IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO.: 76755/2018

YASMIN SOOKA	First Applicant
DUMISA BUHLE NTSEBEZA	Second Applicant
MARY BURTON	Third Applicant
WENDY ORR	Fourth Applicant
GLENDA WILDSCHUT	Fifth Applicant
FAZEL RANDERA	Sixth Applicant
LAW SOCIETY OF SOUTH AFRICA	Seventh Applicant

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

MINISTER OF POLICE Third Respondent

IMTIAZ AHMED CAJEE Fourth Respondent

FILING SHEET

Documents to be filed:-

1. Notice of Motion
2. Founding Affidavit
3. Heads of Arguments

DATED AND SIGNED AT PRETORIA ON THIS THE 27TH DAY OF MARCH 2019

MKHONTO & NGWENYA INC.
APPLICANT'S ATTORNEYS
144 MONUMENT AVENUE
(OFF CANTONMENT AVENUE)
LYTTELTON, CENTURION
PRETORIA
TEL: 012 323 7210
FAX: 012 323 5581
REF: MKHONTO/LSSA

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
PRETORIA

AND TO: **BEN MINNAAR ATTORNEYS**
Attorneys for the Applicant
190 Melt Marais Street
Wonderboom AH X1
Wonderboom
PRETORIA
Tel: 082 446 2644
Email: benjaminnaar@gmail.com
REF: BM 01/10/18

AND TO: **THE ACTING DIRECTOR OF PUBLIC PROSECUTIONS**
First Respondent
c/o State Attorney
316 Thabo Sehume Street
Salu Building
PRETORIA
REF: PETER SELEKA
Email: pseleka@justice.gov.za

AND TO: **THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICE**
Second Respondent
c/o Thabo Sehume Street
Salu Building
PRETORIA
REF: PETER SELEKA
Email: pseleka@justice.gov.za

AND TO: **THE MINISTER OF POLICE**
Third Respodent
c/o Thabo Sehume Street
Salu Building
PRETORIA
REF: PETER SELEKA
Email: pseleka@justice.gov.za

AND TO: **LEGAL RESOURCES CENTRE**
Attorneys for the Fourth Respondent
Braam Fischer Towers
15th & 16th Floor
20 Albert Street
Marshalltown
JOHANNESBURG
Tel: 011 836 9831
Fax: 011 836 8680
Email: naseema@lrc.org.za / tina@lrc.gov.za
Ref: N Fakir/ T Power

AND TO: **WEBBER WENTZEL**
Attorneys for the Fourth Respondent
90 Rivonia Road, Sandton
P.O. Box 61771, Marshalltown
Docex 26 Johannesburg
Tel: 011 530 5000
Fax: 011 530 5111
Email: moray.hathorn@webberwentzel.com
REF: M HATHORN

AND TO: **LAWYERS FOR HUMAN RIGHTS**

Attorneys for Southern Africa Litigation Centre

Strategic Litigation Centre

4th Floor, Southpoint Building

87 Korte Street

BRAAMFONTEIN

Tel: 011 339 1960

REF:

Served by email to: wayne@lhr.org.za

AND TO: **MCHUNU ATTORNEYS**

Attorneys for Pan African Bar of South Africa

3rd Floor, North Tower

160 Jan Smuts Avenue

ROSEBANK

Tel: 011 778 4060

REF: S Mabetlela/Emokoena

Served by email to: elsie@mchunu.co.za

samuel@mchunu.co.za

AND TO: **HAFFEGEE ROSKAM AND SAVAGE ATTORNEYS**

Attorneys for the Applicants / Former TRC Commissioners

3rd Floor

1 Bompas Road

Dunkeld West

JOHANNESBURG

Tel: 011 017 3130

munier@hrsattorneys.co.za

REF: M. ISMAIL

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.: 76755/2018

THE LAW SOCIETY — Applicant

And

RODRIGUES — First Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTION — Second Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES — Third Respondent

MINISTER OF POLICE — Fourth Respondent

FILING SHEET

Documents presented for filing: Supporting Affidavit

Heads of arguments

Enrolled on the 28 & 29 March 2019

DATE AT PRETORIA ON THIS THE 14TH DAY OF MARCH 2019.

