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

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

FOURTH RESPONDENT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1 This matter deals with an application by the applicant (also referred to as "**the accused**" or "**Rodrigues**") to permanently stay the criminal prosecution against him in respect of the murder charge.[1] He claims that the murder prosecution some 47 years after the death of Ahmed Essop Timol ("**Timol**") undermines his right to a fair trial as upheld by the Constitution.

2 The fourth respondent ("**Cajee**") intervened in these proceedings to prevent a grave injustice being perpetrated upon himself, his family and the wider community. Cajee was granted leave to intervene in these proceedings on 19 December 2018. The Timol family ("**the family**") has been striving for justice and closure over several decades.

3 Rodrigues presumably did not seek a stay of prosecution in respect of the defeating the ends of justice charge ("**defeating charge**") as that charge is premised on the cover-up he pursued before the 2017 Inquest Court (Case Number: IQ01/2017, Gauteng Division) ("**Reopened Inquest**").[2] No complaint of delay, prejudice or violation of fair trail rights can be raised given that the criminal proceedings commenced in 2018. To the extent that Rodrigues seeks the withdrawal of the defeating charge[3] this Honourable Court will have little problem in dismissing such relief as baseless.

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1 NOM p 2 para 3

2 See count 2 in Charge Sheet, Annex JR1 to FA, pp 62 – 63.

3 Notice of Motion, p 2, prayers 2 and 5.

4 When considering whether s 35(3)(d) of the Constitution, which provides that an accused has a right to have his trial begin and conclude without unreasonable delay, has been violated, we submit that the period to consider is that between the date of indictment and the commencement and conclusion of trial. This is simply because prior to indictment the individual in question is not an accused. Since Rodrigues was only charged on 30 July 2018 and the only real interruption in the criminal proceedings so far has been his application for a permanent stay, he cannot complain of a delay in the period post the date of his indictment. This accords with the position adopted by foreign courts, which we refer to in due course.

5 However, the long lapse of time of nearly 5 decades between the date of crime and date of charge cannot simply be ignored. This is because the lapse in time has been undeniably long and because this Court, as well as the applicant, the family and the wider public are entitled to know the full truth behind the long delay. In addition, the fourth respondent's (referred to as "**the NPA**") own Prosecution Policy requires it to consider the period between the committal of crime and the trial date when deciding whether it is in the public interest to prosecute.[4]

6 The NPA, in its answering papers filed to date, conspicuously offers little or no explanation as to what transpired prior to the 2017 Inquest, particularly in the period following the winding up of the Truth and Reconciliation Commission

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[4] Prosecution Policy issued in terms of s 179(5)(a) of the Constitution (Revision Date: June 2013), p 7. It is noted that this specific requirement was not invoked by Rodrigues in his founding papers. It is further noted that Rodrigues has not sought to set aside the actual decision to prosecute him.

("**TRC**") and its amnesty process in 2002 ("**the post-TRC period**"). This has naturally led the family to conclude that the NPA prefers to conceal or cover-up the real explanation for its inaction during this period. The public statements since made by the NPA's spokesperson and senior prosecutor Advocate Chris MacAdam lend credence to this conclusion.[5]

7 Responsibility for the delays in pursuing justice against those who collaborated in the murder of Timol cannot be laid at the feet of the family. The responsibility for pursuing justice rests with the police and prosecutors.[6] It is now apparent that a dereliction of duty of monumental proportions occurred within the South African Police ("**SAPS**") and National Prosecuting Authority ("**NPA**") which resulted in the abandoning of virtually all the cases referred by the Truth and Reconciliation Commission ("**TRC**") to the NPA ("**the TRC cases**"), including the Timol case. This dereliction of duty was the product of gross political interference in the work of the NPA and SAPS. The leadership of these bodies shamefully violated their constitutional and statutory obligations in acquiescing to this interference and shutting down the pursuit of justice in these cases.[7]

8 It is our submission that the halting the prosecution of Rodrigues in the light of these circumstances would violate several constitutional rights of the Timol family. Moreover, it would amount to a gross perversion of the rule of law as it would play into the hands of dark forces that sought total impunity for serious crimes such as murder and torture. It would signal that unlawful efforts to

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5 See the fourth respondent's supplementary affidavit filed on 25 January 2019.

6 *Nkadimeng v National Director of Public Prosecutions* [2008] ZAGPHC 422 at para16.2.3.3.

7 AA, pp 499 – 497, paras 64 – 65.7; pp 504 – 512, paras 82 – 98, read with annexes IC 4 – 11.

suppress justice would be rewarded and it would encourage further such machinations going forward.

9 These heads of argument were compiled without the benefit of sight of the written submissions of the applicant. In addition, it is possible that certain documents referred to in the answering affidavit of senior state advocate Jacobus Petrus Pretorius but not annexed may still be filed.[8] Accordingly Cajee reserves his right to file supplementary heads of argument to the extent necessary.

10 These heads of argument are organised as follows:

10.1 First, we set out the background to the present matter.

10.2 Second, we deal with the applicant's objection to the murder charge.

10.3 Third, we describe the legal framework that requires that the applicant be prosecuted, and apply the facts of the present matter to this framework.

10.4 Finally, we conclude, submitting that the application should be refused.

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8 Affidavit of Senior Deputy Director of Public Prosecutions Adv Christopher Raymond Macadam (referred to in para 8.15 as annex JPP 5) and the affidavit of the investigating officer (referred to in para 7.50 as annex XX).

BACKGROUND

11 The background to these proceedings has been set out in considerable detail in Cajee's answering affidavit.[9] Aside from providing a high-level overview we will not burden these submissions by repeating this background.

12 The primary enforcers of the pernicious system of Apartheid were the security forces, especially the former South African Police ("**SAP**") and its notorious Security Branch ("**SB**"). The SB, acting under orders from the highest political levels, were required to crush all serious opposition to Apartheid. In doing so, they were a law unto themselves. They acted entirely without restraint and without fear of ever having to face justice. The SB perpetrated countless crimes against perceived dissidents, including murder, enforced disappearance and torture. Compliant investigating officers, prosecutors and magistrates ensured that the SB enjoyed near total impunity.[10]

13 The SB could naturally count on their members not only to carry out such crimes, but also to protect each other through cover-ups. This was routine practice in the SB. Rodrigues, a former pay clerk in the SB, dutifully played in his part when called on to do so by his friends and colleagues, Captains Johannes Hendrik Gloy ("**Gloy**") and Johannes Zacharias van Niekerk (**Van Niekerk**). Rodrigues claimed that he was the only person in room 1026 when Timol fell from the 10th floor of John Vorster Police Station on 27 October 1971. This version had the desired effect of sparing Gloy and Van Niekerk (and other

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9 AA, pp 475 – 502, paras 2 – 3, 10 – 20, 22 – 76.

10 AA, pp 475 – 502, paras 2 – 3

SB officers) from scrutiny as to what transpired in the office at the time of the fall. [11]

14 We now know that prior to his murder, Timol was grievously injured following more than 4 days of unrelenting torture at the hands of the SB.[12] The reopened inquest found that Timol did not jump or dive, as alleged by Rodrigues, but was pushed by members of the SB, and that such act amounted to murder.[13] Prior to this historical finding the Timol family had to live with the official finding that Timol had taken his own life – a pain that they had to bear for 46 years.

15 Yet, against all adversity, the Timol family never gave up their quest for justice. They never accepted the finding of the first inquest court.[14]

15.1 Timol's mother participated in the TRC process by testifying at a victim's hearing. She refused to accept the first inquest court finding. She wanted to know who killed her son.[15]

15.2 Cajee has waged a campaign for justice. He has written a book profiling Timol and detailing his quest to see justice done for his uncle's death. He conducted his own extensive investigations into Timol's death and

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11 George Bizos SC affidavit dated 23 June 2017 before the Reopened Inquest, Vol C, pp59 – 89. Also see: Bizos G (1998) *No one to Blame. In Pursuit of Justice in South Africa*, Cape Town South Africa, David Phillip Publishers.

12 *The re-opened inquest into the death of Ahmed Essop Timol* [2017] ZAGPPHC 652 paras 317-318.

13 *Id* at para 335(d).

14 AA pp 487 - 499 paras 40 – 46 and 56 – 63.

15 AA p 487, para 41.

engaged all individuals and institutions relevant to his uncle's death to push for the reopening of the inquest into Timol's death.[16]

15.3 Timol's brother, Mohammed Timol, learned of Timol's death during his detention by the SB in Durban. He attended the first inquest daily, only to be bitterly disappointed with the court's finding. He always remained committed to seeing justice done for Timol's death.[17]

16 The Timol family's efforts resulted in the re-opening of the inquest into Timol's death. Both Cajee and Mohammed testified.[18] In its judgment, the Court noted Cajee's testimony recommending *inter alia*:

> *"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.*"

17 This Court made history when it found that Timol had been murdered at the hands of the SB. Rodrigues placed himself at the scene of Timol's death and the Court declared him to be party to the cover-up, finding that he had "*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*

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16 AA pp 488 – 493, paras 43, 56 - 61.

17 Affidavit of Mohammed Timol before the Reopened Inquest dated 23 June 2017, Vol C, pp121 – 134.

18 *The re-opened inquest into the death of Ahmed Essop Timol* [2017] ZAGPPHC 652 paras 125-135, 197-202.

evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution."[19]

18 Rodrigues was specifically invited and encouraged to appear before the TRC during 1997. He spurned this invitation.[20] He could have participated in the national reconciliation process, unburdened himself and claimed his amnesty in respect of his crimes associated with the death of Timol. If he had done so he would have earned the respect and appreciation of the family.[21] This would have opened the door to the prosecution of key suspects who were still alive and would have obviated the need for the Reopened Inquest. Rodrigues chose not to participate preferring to keep the family in ongoing pain and anguish for another 20 years. At the Reopened Inquest in 2017 the family extended an open hand to Rodrigues which was again spurned:

> "*We went on record to say that we were only interested in the full truth. We sought no vengeance or retribution. We advised that if the full truth was disclosed we would not seek a prosecution. Our plea was spurned by the police witnesses, particularly Rodrigues.*" [22]

19 The delays in pursuing justice since the murder of Timol in 1971, and particularly since the advent of democracy in South Africa, has been dealt with in considerable detail in Cajee's answering affidavit and will not be repeated in any detail in these submissions. [23] While there are explanations for the inaction during apartheid, namely that all relevant organs of state colluded in the cover-

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19 *The re-opened inquest into the death of Ahmed Essop Timol* [2017] ZAGPPHC 652 para 335(d).

20 Supporting affidavit of Piers Ashley Pigou, pp 695 – 699, paras 7 – 12.

21 AA p 511, para 96.

22 AA p 480, para 19. See also Reopened Inquest Transcript, Vol 16, p 1128.

23 AA, pp 504 – 512, paras 82 – 98, read with annexes IC 4 – 11.

up, as well as during the TRC's amnesty process, namely that the authorities may have been waiting for perpetrators to apply for amnesty, there is no official explanation for the inaction in the post-TRC period.

