IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 72747/2016

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

5/6/18 .....
DATE

.....
SIGNATURE

In the matter between:

WILLEM HELM JOHANNES COETZEE — **1ST APPLICANT**

ANTON PRETORIUS — **2ND APPLICANT**

FREDERICK BARNARD MONG — **3RD APPLICANT**

THEMBISILE PHUMELELE NKADIMENG — **4TH APPLICANT**

And

THE MINISTER OF POLICE — **1ST RESPONDENT**

THE PROVINCIAL COMMISSIONER FOR GAUTENG, SOUTH AFRICAN POLICE SERVICE — **2ND RESPONDENT**

JUDGMENT

PRETORIUS J,

(1) This is an application by the first, second and third applicants for the review and setting aside of the decision of the second respondent on 4 May 2016 to refuse the three applicants' applications for the payment of legal costs in the criminal trial. The first three applicants are accused numbers two, three and four in the indictment and are accused of the murder of Ms Nokuthula Simelane during 1983.

(2) The three applicants furthermore require a declaration that the three applicants are legally entitled to assistance by the South African Police Service ("SAPS") for payment of the legal costs in the criminal trial and the necessary cost orders.

(3) The fourth applicant was joined in this matter by court order on 29 March 2017. The fourth applicant supports the relief sought by the three applicants for the respondents to pay the reasonable legal fees of the three applicants in the criminal trial.

THE PARTIES:

(4) The first applicant is Mr W J Coetzee, who in 1983 was the

Operational Unit Commander of the Security Branch ("SB") of the former South African Police ("SAP"). The first applicant and the second and third applicants were at the time members of the Soweto Intelligence Unit of the SB. It is common cause that this unit acted under instruction of Brigadier Hennie Muller, who is now deceased. He was then Divisional Commander of the SB, as well as Brigadier WF Schoon, who at the time was the Pretoria Headquarters Commander of Section C of the SB, the section in the SAP charged with combatting terrorism. The first applicant left the South African Police Services ("SAPS") on 30 April 1997.

(5) The second applicant is Mr A Pretorius, who was second in command to the first applicant in the same unit in 1983. He left the SAPS on 30 April 1997.

(6) The third applicant is Mr FB Mong, who was a subordinate member in the unit in 1983. He is currently still employed in the SAPS.

(7) The fourth applicant is an adult sister of the deceased, Nokuthula Simelane, and acts on behalf of herself and her family, who was joined in this application by court order on 29 March 2017.

(8) The first respondent is the Minister of Police. No relief is sought

against the first respondent, unless he opposes the present application.

(9) The second respondent is the Provisional Commissioner of Police for Gauteng, SAPS.

ISSUES:

(10) The court has to decide whether the Minister and/or the Commissioner, the first and second respondents, have a legal obligation to pay the criminal defence costs of the three applicants, as accused, in the criminal trial, State v MT Radebe and 3 Others (Case no.: CC19/2016).

CHRONOLOGY OF LITIGATION:

(11) The chronology is important when the court has to decide whether the decision by the second respondent should be reviewed and set aside, and if doing so the matter should be remitted or whether the court should substitute the decision of the second respondent.

(12) On 26 February 2016 the three applicants were arrested and charged with the murder of Nokuthula Simelane during September 1983. They were released on bail of R5 000 each and are currently still on bail.

(13) On 14 March 2016 all three applicants applied, in terms of Standing Order 109, to the Police for legal assistance in the criminal matter. On 15 April 2016 the three applicants received a copy of the docket.

(14) On 4 May 2016 the second respondent refused the three applicants' applications for legal assistance. On 15 June 2016 the attorneys for the applicants requested the second respondent to reconsider her refusal and on 7 July 2016 again requested a reconsideration. No reply was forthcoming.

(15) On 27 September 2016 and 5 October 2016 the review application was served on the respondents respectively. Both respondents served a notice of intention to oppose – this notice was served out of time.

(16) On 11 November 2016 the State Attorney was requested to file the record of proceedings by 18 November 2016. It was only filed on 24 November 2016.

(17) On 8 December 2016 the applicants filed supplementary founding affidavits. On 17 January 2017 the State Attorney requested an extension until 30 January 2017 to file its answering affidavits. Once more the State Attorney did not adhere to the chosen date, but on 2 February 2017 requested a further extension until 9 February 2017.

Again the date was not adhered to, but the State Attorney requested a further extension to 17 February 2017. In the end the answering affidavits were only served on 22 March 2017 – more than a month after the date chosen by the State Attorney.

(18) After the joinder of the fourth applicant, she filed her founding papers on 30 March 2017. Once more the respondents' notice to oppose was served late. The respondents' answering affidavit was only filed on 18 May 2017, where after the applicants filed their replying affidavits, which was followed on 7 June 2017 by the fourth applicant's replying affidavit.

(19) On 7 July 2017 the fourth applicant filed heads of argument and on 14 July 2017 the applicants filed their heads of argument and practice note. The respondents only filed their heads of argument and practice note three months later on 13 October 2017. It is thus clear, that throughout these proceedings, the respondents failed to adhere to the Uniform Rules of Court in respect to time limits in which papers had to be filed.

BACKGROUND:

(20) The background to the application is common cause, but it is relevant and necessary to the facts in the current application. The criminal

case against the three applicants is that in 1983 the three applicants, whilst in the employ of the then South African Police, allegedly murdered Nokuthula Simelane ("Nokuthula"), a 23 year old university graduate and an underground operative of the African National Congress ("ANC"). Nokuthula was the sister of the fourth applicant.

(21) She was viciously tortured and disappeared after the three applicants had failed in a *"kopdraai"* operation. This operation was allegedly perpetrated by the first, second and third applicants ("the applicants") as members of the Soweto Intelligence Unit of the SB.

(22) Nokuthula was abducted at the Carlton Centre in Johannesburg during September 1983.

(23) Nokuthula was detained at a safe premises, interrogated, tortured and assaulted by the three applicants for a number of weeks. This was done on the instructions of their commanding officers, Muller and Schoon. The purpose was to recruit her as an agent for the SB. This was admitted by the respondents. Nokuthula was treated in the most reprehensible, inhumane manner whilst in the custody of these members. She was repeatedly punched, kicked, slapped, suffocated with a bag, electrically shocked and denied toiletries and basic medicine. She could not walk unassisted and she was unrecognisable as her face was so badly swollen. According to the applicants they

dropped her at the Swaziland border after she had indicated that she would assist the SB. She was never seen again. To date the fourth applicant and her family still do not know what had happened to Nokuthula.

(24) The fourth applicant tried through the years to get justice for her sister from the SAPS and the National Director of Public Prosecutions, to no avail. As a final resort she obtained a court order in 2015 to compel the National Prosecuting Authority to either conduct an inquest or prosecute the applicants. This resulted in the applicants being prosecuted for the murder of Nokuthula in the indictment of State v MT Radebe and 3 Others (Case No CC19/2016).

(25) As a result of the indictment the applicants applied to the respondents to have their legal fees, in the criminal case, to be paid by the respondents. This application for assistance of payment of legal fees was in terms of Police Standing Order 109.

(26) On 26 February 2016 the applicants appeared in the Pretoria Regional Court and were granted bail of R5 000 each. They have subsequently appeared on four further occasions; 29 March 2016, 25 July 2016, 20 September 2016 and 25 November 2016 when the matter was then postponed to 28 July 2017. On 4 May 2016 this application for assistance was refused by the second respondent. This refusal

resulted in the trial of the applicants to be delayed and postponed on several occasions so that the issue of payment of legal fees could be taken on review.

(27) After 35 years Nokuthula's family still do not know what had happened to her and where her body is. The Truth and Reconciliation Committee ("TRC") concluded in 2001 that the applicants had lied to the Commission about the severity of the torture and the duration thereof. They were thus only granted amnesty for her kidnapping, but were denied amnesty for the assault and torture. There was no application for amnesty for the murder of Nokuthula as the applicants deny that they had killed her.

(28) The reasons dealt with by the second respondent's legal team when refusing the application were that the applicants had exceeded their powers of duty, that it would be against State and public interest to grant legal assistance; that there is a conflict of interest as the applicants' version differs from that of three witnesses and that the State is the complainant. Furthermore, it was stated that two of the applications, that of first and second applicants were incomplete and that it would be difficult to recover the debt as the first and second applicants are no longer in the employ of the SAPS.

(29) It is important to note what the reasons for the decision not to provide

legal assistance were in the original decision and the reasons as set out in the Commissioner's, the second respondent's, answering affidavit.

(30) In the application form for assistance by all the applicants it is stated under clause "H": *"If the application is refused, the reasons for the refusal must be recorded in full."*

(31) The legal administration official of the second respondent did not recommend that the application for legal assistance be granted, but set out on 11 April 2016:

> *"(1) The member exceeded his powers when executing his duties.*
>
> *(2) There is conflict of interest existing due to different versions of facts offered by employees involved in the same incident.*
>
> *(3) It will be against the State and public interest to offer assistance as the state is a complainant."*

(32) The Provincial Head: Legal Services similarly did not recommend the application and furnished the reason that the first applicant does not work for SAPS and *"recovery of any debt due to SAPS will be problematic"*.

(33) The second respondent only noted that the application is not approved and that *"the member to apply for assistance for legal aid"*. There was no further reasons furnished by the second respondent, neither did she confirm the reasons furnished by the legal administration official, or the Provincial Head: Legal Services. Both these parties furnished the same reasons for not granting the application of the second applicant.

(34) The same reasons were given by the legal administration official, but the Provincial Head: Legal Services noted *"I agree with the above reasons. The member was obeying an illegal instruction. Member must apply to Legal Aid"*.

(35) The second respondent made the same note on the second and third applicant's application when refusing to grant legal assistance, namely *"the member to apply for assistance for legal aid"*. The recommendation by Colonel Nomdoe, the commander of the third applicant, that the third applicant should receive legal assistance from the SAPS and set out his reason for doing so as: *"member was on duty and obeying his commander's instructions"*.

(36) There is no indication by the second respondent that she had considered the applications and reasons of her legal assistants, but

only a terse note that *"the member to apply for assistance for legal aid"*.

LEGAL BACKGROUND:

(37) Clause 4(4)(b) of the Standing Order 109 that provides:

"An application for assistance may be refused in the event of information showing that –

(b) it will be against state or public interest to do so;"

(38) Clause 4(1) and (2)(a) of Standing Order 109 sets out the grounds on which the second respondent can approve or refuse applications for legal assistance:

"(1) An employee may, subject to subparagraphs (2) and (3), only be provided with assistance in accordance with this Order if, at the time the alleged commission of the offence, such an employee acted or omitted to act when he or she should have acted in the execution of his or her duties.

(2) An employee does not qualify for assistance paid for by the Service, if he or she, at the time of the alleged commission of the offence, -

(a) intentionally exceeded his or her powers;"

(39) It is clear that an employee, *"at the time of the alleged commission of an offence"* who was not disqualified in terms of paragraph 2(a) of the Standing Order, would be granted legal assistance. Clause 8 of the Standing Order deals with a separate procedure after conclusion of the criminal case.

(40) The **South African Police Service Act** and **Internal Security Act**[1] conferred the police with extraordinary and draconian powers.

(41) Section 35(3) of the **Constitution** provides:

> *"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*

[1] Act 74 of 1982

would otherwise result, and to be informed of this right promptly;"

(42) In considering the grounds of review the court has to keep in mind that the principle is that a review is not concerned with the correctness of a decision made, but whether and how the second respondent performed the function with which she was entrusted[2].

(43) In **Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another**[3] Navsa ADP held:

"So, both the process by which the decision is made and the decision itself must be rational. If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose."

(44) The test to establish bias was set out in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others**[4] *"whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has*

[2] MEC for Environmental Affairs and Development Planning v Clairison's CC 2013(6) SA 235 (SCA) at paragraph 18
[3] [2017] 4 All SA 726 (SCA) at paragraph 82
[4] 1999(4) SA 147 (CC) at paragraph 48

not or will not bring an impartial mind to bear on the adjudication of the case". This test applies in the present matter.

(45) It is so that the party who relies on bias, or reasonably suspected bias bears the onus to prove this. The importance of procedural fairness is dealt with in **Joseph and Others v City of Johannesburg and Others**[5]:

> *"The importance of procedural fairness is well described by Hoexter:*
>
> *'Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy'."*

(46) In **Minister of Health and Another v New Clicks South Africa**[6] the Constitutional Court held that affected parties cannot make meaningful representations when they do not know what factors will be taken into consideration in a decision to be taken. In this instance it is alleged that the second respondent failed to inform the applicants of her decision to have regard to the TRC findings, as well as the statements

[5] 2010(4) SA 55 (CC) at paragraph 42
[6] 2006(3) SA 311 (CC) at paragraph 152

of the three witnesses.

(47) In **Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another**[7] the Full Bench found:

> *"Furthermore, the DG made his decision without having heard the applicant and without even being aware of the nature and substance of the applicant's submissions. In these circumstances, I am driven to the conclusion that the process that underlay the decision of the DG was procedurally unfair and falls to be set aside."*

(48) Section 8(1)(c)(ii) of **PAJA** provides:

> *"The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-*
>
> *(c) setting aside the administrative action and-*
>
> *(ii) in exceptional cases-*
>
> *(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or*
>
> *(bb) directing the administrator or any other party to the proceedings to pay compensation;"*

[7] 2005(3) SA 156 (WCC) at paragraph 78

NO LONGER IN EMPLOY OF SAPS AND DIFFICULT TO RECOVER DEBT:

(49) In paragraphs 60 and 61 of the second respondent's answering affidavit her reason for refusing the first and second applicant's application was, *inter alia*, that they *"...were no longer in the employ of the SAPS, they accordingly could not qualify for assistance..."*. This decision by the second respondent was based on the definition of *"employee"* in Standing Order 109, where *"employee"* is defined as *"employee means any person in the employment of the Service..."*.

(50) Although the first and second applicants left the SAPS on 30 April 1997, they were members of the SAP in 1983 when this incident took place. The decision that it would be problematic to recover their debt, should it become necessary, can in no manner be regarded as sufficient reason for denying the first and second applicants' legal assistance. Such a reading and interpretation of the Standing Order would lead to absurdities where members resigning from the SAPS are prosecuted for alleged crimes committed whilst in the SAPS, at the behest of their superiors and will not be able to rely on legal assistance from the SAPS. There is no evidence that it would be impossible to recover the debts from the first and second applicants. This reasons cannot stand.

(51) If one applies this decision to the application of the third applicant, the

same reason should apply as he was not a member of the SAPS, but also a member of the SAP at the time and is still in the employ of the SAPS.

(52) It is important to note that the second respondent does not regard the SAPS as the successor in title of the SAP and does not concede that all the liabilities and responsibilities attached to the SAP, will apply in equal measure to the SAPS, the successor in title of the SAP. This cannot be correct. The fact that the applications were dealt with in terms of Standing Order 109 confirms that the second respondent did consider the applications, but misdirected herself by finding that they were no longer in the employ of the SAPS. She did not take the provisions of paragraph 4(1) where it specifically provides that *"at the time of the alleged commission of the offence..."* into consideration. All three applicants were employees of SAP at the time of the commission of the alleged offences in 1983 and were under command and instruction of Brigadier Hennie Muller. The court has to consider the prevailing circumstances during 1983, at the height of the apartheid government's war against the liberation movements. This cannot simply be negated. I find that all three applicants were members of the SAP and as such qualify for legal assistance.

(53) I must agree with the applicants that this is such a serious misdirection by the second respondent that it justifies the setting aside of her

decision not to provide legal assistance to the applicants.

INCOMPLETE APPLICATION FORMS:

(54) The incompleteness of the application forms were no longer an issue when the matter was argued and I will not deal with it, save to comment that it was impossible for first and second applicants to get their commanding officers to complete the forms, as Brigadier Muller is deceased.

LAWFUL, REASONABLE AND PROCEDURALLY FAIR:

(55) When making a decision, the decision must be lawful, reasonable and procedurally fair. The second respondent set out in her decision in the first applicant's application:

"Not approved member to apply for assistance for legal aid."

In the third applicant's application she noted her decision as follows:

"The member must not receive legal assistance, he can apply for legal aid."

(56) The applicants contend that the second respondent failed to conduct a fair and unbiased investigation. In her answering affidavit she disclosed that she had considered the statements by the three witnesses, namely, M E Sephufhi, N L Selamolela and N N Veyi. The

applicants were not aware that she had done so until the answering affidavit was served. They did not have an opportunity to deal with these statements. Counsel for the second respondent conceded, during argument, that it is problematic that she did not inform the applicants of this fact.

(57) It is also clear from her answering affidavit that she had taken into consideration what had taken place at the TRC. She had formed a view in this regard without granting any of the applicants an opportunity to deal with her reliance, *inter alia*, on the findings of the TRC. She should have informed the applicants that she would take the findings of the TRC into consideration and not have waited to disclose it in her answering affidavit. There was no indication on their application forms by either the Legal Administration Officer or the Legal Executive Officer that the findings by the TRC would be considered.

(58) There is no indication whether she considered all the facts before her or which facts she had considered. Even if it is so that she need not give reasons, she must at least indicate that she had considered the matter and that she had taken the facts into consideration when making her decision. In the application form, under clause "H", it is set out:

"(1) The member exceeded his powers when executing his duties.

(2) There is conflict of interest existing due to different versions of facts offered by employees involved in the same incident.

(3) It will be against the State and public interest to offer assistance as the state is a complainant."

These reasons were the reasons as ascertained and set out by the Legal Administration Official and the Executive Legal Officer of the second respondent. There is no indication which of these reasons, or whether any of these reasons persuaded her not to grant legal assistance.

(59) In these circumstances I find that the applicants have a reasonable apprehension of bias and that the second respondent followed an unfair procedure. The process was not impartial and there is thus a reasonable apprehension of bias against the three applicants.

EXCEEDED POWERS OF DUTY:

(60) In her answering affidavit the second respondent deals[8] with section 205(3) of the **Constitution**[9], as well as with the provisions of the **South African Police Service Act**[10]. These Acts were not in

[8] In paragraph 39
[9] Act 108 of 1996
[10] Act 68 of 1995

existence during 1983. This application has to be dealt with according to the prevailing legislation in 1983 and therefor her reliance on the Constitution and provisions of the **South African Police Service Act** is totally flawed. The applicants were not members of the SAPS in 1983, but members of the erstwhile SAP. There was no provision in these Acts referring to the police.

(61) The second respondent had to consider the applicants' applications with reference to the prevailing conditions in 1983.

(62) All the applicants dealt with the *de facto* situation during 1983 with reference to the Truth and Reconciliation Committee's findings. The three applicants' position, at the time, was that they were members of the Security Branch. It was at the height of the resistance against the apartheid regime by the ANC and other freedom organisations.

(63) It is apposite to take into consideration what the Amnesty Committee said in Jan Hattingh Cronje's application for amnesty in terms of the **Promotion of National Unity and Reconciliation Act**[11]:

> *"...Both van der Merwe and Vlok gave evidence of a general nature explaining circumstances under which members of the police worked during the time of political turmoil in the country,*

[11] Act 34 of 1995

and also how they might have understood their instructions in the light thereof…

It may shorten future proceedings if the evidence could be summarised in this decision and simply be referred to in future without the necessity of repeating it in all future hearings. Almost all policemen appearing before us joined the police force after the National Party became the government of South Africa in 1948 and implemented the apartheid policy. They were brought up under this doctrine which was supported by schools and all the Afrikaans churches. There was rarely any voice in the circles they moved in, condemning the policy. On the contrary the churches proclaimed the policy to be in accordance with the scriptures and even acted against preachers like the Rev. Beyers Naudé who spoke out against it. As policemen they were indoctrinated to defend the policy and the government of today even with their lives should it be necessary. They accepted the legally enforced environment as the accepted and acceptable social structure of the country…

Their functions were extended beyond the primary police functions of combating crime. A security branch was created with the ultimate task of keeping the government in power to enable them to work out a political solution if and when they could succeed in doing so…

They did the work of soldiers, became involved in killing

contrary to the normal police function of keeping the peace and combating crime in accordance with the ordinary and customary laws applicable to police forces generally. Violence escalated since 1976 and during the 1980's a full scale revolutionary war developed in South Africa."

(64) The expert evidence of Adv Ntsebeza SC and Mr Dutton, furnished by the fourth applicant, cannot be disregarded. This evidence was not dealt with by the Commissioner, as she only made a bare denial dealing with their affidavits.

(65) Adv Ntsebeza SC explains the situation as follows:

"The kidnapping, torture and murder of Nokuthula Simelane in 1983 by members of the Security Branch happened in a particular context which must be brought to the attention of this Honourable Court. This context is one where state sanctioned extra judicial killings and rampant criminality was the order of the day."

And:

"The TRC in its Final Report concluded that at a certain point, which coincided with PW Botha's accession to power in 1978, the South African state through its security forces, and in particular, the SAP, ventured into the realm of criminality as a matter of state sanctioned policy (TRC Report, Vol 5 Ch. 6,

Findings and Conclusions, p 212). This period ran from the late 1970's to the early 1990's."

Mr Dutton, an international policing and investigation expert, came to the following conclusion in the present matter:

"I conclude that the accused acted under the direct and indirect instruction of their SAP commanders. An important function of the SB was to obtain, frequently by illegal means, operational information from arrested or captured activists. The modus operandi employed by the Security Branch at that time also involved so-called "kopdraai" operations which routinely included abduction, torture and the elimination (murder) of captives who refused to become informers."

(66) It is clear that during 1983, at the height of the resistance of the freedom fighters in the Republic of South Africa, the police used all and any methods to safeguard the apartheid regime. I cannot find, and it is not incumbent on me to find whether the applicants acted in a manner, at that particular time, exceeding their powers. It will be for the trial court to make such a determination.

(67) I have considered all the arguments, documents and evidence and find that the second respondent erred in disqualifying the three applicants for legal assistance on this ground.

AGAINST THE STATE AND PUBLIC INTEREST AND IN CONFLICT BY OTHER EMPLOYEES:

(68) The second respondent set out in the answering affidavit[12] *"...the facts relied on by the State in prosecuting the applicants are exceptionally serious and this in itself is indicative that it would be against the State or the public interest to offer financial assistance to the applicants"*.

(69) According to the second respondent an application may be refused if it shows *"that it will be against the state or public interest to do so or a conflict of interest exists due to different versions of fact offered by employees involved in the same incident"*.

(70) This averment by the second respondent is in relation to statements by Messrs Sephuthuli, Selamolela and Veyi who were also allegedly involved in the incident. First of all it must be mentioned that these are persons who the State may call during the criminal trial as witnesses – they are not co-accused of the applicants. It is evident that the second respondent took the contents of the affidavits of the three witnesses into consideration when deciding whether to provide legal assistance.

(71) It was not conveyed to the three applicants that she had these three

[12] Paragraph 5

statements in her possession. She further did not inform the applicants that she intended considering these statements when deciding whether the three applicants qualify for legal assistance. She failed to grant the applicants the opportunity to deal with the contents of these conflicting statements and to make representations to her in respect of the three statements. Her reason for doing so is set out as *"...a conflict of interest exists due to the different versions of fact offered by the employees involved in the same incident..."*.

(72) As was pointed out by counsel for the fourth applicant the second respondent misconstrued this requirement. The three policemen are not standing trial with the three applicants and therefor no conflict of interest can arise. The three applicants' versions amongst themselves are non-contradictory and the SAPS need not support employees, where they are co-accused, who contradict one another, as it is simply not the case in the present matter.

(73) The version that the third applicant had provided these statements cannot be true as the three applicants' applications for assistance were submitted to the second respondent on 14 March 2016. Thereafter, on 15 April 2016, almost a month after submitting their applications, the case docket was handed to the applicants. The record for review in terms of Rule 53 was prepared by the second respondent and her office and was served on the applicants' attorneys on 24 November

2016. According to this record[13] the statements of the three persons were already on file on 11 April 2016 and it appears that it was received by the respondents on 23 March 2016. This was done after the applicants had applied for legal assistance. The court finds that the applicants were not aware that these documents would be used by the second respondent to reach a decision. The *audi alteram partem* rule was breached as the applicants were not granted the opportunity to deal with the contents of these statements.

(74) It is clear that the second respondent did not have the indictment and summary of substantial facts in her possession when she had initially made the decision. She could only have become aware of it when she read the applicants' founding affidavit in this application. She did not rely on this ground when dealing with the applications for legal assistance as she did not have the indictment at the time. She supplemented her reasons in the answering affidavit when she set out:

> *"43. The torture of Ms Simelane, which may well have culminated in her murder and perpetrated under the apartheid regime, is against both the State and public interest and therefore the decision not to approve the applications for assistance on this basis was rational or reasonable and in line with the Standing Order.*
>
> *44. The seriousness of the offence also cannot be*

[13] Page 50

overlooked."

Once more the applicants were not afforded the opportunity to deal with this reason and therefor the *audi alterem partem* rule was once more not adhered to. This reason was thus unreasonable and procedurally unfair.

STATE AS COMPLAINANT:

(75) Counsel for the respondents conceded that this ground should be disregarded as incorrect in this application.

(76) I have considered all the facts, arguments and authorities. I find that the decision by the second respondent has to be set aside due to finding that at the time, in 1983, the applicants were in the employ of the SAP. I further find that the second respondent did not act in a reasonable, lawful and fair manner by not adhering to the *audi alteram partem* rule and not informing the applicants that she had considered the applications. Her investigation was not fair and unbiased if one has regard to the reasons for her decision set out in her answering affidavit. It is furthermore not for this court to decide whether the applicants had exceeded their powers of duty. The trial court will have to make that decision. In the event that the SAPS will have to recover the money for legal assistance, after the trial, Standing Order 109 provides for such an eventuality. The last reason that there were conflicting versions by employees shows that the second respondent

had not carefully considered this averment. It is quite clear that the three witnesses who are, or were, in the employ of either the SAP, or SAPS, may be giving conflicting versions as to what had transpired in 1983, but they will be witnesses and not co-accused. Taken cumulatively I find that the first respondent acted in a biased, unfair and irrational manner when I apply the test as set out in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** and the principles as discussed in the cases quoted above. The decision has to be set aside.

SUBSTITUTION:

(77) The court was requested by all the applicants that should the court find in favour of the applicants and review and set aside the decision that the court should substitute its decision in terms of section 8 of the **Promotion of Administrative Justice Act**[14] (**"PAJA"**).

(78) In **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another**[15] the court dealt with exceptional circumstances and held: *"an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances".*

The court dealt with the necessary factors and set out[16]:

---

[14] Act 3 of 2000
[15] 2015(5) SA 245 (CC) at paragraph 35
[16] 2015(5) SA 245 (CC) at paragraph 47

"The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."

The court held[17] that where the court has found an administrator to be biased it would be *"unfair to ask a party to resubmit itself to the administrator's jurisdiction".*

(79) This court has firstly to determine whether it is in as good a position as the administrator to make the decision, secondly whether the decision is a foregone conclusion and thirdly, whether remitting the decision will result in a further delay which would cause prejudice to all four applicants and, in this instance, to the community at large.

(80) I must agree with counsel for the fourth applicant that the respondents

[17] 2015(5) SA 245 (CC) at paragraph 54

have not covered themselves in glory from the inception of the present litigation. Not only did the respondents not adhere to time limits and court rules, but the state machinery had throughout, failed the deceased and her family abysmally.

(81) The delay has lasted decades. Since the indictment of the three applicants, four postponements had already been granted in order to resolve the issue of legal assistance.

(82) The state has the duty in terms of section 7(2) of the **Constitution** to *"respect, protect, promote and fulfil the rights in the Bill of Rights"*. The National Prosecuting Authority's prosecution policy states the maintenance of law and order within a human rights culture requires *"effective and swift prosecution"*.

(83) The fourth applicant has been pleading for years, and had to resort to litigation, to have the State institute criminal proceedings against the three applicants. This has caused suffering to the fourth applicant and her family – her father and brother had passed away before getting closure as to the whereabouts of Nokuthula. Her mother is an elderly lady, suffering from ill-health.

(84) According to counsel for the fourth applicant this delay has betrayed

the constitutional compact which was envisaged by the **Interim Constitution** and the spirit in which the TRC process was instituted.

(85) In **Mvumvu and Others v Minister for Transport and Another**[18] the Constitutional Court stated:

> *"In our young democracy, and because of our history, which was characterised by inequalities and discrimination, constitutional breaches such as the present must be redressed effectively, by, where possible, vindicating the infringed rights fully. This court in Fose v Minister of Safety and Security said:*
>
> *'Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility*

[18] 2011(2) SA 473 (CC) at paragraph 48

in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'"

(86) It would be in the public interest if this trial commences as soon as possible to ensure justice not only to the applicants, but to the fourth applicant and her family as well, and society as a whole. It is further in the public interest that the applicants should have proper legal representation and a fair trial as soon as possible. The commencement of the trial has already been unduly delayed due to the decision not to assist the three applicants with payment.

(87) I find that I am in as good a position as the second respondent to make the decision. All the facts are before me. There is no expert knowledge required to make a decision. Due to the history of the matter, the reasons for the decision by the second respondent, I find that on a balance of probabilities the decision by the second respondent is a foregone conclusion.

(88) The second respondent's refusal is against the rights of the fourth applicant and her family and the community at large, as well as the three applicants.

(89) The present matter is such a matter as mentioned in the **Trencon** and

Mvumvu case. I find that, as I have found that the second respondent was acting procedurally unfair and biased, that there is no merit in the reasons provided by the SAPS to justify the decision. An effective remedy, in the current situation will be a swift decision. Having regard to not only the history of the problems the fourth applicant encountered to get the National Prosecuting Authority to institute proceedings, but also the tardy manner in which the defence dealt with the present application, I am satisfied that a further, prolonged delay will be caused should the matter be remitted. It has taken more than 30 years for Nokuthula's family to get to the stage where they may be granted truth, justice and closure. The severe continued delay to deal with this case can never be in the interest of justice. This is reason enough to substitute the second respondent's decision with that of the court.

(90) The applicants are entitled to proper legal assistance which can only be achieved, in the circumstances, where such assistance is provided by SAPS to pay their legal costs in the criminal trial.

(91) In the result the following order is made:

1. The decision by the second respondent as communicated to the applicants on 4 May 2016, to refuse their applications for assistance with the payment of legal costs in a criminal matter, namely The State v MT Radebe and 3 Others (case no. CC19/2016) is reviewed and set aside;

2. The applicants are legally entitled to assistance by the SA Police Service with the payment of reasonable legal costs in the criminal matter of The State v MT Radebe and 3 Others (case no. CC19/2016);
3. The first and second respondents are ordered to pay the costs of the applications including the costs of two counsel, where applicable, jointly and severally, the one paying the other to be absolved.

Judge C Pretorius

Case number	: 72747/2016
Matter heard on	: 15 May 2018
For the 1st, 2nd & 3rd Applicants	: Adv. M. D. du Preez SC
Instructed by	: Steyn Wilson Attorneys
For the 4th Applicant	: Adv. Muzi Sikhakhane SC Adv. Howard Varney
Instructed by	: Webber Wentzel Attorneys

For the Respondents	: Adv. N H Maenetje SC
	Adv. S. Tilly
Instructed by	: State Attorney
Date of Judgment	: 5 June 2018