MKHONTO & NGWENYA INC.
144 Monument Avenue
Lyttleton
Centurion
Pretoria
Tel: (012) 323 7210
Fax: (012) 323-3881
REF: MR. MKHONTO/LSSA
tsholofelo@mkhontongenyaiinc.co.za

To: THE REGISTRAR OF THE ABOVE COURT
PRETORIA

And to: RODERIGUES
FIRST RESPONDENT

And to: **The National Director of Public Prosecutions**
Second Respondent
Victoria & Griffiths Mxenge Building (VGM Building)
123 Westlake Avenue
Weavind Park
Silverton
PRETORIA
E-mail: mmtshivhana@npa.gov.za

OFFICE OF THE NATIONAL DIRECTOR
LEGAL AFFAIRS DIVISION
2019 -03- 15
SIGN: .....
OF PUBLIC PROSECUTIONS

And to: **Minister of Justice & Correctional Services**
Third Respondent
MINISTRY DESK
316 Thabo Sehume & Francis Baard Streets
PRETORIA
E-mail: jmhlarhi@justice.gov.za

MINISTRY FOR JUSTICE AND CORRECTIONAL SERVICES
PRETORIA
2019 -03- 19
PRETORIA
MINISTERIE VIR JUSTISIE EN KORREKTIEWE DIENSTE

And to: **Minister of Police**
Fourth Respondent
SAPS HEAD OFFICE
231 Pretorius Street
PRETORIA
E-mail: Gaehelersmk@saps.gov.za

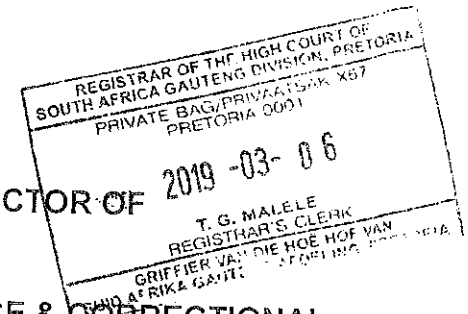
MINISTRY OF
2019 -03- 19
PRETORIA
POLICE

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.: 76755/2018

THE LAW SOCIETY OF SOUTH AFRICA — Applicant

and



RODRIGUES — First Respondent

THE NATIONAL DIRECTOR OF PROSECUTIONS — Second Respondent

MINISTER OF JUSTICE & CORRECTIONAL SERVICES — Third Respondent

MINISTER OF POLICE — Fourth Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE THAT the Applicant intends to on the time to be arranged by the Registrar apply for an order in the following terms:

1. That the Applicant be allowed to participate in the proceedings in Case No.: 76755/2018 as an *amicus curiae*.

2. Further and/or alternative relief.

BE PLEASED TO TAKE NOTICE THAT the Affidavit of MVUZO NOTYESE will be used in support of this application.

BE PLEASED TO TAKE NOTICE THAT the Applicant has appointed

MKHONTO NGWENYA INCORPORATED ATTORNEYS with their address at **144 MONUMENT AVENUE, LYTTELTON, CENTURION** which it will accept notice and service of all process in these proceedings.

BE PLEASED TO TAKE NOTICE THAT if you intend opposing this application, you are requested:

(a) To notify the Applicant's Attorney in writing on or before **08 March 2019.**

(b) Within fifteen (15) days of service of this Notice upon you, to file your Answering Affidavits, if any and further that you are required in such notification an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose be given, the application will be made on **19 March 2019.**

DATE AT PRETORIA ON THIS THE 4TH DAY OF MARCH 2019.

MKHONTO & NGWENYA INC.
144 Monument Avenue
Lyttleton
Centurion
Pretoria
Tel: (012) 654-1039
Fax: (012) 323-3881
REF: MR. MKHONTO/LSSA

To: The Registrar of the above Court
Pretoria

And to: Roderigues
First Respondent

And to: **The National Director of Public Prosecutions**
Second Respondent
Victoria & Griffiths Mxenge Building (VGM Building)
123 Westlake Avenue
Weavind Park
Silverton
PRETORIA
E-mail: mmtshivhana@npa.gov.za

OFFICE OF THE NATIONAL DIRECTOR
LEGAL AFFAIRS DIVISION
2019 -03- 04
SIGN: .....
OF PUBLIC PROSECUTIONS

And to: **Minister of Justice & Correctional Services**
Third Respondent
State Attorney Pretoria
316 Thabo Sehume & Francis Baard Streets
PRETORIA
E-mail: jmhlarhi@justice.gov.za

MINISTRY FOR JUSTICE AND CORRECTIONAL SERVICES
PRETORIA
2019 -03- 07
PRETORIA
MINISTERIE VIR JUSTISIE EN KORRIEKTIEWE DIENSTE

And to: **Minister of Police**
Fourth Respondent
State Attorney Pretoria
316 Thabo Sehume & Francis Baard Streets
PRETORIA
E-mail: Gaehelersmk@saps.gov.za

MINISTRY OF
2019 -03- 12
PRETORIA
POLICE

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 76755/2018

In the matter of:

RODRIGUES

Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

AND ANOTHER

Respondents

AFFIDAVIT

I, the undersigned,

MVUZO NOTYESI

do hereby make oath and say:

1. I am an admitted attorney of this Honourable Court and I practice under the name and style of Mvuzo Notyesi Incorporated at 14 Durham Street, Mthatha, Eastern Cape Province.

M.N T.S.K

2. I am the Co-Chairperson of the Law Society of South Africa (the LSSA) and in my said capacity I am authorised to depose to this affidavit.

3. The contents of this affidavit, where they are within my own knowledge, are true and correct. I rely on the advice of experts and the attorneys for the LSSA.

4. The LSSA is a voluntary association with legal capacity. It came into being on 16 March 1998 by the adoption of a constitution agreed to between participating constituent members, namely the former statutory law societies, the BLA and NADEL.

5. With effect from 1 November 2018 the Legal Practice Act 28 of 2014 dissolved the provincial law societies as the statutory regulators of the attorneys' profession and replaced them with the South African Legal Practice Council, established in terms of section 4 of the Legal Practice Act. The Legal Practice Act has accordingly created a statutory succession in terms of which the former provincial law societies have been replaced by the Legal Practice Council.

6. On 1 November 2018, when the Legal Practice Act came into operation, the LSSA's amended constitution came into effect with the nine provincial attorneys' associations, the BLA and NADEL as the constituent members.

7. The LSSA is serious to participate in the application as *amicus curiae* as it is of the view that its views as a Professional Society representing thousands of Attorneys be heard by the Court in this matter.

8. The matter is of public importance and also concern certain constitutional

M.N T.S.K

issues regarding the delay in the prosecution of Rodrigues. The decision of the Court that will ultimately hear the matter will have wide ranging consequences as there are various people who have not applied for amnesty during the truth and reconciliation process. It is thus important to point out to the Court in a proper presentation that will have the effect of absolving any liability being criminal or civil in respect of any such people even if information come to the fore that they were in fact involved in crime during the apartheid era.

9. It is my humble view that the Court may well benefit from the participation of the LSSA in this matter by allowing the LSSA to present legal argument as to whether the delay to institute proceedings can be justified specifically taking into account the constitutional issues involved.

10. In the premises I pray for an order in terms of the Notice of Motion.

M. Ntsebeni

DEPONENT

SIGNED AND SWORN TO BEFORE ME AT KEMPTONON THIS THE 13 DAY OF MARCH 2019, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND CONSIDERS THE OATH BINDING ON HIS CONSCIENCE.

COMMISSIONER OF OATHS

Sophie Thabang Kekana
ex officio-Practising Attorney
31 Princess of Wales Street
Parktown
Johannesburg

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number 76755/2018

In the matter between:

RODRIGUES Applicant

And

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

HEADS OF ARGUMENT FOR THE INTERVENOR LAW SOCIETY OF SOUTH AFRICA – "LSSA"

INTRODUCTION

1. The Law Society of South Africa seeks to intervene in this matter as an *amicus curiae* and to make written submissions. In due course, may it please this Honourable Court to permit the LSSA to address the Court.

2. Mr Ahmed Essop Timol died on 27 October 1971 at John Vorster Square while in the custody of the Special Branch of the South African Police. An inquest conducted in 1972 found that Mr Timol had committed suicide by jumping from the 10th floor of John Vorster Square.

3. On 26 June 2017 (Freedom Charter Day), at the behest of Mr Imtiaz Cajee, a nephew of Mr Timol, the inquest into the death of Ahmed Essop Timol was re-opened in the High Court of South Africa, Gauteng Division, Pretoria.

4. Having conducted the inquest, Judge SP Mothle delivered his judgment on 12 October 2017. [1] His findings are set out at paragraph 335 on page 126 of the judgment. Judge Mothle found that Mr Timol was pushed from the 10th floor or roof of the John Vorster Square building, "such act having been committed through *dolus eventualis* as the form of intent and *prima facie* amounting to murder."

5. One of the members of the Security Branch present on 27 October 1971, a certain Joao Anastacio Rodrigues - the Applicant - has subsequently been charged for the murder of Mr Timol. The Applicant seeks a permanent stay of prosecution alleging that his right to a fair trial will be violated since more than 47 years have passed since the murder: such passage of time amounts to an unreasonable delay in the prosecution, he opines.

6. The Rodrigues application is centred on section 35 (3)(d) [2] of the Bill of Rights in the Constitution of the Republic of South Africa, 1996. This is ironic.

---

[1] See http://www.saflii.org/za/cases/ZAGPPHC/2017/652.html

[2] (3) **Every accused person has a right to a fair trial, which includes the right-**
(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) **to have their trial begin and conclude without unreasonable delay;**
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

7. The applicable law at the material time of 27 October 1971 was section 388 of the Criminal Procedure Act 56 of 1955. In terms of the erstwhile section 388, [3] the right of prosecution for murder was not barred by lapse of time.

8. Furthermore, the Criminal Procedure Act, 1955 did not have any provision similar to section 342A [4] of the Criminal Procedure Act, 1977. Section 342A requires a court to investigate any delay, which appears unreasonable, in the completion of the proceedings.

9. Section 342A (2) sets out a list of factors the court must consider to determine whether any delay is unreasonable. These factors are addressed below.

THE DIRECTIVE: THREE ISSUES

10. These heads of argument address the three issues posed in the Directive dated 8 February 2019 to wit:

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court. (Emphasis added.)

[3] **Section 388 - Prosecution for offences other than murder barred by lapse of time**

The right of prosecution for murder shall not be barred by lapse of time; but the right of prosecution for any other offence, whether at the public instance or at the instance of a private prosecutor, shall, unless some other period is expressly provided by law, be barred by the lapse of twenty years from the time when the offence was committed. (Emphasis added.)

[4] **342A Unreasonable delays in trials**

(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

a. Whether the pending criminal trial would be fair in light of the material time delay to prosecute Mr Rodrigues;

b. The effect on, *inter alia*, the right to a fair trial in instances such as this, where a very long time delay is present between the re-opening of the inquest and the subsequent prosecutions following from the findings of such re-opened inquests; and

c. Any other matter that may be raised for determination.

11. It will be argued that the criminal trial will be fair, the delay does not materially prejudice the accused and that the accused now has a very detailed insight into the State's case against him attendant upon the evidence and findings of the re-opened inquest. In short, the Applicant is in a better position to defend himself than he would have been before the re-opened inquest.

PRESCRIPTION OF PROSECUTION FOR MURDER

12. Under the common law all crimes prescribed in twenty years. That included the crime of murder. [5]

---

[5] *Per* Selikowitz J in *S v De Freitas* 1997 (2) SA 204 (C) at page 207 E-F to wit:

"In terms of our common law all offences prescribed after a period of 20 years from the date of the commission of the offence. This is recorded in the writings of Matthaeus (1601-1654) in his *De Criminibus* 48.19.4.1, as also by Carpzovius (1595-1666) in his *Verhandeling der Lijfstraffelijke Misdaaden in Haare Berechtinge*.
In our common law the prescription which was always 20 years runs on whether the complainant or the representative of the prosecuting authority knows about the crime or not, and the 20-year prescriptive period can be interrupted by the institution of a prosecution. See in this regard R v Magcayi 1951 (4) SA 356 (O); R v Friedman 1948 (2) SA 1034 (C)."

13. However, as Judge Selikowitz noted in the *De Freitas* case, "[t]he earliest legislation which dealt with this subject is to be found in the Cape Colony in s 21 of Ordinance 40 of 1828 which altered the common law by providing that a prosecution for the crime of murder would not be barred as a result of a lapse of time, but that in respect of all other crimes the right to prosecute would lapse after the expiry of a period of 20 years from the time the offence was committed." [6]

14. The trend to keep murder as a crime which does not prescribe by time delay continued into the Criminal Procedure Act 56 of 1955. See section 388 quoted above.

15. The current Criminal Procedure Act 51 of 1977 deals with prescription of crimes in section 18. Murder is one of the crimes in respect of which the right to institute a prosecution does not prescribe.

16. The text of section 18 is set out in the footnote below. [7]

---

[6] *Op cit*, page 207 G.

[7] 18 **Prescription of right to institute prosecution**
The right to institute a prosecution for any offence, other than the offences of-
(a) murder;
(b) treason committed when the Republic is in a state of war;
(c) robbery, if aggravating circumstances were present;
(d) kidnapping;
(e) child-stealing;
(f) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
(g) genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;
(h) any contravention of section 4, 5 or 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act 7 of 2013);

17. However, recently in the matter of *NL and Others v Estate Late Frankel and Others* 2018 (2) SACR 283 (CC) section 18 was "declared to be unconstitutional and invalid to the extent that it bars, in all circumstances, the right to institute a prosecution for all sexual offences, other than those listed in s. 18 (f), (h) and (i), after the lapse of a period of 20 years from the time when the offence was committed." (The sexual offences had occurred from 1970 to 1989.)

18. Jutastat records the effect of the declaration of invalidity in the footnote below. [8] The consequence is that there are at least eleven serious crimes that do not prescribe after twenty years. As such, murder is no longer in a unique category as before 1977.

19. Indeed, the expanded category of crimes that do not prescribe after 20 years first appeared in the Criminal Procedure Act, 1977 at section 18. The category was drafted, framed and hinged upon the death penalty. [9]

(hA) trafficking in persons for sexual purposes by a person as contemplated in section 71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
(i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20 (1) and 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
(j) torture as contemplated in section 4 (1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act 13 of 2013),
shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

[8] The order was suspended for 24 months to afford Parliament an opportunity to enact remedial legislation. During the period of suspension s. 18 (f) is to be read as though the words 'and all other sexual offences whether in terms of common law or statute' appear after the words 'the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.' Should Parliament fail to enact remedial legislation within the period of suspension, the interim reading-in remedy shall become final. The declaration of invalidity is retrospective to 27 April 1994.

[9] The text of section 18 read as follows:

"(1) The right to institute a prosecution for any offence, **other than an offence in respect of which the sentence of death may be imposed**, shall, unless some other period is expressly provided by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

Delay in the context of the Constitution

24. *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) is the leading case on unreasonable delays in criminal prosecution. However, the case focussed on delays after the institution of the prosecution.

25. Nevertheless, the fourfold test enunciated in the *Sanderson* case was adopted in *Bothma v Els and Others* 2010 (2) SA 622 (CC). At para [36] Justice Sacks stated the test as follows: "there was a balancing test in which the conduct of both the prosecution and the accused were weighed and the following considerations examined: the length of the delay; the reason the government assigns to justify the delay; the accused's assertion of a right to a speedy trial; and prejudice to the accused."

26. Omitted from *that* formulation of the test is a consideration of the effect on the family and friends of the victim. Indeed, the test omits a consideration of the interests of society as well. However, at para [37] Justice Sacks said: "A word of caution: these four factors should not be dealt with as though they constitute a definitive check list. A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis."

27. Justice Sacks then added another factor: the nature of the offence [para 38] and, at para [41] approved a *dictum* from the *Sanderson* case, which improves the fourfold test, to wit: "In making a value 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. When a permanent stay of prosecution is sought this societal interest will loom very large." (Emphasis added.)

20. On 6 June 1995 the Constitutional Court declared the death penalty unconstitutional. [10] That required an amendment to section 18 of the Criminal Procedure Act, 1977, which was effected by Amendment Act 105 of 1997. What remained the same, however, was the list of eleven crimes that do not prescribe after 20 years.

Fairness in light of the material time delay?

21. The concept of a fair trial developed slowly from the 17th century and picked up pace after the Second World War. [11] Initially conceptualised as a test of procedural fairness, it now embraces substantive issues such as the list of requirements set out in section 35(3) of the Bill of Rights.

22. Frankly, none of the fair trial requirements in section 35(3) is at risk, save quibbling about s 35(3)(d) as to the meaning of "unreasonable delay".

23. The delay from 27 October 1971 until the application for a permanent stay of prosecution in late 2018 is forty-seven years. That delay has no significance in terms of the law of prescription. However, it has significance in terms of the Constitution, 1996 especially with regard to the value accorded to human dignity and freedom in the Constitution. [12]

---

(2) The right to institute a prosecution for an offence in respect of which the **sentence of death may be imposed, shall not be barred by lapse of time**." (Emphasis added.)

[10] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665; [1995] ZACC 3) at paras [148] to [151].

[11] Ian Langford (2009) *Fair Trial*: The History of an Idea, Journal of Human Rights, 8:1, 37-52, DOI: 10.1080/14754830902765857 https://www.tandfonline.com/doi/pdf/10.1080/14754830902765857

[12] *Bothma v Els and Others* 2010 (2) SA 622 (CC) at para [33].

28. Bearing in mind the Constitutional law cited above, the most effective manner to approach the question of unreasonable delay is by way of the Criminal Procedure Act 51 of 1977. Section 342A (2) sets out a list of factors [13] the court must consider to determine whether any delay is unreasonable.

South Africa: a country of no consequence?

29. It is respectfully submitted that lest South Africa become known as the country of no consequences for crime, the application for a permanent stay of prosecution must be dismissed. There are five reasons for this submission.

30. **First**, to reiterate the history of our law – murder does not prescribe.

31. **Second**, the nature of the crime must be considered in its context. The murder was a political act carried out by the police of the Apartheid State.

---

[13] (2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

(a) The duration of the delay;

(b) the reasons advanced for the delay;

(c) whether any person can be blamed for the delay;

(d) the effect of the delay on the personal circumstances of the accused and witnesses;

(e) the seriousness, extent or complexity of the charge or charges;

(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;

(g) the effect of the delay on the administration of justice;

(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;

(i) any other factor which in the opinion of the court ought to be taken into account.

32. **Third**, it would be unconscionable to allow a man implicated in a murder of a political nature, who did not obtain amnesty in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 to remain at large when his *prima facie* culpability has been so thoroughly exposed as in the re-opened inquest. [14]

33. **Fourth**, the unhealthy cynicism that would be further engendered by a permanent stay of prosecution, in light of all the surrounding circumstances of contemporaneous South Africa, like the State Capture Commission and various other Commissions into the misconduct of State officials and their venal private sector supporters, not only places the Constitution under threat but also the very legality, effectiveness and propriety of a free and democratic society. [15]

34. **Finally**, it was by dint of the diligence of Mr Imtiaz Cajee, a nephew of Mr Timol, assisted by eminent Human Rights lawyers and activists that sufficient new evidence was obtained to justify the re-opening of the 1972 inquest. This fact alone, it is submitted, sufficiently and plausibly explains the delay by the State in prosecuting the Applicant.

---

[14] Consider the remarks of Maya AJA in *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA) at para [21]:

"The nature of the crime involved is another relevant factor in the enquiry. This is particularly so in the present case, considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime."

[15] "Rather, mistrust may well be inherent to vibrant democratic societies, as long as it takes the shape of vigilant skepticism rather than numbing cynicism." See Political Trust and the "Crisis of Democracy" by Tom W G van der Meer at:
http://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-77?print=pdf

The Applicant's perspective

35. Applicant must prove that he has suffered irreparable trial prejudice as a result of the delay. During June and July 2017, the Applicant attended the re-opened inquest. At the inquest the Applicant heard all the evidence, especially the expert evidence concerning the cause of death of Mr Timol. In the circumstances, the Applicant has a unique insight into the strengths and weaknesses of the State case against him for murder.

36. Having a unique insight into the State's case against an accused, affords the Applicant a better position to defend himself than had he simply been indicted out of the blue. In this specific regard, the Applicant has an advantage over the State that rarely is obtained by an accused in the normal course of proceedings, despite the docket cases. [16]

The interests of society (the public and the victims)

37. In the context of the political settlement in South Africa to end apartheid and to create a democratic society based on constitutional principles, Parliament enacted the Promotion of National Unity and Reconciliation Act 34 of 1995. The Truth and Reconciliation Commission was established in terms of that Act with the mandate, inter alia, to grant amnesty "in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past".

38. An applicant for amnesty had to demonstrate acts associated with political objectives and make a full disclosure of all the relevant facts relating to such acts.

---

[16] *Shabalala and Others v Attorney-General of the Transvaal and Another* 1995 (2) SACR 761 (CC) (1996 (1) SA 725; 1995 (12) BCLR 1593; [1996] 1 All SA 64);

39. Remorse was not a requirement. Yet the Applicant is this case did not apply for amnesty before the Truth and Reconciliation Commission.

40. In the circumstances, it is submitted that the Applicant's application for a permanent stay of prosecution be dismissed with costs.

Counsel for the LSSA
27 February 2019