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

In the matter between: **Case No.: 2018/76755**

JOAO RODRIGUES **APPLICANT**

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **FIRST RESPONDENT**

MINISTER OF JUSTICE **SECOND RESPONDENT**

MINISTER OF POLICE **THIRD RESPONDENT**

IMITIAZ AHMED CAJEE **FOURTH RESPONDENT**

FIRST RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

JACOBUS PETRUS PRETORIUS

do hereby make oath and state as set out below.

1 INTRODUCTION

1.1 I am an adult and I am employed by the National Prosecuting Authority, herein represented by the first respondent. I have already deposed to the first respondent's answering affidavit and remain duly authorized to place the evidence contained herein before the Court on behalf of the first respondent.

1.2 Unless the context indicates otherwise, the contents of this supplementary answering affidavit fall within my knowledge and they are true and correct. In some respects, my knowledge of the contents hereof is derived from the documents to which I also refer herein. I believe that the contents of such documents are true and correct when regard is had to the source of such documents.

1.3 The purpose of this supplementary answering affidavit is to deal with the contents of the fourth respondent's answering affidavit and supplementary affidavit.

1.4 I have considered the fourth respondent's answering affidavit and I reply thereto below to the extent that it is necessary to show that the first respondent is not responsible for the delays in prosecuting the applicant and that the delays complained of do not justify the relief which the applicant seeks.

1.5 I have also considered the contents of the fourth respondent's supplementary affidavit in which is attached an uncertified transcript of what purports to be an interview conducted with a radio station. This supplementary affidavit is irrelevant and serves no purpose in these proceedings and was filed with an intention to paint the National Prosecuting Authority and the South African Police in a negative light. I do not admit the authenticity of the transcript attached to this supplementary affidavit and I am not going to respond thereto.

2 THE DELAYS

2.1 The fourth respondent filed an answering affidavit to oppose the relief which the applicant seeks in this application. This affidavit, however, reads like a supporting affidavit intended to boost the applicant's case and I have no doubt that the applicant will rely on it to support his case.

2.2 In such answering affidavit, the fourth respondent also seeks to tell the Court what caused the delays in instituting the criminal proceedings which are sought to be stayed permanently by the applicant. The only issue which the first respondent takes with the fourth respondent's approach is that he seeks to blame the National Prosecuting Authority and the first respondent for such delays.

2.3 I strongly deny that the first respondent is responsible for the delays upon which the fourth respondent seeks to rely. Even on the evidence upon

which the fourth respondent relies, it is clear that the prosecution was delayed as a result of political interference by others.

2.4 Even if it may be found that the first respondent is responsible for the delays, which I deny, the delays and the first respondent's conduct is not of such a nature that it justifies the permanent stay of the criminal proceedings when regard is had to the following:

2.4.1 the nature of the criminal offence with which the applicant is charged;

2.4.2 the circumstances under which Mr. Timol died;

2.4.3 the fact that the fourth respondent himself says that the National Prosecuting Authority was subjected to severe political pressure not to take urgent steps to prosecute people such as the applicant;

2.4.4 the fact that the interests of justice require the Court to refuse the permanent stay sought by the applicant; and

2.4.5 the fact that the National Prosecuting Authority and its Priority Crimes Litigation Unit which was responsible for the prosecution of TRC matters since 2003 always wanted to have these cases investigated and prosecuted.

2.5 It is not entirely clear from the fourth respondent's answering affidavit as to what he seeks to achieve by blaming the first respondent when on the

other hand, he says that the first respondent was prevented from prosecuting by political office bearers.

2.6 Mr. Timol died in October 1971. An inquest which was conducted thereafter did not result in any criminal prosecution.

2.7 In paragraph 82 of his answering affidavit, the fourth respondent seems to accept that the circumstances around Mr. Timol's murder were covered up by the then government of the Republic of South Africa between 1971 and 1994 and that this cover up "*naturally explains*" the inaction during that period.

2.8 It is surprising that the fourth respondent does not take issue with the people responsible for the cover-up and does not seek any punishment against them. He, however, seeks to lobby for an inquiry to be conducted in relation to certain officials of the first respondent, which officials he accepts were subjected to severe political constraints and interference. It would appear from his answering affidavit that this is indeed his sole motive of seeking to blame the first respondent for the delays in prosecuting the applicant even though at the end he says that the delays in prosecuting the applicant do not justify the granting of the permanent stay relief which the applicant seeks in this application.

2.9 It is common cause that Mr. Timol's murder was politically motivated and it is for this reason a political crime. The fourth respondent also describes it

as such in paragraph 84 of his answering affidavit. It is also common cause that Mr. Timol's murder is not the only political crime for which the perpetrators have not been prosecuted.

