

# Stalling the wheels of justice

The NPA's long delays in prosecuting the perpetrators of apartheid-era crimes have sinister implications that must be exposed for justice to prevail, writes

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For many families, the quest to unearth the truth they did not find through the Truth and Reconciliation Commission (TRC) is a frustrating, Sisyphean one. It's filled with piles of paper — news reports, affidavits, investigation dockets, autopsy reports, inquest reports, dog-eared photographs — all serving as reminders of delays and finger-pointing that place any sort of resolution ever further out of reach.



A pattern emerges from these pieces of paper that raises questions about the government's commitment to doing the job it was mandated to do after the TRC report was handed over in 2003.

The story that emerges is one of callous indifference, political expediency and disdain for the supposedly enshrined independence of the National Prosecuting Authority (NPA). It's a story that's coming to light, ironically, as a result of the judicial body's attempt to fulfil its mandate in a recent case, which many victims thought would provide some light at the end of what has been a long, dark tunnel.

In 2015, Thembisile Nkadimeng, the executive mayor of Polokwane, filed an application to force the NPA to make a decision regarding the prosecution of four former members of the apartheid security branch for their involvement in the murder and disappearance of her sister Nokuthula Simelane in 1983.

While the men had received amnesty during the TRC process for their role in the torture and kidnapping of Simelane, they had claimed she was alive when they last saw her and that they had no knowledge of what had happened to her. Nkadimeng refused to accept this version. She and her family employed a private investigator to find and provide new information to the NPA and demand a prosecution for murder.

#### Intentional neglect of serious crimes

Nkadimeng attached to her application a series of affidavits to support her contention that there had been a deliberate delay on the part of the NPA to institute a prosecution. She described the delays as reinforcing her belief “that serious crimes of the past do not receive any diligent attention from authorities and indeed have been singled out for neglect. It also reinforces the likely views of the perpetrators that they need not fear any repercussions for crimes such as murder, so long as these have a political flavour.”

The affidavits supporting Nkadimeng’s accusations of deliberate delay came from former NPA chief Vusi Pikoli; Anton Ackermann, former head of the priority crimes litigation unit (PCLU); former TRC investigator Dumisa Ntsebeza; former TRC commissioner Alex Boraine (who died last month); and retired Scorpions head turned private investigator Frank Dutton. The picture they paint is one of a deliberate attempt by powerful figures within the Thabo Mbeki administration to ensure that cases such as the Simelane one should not be prosecuted or investigated.

In 2016 the NPA announced that it would bring a prosecution against the four policemen involved, but the trial was sidetracked by a dispute over whether the South African Police Service (SAPS) was responsible for the legal costs of apartheid-era cops — a fight that was resolved only last year with a ruling that the SAPS should indeed pay. The case has yet to resume and so the allegations of political interference submitted as part of Nkadimeng’s application four years ago have yet to be tested in court.

While the battle over costs was being fought in the Simelane matter, another family was pushing for answers of their own. The family of Ahmed Timol, a Roodepoort teacher who had supposedly jumped to his death from a 10th-floor office in John Vorster Square in 1971, had been waiting more than four decades to have the decision of the original 1972 inquest reversed; it had found “no-one to blame” for what was ruled a suicide.

#### Timol family’s uphill battle

Driven by the dogged determination of Timol’s nephew Imtiaz Cajee — who, following the failure of any of the officers involved in the case to apply for amnesty at the TRC, had done his own investigation — the family eventually got the NPA to reopen the inquest in 2017. In their arguments, lawyers for the family raised the issue of political interference, but this was not dealt with in any detail by judge Billy Mothle as the inquest was specifically focused on what had really happened to Timol in his last moments in room 1026 of the country’s most notorious police station.

Of the three men who were with Timol before he died, two — captains Gloy and Van Niek-erk — had since died, though they were still alive when Cajee first approached the NPA in 2003. The only one still living was former security branch pay clerk João Rodrigues, 87. The 2017 inquest ruled that Timol was killed by members of the security branch, that he was likely pushed from the roof of the police station and that Rodrigues had lied about what happened, leaving him open to prosecution for murder.

Rodrigues was charged last year but over the past months there has been a lengthy back-and-forth between his legal team and that of the Timol family. Rodrigues is seeking a stay of prosecution, claiming that delays and the length of time since the event are prejudicing his constitutional right to a fair trial.

It's that claim of delays that has allowed Cajee and the Timol family to submit in their responding papers all the affidavits from the Simelane case as evidence of how political interference has hampered TRC cases. It has also spurred Cajee to call on President Cyril Ramaphosa to establish a judicial commission of inquiry into the lack of will to prosecute apartheidera cases.

This week, Cajee's lawyers filed heads of argument in opposition to Rodrigues's application for a stay in prosecution. Regarding the delay between 2002 when the TRC ended its work and October 2017 when the Timol inquest began, they say: "The failure to act by NPA and the SAPS in this period constitutes a violation of their obligations and duties under the constitution, their enabling acts and the NPA's prosecution policy. It may also very well constitute a wilful obstruction of the course of justice."

While the NPA supports the Timol family's fight against Rodrigues's stay of prosecution and wishes to go ahead with the case, which would be the first postapartheid prosecution of a member of the former security police, it has now been forced to answer questions about its lack of progress on other matters. Although delays during the apartheid era and the years from the establishment of the TRC in 1996 to the handing over to Mbeki of its final report in 2003 can be explained, there are questions to answer about the period after that.

In his speech to parliament in April 2003 marking the delivery of the final report of the TRC, Mbeki said that as far as the prosecution of perpetrators who had not received amnesty or had failed to apply was concerned, the government was "of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human rights violations". The matter would be "left in the hands of the [NPA] for it to pursue any cases that ... it believes deserve prosecution and can be prosecuted."

In line with this, the PCLU was established under Ackermann, who received, according to his affidavit in the Simelane case, "more than 400 investigation dockets". He and fellow advocate Chris MacAdam "conducted the initial audit and identified 21 cases as worthy of further investigation".

A further 16 cases were identified for prosecution between 2004 and 2005, bringing the total number to only 37 out of the initial 400 handed over by the TRC.

One of the cases deemed worthy of prosecution related to the attempted murder of Frank Chikane in 1989. The case involved three former policemen and two high-level superior

officers — former minister of law & order Adriaan Vlok and former police commissioner Gen Johan van der Merwe.

On the morning of November 11 2004, Ackermann said in his affidavit, he received a phone call from attorney Jan Wagener who was acting for the suspects.

“He told me that I would receive a phone call from the ministry of justice and I would be advised that the case against his clients must be put on hold. Shortly thereafter I received a phone call from an official in the then ministry of justice.

“I was informed by the said official that a decision had been taken that the Chikane matter should be put on hold pending the development of guidelines to deal with the TRC cases. I told him that only the national director of public prosecutions [NDPP — at the time Bulelani Ngcuka] could give me such an instruction. A few minutes later the NDPP contacted me and instructed me not to proceed with the arrests. I believe that it can be safely assumed that the NDPP was instructed at a political level to suspend these cases.”

TRC cases were subsequently put on hold. In 2005, an amended prosecution policy in which cases would be reviewed by a panel made up of representatives of various government departments, including the intelligence agencies and the police, was instituted. But this was scrapped after civil society critics argued that this panel would do exactly what Mbeki had promised not to do — provide a second round of amnesty for perpetrators who had escaped the TRC.

Ackermann said he believed that the amendments “were aimed solely at accommodating perpetrators and providing them with another avenue to escape justice”.

Both Ackermann and Pikoli, Ngcuka’s successor as NDPP, complain in their affidavits that during the period between the enactment of the amended guidelines and their scrapping, the late Jackie Selebi — who was commissioner of police at the time — interfered in their work. Selebi, they said, believed that SAPS and National Intelligence Agency (NIA) officials should be part of the prosecutorial process.

In his affidavit Pikoli recounts being summoned to a meeting in 2006 at the home of the then minister of social development, Zola Skweyiya, at which “it became clear that there was a fear that cases like the Chikane matter could open the door to prosecutions of ANC members”.

Pikoli’s unwelcome probing

This impression was further cemented by a letter from the then minister of justice Brigitte Mabandla to Pikoli in February 2007, in which she told him she believed it had been decided that “the NPA will not go ahead with prosecutions” arising from the TRC’s unfinished business.

A few days later Pikoli wrote a secret memorandum to the minister in which he laid out the difficulties he was having trying to maintain the independence of his office with regard to these types of prosecutions. He complained that he was “hindered and/or obstructed from carrying out my functions ... It would appear that there is a general expectation on the part of the department of justice & 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.”

On September 23 2007, Pikoli was suspended as NDPP by Mbeki. In his affidavit, Pikoli says he had “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 TRC contributed to the decision of president Mbeki to suspend me”.

Ackermann had been seen as Pikoli’s right-hand man and had drawn the ire of the then director-general of the department of justice, Menzi Simelane, who had approached Pikoli regarding Ackermann’s handling of TRC cases and pushed for his removal from them. When Pikoli was suspended, Ackermann was summoned to the office of the acting NDPP, Mokotedi Mpshe, and relieved of his duties in relation to TRC cases with immediate effect. Ackermann believed at the time that “if I was being removed from TRC cases then nobody else would be permitted to pursue the cases boldly and fearlessly”.

To date none of the officials mentioned in these affidavits has responded to any of the accusations and it would seem that Ackermann, who retired from the NPA in 2013, was right. However, after the second Timol inquest it was believed by many that the NPA would now push swiftly forward with its mandate in regard to TRC cases. A list of 20 was submitted to the agency in January 2018 and an investigative team was established by the Hawks to look into these cases, which include the deaths of Neil Aggett, the Cradock Four and the Pebco Three.

The lead investigators appointed to head this unit? Two former security policemen, one of whom was accused of assault in 1986. After complaints from lawyers for the families, the two officers were removed from the investigation team but to date there has been little progress on any of those 20 cases.

Full-steam ahead for Hawks

In an interview with 702’s Joanne Joseph last week, NPA spokesperson Luvuyo Mfaku said his office has “about four matters emanating from that TRC list that are before court”, but did not identify any of them.

Asked about the accusations in Pikoli and Ackermann’s affidavits, Mfaku said: “I will never contest that. Remember advocate Pikoli was the head of the NPA and Ackermann was the head of the priority crime unit which was guiding the investigations in respect of the TRC matters. If they are saying that there was that interference, then they have exclusive knowledge of what was happening. I would never contest that.”

In the same show, Hawks spokesperson Brig Hangwani Mulaudzi told Joseph that the unit has “a team of about 15 investigators ... working full-steam in terms of making sure that these cases are getting priority”.

That may be so, but in cases where the chances of bringing prosecutions is diminishing due to the age of suspects and the lack of survivors, it’s scant comfort for families who have waited decades for answers.

Earlier this month, Ramaphosa presented the Isithwalandwe Award to Timol’s family in recognition of the activist’s contribution to the liberation struggle. He told them the ANC “felt great sadness at his death”.

The question is whether that sadness will translate into a serious and determined examination of accusations of political interference into the investigation of the deaths of Timol and many other activists.

Such an investigation may seem like a sideshow in today's political circus, but it might explain why the right to justice that is enshrined in the constitution, and which was one of the foundations of the negotiated settlement that Ramaphosa was so instrumental in forging, has yet to be delivered to those to whom it was promised.

Time is running out.

I believe that it can be safely assumed that the NDPP was instructed at a political level to suspend these cases Advocate Anton Ackermann Commenting on developments in unresolved TRC-related cases in 2004

It would appear that there is a general expectation ... that there will be no prosecutions and that I must play along. My conscience and oath of office does not allow that Vusi Pikoli In a memorandum to the minister of justice in 2007