IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 5245/25

In the matter between:

THABO MVUYELWA MBEKI	1st Applicant
BRIGITTE SYLVIA MABANDLA	2nd Applicant
and	
LUKHANYO BRUCE MATTHEWS CALATA	1st Respondent
ALEGRIA KUTSAKA NYOKA	2nd Respondent
BONAKELE JACOBS	3rd Respondent
FATIEMA HARON MASOET	4th Respondent
TRYPHINA NOMANDLOVU MOKGATLE	5th Respondent
KARL ANDREW WEBER	6th Respondent
KIM TURNER	7th Respondent
LYNDENE PAGE	8th Respondent
MBUSO KHOZA	9th Respondent
NEVILLE BELING	10th Respondent
NOMBUYISELO MHLAULI	11th Respondent
SARAH BIBI LALL	12th Respondent
SIZAKELE ERNESTINA SIMELANE	13th Respondent
SINDISWA ELIZABETH MKONTO	14th Respondent
STEPHANS MBUTI MABELANE	15th Respondent
THULI KUBHEKA	16th Respondent
HLEKANI EDITH RIKHOTSO	17th Respondent
TSHIDISO MOTASI	18th Respondent
NOMALI RITA GALELA	19th Respondent

PHUMEZA MANDISA HASHE	20th Respondent
MKHONTOWESIZWE GODOLOZI	21st Respondent
MOGAPI SOLOMON TLHAPI	22nd Respondent
FOUNDATION FOR HUMAN RIGHTS	23rd Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	24th Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	25th Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	26th Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	27th Respondent
MINISTER OF POLICE	28th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	29th Respondent

In re:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
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FOUNDATION FOR HUMAN RIGHTS	23rd Applicant
and	
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PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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NOTICE OF MOTION

PLEASE TAKE NOTICE that the first and second applicants ("**applicants**") will, on a date and time arranged with the Registrar, apply for an order in the following terms:

1. The applicants for intervention are granted leave to intervene as **7th and 8th respondents** (respectively) in the main proceedings before this Honourable Court, under case number 5245/25;

2. Directing the applicants in the main application to serve on the applicants for intervention as 7th and 8th respondents the complete papers in the main proceedings, including all annexures, within a time period permitted by this Honourable Court;

3. The applicants for intervention, as the 7th and 8th respondents, are directed to file their answering affidavits to the applicants' application in the main proceedings within a time period permitted by this Honourable Court;

4. Any respondent who opposes this application is liable to pay the costs of such opposition;

5. Granting the applicants further and/or alternative relief.

PLEASE TAKE FURTHER NOTICE that the applicants rely on the attached affidavits of **Mr Thabo Mvuyelwa Mbeki** and **Ms Brigitte Sylvia Mabandla** to support of this application.

PLEASE TAKE FURTHER NOTICE that the applicants have appointed Boqwana Burns Attorneys at 1st Floor, 357 Rivonia Boulevard, Rivonia, Johannesburg, as the address where they will accept notice and service of all processes in these proceedings. Boqwana Burns Incorporated will accept service electronically at irvine@boqwanaburns.com and aneesa@boqwanaburns.com.

PLEASE TAKE FURTHER NOTICE that should you intend to oppose this application, you are required to notify the applicants' attorneys within five days from the date of service of this application, and to appoint an address in such notice as meant in rule 6(5)(b) of the Uniform Rules of Court, at which you will accept notice and service of all documents in this presence. You are then also required to deliver your answering affidavit within 15 days of giving such notice.

DATED at **Rivonia** on 31 March 2025.

Boqwana Burns Attorneys
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TO:

The Registrar of the Above Honourable Court

AND TO:

Webber Wentzel
Attorneys for 1st to the 23rd Respondents
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AND TO:

State Attorney, Pretoria
Attorneys for the 24th and 25th Respondents
SALU Building 316 Thabo Sehume Street
Pretoria 0002
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AND TO:

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FOUNDING AFFIDAVIT

I, the undersigned,

THABO MVUYELWA MBEKI

do hereby make oath and say:

TM. C.M

1. I am an adult male and the former President of the Republic of South Africa. I served as South Africa's President from 14 June 1999 to 24 September 2008.

2. Unless otherwise stated or the context indicates to the contrary, the facts set out in this affidavit are within my personal knowledge. They are, to the best of my knowledge and belief, all true and correct. Where I rely on facts not within my personal knowledge, I provide the necessary confirmatory affidavits.

PARTIES

3. I am the first applicant.

4. The second applicant is Ms Brigitte Sylvia Mabandla ("**Ms Mabandla**"). For present purposes, Ms Mabandla was the Minister of Justice and Constitutional Development ("**Minister of Justice**") from 2004 to 2008. Her supporting affidavit is attached to this affidavit.

5. The first to 23rd respondents instituted an application before this Honourable Court, under case number 5245/25 ("**main application**"). They are respectively described in the founding affidavit in the main application (in paragraphs 4, 33 to 55). I do not wish to unduly lengthen this affidavit by repeating those descriptions here.

6. The 24th to 29th respondents consist of the Government of the Republic of South Africa, the President of the Republic, the Minister of Justice and

Constitutional Development, the National Director of Public Prosecutions, the Minister of Police and the National Commissioner of the South African Police Service. They have also been described in the main application (paragraphs 56 to 61).

PURPOSE OF AFFIDAVIT

7. I depose to this affidavit in support of mine and Ms Mabandla's application to intervene as the 7th and 8th respondents (respectively) in the main application. Our application is made in terms of rule 12 of the Uniform Rules of this Honourable Court.

8. The applicants in the main application ("**Calata *applicants***") seek the following relief:

   8.1 a declarator that the 1st to 6th respondents' ("**government respondents**") conduct in unlawfully refraining and/or obstructing the investigation and/or prosecution of apartheid-era cases that were referred to the National Prosecuting Authority ("**NPA**") by the Truth and Reconciliation Commission ("**TRC**") ("**the TRC cases**") or to otherwise unlawfully abandon or undermine such cases:

      8.1.1 violates the *Calata* applicants' rights, as well as those of the families of the victims and survivors of the apartheid-era crimes ("**the families**"), to equality, dignity, life and bodily integrity in terms of sections 9, 10, 11 and 12 of the Constitution;

8.1.2 is inconsistent with the values in section 1 (a) and the rule of law as enshrined in section 1 (c) of the Constitution;

8.1.3 is inconsistent with the principles, values and obligations imposed by the Promotion of National Unity and Reconciliation Act 34 of 1995, read with the postscript to the Interim Constitution;

8.1.4 breaches the duties and obligations contained in the Constitution, the National Prosecuting Authority Act 32 of 1998 and the South African Police Service Act 68 of 1995, to investigate and prosecute serious crime, and not to interfere with the legal duties of prosecutors and law enforcement officers; and

8.1.5 is inconsistent with South Africa's international law obligations in terms of sections 231 to 233, read with section 39(b), of the Constitution.

9. The phrase "TRC cases" was used with regard to two instances:-

9.1 the cases referred to the NPA by the TRC - the National Executive never interfered with the NPA with regard to these "TRC cases".

9.2 the cases that the National Executive foresaw would arise after the TRC had completed its work, sometimes referred to as "unfinished TRC business". These were also referred to as "TRC cases". It was with regard to these "TRC cases" that the 2003 speech refers. The

issues about 'Prosecution Policy' and the 'Presidential Pardons' refer only to this second set of "TRC cases".

10. Anyway, on the back of what is set out in paragraph 8, the *Calata* applicants pray for the payment of constitutional damages by the South African government.

11. The applicants also seek a declarator that the failure and/or refusal by the current President, the 2nd respondent, to establish a commission of inquiry into the suppression of the investigations/prosecution of the TRC cases is inconsistent with his responsibilities under sections 84(2)(f) read with ss1(c), 7(2), 83(b) and 237 of the Constitution and violates the applicants' rights, as well as those of the families, to equality, dignity, life and bodily integrity in terms of sections 9, 10, 11 and 12 of the Constitution. They seek that the President's failure or refusal be reviewed and set aside, and that he be directed to promulgate the establishment of a commission of inquiry within 30 calendar days of the order. One of the questions that they request the commission to investigate is whether there were efforts to influence or pressure members of the National Prosecuting Authority and/or the South African Police Service to stop investigating and/or prosecuting TRC cases, why this was done, and by who. The commission would then make recommendations, including directing that prosecutions be instituted against persons found to have acted unlawfully.

12. I noted above that I was South Africa's President from 1999 to 2008, and that Ms Mabandla was the Minister of Justice from 2004 to 2008. The work of the TRC was started in 1996, when former President Nelson Mandela

was the South African President. The TRC released the first five volumes of its final report on 29 October 1998, and the remaining two volumes were released during my term as President – on 21 March 2003.

13. Although styled in the notice of motion as unlawful conduct by the government respondents, the *Calata* applicants' claimed relief is underpinned by allegations of unconstitutional, unlawful and criminal conduct by me and Ms Mabandla during our tenure. I set out the allegations that relate to our alleged unlawful conduct below.

14. Given the nature of the direct allegations made against Ms Mabandla and I, which underpin the relief that the *Calata* applicants seek, as well as the orders that they seek, Ms Mabandla and I seek leave to intervene as 7th and 8th respondents. We have standing under section 38(a), (c) and (d) of the Constitution and under the common law to intervene as 7th and 8th respondents. We also have a direct and substantial interest in the subject matter of the application. Our legal rights will be adversely affected by the judgment and order of the Court. I am advised that whether we have such legal rights needs to be determined on a case and context-specific basis. I shall demonstrate below that when assessed on a case and context-specific basis, the intervention application ought to be granted.

15. In respect of section 38(c) of the Constitution, Ms Mabandla and I also act as members of and in the interest of the administration of which I was President. Some of the members of that administration are mentioned by name whilst others are not. It is also in the public interest as envisaged in section 38(d) of the Constitution that the full facts are placed before the

Court to determine this important matter of huge public importance that the *Calata* applicants have brought to this Court.

16. In summary, the direct and substantial interest that Ms Mabandla and I assert arise in the following circumstances:

16.1 First, the serious allegations of unconstitutional, unlawful and criminal conduct against Ms Mabandla and I, as well as members of the administration of which I was President, are issues between the parties in the litigation. The Court must determine the issues in order to grant the *Calata* applicants the relief that they seek. Those allegations are highly defamatory and damaging of our dignity and reputation. Our character is beyond all price. In such circumstances, Ms Mabandla and I are entitled to intervene to dispute the serious and damaging allegations made and to place direct evidence before this Court for it to determine the correctness or otherwise of the serious and damaging allegations against us on which the applicants rely for their relief.

16.2 Second, Ms Mabandla and I dispute that we or the administration of which I was President interfered with the NPA's prosecution of TRC cases and committed unconstitutional, unlawful and criminal acts as the *Calata* applicants allege. We intend to place relevant direct evidence before this Court to oppose the allegations on which the *Calata* applicants seek relief and to have legal submissions made on our behalf in that regard. Denying us intervention in such circumstances would conflict with, and unjustifiably deny us, our right under section 34 of the Constitution to have this dispute resolved by the application of law decided in a fair public hearing before

this Court. Once we are denied the right to intervene as respondents and defend ourselves against the serious and damaging allegations, we would not be able in future to relitigate the findings of this Court against us. It is unlikely that a court of appeal would allow us the right to intervene to challenge any adverse findings by this Court if we are denied the opportunity to defend ourselves as respondents before this Court. I am advised that there is authority in the highest court in the land that a witness who was not party to proceedings may not seek to intervene on appeal to challenge adverse findings against him or her where he or she does not challenge the order that the court of first instance has granted.

16.3 Third, given the allegations of intentional interference with the NPA and the prosecution of TRC cases for alleged personal interests or private organisational interests, the government, represented by the first, second, third and fifth respondents, may contend that this Court must find that if there was unconstitutional, unlawful or criminal conduct by Ms Mabandla and I, and the administration of which I was President, it is conduct that is contrary to the public interest because the government and the public have an interest in protecting the rule of law and ensuring good governance. If the Court were to make a finding along these lines, Ms Mabandla and I may be exposed to potential personal liability by those that claim to have been victims of such unconstitutional, unlawful conduct and criminal conduct or whose claims derive from the rights of such victims. In other words, we may be exposed to loss of indemnity from liability as former government functionaries. Such a risk has far-reaching implications for our legal rights and financial interests.

16.4 Fourth, it is clear from a reading of prayer 6 of the notice of motion and the founding affidavit that the commission of inquiry to be established must investigate Ms Mabandla's and my conduct, including that of the administration of which I was President. We clearly have a direct and substantial interest in the outcome of the application in relation to this prayer as well.

17. Finally, the allegations made against Ms Mabandla and I, if upheld albeit false, will unjustifiably breach our right to human dignity in section 10 of the Constitution. To the extent that the common law does not accord us the right to intervene in the circumstances of the present case, the common law rules on intervention must be developed in terms of section 39(2) of the Constitution to recognise the right for a party to intervene as a respondent in circumstances similar to the present case. Those circumstances are where the present administration is challenged for breaches of the Constitution relying directly and only on alleged conduct of the former administration, where named members of the former administration are expressly and directly alleged to have acted in an unconstitutional, unlawful and criminal manner. This Court would fail to promote the spirit, purport and objects of the Bill of Rights if it does not develop the common law to recognise our right to intervene in such circumstances.

ALLEGATIONS UNDERPINNING RELIEF SOUGHT IN MAIN APPLICATION

General allegations

18. It is true that accountable governance and social trust in such governance depend on public officials making decisions that are both reasonable and responsive.

19. In the main application, the *Calata* applicants allege, however, that this principle was violated due to political interference in the prosecution of the TRC cases. Their central allegation is that there was a deliberate political decision, especially during my tenure as the President, not to prosecute individuals who committed apartheid-era crimes, and who were not granted amnesty by the TRC. According to the applicants, this decision deprived them of substantive rights and entitlements under the Constitution.

20. The *Calata* applicants allege that with the exception of the Mandela administration, the post-apartheid state deliberately delayed the investigation of the TRC cases and prosecution of perpetrators. This delay, according to the *Calata* applicants, suggests political compromise or a deliberate tolerance of these crimes for *ulterior* motives.

21. From the perspective of the *Calata* applicants, this constituted a violation of the rule of law, which was further aggravated by the government's refusal or failure to thoroughly investigate the suppression of the TRC cases through a credible, independent, and transparent inquiry.

22. The *Calata* applicants directly allege that over the years, the Executive (at its highest level), the NPA, the South Africa Police Service ("**SAPS**") and other state organs colluded, or acquiesced in the suppression of the TRC cases. Despite various requests (so the allegation goes), the SAPS and the

NPA did not investigation the TRC cases. In doing this, they sometimes acted on instruction from the highest level of the Executive – the President. The *Calata* applicants allege that this conduct was in bad faith and for unlawful political reasons.

23. The *Calata* applicants allege further that the suppression of the TRC cases by the state's machinery is contrary to the rule of law, which underpins South Africa's constitutional order. It is also a breach of South Africa's international law obligations, which are contemplated in sections 231 to 233 of the Constitution, read with section 39(b) of the Constitution. The suppression is lastly (according to the *Calata* applicants) a violation of rights in the Bill of Rights.

24. The *Calata* applicants also allege in their founding papers that Ms Mabandla and I violated rights [556][1], breached the rule of law [562]; and committed serious crimes [559].

25. They further allege that my administration was responsible for the brazen suppression of the TRC cases [405] – at my direction, and further that this violated multiple constitutional and statutory provisions [529 and 530], including section 32(1)(a) and (b) of the National Prosecuting Authority Act 32 of 1998 [529.5 and 530.2].

Specific allegations made against me or relating to me and the Presidency

[1] All references in brackets are to paragraphs in the founding affidavit.

26. In what follows, I set out the allegations that the *Calata* applicants make against me and/or that relate to me and the Presidency/administration in their founding papers in the main application.

27. These allegations are relied on by the Calata applicants to demonstrate conduct (both direct and seemingly implied) on my part in suppressing unlawfully the TRC cases for political motivations. This nefarious and unconstitutional conduct is said to have commenced in 1998 when I was a Deputy President, until 2008 when I resigned from office.

28. In making these allegations, the Calata applicants rely primarily on affidavits and documents that were used in different forums, including Courts, over the years. They also rely on books authored and interviews by authors who have written on the TRC cases. Reliance is also placed on alleged oral accounts of incidents relayed by various persons.

Alleged conduct 1: the "deliberations" and attempts to amend TRC legislation

28.1 The starting point is 1998, when I was the Deputy President.

28.2 The *Calata* applicants allege that in 1998, secret consultations began between the government and a group of high-ranking former generals of the SANDF and the security police. These "deliberations" were held to discuss questions of criminal liability arising from the past. The discussions were allegedly mediated by Mr Jürgen Kögl, who had close ties to key ANC members. In addition to former President Jacob Zuma, high-ranking ANC officials, including Mr Penuell Maduna (then Justice Minister), Mr Mathews

Phosa, Dr Sidney Mufamadi, and Mr Charles Nqakula, participated at various times.

28.2.1 I must say immediately that the discussions which included Mr Jürgen Kögl and various Afrikaners had absolutely nothing to do with "questions of criminal liability arising from the past". They were solely and exclusively about the various demands made by some Afrikaners about such matters as a 'volkstaaat' and 'the right to self-determination'.

28.3 I am alleged to have been involved in these "deliberations", initially as Deputy President and later as President. [381.3] and that I frequently consulted with Former President De Klerk or other senior government officials. [379.1].

28.4 The "deliberations" were apparently aimed at finding mutual arrangements to avoid post TRC trials through a new indemnity mechanism. The allegation seems to be that the need for mutual agreement stemmed from the fact that in March 1999, the TRC had denied amnesty to 37 ANC leaders, among them myself, because we did not disclose any individual offences. [377 – 377.1].

28.5 The Calata applicants allege that during July 1998 the former SANDF Generals called for a blanket amnesty *for all sides*.

28.6 Soon thereafter, I informed Parliament that the government was reviewing additional amnesty proposals submitted by the SADF generals. [377.2].

28.7 According to the former police commissioner and head of the Foundation for Equality Before the Law (FEL), Mr Johan van der Merwe, the FEL proposed an indemnity procedure based on admission of the crime committed without the need to make full disclosure. [379-381, 386]

28.8 I am alleged to also have attempted to amend TRC legislation to allow amnesty for collective responsibility without requiring individual disclosure. This, apparently, was because ANC spokesperson indicated that the Generals had expressed willingness to disclose information but only if guaranteed amnesty. [377.3].

28.9 By late 2002, when I was the President, the proposal and draft legislation had been finalised and was presented to Parliament for enactment. However, I rejected the legislation when it was presented to me for approval.

28.10 Before I rejected the amnesty legislation, the Generals were reportedly close to securing a resolution. The *Calata* applicants also allege that one Marais informed one Schmidt that after seven years of negotiations, the Generals and the government's security cluster had agreed on a legal framework for post-TRC amnesty, with the government commissioning a "*law writer in Cape Town*" to draft the legislation. [391].

Alleged conduct 2: presentation of the final TRC report and implementation

28.11 The next pivotal point of alleged conduct relates to my presentation of the final TRC report on 15 April 2003 and the implementation thereof.

28.12 I addressed the National Houses of Parliament and the Nation on 15 April 2003, during the presentation of the final volume of the TRC Report. [124].

28.13 In my address, I apparently outlined formal strategies for pollical interference with the TRC cases. [126].

28.14 While I appeared to reject another amnesty due to its constitutional implications, I nonetheless emphasised the need to accommodate the many perpetrators who had not participated in the TRC process. [126.1].

28.15 I stated that while the NPA would be allowed to continue its work, it would be required to collaborate with intelligence agencies to enable those still willing to disclose the truth to enter into arrangements that are standard in the normal execution of justice. [126.2].

28.16 I also reaffirmed that individuals seeking justice or raising human rights violation grievances could still approach the courts and noted that relevant government departments were assessing the practical implementation of this approach and whether new legislation was necessary. [126.3].

28.17 I signalled that the TRC cases would not follow the usual prosecutorial approach. Unlike other serious crimes, such as murder, the TRC cases would be treated differently, with perpetrators offered leniency or alternatives to prosecution. Families of victims could participate in these legal arrangements and, if dissatisfied, could still pursue private prosecutions or civil litigation. [127].

28.18 I allegedly also articulated a government policy that effectively deprioritised the prosecution of TRC cases, instead implementing special arrangements, and that my alleged reference to intelligence agencies foreshadowed their eventual influence over prosecutorial decisions. [128].

28.19 According to the *Calata* applicants, the abovementioned strategies were developed and shaped during the earlier mentioned "deliberations" that took place between me and/or government representatives and former President F.W De Klerk and/or his representatives to find a solution to avoid the prosecution of former members of the SAP who had not received amnesty. [397].

28.20 The Calata applicants contend that following my speech, those in power moved swiftly to shut down TRC-related cases. [129].

28.21 They allege that the state entities authorised to conduct investigations, namely the SAPS and the NPA, both refused to work on TRC cases *unless I approved this*. [137- 140].

28.22 The NPA (NDPP Ngcuka at the time) never contacted me for a decision regarding the investigation and prosecution of TRC-related cases probably because this was seen as a futile exercise.[141].

28.23 The Calata applicants allege that on 23 February 2004, a Director-General's Forum chaired by Adv Pikoli (who was the Director-General of the Department of Justice at the time) met to consider how to give effect to the objectives in my April 2003 speech. Effectively, the meeting discussed how to deal with TRC-related cases.

28.24 The Forum appointed an Amnesty Task Team to inter alia consider and report to the Forum on a criterion that the NPA would apply in deciding TRC prosecutions and formulate guidelines for prosecutions. [148-150]. The Amnesty Task Team recommended the establishment of a Departmental Task Team comprised of representatives from the Department of Justice, Intelligence Agencies, South African National Defence Force, South African Police Service, Correctional Services, NPA and the Office of the President. The Departmental Task Team would, amongst other things, consider the advisability of the institution of proceedings committed during conflicts of the past *before* the institution of criminal proceedings. [155-156].

28.25 It is alleged that the government accepted and implemented much of the Amnesty Task Team's recommendations, and this is allegedly evident from the 2005 amendments to the Prosecution Policy and my introduction of a Special Dispensation for Political Pardons in 2007. [160].

