of Law

50.1 It is respectfully submitted that the Rights of the Applicant in the Main application must be weighed against the Rights of the interested public. A mere granting of the order without serious considerations being given to the public and society as a whole will undermine the very foundation of South African Society and particular, the Rule of Law. The relationship between crime and the Rule of Law has been recognised by the Constitutional Court as follows:

“crime strikes at the very core of the fabric of our society. It undermines Some of the fundamental human rights enshrined in our Bill of Rights. It violates the right to life, the right to freedom and security, the right to property and the right to dignity to mention a few. It undermines the rule of law, a foundational value of our constitutional democracy. What is more, those who commit crimes violate their constitutional duties and responsibilities as citizens of this country. The State has a constitutional duty to eliminate crime.

This obligation flows generally from its obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

Minister of Home Affairs v NICRO 2005 (3) SA 280 (CC) (2004 (5) BCLR 445) at para 144 (per Ngcobo J)

51.

The Constitutional Court ruled that granting amnesty to a wrongdoer "effectively obliterates" various rights in the constitution:

"The effect of an amnesty undoubtedly impacts upon very fundamental rights. All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights."

Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and Others 1996 (4) SA (CC) (1996) at para 9.

52.

The Constitutional Court further recognised that an effective indemnity would constitute an infringement of the right to human dignity when it held that:

“Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigations of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration of proof.

.....Secrecy and authoritarianism have concealed the truth in the crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling.

Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and Others 1996 (4) SA (CC) (1996) at para 17.

53.

It is therefore respectfully submitted that crimes of this nature are not simply crimes of greed and personal gain but are indeed crimes against humanity. In as much as the court in the *Azapo* matter dealt with the issue of amnesty, the reasoning of the learned Judge is of paramount importance with particular emphasis being placed on the rights of victims.

54.

It is therefore respectfully submitted that in assessing whether the applicants rights in the main action are being infringed to warrant a permanent stay of the proceedings the courts must weigh the interest of an accused person, the interest of the public and victims and consider what is in the interest of justice.

55.

It is submitted that the applicant in the main application was only indicted on the charge of murder 47 years after the commission of the alleged offence. During this time he was not subjected to any arrest or court proceedings and lived a life without

having to concern himself with these allegations. His indictment only emanated from the recent findings arising out of an inquest. It must be noted that at no stage was there an attempt by him to disclose his role in the matter leading up to the death of the deceased, when he had every opportunity to do so.

56.

It is submitted further that whilst perpetrators walk freely for many years, victims of these types of offences have to wait a long time to finally obtain justice. These victims had to endure the heartache and trauma of having lost loved ones and family members for the better part of their lives.

57.

It is further respectfully submitted that there must be a weighing up and balancing of the rights and interest of the accused to a fair trial and the rights and interest of the victims and the public. In this regard it is respectfully submitted that both parties are on equal footing in terms of the number of years it took for this matter to be brought before the courts.

58.

It is further submitted that the uniqueness of these type of matters unlike others creates huge public interest, especially in light of our troubled past. Any delay therefore on the part of the prosecuting authority should not preclude innocent victims and the public from seeing that justice is served. Victims should not be prejudiced by a failure to prosecute these matters timeously and that these type of matters should be seen as unique or exceptional considering the difficulties in bringing perpetrators to account for their conduct.

59.

Applicant's reference to section 342A of the CPA, in the main application he contends that his constitutional right to a fair trial is being prejudiced. It is respectfully submitted that this section must not be treated in isolation without due regard being given to not only the rights of the accused, but to the victims as well.

Due regard must also be given to the interest of the public.

"...The relief...is radical, both philosophically and politically. Barring the prosecution before the trial begins-and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case-is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rule of conduct. That will seldom be warranted in the absence of significant prejudice to the accused"

Sanderson v Attorney General, Eastern Cape 1998 1 SACR 227 (CC) at 245c-e

60.

The decisive answer to the question as to whether a particular time lapse was reasonable involves a "balancing test" in which the conduct of the prosecution and the accused are weighed and the following factors considered; (i) the length of the delay; (ii) the reason supplied by the state to justify the delay; (iii) the accused's assertion of his right to a speedy trial and (iv) the prejudice to the accused,

Wild v Foffert 1998 2 SACR 1 (CC)

61.

It is therefore submitted that the factors mentioned in the immediately preceding paragraph are considered when weighing up the competing interests of the respective parties. It is significant to note that section 342A (2) (h) specifically places emphasis on the adverse effect on the interest of the public or victims in the event of the prosecution being stopped or discontinued.

62.

62.1 It is further submitted that the importance of this particular provision of this section is to ensure that public interest and the interest of victims are protected. It is our further contention that the application of purposive interpretation will result in demonstrating that the rights of the victims in the circumstances of this case as a whole (taking into account) the commonly known history should supersede those of the applicant in the main application.

62.2 it is therefore not out of place to submit that section 342A(2) (h) and the rights entrenched in the constitution particularly the rights to dignity, equality and access to courts place emphasis on the importance of public interest or victims' interest especially in a matter as unique as this.


62.3 it is further submitted that this matter in particular is the first of its kind in South Africa and has drawn wide spread public interest nationally and internationally due to its historical significance, hence its uniqueness.

63.

Conclusion

It is therefore our respectful submission that the Applicant be admitted to make submissions as an interested party in the main application for the reasons mentioned in these heads.

Dated at LADYSMITH on this 17TH day of SEPTEMBER 2018.



A S JESSOP
ATTORNEY FOR APPLICANT

**(Duly authorised in terms of
Section 4 (2) of Act No. 62 of 1995)**