

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

**CASE NO: 86381/18**

In the *ex parte* application of:

**THEMBISILE PHUMELELE NKADIMENG**

Applicant

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**APPLICANT'S HEADS OF ARGUMENT**

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**OVERVIEW**

- 1 The applicant, Ms Thembisile Nkadimeng, and her family, bring these proceedings with a heavy heart. She seeks a *rule nisi* calling upon all interested persons to show cause (if any) why an order presuming the death of Nokuthula Simelane – the applicant's sister – should not be made final.<sup>1</sup>
- 2 Ms Nkadimeng brings this application in her own interest, as well as that of her family.<sup>2</sup> Ms Sizakele Simelane – the mother of the applicant and the late Nokuthula – has deposed to an affidavit in support of this application.<sup>3</sup>
- 3 Ms Nkadimeng and her family bring this application to seek closure. Nokuthula's father died in 2001 without knowing what happened to her. The applicant's brother, Antonio Lungelo Simelane, died in 2017 after suffering from years of anxiety and depression. Nokuthula's mother (78) is elderly and sick

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<sup>1</sup> NOM p 1 para 1.

<sup>2</sup> FA p 5 para 2.

<sup>3</sup> Annexure TN1 pp 31-33.

with nervous tension.<sup>4</sup> She has lost all hope that Nokuthula is alive and believes that all the evidence points overwhelmingly to the contrary.<sup>5</sup> This application represents a meaningful step in the process of their healing as a family.<sup>6</sup>

## FACTUAL BACKGROUND

4 Ms Simelane was a 23-year-old university graduate and an underground operative of the African National Congress.<sup>7</sup>

5 In September 1983, Nokuthula was abducted, viciously tortured and enforcedly disappeared in a failed “*kopdraa*” (head turn) operation perpetrated by the Security Branch (“**SB**”) of the former South African Police (“**SAP**”).<sup>8</sup>

6 Nokuthula suffered the most brutal treatment at the hands of the SB, including:

6.1 Nokuthula was persistently tortured and assaulted for several weeks while her sleep was kept to a minimum.<sup>9</sup> SB members viciously assaulted her by way of punches, kicks and slaps with blows delivered at full force.<sup>10</sup>

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<sup>4</sup> CA p 32 para 4.

<sup>5</sup> CA p 32 para 7.

<sup>6</sup> FA p 29 para 74.

<sup>7</sup> FA p 7 para 11.

<sup>8</sup> FA p 7 para 12.

<sup>9</sup> FA p 10 para 26.1.

<sup>10</sup> FA p 12 para 26.5.

- 6.2 Nokuthula was administered electric shocks by way of a hand-held generator for minutes at a time with certain shocks applied to her neck and exposed nipples. These shocks rendered Nokuthula comatose with foam frothing from her mouth.<sup>11</sup>
- 6.3 Nokuthula was repeatedly suffocated by placing a wet canvas bag over her head and holding it tightly until her body convulsed, often causing her to urinate and soil herself.<sup>12</sup>
- 6.4 Nokuthula was thrown into a zinc dam after bouts of interrogation and was subjected to near drownings in the dam.<sup>13</sup>
- 7 Nokuthula's treatment caused her health to deteriorate significantly. Nokuthula was beaten so badly that her face was barely recognisable; she was unable to perform her own ablutions; could no longer walk unassisted; and developed swellings and bruises all over her body.<sup>14</sup>
- 8 At the time she was last seen alive,<sup>15</sup> Nokuthula's head and face were swollen and distorted. Her legs and ankles were swollen and rubbed raw, and her wrists were lacerated and swollen from persistently being restrained in leg irons and hand cuffs. Nokuthula could not stand independently and had lost her sense of balance. She could not lift her arms higher than her shoulders.<sup>16</sup>

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<sup>11</sup> FA pp 10-11 para 26.2

<sup>12</sup> FA p 11 para 26.3.

<sup>13</sup> FA p 11 para 26.4.

<sup>14</sup> FA pp 12-13 paras 26.7, 26.9-26.10.

<sup>15</sup> FA pp 13-14 para 26.11.

<sup>16</sup> *Id.*

- 9 Nokuthula's dire state from her unrelenting and vicious treatment at the hands of the SB left her in such a weakened and desperate physical state that she would have likely died if not afforded urgent medical treatment in hospital.<sup>17</sup>
- 10 The white SB officers who applied for amnesty from the TRC (following disclosures by some of the black officers) did not deny that they abducted and tortured Nokuthula. However, they claimed that she was only tortured during the first week of her captivity and thereafter she was only subjected to the odd slap or punch to secure her continued co-operation. They also falsely claimed that they had 'turned' Nokuthula into an informer and returned her to Swaziland. These transparently false claims were rejected by the TRC's Amnesty Committee, which also refused their applications for amnesty for the torture of Nokuthula.<sup>18</sup> The aforesaid officers, listed in paragraph 2.2 of the Notice of Motion, were indicted for the murder of Nokuthula in 2016.<sup>19</sup>
- 11 Thirty-six years have passed since Nokuthula's disappearance. Throughout this period, her family has persistently searched for her. The circumstances point overwhelmingly to the conclusion that Nokuthula is no longer alive and was murdered by the police while in their captivity.
- 11.1 Nokuthula's family attended at the South African / Swaziland border and made inquiries at the border, as well as with the ANC in Swaziland and in neighbouring countries. The family also reported Nokuthula's

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<sup>17</sup> FA p 16 para 30.

<sup>18</sup> Decision of the Amnesty Committee (AC/2001/185) at pp 36 – 41 (Annex TN2).

<sup>19</sup> FA p 6 para 8. Indictment (Case Number: CC 16/2016) attached as annex TN3.

disappearance to police in Swaziland and South Africa. These efforts came to naught.<sup>20</sup>

11.2 Nokuthula's family participated in the TRC process and testified in a "*victims' hearing*" before the Human Rights Violations Committee.<sup>21</sup>

11.3 Nokuthula's case was investigated by the Priority Crimes Litigation Unit (PCLU) of the National Prosecuting Authority (NPA), but Nokuthula could not be traced.<sup>22</sup> Alarmed by the shameful attempts by the authorities to suppress the cases from South Africa's past, Nokuthula's family brought 2 separate cases against the NPA to strike down amendments to the Prosecution Policy (which provided perpetrators with a backdoor amnesty)<sup>23</sup> and an application to compel the NPA and the South African Police Service (SAPS) to take action in Nokuthula's case.<sup>24</sup>

11.4 Nokuthula's family appointed private detectives to inquire into Nokuthula's whereabouts.<sup>25</sup> These investigations revealed that none of Nokuthula's family members, closest friends and colleagues, including cadres in the underground, had seen or had any contact with Nokuthula following her kidnapping and that she had not been seen since.<sup>26</sup>

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<sup>20</sup> FA pp 20-21 paras 45-46.

<sup>21</sup> FA p 22 para 51.

<sup>22</sup> FA p 21 paras 47-49, Annexure TN7 pp 106-110, Annexure TN8 pp 111-115.

<sup>23</sup> *Nkadimeng v National Director of Public Prosecutions* (2008] ZAGPHC 422

<sup>24</sup> FA pp 24-25 para 58, pp 26-27 para 65. See: *Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others*, Gauteng Division Case Number 35554/ 2015

<sup>25</sup> FA p 7 para 14, p 8 para 16, p 25 para 60.

<sup>26</sup> FA p 25 para 61. See also the supporting affidavit of Frank Dutton at pp 58 – 102.

11.5 Nokuthula's case received widespread and consistent media attention, a documentary about Nokuthula has been screened on national television, a statue of Nokuthula has been erected, yet neither Nokuthula nor anyone else has come forward to suggest or claim that she is alive.<sup>27</sup>

11.6 As is set out comprehensively in the supporting affidavit of Frank Dutton, it was routine practice of the SB in the 1980s to carry out the following practices:

11.6.1 abductions and torture, including murders when attempts at recruiting cadres failed, or when other operatives or information had to be protected;

11.6.2 the destruction and concealing of human remains to ensure they would never be recovered; and

11.6.3 the fabrication of stories to suggest that, murders and other crimes committed by the SB, were carried out by the ANC and other opposition groups.<sup>28</sup>

12 Having regard to the extensive period of time that has lapsed; the circumstances in which Nokuthula disappeared and her grave state of health when she was last seen alive; the family's efforts to locate her; and the widespread media publicity, the *modus operandi* of the SB, it is overwhelmingly probable that Nokuthula is no longer alive.<sup>29</sup>

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<sup>27</sup> FA p 8 para 16, pp 27-28 paras 68-72, p 29 para 73.4.

<sup>28</sup> Supporting affidavit of Frank Dutton at pp 58 – 102.

<sup>29</sup> FA pp 28-29 paras 73-74.

## THE COURT SHOULD GRANT A PRESUMPTION OF DEATH

### *The Law*

- 13 In deciding whether to grant a presumption of death order, a court will consider “*whether what has been put up, coupled with the absence of any additional facts, is sufficiently cogent, as a matter of probability, to presume that death has taken place*”.<sup>30</sup>
- 14 The High Court judgment in *Ex Parte Govender* (per Didcott J) expanded on the test that a court will apply as follows:

*“The Court requested to presume the death of a person will not do so unless it is satisfied that such can rightly and should therefore be inferred on a preponderance of probability from the evidence adduced in the proceedings. Whether the inference can rightly be drawn in any given case is always a question of fact, the answer to which depends on its own particular circumstances. Over the years judicial accord has developed, however, about the treatment of one set of facts. **It consists simply of the disappearance of the person concerned and his subsequent absence from the scene.** Those circumstances, standing alone, are generally regarded as insufficient to warrant the inference that the explanation for them lies in his death, even when he has been absent for a long time. Something more suggestive of the explanation is required in addition. **That he disappeared in an intrinsically dangerous situation or area, for instance, will usually tip the scales once such is the case.** So will the fact that, although his disappearance remains an unsolved mystery, he can no longer be alive without having reached an age so great that it exceeds any span of life which is realistically imaginable with reference to him.”<sup>31</sup> (Emphasis added.)*

- 15 The elapse of long-time does not itself warrant a presumption of death order.
- “[T]here will always be a reluctance to assume that death alone will serve to*

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<sup>30</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 381.

<sup>31</sup> *Ex Parte Govender* 1993 (3) SA 722 (D) 722-723.

*explain a disappearance when the pointers to that conclusion are minimal and rest on little else save conjecture*".<sup>32</sup> However, this rule is not inflexible and in circumstances where an elapse of thirty-five years had passed and the subject would be of old age, our courts have presumed death.<sup>33</sup>

16 Our courts have considered various factors in determining whether to grant a presumption of death order, including:

16.1 The age of the subject at the time of the application.<sup>34</sup>

16.2 The general well-being and health of the subject,<sup>35</sup> including whether they were in failing health.<sup>36</sup>

16.3 The reasons for the subject's disappearance.<sup>37</sup>

16.4 The inquiries made to verify the subject's whereabouts.<sup>38</sup>

16.5 The reasons why the subject's body, if indeed dead, has not been found.<sup>39</sup>

16.6 Whether the subject, on the facts, probably met their death by accident, suicide or homicide.<sup>40</sup>

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<sup>32</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 382.

<sup>33</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 382, applying *Ex Parte Engelbrecht* 1956 (1) SA 408 (E)

<sup>34</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 381, *Ex Parte Govender* 1993 (3) SA 722 (D) 722, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1301.

<sup>35</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 381, *Ex Parte Govender* 1993 (3) SA 722 (D) 722, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1300-1301.

<sup>36</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 383, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1301, *Ex Parte Rungsamy* 1958 (4) SA 688 (D).

<sup>37</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 381.

<sup>38</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 382, *Ex Parte Govender* 1993 (3) SA 722 (D) 722, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1300.

<sup>39</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 382.

16.7 Whether a press report on the subject's disappearance prompted information on the subject's whereabouts.<sup>41</sup>

### ***Applying the Principles***

17 When these principles are applied to this application, it is clear that this Court should grant the requested presumption of death.

18 The period of time that has elapsed since Nokuthula's disappearance is some 36 years.<sup>42</sup> This period is significant, and our courts have ordered a presumption of death after the elapse of similar time periods.

19 Nokuthula was in a grave state at the time that she was last seen as a result of her treatment at the hands of the SB.<sup>43</sup> It is improbable that she would have survived without urgent medical attention and hospitalization, of which there is no record.<sup>44</sup> Indeed the last time she was seen alive by the black police officers she was in the boot of Willem Coetzee's<sup>45</sup> vehicle, still restrained with handcuffs and leg irons.<sup>46</sup>

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<sup>40</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 383, applying *Ex Parte Chodos* 1948 (4) SA 221 (N), *In re B R C Cook* 1907 NLR 315, *In re Labistour* 1908 NLR 227, *Ex Parte Dorward* 1933 NPD 17, *Ex Parte Holden* 1954 (4) SA 128 (N), *Ex Parte Govender* 1993 (3) SA 722 (D) 723, *Ex Parte Stoter* 1996 (4) SA 1299 (E) 1301.

<sup>41</sup> *Ex Parte Govender* 1993 (3) SA 722 (D) 722.

<sup>42</sup> FA p 28 para 73.1.

<sup>43</sup> FA p 29 para 73.2.

<sup>44</sup> FA p 14 para 27.1.

<sup>45</sup> Coetzee was the officer commanding the SB's Soweto Intelligence Unit.

<sup>46</sup> FA p 16 para 30.

20 Nokuthula's was enforcedly disappeared in a "kopdraai" operation. Considering the *modus operandi* of the SB and circumstances in which Nokuthula was taken, the overwhelmingly likely that she was murdered by the SB to cover-up the failed "kopdraai", which involved her kidnapping and unrelenting torture.<sup>47</sup>

20.1 As mentioned above, according to the black police officers, Nokuthula was wholly incapacitated, could no longer walk, her body was bruised and swollen, and her face was unrecognisable.

20.2 As forcefully pointed out by Frank Dutton, aside from protecting themselves and their informant from follow-up, there was simply no way the police could return her to Swaziland in such a desperate state.<sup>48</sup>

21 Nokuthula's body has not been found. The testimony of the black SB officers demonstrates that the white SB officers had to conceal the location of her body in order to cover-up the fact they had murdered her and to maintain the falsehood that she had been released to Swaziland as an SB informer.<sup>49</sup>

22 Despite significant investigative efforts by the family and widespread media coverage, Nokuthula has not been heard from.<sup>50</sup>

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<sup>47</sup> FA pp 16-17 paras 33, 35.

<sup>48</sup> Supporting affidavit of Frank Dutton, paras 77 - 95 at pp 93 – 95.

<sup>49</sup> FA p 16 para 31; pp 18-19 paras 37-41.

<sup>50</sup> FA p 29 paras 73.3-73.4.

## CONCLUSION

- 23 This application is brought by way of a *rule nisi*. Accordingly, all the applicant needs to establish is a *prima facie* case to obtain the relief sought.<sup>51</sup>
- 24 The applicant will then serve this Court's order:<sup>52</sup>
- 24.1 By publishing the order in one edition of the Government Gazette, *Die Beeld* and the *Citizen* newspapers; and
- 24.2 By the Deputy-Sheriff serving a copy of this Court's order on those SB officers that are accused of having perpetrated Nokuthula's murder.<sup>53</sup>
- 25 This will permit any interested persons an opportunity to place any additional facts before this Court on the return date to either support or oppose the confirmation of the *rule nisi*. This is the standard procedure that has typically been adopted by our courts.<sup>54</sup>
- 26 To this end, the applicant has provided for a period of fifteen court days prior to the return date.<sup>55</sup>

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<sup>51</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D) 381.

<sup>52</sup> NOM pp 1-2 para 2.

<sup>53</sup> Former SB Officer Msebenzi Timothy Radebe apparently died earlier this year. The applicant's attorney has requested the NPA to establish to locate an unabridged death certificate for Mr. Radebe, which has not as yet been provided.

<sup>54</sup> *Ex Parte Pieters* 1993 (3) SA 379 (D), *Ex Parte Govender* 1993 (3) SA 722 (D), *Ex Parte Stoter* 1996 (4) SA 1299 (E).

<sup>55</sup> NOM p 2 para 3.

**H VARNEY  
T SCOTT**

Counsel for the Applicant

Chambers, Sandton  
07 June 2019

## TABLE OF AUTHORITIES

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