28.26 The Calata applicants contend that as a result of the mooted strategies in my April 2003 speech, a moratorium of three years (2003 to 2005) was placed on the pursuit of TRC cases while the Amnesty Task Team worked on the drafting Prosecuting Policy for TRC cases. [179].

Alleged conduct 3: interference with prosecution in Chikane matter

28.27 Mr Ackermann of the NPA had been appointed as the head of the Priority Crimes Litigation Unit (PCLU) which was the unit that was created within

the NPA by Presidential Proclamation in March 2003 to deal with TRC cases. [106].

28.28 The TRC cases were declared priority crimes in terms of the PCLU proclamation by NDPP Ngcuka in May 2003 [107].

28.29 The Calata applicants allege that in defiance of the abovementioned moratorium, Mr Ackermann pursued cases in 2004 including one involving the poisoning of Reverand Frank Chikane in which Dr Wouter Basson was implicated together with three former policemen. Dr Basson is known to have been the former head of the apartheid government's chemical and biological warfare project. This was considered a priority case by the PCLU. [209]

28.30 Apparently on the morning of the police's intended arrest of Dr Basson and the co-accused, in November 2004, Mr Ackermann received telephone calls from their attorney, Mr Wagener and an official of the Department of Justice. The latter requested that Mr Ackermann suspend the arrests and halt work on all TRC cases pending the development of the prosecution guidelines. [182.1-4]

28.31 The Calata applicants contend that, according to Mr Wagener I authorised the suspension of these arrests "*in an extraordinarily swift move*". [183].

The implementation of the Prosecution Policy and prosecution in the Chikane matter

28.32 In December 2005, the Prosecution Policy became effective. According to the Calata applicants, the amendments to the Policy were introduced in view of the essential features of my April 2003 speech on the TRC final report. [194].

28.33 The Calata applicants allege that while the amendments to the Policy professed to pursue various noble objectives including not perpetuating TRC amnesty, the maintenance of impunity was intended. The Policy set out procedural arrangements for those wanting to make representations to the NDPP in respect of their crimes arising from conflict committed before 11 May 1994. [195-196]. Moreover, it provided the criteria for determining whether to prosecute. These and other features, the Calata applicants contend, amounted to a rerun of the TRC's amnesty criteria and guaranteed the perpetuation of impunity. [198-199].

28.34 Once the guidelines were issued, the NPA proceeded with the TRC cases and Adv Pikoli invited representations from the people implicated in the Chikane attempted murder case. Adv Pikoli concluded to prosecute the accused and informed them of this in July 2006. [210, 219]

28.35 The Calata applicants allege that the Chikane prosecution prompted improper intervention by several Ministers. They contend that in 2006, Adv Pikoli was summoned to a meeting that was attended by several Ministers, including Minister Zola Skweyiya (then Minister of Social Development), Minister Mosiuoa Lekota (Minister of Defense), Acting Minister Thoko Didiza (representing the Minister of Justice – Minister Brigitte Mabandla) and Mr Jafta, the Chief Director in the Presidency. The meeting was

allegedly called by Acting Minister Didiza to address the prosecution in the Chikane matter. [244].

28.36 At this meeting, it apparently became clear to Adv Pikoli that there was a fear that cases like the Chikane matter could open the door to prosecution of ANC members. The Ministers apparently expressed concern at Mr Ackermann's involvement and sought clarity about whether he would be able to decide to undertake a prosecution of the ANC members without Adv Pikoli's approval. Adv Pikoli assured them that the decision to prosecute laid only with him. [225].

28.37 The Calata applicants allege that this meeting probably pointed to the overriding concern of government that pursuing a TRC case, like the Chikane matter, would put pressure on the NPA to pursue cases against the ANC members. [226].

28.38 In 2006, Adv Pikoli was again summoned to a meeting which took place at the office of the Presidency. At this meeting, Adv Pikoli proposed that Dr Ramaite, the Deputy National Director of Prosecutions, should chair the Task Team given the adverse views against Mr Ackermann. This proposal was accepted. A further meeting was held with Ministers in the Security Cluster, attended by the Minister of Safety and Security, the Minister of Social Development, Acting Minister of Justice, various DGs and Mr Jafta. The proposal to establish a working group was accepted and Adv Pikoli wrote to the various DGs, including Commissioner Selebi – inviting them to nominate a senior official to serve on the task team. [227-228].

28.39 The task team met for the first time on 12 October 2006 and was attended by Adv Pikoli together with the various officials. However, Adv Pikoli did not participate further in the activities of the task team. According to Mr Macadam, the NPA representative on the task team, the task team comprised primarily of members of the intelligence community who were intent on cross examining him as to why mattes should be investigated rather than addressing the issue of outstanding cases. [229]

28.40 The Calata applicants note that the involvement in the task team of Mr Jafta, the Chief Director in the Presidency who had an intelligence background should not have been allowed because the policy guidelines did not make provision for a member of the Presidency to be part of the group assessing TRC cases. They allege that this involvement indicated that the Presidency intended to have direct involvement in the decisions relating to the TRC cases. [230].

28.41 Adv Pikoli received further representations from the suspects in the Chikane matter claiming that they had received indemnity against prosecution but after seeking independent advice Adv Pikoli was advised that the indemnities did not bar prosecution. In the meantime, however, the SAPS representative in the task team advised the NPA that National Commissioner Selebi did not believe Reverend Chikane was interested in prosecution and that the NPA needed to consult with Reverend Chikane about the proposed prosecution. Adv Pikoli thus instructed Mr Ackermann to confirm his position. However, on the same day, the head of the SAPS Legal Support sent a letter to the PCLU expressing the National

Commissioner's view that before any prosecutorial decision could be taken, the task team had to submit a final recommendation to the Committee of Directors General in respect of each case – which in turn must advise the NDPP who to prosecute or not. [233-234].

28.42 According to the Calata applicants, at the end of 2006, and after the abovementioned interactions, Adv Pikoli realised his counterparts in the other departments in the task team viewed their role as clamping down on the TRC cases from proceeding and to made clear to him that he could not proceed to prosecute without their permission. [236].

28.43 The Calata applicants contend that the central concern of government leadership was that the pursuit of the TRC cases could lead to cases against ANC members, and for this reason all cases had to be stopped even if it meant denying justice to families in the TRC cases. [237].

28.44 As a result of the differences within the task team, in early January 2007 Adv Pikoli advised Commissioner Selebi and the Directors General that he would approach the Minister of Justice to get guidance on the serious misunderstandings about the role of the task team which compromised the functioning of the team. [238].

28.45 During this same period, on 5 January 2007, Minister Mabandla issued a press statement expressing the need to develop a policy on presidential pardons for prisoners who alleged that their offences were politically motivated. She explained that the matter was complex, novel and required a "political solution". The Minister noted that the pardons were necessary

to address situations where applicants had not applied for amnesty from the TRC because their political parties did not support the TRC; applicants had pleaded ignorance of the TRC processes; or crimes committed by applicants after the cut-off date for TRC amnesty. [239].

28.46 Also around this period, the former Minister of Police, Adriaan Vlok and the former Commissioner of Police, General van der Merwe made representations to Adv Pikoli admitting to authorizing the murder of Reverend Chikane and requested not to be prosecuted in light of the disclosure. They however refused to make full disclosure. Adv Pikoli thus declined to grant them immunity from prosecution – in terms of the prosecution guidelines. Their prosecution thus commenced. [241].

28.47 Adv Pikoli then met with then Minister Mabandla. The interaction between them is addressed later in this affidavit.

28.48 Adv Pikoli and Mr Ackermann appeared before the Justice Portfolio on 3 May 2007. According to the Calata applicants, the minutes of this meeting reflect Adv Pikoli's frankness about what was stopping prosecutions of the TRC cases. In terms of the minutes, Adv Pikoli highlighted that whenever there was an attempt to charge members of former police services, there was political intervention. While on the other hand, families of victims were pressing for prosecution. The Calata applicants contend that the statements by Adv Pikoli demonstrates his frustration that former generals seemed able to exert influence and were able to engineer political intervention when their people were pursued. They also allege that failure by the justice Portfolio Committee and across the political spectrum to call

for an independent inquiry into the alleged violation of the rule of law at that stage is shameful.[251].

28.49 The Prosecution Policy was challenged in the High Court by family victims in July 2007 and it was argued that the policy was designed for the sole purpose of guaranteeing impunity for apartheid-era perpetrators. The application was opposed by the Minister of justice and the NDPP. [252].

28.50 Also in July 2007, a plea and sentence agreement was reached with the accused in the Chikane attempted murder matter. Adv Pikoli sent a memorandum to the Justice Minister informing her that the case had been set down for hearing on 17 August 2007, for confirmation of the plea and sentencing agreement. This occurred on 17 August 2007 and after pleading guilty, the accused were convicted and suspended sentences were imposed. [253-255].

28.51 The Calata applicants allege that the prevailing view by Adv Pikoli and Mr Ackermann was that the NPA would have preferred a full prosecution as this would have produced greater truth and accountability. But Adv Pikoli's concern at the time was that the "political headwinds" were too strong and he feared that police investigations into the matter would have compromised the case. It was clear to Adv Pikoli, so the allegation goes, that the government – especially the then Minister of Justice (Ms Mabandla) – did not want the NPA to prosecute the accused in the Chikane case. [258.]

Alleged conduct 4: suspension of Adv Pikoli

28.52 After the convictions in the Chikane matter, a newspaper article was published on 19 August 2007 in which it was claimed that the NPA was preparing to prosecute ANC leaders. The article was based on a memorandum drafted by Mr Ackermann four years prior, however, the note was forged to suggest that it was recently made. The NPA released a press statement on 21 August 2007 and denied the allegations in the article. [260].

28.53 According to the Calata applicants, several interventions followed the release of this article which point to the extent of political interference. First, Adv Pikoli was asked to relieve Mr Ackermann from the TRC cases by the DG, Department of Justice. He declined to do so. Second. Adv Pikoli was summoned to a meeting of the subcommittee of the Justice, Crime Prevention and Security Cabinet Committee on Post TRC matters on 23 August 2007. Cabinet Ministers in attendance included the Minister of National Intelligence Services, Minister Ronnie Kasrils, Minister Mabandla and Minister Skweyiya. [262-263]. According to Adv Pikoli, those in attendance at the meeting demanded answers from him about the TRC prosecutions. [264].

28.54 It is alleged that Minister Mabandla and Adv Pikoli interacted during the meeting and thereafter. I address that interaction later in this affidavit. I mention, however that during their interaction, Adv Pikoli confirmed that the NPA was not investigating "the 37 ANC leaders including the President". [267.]

28.55 I suspended Adv Pikoli from office on 23 September 2007 and announced the establishment of the Ginwala Enquiry into his fitness to hold office. [276]. One of government's complaints against Adv Pikoli was his handling of the TRC cases in that he did not demonstrate an appreciation of the public interest issues that were mandated by the prosecution policy. [278].

28.56 The Calata applicants observe that Adv Pikoli attested that the decision to suspend him was influenced by his approach in the TRC cases. [272].

28.57 Mr Ackermann was allegedly then summoned by the acting NDPP, Adv Mpshe, and relieved of his duties in relation to the TRC cases. Mr Ackermann also attested that Adv Mpshe no doubt received a political instruction to remove him from the cases. [271].

28.58 The Calata applicants contend that the establishment of the Ginwala Enquiry and removal of Mr Ackermann marked the start of years of complete inactivity in the TRC cases [275]. SAPS declined to further investigate the TRC cases pending the finalization of the enquiry. [277].

Conduct 5: special process for handling pardons

28.59 At a joint Parliamentary session on 21 November 2007, I announced a special process for handling pardon requests from individuals convicted of politically motivated offenses, who had not been denied amnesty by the TRC. I am alleged to have framed this initiative as an effort to resolve the TRC's "unfinished business". [289 The window period for submitting requests was 15 January 2008 to 15 April 2008 and was subsequently extended to May 2008. [291-293].

28.60 The Calata applicants note that some of the applicants who were recommended for pardon to former President Motlanthe included the accused in the Chikane matter and AWB members. [296].

28.61 The pardon process was criticised by civil society organisations, for being opaque and excluding the victims. Ultimately, (in 2009) the pardons' process was interdicted by court and in 2010 the Constitutional Court later ruled that no pardon could be issued without first affording the victims a hearing. [300-301].

28.62 By this time, I had resigned as President.

The Calata applicants place me at the centre of political interference

29. It is apparent from the allegations against me in the founding affidavit (which are <u>not</u> exhaustively and comprehensively summarised here), that the *Calata* applicants' case for political interference in the investigation and prosecution of the TRC cases, or even their so called suppression, is based on my alleged conduct, and the conduct of various officials in my administration during my tenure as Deputy President and President (i.e from 1998 to 2008). The *Calata* applicants state in their papers that my administration played a central role in what they allege to have been a violation of the rule of law, human rights, as well as other provisions in the Constitution and criminal conduct. They allege that this unlawful conduct was perpetuated after I left office.

30. The *Calata* applicants squarely allege that while publicly rejecting a general amnesty, I endorsed special arrangements to accommodate

perpetrators who had not participated in the TRC process, or who were denied amnesty, in order to shield myself against prosecution.

31. They have placed me at the centre of the political interference and then allege that I deny such involvement. They allege further that my denial conflicts with the clear suppression of TRC cases that occurred under my administration. They assert that an independent commission of inquiry is required to "consider and test the veracity of the denials of former President Mbeki". [401–405].

32. This makes it that I am the principal target of the commission of inquiry that they seek.

The motivation for my alleged interference

32.1 The Calata applicants allege that the political interference stems from the ANC's failed attempts to obtain collective amnesty for apartheid era crimes.

32.2 The Calata applicants refer to a docket that allegedly implicates 37 ANC members, including me, apparently compiled by the FEL. This docket is said to contain sufficient evidence to support criminal charges against ANC officials, including charges of terrorism against me. The FEL, so the allegation goes, has refused to hand over the docket to the prosecuting authority and has claimed that it would only be used if apartheid era officials were targeted for prosecution. [397].

The allegations against Ms Mabandla

33. As against Ms Mabandla, the applicants allege that:

33.1 On 5 January 2007, she issued a press statement highlighting the need to develop a policy on presidential pardons for prisoners claiming their offenses were politically motivated. [239].

33.2 On 6 February 2007, she met with Adv Pikoli and appeared to have had the impression that he (Adv Pikoli) had previously agreed not to proceed with the TRC cases. [242].

33.3 She sent a letter to Adv Pikoli on 8 February 2007. The letter was titled "TRC MATTERS," and in it, she expressed surprise at media reports suggesting that the NPA intended to proceed with prosecutions. She is further alleged to have stated in the letter, that: "*I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions, you briefly mentioned to me that the NPA will not go ahead with prosecutions*". [243].

33.3.1 The *Calata* applicants allege that in response, Adv Pikoli addressed a memorandum to Ms Mabandla, in which he "*set out the history behind the policy to the TRC cases and to inform the Minister of the problems experienced in implementing this policy*". [246].

33.3.2 It is further alleged that Ms Mabandla never responded to Adv Pikoli's memorandum, nor did she deny that her department was involved in improper interference with the NPA's work.

33.4 The *Calata* applicants allege further that in his affidavit in *Nkadimeng 2 (FA22)*, Adv Pikoli stated that he was shocked by the absence of an immediate response by Ms Mabandla to his memorandum, given the serious concerns he had raised and the fact that obstructing the prosecution authority's work is a criminal offense. To him (so the allegation goes), Ms Mabandla's silence indicated that she was content with the deadlock between the NPA, the Department of Justice, SAPS, and National Intelligence Agency ("**NIA**"), effectively allowing the suppression of TRC cases to continue [249].

33.5 It was clear that the government, especially the Minister of Justice, did not want the NPA to prosecute those implicated in the Rev Chikane case. [258].

33.6 After a newspaper article on the issue was published, Adv Pikoli was summoned to a meeting of the subcommittee of the Justice, Crime Prevention, and Security ("**JCPS**") Cabinet Committee on Post-TRC matters on 23 August 2007. The meeting was attended by several cabinet ministers, directors-general, and Adv Selebi. Among the ministers present were Ronnie Kasrils (Minister for National Intelligence Services), Ms Mabandla, and Minister Skweyiya. [262].

33.7 It is alleged that during the meeting, it was immediately demanded that Adv Pikoli provide answers about the TRC prosecutions – and to especially explain why the NPA was instituting investigations in relation to a forged memorandum. Ms Mabandla instructed Adv Pikoli to halt the investigation, to which Adv Pikoli responded that the NPA

was bound by law to continue with the prosecutions of individuals who did not apply for or were refused amnesty. [264].

33.8 Ms Mabandla sent a fax to Adv Pikoli on 28 August 2007, complaining that she had not been advised of the decision to investigate (*the 37 ANC leaders*), and wanted to know the basis thereof. [265].

33.9 Adv Pikoli apparently responded and confirmed that there was no investigations by the NPA "against the 37 ANC leaders including the President". [267]. He concluded the letter by requesting an urgent meeting with the Minister. [269].

33.10 According to the Calata applicants, Ms Mabandla did not respond to the meeting request. [270] Instead, Adv Pikoli was suspended and the Ginwala enquiry into his fitness was established.

34. It is clear that the allegations against Ms Mabandla suggest that as Minister of Justice, she sought to obstruct the investigation and prosecution of TRC cases.

REASONS FOR SEEKING TO INTERVENE

35. I repeat what I have stated above in summary regarding our direct and substantial interest in the subject matter of the main application. What I say below does not detract from what I have already said.

36. Ms Mabandla and I beg the court's leave to intervene in the main application:

36.1 to protect at the very least our respective right to dignity, which is protected by section 10 of the Constitution; and to have our dispute of the Calata applicants' serious and damaging allegations against us determined fairly in accordance with section 34 of the Constitution. This, we intend to do by challenging the tarnishing allegations against us, that underpin the *Calata* applicants' request for: (a) declarators of political interference in the investigation and prosecution of the TRC cases; and (b) constitutional damages.

36.2 Permitting us to place our versions before court would add to the body of evidence that would have to be evaluated and tested, in order for that court to determine the true factual position, apply the law to the correct facts, and thus issue the correct outcome in the circumstances, as well as appropriate relief, including that regarding the establishment of a commission of inquiry.

36.3 Absent our versions, the allegations in the founding affidavit would be taken as given – there would be no contrary version before court. There would also be no other opportunity to challenge the *Calata* applicants' versions, including by way of appeal.

SUMMARY OF FACTS TO BE PROVIDED

37. The allegations against us, and the TRC cases generally, in the founding affidavit are disjointed, lack context, are incomplete and materially false.

38. If permitted to intervene in the main application, we will address several topics including:

38.1 The reason behind the TRC, and its role in the transition to democratic rule in South Africa;

38.2 The events post the TRC;

38.3 The position of the "ANC 37" in the context of the TRC and their potential prosecution;

38.4 My, and Ms Mabandla's role/interactions (respectively) with the NPA regarding the TRC cases;

38.5 The Rev Chikane matter; and

38.6 The suspension of Adv Pikoli.

39. In what follows, I provide a broad overview of these topics but hope to have the opportunity to address the specific allegations of interference raised by the *Calata* applicants in due course and once we have been permitted to intervene. The allegations in the *Calata* application span a significant historical timeframe and will require time to deal with.

The TRC and transition to democracy

40. The TRC was established with the important aim to help ensure that the truth was told about human rights violations during the larger part of the apartheid years, with the violators being exposed and given the opportunity publicly to apologise. The process provided an opportunity to those who had committed crimes in the context of those violations of human rights to apply for amnesty, apologise to those they had harmed, and gave an opportunity to the latter to confront the wrong-doers. The TRC

retained the power to deny such amnesty and refer matters to the relevant authorities for prosecution; and order for reparations to be paid to those who had been victim to the crimes indicated above. In the context of the foregoing, the ANC in particular was accepted as a representative of those who had been oppressed and against whom various crimes had been committed.

41. The 1995 Promotion of National Unity and Reconciliation Act which created the TRC contains very important provisions which help to explain the importance of the TRC for the transition to democracy. Ultimately, the TRC had a critical place and was vitally important in the historic endeavour to build the new post-apartheid South Africa.

42. Some time while the TRC was continuing its work, a group of former senior officers of the SAP and the SADF, including Generals, requested a meeting with the ANC concerning matters relevant to the TRC. I, together with some other members of the ANC Committee tasked to deal with the TRC, met these former SAP and SADF Officers. They told the ANC delegation that their view with regard to how the previous (apartheid) government should approach the TRC was as follows, that:

42.1 the former National Executive (Cabinet) should approach the TRC to inform it of the decisions it had taken to advance its policies, as well as defend both the government and the apartheid system as a whole;

42.2 the Senior Officials serving this Cabinet, like the former SAP and SADF Generals, should then approach the TRC to explain what they

did to implement the policies handed down to them by this Cabinet, including the instructions they had given to the subordinate officials; and,

42.3 these Subordinate Officials should then also approach the TRC to explain what they did to implement the directives handed down to them by the Senior Officials/Generals.

43. The former Senior Officers/Generals informed the ANC delegation that the former Cabinet, led by Mr F.W. de Kerk, had refused to appear before the TRC as suggested above. This was the reason why they (the former Senior Officials/Generals) had not volunteered to appear before the TRC. They thought it was unfair to leave only the Subordinate Officials to appear before the TRC to explain their actions. Some of these actions would be violations of human rights, requiring amnesty, presented without the context which would have been provided by the submissions to the TRC of the former Cabinet members and Senior Officials/Generals.

44. On the back of this, the former Senior Officials/Generals requested that the ANC should approach Mr de Klerk and his former colleagues to appear before the TRC for the purpose indicated above.

45. In response to this request, the ANC decided that a collective of selected members of its leadership should approach the TRC to make a submission equivalent to the submission expected of the former Cabinet, formerly led by Mr de Klerk.

46. The ANC leadership then handpicked the members of its leadership who would be part of the collective to approach the TRC, taking into account persons who would have been in relevant leadership positions during the period in question.

47. This is the ANC 'Group of 37' which applied for amnesty on the basis that it had decided the policies which had been implemented by lower organs of the ANC.

48. The TRC first granted a general amnesty to the 'Group of 37'. However, a court overturned this TRC decision on the basis that the application of the 'Group of 37' did not meet the requirements of the TRC Act, which required that those who applied for amnesty should indicate in full the specific offenses for which they sought amnesty.

49. The members of the 'Group of 37', individually and collectively, were not practitioners at the implementation level equivalent to the Subordinate Officials mentioned earlier and therefore had committed no specific offences requiring amnesty in terms of the TRC Act.

50. The final TRC response put paid to the ANC's attempt to set an example for the former Cabinet, which, if we had succeeded in our application, would have given us the moral authority to approach the former Cabinet to follow our example.

51. This, in turn, would have opened the way for the former SAP and SADF Senior Officials/Generals to approach the TRC.

52. The ANC understood and accepted the rationale behind the ultimate rejection of the amnesty application of the 'Group of 37'. It saw no need to take the matter further, including the original intention to persuade.

53. However, in my speech on 15 April 2003, when I tabled the TRC Report before the Houses of Parliament, I said:

> *"Yet we also have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases: and this was not to be."*

54. In the same speech I quoted what the TRC had said about some who 'did not participate in the TRC'. In this regard, the TRC said:

> *"Others did not wish to be portrayed as a 'victim'. Indeed, many said expressly that they regarded themselves instead as soldiers who had voluntarily paid the price of their struggle...Many have expressed reservations about the very notion of a 'victim', a term which is felt to denote a certain passivity and helplessness...Military operatives of the liberation movements generally did not report violations they experienced to the Commission, although many who were arrested experienced severe torture. This is in all likelihood a result of their reluctance to be seen as 'victims', as opposed to combatants fighting for a moral cause for which they were prepared to suffer such violations. The same can be said for most prominent political activists and leadership figures...The Commission did not, for example, receive a single Human Rights Violation statement from any of the Rivonia trialists."*

55. We accepted these observations as correct.

Events post the TRC

56. The TRC referred to the NPA for further investigation and prosecution the cases of some of those to whom amnesty was denied. The Government accepted this TRC decision, which did not require any intervention on the part of the National Executive. Accordingly, the National Executive assumed that the NPA would act as requested by the TRC.

The NPA and the TRC cases

57. What I said in my speech on 15 April 2003 as I tabled the TRC Report before the Houses of Parliament reflects and represents exactly this philosophical outlook. In this context, I said, for instance:

> *"However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.*
>
> *"This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.*
>
> *"It is critically important that, as a government, we should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity."*

58. In the discussion on the TRC to which I have referred, I mentioned that South Africa is currently confronted by the interventions of groups of South

Africans who are determined to subvert the process of the development of the South Africa visualised in our country's Constitution.

59. It would earn our country and people huge dividends if ways and means could be found, including *"(leaving the NPA) doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth",* which would end the destruction caused by a group I have characterised as counter-revolutionary.

60. None of what I said in 2003 related to the cases referred by the TRC to the NPA, which the latter was expected to investigate and prosecute. Indeed, during the 2003 speech I also referred to what might, in future, be cases similar to those handled by the TRC and said:

> *"Given that a significant number of people did not apply for amnesty, what approach does government place before the national legislature and the nation on this matter? Let us start off by reiterating that there shall be no general amnesty."*

The Rev Chikane matter

61. I deny that I interfered with any aspect concerning Rev Chikane's case. I will provide further particulars of what transpired – this requires a conversation with Rev Chikane, which I have not been able to have in the period of time I had to prepare this application.

The suspension of Adv Pikoli

62. Sometime before 2007, possibly in 2006, the NPA and the Directorate of Special Operations (DSO) or the 'Scorpions' started investigating then National Commissioner of Police, the late Jackie Selebi, for corruption.

63. During this investigation, the National Director of Public Prosecutions, Adv Pikoli, informed me that Mr Selebi and the Police Service as a whole were obstructing his work of investigating the National Commissioner. I must add that investigations regarding the National Commissioner had nothing to do with TRC cases.

64. He asked me to help him in this regard. I convened a meeting at the offices of Crime Intelligence to address the matter reported to him by the NDPP.

65. In addition, the meeting was attended by Adv Pikoli, National Commissioner Selebi, the heads of the DSO and Crime Intelligence, and Rev Frank Chikane, the DG in the Presidency.

66. I informed the meeting that everybody had a constitutional duty to help the NPA to carry out its work. Accordingly, National Commissioner Selebi and the SAPS had a duty to help the NDPP and the DSO to carry out their work.

67. I directed that the SAPS should therefore not obstruct the NPA in its work, including during its investigation of the National Commissioner. He also directed that if any problem arose in future between the SAPS and the NPA in the context of the investigation of the National Commissioner, those concerned should report this to DG Chikane, who would inform me.

68. During the meeting it was agreed that the DSO should have access to any relevant Crime Intelligence files. It would read these at the Crime Intelligence offices rather than take them away to study in its own offices.

69. After this meeting, nothing was ever reported to me that the SAPS were obstructing the work of the NPA.

70. The next time I had to deal with this matter was when Adv Pikoli informed me that he had a Warrant to search the SAPS Headquarters and National Commissioner Selebi's house.

71. I then asked Adv Pikoli to meet me at the Official President's residence in Tshwane, Mahlambandlopfu. I also invited DG Chikane to attend the meeting.

72. During the meeting, Adv Pikoli confirmed that he had applied for and obtained the said Search Warrant. He said that he had to execute it immediately or within a week.

73. I told the Adv Pikoli that (in my view), the SAPS would oppose any attempt to search its Headquarters. I also said that so bad were the relations between the SAPS and the NPA and DSO that members of the SAPS might even open fire against the NPA search team. I therefore asked Adv Pikoli to give me a fortnight within which I would engage the SAPS and take all necessary measures to ensure that the NPA and DSO carry out their searches without problems.

74. I also told Adv Pikoli that I was surprised that he had sought a Search Warrant, knowing very well that I was ready to intervene with the SAPS, as I had already done successfully, to help the NPA.

75. Adv Pikoli did not explain why he had opted to get a Search Warrant.

76. However, he turned down my suggestion to delay executing the Search Warrant, undertaking to engage the SAPS so that the NPA could search the SAPS Headquarters with no opposition after a fortnight.

77. He insisted that he had to execute the Search Warrant within the short period he had indicated.

78. However, he conceded that indeed there might be a shoot-out at the SAPS HQ, saying that he based himself on what had nearly happened when a DSO unit had tried to search then Deputy President Jacob Zuma's residence at Forest Town in Johannesburg.

79. During this meeting, I also expressed concern that the NPA had decided to grant immunity to the assassins of Brett Kebble as part of the process of prosecuting National Commissioner Selebi.

80. I was of the view that both the National Commissioner and the assassins should be charged for whatever offence they were responsible, without wilfully exempting people who had committed murder.

81. Adv Pikoli responded by saying that it was normal to us 'small fry' to 'catch bigger fish', which is what the NPA was doing by granting immunity to the assassins.

82. Otherwise no argument could persuade Adv Pikoli to move away from his determination to execute the Search Warrant as he had indicated.

83. I then told Adv that I could never allow the situation where organs of State engaged each other in a shoot-out.

84. I said that to stop the NDPP from engaging in the reckless action of marching into the SAPS HQ because he was so authorised by a Search Warrant, and given that I had no power to instruct the NDPP about what he should do, my only recourse was to suspend the NDPP with immediate effect. I then went to my office in the residence, typed the suspension letter, and handed it to Adv Pikoli. After reading the letter, Adv Pikoli said that what I had done had 'lifted a lot of weight from his shoulders'.

85. I then appointed Adv Mokotedi Mpshe to the post of Acting NDPP. The Acting NDPP followed up the investigation of National Commissioner Selebi. When he was ready to arrest the National Commissioner, he informed me.

86. I engaged the SAPS as I had suggested to Adv Pikoli, again urging the National Commissioner to cooperate with the NPA.

87. I also dealt with the consequences of the impending arrest of the National Commissioner, including the appointment of an Acting National Commissioner.

88. National Commissioner Selebi surrendered himself to the relevant authorities when he was so requested by Acting NDPP Mpshe.

89. Contrary to what some have falsely suggested, this example shows two things. These are that:

89.1 even I had no power to instruct the NDPP about what he should do; and,

89.2 in a case which involved a very senior member of the police, I, on behalf of the National Executive, intervened practically to help the NPA carry out its constitutional and statutory tasks in a safer manner. I did not intervene to stop the NPA from carrying out its tasks.

90. I find it very strange indeed that the same President is accused of having suddenly developed the capacity to stop the NPA from carrying out its duties, acting to protect people who had been part of the apartheid machinery from prosecution for their crimes committed in defence of the apartheid crime against humanity.

91. The above demonstrates that the suspension of Adv Pikoli had nothing to do with the TRC cases.

The TRC cases post Adv Pikoli

92. The position of the National Executive with regard to the cases referred by the TRC to the NPA remained the same both while Adv Pikoli was NDPP and afterwards.

93. I addressed a Joint Sitting of the Houses of Parliament on 21 November 2007, to present a proposal about Presidential Pardons. Of course, the Constitution grants the President the power to grant pardons.

94. In this regard, the situation was that as I addressed Parliament, the Government was in possession of at least 1062 applications for presidential pardons by people who had been found guilty of offences which were allegedly committed with a political motive, arising from the conflicts of the past.

95. Further, there were ongoing political conflicts in the country which would undoubtedly increase the numbers of those who would request presidential pardons on the basis that the offences for which they were convicted were committed with a political motive, in conflicts which were a legacy of the apartheid years.

96. Necessarily, the President could not ignore these requests but was obliged to apply his mind to each one of them.

97. However, I was very mindful that we should do everything possible to respect the TRC. Accordingly, I said:

> *"In dealing with the challenges I have outlined, we have had to proceed with care, sensitive to the legacy of the TRC…It is important that our actions do not, in any way, undermine or suggest that any attempt is being made to undermine the TRC process and its outcomes…*

"In order to ensure that we do not undermine the work of the TRC, applicants who had applied to the Amnesty Committee established under the TRC Act and whose application for amnesty was refused, will not be considered for this Presidential pardon process."

98. I requested to address a sitting of both Houses of Parliament to make proposals about the exercise of the presidential pardon which would require 'care and sensitivity to the legacy of the TRC'.

99. Specifically, I proposed that the parties represented in Parliament should each appoint a representative who would serve on a Reference Group on Presidential Pardons and which would advise the President on each of the requests for pardon for politically related offences which the President would refer to the Group.

100. I believed that this would help to address the required sensitivity to the legacy of the TRC, while still respecting the Constitutional provision enabling the President to grant pardons.

101. I promised Parliament that the Presidency and the Department of Justice and Constitutional Development would later present documents to the Reference Group detailing its support mechanisms and related questions.

102. Naturally I would study and correct such documents once the Government officials forwarded their drafts to me.

CONCLUSION

103. For all the reasons submitted above, it would be in the interests of justice to grant the intervention application as per the notice of motion.

104. It is contrary to South Africa's constitutional order for the court to decide issues raised in the *Calata* application, without affording Ms Mabandla and I the opportunity to be heard. An adverse finding without hearing us would offend against our right to equality (in section 9 of the Constitution), human dignity (in section 10 of the Constitution) and access to court (in section 34). If the common law does not recognise our right to intervene in the present circumstances, it should be developed to recognise such right.

105. Once intervention is granted, Ms Mabandla and I request the Court to afford us a fair opportunity to file an answering affidavit in which we will address all the relevant allegations in the founding affidavit. Given the extensive historical nature of the allegations of fact made, and the extensive annexures on which the applicants rely, it will take significant time to put together a proper answer to the allegations. This could not be done in the time afforded us to bring this application. There are also other relevant and historical material that may have to be obtained, in some cases from archives, to respond properly to the allegations made. Various persons will need to be consulted also to put together a proper answer to the allegations.

WHEREFORE, the applicants pray for an order as set out in the notice of motion.

THABO MVUYELWA MBEKI

I certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and deposed before me at JOHANNESBURG on this the 31 day of March 2025, and that the provisions of the regulations contained in the Government Notice R1258 of the 21st of July 1972, as amended, and Government Gazette Notice R1648 of the 19th of August 1977, as amended, have been complied with.

COMMISSIONER OF OATHS

FULL NAMES: **Goodman Ntandazo Vimba**

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 5245/25

In the matter between:

THABO MVUYELWA MBEKI	1st Applicant
BRIGITTE SYLVIA MABANDLA	2nd Applicant
And	
LUKHANYO BRUCE MATTHEWS CALATA	1st Respondent
ALEGRIA KUTSAKA NYOKA	2nd Respondent
BONAKELE JACOBS	3rd Respondent
FATIEMA HARON MASOET	4th Respondent
TRYPHINA NOMANDLOVU MOKGATLE	5th Respondent
KARL ANDREW WEBER	6th Respondent
KIM TURNER	7th Respondent
LYNDENE PAGE	8th Respondent
MBUSO KHOZA	9th Respondent
NEVILLE BELING	10th Respondent
NOMBUYISELO MHLAULI	11th Respondent
SARAH BIBI LALL	12th Respondent
SIZAKELE ERNESTINA SIMELANE	13th Respondent
SINDISWA ELIZABETH MKONTO	14th Respondent
STEPHANS MBUTI MABELANE	15th Respondent
THULI KUBHEKA	16th Respondent
HLEKANI EDITH RIKHOTSO	17th Respondent
TSHIDISO MOTASI	18th Respondent
NOMALI RITA GALELA	19th Respondent

PHUMEZA MANDISA HASHE	20th Respondent
MKHONTOWESIZWE GODOLOZI	21st Respondent
MOGAPI SOLOMON TLHAPI	22nd Respondent
FOUNDATION FOR HUMAN RIGHTS	23rd Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	24th Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	25th Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	26th Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	27th Respondent
MINISTER OF POLICE	28th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	29th Respondent

In re:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
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SIZAKELE ERNESTINA SIMELANE	13th Applicant

SINDISWA ELIZABETH MKONTO	14th Applicant
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NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant
and	
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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CONFIRMATORY AFFIDAVIT

I, the undersigned,

BRIGITTE SYLVIA MABANDLA

do hereby make oath and say:

1. I am an adult female and a former Minister of Justice and Constitutional Development from 2004 to 2008.

2. Unless otherwise stated or the context indicates to the contrary, the facts set out in this affidavit are within my personal knowledge. They are, to the best of my knowledge and belief, all true and correct.

3. I am the second applicant.

4. I have read the founding affidavit deposed to by former President, **Thabo Mvuyelwa Mbeki** and confirm that the averments therein, in as far as they relate to me.

BRIGITTE SYLVIA MABANDLA

I certify that the deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and deposed before me at JOHANNESBURG on this the 31 day of March 2025, and that the provisions of the regulations contained in the Government Notice R1258 of the 21st of July 1972, as amended, and Government Gazette Notice R1648 of the 19th of August 1977, as amended, have been complied with.

COMMISSIONER OF OATHS

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CAPACITY:

ADDRESS: