IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: **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
PAN AFRICAN BAR ASSOCIATION OF SOUTH AFRICA	*Intervening party (Amicus Curiae applicant)*

PABASA HEADS OF ARGUMENT

INTRODUCTION

"… *the past is not done with us; that it is not past; that it will not leave us in peace until we have reckoned with its claims to justice*."[1]

1 The applicant (Rodrigues) seeks a permanent stay of prosecution against a charge of the murder of Mr Ahmed Essop Timol (Timol) on 27 October 1971 on the basis that the continuance of trial proceedings against him will infringe Rodrigues' right to a fair trial under section 35(3) of the Constitution.

2 The 48 years since the death of Timol is a significant period which raises the legal question of undue delay in the prosecution of the crime. This, however, is no ordinary charge of murder and the charge cannot be divorced from the context in which the conduct took place – that of an apartheid State that endorsed, supported, and protected its officials following actions of this kind.

3 The 48 year period must be understood against the fact that Rodrigues is accused of a most vicious and heinous crime for which he was afforded refuge by the Security Branch and a monolithic State system that protected him. After 1994 the Interim Constitution established a form of public reconciliation that permitted Rodrigues, and others similarly situated, to obtain amnesty and avoid the threat of criminal prosecution.

[1] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) par [154] per Cameron J

4 The death of Timol was in fact only recognised to have been an unlawful killing on 12 October 2017[2] when Mothle, J ruled that the death of 29-year-old Timol was not a consequence of suicide or accident but that:

> "*Timol's death was brought about by an act of having being pushed from the 10th floor or roof of the John Vorster Square Building to fall to the ground, such act having been committed through dolus eventualis as the form of intent and prima facie amounting to murder*."[3]

5 In context, it is therefore only since October 2017, that there is knowledge of the existence of a crime and a criminal charge to be answered.

6 This case cries for prosecution – it is important not only for the matter to be tried and Rodrigues' guilt or innocent to be determined but, far more significantly, for the people of this country and those around the world to witness the second leg of the commitment to unity and reconciliation provided for in the Interim Constitution – namely the prosecution of those individuals who were not granted amnesty and who must be seen to account for their conduct during apartheid. This is in many ways a unique case. Moreover, it is a case of great importance and relevance, not only to the development of our law, but also in the national and public interest.

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[2] *The re-opened inquest into the death of Ahmed Essop Timol* (IQ01/2017) [2017] ZAGPPHC 652 (Inquest judgment) par 2

[3] Inquest judgment (above) par 335

7 The facts of the case are largely common cause and we therefore do not set them out in these submissions. In light of the limited role of PABASA as amicus curiae, we deal in these heads of argument with the following:

7.1 The principles applicable to prosecutorial delay;

7.2 The constitutional source of the obligation to prosecute Apartheid crimes; and

7.3 South Africa's international law obligation to be seen to prosecute Apartheid crimes.

THE COMMON LAW ON PROSECUTORIAL DELAY

8 The question of unreasonable delay and the factors to be considered are set out in *Sanderson*.[4] In that case, the Constitutional Court set out factors which are relevant to the exercise of the court's discretion :

8.1 The test requires an objective and rational assessment of relevant considerations to be made. What is relevant depends on the context.[5]

8.2 The amount of time which has elapsed is central to the enquiry.[6] This is so as the constitutional right protected is one "*to have [the] trial begin and conclude without unreasonable delay*".[7]

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[4] *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC)

[5] *Sanderson* (above) par 27

[6] *Sanderson* (above) par 27

[7] Section 35(3)(d) of the Constitution

8.3 The waiver of time periods, the time requirements inherent in the case, and systemic reasons for the delay all operate to diminish the impact of elapsed time [8] and must be evaluated against the particular circumstances of the case.

