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Navigating the way to justice – a discussion on truth, justice and reconciliation

By Haroon Aziz

The Truth and Reconciliation Commission's (TRC) Final Report in 2003 referred about 300 cases to the National Prosecuting Authority (NPA) for investigation and prosecution. Nothing much happened until 2007 when Thembisile Nkadimeng took legal action, relating to the kidnapping, torture, and murder of 23-year-old African National Congress (ANC)/*uMkhonto we Sizwe* operative Nokuthula Simelane. Her remains had not been found (see *Nkadimeng and Others v National Director of Public Prosecutions and Others* (GP) (unreported case no 32709/07, 12-12-2008) (Legodi J)).

The case lifted the veil on unconstitutional presidential interference in the modes of existence and operations of the organs of state power. The supporting affidavit of advocate Vusumzi Pikoli, the former National Director of Public Prosecutions (NDPP), helped lift the veil.

On 23 September 2007, former President Thabo Mbeki suspended Mr Pikoli from duty because he had authorised the prosecution of a former commissioner of police on corruption charges. Mr Pikoli had also decided to pursue prosecutions of Apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the TRC.

In 2008, the Ginwala Commission's Report of the Inquiry into the Fitness of Advocate VP Pikoli to hold the Office of National Director of Public Prosecutions found that the government had failed to justify Mr Pikoli's suspension and that he was a fit and proper person to hold the NDPP position. However, acting President Kgalema Mothlanthe dismissed Mr Pikoli from his post. In 2009, Mr Pikoli obtained a High Court order that restrained President Jacob Zuma from appointing a successor to his position, but he accepted a monetary out-of-court settlement from the Zuma administration.

Section 179(1) – (4) of the Constitution and s 32 of the National Prosecuting Authority Act 32 of 1998 (NPA Act) guarantee the independence of the NDPP and the NPA.

Former President Mbeki, on receipt of the TRC report announced in Parliament that the prosecution of perpetrators who did not participate in the TRC process was to be left to the NPA as part of the 'normal legal processes'.

On 23 February 2004, the Director-Generals' Forum appointed a Task Team to report on the mechanism to effect presidential objectives. On 1 February 2005, the Priority Crimes Litigation Unit (PCLU) of the NPA, had been tasked with handling TRC cases under advocate Anton Ackermann SC.

In November 2004, Dr Silas Ramaite SC, the Acting NDPP, had decided to prosecute three Security Branch members, namely, Colonel CL Smith, Captain GJLH Otto, and Captain HJ van Staden for the attempted murder of Reverend Frank Chikane in 1989. However, was ordered to suspend all TRC cases pending new guidelines for TRC cases.

On 1 December 2005, Parliament

passed the amendments to the Prosecution Policy, which permitted backdoor amnesty, plus the launch of Former President Mbeki's special dispensation on political pardons.

In February 2006, Mr Pikoli authorised the prosecution of the Security Branch members for attempted murder. They used legal chicanery to escape prosecution by lying that they were indemnified in terms of the Indemnity Act 35 of 1990 though it was repealed in 1995.

Simultaneously, former Police Commissioner, Jackie Selebi, objected to Ackermann's participation in PCLU on the alleged grounds that Ackerman had the intention to prosecute the ANC leadership.

In mid-2006 there was a meeting in the Presidency between Pikoli, Chikane, Director Generals of Justice and National Intelligence Agency, Selebi, the Secretary of the Defence Secretariat, and Mr Loyiso Jafta. Mr Selebi repeated his objection to Mr Ackermann.

Later in 2006, Ms Thoko Didiza, the Acting Justice Minister, summoned Mr Pikoli to a meeting at Minister Zola Skweyiya's residence. Present were the Minister of Safety and Security and the Minister of Defence, and Mr Jafta. On the agenda was the *Chikane* case. The meeting expressed its fear that the *Chikane* prosecution would open the door to prosecutions of ANC members for their pre-1994 alleged crimes.

Also in 2006, a further meeting was held at the Office of the Presidency where it was decided that the Task Team would await inputs from other departments.

On 25 October 2006, the Task Team meeting received an audit report on all PCLU cases from Mr Ackermann. On 6 November 2006, the Task Team discussed the *Chikane* matter when Mr J Lekalakala (of the South African Police Service) reported that Mr Selebi believed that Chikane was not interested in prosecution though Chikane had clearly left the matter to the NPA. In December 2006, Mr Selebi further alleged that Chikane had not been consulted.

On 17 August 2007, while Mr Pikoli was on compassionate leave, Adriaan Vlok, Johann van der Merwe, and the three Security Branch members were successfully prosecuted for the attempted murder of Chikane but they were given suspended sentences.

Mr Pikoli considered the presidential interference in his work as 'unwarranted interference in my constitutional duty to prosecute without fear, favour or prejudice'. It 'impinged upon my conscience and my oath of office'. The interference was tantamount to criminal obstruction in terms of the NPA Act.

The NPA/Scorpions and (later the State Security Agency) became an open field for rogue units to indulge in criminal activities in pursuit of ordinary citizens as cover. The Scorpions were created out of the remnants of the Security Branch, the Brixton Murder and Robbery Unit, and 'terrorism trial' prosecutors with unchecked investigative and prosecutorial powers.

There were not only costs to the state in billions of Rands but also in social and psychological costs to ordinary citizens. The human rights abuse was not a theory to its victims and survivors, but it bit into their core. The nation went into a mute mode.

How did the nobility of the Constitution mutate into ignobility?

The legal basis of the mutation can be traced back to the case of *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC). The second applicant was Nontsikelelo Biko.

The application was for an order declaring s 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 unconstitutional. The section permits the TRC Amnesty Committee to grant amnesty to perpetrators. They also argued that the state was obliged under international law to prosecute perpetrators of human rights violations and that authorising amnesty to the perpetrators was a breach of the Geneva Conventions of 1949.

Judge Ismail Mahomed DP delivered the majority judgment.

He established the legality of amnesty provision of the Constitution by using the three criteria of criminal liability, civil liability, and the state's civil liability. He relied on the provision for amnesty on the postamble to the Interim Constitution: 'In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives'.

He made reconciliation and reconstruction the central political aim of the ANC government, against the (unstated) backdrop of the ANC's Reconstruction and Development Programme and the 'sunset clause'. He uses 'epilogue' 26 times and 'amnesty' 94 times in the judgment.

In making an argument to close the book on the past he refers to the epilogue as an eloquent expression of this fundamental philosophy. He also gives amnesty equal footing with the right of individuals to have disputes settled by an impartial forum.

On criminal liability, he argues that amnesty is necessary for the discovery of truth and reconciliation but there is insufficient evidence to charge individuals. He encouraged victims and survivors 'to unburden their grief publicly' in a new nation. He also argued that the incentive of amnesty would elicit information about the past and find out 'the truth through amnesty from criminal liability' (KL Martin 'Tackling the Question of Legitimacy in Transitional Justice: Steve Biko and the Post-Apartheid Reconciliation Process in South Africa' 2015 *CUREJ*).

He stated: 'The families of those unlawfully tortured, maimed, or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of guilt … transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconstruction and reconciliation" … [for the] painful objectives of the amnesty articulated in the epilogue.'

On civil liability, he argued that there is not anything in the wording of the Constitution that would grant amnesty from criminal prosecution but would not grant the same for civil damages. He made a fine distinction and said that acts and omissions are in addition to offences in the epilogue, which shows that amnesty expands beyond solely criminal liability.

On state's civil liability, he argued that the epilogue was open-ended on the forms of amnesty and that Parliament had the right to protect the state from civil damages. He had in mind the limitation of rights clause in the Constitution by law of general application (s 33(1)).

He dismissed the arguments based on international law as irrelevant to the application.

Justice Mahomed acted, primarily, in the interests of the state and, secondarily, in those of victims. This is what also used to happen under Apartheid 'justice'.

It took one private initiative by Imtiaz Cajee in the Ahmed Timol re-inquest 21 years to obtain justice for a victim and restore his human dignity after he was killed in detention 46 years earlier and 27 years after the birth of democracy.

In 2017, Parliament in welcoming the new Timol verdict expressed that it 'trusts that the verdict will lead to the [NPA] prosecuting former members of the police, who sought to evade justice through perpetuating lies'. It also supported the private 'campaign towards a wider programme that seeks justice for other political activists who disappeared at the behest of the apartheid regime.'

The political interference was further confirmed by two senior NPA officials in sworn affidavits filed on behalf of the NDPP in *Rodrigues v National Director of Public Prosecutions of South Africa and Others (Sooka and others as* amici curiae*)* [2019] 3 All SA 962 (GJ), as an outcome of the Timol re-inquest. The Full Bench in that matter criticised the NPA for succumbing to such pressure and not adhering to its constitutional and legal obligations (paras 55 – 65).

Did Justice Mahomed not err in equating his level of noble consciousness to that of victims and of perpetrators?

The TRC received testimonies of about 20 000 victims. About 7 500 perpetrators applied for amnesty, of whom 1 500 were granted amnesty.

Contrast the 7 500 against the 34 378 SAP members and the 18 000 Permanent Force SADF members (1970) with a combined budget of R 1,58 billion (1977). Totalitarianism provided the atmosphere for crimes against humanity.

In the TRC Amnesty hearing of Daniel Siebert (1997), the legal counsel for the Biko family established a *prima facie* case of the murder of Steve Biko not only against Siebert but also against his four accomplices without the need for rigorous application of the law of inferential evidence. However, in 2003 the Department of Justice announced that it would not pursue criminal prosecution because of 'insufficient evidence'. In 2020, the Department of Justice reiterated that the government would be financially hard-pressed to restart the process. It said '[i]f you reopen the process more than 20 years later, we have to reset the TRC, collect submissions and re-evaluate as the TRC did.'

The Department of Justice and Constitutional Development controls the President's Fund, supposedly for victims. It has a cash asset of R 1 686 628 000, of which R 6 million is invested in 'Isibaya' and the rest in the Public Investment Corporation (PIC) (President's Fund Annual Report 2019/20 at p 22).

A victims' initiative called the 'Apartheid Era Victims' Families and Support Group' (AVFG), after the historic victory in the Timol re-inquest, is continuing the struggle for legal justice as a component of transitional justice from Apartheid to democracy. There is a need for the legal community to get involved in the massification of legal justice. Otherwise, human rights projects will remain vanity projects.

Were the families of Steve Biko, Imam Haron, and others justified in their refusal to participate in TRC proceedings?

The judgment aroused fears and hopes. While the fears remain, the hopes lie in ashes.

Should judges and magistrates not be seen to transform the criminal justice system from a judicial colony of medieval Rome, Holland, and England to a liberated judicial space by creating new case laws based on the Constitution?

The universal lesson from the consequences of the Justice Mahomed judgment is that when good people are exposed to corruption, they have the potential to become corrupt.

Had the judgment anticipated the potentiality of presidents for unconstitutional conduct, would there have been a need for the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the Commission)? Should the Constitutional Court not sanction presidents for indulging in unconstitutional conduct?

Justice Mahomed when crafting the idealistic judgment, did he have the Mbekis, Mothlanthes, and Zumas or the Pikolis in mind?

Did he succeed in the historic task of laying the foundation of new jurisprudence in a new democratic nation?

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