

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 1186/2019

GLD Case NO: 76755/18

In the matter between:

JOAO RODRIGUES

Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MINISTER OF POLICE	Third respondent
IMTIAZ AHMED CAJEE	Fourth Respondent
SOUTHERN AFRICA LITIGATION CENTRE	First <i>amici curiae</i>
YASMIN SOOKA	Second <i>amici curiae</i>
DUMISA BUHLE NTSEBEZE	Third <i>amici curiae</i>
MARY BURTON	Fourth <i>amici curiae</i>
WENDY ORR	Fifth <i>amici curiae</i>
GLENDA WILDSCHUT	Sixth <i>amici curiae</i>
FAZEL RANDERA	Seventh <i>amici curiae</i>

WRITTEN SUBMISSIONS ON BEHALF OF

THE 2ND TO 7TH *AMICI CURIAE*

(FORMER TRC COMMISSIONERS)

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INTRODUCTION

1. The second to seventh amici curiae, collectively referred to herein as "*the former TRC Commissioners*", were admitted as such by order of this Court on 29 September 2020.
2. These heads of argument are filed pursuant to that order
3. Having regard to the underlying facts of this case, the former TRC Commissioners will address the following key issues which relate directly to whether or not this Court should uphold the appeal and grant the applicant a permanent stay of prosecution:
 - 3.1. the unique nature of apartheid-era crimes and the need for a bold prosecutions policy in respect thereof;
 - 3.2. South Africa's obligation to prosecute apartheid-era crimes having regard to its obligations in international law; and
 - 3.3. the correct approach to be taken by the Court where age is a factor relied upon to justify a permanent stay of prosecution for apartheid-era crimes.
4. In doing so the former TRC Commissioners seek to emphasise that –

- 4.1. there is profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused.¹ This is heightened when dealing with apartheid-era crimes where the alleged perpetrator has not applied for (or received) amnesty;
- 4.2. a bold prosecutions policy, which has hitherto not been implemented by the first respondent, is called for in order to uncover the truth regarding apartheid-era crimes where the alleged perpetrator has not applied for (or received) amnesty;
- 4.3. South Africa cannot take its rightful place within the community of nations if it does not seriously prosecute its "own" crimes domestically. A commitment to domestic prosecutions of the most serious crimes gives comfort to our international treaty partners that, under the doctrine of mutual legal assistance, South Africa is no safe haven for criminals accused of committing "international crimes".
- 4.4. age may be a factor that a court could rely upon to impose a lighter sentence – or no sentence at all. But age alone, as a factor requiring compassionate consideration, does not

¹ Sanderson v A-G, EC 1998 (2) SA 38 (CC) at para 36

release a court from its obligation to consider and make a finding in respect of criminal liability.

5. What this case invites this Court to do is to pronounce upon the correct systemic approach to be taken to apartheid-era crimes regardless of the individual accused and their circumstances.
6. Ironically, the further delay caused by the applicant in persisting with his appeal prevents a trial court from considering the case against him and pronouncing upon his innocence of guilt, and imposing an appropriate sentence (if any).

THE DOCTRINE UNDERLYING AMNESTY REQUIRES THAT THE APPLICANT IS PROSECUTED

7. The Truth and Reconciliation Commission ("**TRC**") was established by section 2 of the Promotion of National Unity and Reconciliation Act, 34 of 1995 ("**TRC Act**").
8. Section 3 of the TRC Act sets out the TRC's functions and objectives. Significantly, the mechanism chosen – being a fact-finding enquiry underscored by public disclosure – was aimed to "*promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past*".

9. *"Understanding"* cannot be decoupled from *"national unity and reconciliation"*. In other words, a nation cleft by racial division could never heal as one without knowledge of past atrocities.²
10. In their wisdom, the first democratic Parliament determined that the moral culpability and criminal liability of those who committed apartheid-era crimes could legally be forgiven if they held themselves fully accountable for the atrocities in which they were complicit.³
11. The mechanism chosen for this legal forgiveness was the process of amnesty. In terms of section 20(1) of the TRC Act:

"(1) If the Committee, after considering an application for amnesty, is satisfied that –

(a) the application complies with the requirements of this Act;

(b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with provisions of sub-section (2) and (3);
and

² *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) at para [154].

³ Section 3(1)(b) of the TRC Act.

(c) *the applicant has made full disclosure of all relevant facts,*

it shall grant amnesty in respect of that act, omission or offence." (emphasis added)

12. It is common cause that the applicant was never granted amnesty in terms of section 20 of the Act.

13. Instead, the applicant contended that he was granted amnesty pursuant to a "*parallel amnesty process*".⁴

14. But no such parallel process exists. In *Nkadimeng*,⁵ *Albutt*,⁶ and *Chonco*,⁷ our courts have repeatedly struck down as unlawful any purported parallel amnesty process.

15. In other words, the only entity clothed with the legal power to grant the applicant amnesty was the TRC. It is a trite principle in our law

⁴ This was an argument persisted with by the applicant in the Court *a quo*. It is not clear to what extent this argument is persisted with before this Court.

⁵ *Nkadimeng and Others v National Director of Public Prosecutions and Others* [2008] ZAGPHC 422 (12 December 2008).

⁶ *Albutt v Centre for The Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).

⁷ *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC).

that only the public functionary clothed with a particular power may give effect to it.⁸

16. In the absence of amnesty of any kind, let alone from the TRC itself, the simple fact is that the applicant has not been given amnesty.
17. In order to preserve and respect the constitutional pact which resulted in the TRC process, it is crucial that prosecutions for apartheid crimes for which alleged perpetrators were not granted amnesty, be robustly pursued.

THE NATURE OF THE CRIME

18. In *Zanner*, this Court held that "It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. . . Clearly, in a case involving a serious offence such as [murder], the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay"⁹.

⁸ *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) at paras [97] and [114].

⁹ *Para 44*

19. The murder of Ahmed Timol is sufficiently serious to trigger the societal demand to bring the applicant to trial. What aggravates the matter exponentially is the following:

19.1. The murder arose as a result of the torture of Mr Timol, a political activist;

19.2. The torture was at the hands of the notorious Security Branch of the SAP;

19.3. Initially Mr Timol's death was covered up by the police who claimed that he committed suicide; and

19.4. The applicant elected not to apply for amnesty despite being specifically invited to do so.

20. These factors cumulatively form part of the "societal interest" described by the Constitutional Court in *Sanderson*¹⁰ and weigh heavily against the application to stay.

¹⁰Supra at paras 41 and 42

21. What the applicant hopes to achieve by means of this application is to evade all criminal liability on the mere basis that the State has apparently delayed in prosecuting him.
22. Notwithstanding that the applicant's collateral position is strongly suggestive of the fact that he should be made to stand trial, the point remains that by permitting him to do so, the Court would inadvertently allow the NPA (under the leadership of the first respondent) to escape its duty to prosecute crimes.
23. This is impermissible, particularly in circumstances where the TRC Act¹¹ and the final TRC Report¹² envisaged prosecutions of accused persons where no amnesty had been granted.
24. As an organ of state the NPA is obligated to respect, promote and fulfil the rights in the Bill of Rights.¹³ It does not do so where it fails to prosecute apartheid-era crimes, as it is obligated to do,¹⁴ and

¹¹ See, for example, sections 7 and 21 of the TRC Act which respectively provided that the granting of amnesty to one person would have no influence upon the criminal liability of another and that, where amnesty was refused, criminal liability would follow upon the conclusion of an unsuccessful amnesty application.

¹² TRC Report: Chapter 1 para 24.

¹³ Section 7(2) of the Constitution.

¹⁴ See generally, section 179 of the Constitution.

where it bears a further responsibility to assist other organs of state – like the TRC – in achieving its constitutionally envisaged mandate.

