ORAL SUBMISSIONS ON BEHALF OF TIMOL FAMILY

RODRIGUES V NDPP & OTHERS: CASE NO. 76755/ 2018

28 MARCH 2019

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INTRODUCTION

1. In South Africa's leading case on the question of a permanent stay of prosecution, *Bothma v Els* 2010 (2) SA 622 (CC) the Constitutional Court quotes the popular Setswana saying *'Molato ga o bole'* to remind us that "*some crimes do not go away'*.[1]

2. We submit that the matter before this Honourable Court is one of those crimes that will not go away. If these criminal proceedings are stopped this crime will not go away. There will be no resolution for the family and the wider community. This family – and their community – have been campaigning for justice and closure for decades. They will not stop. This crime is etched into the South African psyche. With no resolution it will fester in our collective consciousness forever.

3. There are other dangers, most notably the impact on the fabric of our society – when that society observes a vicious and callous crime left unresolved. This is not just any crime. It is the murder of a young idealist who had so much to offer our country.

[1] At para 77

a. The story of Ahmed Timol is rooted in our brutal past. He was not cut down on the battlefield while in the line of fire. He was detained under pernicious security laws and sadistically tortured for more than 4 days. Timol's tormentors were police officers who were meant to serve and protect, particularly those in their care.

b. While in an utterly incapacitated and defenceless state, and to cover up their crimes, Timol was thrown from the 10th floor of John Vorster Square. Even though he survived the fall the police did not a lift a finger to help him. Indeed, they took deliberate steps to ensure his death.

c. Rodrigues, who on his version, knew best what happened to Timol, was at the heart of this diabolical plan. Notwithstanding his shrill denials, he admitted under oath in the Reopened Inquest to his role in ensuring Timol's death.

4. The ultimate sacrifice made by Ahmed Timol helped to lay the basis for South Africa's democracy with its enshrined freedoms.

a. Imtiaz Cajee and Mohammed Timol, Timol's nephew and brother, and the Timol family, are amongst the victims contemplated in South Africa's historic Constitutional compact.

b. In this compact we all agreed that we would not seek revenge for those who tortured, abducted and murdered our relatives, friends and colleagues.

c. We agreed that in the new South Africa "self-help" would not be tolerated. The barbarism of the past would not be revisited. As Nelson Mandela said at his inauguration:

> *"Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another*."

5. In order to move beyond the bitterness of the past, society at large, and victims such as the Timol family, generously and graciously, offered perpetrators of gross human rights violations a chance to start afresh in the new South Africa:

a. If they came forward to the Truth & Reconciliation Commission (TRC) with the full truth, they would receive full and complete immunity for their past crimes.

b. But society promised to punish offenders denied amnesty or who spurned the process. If society does not, then we not only betray our constitutional compact, and the solemn promises we made during our historic transition, we risk a return to self-help and barbarism.

c. The Timol family, notwithstanding their own pain and suffering, embraced the compact which ushered in South Africa's new democratic order. They did so on the basis that:

    i. Where the full truth was provided, they would accept that the perpetrators were entitled to amnesty, and start their lives afresh unburdened by the past.

    ii. Where perpetrators were not truthful, or if they spurned the process, serious steps would be taken to ensure that they face justice.

d. It was always open to Rodrigues to come forward, speak the truth and claim his amnesty. Indeed, he was specifically invited by a TRC investigator to so. He spurned the offer.

6. If Rodrigues had simply told the TRC what he told the Reopened Inquest in 2017 – such as his role post the fall; and that he had been asked by the investigating officer and one of the interrogators to fabricate a version to explain the torture related injuries – it would have opened the door for Gloy, Van Niekerk and Buys – who were all alive then – to be held to account – and it is most likely we would not be here today.

    a. Instead Rodrigues chose to maintain a wall of silence, thus ensuring that key suspects would be protected from scrutiny. He also condemned the Timol family to another 20 years of anguish and trauma.

    b. In particular, he ensured that Timol's mother Hawa, who testified emotionally at the TRC, was sent to her grave without knowing the truth of what happened to her son.

    c. In short, Rodrigues chose to deny the family closure and the basic human right of the right to know. In so doing he deeply violated their constitutional right to human dignity.

7. At the Reopened Inquest, the Timol Family, again magnanimously, and in the spirit of reconciliation, extended an open hand to Rodrigues, inviting him to come to clean, advising him that should he do so they would not seek a prosecution. Again, Rodrigues stuck to the hymn sheet concocted by his masters. He has been the master of his own fate. He must now face the consequences.

MATTERS ARISING FROM THE APPLICANT'S HEADS

Point in limine

8. The Applicant appears to take a point *in limine* that because of various disclosures and admissions in the belated affidavits filed by the NPA's Advocates Pretorius and Macadam, relating to the political interference that resulted in the suppression of the TRC cases, the entire nature of the case has changed.[2]

    a. They allege that the NPA and the Minister of Justice have withheld material facts from this Court and suggest that this Court is no longer in a position to properly adjudicate this case. They suggest that this court should seek all outstanding evidence in relation to the political interference and get to the bottom of it through hearing oral evidence (para 59). This is simply aimed at prolonging these proceedings and should not be countenanced.

    b. While we agree that it is absolutely critical to understand the genesis of the political interference, and its impact, this court is not the forum for that exercise. A commission of inquiry is required for this purpose. The former TRC commissioners have called for an inquiry and this has been endorsed by the 4th respondent.

    c. Since the NPA has admitted that political interference stopped the TRC case, including the Timol case, there is no need for this Court to interrogate the political interference in any depth. The only question that arises is whether the political interference justifies or warrants awarding a permanent stay of prosecution to the Applicant.

    d. The Applicant speculates rather spuriously in his heads (para 13) that since Mr Cajee was a member of the NIA he had access to the materials disclosed in his answering affidavit in relation to the political interference,

        i. Firstly, Cajee is not a member of the NIA (he works at the State Security Agency), and

        ii. Secondly, the NIA provided no information whatsoever. All the information was evidence was generated in 2 earlier cases against the NPA:

            1. The 2008 case brought Thembi Nkadimeng and the wives of the Cradock 4 to set aside amendments to the

[2] Applicant's heads paras 12 – 27

Prosecution Policy – which provided a backdoor amnesty to Apartheid era perpetrators.[3]

2. The 2015 case brought by Thembi Nkadimeng against the NPA to compel them to make a decision in the case of her sister, Nokuthula Simelane (who was abducted and murdered by the SB in 1983.[4]

Claimed granting of amnesty

9. The Applicant's heads raise a curious point. He asks (at para 16) whether during the various political machinations the President granted an amnesty – which he may have benefited from; and concludes (at para 24 and 29.10) that it was granted. This assertion is made even though the papers disclose no evidence or suggestion of an amnesty and the applicant points to nothing that suggests one may have been issued.

    a. Since, it goes without saying that an amnesty may only be issued under law, and no such law exists – that really is the end of the matter. The Applicant's heads (at para 56.1) quote a passage from the secret Amnesty Task Team (ATT) report in which the ATT decides not to recommend a further amnesty process[5] – and yet the Applicant still poses the question whether there is one in place.

    b. Cajee's answering affidavit has set out, what in fact transpired – at least at a public level. There were legal efforts taken to accommodate perpetrators and promote impunity for apartheid-era crimes. These were set out in Cajee's affidavit (at paras 65 to 65.3) which were amendments to the NPA's Prosecution Policy and President Mbeki's Special Dispensation for Political Pardons. Both initiatives were stopped in the courts.[6]

    c. We know from the affidavits of former NDPP Adv Vusi Pikoli and the former head of the PCLU, Adv Anton Ackermann SC, (filed in the 2015 *Nkadimeng* matter) that considerable 'behind scenes' pressure was brought to bear on the NPA not to take the TRC cases forward.[7] Already the SAPS and the DSO had refused to investigate the TRC cases, including murder cases like the instant matter. When Pikoli and

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3 *Nkadimeng v National Director of Public Prosecutions* [2008] ZAGPHC 422. Referred to in footnote 16, 4th Respondent's heads

4 *Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions* & 8 *Others,* Gauteng Division Case Number 35554/2015. Notice of Motion attached to Cajee affidavit as 'IC5' at p 564. See 4th Respondent heads paras 25 – 26.3; paras 65 – 65.5 and 85 – 90.

5 Record p 554 para 2.1(a); p 555 para 2.1(c); p 557 para 3.1(b); and pp 562-563 paras 3.3-3.4

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

7 See Cajee affidavit annexes 'IC6' at 575 and 'IC7' at 622.

Ackermann proceeded with a few cases that had already been investigated, the former was suspended, and the latter was relieved of his duties in respect of the TRC cases. [8]

d. The net result was that the bulk of the TRC cases were not pursued. The NPA, together with the SAPS, simply downed tools in respect of the TRC cases. The exact 'arrangements' or 'agreements' that produced these results is not for this Court to interrogate and has no bearing on the issues for determination.

Basis of the Rodrigues application

10. Under Part C of the Applicant's heads the basis for the application is set out. Apart from reliance on various subsections of s 35 of the Constitution, the 'amnesty ground' is set out and reliance is placed on s 84(2)(j) of the Constitution. This section authorises the President to grant a pardon.

11. It is entirely unclear why such a ground now appears in the Applicant's heads. He has not sought to amend the relief he seeks through an amendment of his notice of motion.

    a. In any event, Rodrigues has not applied for a presidential pardon – nor did he seek a pardon through the Special Dispensation on Political Pardons.

    b. Moreover, the clause in question affords no substantive rights. Once an application for a pardon is made certain procedural rights arise but in South Africa nobody has a right to a pardon.[9]

Presidential Pardon

12. Under the heading "Legal Principles" (at paras 51 – 57) the Applicant returns to the pardon / amnesty theme.

    a. He speculates that since the ATT did not recommend an amnesty and left that matter in the hands of government the President must have considered this question (56.1 – 3).

    b. This is notwithstanding the total lack of any evidence of any pardon or amnesty being issued. It is worth noting that s 101 of the Constitution requires that decisions of the President be in writing if it has legal consequences – which if made could have been accessed.

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8 Pikoli affidavit at para 74 – 75 at 601 – 602. Ackermann affidavit at para 37 at 638.

9 *Albutt*, para 27 (Relying on *Chonco*)

c. It is then stated as "an objective fact" that no prosecutions took place for 20 years following the TRC (para 56.4). While very few took place Ackermann SC points to 4 proceedings that were initiated – in respect of cases that had already been investigated.[10]

d. Remarkably the Applicant claims that the NPA regarded itself as 'legally bound' by the decision not to prosecute apartheid era prosecutors – and that this was on the basis of a legal agreement reached between the government and interested parties. Unsurprisingly the applicant does not reference or source this claim. There is no evidence of this. Indeed, there is evidence to the contrary, which the applicant himself highlights and quotes at para 15.4 of his heads from the NPA's supplementary affidavit:

> *"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****. …"*[11]

Agreement not to prosecute

13. The Applicant argues that the President, Minister of Justice and NPA entered into an agreement/ arrangement not to prosecute persons such as the Applicant. Flowing from this, the Applicant argues that he has obtained rights from this conduct despite the fact that such an arrangement may be found to be unlawful and invalid. (paras 61-62).

    a. As mentioned, s 101(1)(b) of the Constitution requires that a decision by the President must be in writing if it has legal consequences. No decision in writing has been taken by the President. Accordingly, it cannot be presumed that the President took such a decision as there is no such decision.

    b. In any event, a requirement for the principle of presumptive legal validity is that a decision has been taken, which has been communicated to a subject and who then places reliance on the decision. (*MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) paras 64, 66 and 105). In the present case, no decision has been communicated to the Applicant, upon which the Applicant can place reliance.

    c. The Applicant's reliance on *Tamarillo* is also misplaced as this case dealt with a binding contract concluded between two private parties. *Tamarillo*

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10 Ackermann affidavit at paras16 -17 at p 618 – 621.

11 First Respondent's Supplementary Affidavit: P. 768, par 2.30

relies on private law contractual principles, whereas the present matter concerns the exercise of public power. In any event, no agreement was concluded by the applicant.

d. To the extent that the Applicant relies on the Constitutional Court's decision in *Gijima*, this takes the point no further. The *dicta* relied upon concerns the Court exercising its just and equitable remedial discretion in terms of section 172 of the Constitution. In the present case, this Court is in any event required to make an equitable determination on the basis of the interests of justice, which requires a conspectus of all relevant factors, of which the State's reprehensible conduct is but one.

Delay

14. We have dealt with the delay in considerable detail in Cajee's answering affidavit (paras 81 – 100) and in our written heads (paras 84 – 89). For purposes of analysis we divided the period between the crime and the commencement of criminal proceedings into 4 periods (heads: paras 86.1 – 86.5).

    a. Period 1: between crime and end of apartheid (1971 – 1994);
    b. Period 2: Start of TRC to end of amnesty process (1995 – 2002);
    c. Period 3: Post TRC/ amnesty to work on second Inquest (2003 – 2016);
    d. Period 4. Commencement of criminal proceedings: July 2018

15. There appears to be something of a consensus between the parties that the greatest onus on the authorities to act was in the post TRC period – and that various explanations may explain the inaction in the preceding periods.

16. On the question of the delay the Applicant (at paras 38 – 49) focusses exclusively on the post TRC delay. His submissions completely ignore the preceding periods. While the post TRC period is the most contentious period, it is in fact the preceding period that constitutes the bulk of the delay. According to our calculations the preceding period consists of some 31 years. This is the period between the year of the crime in 1971 and the winding up of the TRC's amnesty process in 2002.

17. The post TRC delay or inaction, should in our view run from 2003 (when the amnesty process was concluded and when Cajee approached the NPA) to 2016, when the NPA became seized with the matter and actively worked to prepare for the Reopened Inquest. This then is a period of some 13 years. If, for argument's sake, this was the only period under consideration – then it is most likely we would not be in this court today. (The same would apply even an additional 18 months were added to bring the period up to the date of arrest).

18. The Applicant relies on the case of Broome v Director of Public Prosecutions, Western Cape & Others, in which the Western Cape High Court granted a stay of prosecution in respect of crimes (fraud and violations of the Companies Act) that had been delayed for 7 years. The Applicant's reliance on *Broome* (at para 74 of his heads) is misplaced because:

    a. In granting a stay of prosecution, the Court will consider various factors, including the prejudice suffered by the accused as well as the seriousness of the offence. As we have already set out in our heads, the greater the prejudice and the more serious the offence, the less the delay need be.

    b. In *Broome*, the offence was significantly less serious than the present case and concerned various white-collar crimes, including fraud, contraventions of the Companies Act, 61 of 1973 and the Banks Act, 94 of 1990.

    c. The seven-year period (relied upon by the Applicant) concerns the period from the conclusion of the investigation to the decision to prosecute. During this period the applicant had to endure 'anxiety, concern and stigma'.[12] In the present case, it can only be said that the investigations were only concluded during the Reopened Inquest in 2017 and the decision to prosecute the Applicant was taken in July 2018. Accordingly, Rodrigues has endured minimal anxiety, concern and stigma. The only delay is attributable to the applicant seeking a permanent stay.

    d. Moreover, the prejudice to the accused in *Broome* was clear in that the audit working papers that were the subject matter of the crime in question had been lost by the State. In the present case, the applicant has not alleged that the State lost, concealed or destroyed evidence. A significant amount of evidence remains available against the Applicant, including the complete the reopened inquest court records and forensic evidence.

19. The applicant at para 87 of the heads attempts to distinguish the numerous examples of cases in various foreign jurisdictions brought after many decades.[13] He alleges that in these cases (particularly relating to Nazis suspects) the perpetrators unlawfully evaded detection by going into hiding and had to be tracked down. He does not specify which cases he is referring to; and he offers no facts to support his claim – and again this simply amounts to conjecture. The heads of the former TRC Commissioners provides an example (at para 93) of a Nazi era case - the Groning case, in which there was no such evasion.

[12] *Sanderson* at para 20

[13] Cajee answering affidavit paras 99 – 100.2

Unfair or improper motive

20. At paras 95 – 108 of the Applicants' heads aspersion is cast on the decision to charge Rodrigues with the murder of Timol – given that there was no specific finding to this effect by the Inquest Court. By the same token that court did not exonerate Rodrigues in this regard.

21. Notwithstanding the Applicant's strenuous complaints in this regard there is no evidence that the Applicant made any representations to the NDPP in terms of s 22(2)(c) of the NPA Act 32 of 1998 for a review of the decision to prosecute him on the charge of murder – as he was entitled to do.

22. The claim that the NPA should have prosecuted Rodrigues at the time of the decision to reopen the inquest – since it had all the evidence at that time – and no further evidence – cannot be taken seriously. In fact, the decision to reopen the inquest was taken largely on the basis of the statement provided by Salim Essop. The bulk of the additional evidence was only generated subsequent to this decision (para 133, Cajee answering affidavit).

23. In any event, the applicant's objections to the murder charge must be considered in the light that in the Reopened Inquest he effectively admitted to the murder of Timol on the basis of *dolus eventualis* in respect of his conduct post the fall. We deal with this in detail at paras 51 to 59 of our written heads.

24. In *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* 2018 (1) SA 200 (SCA):

> It is incumbent on prosecutors to disclose to a court any fact which, in their view, may impact negatively on the prosecution and in favour of the accused. This is in line with constitutional values and the provisions of the NPA Act. It is in the interest of the NPA, accused persons and the public's confidence in the administration of justice, that decisions concerning allegations of abuse of process be made by a trial court. (Para 91)

Political context

25. At para 100 of our heads we referred to the European Court of Human Rights case of *Acquaviva v France* no 19248/91 (ECtHR, 21 November 1995)

26. In *Acquaviva*, the European Court of Human Rights ("ECHR") had to consider an application brought by the parents of a man who had been killed in 1987. At the time of his death, the deceased was a militant nationalist on the run in Corsica. Of relevance to the present proceedings, the ECHR held at para 66 that:

> …although State authorities must act with with diligence taking special account of the interests and rights of the defence, **the political context**

cannot be disregarded, as in this instance, it has an impact on the course of the investigation. Such a situation may justify delays in proceedings.

27. In that matter the Court considered prevailing political instability that delayed the proceedings. We submit that in the present matter political instability was also present, albeit of a different nature. The NPA and SAPS became destabilised or incapacitated due to political interference – and similarly while such political instability is regrettable and must be addressed (in a different forum) – it must be accepted that in the prevailing circumstances it was not possible to bring this case at that time.

Costs

28. If the Respondents prevail in this matter, we do not seek costs against the Applicant. He is a pensioner without apparent means. Moreover, Cajee's legal team has acted largely pro bono (with exception of modest disbursements at human rights rates) to our junior.

29. Should the applicant prevail we submit that the 4th respondent should not be mulcted with a costs order on the basis of the *Biowatch* principle. In resisting this application Cajee has sought to vindicate his constitutional rights.

H Varney
T Scott
Counsel for 4th Respondent

28 March 2019
Chambers, Sandton