

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 35554/15

In the matter between:

THEMBISILE PHUMELELE NKADIMENG

Applicant

And

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

First Respondent

**THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE**

Second Respondent

THE MINISTER OF JUSTICE

Third Respondent

THE NATIONAL MINISTER OF POLICE

Fourth Respondent

WILLEM HELM COETZEE

Fifth Respondent

ANTON PRETORIUS

Sixth Respondent

FREDERICK BARNARD MONG

Seventh Respondent

MSEBENZI TIMOTHY RADEBE

Eighth Respondent

WILLEM SCHOON

Ninth Respondent

SUPPLEMENTARY AFFIDAVIT

I, the undersigned

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THEMBISILE PHUMELELE NKADIMENG

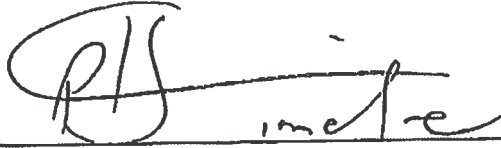
state under oath as follows:

1. I am an adult female, currently the Executive Mayor of City of Polokwane. I reside at 82 General Viljoen Street, Welgelegen, Polokwane. I deposed to the founding affidavit in this matter which was issued and served on 20 May 2015.
2. This affidavit serves to include all the pages of annexure "TN 42" to the founding affidavit which were not all initialed by me when I signed the affidavit on 18 May 2015.
3. Annexure "TN 42" was printed double sided and I therefore initialed only pages 430, 432, 434, 436, 438, and 440, 442 and 444 of the annexure.
4. I annex hereto a single sided copy of annexure "TN 42" properly initialed by myself and the relevant commissioner of oaths.

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Johannesburg
Signed at 22nd ^{TP DM} on this the 22nd ^{TP DM} day of MAY 2015.



THEMBISILE PHUMELELE NKADIMENG

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at _____ on this the _____ day of _____ 2015 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

DUMISANI MATHIBA

KOMMISSARIS VAN EDE
COMMISSIONER OF OATHS EX OFFICIO

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**REPORT
AMNESTY TASK TEAM**

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Secret**REPORT: AMNESTY TASK TEAM****1. Background**

1.1 A Director-General's Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed a Task Team to consider and report on the following:

- "1. Consideration of the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past.
2. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.
3. Bearing the above-mentioned in mind, whether legislative enactments are required."

1.2 The Task Team comprises the following members:

Deon Rudman (Chairperson):	Department of Justice and Constitutional Development
Yvonne Mabule :	National Intelligence Agency
Vincent Mogotloane :	National Intelligence Agency
Gerhard Nel :	National Prosecuting Authority
Lungisa Dyosi :	National Prosecuting Authority
Ray Lalla :	South African Police Service
Joy Rathebe :	Department of Defence

1.3 The Task Team was requested to submit its report to the Director-General's Forum by close of business on 1 March 2004. The Task Team met for the first time on 26 February 2004 and again on 1 March

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2004. Commissioner Ray Lalla could unfortunately not attend the first meeting. He did, however, submit his proposals to the Task Team for its consideration.

2. Terms of reference

2.1 At the outset the Task Team discussed its terms of reference in detail. It came to the conclusion that it had to perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003. The President provided the following guidelines:

- (a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.
- (b) Yet we also have to deal with the reality that many of the participants in the conflicts of the past did not take part in the TRC process. Among these are—
- individuals who were misled by their leadership to treat the process with disdain;
 - others who calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel;
 - others who expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases, which did not happen.

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- (c) "Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations."
- (d) "We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing."
- (e) "However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our Intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation."
- (f) "This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts."
- (g) "It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity."
- (h) "This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts."

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- (l) "Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action."
- (j) "Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard."
- (k) "The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments."

2.2 Paragraph 1 of the Task Team's terms of reference relates directly to the abovementioned framework determined by the President. Paragraphs 2 and 3 were added to the Task Team's terms of reference in order to enable it to pursue alternative routes in order to address the concerns expressed by the President should the Task Team deem it necessary.

3. Discussion

3.1 In its deliberations the Task Team also took cognisance of the following factors:

- (a) In terms of section 179(1) and (2) of the Constitution the National Prosecuting Authority (NPA) is an independent constitutional institution and the National Director of Public Prosecutions (NDPP) has full discretion on whether a particular

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prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

- (b) Any recommendations relating to the granting or refusing of amnesty should be in line with the TRC process which was constitutionally entrenched as a trade-off between the individual's right to seek justice in a court of law, on the one hand, and the imperatives of reconciliation and reparation, on the other.

3.2 Ad paragraph 1 of terms of reference

3.2.1 In order to give effect to the "arrangements" contemplated in the President's statement as reflected in paragraph 1 of the Task Team's terms of reference, it is recommended that a Departmental Task Team be appointed comprising members of the following Departments or Institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies
- The South African National Defence Force
- The South African Police Service
- Correctional Services
- The National Prosecuting Authority
- Office of the President

3.2.2 The functions of the proposed Task Team should be the following:

- (a) Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.

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- (b) To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—
- (i) the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;
 - (ii) the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.
- (c) To—
- receive information or representations from victims, perpetrators, legal representatives or any other person or institution regarding any specific matter;
 - gather intelligence information;
 - investigate the matter;
 - consult victims.
- (d) To consider the following factors when carrying out its mandate:
- (i) The general criteria governing a decision to prosecute as determined by the NDPP in the Policy Manual attached hereto as Annexure "A".
 - (ii) The following specific criteria:
 - o Whether the alleged offence is associated with a political objective committed in the course of the conflicts of the past.

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- o Whether a prosecution can be instituted on the strength of adequate evidence.
- o Whether the case, geographically and politically, reflects the aims and objectives set out in the Promotion of National Unity and Reconciliation, 1995(Act 34 of 1995), and is not in conflict with the requirements of objectivity in prosecutions specified in the Constitution.
- o Whether the offence in question is serious.
- o Whether the ill health of or other humanitarian consideration relating to the accused may justify the non-prosecution of the case.
- o Whether the prosecution will lead to the traumatising of victims and conflicts in areas where reconciliation has already taken place.
- o The degree of co-operation on the part of the alleged offender.
- o The credibility of the alleged offender.
- o The alleged offender's sensitivity to the need for restitution.
- o The alleged offender's further endeavours to expose possible further clandestine operations during the past years of conflict.
- o The degree of remorse shown by the alleged offender and his or her attitude towards reconciliation.
- o The degree of indoctrination to which the alleged offender was subjected.
- o The extent to which the alleged offender carried out instructions or perceived instructions.
- o The disclosure of organisations/individuals, if any, under whose instructions the alleged offender operated.

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- o The alleged offender's role during the TRC process – co-operation, full disclosure and assisting the process in general (if relevant).
- o Renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender.
- o Whether the alleged offender fully disclosed the alleged offences.
- o The views of the NPA.
- o If the accused is in custody, the views of the presiding judge or magistrate.
- o Any other criteria for deciding whether a political offence was committed as set out in the TRC Act.
- o Any further criteria, which the Task Team might deem necessary.

(e) To consider—

- (i) the provisions of section 105A of the Criminal Procedure Act, 1977(Act 51 of 1977), relating to plea and sentence agreements and the directives issued by the NDPP in terms of section 105A(11) of the said Act;
- (ii) the provisions of sections 7 of the Criminal Procedure Act relating to the issuing of a *nolle prosequi* certificate and the right of a private person to institute criminal proceedings in terms of the section 8 of the said Act;
- (iii) the provisions of section 18 of the Criminal Procedure Act relating to the lapsing of the right to institute a prosecution for any offence after the expiration of a period of 20 years from the time when the offence was committed, other than the offences of murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child-stealing; rape; or the crime of genocide, crimes

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against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;

- (iv) the possibility of diversion in the case of juvenile offenders;
- (v) possible arrangements settling the matter out of court;
- (vi) the provisions of section 204(2) of the Criminal Procedure Act relating to the discharge of the alleged offender from prosecution for the alleged offence if such offender testified as a state witness and answered all questions frankly and honestly.

3.2.3 If the above proposals are acceptable, it is recommended that the President announces the proposed process and invites full participation by those who may benefit from the process.

3.2.4 The Task Team realises that the proposed process will have the following shortcomings/concerns:

- (a) A possible negation of the constitutional rights of victims, the public at large and alleged offenders.
- (b) The possibility of the institution of private prosecutions.
- (c) The absence of any guarantee that alleged offenders will not be prosecuted. This might mean that they will be reluctant to approach the Task Team and make full disclosure. The concerns relating to persons who have disappeared, the arms caches that have not yet been discovered and the Kwazulu-Natal problem will not be solved.

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(d) Public perception regarding the participation in a further amnesty process by the security services as the public may regard them as perpetrators in the conflicts of the past.

3.3 Ad paragraph 2 of terms of reference

3.3.1 The Task Team is of the view that the only way to address the above concerns adequately would be to provide for a further amnesty process similar to that of the TRC process. This possibility elicited much debate within the Task Team. On the one hand, there were those who rejected this possibility out of hand. They argued that such a process would undermine and discredit the TRC process, further undermine the reconciliation process and not necessarily achieve the desired objectives. They argued that there is no reason why offenders who previously refused to participate in the TRC process will now, all of a sudden decide otherwise. Some members of the Task Team, however, placed emphasis on the need to create a further effective opportunity for full disclosure in order to address the concerns referred to in paragraph 3.2.4(o) above. They argued that a substantial number of those individuals who were in the past misled by their leadership and others who expected their political leadership to provide the overall context against which they could present their cases, may make use of a further amnesty process.

3.3.2 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. Should Government, however, decide to proceed with such a further process, a draft indemnity Bill is attached as Annexure "B" for consideration.

3.4 Ad paragraph 3 of terms of reference

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The recommendations under paragraph 1 of the terms of reference do not require any legislation. Should Government, however, decide on a further amnesty process as discussed in paragraph 3.3, legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court.

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ANNEXURE "A"

GENERAL CRITERIA GOVERNING A DECISION TO PROSECUTE

1. General

- (a) The process of establishing whether or not to prosecute usually starts when the investigating officer presents a docket to the prosecutor. The case needs to be studied carefully to make sure that it is properly investigated. In this regard the prosecutor may—
- request the police to investigate the case further;
 - decide to institute a prosecution;
 - decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
 - decline to prosecute without taking any other action.
- (b) The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.
- (c) Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.
- (d) In deciding whether or not to institute criminal proceedings against an accused person, prosecutors should 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. This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements. Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused must also be considered, before a decision is made. This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.
- (e) The review of a case is a continuing process. Prosecutors should take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute has been made. This may occur after having heard and considered the

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version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution.

2. Factors to be considered when evaluating evidence

When evaluating the evidence prosecutors should take into account all relevant factors, including—

(a) *How strong is the case for the State?*

- Is the evidence strong enough to prove all the elements of an offence?
- Is the evidential material sufficient to meet other issues in dispute?

(b) *Will the evidence be admissible?*

Will the evidence be excluded because of the way in which it was acquired or because it is irrelevant or because of some other reason?

(c) *Will the state witnesses be credible?*

- What sort of impression is the witness likely to make?
- Are there any matters that might properly be put by the defence to attack the credibility of the witness?
- If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

(d) *Will the evidence be reliable?*

If, for example, the identity of the alleged offender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

(e) *Is the evidence available?*

Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

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(f) *How strong is the case for the defence?*

Is the probable defence of the accused likely to lead to his or her acquittal in the light of the facts of the case?

3. **Prosecution in the public interest**

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise. There is no rule in law, which states that all the provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice. When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

(a) *The nature and seriousness of the offence:*

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

(b) *The interests of the victim and the broader community*

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of a complainant's wish not to proceed.
- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

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(c) *The circumstances of the offender*

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial*).
- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.
- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The above factors and the weight to be attached to them will depend upon the particular circumstances of each case. It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

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