9 In summary, thee prejudice suffered by the accused, the nature of the case, and systematic delays are all relevant considerations. The Supreme Court of Appeal (SCA) in *Zanner*, considered these factors and placed emphasis on the fact that the accused, as in this case, was charged with murder. In *Zanner* there had been a 10-year delay in the institution of criminal proceedings. The SCA held:

> "*The time period is, of course, central to the enquiry whether there has been an unreasonable delay. Nevertheless, the fact of a long delay cannot per se be regarded as an infringement of the right to a fair trial.*
>
> *Whether there was 'unreasonable delay' must be determined in the context of the particular circumstances of each case, taking into account factors such as the length of the delay, the reason for the delay, whether the accused has suffered or is likely to suffer prejudice by reason thereof and the accused's assertion of his right to a speedy trial. …*
>
> *The nature of the crime involved is another relevant factor in the enquiry. This is particularly so in the present case, considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most*

[8] *Sanderson* (above) par 29

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. (See S v Jaipal 2005 (1) SACR 215 (CC) (2005 (4) SA 581; 2005 (5) BCLR 423) para [29].) It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. (See s 18 of the Criminal Procedure Act 51 of 1977.) Clearly, in a case involving a serious offence such as the present one, the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay."

[emphasis added]

10 This position was endorsed by the Constitutional Court in *Bothma*.[9] Indeed in relation to the loss of evidence due to a delay in the institution of a prosecution, the Court held that further inquiry is necessary and that loss of evidence on its own cannot be equated to irreparable trial prejudice:

> "*Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice*"[10]

[9] *Bothma v Els* & others 2010 (1) SACR 184 (CC)

[10] *Bothma* (above) par 67

11 Having considered the relevant and recent case law, the Court concluded:

> "*It is notable that in the only case where a stay was granted, it was the state that had been responsible for the loss of crucial documents. This was the precipitating factor that introduced an element of unfairness that went not only to the untoward harm caused to the defence, but to the integrity of the criminal process. It is simply not fair for the state to prosecute someone and then deliberately or through an unacceptable degree of negligence deprive that person of the wherewithal to make a defence. This is qualitatively different from the irretrievable weakening of a defence that flows from loss of evidence of the kind that could happen even with short delays, but be intensified by long delays. Witnesses die, evidence disappears, memories fade. These factors, the natural products of delay, may not necessarily be sufficient to establish unfairness. If, as a result of the lack of evidence, the judicial officer dealing with the matter is unable to make a clear determination of guilt, then the presumption of innocence will ensure an acquittal*."[11]

12 The clear starting point is that length of the delay is not in itself a decisive factor. In the present case, the knowledge of the unlawful conduct was only ascertained decades after the event. The National Prosecution Authority cannot be regarded as unduly delaying the prosecution of Rodrigues as it acted promptly after the Mothle judgment.

[11] *Bothma* (above) par [74]

13 This much was confirmed by the SCA in *Van Zijl*, where the Court held that the purpose of prescription is to penalise unreasonable inaction, and not inability to act.[12] In *Van Zijl* and *Bothma* the inability to act arose from the traumatic nature of sexual violence experience while the complainant was a child and their inability to report the fact that a crime had taken place. In the present case, the inability of the State to act was premised on the State being complicit in and an advocate for the criminal conduct and thus there being no knowledge of the fact that an unlawful killing took place.

14 This is all the more so for the reasons advanced by Maya AJA in *Zanner*. As in that matter, the charge in the present case is one of murder. In terms of section 18 of the Criminal Procedure Act, 1977 there is no statutory limitation on the crime of murder and the passage of time on its own cannot absolve an accused from facing and defending the charges against him.

15 The importance of the right to fairness in section 35(3) attaches not only to the accused but also to the public, as represented by the State. The Prosecution must instil public confidence in the criminal justice system. This was acknowledged by the Constitutional Court in *Levenstein*.[13] The Court in that case noted that the right to a fair trial, coupled with the State's

[12] *Van Zijl v Hoogenhout* [2004] ZASCA 84; [2004] 4 All SA 427, cited with approval in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* 2018 (2) SACR 283 (CC) par [54]

[13] *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* 2018 (2) SACR 283 (CC) par [64]

discretion on whether to prosecute, based on the cogency and reliability of the evidence at its disposal, serve to reduce any prejudice an accused person might experience as a result of a delay.

16 The interpretation of the common law which we advance is to read the common law consistent with the Constitution principles of equality, dignity and freedom. To the extent that the common law is not consistent with the Constitution, it falls to be developed in line with the provisions of section 39(2) of the Constitution – to promote the spirit, purport and object of the Bill of Rights.[14]

17 In addition to the common law position on undue delay in prosecution, we note that this application raises issues of the constitutional imperative to bring about reconciliation.

THE CONSTITUTIONAL IMPERATIVE TO RECONCILE

18 The Interim Constitution, 1993 contemplated a two-prong approach to unity and reconciliation. The first an amnesty accessible to those individuals who had committed atrocities and criminal acts during apartheid. The second, the retention of the right of the State to thereafter prosecute individuals who either had sought and been denied amnesty or who had not participated in the amnesty process and were suspected of having committed criminal conduct.

[14] *Carmichelle v Minister of Safety and Security* 2001(4) SA 938 (CC) at para 32.

19 The Interim Constitution framed the approach to unity and reconciliation in the following matter:

> "*This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.*
>
> *The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.*
>
> *These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.*
>
> *In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any,*

through which such amnesty shall be dealt with at any time after the law has been passed. . .”

20 This undertaking remains part of the Constitution in terms of Schedule 6 item 22.[15]

21 This commitment culminated in the Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act). The preamble to the TRC Act set out the constitutional imperative thus:

> “*provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered*”

[15] The provision states:

> “(1) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.”

22 During this period any person or organisation who committed "any act associated with a political objective"[16] and was granted amnesty by the TRC would in terms of section 20(7)(a):

> "*No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.*"

23 Following the publication of the TRC Report in 1998 and the dissolution of the TRC, the injunction on the State to prosecute criminal conduct "associated with a political objective" resumed. The ability to obtain amnesty had lapsed and the second-leg of the process of reconciliation had commenced, namely the prosecution of criminal conduct committed during apartheid.

24 The obligation for the State to institute and proceed with the Rodrigues prosecution is an obligation to be evaluated in this context. The constitutional imperative on the National Prosecuting Authority under section 179 of the Constitution is coupled with the national project sourced in the interim constitution to reconcile the people of the country and allow justice to be seen to be done. This constitutional project is critical regardless of the outcome of the prosecution itself.

[16] Defined in section 20(2) of the TRC Act

25 In the part that follows, we show how this national constitutional imperative is supported by South Africa's international law obligations.

SOUTH AFRICA'S INTERNATIONAL LAW OBLIGATIONS

26 South Africa is bound by both:

26.1 its international law obligations as a State party in the international arena; and

26.2 international law through the injunction in section 39(2) of the Constitution[17] to consider its international law obligations when interpreting the rights in the Bill of Rights.

27 In *Glenister II*, [18] the Constitutional Court emphasised the role of international law in the domestic context as follows:

> "*Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human-rights law.... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution*."[19]

[17] Section 39(2) of the Constitution provides, "*When interpreting the Bill of Rights, a court, tribunal or forum, … must consider international law*"

[18] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (Glenister II)

[19] *Glenister II* (above) par 97

28 In order to incorporate international agreements,[20] principles, or practices of international law in the domestic context, it is necessary that South Africa transpose any international obligations it has assumed into its domestic law. It is only once South African law has itself incorporated the agreement through appropriate legislation that an international obligation may be regarded as enforceable under domestic law. This is dealt with in sections 231 of the Constitution.

29 Section 232 of the Constitution provides that customary international law is law in the Republic, unless "*it is inconsistent with the Constitution or an Act of Parliament*". In *Glenister II* the Constitutional Court explained it thus:

> "*An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane. And failure to observe the provisions of this agreement may result in South Africa incurring responsibility toward other signatory states. An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated in our law cannot be a source of rights and obligation*."[21]

[20] "International agreement" has been interpreted as synonymous with the word treaty, convention or protocol and refers to legally binding, enforceable agreements that meet the requirements of the definition contained in Article 2 of the Vienna Convention on the Law of Treaties, 1969.

[21] *Glenister II* par [92] (minority judgment) and par [191] (majority judgment). See also, *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* case no: 83145/2016 [2017] ZAGPPHC 53 (22 February 2017) par [55]

30 In the present context both the UN General Assembly Conventions and Resolutions, and the Rome Statute are relevant to the consideration of what South Africa's obligations are under domestic and international law in this regard.

31 Apartheid was declared a crime against humanity by the United Nations in the International Convention on the Suppression and Punishment of the Crime of Apartheid, General Assembly Resolution 3068[22] and the 2002 Rome Statute.

32 This action was a culmination of prior steps of condemnation against the policy of apartheid adopted by the international community:

33 Apartheid was annually condemned by the United Nations from 1952 to 1990 as inimical to Articles 55 and 56 of the United Nations Charter 1945. In 1966, the General Assembly labelled apartheid as a crime against humanity [23] and, in 1984, the Security Council endorsed this determination.[24]

34 The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (entry into force 1976) declares in Article I(1):

> "*The States Parties to the present Convention declare that apartheid is a crime against humanity and that*

[22] Entry into force 18 July 1976

[23] GA Resolution 2202 A (XXI) of 16 December 1966

[24] SC Resolution 556 (1984) of 23 October 1984

inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security."

35 Article II continues:

"*the term 'the crime of apartheid', which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:*

(a) denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) by murder of members of a racial group or groups;

(ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) …

(c) any legislative measures and other measures calculated to prevent a racial group or groups from

participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association

…

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid."

36 Article III imposes international criminal responsibility on individuals, members of organisations and representatives of the State who commit, incite or conspire to commit the crime of Apartheid. Specifically, the Article provides:

"*International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:*

(a) commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;

(b) directly abet, encourage or co-operate in the commission of the crime of apartheid."

37 South Africa is not a signatory, and thus not a party to the International Convention on the Suppression and Punishment of the Crime of Apartheid.

38 However South Africa is a signatory and party to the Rome Statute.[25] South Africa incorporated the Statute into domestic law in terms of the Rome Statute Implementation Act 27 of 2002.[26]

39 The Rome Statute takes the crime of apartheid one step further and recognises the crime as one of the crimes against humanity in Article 7(1)(j). The crime is described in Article 7(2)(h) as:

> "*inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime*"

40 Thus, despite the end of apartheid as a political system in South Africa, it lives on as a type of crime against humanity both under customary

[25] South Africa signed the Rome Statute on 17 July 1998 and ratified the Rome Statute on 27 November 2000. Despite filing its Notice of Withdrawal as a signatory to the Rome Statute with the UN Secretary-General on 19 October 2016, this Notice has since been revoked due to procedural irregularities.

[26] Entry into force on 16 August 2002

international law[27] and the Rome Statute of the International Criminal Court.

41 In the domestic context South Africa is obliged to give effect to the obligations contained in the Rome Statute and it cannot ignore its international law obligations in this regard.

42 In relation to the weight to be attached to international law in the protection and enforcement of fundamental rights, the Constitutional Court stated the following:

> "*Section 39 of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights. In* Makwanyane *Chaskalson P, in the context of section 35(1) of the interim Constitution, said:*
>
> *'. . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human*

[27] Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way and includes:

a) the widespread repetition by States of similar international acts over time (State practice);

b) the requirement that the acts must occur out of a sense of obligation (opinio juris); and

c) that the acts are taken by a significant number of States and not rejected by a significant number of States

Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].' (Footnotes omitted)

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable."[28]

43 It is in this context that the issue of unreasonable delay before the court must be determined.

CONCLUSION

44 In determining whether there has been undue delay in the prosecution of a crime and a resulting violation of an accused's right to a fair trial under section 35(3) of the Constitution this Court, should, in our submission consider that the crime at issue is one committed in the furtherance and protection of the system of apartheid.

45 Significantly, apartheid has been declared to constitute a crime against humanity and therefore South Africa is under both a constitutional and

[28] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) par [26]

international law obligation to be seen to prosecute crimes contemplated by the TRC Act.

46 The delay in this case, may be unfortunate but we submit that the nature of the crime and the constitutional imperative outweigh the prejudice to the accused. Moreover, as pointed out in these submissions, the common law crime of murder does not prescribe in our law – there is, in our submission, no basis in law to treat the accused in this case more favourably than any other person accused of murder.

TEMBEKA NGCUKAITOBI
SHA'ISTA KAZEE
JAMES GRANT
Advocates Chambers, Sandton
27 March 2019

LIST OF AUTHORITIES

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1 *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC)

2 *Bothma v Els & others* 2010 (1) SACR 184 (CC)

3 *Carmichelle v Minister of Safety and Security* 2001(4) SA 938 (CC)

4 *Daniels v Scribante and Another* 2017 (4) SA 341 (CC)

5 *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* case no: 83145/2016 [2017] ZAGPPHC 53 (22 February 2017)

6 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)

7 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)

8 *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC)