IN THE SUPREME COURT OF APPEAL

(BLOEMFONTEIN)

APPEAL COURT CASE NUMBER: 1186/2019

GAUTENG HIGH COURT CASE NUMBER: 76755/2018

In the matter between:

JOAO RODRIGUES	Appellant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

APPELLANT'S WRITTEN SUBMISSIONS

A. <u>INTRODUCTION</u>:

1. We deal in these Heads of Argument with both the Application for Leave to Appeal to this Honourable Court as well as with the merits of the appeal.

2. Appellant approached the Court *a quo* (Full Court) on the 28th of March 2019 for an order prohibiting the First and/or Second Respondents to proceed with the criminal prosecution against Appellant on a charge of murder relating to the death of the late A E Timol ("the deceased"). This application was dismissed on the 3rd of June 2019.

3. The Application for Leave to Appeal was dismissed by the Court *a quo* on the 18th of September 2019.

4. The Application for Leave to Appeal to this Honourable Court, in terms of section 17(2)(b) read with section 16 of the Superior Courts Act, Act 10 of 2013, was partly successful. This Court granted Appellant the right to appear in order to apply for Leave to Appeal in Court and ordered that the Application for Leave to Appeal and the Appeal would be heard together.

B. <u>BASIS OF THE APPLICATION</u>:

5. It will be argued on behalf of Appellant that the envisaged prosecution will infringe the following fundamental rights provided for in section 35(3) of the Constitution:

5.1. Section 35(3)(d) – Appellant's right to have the trial to begin and be concluded without unreasonable delay.

5.2. Section 35(3)(i) - the right to adduce and challenge evidence effectively.

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

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

5.5. The issue relating to an agreement/arrangement between Government and other interested parties not to prosecute in certain alleged offences, including the incident relevant to this application. The prosecution of the Appellant contrary to an agreement/ arrangement will certainly have a bearing on the fairness of the prosecution.

C. BACKGROUND FACTS:

6. The following facts were common cause and/or largely undisputed:

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

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

6.3. On the 27th of October 1971 the deceased died as a result of injuries suffered when he fell from the 10th Floor of the offices of the Security Branch at John Vorster Square whilst in custody.

6.4. The Appellant was not involved in the arrest or subsequent investigation of the case against the deceased.

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

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

6.7. The First Respondent eventually, and after many years following the request to reconsider the issue, made recommendations to the Second Respondent for the re-opening of the inquest of the deceased in terms of section 17A of the Inquest Act, Act 51 of 1959 in 2017.

6.8. The Truth and Reconciliation Commission ("TRC") also investigated the death of the deceased.

6.9. Appellant was indeed approached by an investigator on behalf of the TRC during 1996 and questioned about the incident relating to the death of the deceased.

6.10. The State President and Government at the highest level considered amnesty for politically motivated offences following the TRC proceedings. A special task team had been appointed for this purpose. Unfortunately we do not know what the outcome of the consideration by the State President was in this regard. (The reason for this unfortunate position is solely the fact that the Second Respondent deliberately failed to disclose the facts relevant to this

issue to the Court.) We will, however, submit that the most probable inference is that there was indeed an amnesty granted.

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

6.12. The inquest proceedings were finalised on the 24th of August 2017 and the Honourable Mothle J delivered his findings on the 12th of October 2018. A copy of the judgment containing the findings was annexed to the founding affidavit. We deal with the material findings in this regard hereinafter.

7. Subsequent to the ruling referred to above the First Respondent decided to charge Appellant on *inter alia* a count of premeditated murder. Appellant was arrested on these charges on the 30th of July 2018 and brought before the Regional Court in Johannesburg. He was released on bail in the amount of R1 000.00.

8. The case was transferred to the South Gauteng High Court for trial and Appellant appeared for the first time on the 18th of September 2018.

Deliberate attempt by First to Third Respondents to conceal the true facts from Court:

9. We submit that an aspect that is relevant to the question of fairness was the improper and regrettable conduct of the First and Second Respondents

in dealing with the application. These Respondents deliberately withheld extremely important facts from the Court *a quo* relating to the reasons for the lengthy delay and serious political interference in prosecutions of this nature in their initial answering papers. First Respondent was forced to disclose some of these relevant facts in a supplementary affidavit, only after Fourth Respondent successfully applied for the right to be joined as a Respondent and disclosed some of the facts within his knowledge in his answering affidavit. First Respondent then filed a supplementary answering affidavit in which they admitted these facts and only then disclosed facts indicating a deliberate decision not to prosecute in matters of this nature. This included interference by the State President and the Minister of Justice (Second Respondent).

10. Second Respondent (the Minister of Justice) chose not to disclose any of these material facts even after being confronted with documentation corroborating Fourth Respondent's version of material political interference in prosecutions of this nature. This inexplicable conduct was maintained even after the First Respondent filed a supplementary affidavit admitting the interference by the Second Respondent.

11. The unfortunate result of this decision to conceal the true facts by First and Second Respondents is that this Court is still not privy at this stage to all the relevant facts in order to properly evaluate the effect thereof.

12. The Trial Court refused the application on Appellant's behalf to order Second Respondent to file an affidavit disclosing all the relevant facts *alternatively* refer the application for oral evidence in order to compel Second Respondent to testify on this issue.

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

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

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

15. The objective facts in this case are of course that Appellant has only been charged more than 47 years after the death of the deceased and at a time when he is more than 80 years of age.

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

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

18. The failure by the First Respondent to take any action must be seen against the continuous requests and pressure by the family of Timol to proceed in the matter.

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

20. At that stage the perpetrators, according to the findings of Mothle J in the re-opened inquest proceedings, were still alive and could be prosecuted. According to the finding of Mothle J the Appellant played no role in the killing of the deceased.

21. Although we do not have access to all the relevant and material facts and documentation at this stage to fully evaluate the course of the delay, some indications could be gathered from the First Respondent's supplementary affidavit. It appears to be common cause that the reason for any delay in the prosecution of the Appellant was a deliberate decision by the First Respondent not to prosecute *inter alia* the Appellant as a result of decisions and interference by Government including the State President and the Minister of Justice (Second Respondent). In order to assist the Honourable Court we refer to the following evidential material supporting the above submission:

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

> *"I do not deny that the National Prosecuting Authority was subjected to political interference and political pressure not to immediately prosecute cases such as the present. Incidentally, this also happened during the time that Pikoli was the National Director of Public Prosecutions."*[1]

21.2. The First Respondent attempted to explain the extreme delay on political interference and severe political constraints to which the First Respondent was subjected.[2] It was further stated under oath on behalf of the First Respondent that the reason for the delay was the manipulation of the criminal justice system to protect individuals from criminal prosecution.[3]

21.3. In an affidavit the former Special Director of Public Prosecutions in the office of the First Respondent, Advocate Ackermann SC, set out in detail how he was stopped from pursuing the investigation and prosecution of these type of cases.[4]

21.4. In a secret memorandum by Advocate Pikoli, a former National Director of Public Prosecutions, he concluded that there had been interference in relation to TRC cases and that he was obstructed to proceed with the prosecution of these cases.[5]

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

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[1] See: First Respondent's Supplementary Affidavit: Vol 4: P. 698, par 5.4
[2] See: First Respondent's Supplementary Affidavit: Vol 4: P. 665, par 2.12
[3] See: First Respondent's Supplementary Affidavit: Vol 4: P. 675, par 2.30
[4] See: Annexure "IC7": Core Bundle: P. CB31
[5] See: Annexure "IC10": Core Bundle: P. CB138

> *"I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the Truth and Reconciliation Commission … contributed to the decision of President Mbeki to suspend me …"*[6]

And

> *"In particular, I confirm the contents of the Applicant's affidavit under the heading 'political constraints'. I confirm that there was political interference that effectively barred … possible prosecution of the cases recommended for prosecution by the TRC …"*[7]

And

> *"I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of any TRC matters since my suspension and the removal of the TRC cases from Advocate Ackerman."*[8]

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

> *"5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the 'normal legal processes' and 'prosecuting mandates' of the NPA, as originally envisaged by Government. Therefore, and in view*

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[6] See: Annexure "IC6": Vol 3: P. 534, par 8
[7] See: Annexure "IC6": Vol 3: P. 535, par 14
[8] See: Annexure "IC6": Vol 3: P. 558, par 75

of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter."[9]

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

E. EVALUATION OF REASONABLE TIME:

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

24. Subsequently First Respondent of course filed the supplementary affidavit now admitting the substantial delay and explaining that political interference was the cause of the delay.

25. We submit that such approach is wrong. The delay prior to the date that an accused person has been charged is clearly relevant and should be considered when deciding the question whether a reasonable time has lapsed for purposes of section 35(3)(d) of the Constitution.

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[9] See: Annexure "RCM17": Core Bundle: P. CB148

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

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

> *"after being charged".*

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

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

> *"The accused person's right to trial within a reasonable time is one right which quite obviously includes consideration of a period before the commencement of the proceedings."*[10]

And

> *"The final Constitution has dropped the requirement that one be charged before the period of delay can be considered, and has also clarified that the scope of the right to trial within a reasonable time extends to the conclusion of the trial as well as its inception."* [11]

30. At the outset we have to submit that this Court is confronted with a totally unique situation. In this case the Court has to deal with the consequences

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10 At p. 51 - 123
11 At p. 51 - 123

and the effect of a deliberate decision not to prosecute and not by a systemic failure and/or lack of diligence by the Prosecuting Authority.

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

32. It is further clear that there was some decision taken and//or agreement and/or arrangement between Government on the highest level and other interested parties in terms whereof it was agreed that no prosecutions will be instituted for certain political crimes which included the one relevant to this application.

33. Although we accept that an order of the nature sought by the Appellant in this application is drastic and should not be granted easily[12], we submit that a proper case has been made out in this application.

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

35. The object of this provision is to protect an accused's liberty, personal security and trial-related interests[13].

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

[13] Sanderson para [20]; Wild para [5].

36. The Constitutional Court in ***Sanderson*** *supra,* summarised the principles relating to a fair trial as follows:

36.1. The right to a fair trial conferred by the Constitution is broader than the list of specific rights set out in the subparagraphs of the relevant section in the Bill of Rights.

36.2. The right to a fair trial embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our Criminal Courts before the Constitution came into force.

36.3. A criminal trial should be conducted in accordance with open-ended notions of basic fairness and justice.

36.4. The nature of the criminal justice system aims to punish only those persone whose guilt has been established in a fair trial. Prior to a finding of liability, and as part of the fair procedure itself, the accused is presumed innocent.

37. In **Broome v Director of Public Prosecutions, Western Cape & Others; Wiggins & Another v Acting Regional Magistrate, Cape Town & Others**[14] the Court had to deal with a case that had been delayed for 7 years. The Court held among others that on a conspectus of all the facts, the prosecuting authority had been responsible for an undue and excessive delay and that the fundamental rights of the accused to a speedy trial had been infringed. It also found that the undue delay of seven (7) years and

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14 2008 (1) SACR 178 (CPD)

the consequential loss of evidentiary material is sufficient to make a finding that the accused will suffer irreparable trial prejudice in preparing a proper defence.

38. The mere passage of time in the abstract by itself does not justify a permanent stay of prosecution.[15] It must be established whether the effect thereof is to cause material and irremediable trial prejudice.

39. The remedy may be granted in the absence of trial-related prejudice, where 'there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate'.[16]

40. As the Court pointed out in Sanderson[17], the test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained. The Courts will apply their experience of how the lapse of time generally affects the liberty, security and trial-related interests that concern us.

41. In ***Wild and Another v Hoffert NO and Others***[18], Kriegler J again held that inferences of inordinate delay may at times be made from the available facts. The learned Judge stated that where there is a period of ostensible culpable inactivity on the part of the Prosecution and inference of unreasonableness can more readily be drawn if no explanation is profert.[19]

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15 Bothma v Els 2010 (2) SA 622 (CC), at para 39.

16 See: Wild and Another v Hoffert NO and Others 1998 (2) SACR 1 (CC) (1998 (3) SA 695; 1998 (6) BCLR 656) par [27]
McCarthy v Additional Magistrate, Johannesburg and Others 2000 (2) SACR 542 (SCA) [2000] 4 All SA 561

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

18 1998 (2) SACR 1 (SCA)

19 Paragraph [25]

42. In ***Bothma v Els*** *(supra)* the learned Sachs J stated that the delay must be evaluated not as the foundation of a right to be tried within unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would taint the overall substantive fairness of the trial.[20]

43. In ***DPP v Phillips*** and with reference to the prosecution's delay found that the right to be protected against unreasonable delays located in both the substantive right to a fair trial as well as section 35(3)(d) of the Constitution. The learned Judge further found that the delay in the relevant case in prosecuting the appeal tainted the overall substantive fairness of the trial and hence infringed the right to a fair trial.[21]

44. Any reference to cases from Foreign Jurisdiction (for instance prosecutions of NAZI perpetrators can be distinguished from the present case. We submit that there are very material differences between these cases and the present case before the Court. We refer to the following:

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

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

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20 Bothma v Els *supra:* P. 199 b-c
21 Paragraph [70]

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

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

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

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

45. We submit that this Court deals with a situation that is so unfair and wrong that the Court should not allow a prosecutor to proceed with the trial even if the trial may in other respects be regular.[22]

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

F. RIGHT TO ADDUCE AND CHALLENGE EVIDENCE:

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

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

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

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

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

48.1. First Respondent was requested to indicate whether Appellant manifested his participation in the alleged common purpose with the

other perpetrators by himself performing any act of association with the conduct of the others.

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

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

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

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

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

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

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

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

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

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

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

52. The practical result is therefore that Appellant is confronted with the situation where he, as an 81 year old person, hampered by a seriously fading memory, has to answer and defend himself against allegations of participating in assaults and torture of the deceased over a period of six days more than 48 years ago and under circumstances where the Prosecutors refused to supply him with any of the following information (either in the charge sheet or in further particulars):

52.1. When Appellant allegedly participated in this unlawful conduct.

52.2. What Appellant's alleged role was relating to these unlawful activities?

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

53. In the above regard it should again be emphasised that in the evidential material provided by the First Respondent there is no suggestion of any

allegations to the effect that Appellant at any stage participated in the assault or torture of the deceased.

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

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

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

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

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

54.4. The question relating to the fairness of the charge of premeditated murder against the Appellant under circumstances where the High Court found in the re-opened inquest proceedings that the Appellant's only involvement related to the providing of an alibi to the perpetrators after the incident. It is of course common cause that this crime prescribed in terms of the Criminal Procedure Act.

Presidential pardon:

55. Section 84(2)(j) of the Constitution provides for the power to the President to grant pardon to offenders.

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

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

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

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

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

> *"In the light of the views expressed by the President regarding a further amnesty process, the task team decided not to make a*

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

recommendation in this regard and to leave this decision in the hands of Government…"[27]

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

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

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

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

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

60. The above situation was of course perpetuated by the conduct of First and Second Respondents not to disclose these facts to the Court in their initial answering affidavit, and thereafter a very selective disclosure. As already

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

mentioned the Second Respondent still failed to disclose any of these facts to the Court until this stage.

The agreement/arrangement not to prosecute:

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

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

63. From the facts before Court we do know the following:

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

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

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

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

64. Questions may arise with reference to the following:

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

64.2. The validity of such agreement/arrangement.

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

65. We submit that the State President, Minister of Justice and First Respondent clearly had the competence to take the decisions relied on by the Appellant and/or to enter into an agreement/arrangement in the above regard. In any event we submit that competence will be presumed in terms

of our Law and that without facts specifically stated by the First to Third Respondents there is no basis for this Court to find otherwise.[28]

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

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

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

69. It is further submitted that even in the event that a Court may find that the agreement/arrangement was invalid, it would not follow that persons like the Appellant will be divested of their rights[31]:

H. <u>UNFAIR AND/OR IMPROPER MOTIVE</u>:

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

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[28] See: Wessels: Law of Contract, Second Edition, Vol. 1, par 693;
Serobe v Koppies Bantu Community School Board 1958 (2) SA 265 (O) 271 to 272
[29] 1982 (1) SA 398 (A) at p. 442
[30] See: Transnet v Owner of the MV Snow Crystal 2008 (4) SA 111 (SCA), para 25 to 28
[31] See: State Information Technology Agency SOC Ltd v GGijima Holdings (Pty) Ltd 1918 (2) SA 23 (CC)

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

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

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

74. An inquest and/or the re-opening of an inquest is only competent in terms of the Inquest Act under circumstances where the Institution of Criminal Proceedings is not envisaged.[32]

75. An inquest should not be ordered or conducted where a criminal prosecution is already instituted and/or is to be instituted in connection with the death of a person. In the event that it comes to the knowledge of the judicial officer who presides the inquest proceedings that criminal proceedings have been or are to be instituted relating to the death of the relevant deceased, he or she ***SHALL*** stop such inquest proceedings.[33]

76. The objective facts in this case are that the High Court conducted a very thorough and detailed inquest in the re-opened proceedings over a lengthy period. It then concluded in its findings that Appellant was not involved in

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[32] Section 5(1) of the Inquest Act
[33] Section 21 of the Inquest Act

causing the death of the deceased. We will deal in more detail with the specific findings in this regard hereinafter.

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

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

79. The above allegations were indeed confirmed by First Respondent in a response to a request for further particulars in terms of section 87 of the CPA referred to above.

80. It is a fundamental principle of our law that a prosecution can only be instituted on a specific charge against an accused person if there is, as a starting point, a reasonable prospect of a successful prosecution i.e. a reasonable prospect of a conviction.

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

according to the finding was that he afterwards lied about the circumstances of the death.

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

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

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

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

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

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

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

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

84.6. It is interesting to note that the re-opening of this inquest in a High Court is the first of its kind by a High Court and presided by a Judge of the High Court.[34]

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

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

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

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

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

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

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

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

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

And

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

and

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

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

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

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

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

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

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

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

I. **EVALUATION OF JUDGMENT BY COURT *A QUO***:

86. It is submitted that the following findings that this Honourable Court made in the judgment relating to the main application is not only relevant but important for purposes of this application:

86.1. All investigations of this nature, including the investigation of the Appellant's case, relating to cases of alleged crimes of the past were stopped as a result of an executive decision taken at the highest

level that purported to interfere with the National Prosecuting Authority's prosecutorial decision making.[35]

86.2. The high level of executive interference on investigations of the abovementioned matters included the involvement of the Minister of Justice and State President.[36]

86.3. The above issue of political interference is a matter of great seriousness. This included the manner in which the evidence about the interference was revealed.[37]

86.4. The fact that the detail of the interference and the basis therefore was deliberately withheld from this Court.[38]

86.5. There is a possibility of amnesty or pardon being granted to these persons accused of crimes in the past.[39] The finding by the Court that it is unlikely that there was an amnesty or a pardoned and that the legal basis and legal validity would be highly questionable because there is nothing more than speculation as there is nothing on the papers to suggest that either an amnesty or pardon was granted to the Appellant[40] is clearly debatable. We refer to the following:

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[35] See: Judgment: Par [21], p. 10
[36] See: Judgment: Par [23], p. 11
[37] See: Judgment: Par [31], p. 13
[38] See: Judgment: Par [66] to [68], p. 26 to 27
[39] See: Judgment: Par [33], p. 14
[40] See: Judgment: Par [33], p. 14 and [71], p 28

86.5.1. The objective facts are that there was no prosecution for 47 years. This included the period between 2003 to 2017.

86.5.2. There is no explanation by the Minister of Justice and/or State President why they conducted themselves in this manner.

86.5.3. The fact that the NPA just accepted this interference despite their constitutional obligation to the contrary is not properly explained.

Clearly there is, with respect, a basis for the assertion that there was an amnesty and/or pardon and/or agreement not to prosecute.

86.6. The delay would have resulted in some prejudice to the Appellant – the trial he is now required to face could have occurred much earlier.[41]

86.7. It was found in conclusion that the delay has caused some measure of prejudice.[42]

87. We submit that the conclusion by the Court *a quo* that despite the above findings that a proper case for a stay of proceedings had not been made out is, with respect, not supported by the facts of this case.

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[41] See: Judgment: Par [77], p. 30
[42] See: Judgment: Par. [89], p. 34

J. <u>CONCLUSION</u>:

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

89. We therefore request the Honourable Court that leave to appeal be granted to the Applicant.

90. We submit that a further order then be made that the appeal succeeds and that First Respondent be prohibited from proceeding with the criminal prosecution of the Appellant relating to the death of the late Mr Timol.

DATED at PRETORIA on this 10th day of JUNE 2020

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