IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 76755/2018

In the matter between:

JOAO RODRIGUES	Applicant
and	
THE 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

APPLICANT'S WRITTEN SUBMISSIONS

A. INTRODUCTION:

1.

Applicant approached this Honourable Court for an order prohibiting the First and/or Second Respondents to proceed with the criminal prosecution against Applicant on a charge of murder as set out in the indictment annexed

to the founding papers relating to the death of the late A E Timol ("the deceased").

2.

First and Second Respondents gave notice of their intention to oppose the application and thereafter filed opposing affidavits.

3.

Third Respondent filed a notice to the effect that Third Respondent will abide the decision of the Court. Third Respondent, however, subsequently filed an affidavit following the answering affidavit filed on behalf of the Fourth Respondent. It will, however, be submitted that this affidavit does not deal with the issues material to this application.

4.

A number of parties claiming to have an interest in the proceedings subsequently applied to be joined as further Respondents and/or *amicus curiae* to the proceedings.

5.

On the 19th of December 2018 this Honourable Court granted leave to the Fourth Respondent to be joined as a party. Fourth Respondent thereafter also filed an affidavit opposing the application and subsequently a further supplementary affidavit. The other Respondents' applications were dismissed.

6.

The complexity and direction of the application then dramatically changed when First Respondent, clearly prompted by the answering affidavit filed on behalf of the Fourth Respondent, made a complete turnaround in their approach. They now admit under oath that the delay of the prosecution was the result of a deliberate decision not to prosecute these political offences, following political interference in the criminal justice system from the highest levels of Government (including the then State President).[1]

7.

The allegation in the supplementary affidavit of the First Respondent to the effect that:

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[1] See: First Respondent's Supplementary Affidavit: P. 770, par 2.35

"… 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 the supplementary answering affidavit."[2]

is clearly opportunistic. The basis of the application is that First Respondent failed to comply with its obligations in terms of the Constitution to proceed speedily against the Applicant in order to afford him a fair opportunity to defend himself. First and Second Respondents perpetuated their unconscionable conduct in the above regard by failing to disclose these facts to the Honourable Court in their answering affidavits.

8.

It is inconceivable on what basis the First Respondent can now allege that they were not called upon to disclose the reasons for the enormous time delay to commence with the proceedings against the Applicant. There was undoubtedly a duty on the First and Second Respondents, as the National

[2] See: First Respondent's Supplementary Affidavit: P. 770, par 2.35

Director of Public Prosecutions and the Minister of Justice, to disclose all relevant facts to a Court under these circumstances. This issue has been exacerbated by the fact that Applicant specifically criticised First to Third Respondents in the replying affidavit for not explaining what the cause of the delay indeed was.

9.

The question arises, if the Respondents are not frank with the Court in this regard, how can Respondents be trusted in any of the other explanations provided in these papers.

10.

Inexplicably the Second Respondent, who was clearly, based on the new information disclosed, party to the decision not to prosecute and/or have knowledge of the granting of an amnesty in terms of the Constitution chose not to take the Court in his confidence by disclosing the true facts relevant and material to this application, and Second Respondent's participation in this interference.

11.

We unfortunately have to submit that the Court deals with Respondents, representing the highest offices in the land, that are not open and frank with the Court.

B. *IN LIMINE*:

12.

It has to be mentioned, at this stage, that the question arises whether this Court is in a position to properly adjudicate the issues to be determined. This concern is based on the fact that the Respondents, more in particular Second Respondent, failed to disclose all material relevant facts to the Court. The objective facts are of course that these facts and information are not in the public domain. We have therefor to make the submission that this was an opportunistic attempt by First and Second Respondents to withhold this vital information from Court. The relevant memorandum was indeed mark “secret”.

13.

It was only after the Fourth Respondent (the deponent bening a member of NIA)[3] disclosed certain material issues in its answering affidavit that the First Respondent was prompted to make a turnaround in its approach to the application and disclose some of these facts and now formally admitted under oath that there was a serious infringement of the independence of the First Respondent by Government officials on the highest level (including the State President).

14.

The startling admission in this regard was formulated as follows in the supplementary affidavit filed on behalf of the First Respondent:

> *"… 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."*[4]

[3] See: First Respondent's Supplementary Affidavit: P. 828, Annexure "RCM8"
[4] See: First Respondent's Supplementary Affidavit: P. 758, par 2.12

15.

The development of this turnaround by the First Respondent can be summarised as follows:

15.1. Prior to the filing of the answering affidavit and in the answering affidavit itself the First Respondent maintained its stance that there was no material delay in the prosecution of the Applicant in this matter.

15.2. The First to Third Respondents failed to disclose, even remotely that there was political interference causing the delay in the prosecution.

15.3. It was only after the filing of the answering affidavit on behalf of the Fourth Respondent that the First Respondent made a turnaround in its approach and now admit that the cause of the delay was a deliberate decision not to prosecute *inter alia* the Applicant as a result of political interference:

> *"… 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"."[5]

15.4. In conclusion the deponent on behalf of the First Respondent's supplementary affidavit stated the following:

"I agree with what the Fourth Respondent says … 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. …"[6]

16.

The material questions are of course whether the State President granted an amnesty and/or what the effect of this agreement/arrangement/conduct by Government, at the highest level, should be on individuals who were not part of this interference and did not even know about such interference. We submit that the correct approach can never be to prejudice the right to a fair trial of individuals as a result of the conduct of Government. This can clearly not be the correct approach.

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[5] See: First Respondent's Supplementary Affidavit: P. 763, par 2.21
[6] See: First Respondent's Supplementary Affidavit: P. 768, par 2.30

17.

A further material problem that this Honourable Court faces at this stage is the fact that Second Respondent, who was clearly party to the political interference in the criminal justice system, chose not to take the Honourable Court in its confidence in this regard. No mention was made in the answering affidavit filed on behalf of the Second Respondent dealing with the political interference. Even more significant is the fact that the Second Respondent failed to deal with this issue even following the answering affidavit filed on behalf of the Fourth Respondent and/or the filing of the supplementary affidavit on behalf of the First Respondent.

18.

As submitted above the explanation by the First Respondent for its failure to disclose the relevant and very material facts to the Court is totally unacceptable.

19.

It appears, at this stage, that this Court is confronted with a situation that it has to adjudicate on an extremely serious issue involving

"gross subversion of the rule of law"

from the highest offices of Government and without being provided with all the relevant documentary material and information.

20.

The inexcusable aspect of the above situation is the fact that the failure to provide this Court with the necessary documentation and information has to be ascribed to the deliberate and unconscionable conduct of the First to Third Respondents, more in particular the Second Respondent.

21.

We have addressed a letter to the attorneys acting on behalf of the First to Third Respondents in order to obtain the further relevant and material documentation and information relating to the issue to be adjudicated. At this stage we have not received any response to our request.[7]

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[7] See: Applicant's Supplementary Replying Affidavit: P. …, Annexure "JR1" (Hierdie brief is aangeheg by die laaste verklaring wat ons eergister ge-file het)

22.

We therefore have to agree with the sentiments expressed by the Fourth Respondent, in this regard, that the interests of justice require that the State President be approached in order to appoint a Commission of Inquiry to investigate the issue and obtain all the relevant facts pertaining to the issue.

23.

It is submitted that this is a matter of extreme importance and that the further prosecution of numerous potential accused, on both sides of the political spectrum, will depend on the outcome of this application. We submit that it will be totally unsatisfactory and not in the interest of justice that this Court will have to decide on this issue without having had the opportunity to consider all relevant facts and documentation relating to the issue.

24.

It appears that there was indeed amnesty granted *alternatively* an agreement reached on the highest Governmental level by interested parties not to prosecute in politically motivated crimes preceding 1994. This

agreement clearly included perpetrators on both sides of the political spectrum.

25.

Although the Applicant was not a party to such an agreement/arrangement it is clear that the present incident falls within the ambit of such arrangement/arrangement.[8]

26.

The validity of such pardon and/or agreement may be in dispute but it is submitted that it will clearly not be in the interest of justice for this Honourable Court to adjudicate this issue without having been provided with the full detail of such agreement/arrangement including detail relating to the parties, the terms and any further conditions to such agreement. What is objectively clear is that there were instructions from the highest level of Government not to proceed with prosecutions within this category, including the prosecution against the Applicant.

[8] See: First Respondent's Supplementary Affidavit: P. 766, par 2.21.8

27.

We will, at this stage, and without having had the advantage of knowledge of all the relevant facts pertaining to the issue, submit heads of argument. We have to emphasise that our view is, however, that we are not in a position to fully deal with the relevant issues and that the Court is probably not in a position to properly adjudicate the issues for the reasons set out above.

C. BASIS OF THE APPLICATION:

28.

The application is based on the principle that the prosecution will infringe Applicant's constitutional right to a fair trial as provided for in section 35(3) read with section 12 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"). It will also infringe the Applicant's right to dignity, to stand trial at the age of 80 years following an incident that occurred almost 50 years ago. Applicant submits that the envisaged prosecution will infringe the following fundamental rights provided for in section 35(3) of the Constitution:

28.1. Subsection 35(3)(d) – Applicant's right to have the trial to begin and be concluded without unreasonable delay.

28.2. The right to have a fair trial that is procedurally fair and is not instituted and/or prosecuted with an unlawful and/or improper motive. This will include the requirement of a fair procedure prior to the institution of the prosecution.

28.3. The issue relating to an amnesty granted by the President in terms of section 84(2)(j) of the Constitution.

28.4. The issue relating to an existing agreement/arrangement between Government and other interested parties not to prosecute in certain alleged offences, including the incident relevant to this application, has now also become relevant. The prosecution of the Applicant contrary to a specific agreement/arrangement in this regard will certainly have a bearing on the fairness of the prosecution.

28.5. Subsection 35(3)(a) - the right to be informed of the charge against Applicant with sufficient detail to answer to it.

28.6. Subsection 35(3)(i) - the right to adduce and challenge evidence effectively.

28.7. Subsection 35(3) further provides for the right to remain silent and not to incriminate Applicant.

D. <u>BACKGROUND FACTS</u>:

29.

From the papers the following background facts appear to be undisputed:

29.1. The deceased and one Salim Essop ("Essop") were arrested on the 22nd of October 1971 at a roadblock in Coronationville. When searching their vehicle, the Police found pamphlets of the then banned SACP in the boot of the vehicle. The deceased was apparently a member of the then banned SACP at that stage.

29.2. The deceased was held in custody at the offices of the Security Branch of the South African Police at John Vorster Square where he was interrogated and allegedly tortured.

29.3. On the 27th of October 1971 the deceased died as a result of injuries suffered when he fell from the offices of the Security Branch at John Vorster Square whilst in custody.

29.4. An inquest was held in 1972 following the death of the deceased. The Presiding Magistrate concluded that the deceased had committed suicide and no person was responsible for his death.

29.5. The family of the deceased did not accept the mentioned finding and subsequently approached, on a number of occasions, *inter alia,* the First Respondent to reconsider the situation.

29.6. They assured the First Respondent that they had obtained evidential material to the effect that it was clear that Timol did not commit suicide but that he was probably murdered.

29.7. The First Respondent eventually, and after many years following the request to reconsider the issue, made recommendations to the Second Respondent for the re-opening of the inquest of the deceased in terms of section 17A of the Inquest Act, Act 51 of 1959.

29.8. The Truth and Reconciliation Commission ("TRC") also investigated the death of the deceased. It appears from a statement of the investigating officer, Captain Benjamin Nel (deposed to on the 23rd of June 2017) that he, as part of his investigation into the Timol matter, studied the TRC report on the death of the deceased.

29.9. Applicant was indeed approached by an investigator on behalf of the TRC during 1996 and questioned about the incident relating to Timol.

29.10. The State President and Government on the highest level indeed considered amnesty for politically motivated offences following the TRC proceedings. A special task team had indeed been appointed for this purpose. Unfortunately we do not know what the specific outcome of the consideration by the State President was in this

regard. We will, however, submit that the most probable inference is that there was indeed an amnesty granted.

29.11. It was only in 2017 (more than 20 years later and more than 46 years after the incident) that Applicant was informed that the inquest into the death of the deceased had been re-opened and that Applicant will be recalled to testify in the proceedings.

29.12. Applicant agreed to do so and indeed testified during August 2017 before the Honourable Mothle J.

29.13. The inquest proceedings were finalised on the 24th of August 2017 and the Honourable Mothle J delivered his findings on the 12th of October 2018. A copy of the judgment containing the findings was annexed to the founding affidavit.

30.

Subsequent to the ruling referred to above the First Respondent decided to charge Applicant on *inter alia* a count of premeditated murder. Applicant was arrested on these charges on the 30th of July 2018 and brought before

the Regional Court in Johannesburg and was released on bail in the amount of R1 000.00.

31.

The case was transferred to the South Gauteng High Court for trial and Applicant appeared in that Honourable Court for the first time on the 18th of September 2018.

E. NATURE OF THE APPLICATION:

32.

It appears that there may be some confusion between the Respondents as to the exact nature of this application. We have to emphasise that this is an application in terms of section 35(3) of the Constitution on the basis as set out above.

33.

Although reference was made to section 342A of the CPA it has to be emphasised that the application is in material terms based on the principle of a fair trial as is provided for in section 35(3) of the Constitution.

34.

When evaluating the case law in this regard it appears that the basic differences between a defence raised in terms of section 35(3) of the Constitution and section 342A of the CPA are the following:

34.1. Section 342A of the CPA deals with delays subsequent to the institution of the criminal proceedings against an accused. Section 35(3) of the Constitution also include delays prior to the institution of the specific prosecution.

34.2. The defence raised in terms of section 342A of the CPA can be raised before the Trial Court during the trial proceedings. The Trial Court will include a Lower Court. An application for a permanent stay of prosecution in terms of section 35(3) can only be brought before a High Court. The Magistrate's Court does not have the jurisdiction to hear applications of this nature.

34.3. The ambit of section 35(3) of the Constitution is also wider than the ambit of section 342A of the CPA. Section 35(3) of the Constitution

deals with any aspect and/or issue that may render proceedings unfair against an accused person. A delay of proceedings is only but one of these aspects that falls within the ambit of section 35(3) of the Constitution.

35.

The Full Bench in the Western Cape in the case of ***State v Naidoo***[9] found as follows in this regard:

> *"[18] In the result, an accused person who seeks a permanent stay of prosecution on the grounds that his or her constitutional right in terms of s 35(3)(d) of the Constitution has been infringed by reason of unreasonable delay before the commencement of criminal proceedings (in other words, in circumstances not provided for in s 342A of the CPA) must bring the application, before the high court having jurisdiction. By contrast, what we have termed 'intracurial' delay – delay occurring after the commencement of criminal proceedings – is a matter falling to be dealt with exclusively by the court seized with the criminal proceedings."*

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9 2012 (2) SACR 126 (WCC)

36.

The Full Bench of KZP in ***Naidoo v Regional Magistrate, Durban & Another*** [10] stated the following in the above regard.

> *"[21] The court thereafter proceeded on an analysis of s 342A of the Act and found, correctly in my view, that the provisions of s 342A do not apply to events preceding the institution of criminal proceedings. The court then considered the prejudice suffered by an accused if there is a delay in the proceedings and found that the question of prejudice to an accused must take precedence in the consideration of any delay. Whilst I am in agreement with Hugo J that* ***S v Scholtz and Others*** *was of no assistance to the court, since the said case was decided in terms of the provisions of the interim Constitution, which differed vastly from the final Constitution in regard to an expeditious trial, the interim Constitution provided for the time period to start when an accused is charged with an offence, whilst s 35(3)(d) of the Constitution now provides:*
>
> > *'Every accused person has a right to a fair trial, which includes the right –*
> >
> > *(d) to have their trial begin and concluded without unreasonable delay; …' [my emphasis.]*
>
> *In* ***Director of Public Prosecutions KwaZulu-Natal v Regional Magistrate, Durban*** *supra the court noted the difference between*

[10] 2017 (2) SACR 244 (KZP)

the interim Constitution and present Constitution, but concluded that the two Constitutions also differed on the issue of the jurisdiction of courts. The court reached this conclusion without substantiating its finding.

[22] In my view an application for a permanent stay of the prosecution, not provided for in s 342A of the Act, must be brought before the High Court that has the necessary jurisdiction to hear it."
(My emphasis)

37.

In ***Eleveld and Others v Mabile and Another***[11] it was ruled that section 342A of the CPA is not applicable when considering pre-trial delays.

"The remedies provided in Section 342A are not available for pre-trial delays, although I am of the view that a Presiding officer would be entitled to take cognisance of such delays when adjudicating on delays encountered during the trial[12]".

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[11] (A747 and A748/12) [2013] ZAGPPHC 83 (15 March 2013)

[12] *See:* Director of Public Prosecutions: Kwa-Zulu Natal v Regional and Magistrate, Durban and Another 2001 (2) SACR 463 (N)"

F. <u>UNDUE DELAY</u>:

38.

Section 35(3)(d) of the Constitution entrenches an accused person's right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay.

39.

The further fundamental requirement for a fair trial provided for in section 35(3)(i) of the Constitution is the right to adduce and challenge evidence. This presupposes that a trial should be instituted and concluded at a time that will enable an accused person to properly and effectively adduce and challenge evidence.

40.

The objective facts in this case are of course that Applicant has only been charged more than 47 years after the death of the deceased.

41.

At all relevant times Applicant co-operated with the First Respondent and/or the investigating team in this matter. Applicant at the same address for the past 54 years and tracing Applicant could never have been any problem for the First Respondent or the investigating team. The TRC had no difficulty in approaching Applicant in 1996 relating to this incident.

42.

Apart from denying any involvement in the causing of the death of the deceased at all relevant stages Applicant never did anything to evade justice and/or caused a delay to the proceedings. He agreed to testify at the re-opened inquest proceedings when requested to do so and also handed himself over to the investigating team when he was informed that the First Respondent decided to arrest and charge him.

43.

The objective facts are of course that there was an enormous delay by the First Respondent to proceed with the prosecution against the Applicant – more than 47 years.

44.

The above failure must be seen against the continuous requests and pressure by the family of Timol to proceed in the matter.

45.

It must further be evaluated against the assurances given by the family of Timol to the effect that sufficient evidence was uncovered and available to indicate that Timol did not commit suicide as was previously found.

46.

At that stage the perpetrators, according to the findings of Mothle J in the re-opened inquest proceedings, were still alive and could be prosecuted.

47.

Although we do not have access to all the relevant and material facts and documentation at this stage to fully evaluate the course of the delay, we do establish the following from the explanations provided on behalf of the First Respondent in the supplementary affidavit.

48.

We can, however, make the submission that it appears to be common cause that the reason for any delay in the prosecution of the Applicant was a deliberate decision by the First Respondent not to prosecute *inter alia* the Applicant as a result of decisions and interference by Government including the State President and the Minister of Justice (Second Respondent). In order to assist the Honourable Court we refer to the following evidential material supporting the above submission:

48.1. In the supplementary affidavit on behalf of the First Respondent it was now emphatically admitted that the cause for the delay of the prosecution was based on a decision in this regard:

> *"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."*[13]

48.2. We refer the Honourable Court again to paragraph 12 above together with the quotation from the supplementary affidavit on behalf of the

[13] See: First Respondent's Supplementary Affidavit: P. 791, par 5.4

First Respondent. As mentioned it was stated under oath that the delay was caused by the political interference and the severe political constraints to which the First Respondent was subjected.[14]

48.3. We also again refer the Honourable Court to paragraph 13.4 above where the admission formulated by the deponent on behalf of the supplementary affidavit on behalf of the First Respondent unequivocally agreed that the reason for the delay was the manipulation of the criminal justice system to protect individuals from criminal prosecution.[15]

48.4. In an affidavit the former Special Director of Public Prosecutions in the office of the First Respondent, Advocate Ackermann SC, set out in detail how he was stopped from pursuing the investigation and prosecution of these type of cases.[16]

48.5. In a secret memorandum by Advocate Pikoli, a former National Director of Public Prosecutions, concluded that there had been

[14] See: First Respondent's Supplementary Affidavit: P. 748, par 2.12
[15] See: First Respondent's Supplementary Affidavit: P. 768, par 2.30
[16] See: Annexure "IC7": P. 622

interference in relation to TRC cases and that he was obstructed to proceed with the prosecution of these cases.[17]

48.6. Advocate Pikoli of course also stated under oath in an affidavit annexed to the Fourth Respondent's answering affidavit that:

> *"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 …"*[18]

And

> *"In particular, I confirm the contents of the Applicant's affidavit under the heading 'political constraints'. I confirm that there was political interference that effectively barred … possible prosecution of the cases recommended for prosecution by the TRC …"*[19]

And

> *"I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of any TRC matters since*

[17] See: Annexure "IC10": P. 644
[18] See: Annexure "IC6": P. 575, par 8
[19] See: Annexure "IC6": P. 579, par 14

my suspension and the removal of the TRC cases from Advocate Ackerman."[20]

48.7. Advocate Pikoli further stated in a secret internal memo dated 15 February 2007 to the Minister of Justice (Second Respondent):

> *"5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the 'normal legal processes' and 'prosecuting mandates' 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."*[21]

49.

It must of course be pointed out that the political interference and political pressure referred to in the supplementary affidavit on behalf of the First Respondent apparently occurred after the conclusion of the TRC proceedings. These proceedings were finalised during the late 1990's. Thereafter the First Respondent waited approximately 18 years before the request was submitted for the re-opening of the inquest in the Timol matter.

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[20] See: Annexure "IC6": P. 602, par 75
[21] See: Annexure "RCM17": P. 869

G. LEGAL PRINCIPLES RELATING TO THE ISSUE OF AN UNFAIR TRIAL:

50.

There are various issues that are relevant and will require evaluation and adjudication by this Honourable Court:

50.1. The question whether an amnesty had been granted to a group of politically motivated perpetrators for conduct prior to 1994.

50.2. The factual issue relating to the precise nature and terms of the agreement/arrangement between Government and interested parties with reference to the prosecution of certain politically motivated offences (which includes the incident relating to this application).

50.3. The effect of the very substantial time delay in the prosecution of the Applicant caused by the deliberate decision not to prosecute.

50.4. The question relating to the fairness of the charge of premeditated murder against the Applicant under circumstances where this Court found in the re-opened inquest proceedings that the Applicant's only

involvement related to the providing of an alibi to the perpetrators after the incident.

Presidential pardon:

51.

Section 84(2)(j) of the Constitution provides for the power to the President to grant pardon to offenders. For the convenience of the Honourable Court we quote the relevant section:

*"84 **Powers and functions of President***

(1) ….

(2) The President is responsible for –

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(g) …

(h) …

(i) …

(j) Pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and

(k) …"

52.

It is clear that section 84(2)(j) of the Constitution empowers the President to pardon individuals or groups of people.[22]

53.

It is clear that the power to consider and grant amnesty lies with the President. In ***Minister for Justice and Constitutional Development v Chonco and Others***[23] the Constitutional Court emphasised that the final decision on the issue of pardon and the Constitutional responsibility for such decision rests with the President as Head of State.

54.

Not even Parliament is empowered to restrict the President's power in the above regard[24] and the President cannot himself restrict the above power by agreement.[25]

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[22] See: President of the Republic of South Africa v Hugo 1997 (4) SA (1), par 29
[23] 2010 (4) SA 82 (CC), par [35]
[24] See: President of the Republic of South Africa v SARFU 2000 (1) SA 1, par 155
[25] See: SARFU *supra,* par 159

55.

It is also material to mention that the President may consider and grant a pardon on his own initiative.[26]

56.

We submit that on probability the President indeed granted a pardon to the group of politically motivated perpetrators who did not apply for amnesty (which include the Applicant). We make the submission for the following reasons:

56.1. We of course know from the Amnesty Task Team Report quoted by the First Respondent in the supplementary affidavit that:

> *"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…"*[27]

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[26] See: Hugo case *supra*

[27] See: First Respondent's Supplementary Affidavit: P. 761, par 2.15.4;
Annexure "IC4": P. 554, par 3.3.2

56.2. The granting of amnesty was therefore clearly considered by the President.

56.3. It is clear that the President indeed considered a further amnesty and that the decision was referred to the President by the Task Team.

56.4. We know as an objective fact that no prosecutions followed the conclusion of the TRC proceedings for approximately 20 years.

56.5. Pikoli in his statement stated under oath that he was suspended because he was of the view that these perpetrators should be prosecuted.

56.6. We further know that the First Respondent regarded itself legally bound by the decision/pardon not to prosecute perpetrators. The only basis for such view could have been their knowledge of a legal pardon being granted and/or a legal agreement between Government and interested parties.

57.

The above situation was of course perpetuated by the conduct of First and Second Respondents not to disclose these facts to the Court in their initial answering affidavit, and thereafter a very selective disclosure. As already mentioned the Second Respondent still failed to disclose any of these facts to the Court until this stage.

The agreement/arrangement not to prosecute:

58.

With reference to the issues raised in paragraph 50 above the challenge that faces the Court is of course the fact that First to Third Respondents did not take the Court in their confidence with reference to this issue. Particularly the Second Respondent, who was clearly a party to this agreement/arrangement failed to disclose any facts in this regard despite the fact that they were confronted by the Fourth Respondent's answering affidavit that clearly indicated an agreement/arrangement in the above regard and further the Second Respondent's participation therein.

59.

It appears from Fourth Respondent's supplementary affidavit that they hold the view that the solution is to request the State President for the appointment of a Commission of Inquiry to get to the bottom of this situation. Another solution may be the hearing of oral evidence by this Honourable Court on this issue in order to enable the Court to properly deal with the question.

60.

From the facts before Court we do know the following:

60.1. There were discussions and negotiations relating to the question whether certain politically motivated incidents that occurred pre-1994 and for which the TRC did not grant amnesty should be prosecuted or not.

60.2. Some decision was taken and/or some agreement and/or arrangement was reached to the effect that certain incidents would not be prosecuted on – this clearly included the incident relevant to this application.

60.3. Government was represented at the highest level during these negotiations and decisions.

60.4. The First Respondent did not take any steps to prosecute *inter alia* the Applicant for the next more than 20 years after the decision/ agreement/arrangement, despite pressure being put on the First Respondent by the Fourth Respondent.

61.

Questions may arise with reference to the following:

61.1. The competence of the representatives of Government to reach an agreement/arrangement.

61.2. The validity of such agreement/arrangement.

61.3. Whether accused persons like the Applicant may have obtained rights from the above conduct by Government despite the fact that the agreement/arrangement may be found to be invalid.

62.

We submit that the State President, Minister of Justice and First Respondent clearly had the competence to take the decisions relied on by the Applicant and/or to enter into an agreement/arrangement in the above regard. In any event we submit that competence will be presumed in terms of our Law and that without facts specifically stated by the First to Third Respondents there is no basis for this Court to find otherwise.[28]

63.

The above principle was also upheld by the SCA in ***Tamarillo v BN Aitken***[29]

64.

The onus will clearly be on the Respondents to allege and prove the illegality of such agreement/arrangement and/or the voidness of such decision.[30]

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[28] See: Wessels: Law of Contract, Second Edition, Vol. 1, par 693;
Serobe v Koppies Bantu Community School Board 1958 (2) SA 265 (O) 271 to 272

[29] 1982 (1) SA 398 (A) at p. 442

[30] See: Transnet v Owner of the MV Snow Crystal 2008 (4) SA 111 (SCA), para 25 to 28

65.

The important point is of course the fact that the Respondents implemented the agreement/arrangement and/or decisions for the past more than 20 years.

66.

It is further submitted that even in the event that a Court may find that the agreement/arrangement was invalid, it would not follow that persons like the Applicant will be divested of their rights. In ***State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd***[31] the Constitutional Court found with reference to an invalid agreement:

> *[54] … In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled . …"*

Substantial time delay:

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[31] 1918 (2) SA 23 (CC)

67.

At the outset we have to submit that this Court is confronted with a totally unique situation. In this case the Court has to deal with the consequences and the effect of a deliberate decision not to prosecute and not by a systemic failure and/or lack of diligence by the Prosecuting Authority.

68.

The further material aspect that the Court will have to deal with in the above regard is that this decision not to prosecute, came from the highest levels of Government including the State President, Minister of Justice, National Director of Public Prosecutions and other Heads of Governmental Departments. Although the First Respondent attempted to distance itself from that decision the office of the First Respondent clearly accepted that decision and/or agreement for almost two decades.

69.

It is further clear that there was some decision taken and//or agreement and/or arrangement between Government on the highest level and other interested parties in terms whereof it was agreed that no prosecutions will

be instituted for certain political crimes which included the one relevant to this application.

70.

Although we accept that an order of the nature sought by the Applicant in this application is drastic and should not be granted easily[32], we submit that a proper case has been made out in this application.

71.

Section 35(3)(d) provides as follows with reference with a trial without unreasonable delay:

> *'Every accused person has a right to a fair trial, which includes the right-*
>
> …..
>
> *(d) to have their trial begin and conclude without unreasonable delay.'*

72.

[32] See: Sanderson v Attorney-General, Eastern Cape 1998 (1) SACR 227 (CC) (1998 (2) SA 38; 1997 (12) BCLR 1675) para [38]

The object of this provision is to protect an accused's liberty, personal security and trial-related interests[33]. The protection of these three rights is described in a judgment of the Supreme Court of Canada, ***R v Morin***[34] as follows:

> *'The right to security of the person is protected . . . by seeking to minimise the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimise exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh*.'
>
> (See also Barker v Wingo, Warden 407 US 514 (1972) at 532.)

73.

In Saunders[35] the Constitutional Court remarked as follows:

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33 Sanderson para [20]; Wild para [5].
34 (1992) 8 CRR (2d) 193 at 202 (Quoted with approval in Sanderson para [20])
35 Par [22]

"[22]……Writing for the Court in S v Zuma[36] and Others, Kentridge AJ affirmed that: The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.

Marking a significant break from the common law past, Kentridge AJ suggests that criminal trials should be conducted in accordance with open-ended notions of basic fairness and justice[37]. I will suggest in a moment why the fair trial protection of the accused extends to non-trial related prejudice, but my point here is simply that a narrow textual approach to section 25(3) is likely to miss important features of the provision[38].

[23] The central reason for my view, however, goes to the nature of the criminal justice system itself. In principle, the system aims to punish only those persons whose guilt has been established in a fair trial. Prior to a finding on liability, and as part of the fair procedure itself, the accused is presumed innocent. He or she is also tried publicly so that the trial can be seen to satisfy the substantive requirements of a fair trial. The profound difficulty with which we are confronted in this case is that an accused person despite being presumptively innocent is subject to various forms of prejudice and

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36 1995 (4) BCLR 401 (SA) at para 16.

37 Id at para 16

38 It might also be argued that protecting all the accused=s interests (as an accused) under Section 25(3) accords with the tenor of the majority judgment in Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC). See Chaskalson P at paras 184-5

penalty merely by virtue of being an accused. These forms of prejudice are unavoidable and unintended by-products of the system. In Mills, Lamer J explained that [a]s a practical matter . . . the impact of a public process on the accused may well be to jeopardize or impair the benefits of the presumption of innocence. While the presumption will continue to operate in the context of the process itself, it has little force in the broader social context. Indeed many pay no more than lip service to the presumption of innocence. Doubt will have been sown as to the accused's integrity and conduct in the eyes of family, friends and colleagues. The repercussions and disruption will vary in intensity from case to case, but they inevitably arise and are part of the harsh reality of the criminal justice process[39].

74.

In **Broome v Director of Public Prosecutions, Western Cape & Others; Wiggins & Another v Acting Regional Magistrate, Cape Town & Others**[40] the Court had to deal with a case that had been delayed for 7 years. The Court held among others that on a conspectus of all the facts, the prosecuting authority had been responsible for an undue and excessive delay and that the fundamental rights of the accused to a speedy trial had

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39 Mills v The Queen above n 10 at 143. For other statements suggesting a connection between the presumption of innocence and the right to a trial within a reasonable time, see R v Askov (1990) 74 DLR (4th) 355 at 380; Dickey v Florida 398 US 30, 41 (1970); Jago v District Court of New South Wales and Others (1989) 87 ALR 577 (HCA) at 599-600; and Wemhoff v Federal Republic of Germany (1968) 1 EHRR 55 at 89. For an early expression of the same insight in South Africa, see S v Geritis above n 7 at 754F-G.

40 2008 (1) SACR 178 (CPD)

been infringed. It also found that the undue delay of seven (7) years and the consequential loss of evidentiary material is sufficient to make a finding that the accused will suffer irreparable trial prejudice in preparing a proper defence.

75.

In ***Bothma*** supra,[41] Sachs J distinguished the exceptional circumstances of *Broome* in terms which hold true for the current case: *'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,***

41 At, Par 74

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. (Emphasis supplied.)

76.

The mere passage of time in the abstract by itself does not justify a permanent stay of prosecution.[42] It must be established whether the effect thereof is to cause material and irremediable trial prejudice.

77.

The remedy may be granted in the absence of trial-related prejudice, where 'there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate'. (See Wild and Another v Hoffert NO and Others 1998 (2) SACR 1 (CC) (1998 (3) SA 695; 1998 (6) BCLR 656) para [27]; see also McCarthy v Additional

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42 *Bothma* supra, at para 39.

Magistrate, Johannesburg, and Others 2000 (2) SACR 542 (SCA) ([2000] 4 All SA 561).)

78.

As the Court pointed out in Sanderson[43], 'the test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained . . . [t]he Courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us'. Be that as it may, the issue was not debated before us and it is not necessary, in my view, to consider it in the light of counsel's agreement.

79.

The phrase “interests of justice” denotes an equitable evaluation of all the circumstances of a particular case. In that evaluation an important test is whether the individual’s position is substantially better or worse under the final Constitution than under the interim Constitution. The respective sections, though not identical, are substantially the same, however. In any event, the difference in wording is minor and of no consequence in this case.

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[43] Sanderson v Attorney-General, Eastern Cape 1998 (1) SACR 227 (CC) para [30]

Section 35(3)(d) of the final Constitution, the current equivalent of the section, reads as follows: “Every accused person has a right to a fair trial, which includes the right B . . . . (d) to have their trial begin and conclude without unreasonable delay.”[44]

80.

In order to determine the reasonableness of the delay, the Court may consider those factors listed in section 342A in order to make a value judgment. In ***Sanderson v Attorney-General, Eastern Cape*** (*supra)* the court put it as follows at paragraph [36]:

> *“The qualifier ‘reasonableness’ requires a value judgment. In making that judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused … The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structured legal system; a system which requires the prosecution to prove its case in a public forum. We also have to be prepared to pay a price for our membership of a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused. But we*

[44] Sanderson supra para [17]

have to acknowledge that these burdens are profoundly troubling and incidental. The question in each case is whether the burdens borne by the accused as a result of delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence, and become in itself a form of extra-curial punishment."

81.

In ***Wild and Another v Hoffert NO and Others***[45], Kriegler J again held that inferences of inordinate delay may at times be made from the available facts. At paragraph [25] the learned judge held as follows:

"*Once the criminal case has been struck off and the High Court application was withdrawn, a period of some four months elapsed before the fresh case was mooted. Arguably the time period that elapsed before the Attorney-General decided to resume the case was unreasonably long. That is certainly what counsel for the appellants forcefully contended in this Court, and seems to be what was found in the Court below. Such a conclusion is more-over fortified by the fact that the deponent to the answering affidavit on behalf of the Attorney-General did not see fit to take the Court into his confidence about that period from March to July 1995. Although it appears to be a significant period of time and although culpable delay on the part of the prosecution is the very crux of the appellant's case under s. 25(3)(a), the answering affidavit does not proffer any*

[45] See: 1998 (2) SACR 1 (SCA)

> *explanation. In such a case as this, <u>where there is a period of ostensible culpable inactivity on the part of the prosecution, an inference of unreasonableness can more readily be drawn if no explanation is proffered</u>.*"

82.

The learned Sachs J in ***Bothma v Els*** *(supra)* stated as follows:

> "*In this context, then, the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial*."[46]

83.

Satchwell J in ***DPP v Phillips WLD*** and with reference to the prosecution's culpable inactivity made the following remarks:

> "*[69] There has indeed been inordinate delay in finalizing this trial and this appeal, all of which delay must be laid at the door of the office of the DPP. Further delay is inevitable. Any prosecutorial appeal and any ensuing trial would place Phillips back in jeopardy of*

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[46] Bothma v Els *supra:* P. 199 b-c

conviction – double jeopardy. Renewed trial proceedings will unfairly advantage the State which has already led all its evidence some seven years ago while Phillips has not. The personal impact of the litigation upon Phillips cannot be disregarded. The longevity and continuation of the POCA restraint order is without precedent. All these factors have apparently been disregarded by the DPP when exercising its prosecutorial powers. The interests of the general South African community and the integrity of the criminal justice system are not, in this case, antithetical to the interests of Phillips.

[70] I am satisfied that the right of Phillips to a fair trial is and has been infringed by delay in finalising the appeal. The right to be protected against unreasonable delay is located in both the substantive right to a fair trial as well as section 35(3)(d) of the Constitution to which I have referred. I take the view that in this case, the delay in prosecuting the appeal serves "inevitably and irremediably to taint the overall substantive fairness of the trial" (if it were to be reconvened) and hence the right to a fair trial would be infringed."

The ***DPP and Minister of Justice and Constitutional Development v Phillips***[47]

> "*[55] I can find no fault with Satchwell J's reasoning in her path toward concluding that a permanent stay of the prosecution was justified. She was correct in laying the fault for the delay at the door of the DPP. She was correct to conclude that the inordinate delay was inexcusable. The learned judge was correct in her reasoning about the impact of the delay on the trial that itself was unduly prolonged. This was ironic, given that the justification for engaging 'private' prosecutors was that it would result in greater efficiency and expedition*."

85.

Moosa J dealt with the general approach that a Court should follow in **S v Jackson and Others**[48] where he held as follows:

> **"***It is common cause that the postponements throughout the proceedings were consensual and the appellants, at no stage of the proceedings, raised any objections thereto. The question that arises: can it be said that the cumulative effect of the delays, during the various stages of the proceedings, from the start of the proceedings*

[47] (803/11) [2012] ZASCA 140 (28 September 2012)
[48] See: 2008 (2) SACR 274 (CPD)

> *in the district court to the conclusion of the trial in the High Court, is unreasonable? Before answering the question it is perhaps appropriate to make a few preliminary remarks. In the first place, there are two interesting and contrasting sayings with regard to the administration of justice. The one is : 'Justice delayed is justice denied'. The other is: 'Justice hurried is justice buried'. In the proper administration of justice, I think that a balance has to be struck between delaying justice on the one hand and hurrying justice on the other hand.*"

86.

The Respondents will probably refer the Honourable Court to examples of cases in Foreign jurisdictions where prosecutions have been instituted long after the unlawful conduct. We submit that these cases should be carefully evaluated. These examples may refer to, for instance, prosecutions of NAZI perpetrators for crimes committed during the Second World War.

87.

We submit that there are very material differences between these cases and the present case before the Court. We refer to the following:

87.1. The decision to prosecute World War 2 perpetrators were taken shortly after the war and perpetrators who could be apprehended followed directly thereafter.

87.2. Some perpetrators unlawfully evaded prosecution by deliberately going into hiding and/or evading prosecution in other manners. They were then only prosecuted as and when they were apprehended – some many years after the crimes were committed.

87.3. The sole reason for the delay in those prosecutions can therefore be ascribed to the unlawful evading of justice by the perpetrator himself or herself.

87.4. In the present case it is common cause that the Applicant did not do anything to evade justice – he still resides at the very same address where he resided 48 years ago during the relevant incident.

87.5. It is now common cause that the reason for the delay in the prosecution is the deliberate decision by the authorities – including the First Respondent – not to prosecute these alleged crimes.

87.6. The reason stated by the First Respondent for the failure to prosecute is political interference in the criminal justice system from the highest level of Government. It is common cause that the Applicant did not participate and/or did not even have knowledge in these decisions and/or conduct.

88.

We submit that this Court deals with a situation that is so unfair and wrong that the Court should not allow a prosecutor to proceed with the trial even if the trial may in other respects be regular.[49]

H. UNFAIR AND/OR IMPROPER MOTIVE:

89.

[49] See: R v Hui-Chi-Ming [1992] 1 AC 34 at p. 57 B;
R v Martin [1998] 1 ALL ER 193 P. 215 - 216

It is trite that an accused person is entitled to a fair trial that will include a trial that is instituted and conducted in a procedurally fair manner and is not instituted and/or prosecuted with an unfair, improper or unlawful motive.

90.

This fundamental right was part of our law prior to the Constitutional era but is now entrenched in section 35(3) of the Bill of Rights in the Constitution.

91.

In this case the First Respondent recommended to the Second Respondent, in terms of section 17A of the Inquest Act, to request the Judge President of this Division of the High Court to designate a Judge of the Supreme Court of South Africa to re-open the inquest.

92.

This recommendation followed various requests by family member(s) of the deceased that the circumstances relating to his death should be reconsidered by the First Respondent.

93.

An inquest and/or the re-opening of an inquest is only competent in terms of the Inquest Act under circumstances where the Institution of Criminal Proceedings is not envisaged. Section 5(1) of the Inquest Act provides as follows in this regard:

> ***"5. When inquest to be held***
>
> *(1) If criminal proceedings are not instituted in connection with the death, or alleged death, the public prosecutor referred to in section 4 shall submit those statements, documents and information submitted to him to the magistrate of the district concerned."*

94.

An inquest should not be ordered or conducted where a criminal prosecution is already instituted and/or is to be instituted in connection with the death of a person. In the event that it comes to the knowledge of the judicial officer who presides the inquest proceedings that criminal proceedings have been

or are to be instituted relating to the death of the relevant deceased, he or she ***SHALL*** stop such inquest proceedings. Section 21(2) of the Inquest Act provides as follows in this regard:

> ***"21 Inquest not to prevent institution of criminal proceedings***
>
> *(1) …*
>
> (2) *Whenever it comes to the knowledge of the judicial officer who is holding or is to hold the inquest that criminal proceedings are being or to be instituted in connection with any death in respect of which inquest proceedings may have been instituted, he shall stop such inquest proceedings."*

95.

The objective facts in this case are that the High Court conducted a very thorough and detailed inquest in the re-opened proceedings over a lengthy period. It then concluded in its findings that Applicant was not involved in causing the death of the deceased. We will deal in more detail with the specific findings in this regard hereinafter.

96.

The First Respondent thereafter decided to institute a criminal prosecution against Applicant on a charge of premeditated murder, directly contrary to the findings by the Presiding Judge in the re-opened proceedings.

97.

It is clear that First Respondent had no further evidential material, that was not presented to Court during the re-opened inquest proceedings, available when deciding to charge Applicant on the count of murder. All the evidential material available was presented to the Court during the inquest proceedings and was available at the time that the decision to re-open the inquest proceedings was taken.

98.

The above allegations were indeed confirmed by First Respondent in a response to a request for further particulars in terms of section 87 of the CPA referred to above. We refer the Honourable Court to Annexure “JR4” and “JR5” to the founding affidavit in this regard.

99.

It is a fundamental principle of our law that a prosecution can only be instituted on a specific charge against an accused person if there is, as a starting point, a reasonable prospect of a successful prosecution i.e. a reasonable prospect of a conviction. The formal Prosecution Policy Directives issued by the National Director of Public Prosecutions in terms of section 179(5)(b) of the Constitution read with section 21 of the National Prosecuting Authority Act, Act 32 of 1998 ("NPA Act") provides as follows in this regard:

> *"In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide* ***a reasonable prospect of a successful prosecution****. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued."*
>
> (My emphasis)

And

> *"The process by which charges are selected must be compatible with the interests of justice.*
>
> *Prosecutors must decide upon, and draw up charges based on, available evidence, which evidence-*

- *Adequately reflects the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction;*
- *Provides the court with an appropriate basis for sentence; and*
- *Enables the case to be presented in a clear and simple way.*

This means that prosecutors may not necessarily proceed with the most serious charge possible.

Additional or alternative charges may be justified by the available evidence and where such charges will significantly enhance the likelihood of a conviction of an accused person or co-accused.

However, the bringing of unnecessary charges should, in principle, be avoided, because it may not only complicate or prolong trials, but also amount to an excessive and potentially unfair exercise of power.
(My emphasis)

Prosecutors should therefore not formulate more charges than are necessary just to encourage an accused person to plead guilty to some of the charges. Similarly, a more serious charge should not be proceeded with as part of a strategy to obtain a guilty plea on a less serious one."

100.

The Prosecution Policy Directives have been formulated by the National Director of Public Prosecutions in terms of section 21 of the NPA Act which provides as follows:

> *"**21 Prosecution policy and issuing of policy directives***
>
> *(1) The National Director shall, in accordance with section 179 (5)(a) and (b) and any other relevant section of the Constitution-*
>
> *(a) with the concurrence of the Minister and after consulting the directors, determine prosecution policy; and*
>
> *(b) issue policy directives,*
>
> *which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in this Act or any other law."*

101.

Section 179(5)(a) of the Constitution provides as follows:

> *"179 **Prosecuting authority***
>
> *(1) …*
>
> *(2) …*
>
> *(3) …*

(4) …

(5) The National Director of Public Prosecutions -

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Director of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) …

(d) …"

102.

The Constitution further specifically provides that National Legislation must ensure that the Prosecuting Authority exercises its functions without fear, favour or prejudice. We refer the Honourable Court to section 179(4) of the Constitution in this regard.

103.

We submit that it is inherently unfair to charge an accused on a count of murder after the lapse of more than 47 years and under circumstances where a High Court, after a very detailed investigation and evaluation of all relevant evidence in this regard, found that the accused was not involved in

or present at the time of the murder of the deceased. His only involvement according to the finding was that he afterwards relied about the circumstances of the death.

104.

In the alternative it is submitted that Respondents' request for the re-opening of the inquest was inherently unfair and unlawful if they, at that stage, with all the relevant facts available to them, already concluded that they would prosecute Applicant or were in a position to take such decision if they properly applied their minds.

105.

As mentioned, the circumstances relating to the death of the deceased was already officially investigated during 1996 by the TRC. There is clearly no reason that the First Respondent could not and should not have proceeded with criminal proceedings against Applicant should they have held the view that a *prima facie* case existed against Applicant.

106.

It is submitted that Applicant will clearly be prejudiced after such material delay of 47 years after the event if he is being prosecuted at this stage.

107.

The allegation that the First Respondent has an unfair and/or improper and unlawful motive for the prosecution against Applicant on the charges as formulated in the indictment, more in particular the first count of murder is based on the following:

107.1. The inquest proceedings were presided by the Honourable Mothle J of this Division.

107.2. The inquest into the death of the deceased was formally re-opened by the High Court (Gauteng Division, Pretoria) on the 26th of June 2017 in terms of section 17A of the Inquests Act, Act 58 of 1959 ("the Inquests Act").

107.3. The initial inquest was held in 1972 following the death of the deceased on the 27th of October 1971.

107.4. The purpose of the re-opening of the inquest was stated to be the investigation of the circumstances leading to the death of the deceased in the light of further evidence that has been uncovered after the initial inquest.

107.5. The deceased's nephew, one Mr Cajee, approached the First Respondent during 2003 in order to reconsider the position. The First Respondent made recommendations to the Second Respondent for the re-opening of the inquest in terms of section 17A of the Inquests Act.

107.6. It is interesting to note that the re-opening of this inquest in a High Court is the first of its kind by a High Court and presided by a Judge of the High Court.[50]

107.7. The High Court commenced hearing evidence in the re-opened inquest on the 26th of June 2017.

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[50] See: Par 6 of the judgment in the High Court following the completion of the re-opened Inquest which will be annexed hereinafter

107.8. The Court dealt in immense detail with all relevant aspects relating to the death of the deceased and heard evidence over many days. The evidence was eventually concluded on the 24th of August 2017.

107.9. Apart from the representatives of the First Respondent (senior and junior counsel), the family of the deceased was also represented by senior and junior counsel and fully participated in the proceedings.

107.10. Applicant also testified during the proceedings and was cross-examined by both the representatives of the First Respondent as well as the representatives acting on behalf of the family of the deceased.

107.11. Following the conclusion of evidence representatives of all parties involved submitted detailed and lengthy written submissions to the Presiding Judge.

107.12. After considering the vast body of evidential material put before the Court a very detailed and lengthy judgment consisting of 129 typed pages was delivered in the inquest on the 12th of October 2017.

107.13. The following material findings were made by the Court that are relevant to this application:

> *"320.4 On 27 October 1972, Timol's interrogation was conducted by Gloy and Van Niekerk. At the time Timol fell, he was under the care of at least Gloy and Van Niekerk."*

And

> *"320.8 Three independent witnesses put the time of Timol's fall as mid-morning on 27 October 1971. This is in direct contrast to Rodrigues' evidence that Timol fell between 15H45 and 16H00. This Court accepts that Timol fell in the mid-morning and that Rodrigues, if ever he was in room 1026 later in the afternoon, was brought there to legitimise the cover up narrative."*

and

> *"320.12 There is prima facie evidence implicating Gloy van Van Niekerk as the police officers who were interrogating Timol when he was pushed to fall to his death. Rodrigues, on his own version, participated in the cover up to conceal the crime of murder as an accessary after the fact of that murder, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests.*

> *A recommendation is made to have him investigated and prosecuted for these offences."*
> (My emphasis)

107.14. It is of significance that the above finding by the Court was consistent with the submissions made on behalf of the First Respondent in their written submissions to the Court after the conclusion of the hearing. They made the following submission in this regard:

> "… *Joao Roderiques perpetuated the cover up for instance that Timol looked shocked when he heard that Quenton Jacobson and two others were identified. There is no way that this person could not have seen the injuries. He did not want to play open cards with the court and his act or omission prima facie amount to an offence on the part of Joao Roderiques be it accessory after the fact or as co conspirator but prima facie amounting to an offence. Thus the Security Police is responsible for his death. He was meant to be held at the cells at John Vorster against the regulations they chose to hold him at the office to cover up their assaults and torture. This must be referred to the National Prosecuting Authority."*

108.

It is therefor significant that the findings of the Court in the inquest was to the effect:

108.1. That the deceased was interrogated by Gloy and Van Niekerk as the Police Officers in control of the deceased at the time when he was pushed to fall to his death.

108.2. Applicant's only involvement was that he participated in the cover up to conceal the crime of murder as an accessory after the fact of the murder.

108.3. That the deceased fell in the mid-morning and that Applicant, if he ever was in the place from which the deceased fell, was only brought there in the afternoon to legitimise the cover up of the narrative that the deceased committed suicide.

108.4. The charge of murder in count 1 is therefore directly in contrast with the findings of the Court in the judgment relating to the inquest.

I. RIGHT TO ADDUCE AND CHALLENGE EVIDENCE:

109.

It is submitted that there can be no doubt that such an extreme delay in commencing with the prosecution against any accused will materially prejudice the accused's right to a fair trial.

110.

It is necessary to evaluate the charge of murder against Applicant and the facts that the First Respondent indicated that they would rely on to persuade the Trial Court that Applicant acted with a common purpose with other members of the South African Police services to commit the alleged murder. We refer to the following:

110.1. In the formulation of the charge the First Respondent alleged that Applicant, together with Van Niekerk and Gloy separately and/or together in the execution of the furtherance of a common purpose unlawfully and intentionally killed the deceased.

110.2. In the summary of substantial facts the First Respondent alleged that Applicant together with Gloy and Van Niekerk tortured and assaulted the deceased. It is further alleged that they thereafter either pushed the deceased out of the window of room 1026 and/or threw the deceased down from and/or rolled the deceased from the roof of John Vorster Square Police Station on the 27th of October 1971.

111.

In the request for further particulars the following questions were *inter alia* posed on Applicant's behalf:

111.1. First Respondent was requested to indicate whether Applicant manifested his participation in the alleged common purpose with the other perpetrators by himself performing any act of association with the conduct of the others.

111.2. Precisely what act(s), if any, did Applicant allegedly perform in the furtherance of the common purpose relied on.

111.3. What act(s) the other alleged perpetrators allegedly performed in the furtherance of the common purpose relied on.

112.

The First Respondent refused to answer any of these questions and only stated that their case is based on circumstantial evidence and that the issue of common purpose will be cleared by evidence.

113.

With reference to the allegations that Applicant tortured and assaulted the deceased and thereafter pushed him from the window of room 1026 and/or from the roof of the John Vorster Square Police Station the following questions were *inter alia* posed on Applicant's behalf:

113.1. What act(s) of assault and/or torture did Applicant allegedly commit?

113.2. When did Applicant allegedly participated in these act(s) of torture and/or assault?

113.3. What injuries to the deceased in these act(s) of torture and/or assault did Applicant allegedly cause?

113.4. When exactly was Applicant allegedly present when these act(s) of torture and/or assault was/were committed?

113.5. What precisely was Applicant's participation allegedly in these act(s) that were committed?

114.

The First Respondent also refused to answer these questions and only responded:

> *"As to how the assault on the deceased occurred, is a matter of evidence and will be addressed by oral evidence including medical and other expert evidence."*

115.

The practical result is therefore that Applicant is confronted with the situation where he, as an approximately 80 year old person, hampered by a seriously fading memory, has to answer and defend himself against allegations of

participating in assaults and torture of the deceased over a period of six days more than 47 years ago and under circumstances where the Prosecutors refused to supply him with any of the following information (either in the charge sheet or in further particulars):

115.1. When Applicant allegedly participated in this unlawful conduct.

115.2. What Applicant's alleged role was relating to these unlawful activities?

115.3. What act(s) of assault and/or torture did Applicant allegedly commit on the deceased?

116.

In the above regard it should again be emphasised that in the evidential material provided by the First Respondent there is no suggestion of any allegations to the effect that Applicant at any stage participated in the assault or torture of the deceased.

J. EVALUATION OF REASONABLE TIME:

117.

It appears from the initial answering affidavits of Respondents that they will argue that the starting point for the calculation of a reasonable time should be taken as the time when the accused person has been charged for the relevant offence. Any delay prior to the date that an accused person has been charged is according to their apparent view irrelevant for purposes of section 35(3)(d) of the Constitution.

118.

Subsequently First Respondent of course filed the supplementary affidavit now admitting the substantial delay and explaining that political interference was the cause of the delay. We are not sure whether the Respondents will persist with this approach in view of the turnaround in their approach. We will deal briefly with this argument raised in the initial answering affidavits.

119.

We submit that such approach is wrong. The delay prior to the date that an accused person has been charged is clearly relevant and should be

considered when deciding the question whether a reasonable time has lapsed for purposes of section 35(3)(d) of the Constitution.

120.

It is submitted that our approach is supported by the wording of section 35(3)(d) of the Constitution, more in particularly if one compares the wording with the wording of section 25(3)(a) of the Interim Constitution, Act 200 of 1993 (“Interim Constitution”).

121.

Section 25(3)(a) of the Interim Constitution specifically provided that this right refers to a reasonable time

> *“after being charged”.*

122.

Section 35(3)(d) of the Constitution of course removed this limitation and does not provide for any limitation in this regard.

123.

In the authoritative work, Constitutional Law of South Africa, it is stated in no uncertain terms:

> *"The accused person's right to trial within a reasonable time is one right which quite obviously includes consideration of a period before the commencement of the proceedings."*[51]

And

> *"The final Constitution has dropped the requirement that one be charged before the period of delay can be considered, and has also clarified that the scope of the right to trial within a reasonable time extends to the conclusion of the trial as well as its inception."* [52]

124.

With reference to ***Du Preez v Attorney-General of the Eastern Cape***[53] it is further concluded at the significance of the pre-charge period on Constitutional grounds, once charged has been defined and now remedied.[54]

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51 At p. 51 - 123
52 At p. 51 - 123
53 1997 (3) BCLR 329 at 339
54 At p. 51 - 125

K **<u>CONCLUSION</u>**:

125.

Although we accept that an order of this nature is drastic and should only be considered in very serious cases, we submit that the Applicant did make out a proper case in this matter.

126.

We therefore request the Honourable Court for an order in terms of the notice of motion.

DATED at PRETORIA on this 15th day of FEBRUARY 2019

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