20 The actual reasons for the inaction in the post-TRC period were exposed in earlier legal proceedings, particularly in *Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others*, Gauteng Division Case Number 35554/2015.[24] This case revealed political interference in the TRC cases dating back to 2003 which saw the utterly disgraceful collusion by the SAPS and NPA in the suppression of investigations of these crimes, including the Timol case. In this regard, the claim that an investigation ensued because one journalist was spoken to cannot be taken seriously.[25] Had there been even the most basic investigation in 2003, and the ensuing years, the key perpetrators could have been held to account as they were still alive. Gloy only died on 30 July 2012. [26]

21 To date the first, second and third respondents have not disputed or acknowledged evidence of the most fundamental violations of their constitutional and statutory obligations, not to mention what amounts to the wilful obstruction of the course of justice. [27] No expression of regret, remorse or

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24 AA, pp 496 – 497, paras 65.4 – 65.5, read with annexes IC 5 – 7.

25 AA, pp 493 – 494, paras 61 – 63; pp 536 – 537, paras 142.4 – 143, read with annex IC 3.

26 *Id* at para 142.6.

27 Soliciting a prosecutor by unlawful means not to prosecute constitutes the crime of obstruction the course of justice (*S v Burger* 1975 (2) SA 601 (C) at 607) ; See *R*. v *Field* (1964) 3 All E. R. 270 at 271, 281 (quoted by Baker R in *S v Burger* 1975 (2) SA 601 (C) at 616): "*Held: A conspiracy to obstruct the course of justice was different from, and might be far more reprehensible than, a conspiracy to obstruct the police in the execution of their duty*…" and may amount to "*a grave crime*". Where a person, knowing that police investigations are based on a suspicion that a crime may have been committed, obstructs the police in their

apology has been offered by any of these respondents for the deep betrayal of victims of past atrocities. It is not surprising that Cajee has called for an inquiry into the conduct of the responsible politicians and officials. [28]

APPLICANT'S OBJECTION TO MURDER CHARGE

22 Rodrigues makes repeated and strenuous objections throughout his affidavit to the fact that he has been charged with murder when the Reopened Inquest Court made no explicit finding that he murdered Timol. [29]

23 Aside from the fact that aforesaid Court never excluded the possibility that Rodrigues was involved in the murder, it is noteworthy that Rodrigues does not explicitly deny or refute that Timol was murdered. His main complaint is that he has been personally implicated in the murder in the indictment. Given that, on his own version, he was with Timol in the moments before he met his demise such an explicit objection ought to have been front and centre of his denials. Indeed, if Timol had not been murdered, there would have been absolutely no need to deny personal involvement in an act, which did not happen.

24 In any event, the objections of Rodrigues have a shrill tone in the light of the fact that the uncontested forensic and scientific evidence led by the family in

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investigations, it is no defence to claim that he did not foresee the possibility of a prosecution (*S v Greenstein* 1977 (3) SA 220 (RA) at 224). The crime of obstructing the course of justice may be committed by means of mere *omissio*, such as where an official refrains from passing material information to a law enforcement officer (*S v Gaba* 1981 3 SA 745 (O)).

28 AA, p 537, para143.

29 FA, pp 14 - 16, paras 15 – 17.3; p 27, paras 27 – 29.

the Reopened Inquest demonstrated that his version of what transpired on 27 October 1971 was physically impossible.

25 Moreover, on his own version, he withheld evidence of the cover-up before the first inquest;[30] and most significantly, on his own evidence before the Reopened Inquest, he inadvertently admitted to the murder of Timol on the basis of *dolus eventualis.*[31] Rodrigues agreed, under cross examination, that an ambulance and emergency medical care should have been immediately summoned; and he agreed that he and the other officers should not have moved Timol while in the garden.[32] Rodrigues also conceded under cross examination before the Reopened Inquest that in the position Timol lay before he was moved, he was ideally placed only a few metres from the road, where an ambulance could have stopped and medical personnel could have gained quick access to him. [33]

26 We submit that the conduct of Rodrigues in not picking up the phone in room 1026 and calling an ambulance can only be consistent with the desire on his part to kill Timor and prevent a proper inquiry into the cause of death. The same can be said for the conduct of Rodrigues in moving a critically injured person, with likely spinal and neck injuries. Timol was moved on a blanket from the garden up to the 9th floor.

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30 AA, p 500, para 73.3.

31 AA, pp 485 - 486, paras 35 - 37.

32 *Id*.

33 Reopened Inquest Transcript, Vol 10, p 792 - 794. Rodrigues also admitted that the actions of the police in immediately moving Timol prevented a crime scene investigation.

27 Rodrigues, on his own version, knew better than anyone else that Timol had fallen 10 storeys. It was overwhelmingly obvious to Rodrigues that Timol needed urgent medical assistance.[34] As a police officer, and as the only person, on his version, who saw Timol exit the window, he was under a compelling a legal duty[35] to seek emergency medical attention. Rodrigues deliberately chose not to obtain medical assistance for Timol.[36]

28 Rodrigues must have foreseen, and by implication did foresee, that there was a reasonable possibility that Timol would die if not medically treated and if moved by the police.[37] He refrained from calling an ambulance and he moved Timol as he intended for Timol to die. Rodrigues subjectively reconciled himself with the foreseen consequences and is accordingly liable for Timol's murder on the basis of *dolus eventualis*.[38] He, and the other police officers involved, had the requisite intention to kill in the form of *dolus eventualis*.

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34 See the analogous case of: *S v Van Aardt* 2008 (1) SACR 336 (E) at 346b and 346c.

35 *Minister of Safety and Security v Craig NNO* 2011 (1) SACR 469 (SCA)*:* Officials who have prisoners in their charge should see to their well-being, and courts should be vigilant to ensure that officials, who have in their charge those whose freedom of movement have been restricted, comply with the obligation to ensure their well-being. Police standing orders place an obligation on members of the police, to whom it appears that detainees are in distress and are therefore injured or ill, to obtain the necessary medical assistance for them. (Paragraphs [60] and [61] at 480*a–d*.). See also: *Minister Van Veiligheid en Sekuriteit v Geldenhuys 2004 (1) SA 515 (SCA).*

36 *S v Van Aardt* 2008 (1) SACR 336 (E) at 345a – b

37 *Id* at 346f - j

38 In *S v Sigwahla* 1967 (4) SA 566 (A) the following was stated at 570B - E: "The expression 'intention to kill' does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*. …. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn…."

29 Rodrigues is liable for the murder of Timol on this basis alone, even without the any of the other forensic and circumstantial evidence, which is equally compelling. We submit that it is not for a court hearing an application for permanent stay to test the evidence. The evidence must be tested at the criminal trial.

THE OBLIGATION TO PROSECUTE AND THE RULE OF LAW

30 The right to life, protected by section 11 of the Constitution, has two components – a material and a procedural component.[39] The material component means that every person has the right to be free from the arbitrary deprivation of life. The procedural component requires proper investigation and accountability where the arbitrary deprivation of life is suspected or has occurred. A failure by the State to ensure accountability for the arbitrary deprivation of life is a violation of the right to life, and undermines the rule of law.

31 The Constitutional Court when considering whether the quashing of charges gave rise to a constitutional matter held:

> *"In a constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights, through, amongst other things, the policing and prosecution of crime. The constitutional obligation upon the State to prosecute these offences which threaten or infringe the rights of citizens is of central*

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39 United Nations General Assembly Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns A/HRC/26/36 (1 April 2014).

> *importance in our constitutional framework … By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective."*[40]

32 The obligation to prosecute offences is not limited to offences that were committed after the Constitution came into force but applies to all offences committed before it came into force.[41] The NPA established in terms of the Constitution has the power to institute criminal proceedings on behalf of the State.

33 Section 179(4) of the Constitution and the National Prosecuting Authority Act, 32 of 1998 ("**NPA Act**") require members of the NPA to carry out their duties without fear, favour or prejudice, subject only to the Constitution and the law. A well-functioning criminal justice system is at the centre of any functioning constitutional democracy, and a subversion of the criminal justice system is a subversion of the rule of law and constitutional democracy itself.[42]

34 In deciding whether or not to institute criminal proceedings, prosecutors assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution.[43] Once it has been established that there is sufficient evidence, a prosecution should follow unless the public interest

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40 *S v Basson* 2005 (1) SA 171 (CC) paras 31-33.

41 *S v Basson* 2005 (1) SA 171 (CC) para 37.

42 *Corruption Watch NPC v President of the Republic of South Africa*; *Nxasana v Corruption Watch NPC* 2018 (10) BCLR 1179 (CC) para 20.

43 NPA Prosecution Policy Revised June 2013 p 5 (issued in terms of section 21 of the NPA Act).

demands otherwise.[44] Where there is sufficient evidence to prosecute, the NPA must comply with its constitutional obligation.[45]

35 The historic compromises made during our negotiations for a peaceful transition also demand that justice be pursued for serious apartheid-era crimes.[46] This was encapsulated in the postscript to the *Constitution of the Republic of South Africa Act* 200 of 1993 ("**the Interim Constitution**") and subsequently in the Promotion of National Unity and Reconciliation Act 34 of 1995 ("**the TRC Act**").

36 The conditional amnesty was authorised for the specific objective of facilitating a peaceful transition towards a democratic order. The constitutional and statutory design of the TRC process specifically envisaged that criminal investigations, and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or had failed to apply for amnesty. This lay at the heart of the compact struck with victims. The compact required the State to take all reasonable steps to prosecute deserving cases of offenders who were not amnestied.

37 In its Final Report released on 21 March 2003 the TRC stressed that the amnesty provision should not be seen as promoting impunity; and highlighted the imperative of "*a bold prosecution policy*" in those cases where amnesty has

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44 *Id* at p 6. When considering whether it is in the public interest to prosecute all relevant factors must be considered including the nature and seriousness of the offence, the interests of the victim and broader community, and the circumstances of the offender.

45 *Nkadimeng v National Director of Public Prosecutions* (32709/07) [2008] ZAGPHC 422 (12 December 2008) para 15.4.4.

46 AA, pp 489 - 491, paras 47 – 55.

not been applied for in order to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.[47]

38 Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those who did not qualify for amnesty.

39 It is within the context of these constitutional, statutory and international law obligations that this matter must be decided.

THE APPLICATION FOR A PERMANENT STAY MUST BE REFUSED

40 The accused seeks to escape prosecution by applying to this Court to declare the criminal proceedings instituted against him to be an infringement of his constitutional rights and for a permanent stay of the prosecution in respect of the charge of murder.

41 The relief sought by the accused has been described by the Constitutional Court as *"radical, both philosophically and socio-politically."*[48] To bar the prosecution before the trial begins prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct, and will seldom be warranted in the absence of significant prejudice to

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47 Volume 6, Section 5, Chapter 1 at paragraph 24

48 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 38.

the accused.[49] As such, it will be granted sparingly and only for the most compelling reasons.[50]

42 The Constitutional Court in deciding whether there had been an unreasonable delay in the prosecution of a matter held that the right to a speedy trial protects three kinds of interests – the right to liberty, the right to security, and trial-related interests.[51] In assessing whether there has been a trial within a reasonable time, an objective and rational assessment of relevant considerations is required.[52] The amount of elapsed time is central to the enquiry, bearing on other considerations and, in turn, being coloured by them.[53]

43 The other relevant factors that a court will consider when making a determination on whether to grant a permanent stay are:[54]

43.1 The nature, gravity and extent of the prejudice suffered by the accused;

43.2 The gravity, nature and complexity of the case;

43.3 Systemic delay (and the role of the accused); and

43.4 The interests of justice.

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49 *Id*.

50 *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA).

51 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 20. The matter was decided in terms of section 25(3)(a) of the interim Constitution. The comparable provision in the final Constitution is section 35(3)(d).

52 *Id* at para 27.

53 *Id* at para 28 and *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 6.

54 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) paras 31-35, *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 6.

Prejudice suffered by the accused

44 An assessment of the nature of the prejudice suffered by an accused is considered on a continuum, from incarceration through restrictive bail conditions, trial prejudice and anxiety.[55] The most invasive prejudice suffered by a person pending trial being pre-trial incarceration.[56] The more serious the prejudice, the shorter the period within which the accused is to be tried.[57] Rodrigues is not incarcerated pending trial and has not alleged restrictive bail conditions.

45 Trial-related prejudice is the prejudice suffered by an accused because of witnesses becoming unavailable and memories fading because of delay, which may prejudice an accused in the conduct of their trial.[58] The accused alleges that his fundamental rights have been infringed because of the:

45.1 Long lapse in time in beginning the prosecution;

45.2 Alleged loss of evidentiary material, unavailability of witnesses and the fading memory of witnesses, including himself; and

45.3 Risk to his state of health.[59]

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55 *Van Heerden v National Director of Public Prosecutions* [2017] 4 All SA 322 (SCA) para 51, referring to *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 31.

56 *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 6.

57 *Id*.

58 *S v Dzukuda; S v Tshilo* 2000 (11) BCLR 1252 (CC) para 51.

59 FA p 56 - 60 paras 60-66.

46 We submit that the accused will not be prejudiced in the conduct of his trial because:

46.1 It is the NPA that bears the onus of establishing the accused's guilt beyond a reasonable doubt. The absence of witnesses, evidence and records thus places a greater burden on the NPA than it does on the accused.[60] In assessing trial-related prejudice, the Supreme Court of Appeal ("**SCA**") has expressed the view that handicaps relating to the availability of witnesses and their recollection of events 15 years later are likely to render the prosecution's task more difficult.[61]

46.2 The Court, per Farlam J, concluded that the listed grounds of prejudice were not sufficient to justify the far-reaching remedy of an indefinite stay, and that the points would have a bearing on the question of proof beyond a reasonable doubt to be brought to the attention of the jury (of the American court hearing the matter).[62] The onus and the presumption of innocence are mechanisms that serve to protect the rights of the accused.

46.3 Any prejudice that the accused claims arising from an absence of evidence may also be remedied by a section 174 discharge application at the end of the prosecution's case.[63]

46.4 Judicial officers are trained to assess the credibility and reliability of witness testimony, and to assess it holistically.[64]

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60 AA p 531 para 134.2.

61 *McCarthy v Additional Magistrate Johannesburg* [2000] 4 All SA 561 (A) para 46.

62 *Id*.

63 AA p 516 para 105.2 (under the Criminal Procedure Act 51 of 1977).

46.5 It is open to the accused to adduce expert and forensic evidence in rebuttal, regardless of the delay.[65]

47 The accused's concern regarding his memory and ability to recall is without basis. Particularly when his version of the events surrounding Timol's death has largely remained consistent from 1971 through to 2017,[66] even if untrue, and where no evidence or medical records of the accused's *"fragile health"* have been provided.[67] His claim of ill health is an entirely bald claim. In any event, we submit that advanced age is not a basis to escape liability. The message that ought to be sent to perpetrators of serious crime, such as murder, should be that they have to account for their actions, no matter their age.[68]

48 It is not true that the accused at all relevant times cooperated with the NPA and/or the investigating team.[69] In reality Rodrigues maintained a wall of silence for 46 years. This was particularly egregious since on his own version, at least since the appearance of Timol's mother before the TRC in 1996, he was well-aware of the plight of the family but chose to remain silent and condemn them to decades more suffering.[70] If Rodrigues had in fact been

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64 AA p 516 para 105.3.

65 AA p 534 para 138.3.

66 NPA AA p 336 para 3.22.

67 AA p 516 para 107.

68 AA p 517 para 109.

69 FA p 45 para 47.

70 AA pp 532 - 533 paras 135 - 136.

cooperative and truthful the question of Timol's death could have been resolved years, if not decades, earlier. In this respect he has been an agent of delay.[71]

49 The prejudice alleged by the accused is purely speculative. He has failed to prove actual prejudice or an infringement of his fundamental rights. If it were to be found that the accused has suffered prejudice due to the delay (which is denied), we submit that the accused only has himself to blame for his situation and that such prejudice does not justify the relief sought.

The nature of the case

50 The gravity, nature and complexity of the case should be considered with the time lapse and the prejudice to the accused.[72] The accused faces serious charges of murder and defeating the administration of justice. The seriousness is illustrated by the fact that the crime of murder does not prescribe. In evaluating the crime of murder the SCA said:

> *"The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the state as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime."*[73]

51 It took the family 46 years to find out the truth of what happened to Timol, namely that he had been viciously tortured and murdered by the police to cover

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71 *Van Heerden v National Director of Public Prosecutions* [2017] 4 All SA 322 (SCA) para 52.

72 *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 7.

73 *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA) para 21.

up the torture.[74] It took almost five decades for the family to prove what they knew all along, that Timol had not jumped to his death.

52 Over this time, Rodrigues continued with his life much as before, unaffected by the events, while knowing exactly what took place but refusing to speak the truth. The 2017 Inquest Court was particularly scathing of him, finding material contradictions in his evidence and concluding that

> *"[T]here is no merit or credibility in the evidence of Rodrigues… the version was clearly fabricated to conceal the real truth as to what caused Timol to fall. The Court rejects this version".*[75]

53 The accused's application cannot succeed when regard is had to the seriousness of the charges against the accused, the painful history of this matter and his appalling conduct.

Delay

54 When considering the question of delay, a balancing test is undertaken whereby the conduct of the prosecution and of the accused are considered against the length of the delay; the reason assigned by the State to justify the delay; the accused's assertion of the right to a speedy trial; and prejudice to the accused.[76]

55 Systemic factors such as resource limitations that hamper the effectiveness of investigations or prosecutions and delay caused by court congestion are also

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74 AA p 498 para 70.

75 AA p 499 para 73.

76 *Bothma v Els* 2010 (2) SA 622 (CC) para 36.

considered.[77] These factors do not form a definitive checklist and each case should be decided on its own facts.[78]

56 In assessing the reasons for the delay in prosecuting this matter over the past 47 years, and the reasons assigned to justify the delay, it is of assistance to consider the time periods in four broad categories:

56.1 First, the inaction between 1971 and 1994 is due to the fact that under apartheid, the police generally, and the Security Branch, in particular, could not have been expected to investigate themselves.[79] Murders and crimes carried out by the Security Branch were routinely covered up, with magistrates and prosecutors often turning a blind eye to the truth. This was the order of the day.

56.2 Second the TRC and amnesty process was in place from 1994 until 2002, constituting another substantial delay in this matter.[80] Although the law enforcement authorities should have pursued justice in this time period many cases were put on hold pending possible amnesty applications.

56.3 It is the third period, from 2002 until the decision to reopen the Inquest in October 2016, which requires an explanation. Unfortunately, the NPA has chosen not to explain the bulk of this extended period. Instead, the NPA only deals with the period governed by section 35(3)(d) of the

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77 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 35.

78 *Bothma v Els* 2010 (2) SA 622 (CC) para 37.

79 AA p 504 para 82.

80 AA p 505 para 83.

Constitution (the period between the issuing of an indictment and the commencement of a trial).[81]

56.4 While the NPA's interpretation of section 35(3)(d) cannot be faulted, it is wrong of the NPA to ignore the period leading up to the decision to institute criminal proceedings.[82] The failure to act by NPA and the SAPS in this period constitutes a violation of their obligations and duties under the Constitution, their enabling Acts and the NPA's Prosecution Policy.[83] It may also very well constitute a wilful obstruction of the course of justice. Even during 2016 the NPA had to be threatened with litigation in order to secure the decision to reopen the inquest.[84] It is also now known that it was the unlawful attempts by the State to suppress political cases around this time that was the actual reason for the post-TRC delay in this matter.[85] To date, the NPA has elected not to refute these assertions.

56.5 The fourth period concerns the decision to prosecute and charge the accused. There has been no delay from the arrest of the accused on 30 July 2018 until the launch of this application in October 2018. If anything, this application brought by the accused is the only real factor that has delayed his prosecution to date.

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81 AA p 535 para 142.

82 *Id*.

83 AA p 536 para 142.3.

84 AA pp 537 - 539 paras 143-144.

85 AA pp 493 – 495 paras 61-65.

57 We submit that the Rodrigues has directly benefitted from the unlawful interference with the independence of the NPA and was protected from investigation and prosecution in the post-TRC years.[86] He now seeks to use the same delay to permanently stay his prosecution. To stay the prosecution in such circumstances would amount to near total impunity for apartheid era crimes. Moreover, it would be deeply offensive to our constitutional order and be in violation of South Africa's international law obligations.[87]

58 While the delay of more than 47 years in prosecuting the accused is unfortunate and regrettable,[88] it must be considered in context. During apartheid there was complete impunity for crimes of this nature. With the advent of democracy in 1994, and the establishment of the TRC, it was open to Rodrigues to come forward to come clean about his role and claim amnesty.[89] Instead he chose to remain silent ignoring the invitations for closure, only testifying in the re-opened Inquest under subpoena.[90]

59 Despite the lapse of time, the obligation on the State to ensure accountability remains. There is considerable precedent for bringing prosecutions in respect

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86 AA p 508 paras 88-89.

87 These include Art 2(3) of the International Covenant on Civil and Political Rights, *U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171;* Articles 4(m) and (o), Constitutive Act of the African Union, OAU *Doc. CAB/LEG/23.15, Adopted by the 36th Ordinary Session of the Assembly of Heads of State and Governments on 11 July 2000 at Lomé, Togo, entered into force May 26, 2001: Articles 4 and 11 of the* Basic Principles and Guidelines on the Right to a Remedy*, G.A. Res. 60/147, U.N. Doc. A/Res/60/147* (Dec. 16, 2005). Adopted unanimously by the UN General Assembly.

88 AA p 510 para 95.

89 AA p 511 para 96.

90 AA p 527 para 129.

of serious crimes even many decades later, particularly in post conflict societies.[91]

Interests of justice

60 Even if it is found that the various delays are unreasonable, when determining the appropriate relief a value judgment is required that strikes a balance between competing societal and individual interests.[92]

61 The Constitutional Court explained in making that judgment:

> *"[C]ourts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. Particularly when the applicant seeks a permanent stay of prosecution, this interest will loom very large. The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structured legal system; a system which requires the prosecution to prove its case in a public forum. We also have to be prepared to pay a price for our membership to such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused. … The question in each case is whether the burdens borne by the accused as a result of delay are unreasonable."*[93]

62 We know now that prior to his murder, Timol was probably fatally or seriously injured following more than four days of unrelenting torture and interrogation at the hands of the Security Branch – policemen charged with the duty to protect. The act of torture is a heinous crime, prohibited as an international norm of *jus cogens.* The torture was followed by the crime of murder and a cover up lasting 46 years.

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91 AA pp 512 – 514 paras 99-100.

92 *Wild v Hoffert NO* 1998 (6) BCLR 656 (CC) para 9.

93 *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) para 36.

63 It is not only the victims and their families that have a substantial interest in seeing crimes of this nature prosecuted; there is a significant public interest as well. It is not only the accused that has a legitimate interest in a trial commencing and concluding it in a reasonable time. Not only is the public interest served but so too is the special interest of complainants.[94] On an evaluation of the circumstances of this case, we submit that it is in the interests of justice that the accused be prosecuted.

Comparative Law

64 Section 39(1)(c) of the Constitution provides that:

> *"(1) When interpreting the Bill of Rights, a court, tribunal or forum—*
>
> *…*
>
> *(c) may consider foreign law.*"

65 In *Fetal Assessment Centre*, the Constitutional Court indicated that the effect of the section is that this Court "*may have recourse to comparative law but is not obliged to follow it*".[95] Applying its earlier judgment in *K v Minister of Safety and Security*, the Court affirmed that despite the non-binding effect of foreign law—

> *"[i]t would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further… The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the Courts and our law will*

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94 *Id at* para 37.

95 *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 28 and 31.

benefit. If it is not, the Courts will say so, and no harm will be done."[96]

66 In the United States, the Sixth Amendment to the United States Constitution guarantees the right to a speedy trial. US courts have interpreted the right to a speedy trial as not only a right that accrues to an accused,[97] but one that serves the interests of defendants and society alike.[98]

66.1 In *Beavers*,[99] the US Supreme Court held that the right to a speedy trial is neither "*unqualified*" nor "*absolute*" and that the right "*does not preclude the rights of public justice*". The Court ruled that the right to a speedy trial is "*necessarily relative*" "*consistent with delays and depend[ent] upon circumstances*".[100]

66.2 In *Barker*,[101] the prosecution of an accused was delayed pending the conviction of an accomplice whose testimony the prosecution sought to use against the accused. The delay entailed 16 continuances. More than five years passed between the time of the accused's arrest and his conviction. The US Supreme Court held that, like the test applied by South African courts, a four-pronged balancing test would be applied that

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96 *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 28, applying *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras 34-35.

97 See *United States v Ewell*, 383 U.S. 116, 120 (1966) which held the Sixth Amendment to be—

"*an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself.*"

98 See *Barker v Wingo*, 407 U.S. 514, 519 (1972) which held that—

"there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused."

99 *Beavers v. Haubert,* 198 U.S. 77 (1905)

100 *Beavers v. Haubert,* 198 U.S. 77, 198 (1905)

101 *Barker v. Wingo,* 407 U.S. 514 (1972)

considered the length of the delay, the reason for the delay, the accused's assertion of his right and the prejudice to the accused.[102]

66.3 The Court made the following findings that are relevant to the present matter:

66.3.1 The length of delay must be weighed against the seriousness of the crime, with serious, complex crimes justifying a greater delay.[103]

66.3.2 Where witnesses are missing this is a valid reason that "*should serve to justify appropriate delay*".[104]

67 In *R v Jordan*,[105] the Supreme Court of Canada had to consider whether the lapse of five years between the date upon which an accused was charged and the end of the accused's trial amounted to an unreasonable delay in that infringed section 11(b) of the Canadian Charter of Rights and Freedoms ("**the Canadian Charter**").[106]

67.1 The Court held that the relevant time period under consideration was from the day of the charge to the actual or anticipated end of trial and not when the crime was committed, or the charge had been laid.

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102 *Id at* 530

103 *Id*

104 *Id at* 531

105 *R v Jordan* (2016) 1 SCR 631

106 Section 11(b) of the Canadian Charter provides that:
"*Any person charged with an offence has the right*
…
(b) to be tried within a reasonable time."

67.2 The Court introduced a presumptive ceiling beyond which delay – from the date of charge to the actual or anticipated end of the trial – is presumed to be unreasonable unless exceptional circumstances provide otherwise. The ceiling was set at 18 months between the time that the charges were laid to the end of the trial in provincial courts and 30 months in higher courts.

68 In the United Kingdom, the common law principle is that a court is not empowered to stay a prosecution unless the accused can demonstrate that he or she would suffer serious prejudice, in the sense that no fair trial could be held, if the stay were not granted.[107] This is also the position in Scotland, where a plea in bar on the grounds of delay the question is whether there was significant prejudice to the prospects of a fair trial.[108]

69 In *R v Her Majesty's Advocate*,[109] the lords of the Judicial Committee of the Privy Council confirmed these principles and held that a stay is not always the appropriate remedy to cure delay:

> *"In a preconviction case the remedies may include a declaration, an order for a speedy trial, compensation to be assessed after the conclusion of the criminal proceedings, or a stay of the proceedings. Where there has been a breach of the reasonable time guarantee, but a fair trial is still possible, the granting of a stay would be an exceptional remedy. In marked contrast to the fair trial and independence guarantees there is therefore no automatic consequence in respect of the breach of a reasonable time guarantee."*[110]

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107 *Attorney-General's Reference* (No 1 of 1990) [1992] QB 630

108 *McFadyen v Annan* 1992 JC 53.

109 *R v Her Majesty's Advocate* [2002] UKPC D3 (28 November 2002)

110 *Id at para* 11.

70 In *Acquaviva*,[111] the European Court of Human Rights ("**ECHR**") had to consider an application brought by the parents of a man who had been killed in 1987. At the time of his death, the deceased was a militant nationalist on the run. Of relevance to the present proceedings, the ECHR held that:

70.1 only delays attributable to the State may justify a finding that a "*reasonable time*" has been exceeded;[112]

70.2 although State authorities must act with with diligence taking special account of the interests and rights of the defence, the political context cannot be disregarded, as in this instance, it has an impact on the course of the investigation. Such a situation may justify delays in proceedings.[113]

71 From a conspectus of comparative foreign law, the following is apparent:

71.1 When a crime is of a serious nature, a longer delay is countenanced in contrast to less serious crimes. In this matter the seriousness of the crime of murder and defeating the ends of justice is accentuated by the fact that Rodrigues is accused of the murder of a detainee who was in his protection and to whom he owed a legal duty of care as a police officer.

71.2 Where witnesses are unavailable or unwilling to come forward, this will justify a longer delay. In the present case, the accused refused to co-

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111 *Acquaviva v France* no 19248/91 (ECtHR, 21 November 1995)

112 *Id at* para 61.

113 *Id at* para 66.

operate with the TRC investigation process[114] and the key witness responsible for the re-opening of the first inquest (Prof Essop) had left the country for the United Kingdom in 1980 pursuant to the lapse of a banning order against him.[115]

71.3 The right to a fair or speedy trial entails consideration of the delay period from the time of the arrest to the conclusion of the trial, not the period from the time of the committal of the crime. In the present case, this period is negligible.

71.4 The accused must demonstrate serious prejudice that he stands to suffer as a result of delays, which the accused has failed to do in the present case.[116]

71.5 This Court should have regard to the prevailing political context that may impact on a subsequent investigation. The political interference clearly contributed to the delay in the present case.

CONCLUSION

72 Decisions in matters of this kind are fact specific. Whether a breach of a right has occurred and whether the relief is justified is to be determined by a court after appraisal of all the facts on a case-by-case basis.[117]

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114 AA p 492 para 58.

115 *The re-opened inquest into the death of Ahmed Essop Timol* [2017] ZAGPPHC 652 para 90, Annexure JPP3 418-419.

116 AA pp 515-516 para 105, pp 517-518 paras 111-112.

117 *Van Heerden v National Director of Public Prosecutions* [2017] 4 All SA 322 (SCA) para 70.

73 Rodrigues has failed to establish sufficient, or indeed any prejudice sufficient to warrant the drastic remedy of a permanent stay of prosecution. Instead, we submit that his behaviour, past and present, illustrates a general unwillingness to go to trial and to be held accountable.

74 Although the lapse in time between the murder of Timol and the indictment of Rodrigues has been extraordinarily long, the time involved is not necessarily a decisive factor in itself.[118] Moreover, it is largely attributable to political factors in the form of the apartheid government's general suppression of justice, followed in the democratic era by political interference in the work of the SAPS and NPA, which regrettably, the bulk of the leadership in these institutions buckled under. A conspectus of the content of s 35(3)(d) of the Constitution in light of foreign case law also indicates that the primary period to be considered, when evaluating fair trial rights, is the period between indictment and the commencement of trial, which has not been unduly long.

75 Upholding the relief sought would compound the suffering faced by the Timol family and unjustly reward the accused's persistent refusal to cooperate. Rodrigues has made his choices. Having elected not to participate in the TRC process, he reconciled himself to the possibility that an independent investigation would expose his role in Timol's untimely demise and open himself to prosecution. That reckoning has now come. History demands that such reckoning be allowed to take its course.

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118 *Bothma v Els* 2010 (2) SA 622 (CC) para 40.

76 Moreover, the disgraceful behaviour of the NPA and SAPS, in succumbing to political interference, should not be exploited for the benefit of the accused. The failure to prosecute apartheid era crimes is inconsistent with the State's constitutional duties, seriously implicates the rule of law, and violates South Africa's international law obligations.

77 The accused has mechanisms of protection at his disposal. If the judicial officer is unable to make a clear determination of guilt due to the lapse of time, the presumption of innocence will ensure his acquittal. The effect of the lapse of time results in the State facing the same prejudice as the accused, the extent of which can only be properly measured by the trial court hearing all the relevant evidence.[119]

78 Weighing all the factors in this case and considering the seriousness of the nature of the offence, the public and complainants' interest far outweighs that of the accused. The family seeks no injustice or revenge against Rodrigues. Their interest is closure and justice. In the circumstances, the criminal proceedings should proceed. We submit that this is a crime that will not go away.[120]

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25 January 2019

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119 *Naidoo v National Director of Public Prosecutions* [2003] 4 All SA 380 (C) 392.

120 *Bothma v Els* 2010 (2) SA 622 (CC) para 77.

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