

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 213/21
SCA CASE NO: 1186/2019
GLD CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES

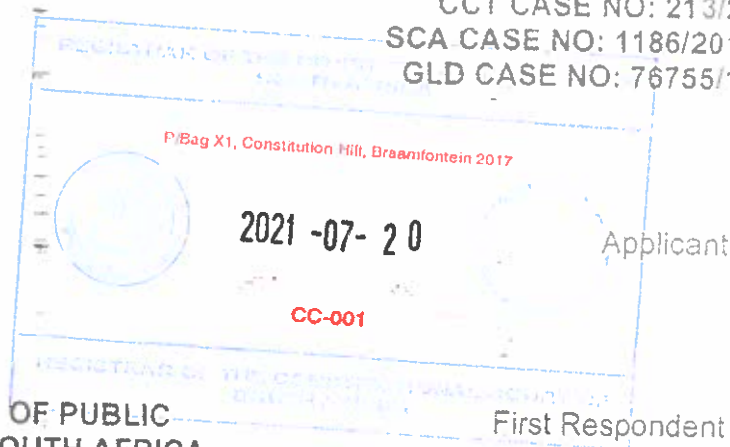
and

NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS OF SOUTH AFRICA

MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES

THE MINISTER OF POLICE

IMITIAZ AHMED CAJEE



First Respondent

Second Respondent

Third Respondent

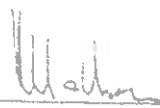
Fourth Respondent

FOURTH RESPONDENT'S NOTICE OF INTENTION TO OPPOSE

TAKE NOTICE THAT

1. the Fourth Respondent intends to oppose this application;
2. the Fourth Respondent has appointed attorneys Webber Wentzel as its attorneys of record;
3. the address at which the Fourth Respondent will accept service of all documents in these proceedings is Webber Wentzel's Johannesburg offices, situated at 90 Rivonia Road, Sandton, Johannesburg.

Dated at Sandton on 19 July 2021



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BY EMAIL

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Ref: J NEL/6002/2018/Z63

BY EMAIL

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 213/21
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JOAO RODRIGUES

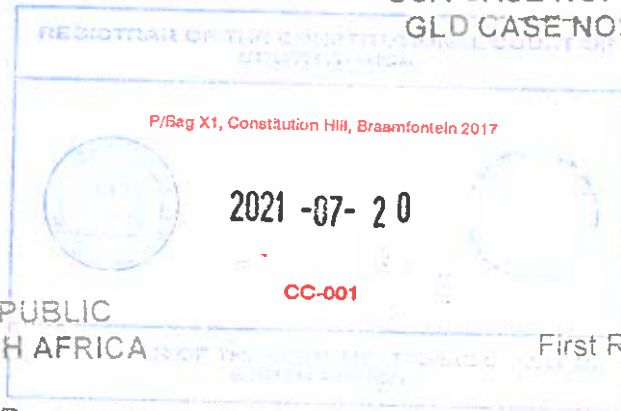
and

NATIONAL DIRECTOR OF PUBLIC
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MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES

THE MINISTER OF POLICE

IMITIAZ AHMED CAJEE



Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

FOURTH RESPONDENT'S GROUNDS OF OPPOSITION TO THE APPLICATION
FOR LEAVE TO APPEAL IN TERMS OF RULE 19(4)

I the undersigned,

IMITIAZ AHMED CAJEE

do hereby make oath and state:

- 1 I am the fourth respondent and the nephew of the late Ahmed Timol, who was brutally tortured and murdered by members of the South African Police's (SAP) notorious Security Branch (SB) on 27 October 1971 at John Vorster Square (JVS) in Johannesburg.

- 2 Save where the context indicates otherwise, the facts deposed to in this affidavit are within my personal knowledge and are to the best of my belief both true and correct. Where I make submissions of a legal nature I do so on the advice of my legal representatives.
- 3 I have read the founding affidavit deposed to by Benjamin Minnaar on behalf of the applicant dated 30 June 2021. I respond to that affidavit thematically. Where an allegation has not expressly been dealt with, or is at variance with what I state herein, it should be regarded as denied.

CONTEXTUAL MATTERS

- 4 Mr Benjamin Minnaar who deposed to the founding affidavit on behalf of the applicant claimed that the applicant (Rodrigues) was of "deteriorating health and memory". A similar claim was made before the Full Court hearing his application for a permanent stay of prosecution. No evidence or medical records were put up in that court or this Court of his state of health. If that in fact was an issue it would have been a simple matter to put up an affidavit or certificate from the applicant's doctor.
- 5 I am advised that advanced age and state of health is not a basis to escape justice. The message that ought to be sent to perpetrators of serious crime such as murder is that they will be held to account for their actions, no matter their age or state of health.

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- 6 Rodrigues complains that he was only a SB pay clerk and was not part of the Timol interrogation team but was nonetheless charged with murder even though the Reopened Inquest only found him responsible for covering up the murder and committing perjury.
- 7 I am advised that a prosecutor's discretion is, as a matter of law, not bound by the recommendations of an inquest court. Notwithstanding the applicant's strenuous objections, he did not make representations to the NDPP in terms of s 22(2)(c) of the NPA Act to reverse the DPP's decision.
- 8 In any event, the applicant's objections to the murder charge must be considered in the light of the fact that during the Reopened Inquest he effectively admitted to the murder of Timol on the basis of *dolus eventualis* in respect of his conduct post the fall. He admitted that following Timol's ten storey fall onto the garden, an ambulance and emergency medical care should have been immediately summoned. In addition, he conceded that he and the other officers should not have moved Timol from the garden in which he lay at the foot of JMS.
- 9 The appellant, who on his own version was the only person in room 1026 with Timol, knew better than anyone else what happened. It was overwhelmingly obvious to him that Timol needed extremely urgent medical assistance. As a police officer, and as the only person, on his version, who saw Timol exit the window, he was under a compelling legal duty to seek emergency medical attention. Notwithstanding this knowledge, he specifically chose not to obtain medical assistance for Timol.

Handwritten signature and initials in the bottom right corner of the page.

10 Despite owing a duty of care to Timoi, he decided not to pick up the phone to call an ambulance. Instead, he and other SB members cruelly placed the critically injured Timoi, with likely back and neck injuries, on a blanket and moved him up to the 9th floor of JVS, thereby greatly exacerbating Timoi's condition.

11 Rodrigues must have foreseen, and by implication did foresee, that there was a reasonable possibility that Timoi would die if not urgently medically treated, and if moved by non-medical personnel. He subjectively reconciled himself with the foreseen consequences and is accordingly liable for Timoi's murder on the basis of *dolus eventualis*. He, and the other police officers involved, had the requisite intention to kill.

12 In the circumstances, Rodrigues must face a murder charge on the basis of his own version put to two courts under oath. I understand that the NPA is only pursuing a murder charge based on common purpose. It would, in my respectful view, be highly irresponsible of the NPA not to also hold Rodrigues liable for murder, on the basis of his conduct post the fall.

THE INTERESTS OF JUSTICE

13 The applicant is a former SB police officer, who was a pay clerk at the time my uncle was brutally tortured and murdered by being thrown out of the window of an interrogation room on the 10th floor of John Vorster Square or from the roof of the building.

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- 14 My uncle paid the ultimate price for the struggle for freedom in South Africa. Regrettably, post-apartheid authorities have abandoned those who died for our freedom. They have deliberately suppressed the investigation and prosecution of hundreds of apartheid-era murder cases in which amnesty was denied or not applied for.
- 15 My family and I have fought for years to obtain justice for my late uncle Ahmed Timol. I have dedicated my life to preserving my uncle's legacy. I have expressed my feelings and my struggle for justice in two books: *Timol a Quest for Justice* and *The Murder of Ahmed Timol - My Search for the Truth*.
- 16 The Full Court that heard Joao Rodrigues' (Rodrigues) application for a permanent stay of prosecution recognised the struggles of the Timol family in its judgment:

"[95] The Timol family have, for many years, simply sought to establish what had happened to the late Ahmed Timol and the circumstances that led to his death. They persisted in seeking the truth and finding a measure of justice and for a long time, their efforts seemed to come to nothing. They were not in search of revenge, but rather the truth and participated in the victims hearing of the TRC. They also implored the Applicant to come forward and reveal all. They accepted that the prospect of amnesty being granted to those responsible for the murder of Timol, was one that was real and a prospect that was contemplated by the TRC Act.

[96] It was largely through their efforts that a decision was taken to reopen the inquest and the Second Inquest was ultimately held. Now that a decision to prosecute has been taken, and someone is at least indicted for the death of Timol, they too are entitled to the justice that has eluded them for so long. Whatever the outcome of the criminal trial may be, they have an interest in ensuring that there is a proper process to ventilate the truth of what occurred and for the Applicant's guilt or innocence to be determined in a court of law. It will no doubt bring a measure of closure after almost 50 years."

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- 17 The efforts of the Timol family led to Justice Mothle recommending in the re-opened inquest that Rodrigues be prosecuted for his involvement in Timol's death on 12 October 2017.
- 18 An arrest warrant was issued against the applicant on 30 July 2018. He was charged with the murder of Timol as well as defeating and/ or obstructing the administration of justice. The applicant's criminal trial is currently pending before the High Court of South Africa Gauteng Local Division, Johannesburg.
- 19 The applicant has since appeared nineteen times in the criminal proceedings between 18 September 2018 and 6 May 2021. His last scheduled appearance on 12 July 2021 was postponed due to ongoing civil unrest.
- 20 The applicant has avoided the commencement of his criminal trial by bringing a deeply flawed application for a permanent stay of prosecution.
- 21 On 3 June 2019, the Full Court dismissed his application for a permanent stay of prosecution. He then brought an ill-conceived application for leave to appeal against this judgment which was dismissed by the Full Court on 18 September 2019. On 21 June 2021, his appeal was dismissed by the Supreme Court of Appeal. This is the decision he now seeks leave to appeal before this Court.
- 22 The applicant has engaged in extensive fruitless litigation at taxpayer's expense. His legal expenses are paid by the State by virtue of his former employment as a SB officer in the erstwhile SAP. The prolonged litigation has

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delayed his criminal trial by more than 3 years, during which time, a key witness who saw Timol fall and who testified in the reopened inquest, died.

23 Eight judges comprising both a full panel of the SCA and a full court of the High Court have already found that the applicant is not entitled to a permanent stay. Both courts made these findings by applying long-established precedents of this Court. They applied these principles against a careful and thorough consideration of various factors, including the period of delay and the claimed prejudice to the applicant. The applicant offers no credible rebuttal to these findings.

24 Viewed in context, the applicant's ongoing civil litigation amounts to a transparent attempt to delay the commencement of his criminal trial. The interests of justice cannot favour permitting an applicant to pursue endless appeals at taxpayer expense, where the appeal has no reasonable prospect of success. The applicant's latest application further delays the long-awaited closure that the Timol family is entitled to. The application ought to be dismissed so that his criminal trial can commence without any further delay.

CLAIM OF AMNESTY OR INDEMNITY

25 Applicant argues that there is inadequate evidence to evaluate whether he and others accused of perpetrating apartheid-era crimes were granted amnesty, indemnity, or an agreement not to prosecute these crimes. His argument is premised on the fact that the State respondents withheld the true facts from the Full Court.

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- 26 Applicant, in particular, takes issue with the failure of the Minister of Justice (second respondent) to disclose any facts in the face of evidence of material political interference by the executive in the prosecution of apartheid-era crimes. He argues that the application can only be determined after the second respondent is forced to file an affidavit or give oral evidence on this issue. In the absence of this evidence, applicant argues, the Full Court and SCA were not entitled to determine this application for a permanent stay.
- 27 The evidence of serious political interference unlawfully preventing the prosecution of apartheid-era crimes was disclosed in my answering affidavit in Full Court proceedings. The NDPP eventually capitulated in a supplementary affidavit and admitted that the NPA had succumbed to political interference and that it was unlawful.
- 28 I agree that it is critical to understand the genesis of the political interference, and its impact. However, an application for a permanent stay is not the appropriate forum for that exercise. A commission of inquiry is required for this purpose. The former TRC commissioners and the Apartheid-era Victims' Families Group have written to the President on four separate occasions since early 2019 requesting the establishment of a commission of inquiry into the suppression of several hundred murder cases. Their pleas have been ignored.
- 29 The applicant's claim that perpetrators of apartheid era crimes were granted an amnesty or pardon because of political machinations is pure speculation. He makes this claim even though his papers disclose no evidence of an amnesty or pardon.

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- 30 It is common cause that Rodrigues did not apply to the TRC for an amnesty, indeed he specifically spurned an invitation to appear before a hearing of the TRC. It is also common cause that he never applied for a presidential pardon. Section 101(1) of the Constitution requires that any decision taken by the President, including a pardon, must be in writing if it is to have legal consequences. No such written decision has been produced.
- 31 This Court has confirmed that in South African law nobody has a right or entitlement to a pardon. In addition, an amnesty may only be issued under law and since the winding up of the TRC amnesty process no such law has been enacted.
- 32 The government's Director-General's Forum appointed a multi-departmental body called the Amnesty Task Team (ATT) in early 2004 to address "the absence of any guarantee that alleged offenders will not be prosecuted". The secret ATT report, which is an annex to my answering affidavit before the Full Court, discloses that that the ATT decided not to recommend a further amnesty, as it would be unconstitutional. Despite this evidence the applicant continues to maintain that there was an amnesty in place.
- 33 I have already described in my answering affidavit before the Full Court how two efforts introduced by the State to guarantee impunity for perpetrators were stopped by our courts. I specifically refer to the attempt to create a 'back door' amnesty by amending the first respondent's prosecution policy (*Nkadimeng and Others v National Director of Public Prosecutions and Others* (32709/07) [2008] ZAGPHC 422) as well as former President Mbeki's special dispensation for

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political pardons, which were both declared unlawful. Indeed, it was this Court that put a stop to the political pardons process in *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).

- 34 It is worth noting that, the applicant never applied to the NPA for a decision not to prosecute under the Amended Prosecution Policy before it was struck down in 2008. He also never applied for a pardon through the Special Dispensation on Political Pardons before it was stopped in 2009.
- 35 It is also common cause from the affidavits of former NDPP, Adv Vusi Pikoli, and the former head of the PCLU, Adv Anton Ackermann SC, annexed to my answering affidavit before the Full Court, that considerable behind scenes pressure was brought to bear on the NPA to abandon the TRC cases.
- 36 The SAPS and the erstwhile Directorate of Special Operations refused to investigate the TRC cases, including the Timol matter. When Pikoli and Ackermann proceeded with one case that had previously been investigated (the attempted murder of the Rev Frank Chikane), Pikoli was suspended, and Ackermann was relieved of his duties in respect of the TRC cases.
- 37 No amnesty was granted, nor could it lawfully have been. What occurred is that the political interference unlawfully suppressed the TRC cases. The first respondent, together with the third respondent colluded in such unlawfulness, or acquiesced to the pressure, and simply downed tools in respect of the TRC cases. The precise detail of these 'arrangements' or 'agreements' has no

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bearing on the issues to be determined as part of the applicant's application for a permanent stay. That is for a commission of inquiry to investigate.

- 38 Since the first respondent admitted that political interference stopped the prosecution of TRC cases, including the Timol case, there was no need for the Full Court or the SCA to delay the determination of the application or subsequent appeal. The only question that arose was whether the political interference justified a permanent stay of prosecution. That is the question that the courts below addressed and concluded correctly that the interference did not warrant a stay of prosecution.

QUESTION OF DELAY

- 39 The applicant takes issue with the treatment by the Full Court and the SCA of the question of delay.
- 40 The Full Court's judgment provided an extensive analysis of the 47 years delay between Timol's murder and his arrest. This analysis was approved by the SCA in its judgment, in which it was noted that only 14 years could be attributable to the political interference.
- 41 The Full Court correctly contextualized the question of delay to determine whether the delay would *"inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence"*. Following a careful analysis of the applicant's circumstances the Full Court concluded that while the delay has caused a measure of prejudice it cannot be said that it will taint

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the fairness of the trial, which will incorporate the safeguards of fairness that Rodrigues is entitled to. The SCA approved of the Full Court's analysis, noting that the appellant had not taken issue with the analysis. Indeed, the applicant has only impugned the analysis in his appeal before this Court.

42 The only rebuttal offered by the applicant is that his right under section 35(3) of the Constitution to a fair trial is unqualified and therefore the Full Court and the SCA had to take into account the period between 1971 and 1994 (23 years) and the period between 1994 and 2002 (8 years).

43 The applicant's claim that his right under section 35(3) is unqualified is manifestly wrong. This Court has already made it clear that delay does not *per se* taint the fairness of a proposed trial and that a court must weigh up various factors in carrying out such an assessment.

44 During the period between 1971 and 1994, apartheid police were never going to seriously investigate themselves. Crimes carried out by the SB were routinely covered up, with magistrates and prosecutors often turning a blind eye to the truth. This was the order of the day.

45 Justice Mothle found at paragraph 315 of his judgment in the re-opened inquest that the true circumstances of Timol's death were covered up and that the applicant was party to this cover-up:

"[T]his court is of the view that there is no merit or credibility in the evidence of Rodrigues and that of members of the Security Branch on their version. The version was clearly fabricated to conceal the real truth as to what caused Timol to fall. The Court rejects this version."

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46 Justice Mothle also found at paragraph 341 of his judgment that the prosecution and the magistracy were complicit in the cover-up of Timol's death:

"It will be remiss of this Court not to address an issue on which Bizos' evidence put a spotlight. This is the impropriety role played by some in the magistracy, prosecuting authorities and medical experts in the past inquest proceedings. Bizos's evidence reveals the role of some of these public officials in being complicit in exonerating members of the Security Branch from the crimes they committed. The 1972 inquest into the death of Timol is one such example. From the outset, it had to take a Court order to allow Timol's family and their lawyers access to case documents before the inquest commenced. The evidence of the 1972 inquest further demonstrate how the prosecution made no effort to obtain evidence other than that of the police and the magistrate attempting to explain away the ante mortem injuries, without any shred of evidence supporting his statement about a brawl."

47 It hardly lies in the mouth of the applicant, having participated in the cover-up of Timol's murder, to claim that the Full Court erred in taking these facts into account

48 Likewise, the period between 1994 and 2002 when the TRC and its Amnesty Committee operated, during which time the applicant, emboldened by his cover-up, elected not to apply for amnesty and declined an invite to appear before the TRC, was properly considered by the Full Court. The Full Court cannot be faulted in its reasoning at paragraphs 52-53.

"Accordingly, this part of the timeline, to the extent that it constituted a delay, was a delay of the kind that was regarded as necessary and important to allow a new society to come to terms with its past, to allow victims and perpetrators to take advantage of the opportunities created by the TRC Act, and to provide a mechanism – flawed, but the product of a historical compromise – to seek and find closure.

It could not, in my view, be said to be a part of the delay when, by operation of the law, it was a period of hiatus that was contemplated by the TRC Act. Even if it could be regarded as a period of delay, then there are meritorious reasons why it was the kind of delay that could hardly be regarded as culpable. It was a historic and unique

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time in the history of South Africa. A difficult political compromise was being given effect to. The nation was collectively prevailed upon to give the process an opportunity to succeed in the hope that it would advance the twin objectives of reconciliation and reconstruction. It was imperative that South Africa embrace this process if it were to have any chance of growing as a new nation and overcoming the deep distrust and suspicion that characterised the relationship between its people for so long."

- 49 A similarly comprehensive analysis of the subsequent period attributable to the political interference appears in the judgment of the Full Court, which was approved by the SCA.
- 50 The applicant's complaint regarding delay has been comprehensively addressed by these judgments, to which no sustainable rebuttal is advanced in the application for leave to appeal before this Court.
- 51 I am advised that there is no basis upon which this Court, as a matter of fact or law, could conclude differently.

PREJUDICE

- 52 Applicant's final argument is that due to the passage of 50 years and the applicant's advanced age he is not able to properly conduct his defence thus causing him trial prejudice. While the delay is admittedly lengthy and the applicant elderly, he has several safeguards to protect him against the claimed prejudice.
- 53 First, it is the first respondent that bears the onus of establishing the applicant's guilt beyond a reasonable doubt. The absence of witnesses, evidence and

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records places a considerably greater burden on the NPA. The onus and the presumption of innocence are mechanisms that serve to protect the rights of the accused.

54 Second, any prejudice that the applicant claims arising from an absence of evidence may be remedied by a section 174 discharge application at the end of the prosecution's case.

55 Third, judicial officers are trained to assess the credibility and reliability of witness testimony, and to assess these holistically.

56 Fourth, it is open to the applicant to adduce expert and forensic evidence in rebuttal, regardless of the delay.

57 The applicant's concern regarding his memory and ability to recall is without basis. Particularly when his version of the events surrounding Timol's death has remained remarkably consistent from 1971 through to 2017. Moreover, applicant has failed to put up even the slightest evidence of his *fragile health*. His claim of ill health is an entirely bald claim.

58 In any event, advanced age is not a basis to escape criminal liability. This Court has already confirmed the need for the prosecution of crime as an important constitutional objective, pointing out that the prosecution of murder is an essential means of protecting the right to life.

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- 59 The Full Court and the SCA noted that Rodrigues was on bail and his legal fees are being paid for by the State. Moreover, the applicant's old age and alleged ill-health are mitigating factors to be considered at the sentencing stage.
- 60 In sum, the prejudice asserted by the applicant does not justify a permanent stay of prosecution.

CONCLUSION

- 61 I am advised that decisions in matters of this kind are fact specific. Whether a breach of a right has occurred and whether the relief is justified is to be determined following an appraisal of all the facts on a case-by-case basis. The applicant has failed to establish a level of prejudice to warrant the drastic remedy of a permanent stay of prosecution. Instead, his behaviour, past and present, illustrates a general unwillingness to go to trial and to be held accountable.
- 62 Granting the application for leave to appeal would compound the suffering of the Timol family and unjustly reward the applicant's stratagem of delaying his criminal trial.
- 63 The applicant made his choices. Having elected not to participate in the TRC process, he reconciled himself to the possibility that an independent investigation would expose his role in Timol's untimely demise and open himself to prosecution. That reckoning has now come. History demands that such reckoning be allowed to take its course, unimpeded by further delay.

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- 64 The applicant has protections at his disposal. If the judicial officer is unable to make a clear determination of guilt due to the lapse of time, the presumption of innocence will ensure his acquittal. The effect of the lapse of time results in the State facing the same prejudice as the applicant, the extent of which can only be properly measured by the trial court hearing all the relevant evidence.
- 65 Weighing all the factors in this case and considering the seriousness of the nature of the offence, the public and complainants' interest far outweighs that of the applicant. The Timol family seeks no injustice or revenge against the applicant. Our interest is closure and justice. In the circumstances, the criminal proceedings should proceed. This is a crime that will not go away.
- 66 The application for leave to appeal ought to be dismissed. The Timol family seeks no order as to costs.



 IMITIAZ AHMED CAJEE

THUS SIGNED AND SWORN TO before me at GURUSTUN TETU on this the 14 day of July 2021 by the deponent who acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards the same as binding on his conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258



of 21 July 1972 as amended



COMMISSIONER OF OATHS

EX OFFICIO: *w/o*

FULL NAMES: *Raymond A. W.*

PHYSICAL ADDRESS: *277 Johnny Claassens Street*

DESIGNATION: *w/o*

SOUTH AFRICAN POLICE SERVICE
GARBFONTJIN
2071-07-19
COMMUNITY POLICE CENTRE
SUID-AFRIKAANSE POLISIEDISNERS

