

Former Commissioners of the Truth and Reconciliation Commission

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5 February 2019

Dear Mr. President,

CALL FOR APOLOGY TO VICTIMS & FOR APPOINTMENT OF A COMMISSION OF INQUIRY TO INVESTIGATE THE SUPPRESSION OF THE TRC CASES

We write to you as former Members of the Truth and Reconciliation Commission (TRC) to call on you to appoint a commission of inquiry into the political interference that has stopped the investigation and prosecution of virtually all the cases referred by the TRC to the National Prosecuting Authority (NPA). We also call on you, in your capacity as President of South

Africa, to apologise to victims of apartheid-era atrocities who have been denied justice for several decades and suffered considerable trauma as a result.

Thembi Nkadimeng, the sister of Nokuthula Simelane, Lukhanyo Calata, the son of Fort Calata, Imtiaz Cajee, nephew of Ahmed Timol, and Jill Burger, sister of Neil Aggett have been struggling for justice and closure over several decades. Their struggles are symbolic of those waged by countless other families. The sacrifices made by their loved ones laid the basis for South Africa's democracy with its enshrined freedoms. The families feel justifiably betrayed by South Africa's post-apartheid state which, to date, has turned its back on them. We owe them answers and we owe them an apology.

Amnesty process

The historic compromises made during our negotiations for a peaceful transition demand that justice be pursued for serious apartheid-era crimes, such as murder. This was encapsulated in the postscript to the Constitution of the Republic of South Africa Act 200 of 1993 ("the Interim Constitution") and subsequently in the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the TRC Act"). The constitutional and statutory design of the amnesty process specifically envisaged that criminal investigations, and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or failed to apply for amnesty. This lay at the heart of the compact struck with victims. The compact required the State to take all reasonable steps to pursue justice where perpetrators were not amnestied.

In our Final Report released on 21 March 2003 we stressed that the amnesty should not be seen as promoting impunity. We highlighted the imperative of "*a bold prosecution policy*" in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.¹ Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those refused amnesty. Sadly, this has not happened.

Political interference

Post the TRC, the story of post-apartheid justice in South Africa is a shameful story of terrible neglect. Both the SAPS and the NPA colluded with political forces to ensure the deliberate suppression of the bulk of apartheid era cases. Even though the TRC had handed over a list of

¹ Vol 6, Section 5, Ch 1 at para 24

several hundred cases to the NPA with the recommendation that they be investigated further, virtually all of them were abandoned. All these cases involved gross human rights violations such as torture, murder and enforced disappearances in which amnesty was either denied or not applied for (the TRC cases).

The reasons for the inaction on the TRC cases were exposed in the 2015 legal proceedings launched by Thembi Nkadimeng who sought to compel the NPA to make a prosecutorial decision in the 1983 murder of her sister, Nokuthula Simelane, by Security Branch officers.² This application disclosed evidence of gross political interference in the operations of the NPA, as per the supporting affidavits of former NDPP, Adv. Vusi Pikoli and Anton Ackermann SC, former Special Director of Public Prosecutions in the Office of the NDPP and former head of the PCLU. The aforesaid NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases.

A secret Amnesty Task Team was established in 2004 to address “*the absence of any guarantee that alleged offenders will not be prosecuted*”,³ which resulted in amendments to the NPA’s Prosecution Policy to allow for a backdoor amnesty as well the launch of President Mbeki’s Special Dispensation on Political Pardons. Both initiatives had to be stopped in the courts.⁴ The Nkadimeng case disclosed a memorandum addressed by Pikoli to the then Justice Minister, Bridgett Mabandla, in which Pikoli concludes that there had been improper interference in relation to the TRC cases and that he had been obstructed from taking them forward. He complained that such interference impinged upon his conscience and his oath of office.⁵

As a result, when Imtiaz Cajee approached the NPA in 2003 to investigate the death in detention of Ahmed Timol no investigation took place. The NPA pretended that the matter had been investigated when in fact it was not.⁶ Had it been investigated the lead interrogators could have been held to account, since the last suspect only died in 2012. This amounted to a travesty of justice. Indeed, the NPA had to be threatened with litigation to have the Timol inquest reopened in 2017.⁷

² *Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others*, Gauteng Division Case Number 35554/2015

³ Undated Secret Report: Amnesty Task Team.

⁴ *Nkadimeng v National Director of Public Prosecutions* [2008] ZAGPHC 422; *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC).

⁵ ‘PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES’ dated 15 February 2007 (classified secret).

⁶ The speaking to one journalist does not amount to an investigation. See “*History, suppressed: What didn’t get revealed at the Timol inquest*” by Kevin Bloom published in the Daily Maverick on 22 September 2017

⁷ Para 114 and sub-paras read with annexes IC21 – 24 of the answering affidavit of Imtiaz Cajee, *Rodrigues v NDPP & Others*, Case No.: 76755/18, Gauteng Division.

Pikoli and Ackermann stated in 2015 that it was no coincidence that there had not been a single prosecution of any TRC matter since September 2007. The indictment in the Nokuthula Simelane case in 2016 was only issued because of the litigation launched in the abovementioned Nkadimeng case. Needless to say, the Simelane and Timol families had to conduct the investigations themselves and rely on the services of pro bono lawyers in order to make these modest advances.

Emboldened by the outcome of the reopened Timol Inquest, human rights activists placed 20 more cases (including the Cradock 4 and Pebco 3 murders) before the NPA and the Hawks in January 2018. Although the Hawks appointed investigating officers it was subsequently discovered that the officers leading the investigations were former Security Branch (SB) or associated with the SB. The most senior investigator had been implicated in the torture of a political detainee in the 1980s. This detainee, together with his wife, were subsequently shot dead by the SB, after he sued the SAP for damages. Although the two officers have since been removed from these investigations following complaints, it is hardly surprising that no progress has been made in any of these 20 cases. As recent as 2018 it is still business as usual with the TRC cases ultimately controlled by forces from the past.

We note with alarm that the real decision makers behind the atrocities committed by the erstwhile SB have not been investigated and prosecuted. Individuals, such as Eugene de Kock and those recently indicted in the Nokuthula Simelane case, were mere foot soldiers. While junior officers must face justice, they acted at the behest of the generals and politicians who remain shielded from accountability. The failure to pursue those most responsible speaks volumes about the captured state of our criminal justice system.

Need for a commission of inquiry

In our view it can be safely concluded that the SAPS and the NPA became captured by political forces in respect of the TRC cases. The few prosecutors with the courage to stand up to the political interference were either removed from their positions or frozen out from these cases. The rest acquiesced and ensured that the TRC cases never saw the light of day.

We contend that the manipulation of the criminal justice system to protect individuals from prosecution serves an ulterior and illegal purpose, interferes with the independence of the NPA and amounts to gross subversion of the rule of law. Indeed, those behind the suppression of these cases may very well have been involved in a conspiracy to obstruct or defeat the course of justice, which is a very serious crime in South African law.

In the application brought by Joao Jan Rodrigues to permanently stay the prosecution against him for his role in the murder of Timol, the NPA and the SAPS in papers filed on 4 February 2019, admitted to the political interference described above.

We accordingly request that you appoint a commission of inquiry to investigate the political interference set out in this document and identify those responsible, within and outside the NPA and SAPS, for suppressing the TRC cases. The terms of reference should consider whether such persons have acted unlawfully, committed any crimes and what steps, if any, should be taken against them. The terms should also include the making of recommendations to prevent such manipulation taking place in the future.

Alternatively, since the political interference has taken the form of state capture you could instruct the *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* (also referred to as the Zondo Commission) to carry out this inquiry. Further alternatively you could expand the mandate of the *Mokgoro Commission of Inquiry* – which is already seized with a probe into the NPA, to handle this inquiry.

Need for apology

The failure to investigate and prosecute those who were not amnestied represents a deep betrayal of all those who participated in good faith in the TRC process. It completely undermines the very basis of South Africa's historic transition. The failure stands as a betrayal of victims who have been waiting for the criminal justice process to take its course and has added considerably to their trauma. Indeed, the policy or approach to allow perpetrators to escape justice adds insult to the suffering endured by victims.

Above all, the failure stands as a betrayal of all South Africans who embraced the spirit of truth and reconciliation in order to move beyond the bitterness of the past. The failure is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in dealing with crimes of the past.

We as former Commissioners are deeply outraged by the actions of those who purport to serve the State and who in fact are compromising it. So far nobody in authority has acknowledged that the role of the NPA and SAPS amounted to the most fundamental violations of the Constitution and the law. No expression of regret, remorse or apology has been offered by anybody in authority for the deep betrayal of victims of past atrocities.

We respectfully call on you to apologize to the victims in your State of the Nation Address for the dereliction of duty by those who were meant to serve.

Yours faithfully



Yasmin Sooka and Advocate Dumisa Ntsebeza SC

On behalf of the Commissioners who have endorsed this letter

Ms Yasmin Sooka

Adv. Dumisa Ntsebeza SC

Ms. Mary Burton

Ms. Glenda Wildschut

Dr Fazel Randera

Mr Richard Lyster

Revd Bongani Finca

Adv Denzil Potgieter

Dr Wendy Orr

Desmond and Leah Tutu Legacy Foundation on behalf of Archbishop Emeritus

Desmond Mpilo Tutu

Former Committee Members

Dr Russell Ally

Prof Piet Meiring.

This letter is also endorsed by the South African Coalition for Transitional Justice constituted by the below-mentioned organisations and individuals:

Centre for the Study of Violence and Reconciliation(CSVR)

Khulumani Victims Support Group

Institute for Justice and Reconciliation(IJR)

Foundation for Human Rights(FHR)

Ahmed Timol Family Trust

Mr. Imtiaz Cajee
Legal Resources Centre
Imam Haron Family
Ms Shamela Shamis
Mr. Muhammed Haron
Ms Fatima Haron Masoet
Mr. Lukhanya Calata
South African History Archives(SAHA)
Ms. Jill Burger
Ms. Shirley Gunn
Mr. Hugo van der Merwe
Ms Valdi van Reenen-le Roux
Ms. Maxine Rubin
Ms. Judy Seidman
Mr. Stanley Henkerman
Ms. Sufiya Bray
Mr. Piers Pigou