25. It bears mentioning that although the recommendations of the TRC were not binding in the same way that the Public Protector's remedial action may be the recommendation contained in the final TRC Report cannot simply be ignored.
26. The applicant cannot stand to benefit from the NPA's delay where he has not yet been held to account for his complicity in the death of Ahmed Timol.
27. Ensuring that the applicant stands trial, in respect of which he may be found innocent, further satisfies an important public function played by the criminal law,¹⁵ in guaranteeing that justice is done. Prosecution is essential to ensure public accountability, the protection of the rule of law, and the advancement of rights contained in the Constitution.¹⁶

¹⁵ *Minister of Homes Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (2) SA 280 (CC) para [144] (minority judgment of Ngcobo J (as he was then)).

¹⁶ *Democratic Alliance v President of the Republic of South Africa and a related matter* [2019] 1 All SA 681 (GP) para 69.

28. If the applicant were allowed to benefit from the NPA's delay in this way, it would, with respect, further erode public trust and confidence in the sanctity of South Africa's criminal justice system.
29. In our current milieu, which regrettably evidences a culture of impunity,¹⁷ prosecuting apartheid-era crimes is the NPA's foremost duty and its regrettable delay is no reason in principle as to why the prosecution of the applicant should not follow.

SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS

30. In order to not repeat the intended submissions of the Southern Africa Litigation Centre, the former TRC Commissioners will not address apartheid crimes ranking as "international crimes".
31. Instead, the former TRC Commissioners accept as a question of law that certain categories of crimes can be characterised as international crimes which invoke an element of "universal

¹⁷ See, for example, *Khosa and Others v Minister of Defence and Military Veterans And Others* 2020 (5) SA 490 (GP) at para [86], wherein the Court found that the State is obligated to prevent this from occurring.

jurisdiction" that can give rise to the prosecution of crimes regardless of where they are committed.¹⁸

32. Whether apartheid is capable of prosecution having regard to its status as an international crime under customary international law, or a particular treaty, need not be finally determined by this Court.¹⁹ (For the purpose of argument we ignore the specific instruments that provide for this²⁰)
33. Instead, by recognising the particularly heinous nature of apartheid, that constitutes a crime not only within South Africa's domestic law but within international law generally, this Court, with respect, must, in refusing the relief sought by the applicant compel the South

¹⁸ *S v Okah* 2018 (1) SACR 492 (CC) at para [43], footnote 68, relying in part on *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre* 2015 (1) SA 315 (CC) at para [74] ("**Torture Case**").

¹⁹ Apartheid is potentially prosecutable under, *inter alia*, Article 2(3) of the International Covenant on Civil and Political Rights (that deals with effective remedies), Articles 4(m) and 4(o) of the Constitutive Act of the African Union, The Universal Declaration of Human Rights, clauses 4 and 5 of the 1985 Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, The 2006 Basic Principles and Guidelines on the Right to a Remedy, and customary international law.

²⁰ See, variously, International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, United Nations General Assembly Resolution 3068 (of which SA is not a signatory, but which would arguably not limit another state from prosecuting the applicant in respect thereof if he attempted to flee there); 2002 Rome Statute and the domestic law that domesticated it being the Rome Statute Implementation Act, 27 of 2002.

African Government (through the NPA) to take a more robust approach towards apartheid-era crimes.

34. The purpose in doing so is not only to ensure that South Africa discharges its domestic and international legal obligations but, as a matter of policy, to give comfort to our international partners that South Africa takes such international crimes seriously.²¹
35. The Constitutional Court has already recognised that South Africa bears particular obligations in terms of doctrine of mutual legal assistance to assist other countries in the prosecution of certain types of crimes.²²
36. This reciprocal legal obligation is important because it gives comfort to our international partners that South Africa will take these categories of crimes when committed domestically sufficiently seriously that it will bring perpetrators to justice.
37. It will also give our international partners comfort that when their fugitives may be detected in South Africa, South Africa shall either

²¹ See, for example, *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para [97] (“**Glenister II**”). Also see *Democratic Alliance v Minister of International Relations and Cooperation and Others Council for the Advancement of the South African Constitution Intervening* 2017 (1) SACR 623 (GP) at para [55].

²² See, for example *Torture Case* at para [39], footnote 45; and para [58].

arrest and repatriate them to the country concerned and/or domestically prosecute them.

38. Similarly, and arising therefrom, South Africa can itself take comfort that where any of its fugitives manage to successfully flee abroad, its international partners will treat South Africa's requests for extradition and/or prosecution in the foreign country equally seriously.
39. While the applicant may not have attempted to flee the Republic, his continued evading criminal prosecution has, or will have, the effect of undermining South Africa's reputation as a serious jurisdiction where crimes of this nature are prosecuted.
40. The applicant's case is a "test case" not only because it implicates the NPA's responsibility to prosecute domestic crimes but also its responsibility to give comfort to international partners that it shall also vigorously prosecute international crimes like apartheid.²³

²³ See, for example, what the Constitutional Court said about the force of international law in/on South Africa in *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) at para [46].

OLD AGE AND/OR DELAY IS NO BAR TO PROSECUTION

41. The Former TRC Commissioners align themselves with the submissions of the other respondents in the Court *a quo* that old age and/or delay is, without more, no bar to prosecution.
42. Indeed, the reason for this is that the default position is that wrongs ought to be righted. Criminal prosecution is the means through which wrongs (committed against society) are remedied.
43. Deviating from this is radical – and, moreover, would require overwhelmingly compelling circumstances to justify the abandonment of the public's rights to have these wrongs righted.²⁴
44. This is clearly because any abandonment of prosecution by the State – acting in the public interest – would effectively require those charged with holding wrongdoers accountable to turn a blind eye, despite the prejudice to the rights of victims and the public as a whole.²⁵

²⁴ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para [38] (“Sanderson”).

²⁵ *Bothma v Els and Others* 2010 (2) SA 622 (CC) at para [33] (“Bothma”).

45. In the context of murder, which is the underlying crime of which the applicant is accused, this Court ought to fully appreciate that it does not prescribe.²⁶
46. Given that this particular murder was inherently tied to furthering the goals of apartheid, there is even less reason to consider that the applicant cannot be prosecuted for it.
47. And, importantly, as the Constitutional Court itself acknowledged, the fact that a prosecution may be pursued after a significant delay does not mean that the applicant is in any way prejudiced.
48. The delay may have a material impact on, *inter alia*, the availability of evidence, the recollection of witnesses, and so on.²⁷
49. While the Former TRC Commissioners have no doubt that if the applicant were to face trial, these issues may be exploited in order to amplify his defence, the point to bear in mind, then, is that the delay actually serves to aid the applicant.²⁸

²⁶ *Bothma* at para [45]. Also see the reasoning of Maya AJA (as she was then) at *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA) at para [21].

²⁷ *Bothma* at para [35].

²⁸ *Bothma* at paras [33] and [35].

50. The delay, then, in these particular circumstances cannot serve as a reason in principle to permit a prosecution from occurring at all. On its own, without more, does not serve as a bar to a fair trial and prosecution.²⁹
51. Given the moral repugnance of the context in which the crime was committed, there is "*greater ... need for fairness to the public and the complainant by ensuring that the matter goes to trial*".³⁰
52. If the applicant is to be acquitted, then he must do so after a fully opposed and adversarial trial. His merely being allowed to walk away only serves to further compound the adverse public perception caused by the NPA's delay (addressed above).
53. Whatever the outcome before the Trial Court, the public must have confidence that it is not as a result of an institutional set-up or incompetence. This can only be done after a prosecution is instituted.
54. As regards the applicant's old age, it is he who bears the onus to demonstrate that such infirmity will prejudice his rights to a fair trial. A general claim in this regard would not suffice.³¹

²⁹ *Zanner* at para [14].

³⁰ *Bothma* at para [77].

³¹ *Sanderson* at para [11].

55. No such evidence has been led by the applicant. So even if he could upset the lower Court's finding in this appeal, which he cannot, the point remains that our Courts do not as a matter of principle consider age on its own sufficient to extinguish a prosecution.
56. Indeed, and in the circumstances of persons accused of apartheid era criminals, this outcome, if accepted by the Court, would be particularly egregious.
57. The longer such accused persons live into our democracy, the safer they would be made to feel, despite the long shadow their conduct will cast over the rainbow nation.
58. Should such persons deserve compassion, such clemency can be given to them if and or when they are convicted. Not before.³² Doing so at any time prior to that, snuffing out prosecutions, is, with respect, an insult to the countless victims of apartheid.

³² See, for example, *S v Heller* 1971 (2) SA 29 (A) at 55C-D which reaffirms that compassion is appropriate in the context of sentence, not conviction. This was recently reaffirmed in *Hewitt v S* 2017 (1) SACR 309 (SCA) at para [17]. Also see *S v Barendse* 2010 (2) SACR 617 (EC).

59. This approach would also be consistent with how such “comparable” crimes are treated in other jurisdictions like Germany.³³ South Africa, with respect, should do the same.

60. That, with respect, is enough to dismiss the application.

CONCLUSION

61. Although the parties have consented to the Former TRC Commissioners participation in these proceedings as *amici curiae*, in the event that the appeal is successful, the Former TRC Commissioners should be immunised from an adverse costs order.

62. While the Former TRC Commissioners may, in effect, participate in these proceedings in “opposition” to the applicant for their particular interest, that is irrelevant.³⁴

63. Their conduct is clearly in the public interest³⁵ and does not trespass the traditional grounds for constitutional litigants to be mulcted with costs.³⁶

³³ *Papon v France*, European Court of Human Rights, Application No. 6466/01 at 4.

³⁴ *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* (CCT 232/19; CCT 233/19) [2020] ZACC 10 (29 May 2020) at para [83].

³⁵ *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) at para [16] - [18].

64. As regards the appeal, and for the reasons developed above, the Former TRC Commissioners submit that the application should be dismissed.

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Chambers, Sandton

7 October 2020

³⁶ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) at para [138].

LIST OF AUTHORITIES

(listed in chronological order)

South African Cases

1. *Daniels v Scribante and Another* 2017 (4) SA 341 (CC).
2. *Nkadimeng and Others v National Director of Public Prosecutions and Others* [2008] ZAGPHC 422 (12 December 2008).***
3. *Albutt v Centre for The Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).***
4. *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC).***
5. *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC).
6. *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).***
7. *MEC for Heath, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).***
8. *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC).

9. *Minister of Homes Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (2) SA 280 (CC).
10. *Democratic Alliance v President of the Republic of South Africa and a related matter* [2019] 1 All SA 681 (GP).
11. *Khosa and Others v Minister of Defence and Military Veterans And Others* 2020 (5) SA 490 (GP).
12. *S v Okah* 2018 (1) SACR 492 (CC).***
13. *National Commissioner of the South African Police Service v Southern Africa Human Rights Litigation Centre* 2015 (1) SA 315 (CC).***
14. *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).***
15. *Democratic Alliance v Minister of International Relations and Cooperation and Others Council for the Advancement of the South African Constitution Intervening)* 2017 (1) SACR 623 (GP).***
16. *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC).
17. *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC).***
18. *Bothma v Els and Others* 2010 (2) SA 622 (CC).***
19. *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA).***
20. *S v Heller* 1971 (2) SA 29 (A).

21. *Hewitt v S* 2017 (1) SACR 309 (SCA).
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24. *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).
25. *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC).

Foreign Cases

1. *R (on the application of Bradley and Others) v Secretary of State for Work and Pensions* [2008] 3 All ER 116 (CA).
2. *Papon v France*, European Court of Human Rights, Application No. 6466/01 at 4.

South African Statutes

1. The Constitution of the Republic of South Africa.
2. Promotion of National Unity and Reconciliation Act, 34 of 1995
3. Rome Statute Implementation Act, 27 of 2002

International Legal Instruments

1. International Covenant on Civil and Political Rights
2. The Constitutive Act of the African Union
3. The Universal Declaration of Human Rights
4. The 1985 Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power
5. The 2006 Basic Principles and Guidelines on the Right to a Remedy
6. International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, United Nations General Assembly Resolution 3068
7. 2002 Rome Statute