2.10 When regard is had to the nature of the crime, it should not be surprising that the government of the day may have taken steps to find a political solution to the political murders which were perpetrated by agents of the pre-1994 government. It is irrelevant as to what one calls such steps. The fourth respondent calls them political interference with the National Prosecuting Authority. He describes the position as follows in paragraph 84 of his answering affidavit:

"*84 In the post-TRC period the NPA and its officials dealing with my uncle's case, as well as other so-called political crimes from the past, became subjected to severe political constraints. Such pressures served to shape the approach or policy of the NPA and the SAPS in relation to the so-called political cases (also referred to as the "TRC cases"). Indeed, it is my submission that such political pressure made it extremely difficult, if not impossible, for them to carry out their responsibilities under law. This in turn rendered their conduct, in relation to Timol's case and other so-called political cases, questionable, if not unlawful. It also explains the inordinate delay in re-opening the inquest into my uncle's death and, now, prosecuting the accused.*" (Own emphasis).

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

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

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

2.14 It is necessary for me to comment on each of the instances upon which the fourth respondent relies to demonstrate that the first respondent is not the author thereof.

The secret government report

2.15 This is a report of the Amnesty Task Team. This task team was appointed by the Director-General's forum on 23 February 2004. The Director-General's forum was not created by the first respondent. It was chaired by the Director-General of the Department of Justice and Constitutional Development. This Director-General must have chaired this forum on the instructions of his superiors. The National Prosecuting Authority was represented thereat by Gerhard Nel and Lungisa Dyosi who were not members of the National Prosecuting Authority's Priority Crimes Litigation Unit responsible for the prosecution of cases such as the present.

2.15.1 The task team was required to consider and report on, amongst others, the following:

> "2. *Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.*"

2.15.2 The report clearly indicates that the democratic government, at its highest level, intended to give people such as the applicant, who did

not participate in the TRC process, another opportunity to apply for amnesty. For this reason, the task team considered that it had to "*perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the tabling of the report of the Truth and Reconciliation Commission on 15 April 2003.*"

2.15.3 The report further states that the President provided, amongst others, the following guidelines:

> "*(a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.*
>
> *(b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process.*" (Own emphasis).

2.15.4 Paragraph 3.3 of the report shows that consideration was given to establishing "*a further amnesty process similar to that of the TRC process.*" This, however, was rejected by the task team with the following provision:

"*3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft indemnity Bill is attached as Annexure "B" for consideration.*"

2.16 It is clear from the report upon which the fourth respondent relies that:

2.16.1 The functions of the aforesaid task team were not determined by the first respondent.

2.16.2 The government, through the President at the time expressed its willingness to establish a second amnesty process similar to that of the TRC clearly in order to give people such as the applicant an opportunity to fully disclose their participation "*during the conflicts of the past.*"

2.16.3 To the extent that the work of the Amnesty Task Team contributed to a delay in the applicant's prosecution, the blame for that does not find a place to sit in front of the first respondent's door steps. In the premises, the report of the Amnesty Task Team upon which the fourth respondent seeks to rely does not in any way establish any wrongdoing on the part of the first respondent.

2.16.4 At best, the government of the Republic of South Africa could be criticized for having entertained the thought of establishing another amnesty process similar to that of the TRC process – but that is as far as that criticism can go. There is absolutely no evidence placed before the Court to suggest that the entertainment of such a thought was malicious and not at all in the interests of justice and the interests of the community as a whole. The time taken entertaining that thought and giving effect to it clearly contributed to the delay in prosecuting the applicant – but that was not the first respondent's doing.

The affidavit of Adv. Vusi Pikoli

2.17 The fourth respondent says that the contents of the affidavit of Adv. Pikoli constitutes evidence of some of the "*various steps aimed at ensuring political control over prosecutorial decisions dealing with the TRC cases.*"

2.18 Pikoli was appointed as the National Director of Public Prosecutions on 1 February 2005. This is the highest position within the National Prosecuting Authority. Prior to that, he was the Director-General of the Department of Justice and Constitutional Development. His affidavit, however, does not say much about the role he played on the Amnesty Task Team. It also does not say anything about the origin of the task team and why it was necessary to set it up.

2.19 In paragraph 85.2 of his answering affidavit, the fourth respondent says that Pikoli's affidavit "*sets out how the independence of his office was seriously compromised*" and "*how he was subjected to withering pressure from political forces, including the then Minister of Justice, Mrs. BS Mabandla, and the then Commissioner of the SAPS, the late Jackie Selebi, to abandon the TRC cases.*"

2.20 I must say upfront that I do not dispute the contents of Pikoli's affidavit upon which the fourth respondent relies. The contents of such affidavit, however, do not constitute a basis to grant the permanent stay which the applicant seeks in this application and further show that the first respondent did not abandon the intention to prosecute people such as the applicant.

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

2.21.1 In paragraph 8 of his affidavit, Pikoli says that:

> "*8. As a result of my decision to authorize the prosecution of a former commissioner of police on corruption charges I was suspended from duty by the then President, Mr. T Mbeki on 23*

September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the truth and reconciliation commission ... contributed to the decision of President Mbeki to suspend me..." (Own emphasis).

2.21.2 It is clear from the above quoted paragraph 8 of Pikoli's affidavit that he did take a "*decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty*" by the Truth and Reconciliation Commission. Pikoli suspects that this decision also influenced President Mbeki to suspend him. Accordingly, not only was there political interference in the work of the highest office of the National Prosecuting Authority, but there was also action taken against the highest office of the National Prosecuting Authority for taking prosecutorial decisions.

2.21.3 In paragraph 14 of his affidavit, Pikoli says the following:

"*14. ... I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, ...*" (Own emphasis).

2.21.4 Pikoli also deals with what is referred to therein as the TRC cases. He says that decisions to prosecute certain members of the Security

Branch of the South African Police Service were taken by then Acting National Director of Public Prosecutions. After such decisions were taken, it was decided that the matters would be "*held over pending the development of the guidelines to deal with the TRC cases that were to be incorporated into the Prosecution Policy.*"

2.21.5 The contents of paragraph 33 of Pikoli's affidavit reveals what could have been the motivation against prosecuting people such as the applicant at the time. Therein, Pikoli suggests that the prosecution of "*cases like the Chikane matter could open the door to prosecutions of ANC members*" and that such prosecution could then "*give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.*"

2.21.6 In paragraph 52 of his affidavit, Pikoli refers to a memorandum which he wrote to the then Minister of Justice complaining about political interference in the work of the first respondent. Therein, Pikoli says that:

"*52. In this memorandum I concluded that there had been improper interference in relation to the TRC caces and that I had been obstructed from taking them forward. I complained that such interference impinged upon my conscience and my oath of office. I indicated that I was unable to deal with these cases in*

terms of the normal legal processes and sought guidance on the way forward." (Own emphasis).

2.21.7 The contents of the above quoted paragraph, which the fourth respondent accepts as true and correct and reflective of the correct legal position, clearly indicates that the highest office of the National Prosecuting Authority had reached a point where it "*was unable to deal with these cases in terms of the normal legal processes*" and deemed it necessary to seek "*guidance on the way forward.*" According to Pikoli, such guidance was never received. In paragraph 54 of his affidavit, Pikoli concludes that:

"*The failure or refusal of the Minister to respond to my memorandum suggested to me that she preferred for the deadlock between the NPA and the SAPS, NIA and DoJ to remain in place.*"

2.21.8 In paragraph 60 of his affidavit, Pikoli again gives light to the reluctance from the political level to prosecute cases such as the present. Therein, he says that there was a "*fear of opening the door to prosecutions of ANC members, including government officials.*"

2.22 All that is contained in Pikoli's affidavit, upon which the fourth respondent relies to create an impression that the first respondent is responsible for the delays, clearly indicates that the highest office of the National Prosecuting

Authority was subjected to political interference and political pressure not to prosecute cases such as the applicant's case.

2.23 There is nothing in Pikoli's affidavit that could be interpreted to suggest that the first respondent was remiss or negligent in handling what is referred to in Pikoli's affidavit as the TRC cases, which include the applicant's case.

2.24 In the premises, on the fourth respondent's version, the delays in prosecuting the applicant were occasioned by political interference and political pressure and not by the first respondent itself. In the premises, there is no room to blame the first respondent for the delays or to use the delays to justify the permanent stay of prosecution.

The affidavit of Adv. Anton Ackermann

2.25 The affidavit of Adv. Anton Ackermann does not take the matter any further.

2.26 In his affidavit, Ackermann confirms that cases such as the prosecution of the applicant were not prosecuted due to political pressure and political interference as stated in Pikoli's affidavit.

2.27 I do not deny what Ackermann says in his affidavit but I do state that the contents of Ackermann's affidavit do not justify the granting of the permanent stay of prosecution which the applicant seeks in this application.

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

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

2.30 I agree with what the fourth respondent says in paragraph 88 of his answering affidavit that the manipulation of the criminal justice system to protect individuals from criminal prosecution serves an ulterior and illegal purpose and that it constitutes bad faith, it is irrational, it interferes with the independence of the National Prosecuting Authority and amounts to a gross subversion of the rule of law. This, however, does not justify the granting of the permanent stay of criminal prosecution which the applicant seeks in this application.

2.31 It is important that I again highlight that the fourth respondent does not say that the "*manipulation of the criminal justice system to protect individuals from prosecution*" was perpetrated by the first respondent and its officials.

Insofar as it is not the fourth respondent's version that the manipulation of the criminal justice system was perpetrated by the first respondent and its officials, there can be no basis to use that against the first respondent to justify the granting of the relief which the applicant seeks in this application.

2.32 The relief which the applicant seeks in this application is so drastic that it cannot be granted simply on the basis of the manipulation of the criminal justice system or by what the fourth respondent says amounts to political interference or severe political constraints.

2.33 In the light of the contents of Pikoli and Ackermann's affidavits and the correspondence attached thereto, there can be no merit in the fourth respondent's suggestion in paragraph 97 of his answering affidavit that "*the SAPS and the NPA colluded with political forces to ensure the deliberate suppression of the bulk of apartheid-era cases.*" It is important to draw the Court's attention to the fact that the fourth respondent does not even tell the Court as to when this alleged collusion with political forces occurred. The fourth respondent is called upon to produce evidence of this alleged collusion or to formally withdraw such allegation.

2.34 In any event, the suggestion that the SAPS colluded with the National Prosecuting Authority is completely inconsistent with the contents of Pikoli and Ackermann's affidavits. The two affidavits clearly tell the Court as to why cases such as the applicant's case were not immediately prosecuted

and they do not include the alleged collusion between the SAPS and the National Prosecuting Authority.

2.35 It is not correct that the National Prosecuting Authority has decided to shield "*itself from embarrassment as well as violations of its obligations and duties under the Constitution*" as alleged in paragraph 142.3 of the fourth respondent's answering affidavit. The correct position is simply that the applicant did not in his founding affidavit call upon the first respondent to deal with the issues which the fourth respondent somehow suggests the first respondent ought to have dealt with in answering the applicant's founding affidavit. It is the fourth respondent which has now raised the issues which I have now answered in this supplementary answering affidavit.

2.36 In paragraph 142.1 of his answering affidavit, the fourth respondent contends that "*the period leading up to the decision to institute criminal proceedings cannot be ignored.*" There is no legal basis for this. The fourth respondent contends, in paragraph 142.3, that "*what transpired during this time-period must be explained by the NPA.*" I deny this. The applicant, however, does not rely on this point.

2.36.1 In support of the above contention, the fourth respondent seeks to rely on paragraph 3(C) of the Prosecution Policy.

2.36.2 Paragraph 3 of the Prosecution Policy deals with the role of a prosecutor. Paragraph 3(C) deals with prosecution in the public interest and seeks to provide guidance to prosecutorial decision-making process in relation to prosecution of cases in the public interest.

2.36.3 In relevant parts, paragraph 3(C) of the Prosecution Policy upon which the fourth respondent relies for his contention that the first respondent must provide an explanation for the time period leading up to the institution of criminal charges against the applicant provides that when a prosecutor considers whether or not it will be in the public interest to prosecute, the prosecutor must consider all relevant factors including, amongst others, whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused person in the delay.

2.36.4 It is important that I draw to the Court's attention the fact that the very same paragraph states that:

"*The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.*"

2.36.5 At all material times relevant to this case, the first respondent has always been aware of the long period of time which has passed between the date when the crime was committed and the date on which criminal proceedings were instituted against the applicant. For this reason, it cannot be suggested that the first respondent did not take into account the delay between the date on which the crime was committed and the date on which criminal proceedings were instituted against the applicant.

2.36.6 When regard is had to the nature and seriousness of the offence; the manner in which Mr. Timol was killed; the pain which Mr. Timol must have suffered; and the fact that the applicant has not admitted guilt and has not shown repentance the delay between the date on which the crime was committed and the date on which the prosecution was instituted justify the dismissal of this application. All of these factors, together with the fact that the delay in prosecuting the applicant was not deliberately caused by the first respondent, it is not in the interests of justice to grant the permanent stay relief which the applicant seeks in this application.

2.37 I deny the fourth respondent's insinuation in paragraph 142.6 that Chris Macadam did not act properly when the investigation of this matter was entrusted to him. In this regard, I attach hereto as **SA1,** Chris Macadam's affidavit in which he sets out in detail, and supported by documentary

evidence, his role during the relevant periods in the investigation of this matter.

2.38 When regard is had to the contents of Chris Macadam's affidavit, it is clear that he did all he could under the political environment which prevailed at the time which, as the fourth respondent himself has indicated in his answering affidavit, was clearly not in favour of prosecuting cases such as the present. For this reason, the insinuation against Chris Macadam is wholly misplaced. [Chris Macadam's affidavit attached hereto as SA1 is the very same affidavit referred to in my main answering affidavit but was not attached thereto].

2.39 In the light of the interest which the fourth respondent has shown in Macadam, it is necessary that I draw the court's attention, and indeed the fourth respondent's attention to some of the contents of Macadam's affidavit and the annexures thereto.

2.40 Macadam is a senior advocate of this court and has, since 2003 served as the Senior Deputy Director of Public Prosecutions in the National Prosecuting Authorities Priority Crimes Litigation Unit. This unit has always been located within the office of the National Director of Public Prosecutions.

2.41 In paragraph 12 of his affidavit, Macadam says that the then National Director of Public Prosecutions took a decision, shortly after the

establishment of the Priority Crimes Litigation Unit, that such unit "*should take over the TRC cases which had not been finalized either by the DPP or by the defunct TRC unit.*" This is a clear indication that right from the beginning, the National Prosecuting Authority intended to investigate and prosecute cases such as the present.

2.42 In paragraphs 15 and 17, Macadam indicates that Mr Timol's case was identified as one which required further investigation and this is confirmed in annexure RCM2 to his affidavit.

2.43 In an internal memorandum dated 15 July 2003 Advocate Ledwaba of the then Directorate of Special Operations (then known as The Scorpions) which was mandated to investigate cases such as the present advised Macadam and others, amongst others, as follows:

"(i) TRC Cases

I have decided that SAPS must take over the investigations of all such cases currently handled by you. Your files should be closed off and all the material given to the PCLU. It must also be given the storeroom currently being used."

2.44 Pursuant to Ledwaba's aforesaid decision, Macadam and Ackermann did the right thing by commencing engagement with the SAPS after which

Commissioner J F De Beer of the SAPS addressed a letter dated 26 September 2003 to Ackerman in, amongst others, the following terms:

"As agreed at our meeting, I have discussed your request for the assistance of the South African Police Service, to investigate cases emanating from the TRC processes, with the National Commissioner. It is evident from your letter that the investigation and prosecution of these cases were referred to the National Director of Public Prosecutions, by the President. Our understanding was that this referral was politically inspired. As you know, a large number of cases to be investigated are those of ex-policemen. It is therefore understandable that you first endeavoured to have these cases investigated by the Directorate for Special Operations (DSO).

From your letter it is firstly not clear why the DSO do not have the legal mandate to investigate the cases emanating from the TRC, and secondly, why it was not possible to obtain a Presidential Proclamation to provide such mandate if it was lacking ...

In view of the nature of the investigations, the fact that the President has referred it to the National Director, and that it seemed to be common cause that the initial understanding was that the DSO would have investigated it, the opinion is held that you, or the National Director should approach the President, and confirm the instruction of the President on who he wants to investigate these cases.

If the President indicates that the South African Police Service should be involved in the investigations, the instruction should be obtained in writing. Upon receipt of such instruction, the South African Police Service shall of course assist, and the terms of reference, as well as issues such as logistics, number of investigators, command, can be discussed, as well as other relevant issues." (Own emphasis).

2.45 The above-quoted letter clearly signaled the beginning of difficulties in investigating and prosecuting cases such as the present. In order to avoid delays and being entangled in bureaucracy, Macadam and Ackermann attempted to persuade Ledwaba to reconsider his decision not to investigate cases such as the present. Their frustrations are well documented in annexure RCM5 attached Macadam's affidavit – being an internal memorandum dated 11 November 2003. Therein, they set out their frustrations and concluded as follows:

"2. *As at the date of this letter I have heard nothing further from you. I am constrained to express my concern at the above state of affairs. Since July 2003 no investigations have been conducted. There are certain cases which could have been prosecuted which have prescribed. There is both national and international pressure to institute prosecutions (eg. Simelane's case). An amnesty hearing for the Motherwell Matter has been set down for early March 2004 and the TRC was given an undertaking that certain investigations would be conducted and made available to the committee. The availability*

of witnesses and high public interest dictate that the other cases be brought to trial as soon as possible. The failure to do so will bring the bona fides of the National Prosecuting Authority into serious [disrepute] and do irreparable damage.

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

2.46 Despite Ackermann and Macadam's pleas, the then Directorate for Special Operations did not appoint investigators as requested and cases such as the present were not further investigated. To make matters worse, in 2004, Macadam was assigned a case which required his full-time attention until late 2007 and was then not involved in the investigation and possible prosecution of TRC cases.

2.47 No serious investigation of cases such as the present took place and the reasons for this are clearly apparent from Macadam's affidavit. In paragraph 40 of his affidavit, Macadam says that he requested the Directorate for Priority Crimes Investigations to re-open the investigation of Mr Timol's case.

2.48 After having done all of the above, Macadam was informed by Advocate Johnson, the then head of the Priority Crimes Litigation Unit *"that we should not continue to work with TRC cases as they were going to be removed from the PCLU."* (Own emphasis).

2.49 Attached to Macadam's affidavit as RCM16 is a letter dated 8 February 2007 from then Minister of Justice Ms Mabandla to then National Director of Public Prosecutions, Pikoli. In this letter, the then Minister expressed her concern that she read media articles suggesting that the National Prosecuting Authority was going ahead with prosecutions of cases such as the present. The then Minister said, amongst others, the following:

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

2.50 The contents of the then Minister's letter clearly indicates that government at the highest level was of the view that the first respondent knew that cases such as the present were not going to be investigated and prosecuted. In addition, the letter also suggests that Pikoli had advised the Minister that *"the NPA will not be going ahead with the prosecutions."*

2.51 In a memorandum dated 15 February 2007 from Pikoli to then Minister of Justice, Pikoli, amongst others, expressed his frustrations arising from political interference with the National Prosecuting Authority's prosecutorial decision-making processes. The upshot of Pikoli's frustrations is set out in paragraph 5.2 of this memorandum, wherein he said:

"5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end. (Own emphasis).

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter." (Own emphasis).

2.52 Insofar as this particular matter is concerned, the political position about the prosecution of cases such as the present did not change until the re-opening of the inquest into the death of Mr Timol. As we now know, the matter was investigated after the 2017 inquest judgment was released and the first respondent then took a decision to prosecute the applicant herein.

2.53 When regard is had to the contents of Macadam's affidavit, there can be no rational basis to suggest that he acted in a cavalier and uncaring manner. The facts set out in his affidavit, confirmed by way of a confirmatory affidavit by Pikoli, clearly indicate that the political interference with the first respondent's prosecutorial decision-making processes did not only start in 2007 when Pikoli was suspended from his position as National Director of Public Prosecutions for what he says, amongst others, deciding to prosecute cases such as the present.

2.54 It is important to draw the court's special attention to paragraph 5.4 of Pikoli's memorandum to the Minister quoted above. Therein, and based on the prevailing political environment at the time, Pikoli took the view that *"these TRC matters"* could not be proceeded with *"in accordance with the 'normal legal processes' and 'prosecuting mandate'"* of the National Prosecuting Authority. Having taken this view, Pikoli then called for the Government to provide direction as far as the investigations and prosecutions of the TRC matters was concerned. Pikoli correctly called for this direction from the State *"in view of the fact that the NPA prosecutes on behalf of the State."* When regard is had to Pikoli's, Ackermann's, and

Macadam's affidavits, it is clear why Pikoli called for this direction from the State – simply because the State had clearly expressed its reluctance to prosecute cases such as the present and its desire to establish a second amnesty process for people such as the applicant.

2.55 The above being the case, this court cannot perpetuate the injustice to which Mr Timol was subjected by granting an order in terms of which the applicant's prosecution is stayed permanently. Mr Timol was subjected to injustice by the apartheid government and its security agents and cannot again be subjected to injustice by this government, for which he died.

I now turn to respond to some of the paragraphs of the fourth respondent's answering affidavit in which negative and incorrect statements are made about the first respondent.

3 AD PARAGRAPHS 64 AND 65

Ad paragraph 64

3.1 I deny that the National Prosecuting Authority acted in a cavalier and uncaring manner.

3.2 The fourth respondent's suggestion that the approach of the National Prosecuting Authority was cavalier and uncaring is not supported by any admissible evidence placed before the Court. Such a suggestion can easily

be disposed of by reference to the contents of Macadam's affidavit to which I have referred above.

Ad paragraph 65

3.3 The contents of paragraph 65.1 do not justify the criticism levelled against the first respondent. This is so due to the fact that the Amnesty Task Team referred to therein was not created by the first respondent. As I have demonstrated above, the Amnesty Task Team was created by the government, in particular, by the highest level of government. Rightly or wrongly, the Amnesty Task Team was clearly created to find ways to give people such as the applicant herein an opportunity to apply for amnesty in respect of their participation in what is referred to in the Amnesty Task Team's report as "*conflicts of the past.*"

3.4 The contents of paragraph 65.2 are not entirely correct. It is not correct that the amendment to the prosecution policy was intended "*to facilitate impunity for apartheid-era criminals.*" A simple reading of the report of the Amnesty Task Team clearly shows that it was not the intention of government to grant people such as the applicant blanket amnesty. There were stringent requirements with which they had to comply.

3.5 Pikoli's affidavit shows that it is not correct that government intended "*to facilitate impunity for apartheid-era criminals*" where he refers to instances where he refused to accept representations not to prosecute people such as

the applicant. The people referred to in Pikoli's affidavit, whose representations not to be prosecuted he refused, would have been granted amnesty easily if government's intention was indeed "*to facilitate impunity for apartheid-era criminals*" as suggested in paragraph 65.2.

3.6 The contents of paragraph 65.3 are not in dispute and do not justify the relief which the applicant seeks in this application and clearly show that it was former President Mbeki who "*introduced a political pardons program to further accommodate perpetrators*" and not the first respondent.

3.7 The contents of paragraph 65.4 are not in dispute.

3.8 The contents of paragraph 65.5 must necessarily bring an end to any criticism levelled against the first respondent by the fourth respondent. In paragraph 65.5, the fourth respondent says that the "*NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases*" which cases included the case of Mr. Timol. On this version, there could not have been collusion between the police and the National Prosecuting Authority.

4 AD PARAGRAPHS 82 TO 94

Ad paragraph 82

4.1 The cover-up of political crimes referred to in paragraph 82 which the fourth respondent says it "*naturally explains the inaction between 1971 and*

1994" is not different from the political interference which resulted in cases such as the present not being prosecuted immediately. For this reason, there is no basis to blame the first respondent and the National Prosecuting Authority for the delays in prosecuting this case.

Ad paragraph 83

4.2 There is no basis to suspect that the first respondent did not explain the delay as a result of an ulterior or improper motive. The position is simply that the applicant did not in his founding affidavit make out a case which required an explanation for the delay in the manner in which the fourth respondent has done in his answering affidavit.

4.3 It is clear from the applicant's founding affidavit that the applicant did not have much information on the basis of which he could criticize and blame the first respondent for the delays in the manner done by the fourth respondent in his answering affidavit. In fact, the fourth respondent's answering affidavit reads like a supporting affidavit on behalf of the applicant.

Ad paragraph 84

4.4 I have already dealt with the contents of paragraph 84 elsewhere above in this supplementary answering affidavit.

Ad paragraph 85

4.5 I have already dealt with the contents of paragraph 85 elsewhere above in this supplementary answering affidavit.

Ad paragraph 86

4.6 The statements and conclusions attributed to Pikoli and Ackermann in paragraph 86 are not in dispute.

Ad paragraph 87

4.7 I fail to understand the purpose of the contents of paragraph 87 because the fourth respondent is fully aware that the first respondent herein did not oppose the application referred to therein. Insofar as the first respondent did not oppose the application referred to in paragraph 87, it was not necessary for it to file an answering affidavit. The applicant's legal representatives are clearly aware of this.

4.8 The contents of paragraph 87 are clearly intended to create unnecessary sensation and negative atmosphere against the first respondent and the SAPS because a false impression is created that they were supposed to file answering affidavits but neglected to do so (even though they did not oppose the application).

4.9 The alleged "*considerable publicity that the case attracted*" did not on its own justify the filing of answering affidavits in circumstances where the first respondent and the SAPS decided not to oppose the application in issue.

Ad paragraph 88

4.10 I have already dealt with the contents of paragraph 88 elsewhere above in this supplementary answering affidavit.

Ad paragraph 89

4.11 I draw the Court's attention to the fourth respondent's conclusion that "*the real reason for the delay in investigating and prosecuting apartheid-era perpetrators like Rodrigues in the democratic-era*" is the "*manipulation of the criminal justice system to protect individuals from prosecution*" referred to in paragraph 88 and the political interference with the independence of the National Prosecuting Authority – none of which was done by the first respondent. On the fourth respondent's own version, it is the first respondent who was politically interfered with.

Ad paragraph 90

4.12 I admit that the unlawful interference with the first respondent's duties and the manipulation of the criminal justice system referred to in the fourth respondent's answering affidavit is not sufficient to justify the granting of a

permanent stay of the prosecution instituted against the applicant. There is no reason why the fourth respondent relies on the unlawful interference with the first respondent only to say it does not justify the relief sought.

Ad paragraph 91

4.13 The contents of paragraph 91 are admitted.

Ad paragraphs 92 and 93

4.14 The contents of paragraphs 92 and 93 are not in dispute.

4.15 It is not in the interests of justice to grant the relief which the applicant seeks on the basis of what the fourth respondent says was an unlawful manipulation of the criminal justice system and unlawful political interference with the first respondent's prosecutorial decision-making processes.

Ad paragraph 94

4.16 In paragraph 94 of his answering affidavit, the fourth respondent seeks to suggest that the National Prosecuting Authority and the South African Police Service are not doing anything about the possible prosecution of cases such as the present. I deny this.

4.17 The cases to which the fourth respondent refers are 9 deaths cases and 11 cases relating to the murder, kidnapping and torture of political activists. These cases include the so-called Cradock 4 and Pebco 3 murders and were placed before the Directorate for Priority Crimes Investigations and the National Prosecuting Authority in January 2018. I deny that "*absolutely no progress has been made in any of these 20 cases.*"

4.17.1 One of the above cases relates to the death of Hoosen Haffejee. In this case, the second respondent has approved the re-opening of the inquest into this death and the fourth respondent is fully aware that this matter is under investigation as it is apparent from the letter attached hereto as **SA2**.

4.17.2 Since the aforesaid cases where allocated to the Directorate for Priority Crimes Investigations and the National Prosecuting Authority, all the required support and resources have been provided to investigate and to then prosecute these matters.

4.17.3 A task team of 15 police officers has been constituted and each case has been allocated at least two investigators. This task team consists of members of the Crimes Against the State unit of the South African Police Service.

4.17.4 Progress meetings have been held on these cases and the fourth respondent and the fourth respondent's investigator, Frank Dutton have attended some of these meetings.

4.17.5 I am also aware that the fourth respondent's investigator, Frank Dutton, has interacted with Captain Chantelle Simpson of the South African Police Service on these matters and the fourth respondent must be fully aware of such interactions but creates a wrong impression that nothing has been done. This wrong impression is deliberately created in order to portray the National Prosecuting Authority and the South African Police Service in a negative light – which does not serve any purpose in proceedings such as the present.

4.17.6 I deny that two former members of the old South African Police's Security Branch were appointed "*to lead these investigations.*" It serves no purpose for the fourth respondent to accuse the South African Police Service and the National Prosecuting Authority and their officials without producing any evidence to support such accusation.

4.18 For the reasons stated above, the contents of paragraph 94 do not advance the fourth respondent's case, they are in any event irrelevant and ought to be rejected.

5 AD PARAGRAPHS 97 TO 99

Ad paragraph 97

5.1 I deny that the SAPS and the National Prosecuting Authority colluded with political forces to ensure the deliberate suppression of apartheid-era cases.

5.2 The fourth respondent's suggestion that the SAPS and the National Prosecuting Authority colluded with political forces is not supported by any admissible evidence placed before the Court. Of importance, this suggestion is inconsistent with some of the evidence upon which the fourth respondent relies which the fourth respondent himself has placed before the Court.

5.3 Elsewhere in his answering affidavit, the fourth respondent makes it clear that there was political interference and political pressure brought to bear upon the National Prosecuting Authority. This being the case, one fails to understand as to on what factual basis the fourth respondent can begin to speculate, let alone suggest, that the National Prosecuting Authority "*colluded with political forces.*" Such a suggestion, if accepted, would mean that Pikoli and Ackerman on whose affidavits the applicant heavily relies, are guilty of the collusion referred to in paragraph 97.

Ad paragraph 98

5.4 I do not deny that the National Prosecuting Authority was subjected to political interference and political pressure not to immediately prosecute cases such as the present. Incidentally, this also happened during the time that Pikoli was the National Director of Public Prosecutions.

Ad paragraphs 99 and 100

5.5 The contents of paragraph 99 are not in dispute.

5.6 The contents of paragraph 100 are not in dispute.

6 AD PARAGRAPHS 140 TO 148

Ad paragraph 141

6.1 The contents of paragraph 141 do not take the matter any further.

6.2 In paragraph 141 of his answering affidavit, the fourth respondent is responding to paragraphs 1.1 to 2.2.4 of the first respondent's answering affidavit to the applicant's founding affidavit. There is no basis to criticize the first respondent because the applicant's founding affidavit did not call the first respondent to provide an explanation for what the fourth respondent refers to as "*the near total inaction of the NPA*."

Ad paragraph 142

6.3 I have already dealt with the contents of paragraph 142 elsewhere above in this supplementary answering affidavit.

Ad paragraph 143

6.4 The contents of paragraph 143 clearly reveal the fourth respondent's motive in painting the first respondent in a negative light. The motive is to obtain answers to the criticism levelled against the first respondent which the fourth respondent would then use to call "*for an inquiry into those prosecutors and police who failed in their duties to uphold the rule of law.*" This is clearly wrong.

6.5 The contents of the affidavits filed in this application for purposes of opposing the relief which the applicant seeks in this application were clearly not intended to defend the first respondent and "*those prosecutors and police*" who allegedly failed in their duties to uphold the rule of law. For this reason, it would be wrong to create an impression that such affidavits also constitute a defence against an allegation that "*those prosecutors and police*" failed in their duties to uphold the rule of law.

6.6 For the avoidance of any doubt, I expressly state that the purpose of this affidavit and the other affidavits filed on behalf of the first respondent in this application are not intended to be an answer and shall not be used as an

answer to the unfounded allegation that "*those prosecutors and police*" have failed in their duties to uphold the rule of law.

Ad paragraph 144

6.7 The contents of paragraph 144 do not require a further response from the first respondent.

Ad paragraph 145

6.8 The contents of paragraph 145 do not justify the relief which the applicant seeks in this application and it is not clear to me as to why the fourth respondent chose to include them in his answering affidavit, the purpose of which is, so I thought, to oppose the relief which the applicant seeks.

Ad paragraph 146

6.9 The affidavit of the investigating officer, Captain FN Mathipa is attached herewith as **SA3 (i)** and the unopposed bail application as **SA 3 (ii)**.

Ad paragraph 147

6.10 The contents of paragraph 147 do not require a further response from the first respondent other than to state that the fourth respondent himself has already told the Court of the reasons why this case was not investigated and prosecuted earlier than now. It accordingly does not serve a purpose to repeat the same contentions differently.

Ad paragraph 148

6.11 The affidavit of Macadam referred to in my main answering affidavit is the one now attached hereto as SA1.

6.12 I stand by what is stated in my main answering affidavit.

6.13 In conclusion, I state that the contents of the fourth respondent's answering affidavit do not justify any of the criticism levelled against the third respondent and the National Prosecuting Authority and also do not justify the granting of the permanent stay of prosecution relief which is sought by the applicant in this application.

6.14 In the premises, I persist that the application for a permanent stay of the criminal prosecution instituted against the applicant ought to be dismissed with costs including the costs consequent upon the employment of two counsel.

WHEREFORE, I pray that it may please the Court to dismiss the application with costs including the costs consequent upon the employment of two counsel.

JACOBUS PETRUS PRETORIUS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on the 4th day of February 2019, the regulations contained in Government Notice No. R 1258 of 21 July 1972, as amended, and Government Notice No. R 1648 of 19 August 1977, as amended, having been complied with.

Captain

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

OFFICE: