

**IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATION
REGARDING EFFORTS OR ATTEMPTS TO STOP THE INVESTIGATION
OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION
CASES (TRC CASES)**

HELD AT:

Sci-Bono Discovery Centre, Corner Mirriam Makeba & Helen Joseph Street,
Newtown, Johannesburg

BEFORE:

The Honourable Retired Madam Justice Sisi Khampepe – Chairperson
Retired Judge Diale Kgomo - Commissioner
Advocate Andrea Gabriel SC - Commissioner

SWORN STATEMENT

I, the undersigned,

BHEKOKWAKHE HAMILTON CELE

do hereby state under oath as follows:

- 1 I am an adult male and a retired former Minister of Police and National Commissioner of Police.
- 2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct.
- 3 I depose to this affidavit to assist the Khampepe Commission of Inquiry into Allegation of Attempts Having Been Made to Stop the Investigation and Prosecution of Truth and Reconciliation Cases. In September 2025, I

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was approached by the Evidence Leaders of the TRC Cases Commission with a request for information relating to my previous roles as the former Minister of Police as well as National Commissioner of Police; and, in particular, the role I played in the refusal to authorise funding for the litigation costs for the prosecution of members of the South African Police Services as well as former members of the security branch services.

4 I have structured my statement as follows:

- 4.1 first, I provide the background of my upbringing, life experiences and political orientation, which informed my approach and decisions relating to the funding of cases involving the prosecution of members and former members of SAPS who were accused of gross violation of human rights;
- 4.2 second, I deal with the requests, pleas and litigation relating to the authorisation of litigation funding for SAPS members who were facing prosecution relating to gross violations of human rights;
- 4.3 third, I explain my role as Minister of Police in the period between February 2018 to June 2024 and my understanding of my role as Minister of Police regarding the investigation of TRC Cases by SAPS; and

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4.4 finally, I address the question of my responsibility as former National Commissioner for SAPS in ensuring that TRC Cases were investigated.

MY BACKGROUND, LIVED EXPERIENCES AND POLITICAL ORIENTATION

5 To appreciate my approach to my previous roles relevant to the Terms of Reference of this Commission, it is important that I place before this Commission my background, life experiences and political activism. These experiences will inform the backdrop against which I submit the Commission ought to view and judge the evidence that follows.

6 I was born in Mzumbe, Port Shepstone, on the 22nd of February 1952. The very fact of the recordal of my birth is deeply intertwined with how the crime of apartheid impacted my own life. The apartheid police, upon my arrest and detention as a political prisoner in the fight against the evil system of apartheid, came to prison to give us identity documents. My birth date in the document handed to me was incorrectly reflected as 22 April 1952, instead of 22 February 1952. When I brought this error to the attention of the police who was handing me my identity document, the policeman remarked; "*Criminals and prisoners have no choices, take what we give you.*"

7 My mother was 18 years old when she gave birth to me and died when I was nine months old. My father worked for the South African Railways

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Services and was forty-four years old when he died. I was just seventeen years old. My father was an “*Induna*” at work and I was very close to him and would visit him at work. He was a deputy to the Railway Manager but was not called a manager but an “*Induna*” as he was black.

- 8 I was schooled at Inala in Fairview and attended Mthwalume High School up until what was then called “*JC*”. [That is short for Junior Certificate, which is now Grade 10.] I could not pursue Matric as my father had passed on. After my father died, I wanted to finish Matric and pursue my dream of being an attorney. I approached the Railways Manager requesting for funding from the bursary reserved for the children of rail workers. The Railway Manager who worked with my father informed me that he could not help me because, in his words: “*We cannot send a black child to school, because there would be nobody to carry heavy bags to load into the wagons.*”
- 9 After passing JC and having failed to secure funding to complete my Matric, I worked at a hospital called Greenville Hospital at the medical laboratory department as an assistant. An opportunity arose whilst I was at Greenville Hospital for me to receive training as a medical technician at Umthatha Hospital. I seized that opportunity. Yet, my burning desire to complete Matric remained with me. Having completed the training, I then worked at Mseleni Hospital, saved money, and went back to school to finish Matric. Upon completing Matric, I proceeded to Mbumbulu College of Education and obtained a Certificate in Education. I am thus a teacher by profession.

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- 10 In 1975, I moved to Lamontville Township and got involved in political activities rooted in community struggles. My political consciousness and activism was rooted in community issues rather than student politics. Together with Lesetja, Jabu Sithole, Terror Lekota and others I was part of "JORAC", which was the Joint Rent Committee. JORAC involved all the townships in Durban who were not part of the KwaZulu Government, such as Clermont, Lamontville, Chesterville and KwaMashu. I was part of the *Asinamali* protests, a campaign that was aimed at resisting the bus fare increases from 43 cents to 48 cents.
- 11 In 1983, through my political activism, I became part of the delegation from Durban that went to Cape Town as part of the launch of the United Democratic Front, where Dr Alan Boesak inspired and sparked fire in us through his melodious and thundering voice. I then began to be part of the underground structures of the African National Congress in Lamontville specialising in the propaganda unit with a focus on graffiti. We would paint walls with slogans such as "*Free Mandela*" and "*Oliver Tambo is coming*" to conscientise the Black population about the political situation in the country.
- 12 I was arrested and detained for the first time in 1984 and taken to the 14th Floor of the CR Swart Building. There, a Colonel Botha, who became my nemesis throughout my political career, arrested me in the early hours, around 2 am, in Lamontville and took me to the 14th Floor. There, there was a window with loose bars – thin bars and I was very thin at the time. He encouraged me to jump out of the window and told me that there are

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brave people who had jumped from this window before. I did not and have lived to tell the tale.

- 13 I had many encounters with Colonel Botha from then on, and also with Colonel Hunter, whose speciality was swearing at me in IsiZulu. When I was released, I realised that I was arrested with Pravin Gordan and Professor Coovadia. Then Advocate Zak Yacoob and attorney Dhaya Pillay legally represented all of us.
- 14 In August 1985, Victoria Mxenge was killed. I was a leader within the UDF at the time and could not sleep in one place. When I came to Mrs Mxenge's house, fresh blood from her body was all over the soil. This was the second prominent person whose death I witnessed after Mr Msizi Dube. There was chaos in Durban following Mrs Mxenge's death. Much of Umlazi township was reduced to ashes. There was a place called Star Point 5 and its roof kissed the floor. Umlazi was an IFP stronghold then. In one incident after Mrs Mxenge's death, Colonel Botha loaded me into a Hippo, and with his colleagues stepped on top of me whilst I was laying on the floor with guns cocked and pointed at me, right in my ear.
- 15 After Mrs Mxenge's death, I was getting arrested almost daily. I then received a message from my commander-in-chief, Mr Jacob Zuma, to leave the country. I went to Mrs Madlala who was my foster mother and told her that I was leaving the country. Mrs Madlala loved me very much.

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- 16 I lived in Soweto for three weeks, not leaving the safe house for fear of being recognised. I then crossed to Mbabane in what was then Swaziland. On the day when we were to cross to Maputo, news of us leaving was leaked. We were arrested and kept at Siteki Police Station in Swaziland. For the first time in my life, I spent twenty-seven days without taking a bath. I saw lice for the first time coming out of me.
- 17 When I got to Maputo, I was debriefed by my commander, Mr Zuma, and Ms Sue Harris who gave me the following options: either I continue with my education, or I go to Angola for military training in the camps. I chose Angola, where I was trained for eight months with Mr Fana Hlongwana and others. From there, I proceeded to Lusaka Political Military Command where I met former ANC President Oliver Tambo for the first time. There I also met ANC Khumalo, also known as Mr Ronnie Kasrils, who was a regular contributor to the *Sechaba* publication, as well as Mr Vusi Mavimbela who used to write speeches for President Oliver Tambo.
- 18 In late 1987, I was dispatched back to the country. However, I was first stationed in Swaziland and had to depart from there into the country. I had a clash with my escorter *en route* when he communicated to me that there were delays and I could not cross the border until the following day. I told him that I would either go back to Maputo or carry on with my journey. We were trained that delays are a signal for betrayal.
- 19 Indeed, when I was arrested by Colonel Botha later on, he asked me how I came back into the country because they were following me and

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expected me to be handed over to them. They then lost track of me. That guy who was my escorter ended up being a state witness in the case against Mr Ibrahim Ibrahim.

20 So, I walked into South Africa from Maputo wearing a leather jacket and ostrich shoes. I had to fend for myself with no escorter. I walked to the taxi rank in Pongola and the first mistake I made was to ask what the taxi fare was from the taxi driver. We knew then that almost all the taxi drivers were working with members of the security forces. I was saved by one of the ladies who took an interest in my leather jacket and told the taxi driver that she too did not know what the correct taxi fare was, owing to the recent increases. I then took a taxi to Mkuze and then Empangeni where I blended nicely with my fancy clothes. My destination was Durban, more specifically Lamontville.

21 In Lamontville, I never saw the sun because I was hiding inside the house the whole day. I was going to meet with Mr Vusi Shabalala in respect of the information and propaganda until I was arrested yet again. I was driving Mr Jabu Sithole 's car and there was a trunk inside. I put this trunk in my house at KwaNyuswa. When Colonel Botha and the police came to my house, searched and found this trunk with political publications - it dawned on the police that they were dealing not with mosquitoes and ants but a serious political activist. The aim was now to break me.

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- 22 I was arrested and placed in solitary confinement for seven months. Whoever invented solitary confinement as a terror method is evil. There, you do not kill mosquitos, they become your friends. You know and can identify ants as they walk up and down. You give them names.
- 23 A policeman used to smuggle a copy of the Mail and Guardian for me. I would not rush to read it all. I disciplined myself to read only segments of it a day. During this time, the police would continue to interrogate me in ways I am ashamed to mention here for fear of impugning my dignity and manhood. They almost broke me and made me betray myself. They were evil and torturous. They told me that Mr Zuma was in the country and was working with them and that he had given them all information pertaining to me. That I was finished. The Mail and Guardian saved me. There, I read that Mr Zuma was still in Maputo and had given a speech. Therefore, when the police came to me the following morning, my strength was regained. The sad part is that in solitary confinement, the only reading material is the Bible. This made me hate the Bible.
- 24 Therefore, when I became an MEC for Safety and Security in the KwaZulu-Natal Government after the 1994 elections, I had to make peace and reconcile with the fact that Colonel Botha and others like him were now my colleagues. I admit that this was a bitter pill to swallow. The pill remained stuck in my throat. It is still stuck.
- 25 That apartheid era crimes and apartheid as a crime against humanity was equated to the struggle I and members of the liberation movements

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waged against apartheid were equated, is something that I could not, and still cannot accept. I was angry when the uMkhonto Wesizwe was disbanded and in the manner in which it was disbanded. But that is a story for another day.

- 26 What has all of this to do with the Terms of Reference of this Commission and my role as a former Minister of Police and National Commissioner? Below, I connect the dots beginning with my role as a Minister of Police and specifically with my refusal to fund the litigation costs of members of the security branch and SAPS members like Colonel Botha who had committed gross human rights violations. I also deal with my responsibility as the Minister of Police in the investigation of TRC Cases.

MY REFUSAL TO FUND THE COSTS OF PROSECUTING FORMER MEMBERS OF SAPS, THE SECURITY BRANCH POLICE AND SAPS MEMBERS IN SERVICE FOR COMMITTING OR ALLEGEDLY COMMITTING CRIMES AGAINST HUMANITY

- 27 My position then and it continues to be that SAPS ought not to have extended monies to pay for the legal costs of lawyers who were in essence providing legal representation of members of SAPS like Colonel Botha who had tortured, kidnapped and killed innocent activists who were fighting for the liberation of this country. I did not wake up and become a Minister of Police. I had a history before then, which I carried with me into this position. When I had to make decisions as a Minister of

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Police and issues came across my desk, I approached them with all of my biographical experience. Insofar as police matters were concerned, I had a painful history. I had lost comrades, graves had been dug up by Madeleine Fullard's Unit, the Missing Persons Unit, where I had stayed in the same premises. I had seen exhumations of bodies of my friends in sitting positions indicating that they were buried alive.

28 When I took office I had also become aware that the state had spent some R218 million for the prosecution of Dr Wouter Basson who had used his medical knowledge to wage biological warfare against black people inside and outside the country, only for him to be found not guilty. Moreover, millions of rands of state money had been paid to lawyers who had defended Wouter Basson in his criminal trials and those lawyers possibly held the same ideology as Wouter Basson – a hatred for all black persons. This remained a sore point for me: how is it that Black people were required to fund Dr Basson's legal fees, in effect to defend him from charges levelled against him for harming Black people! Regarding the legal fees incurred by the State in such circumstances, I also attach the fees in respect of Rodrigues, following a PAIA application by Mr Imtiaaz Cajee as "BC1".

29 When I sat down with the Evidence Leader of the Commission who explained to me how my refusal to pay for such legal fees contributed to or had the effect of stopping the prosecution of TRC Cases against police officers charged with committing gross human rights violations - against such victims as the COSAS Four and Nokuthula Simelane - how the

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perpetrators indeed had died without having been prosecuted; I understood the consequence of my decisions.

30 However, I am constrained to record that I struggled and still struggle to come to terms with the following: how could government be obligated to fund, through taxpayers' money, including taxes paid by black people, the litigation costs of those who committed crimes against humanity, particularly against black people. This was my limitation then and remains my limitation to this day. If this limitation condemns me, I am willing to go back to jail for it and be condemned.

31 I am aware that the courts had indeed ruled that SAPS has an obligation to pay for the litigation costs of former security branch members. I am further aware of the rule of law issues arising from the judgments of the courts insofar as litigation costs are concerned, obligating me to pay for these costs. Legally and as far as the rule of law is concerned, I should have and ought to have not challenged the payment of legal costs. Indeed, I did, later on, in line with the rule of law, agree to the payment of these litigation costs. I attach hereto, a newspaper article detailing my reluctant position in what the article terms a '*somersault*', as annexure "**BC2**".

32 Notwithstanding the '*somersault*', personally, I remain unconvinced that SAPS ought to have paid or be required to pay for the legal fees of the former security branch police. The payment of the legal fees does not provide a guarantee that those prosecuted will tell the truth during trial or

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that they will be convicted, as occurred in the case of Dr Wouter Basson. These perpetrators and those accused, in my view, must pay for their own legal costs or rely on legal aid. After all, they are accused of having committed crimes against humanity, the crime of apartheid.

33 The State did not contemplate what the impact of the experiences of those who were part of the liberation movement and were grossly abused therefore would have on implementing the TRC recommendations and facilitating prosecutions by further protecting and benefiting perpetrators.

34 I have detailed my background and experiences not as an excuse or justification for my actions but rather as context against which my position must be evaluated. The positions taken are more nuanced than a simple black and white answer to the questions posed by the Terms of Reference.

35 I accept that as a result of the position I adopted there are members of the security branch who never faced prosecutions and that affected members of the families appearing before this Commission and beyond. I also acknowledge the pleas from the Legal Resources Centre, the Foundation for Human Rights and others whose voices were not brought to my attention, as the Minister of Police. However, right or wrong, I struggle with how and why democratic South Africa expects me to pay for the crimes Colonel Botha committed.

MY OBLIGATIONS AS MINISTER OF POLICE IN THE INVESTIGATION OF TRC CASES

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- 36 As indicated above, I was the Minister of Police between February 2018 and June 2024. As the Executive head of the police, there is a separation between myself as an Executive Member and the operational aspects relating to police members, who act under the command of Provincial Commissioners and ultimately the National Commissioner.
- 37 What I accept firmly is that the police are charged with the investigation of all crimes within the Republic of South Africa. This is an obligation flowing from section 204 of the Constitution and is given effect to by the South African Police Services Act, the various regulations, policies, directives and practice manuals regulating the functions of the South African Police Services. It is this regulatory framework in its entirety that must be considered when examining the investigative role of the police relating to the investigation of TRC Cases.
- 38 As a Minister, during my time, I never stopped or interfered with any investigation of TRC Cases. During my tenor as Minister, I never received complaints or concerns that the police were not providing investigative support for the investigation of TRC Cases. Nor can any evidence be adduced, to my recollection, pointing to such a failure.
- 39 The Constitution is clear, at section 204 thereof that the police are to investigate crime. The crimes that the police investigate are, as a matter of course, brought to the attention of the police by complainants who are members of the public. Police also engage in preventative strategies where they proactively combat crime. TRC Cases stemming from the

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final report of the TRC, were, as part of the South African Government strategy handed over to the NPA for investigation and prosecution. It is for this reason that the various NPA units have approached the police in a manner akin to that of complainants approaching the police to investigate TRC Cases. As indicated earlier, although in my role as Minister of Police I was remote from the dockets and ordinary investigations as these are operational issues, I have never stood in the way of or stopped the investigation of TRC Cases.

MY POSITION AS THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES – 2008 TO 2011

- 40 When I took over as the National Commissioner of the South African Police Services in 2009, I was operational. In effect, what I could not do as the Minister of Police later on in 2018 to 2024, I was obligated and empowered to do as the National Commissioner.
- 41 I take responsibility for the delays that occurred during that period. However, as I detail hereunder, in my capacity of Commissioner there were several matters that required my attention and to which police resources had to be deployed during that period.
- 42 During that period, one matter that required focused attention was ensuring that the Soccer World Cup that we hosted in 2010 was not disrupted by criminals at any level. It was a historic occasion for the country and any lapse would have major adverse consequences for the country and its economy.

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43 I need to record that long before the bid was awarded to us, countries that were competing to hosting the World Cup were mounting attacks on South Africa as a host based on the crime levels in South Africa. Thus, as the National Commissioner, the weight of ensuring that these attacks are reduced to nought fell on my shoulders. As a result, we had to travel extensively – visiting major cities in various parts of the world, and senior Police Officers had to make presentations and put together teams to ensure that South Africa presents itself as a safe destination to host Africa's first World Cup.

44 South Africa hosted a safe world cup because of the dedication of SAPS resources. The price we paid was indeed high, as most resources were diverted to this goal. In my respectful view, given the circumstances, as a country we did well and enhanced this country's reputation for major international events. That our obligations in respect of other matters were delayed is the unfortunate price that had to be paid.

CONCLUSION

There can never be justification or excuse for any failure to investigate or prosecute TRC Cases. I place before this Commission the nuances involved and argue that this is not a matter where issues are black and white and only about constitutional obligations and legislation. The issues are about real people and their histories and how in my case, one Bhekokwakhe Hamilton Cele navigated his biographical experiences and also tried to fulfil his constitutional obligations in a democratic South Africa with leaders and

M. J. BHE

opponents who had a past, in the brutality of the system we lived in called apartheid.


BHEKOKWAKHE HAMILTON CELE
DEPONENT

Thus, signed and sworn before me, on the **20th day of June 2026**, after the deponent has acknowledged that he knows and understands the contents of this affidavit and that it is binding on his conscious, the Regulations contained in **Government Notice No R 1258 of 21 July 1972**, as amended and **Government Notice No. R 1648 of 19 August 1977**, as amended, having been complied with.

COMMISSIONER OF OATHS (RSA)
Mfanakayise Jeffery Zondo
 Attorney of the High Court and Conveyancer
 Practice No: 77075
 Zondo J and Partners Inc
 157 Belvedere Road, Durban North, 4051

COMMISSIONER OF OATHS

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Mfanakayise Zondo

Official Capacity:

Attorney of High Court

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Date: 20 June 2026

BC 1

**the doj & cd**

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE STATE ATTORNEY: PRETORIA

Private Bag X 91, PRETORIA, 0001 • SALU Building, 316 Thabo Sehume Street, PRETORIA, 0001
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MY REF :5385/17/Z59 timol inuest
MY REF :4319/2018/Z59 RODERIGUES CRIMINAL TRIAL

M E M O TO : OFFICE OF THE CLO**ATTENTION : Mr R ISAACS****RE: REPLY OF ACCESS OF RECORDS**

This serves as a reply request made by **Imtiaz Ahmed Cajee**, requesting the following three records:

1. The costs of inquest the death of **Ahmed Essop Timmol**- Case Number IQ01/2017 incurred by State Attorneys.
2. Criminal matter- Case Number 1555/06/2018 cost incurred by the State Attorneys.
3. Application for the S342. A matter between Joao Rodrigues/ NPA Case Number 76755/2018 cost incurred by the State Attorneys.

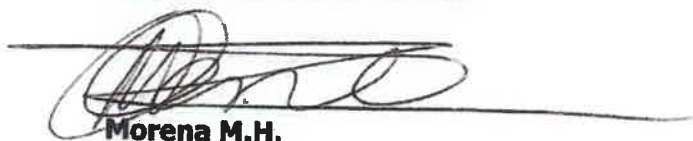
Kindly note that in our records the legal fees paid in all the cases or matters to date amounts to **R 3, 585, 205.92** (Three million five hundred and eighty-five thousand two hundred and five rand ninety-two cents) being the global amount of all matters mentioned above. The amount compromises of legal fees of private attorney, junior and senior legal counsel.

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This only evidencing costs incurred by the State attorney under the above reference numbers. And the amount cannot be broken down as to who was paid what as that might encroach on private individuals, but it only suffices that is in the public interest to disclose costs incurred by the State attorneys but same cannot be said in disclosing specifically financial status of individuals who didn't give consent. further see Ben Minnaar Attorneys memo marked "R".

I trust the disclosure suffices.



Morena M.H.

For: State Attorney

Be1

"R"

BEN MINNAAR ATTORNEYS**190 MELT MARAIS STREET****WONDERBOOM AH X 1****PO BOX 15774****SINOVILLE****0129****PRETORIA****Tel: 0824462644****27 September 2019****Enq: B MINNAAR****My Ref: 101/10/2018 Rod****Email: benjaminnaar@gmail.com****Your Ref: 4319/2018/F2Z59****BY E-MAIL:****Attention: Herren Morena****State Attorney****Pretoria****Dear Sir,****STATE VS J A RODRIGUES**

As to progress in this matter please note the following.

In preparation for the full court hearing in the stay of proceedings matter the court papers were indexed and paginated and heads of argument filed. Bundles were prepared with case law referred to.

All the other parties filed their papers and the matter was heard on 28 and 29 March 2019.

Mr Rodrigues appeared from time to time in the criminal proceedings where Monama J handled the matter. It was postponed on 8 April to 9 May 2019. On 9 May the matter was postponed to 28 June 2019. We briefed and consulted with an expert witness, Prof Saayman, a pathologist and obtained his opinion.

The judgment in the stay of proceedings matter was handed down on 3 June 2019 and the application was dismissed with no order as to costs. Client provided instructions to appeal the ruling and advice from senior counsel was that there are good prospects on appeal. An application for leave to appeal was drawn and served. On 28 June Mr Rodrigues appeared in the criminal matter and it was postponed to 2 August 2019. Although two counsel were briefed on instructions from SAPS only one counsel appeared at the postponements of the criminal matter.

BENJAMIN MINNAAR, B PROC, UP**3**

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There were also numerous consultations in chambers on the postponement dates as Monama J was also in charge of the case management of the matter.

On 2 August 2019 the criminal matter was postponed to 25 September 2019. Heads of argument were drawn and filed for application for leave to appeal and a supplementary application was also drawn and filed. The supplementary ground was based on the provisions of section(17)(a)(ii) of the Superior Courts Act.

On 9 September 2019 we consulted with General Groenewald to bring her up to speed with progress and take further instructions.

On 18 September 2019 the application for leave to appeal was heard in Johannesburg High Court. Some of the appearances in the criminal matter was not in the Johannesburg High Court, but in the High Court at Palm Ridge as Monama J sometimes sat at that court.

We are currently investigating the possibility of curtailing the proceedings. We have instructions to petitions the Supreme Court of Appeal as we are still of the opinion that we have good prospects on appeal to have a permanent stay of proceedings. Consultations we held with representatives of the NDPP on 20 September 2019 to discuss the possibility of curtailing the matter. Currently and if the Supreme Court of Appeal grant leave to appeal the matter will go to the Supreme Court and most likely end up in the Constitutional Court. This will be a prolonged and costly exercise and thus our attempt to curtail the matter.

The last appearance of Mr. Rodrigues in the criminal matter was on 25 September 2019 when the matter was postponed to 12 December 2019. A date was set for further meeting in chambers for case management for 21 October 2019.

We are currently drafting the petition to the Supreme Court of Appeal and will proceed with our attempts to shorten the proceedings and get finality.

We will keep you informed of progress.

Yours faithfully



B Minnaar

BENJAMIN MINNAAR, B PROC, UP

(4)

BC2



NEWS SPORT OPINION LIFESTYLE ENTERTAINMENT ▼

Police minister does an about-turn on paying legal fees for apartheid-era police officer

Mwangi Githahu | Published 3 years ago

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Minister of Police Bheki Cele. Picture: Elmond Jiyane/GCIS

Cape Town — Police Minister Bheki Cele has d about-

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M.J. BHC

BC 2

In January, the South Gauteng High Court in Johannesburg issued an order dismissing Cele's application for leave to appeal last May's judgment directing the police to pay the legal fees of Christiaan Siebert Rorich, one of the accused in the Cosas 4 matter.

At the time, State Attorney Kobus Meier, representing the police minister, said that he had instructions from the minister to petition the SCA and if necessary the Constitutional Court on the matter.

However, the instructions have changed and Meier has since informed the legal team at the Legal Resources Centre (LRC), which is acting for the Cosas 4 families, that Cele had changed his mind about proceeding with the appeal to the SCA.

Cele had previously given Parliament an undertaking that investigations arising out of the TRC in terms of the Promotion of National Unity and Reconciliation Act were receiving the attention of the Hawks.

The Hawks have since hired investigators on a three-year contract basis and 34 of these investigators have been specifically assigned to investigate these TRC cases.

Last year, the National Prosecuting Authority (NPA) referred 129 cases from the TRC to the Hawks for further investigations.

Initially, the SAPS refused to pay Rorich's legal fees, citing mainly procedural arguments to justify the decision.

Foundation for Human Rights (FHR) spokesperson Kholekile Mnisi said this initial refusal was surprising, bearing in mind that they had readily agreed to pay the legal fees of former police officers in other apartheid-era cases, such as those of Ahmed Timol, Neil Aggett, Hoosain Haffeejee and in the Haron inquests.

On Friday, after news of Cele's change of mind, Mnisi said:

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Rorich was a member of the SAP, the forerunner to the post-apartheid SAPS. The other accused, Thlamedi Mfalapitsa, was a former MK member turned police informer who later joined the Security Branch.

Rorich and Mfalapitsa are on trial for the murder of Eustice "Bimbo" Madikela, Itumeleng Peter Matabane, Fanyana Nhlapo, and the serious injury of Zandisile Musi.

The four anti-apartheid activists were members of the Congress of South African Students (Cosas) and they were collectively known as the Cosas 4.

FHR said in a statement that the payment of legal costs for former officers of the former SAP should be expedited in all TRC cases, including the Caiphus Nyoka, Musa Sbo Phewa and Ntombikayise Khubeka matters.

mwangi.githahu@inl.co.za

Cape Argus



RELATED TOPICS:



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M.J. BHC



Dear Mr B Cele,

REQUEST FOR ASSISTANCE WITH INFORMATION IN AID OF THE JUDICIAL COMMISSION OF INQUIRY TO INQUIRE INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES.

- 1 On 29 May 2025, the President of the Republic of South Africa, Mr Cyril Matamela Ramaphosa, issued Proclamation Notice 264 of 2025 establishing a Commission of Inquiry to Inquire into Allegations Regarding Efforts or Attempts Having been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission ('TRC') Cases ('the Commission').
- 2 The Terms of Reference of the Commission require that, among other things, the Commission must inquire, make findings, report and make recommendations concerning:

"...whether, why and to what extent and by whom, efforts were made to influence or pressure members of the South African Police Service or the National Prosecuting Authority to stop investigating or prosecuting TRC cases."

- 3 At the relevant time specified in the Commission's Terms of Reference – that is, between 2018 and 2024 – you served as the Minister of Police. In that capacity, you may have had access to information concerning decisions, discussions, or policies affecting the investigation and prosecution of TRC-related cases.
- 4 The Commission therefore respectfully requests your assistance with furnishing any material in your possession, or to which you had access to during your tenure, that may

be relevant to its inquiry. This includes memoranda, correspondence, minutes of meetings, or other documentary records relating to the TRC cases referred by the Amnesty Committee for investigation or prosecution.

- 5 In addition to providing any relevant material, the Commission would also appreciate receiving, in the form of an affidavit, your own account of any discussions, decisions or considerations during your tenure as President that may bear on the matters set out in paragraph 1.1 of the Terms of Reference. Such a statement will greatly assist the Commission in understanding the context within which decisions relating to TRC cases were taken.
- 6 Should you require any assistance in preparing your affidavit or in furnishing the requested material, you are entitled to liaise with your legal representatives. Alternatively, you may contact the Commission's Secretariat directly, and we will gladly provide the necessary support.
- 7 We would be grateful if you could provide your response no later than the 24th of October 2025, to allow the Commission sufficient time to consider the information and complete its work timeously.

Yours faithfully

Advocate I Semanya SC

CHIEF EVIDENCE LEADER



23 April 2026

Former Minister Cele

Per email: bhcggeneral22@gmail.com

Dear Former Minister Cele,

RE: AFFIDAVIT AND TESTIMONY BEFORE THE KHAMPEPE TRC CASES COMMISSION

- 1 We refer to the meeting between the Commission's Evidence Leaders and yourself on 12 March 2026.
- 2 As explained during this meeting, the Commission is tasked with investigating allegations of efforts and attempts to stop the investigation and prosecution of TRC Cases. You are also aware that the organ of state constitutionally charged with the investigation of criminal cases in South Africa is the South African Police Services.
- 3 In your service to the South African state, you occupied the position of National Commissioner of Police and you are also a former Minister of Police.
- 4 Accordingly, the Commission requires you to place on record, the following issues relating to its Terms of Reference.



- 4.1 During your tenure as the Minister of Police and as National Commissioner of the South African Police Service, what steps did you take to investigate the TRC Cases?
- 4.2 One of the issues that has caused a delay in the prosecution of TRC Cases is the refusal by the Ministry of Police to pay for the legal representation of former security branch members and members of the police services who are alleged to have engaged in gross human rights violations, during their employment. Your role on this aspect, is reflected in the correspondence from the Foundation for Human dated and addressed to your office. In this correspondence, the FHR implores you to attend with urgency, the question of payment of legal fees as the perpetrators were dying and accountability will be avoided.
- 5 The letter from FHR as well as one of the judgments relating to the concerns raised against the Ministry of Police is attached hereto as annexure BC1.
- 6 You are required to furnish this Commission with an affidavit outlining your role, in your capacities both as the Minister of Police and the National Commissioner of Police, in dealing with TRC Cases.
- 7 The Evidence Leaders are available to assist you with the preparation of your affidavit. You are also at liberty, should you so wish, to appoint your own legal representatives to assist you in the drafting of your affidavit at your own cost.



- 8 The Commission requires your affidavit by no later than 8 May 2026. The Commission further requires that you acknowledge receipt of this letter and provide an indication whether you will be requiring the assistance of the Evidence Leaders.

Yours faithfully

Adv AM Thokoa
Secretary



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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS70/2021

DATE: 2022-05-04

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

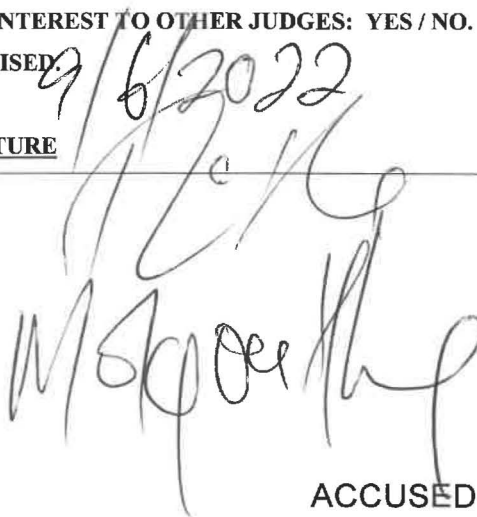
SIGNATURE

10 In the matter between

State

and

Mr Mfalapitso and others

9/6/2022

ACCUSED

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20 **MOKGOATLHENG J:** This is the judgment in the matter between the S v Mfalapitso Tlhamedi Ephraim who is accused 1 and Rorich Christiaan Siebert who is accused 2. Strictly speaking this judgment relates to the application which was launched by the families of the victims who are represented by Webber Wentzel, and the application was argued initially by Mr Marti Hoffman when the Rule nisi was granted and the notice to show cause why the Rule nisi should not be confirmed that argument on behalf of the

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victims the families of the victims was seized with Mr Scott on behalf of the families of the victims also on instructions from Webber Wentzel.

The Legal Aid Board, strictly speaking is not involved in this application, because Mr Mfalapitso Tlhamedi Ephraim is duly represented by the Legal Aid Board. As I have indicated this application strictly speaking was to determine whether the South African Police Services are legally obliged to provide legal representation assistance to Mr
10 Rorich Christiaan Siebert who was formally by the South African Police during the occurrence of the alleged commission of the alleged offences with which Mr Rorich Christiaan Siebert is charged.

To recapitulate briefly about the history of this matter. The two accused in this matter accused 1 and accused 2 were respectively arrested on 20 August 2021 on the said date the matter was postponed to 23 August and on the date the two accused were released on warning, and the two accused then subsequently appeared on various occasions
20 in this Court on the following dates 27 August, 3 September, 25 October, 27 October and on that date a slight correction another accused was added to the indictment meaning that it was accused 2. Accused 1, was the one who was arrested initially on 20 August 2021. Further appearances were on 8 November and 19 November and subsequently

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also on 11 February 2022.

By the [indistinct] of these various postponements was precipitated by the fact that accused 2 having been formally employed by the South African Police exercised according to himself his right of employment then to apply in and during November 2021 to be accorded or afforded legal representation payment by the South African Police. That is when this Court came seized with the matter, because in the Court's view it was accepted that the state was ready for
10 trial, but it could not set down the date for such trial hearing before the application of accused 2 or the outcome thereof was determined.

When this Court inquired from Mr Muller who is representing accused 2, whether the application had been finalised by the South African Police, he advised this Court that he had not had a response from the South African Police, meaning the Commissioner of Police and even the Minister of Police and that is when the Court invoked its inherent jurisdiction in terms of section 173 of the Constitution and also section
20 342A of the Criminal Procedure Act 51 of 1977 to investigate what was the cause of the delay in this matter not being set down.

Then this Court *meri moto* on 17 January 2022, issued an order to the effect that Major General Collen Hendricks who is the provincial head of the Gauteng Legal Division of the

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South African Police, should attend court on or before 26 January 2022, to advise the Court whether he has processed and finalised the application which was launched by Mr Rorich Christiaan Siebert for legal funding for his defence by the South African Police in respect of case SS70/2021. The Court further ordered Major General Collen Hendricks, to give reasons why the application if not finalised that he should not be held in contempt of this court order.

- 10 On 26 January 2022 Major General Collen Hendricks appeared in this court and the Court engaged him concerning the order it had issued and he stated that he was aware of the said order and when asked whether he was able to comply with it, he advised the Court that he was in the process of obtaining instructions from his superior because the South African Police needs to comply with certain departmental regulations which are applicable when funds are dispense for legal expenses. Further, he profit an opinion that the two accused before Court but in particular
- 20 Mr Rorich Siebert, are no longer in the employ of the South African Police and that they have been discharged in the sense that their pensions were paid out and they no longer receive a salary in any form of a pension or otherwise.
- Then he further stated to this Court that Mr Rorich Christiaan Siebert has received a severance package after

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he had resigned apparently in 1987. Consequently, according to Major General Collen Hendricks, that state of affairs have consummated a clean break between accused 2 and SAPS in their formal relationship of employer and employee. Further Mr Collen Hendricks General Collen Hendricks advised this Court that they have got to comply with the prerequisites of the Auditor General in that we have to account why the legal costs were paid and that as far as he was concerned there was no legal obligation on the

10 South African Police Services now to finance the legal defence of accused 2, because he had effectively resigned from his position which he formally occupied with the South African Police.

That there was a clean break as I said and he never ever thereafter set his foot in the employ of the South African Police and that in terms of the prescripts of employment of the South African Police that once a person have taken a lump sum as Mr Rorich has done they as the South African Police only pay out what they owe to the South African

20 Revenue Services and that is an effective termination of the employer, employee relationship between Mr Rorich and the South African Police and to use his words. That relationship employment, employer relationship is extinguish because Mr Rorich no longer even qualifies for a pension and consequently according to Mr Hendricks, in

terms of the National Instruction 1 of 2001 which regulates the payment by the South African Police for legal representation of employees in criminal matters and inquiries, accused 2 did not qualify to be paid for legal representation by the South African Police.

That in broad sweep its explanation which proffered to this Court by Major General Collen Hendricks but in the same breath he said he has even prepared a legal opinion to his legal superiors and he is just awaiting his superiors to
10 implement or decide on that legal opinion. Subsequently, the matter was postponed to await the decision of the South African Police Services. In the meantime round about February 2022 accused 2 eventually received a response from the South African Police Services which was a refusal to accord him funding for his legal representation in respect of the criminal case he is facing. Mr Muller, on behalf of accused 2 advised this Court that accused 2 intends to launch an application for review of the administrative decision taken by the South African Police.

20 That in terms of the promotion of the Administrative Justice Act 3 of 2000 section thereof his client has to do that exercise or perform that exercise within a 180 days of gaining the knowledge of the rejection of his application by the South African Police. That he do not intend launching an application for review in a truncated form and that his

client will possible making the necessary arrangements to collect the records and of the communication needed in support of this application. That they believe that, that application will probably be launched towards the very end of that period of 180 days. Because that is a statutory prescription this Court cannot interfere with the legal rights and the exercise of that statutory prescription of accused 2 by insisting that period should be truncated to accommodate the [indistinct] of the delay in this matter proceeding.

- 10 It was at that stage that this Court received a letter from Webber Wentzel, under the authority of Mr Hoffman Mortimer Hoffman. On 24 February 2022, which was actually a letter which was addressed to the National Commissioner of Police and to the Minister of Police and to the Provisional Commissioner of Gauteng Police and this letter was copied also to the registrar my registrar meaning formally Ms S Polo. The letter reads as follows:

S v Mfalapitso and Rorich criminal case 70/2021 High Court of South Africa Gauteng Local Division. We hold a watch
20 and brief in the above matter of our clients the families of the late Fani Elayah Mathlapo, the late Mr Madikela Mathlapo, the late Mtsingo Matabani and the late Zandisile Musi who were members of the Congress of South African Students. Who were allegedly and I use that adjective advisably because Mr Hoffman makes positive allegations

that this Court, because has not decided and cannot decide any issue before it has heard evidence to that effect terms those allegations alleged allegation that the security police lured the aforementioned deceased to a pump house near Krugersdorp on 15 February 1982. The Police allegedly rigged the pump house with explosive which they detonated once the four deceased were inside the pump house.

At the hearing in the matter on 15 February 2022 the legal representative of Christiaan Siebert Rorich informed the
10 Court that their client intended to bring an application in the High Court to review and set aside the decision of the South African Police Services not to pay the costs of his legal defence. The judge stated that such application should be brought before the next appearance on 22 March. We draw your attention to the attached judgment of Pretorius C, Pretorius J dated 5 June 2018 in the matter of Wilhelm Johannes Coetzee and others v Minister of Police and others Gauteng division that is case number 72747/2016, which set aside the decision of a South African Police
20 Services not to fund the defence of WJ Coetzee, A Pretorius and F B Motheng.

The members the accused in this matter they are members of the formal security branch of the South African Police. They are charged with the alleged murder of the LK operative Nolatula Simelane and that Tembi Nkadineng the

sister of the late Nolatula Simelane intervened in the legal litigation and argued that the accused as formal police officer carrying authorised orders were entitled to legal defence paid for by the South African Police Services, which is the legal successor entitled of the South African Police. Webber Wentzel Attorneys represented Nkadineng in that litigation the causes for case according to Webber Wentzel is allegedly on all fours with that of W F H Coetzee. In that case the Court found that 1, the South African Police
10 Services was a successor entitled to the South African Police assumed the reliabilities and responsibilities. 2, the alleged kidnapping and alleged extrajudicial killing carried out by the security branch of the South African Police were allegedly authorised and were allegedly part of the state sanction policy and same was allegedly executed by the applicants in the cause and the scope of their employment with the South African Police. 3. The state has failed the deceased and their families dismally due to the decade long delays. 4. The refusal of the South African Police Service
20 to provide legal representation to the accused contributed to further delays which compounded the suffering of the family.

The South African Police Services are accordingly bound in terms of this judgment that is the Coetzee judgment by Judge Pretorius to pay the reasonable legal costs of the

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formal police officers in apartheid era cases. We point out that the Minister of Police and the Provincial Commissioner of Police and I take it also the National Commissioner of Police chose not to appeal the judgment consequently this constitutes a firm indication that the South African Police Services accepted the judgment as binding law on the matter. It would constitute a cross abuse of both the criminal and several court processes to allow dispute that judgment when the South African Police Services had ample
10 opportunity to do so in the Simelane matter.

Forcing the litigation in this matter would delay the criminal cases relating to the trial of causes four for at least 2 years as it occurred in the Simelane case. The accused are elderly persons and may very well die during this delay. They may well very well possibly should have added that die during this delay. This would amount to a grieve instance given the causes for case which has already delayed for decades. In the circumstances the refusal to pay for legal defence for Rorich Siebert undermines the
20 interest of justice as it would delay the trial for years. In the Simelane case the two of the accused Gadebe and the two key witnesses died while the litigation dragged on for more than 2 years.

If the accused in this case also died while the litigation was unfolding it would amount to an entirely avoidable travesty

of justice for which the South African Police Services would be solely responsible. Should the South African Police Service persist with its current approach we as Webber Wentzel are instructed to bring an application to intervene in the litigation to be launched by Rorich. If the families of the four are not cited as interested parties and that litigation would seek to have the conduct of the South African Police Service sanctioned by way of a punitive costs.

- 10 We respectively request you the Minister of Police the National Commissioner of Police the Gauteng Provincial Commissioner of Police to reserve your decision not to pay the legal reasonable costs of Rorich and we look for your response at your earliest convenience. According to Mr Hoffan and Mr Scott who representing the families of the four deceased no response was received from either the Minister, the National or the Provincial Commissioner of Police. Which according to Constitutional Law section 165 of the Constitution national organs or national bodies or
- 20 state organs or state bodies are obliged in terms of section 165 of the Constitution to facilitate the smooth implementation of bill of rights and the sections of the Constitution relating to the urgency that we are addressing at the moment.

Subsequent thereto Webber Wentzel also through the

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urgency of Mr Hoffan, addressed a matter to the registrar to my attention. That letter is dated 21 March 2022 and it reads as follows, it is also copied to Meyer Kobus who is the head of the Department of Litigation and the South African Police, it was also copied to the state the prosecutor in other words Mr Mathembu then who was acting. It was also copied to Mr Mogubeni and it states:

10 “RE: subject *S v Mfalapitso and Rorich* case
70/2021 High Court of South Africa Gauteng
Local Division. Dear Ms Polo who is my
registrar we hold a watching brief for the family
of the late Fani Mathlapo the, late Madikela,
and others and we refer to our email dated 2
March below. We respectfully request a
meeting in chambers with the presiding judge
His Lordship Mr Justice Mokgoathheng and the
prosecution and the defence before the start of
the proceedings tomorrow 22 March 2020. The
aim would be to discuss the ongoing delay of
20 the trial due to the refusal of the South African
Police Services to pay the legal costs of Mr
Rorich the second accused. Notwithstanding
the binding judgment in *Coetzee and Others v
Commissioner of South African Police Gauteng
Division* Pretoria Case number 72747/2016.

Firstly, we are of the view that the conduct of the South African Police Service in the light of the afore set judgment should be sanctuaried in open court. The South African Police Services should also be called upon to act expeditiously in accordance with the judgments. Secondly we wish to suggest to the Judge that he should considering acting in terms of section 173 of the Constitution in order to pay in order that the South African Police Services pay the reasonable legal costs of accused 2 Rorich. Mr Hoffman further quotes section 173 that it provides that the Constitutional Court the Supreme Court of Appeal and the High Court have the inherent power to protect and regulate their own processes to develop the common law taking into consideration the interest of justice. The Courts have confirmed that they have inherent [indistinct] of power to regulate its procedure in the interest of the proper administration of justice and he quotes the case of *S v Paddington* 1997 (4) SACR 1076 Constitutional Court at 22. We submit that it is within the inherent power of this Court to ensure that procedural fairness as well as the

rights of the accused that are upheld in the trial and to take necessary steps to guarantee this outcome. If Mr Rorich is denied legal representation in a trial in which he faces very serious charges it will undoubtedly impact on the procedural fairness of the proceedings. In addition, in delaying the trial pending the outcome of the civil review proceedings and possible appeals may result in a serious miscarriage of justice and the accused may die in the intervene years. Such powers may only be exercised in exceptional circumstances see *Phillips and others v NDPP* 2006 (1) SA 505 SCA 52. We submit that these are exceptional circumstances because of the following factors. 1, this case has been delayed for decades. 2, the accused are elderly and in the twilight of their lives. 3, as mentioned above suspending the proceedings for 2 or 3 years to resolve the civil litigation may very well in result in a travesty of justice since the accused could die during this period. All though that power that is the power in terms of section 173 should be exercised sparingly our courts still enjoy considerable flexibility. See the case of

Paulman and others v Van Wyk and others
2001 (1) SA 690 e 697 c – f. We wish respectfully to ask the judge meaning this Court to consider invoking its power its powers in terms of section 173 and if so inclined whether the judge wishes to hear legal argument in this regard. Such legal argument could be supplied in writing if the judge so decides and orally as well. The South African
10 Police Services would probably need to be placed on notice to provide any legal arguments that they may wish to make. If the judge is inclined to invoke his inherent powers in terms of section 173 then it would do away with the need for a lengthy review process in civil courts.”

I may just mention that when this letter arrived at my chambers this Court had because off the inordinate delay which had occurred this Court had *meri moto* had decided to
20 invokes its powers in terms of section 173 of the Constitution. So, when consequently when this letter arrived this Court had actually started conducting an inquiry in terms of the invocation of section 173 as exemplified by the fact that this Court engaged Major Colonel Hendricks who was the head of the Gauteng legal department of legal

affairs of the South African Police.

So, it must not be said that this Court was influenced by Webber Wentzel to invoke its powers in terms of section 173, because this Court had already done so. Consequently, in furtherance of its powers inherent in section 173 this Court decided that Mr Hoffan should address this Court and substantiate his application as annunciate in the letter which I have just read. When this Court entertained that application there was no
10 representation for the Minister of Police nor was there representation for the Minister for the Commissioner of Police that is the National Commissioner of Police and the Gauteng Provincial Commissioner of Police. I take it the state was obviously there represented by Mr Ngobeni and accused 2 was represented by Mr Muller.

Because of urgency of the delay in this matter being set down for hearing the Court exceeded that it was an urgent it was urgent that Mr Hoffan should be entertained in his presumed application. Just to contextualise his application
20 on 23 March 2022 Mr Hoffan argued that there are exceptional circumstances predicated this case which entitle this Court to exercise its inherent power read with section 342A 3 of the Criminal Procedure Act 51 of 1977. To prevent a grave miscarriage of justice from taking place. He argued that it cannot be disputed that because of the

four families of the victims and the accused have substantive rights in insuring that the criminal trial proceeds without further delay. 2, he further submitted that the South African Police Service is under legal obligation to pay the reasonable legal defence cost of accused 2 Mr Rorich. That forcing Mr Rorich to launch civil proceedings review refusal of the South African Police to pay his legal cost in term force the suspension of the criminal trial pending the outcome of he civil proceedings. 3, the civil review
10 proceedings are likely to take around 2 years if not longer if there are appeals subsequent thereto. 5, there is a real risk that the accused who are elderly may die during the intervening period thereby bringing an end to the criminal proceedings. He added that Mr Rorich is about 75 years old like I am and Mr Mfalapitso he is 68 years old.

6, that the harm visited upon the families ands their communities will be incalculable and irreversible. He drew the context predicating this application that some 40 years has elapsed since the alleged brutal and alleged callous
20 murder of the Khoza's four. That some of the alleged perpetrators young Jan Karel Coetzee, Abraham Grobler and Brigadier Willem Frederickson who allegedly authorised their operations have already died before they could allegedly face justice. Further Mr Hoffan submitted that post the winding up of the truth and reconsideration

commission the actions of the post-apartheid state of Nelson Mandela if I may add have visited a terrible injustice upon the Khoza's four families as well as other families of victims of the allegedly apartheid era crimes.

Further he contended that the Khoza's four case was one of approximately 400 which were referred to by the TRC to the National Prosecution Authority for further investigation and possible prosecution and that all these cases involve serious crimes such as alleged murder, alleged kidnappings
10 in which amnesty have been denied or not being applied for.
7, Mr Hoffan submitted that virtually all these cases were suppressed and abandoned as result of political pressure which was brought to upon then National Prosecution Authority and the South African Police Services. Senior official representing the NPA admitted under oath in 2019 that the authority that is the NPA succumbed to political interference in respect of the TRC cases.

That in June 2021 the Supreme Court of Appeal in dismissing the appeal of Rodriguez against the National
20 Director of Public Prosecutor in case 2019 (2) SACR 251 GJ 2019 that the Supreme Court of Appeal in dismissing this appeal noted that it was perplexing and inexplicable why these cases were subjected to political interference. Why such a stance would be taken by the executive which adopted the policy, possession which is considered by the

state parties that the TRC cases would not be prosecuted. Whilst, the TRC advocated a bold prosecution policy and a guarantee of the prosecutorial independence of the NPA and its Constitutional obligation to prosecute crimes and the interest in the interest of the victims and survivors of those crimes.

Further, Mr Hoffan submitted that concerted action was taken in the Khoza's four case following the launching of an application by the families on 2020 before the Krugersdorp
10 Magistrate's Court for the uplifting of forensic evidence. Further Mr Hoffan, submitted that the families of the victims and the accused are in the circumstances of this case have a substantive right to the expeditious completion of the criminal procedure without further undue delay. That under section 1 of the constitution the accused and the families of the deceased have the right to have an alleged serious crime perpetrated against their love ones dealt with expeditiously and without delay.

That a further delay would deny the closure for the families
20 of the victims and constitute a deep violation of their entrenched rights to human dignity and also with valid rights to serious prejudice the prospects of a prosecution of those accused of allegedly murdering their loved ones. Further that South Africa has signed International Covenant for civil and political rights in which article 2 (3) read with article

2(1) of the said International Covenant. It does not permit those who have violated the right to life to escape justice and punishment. Further Mr Hoffman, argued that the accused have a substantive right in terms of section 35(3)(d) of the Constitution to have their trial begin and conclude without unreasonable delay.

He further that is Mr Hoffman, argued that the South African Police Services have the obligation to pay the legal costs which is established in the matter of *William Johannes Coetzee and others v the Minister of Police and Others* 10 which is a judgment of the Pretoria High Court on 5 June 2018 in case 72747/2016 by Judge Pretorius who set aside the decision taken by the South African Police Services not to fund the legal defence of W H J Coetzee, A Pretorius and L V Moheng. He further argues that the accused in that matter were members of the formal South African security branch of the South African Police and they were allegedly charged with the alleged murder of a LK operative Nokatula Simelane and that Tembi Nkadineng the sister of Nokatula 20 Simelane intervened and argued that the accused as former police officers allegedly carrying out the authorised orders of their superiors were entitled to their legal defence being paid by the South African Police Services which is the legal successor to entitle to the South African Police.

He further argued that in the case of Coetzee the Court

characterised the issue for the decision as to where the Minister of Police and or National Commissioner of Police or the Provincial Commissioner of the Police had a legal obligation to pay the criminal defence cost of the accused in the criminal trial, concerning their conduct in an alleged apartheid era crime. The accused had applied for legal assistance in terms of the standing order 109 and that they had acted allegedly on the instructions of their commanding officers.

- 10 Mr Hoffan, further stated that the Court in the Coetzee matter found 1, that the South African Police Services was the successor and entitled to the South African Police and assumed the latter liabilities and responsibilities to the alleged kidnapping and the alleged extrajudicial killings alleged carried out by eh South African by the special branch of the South African Police were allegedly authorised and were allegedly part of the state sanction policy and were allegedly executed by the accused in the course and scope of their employment with the South
- 20 African Police.

Further he argued that is Mr Hoffan, that the state has failed the deceased and their families and their families dismally due to decades of long delays. 4, the refusal of the South African Police Services to provide legal representation to the accused contributed to further delays

which compiled the suffering of the families of the deceased. Critically he also argued that the Khoza's four case that is the present case is on all fours with that of Coetzee. Because both allegedly involved the alleged authorised security branch operations to allegedly act against persons allegedly perceived to be threats to the National Security. That the essential facts described above also arise in the present case and there is no principled distinction between them. That is between the Coetzee

10 case and the present case, of Mr Rorich and Mr Mfalapitso. That consequently the South African Police Services are accordingly bound by the judgment in Coetzee to the case of Coetzee to pay the reasonable legal costs of the formal police officers who were employed during the apartheid era crime significantly that the South African Police Services elected not to appeal the decision of Coetzee, which is in his view a clear indication that the South African Police Services accepted that judgment of Coetzee as a binding law on the matter. That is the argument which was

20 proffered in advanced by Mr Hoffan before this Court.

Mr Muller on behalf of accused 2, contented that his client supported the application which was being argued by Mr Hoffan. That he reserves his rights because he intends his clients reserves his rights because he intends applying or taking the decision of the South African Police Services that

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is the refusal to his client Mr Rorich legal defence funding upon review. After having heard that argument this Court was persuaded to issue a Rule nisi which stated that a Rule nisi calling upon the National Commissioner of the South African Police the Minister of Police and the Provincial Commissioner of Police Gauteng to show cause on 25 March 2022 why the following order should not be made final. That is the South African Police Service be directed to pay the reasonable legal costs of the second accused in
10 this above matter which costs to include the reasonable costs of a senior counsel.

On 25 March 2022 all the parties were present and all the parties were represented. The state was represented by Mr Ngobeni, accused 2 by Mr Muller, the then legal aid was Mr Molasindi and the families of the deceased victims were represented by Mr Scott. Mr Joubert who acted on behalf of the Minister of the Police, the Commissioner of the Police and Provincial Commissioner of Police. Was the first to address the Court, he contended that his instructions are to
20 oppose the confirmation of the rule nisi. He proffered the following defence, that this application when it was launched his clients were not present and that it was brought on an urgent basis all though no papers were delivered in terms of Rule 53 for instance.

Rule 53 governs the applicability of review applications and

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proceedings. Further all thought there was no record according to him in terms of Rule 53, the Rule nisi was accompanied by request that any party who makes representation whether the order the Rule nisi should be confirmed or not, was at liberty to file heads of argument. He also confirmed that he had not received or had sight of this order and this Court duly supplied him with that. He understood according to him that this Court was sitting in its capacity as a criminal court and it was called upon to
10 conduct an inquiry why there were an unreasonable delay in the trial from either the proceedings which impacted on the proceedings not being finalised. He admit that the court can conduct such an inquiry in terms of section 342A of the Criminal Procedure Act and that a Court can make an order it deems fit in the circumstances.

He contended that his clients stated that accused was accused 2 was a formal member of the South African Police Services who had since resigned and apparently he did not go on pension but he bought his discharge. He also stated
20 that he understands now it is about 40 years after the alleged criminal event which occurred in 1982 that accused 1 and 2 are facing charges in respect of kidnapping, 3 counts of murder and a count of a crime against the humanity of apartheid. He stated that he perused the indictment and was au fait with the charges the two accused

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are facing. He contended that those charges are clearly acts which are ordinarily not committed by police officers in the execution of their duties.

He argued that Mr Rorich, when he was charged during 2021 he approached the South African Police Services to request it to afford him legal assistance in the form that the police should find his legal defence for the trial. This application according to Mr Joubert he confirms that it was refused by the South African Police Services and he stated

10 that when Mr Rorich was in the South African Police the standing order which governed his employment was standing order 109 which has since been repealed and replaced as I stated by standing order 1 of 2017. Mr Joubert, contended that standing order 109 was repealed in 2017 by the National Defence Act 1 of 2017. He quoted standing order 109 which he read the relevant features thereof as follows: The legal representation in criminal courts standing order 109 (1a). If a member of the force is to be

20 trialled in a criminal court his defence if he so elects will be conducted by a state attorney provided that he has indicated in the application prescribed in B 8 or the evidence reflects that he did not forfeit the privilege of state defence in that he acted in the execution of his duties or acted in a *bona fide* belief that he did not exercise his powers in a reckless or in a malicious manner or did not

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knowingly exceed them.

Mr Joubert, argued that Mr Rorich would be hard burst to convince any court or the police for that matter that what he did in the execution of his duties could never have been the case. Secondly, he did not exercise his power in a reckless or malicious manner which could not also be the case. At that stage this Court interjected and advised Mr Joubert that this Court was advised that Mr Rorich intends pleading not guilty and that he has a right to exercise his
10 constitutional right to silence and to remain silent that is he is not obliged to make a statement in terms of section 115 of the Criminal Procedure Act to the various charges preferred against him. He has the right to remain silent in terms of the constitution.

However, Mr Joubert persisted and argued that when one reads the indictment objectively and the summary of facts it is clear that accused 2, committed the offences *prima facie*. That he could not have ordinarily be put in the category that if he was a police officer in the category that he was police
20 officer in the execution of his duties. Further Mr Joubert argued that the South African Police have a discretion that there is no legal obligation for them to provide legal funding, because there are several provisions which government that urgency. First an application must be brought by a police officer whether he should be assisted

financially and of the criteria used by the South African Police in considering that application it is whether and how the applicant police officer is going to repay the legal assistance which was disposed financially to him.

Because ordinarily if a police officer he must either an acknowledgment of debt or an undertaking to repay and he must also have the ability to repay include legal costs with which he was assisted. Because in the end if the police officer remains a tax payer and has not withdrawn his
10 pension and he is still in the force that would serve as security for the state that is the South African Police to recover the best legal costs. Further Mr Joubert, argued that there is a discretion, which the police officers are obliged to act rationally and reasonably and meritoriously regarding the execution of their duties.

Further Mr Joubert, contended that under the standing order 217 the other Act's criteria is that a police officer should not exceed his powers because that would be against public interest to grant him legal assistance and also that there
20 should not be a conflict of interest in his version which may differ from whatever the witnesses state. When the state is the complainant which is the case here. Mr Joubert, also argued that all though the South African Police Services do not want to formalistic. The question is whether they will be able to recover the disposed legal fees should accused 2 be

found guilty, and forfeit the state's protection. Further Mr Joubert, contended that it is not every police officer who is being criminally charged who is entitled to legal representation. There is a process. He quoted a judgment of the Cape Provincial of the Western Cape High Court.

Matter of Govender v Minister of Police and others it is case number 21979/2015. Wherein in paragraph 8 of that judgment Mr Joubert quoted same and argued that section 205 of the Constitution ordains the objects of the police
10 services are to prevent, combat, investigate crime and to maintain public order to protect and secure inhabitants of the Republic and their property and to uphold and enforce the laws. That the duties and functions of the members of the police service wilfully are set out in section 11 to section 14 of the South African Police Act. Then it is clear to him the applicants are members of the South African Police Services places them in a position not to commit offences as the crimes as alleged. That is the conduct which the prosecution relies on however by no stretch of
20 imagination he described conduct or X which form X or conduct within the cause and scope of the duties of accused 1 and 2 as employees of the South African Police.

Consequently, he is of the view that eh application of accused 2 for the request for legal assistance be dismissed with costs. Mr Joubert, was further worried that this Court

should be circumspect and cautious in attempting to set aside the position of the South African Police Services of refusing the application to provide legal assistance funding to accused 2. According to him in the case of *Coetzee and others v The Minister of Police* in that case which was adjudicated by Judge Pretorius he said in a civil capacity and not in a criminal capacity.

This Court wanted to inquire if that judgment by my colleague Mr Pretorius in the Coetzee matter was not
10 persuasive at least to this Court. Mr Joubert, argued that maybe the Court can take judicial notice of it, but obviously there is no facts before this Court and that the Court is aware that every case is ordered or finalised on its own merits and that this Court sitting in a criminal court or as a criminal court and doing engaging in an investigation under section 342A. He should be very careful to try and serve he function of the High Court sitting in a review capacity. He must be very careful not to satisfy a decision of the South African Police Services which refuse to grant legal
20 representation to accused 2.

The Court cannot state that whatever decision taken was irrational, or unreasonable in the circumstances or that it was justifiable for this Court to set it aside because there is no evidence before this Court. He conceded that this Court has inherent jurisdiction to take upon the common law in

terms of the Constitution. He further argued that it would be a very brief if this Court could simply without no information on which the Court can even serve those purposes to clearly set aside an administrative decision because the law is clear. If any party is not satisfied with that decision the process of review is to be followed.

Further Mr Rorich, should explain to this Court why since the date of the application was refused he did not immediately take necessary and required types to approach
10 the High Court with an application to review and set aside the decision to refuse his legal representation. That is in broad view was the argument proffered by Mr Joubert on behalf of the South African Police Services.

Thereafter Mr Scott on behalf of the families of the deceased victims argued. Before I deal with his argument maybe, okay fine let me proceed. They argued principally that Mr Hoffman moved an application principally based on section 173 of the Constitution. That this Court indeed has the power in terms of that section not only to act on the
20 basis of the application but the Court can *meri moto* act in terms of that section. They argued that we have invidious situation in that government organs or organs of government and the NPA and the South African Police Services and even the National Government are intent are intent to suppress these cases which recommended by the

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TRC to be investigated and perpetrators to be charged if so proved.

Now that is the NPA which is an arm of government has finally brought this case to Court. We have the invidious position that another branch of government the South African Police Services refuse to assist accused 2 who was formally employed by its predecessor the South African Police. The South African Police Services are actually saying accused 2 should now approach a third branch of
10 government which is the legal aid, because they are not prepared to cover the legal defence cost of accused 2.

Correctly, Mr Scott argued that state entities have the Constitutional duty to respect and promote fundamental rights which includes the rights to dignity for the deceased, the accused and the families of the victims, who also have a right to access this Court and also invoke rights in terms of section 35 of the Constitution including the right to a fair trial. Further that state entities have a duty under section 165 of the Constitution to ensure that the Court processes
20 are effective. That they have a duty also that state entities cannot prepose them with fundamental rights of citizens, because the Constitution is the primary custodian of these fundamental rights and courts must give effect to it.

Mr Scott, argued that the arguments proffered in this Court by the South African Police Services through the urgency of

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Mr Joubert are the same arguments which were advanced in the Coetzee court criminal matter. That the judgment of Coetzee is a binding judgment against the South African Police Services because it did not appeal that judgment. Further Mr Scott argued that in the case of Coetzee and others that Court has already decided those issues which are alious and similar to the issues which are assilant and pertinent in the present case the Court is handling.

All the contentious issues like for instance the issues
10 around whether there was a conflict of interest and that the South African Police Services are the successor of the South African Police and consequently they are also seized with the rights and obligation which accrued from the conduct and activities of the South African Police in the 80s pertaining to this case of Khoza's four. Further Mr Scott, argued that the Supreme Court of appeals and the High Court in Pretoria North Gauteng High Court has is on record that the families of the victims of the deceased victims have a right which is a Constitutional right which exist outside of
20 the rights of the accused and the deceased and that this ratio has been confirmed by the SCA in the case of *Rodriquez v NDPP* SCA 2021 (2) SACR 333 and further that. That right Constitutional right to be heard by this Court has been recognised also in the Coetzee judgment, which on page 5 on paragraph 5 thereof it was contended that the

families of the deceased have substantive rights and they also have rights to closure and the rights to dignity and the rights to avoid further delays which undermines their dignity.

He further argued Mr Scott, that the critical question is this issue of whether or not Mr Joubert argued that his client still was at liberty to exercise a discretion *de novo* in the application of accused 2. Having regard to the same subject matter which was dealt with by Judge Pretorius in
10 the case of the Coetzee. His client the South African Police Services elected not to appeal the decision of Coetzee it means they accepted the correctness of that decision and that decision is binding on the South African Police.

In paragraph 14, of the Coetzee judgment Pretorius J in that division falls under the Superior Court Act the Gauteng Division consequently this Court is bound by Judge Pretorius's decision as a matter of law. I may add that, that is the correct legal statement except that if this Court can find after having read and studied the Judge Pretorius
20 decision and judgment in the Coetzee case can come to the conclusion that Judge Pretorius was clearly wrong, then this Court may not have to be bound by her decision. But if this Court after having read that decision decides that Judge Pretorius is not wrong that is his judgment is not wrong then that decision is the law in the jurisdiction of both courts at

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least and it binds all the judges who sits in these courts.

That is in Pretoria and even Johannesburg concerning the judgment which was made in the Western Cape by Judge Veldman of the Western Cape that case of Govender has got no application in this two divisions that is the Court in Pretoria and the Court in Johannesburg. Because that case was not dealing with standing order 109 which was applicable in the years 1982 and 1983 when the accused before Court were still members and employees of the
10 South African Police. That Cape division deals with standing order 1 of 2017 and it also deals with the Police Act which was passed after the date of 15 August 1982 which date the alleged kidnapping and the alleged murders and the alleged crimes against humanity were allegedly committed by the accused before Court. That date exigency of 15 November 1982.

That date is governed by that is far as

The standing order 109 is concerned is governed by that standing order. It is not governed, that is that offence
20 whether one qualifies for legal assistance or not because it was committed in 1982. It is governed by standing order 109 and not by standing order 1 of 2017. The law is tried that you cannot decide a case posed the legal obligation or the legal precepts which were applicable at the time. In 1982, 1983 there was no constitution action 109 of 2006.

So the Constitution was not applicable then and consequently as I will later find. Mr Major General Collin Hendricks his application of the standing order 1 of 2017 to the application of legal assistance of accused 2 which is predicated on an offence which was allegedly committed in 1982 had completely misdirected himself because that law of 2017 is not applicable to the transmission of legal funding to members of the Police Force, it was not in 1982. Same with the *Cape Western Division of Govender against Veltman*.

10 *Veltman, Govender against the NDPP* the Cape judge deals with *post facto* laws the Police Act and he also deals with standing order 2017.

Those letters were not applicable in 1982. Mr Scott argued that the police South African Police accepted the Coetzee judgment because they did not challenge it and it is consequently binding on them and they cannot now come to court to make the same arguments in the present matter which have been rejected by the court in the Coetzee case. That in summary was the argument which Mr Scott provided.

20 Mr Muller on behalf of accused 2 reminded the court that the application before court which was launched by Mr Hoffen of Webber Wentzel was the application of the families of the victims of the deceased victims; it is not an application by accused 2 but his clients supports that application. That is in broad strokes was the evidence which was delivered, which

was heard by this court. I have now to consider that evidence and decide whether the South African Police Services have a legal obligation to fund the legal representation costs of accused 2.

Ja well, to start at the very beginning, this court as incorrectly argued by Mr Joubert on behalf of the South African Police Services is not reviewing the decision by the South African Police Services in refusing to grant accused 2 the legal funding for his legal assistance against the charges
10 he is facing. I am not taking that decision, I am not taking it on review, I am not reviewing it. This court is proceeding in terms of section 173 of the Constitution and section 342A of the Criminal Procedure Act.

So this court admits that it, because it is conducting an enquiry or an investigation in terms of section 342A of the Criminal Procedure Act and it is also empowered in terms of section 173 of the Constitution to govern its processes if for efficacy if there are problems regarding like in this case the proceedings which are dilatory because of certain reasons
20 and the court has a right to enquire why it is so in terms of section 342A. Just to recap; section 173 of the Constitution provides for the inherent power of superior courts as follows:

“The Constitutional Courts and Supreme Court of Appeal and the High Court of South Africa each have the inherent power to protect and regulate

their own processes and to develop the common law taking into account the interest of justice.”

And sorry I just want to get the, yes excuse me just wait. I have this letter here. Who has got the Criminal Procedure Act? Do you have a copy? I want to quote section 342A of the Criminal Procedure Act. I had it here but because that is, ja here it is sorry. Section 342A concerns unreasonable delays in trials. Paragraph section 1 states:

10 “A court before which criminal proceedings are pending shall investigate any delay in the completion of the proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution. The accused or his or her legal advisor, the state or the witness,

(2) In considering the question whether any delay is unreasonable the court shall consider the following factors:

- 20 (a) The duration of the delay.
- (b) The reasons advanced for the delay.
- (c) Whether any person can be blamed for the delay.
- (d) The effect of the delay on the personal circumstances of the accused and witnesses.
- (e) The seriousness, extent or complexity of the

charge or charges.

(f) The actual or potential prejudice caused to the state or the defence by the delay including a weakening of the quality of evidence. The possible death or disappearance or non-availability of witnesses. The loss of evidence, problems regarding the gathering of evidence and considerations of costs.

10 (g) The effect of the delay on the administration of justice.

(h) The adverse effect on the interests of the public or the victim in the event of the prosecution being stopped or continued.

(i) Any other factor which in the opinion of the court ought to be taken into account.

20 (3) If the court finds that the completion of the proceedings has been delayed unreasonably the court may issue any such order as it deems fit in order to illuminate the delay and any prejudice arising from it or to prevent further delay or prejudice including an order

(a) Refusing further postponement of proceedings.

(b) Granting a postponement subject to any such conditions as the court may determine.

(e) 1. That the state shall pay the accused

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consents, the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the state.

2. The accused or his legal advisor as the case may be shall pay the state his wasted costs infused by the state as a result of an unreasonable delay caused by the accused or his or her legal advisor as the case may be.

10 (f) That the matter may be referred to an appropriate authority for an administrative investigation an possible disciplinary action against any person possible.”

I have laboriously regurgitated the evidence regarding this case. This case inception is the commencement of the alleged criminal offence which apparently happened on 15 September is it?

MR NGOBENI: February.

COURT: February?

MR NGOBENI: February yes.

20 COURT: 15 February ...[Intervenues].

FEMALE SPEAKER: 1982.

COURT: 1982 Thanks thanks. Now that is the triggering, triggering moment of the existence of this case because in our law there is a accountability if a person has been allegedly unlawfully kidnapped, allegedly unlawfully murdered

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et cetera but it is common course that the accused in this case were arrested in August 2021. It is about how many years since 2015? I mean 1982 ne?

MALE SPEAKER: [Indistinct] 40 years [indistinct].

COURT: It is about 40 years, 40 years' no one, no one with any intelligence can argue that there has not been a delay in the prosecution of this case. Without attributing or mentioning the reasons why but the point is every sane person will agree that after 40 years where the accused, the
10 witnesses, the relatives of the deceased's victims have not had closure is a cause for grave concern. It is a cause for grave concern and I am not blaming the accused for the delay, there are other urgencies which apparently have to be blamed for the delay.

So the facts of this case predicated this case fall squarely within the factors mentioned in section 342A of the Criminal Procedure Act. This case was ready for trial as at last year. It was delayed purely by the refusal in main, by the refusal of the South African Police Services to exceed to the request by
20 accused 2 that they should fund his legal, I mean his criminal case. In terms of section 35 the accused 2 has a constitutional right to be defended in a criminal case unless he states that he will defend himself. And in terms of section 35 of the Constitution the accused has the right to a fair trial and a trial can only be fair if the accused wants legal

representation and he then is furnished with such legal representation.

The accused are facing serious charges, kidnapping, counts against humanity of murder read with section 32 of the Constitution alternatively murder read with the provisions of section 91, 92 and 258 of the Criminal Procedure Act 51 of 1977 and alternatively murder also in count 4 and count 3, humanity of crime against humanity read with section 232 and alternatively murder also. These crimes are very serious
10 crimes and the accused too obviously realises that, that is why he invoked his rights by making an application to the South African Police Services to fund his legal costs for the defence of against the charges he faces.

In the case of *state v Ambros* 2005 (2) SACR 211(C) it is a Cape decision of two judge's J P Thlope and Nthlolo J. I just want to state quote the head note. Here the Legal Aid Board had refused to fund an accused person and he contested that refusal and this is what the learned judges had to say:

20 “The refusal by Legal Aid Board to provide legal representation not in all cases absolves the state of its constitutional duty. The refusal by the Legal Aid Board to provide representation not in all cases absolving the state of its constitutional duty. The accused is to be advices of the right to ask the court to make the order that he or she be provided

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with legal representation at state expense as provided for by the Legal Aid Act 22 of 1969.”

These judges are addressing the question of the refusal by a state organ called the Legal Aid Board to provide funding, Legal Aid funding for the accused to have legal representation, and they say that

10 “Refusal does not absolve the Legal Aid Board of its constitutional duty to furnish or provide an accused person with legal representation if he so applies and they say that accused has got a right to ask the court to make an order that she or he be provided with legal representation at state expense as provided by the Legal Aid Act 22 of 1969.”

Now the accused it is common course that he was employed in 1982, 83 he resigned in ‘87 according to Major Collin Hendricks. The accused was employed as a police officer by the predecessor of the South African Police Services in 1982 to 1987 when he was still employed but when one reads the standing order 19 it is very critical for one to bear in mind the
20 strict stipulations of that order. For instance, the definition of employee in the standing order 109 is defined as following:

“An employee may only be provided with assistance in accordance with the instruction if at the time of the alleged commission or offence such an employee acted or omitted to act at the time of

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the commission of the alleged offence.”

So what triggers legal representation the right to legal representation in terms of standing order 19 which was applicable in 1982 and 83? And actually it was applicable right up to 2017 just before the promulgation of standing order 1 of 2017. Once you were employed as a police officer and an exceed [indistinct] that is at the time of the alleged commission of or the offence you are still employed Whatever conduct you are accused of you are entitled, you are entitled
10 to be furnished or provided with legal representation. So when Major Collin Hendricks General Hendricks came and said that “hey, accused 2 resigned in 1987 he was paid off, he took his pension or the board has discharged” that is irrelevant, that is irrelevant. The operative issue is as at the commission as at the alleged commission of the offences on or about 15 February 1982 accused 2 is entitled to invoke his membership and employment as a police officer employed by the South African Police which was subsequently entitle became the South African Police Services which adopted the
20 rights and obligations arising from the South African Police Services. So Mr Roorich on 15 February is entitled as of right. It does not depend; this standing order does not say unless he has not resigned, unless he has not bought his pension, unless he has not taken his discharge, it is a blunt statement okay.

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So we can, this court can dismiss the reasons which were given by Hendricks General Major Collin Hendricks that the South African Police Services are not given obliged to provide accused 2 with the payment of legal fees for his legal representation arising from the charges he is facing. He is speaking about a different law order standing order 1 of 2017, no it is not applicable. The applicable order was 109 standing order 109. Right I will come back to that.

For instance, I said I am not reviewing the decision taken by
10 the South African Services in refusing the application of accused 2 to provide him with funded legal representation. Mr Hoffen and Mr Scott on behalf of the families of the victims, deceased victims argued that this present case of the [indistinct] for the factual matrix of this case is synonymous to the factual matrix which obtained in the case of Coetzee. It must be so in the sense that Coetzee also in 1983 Wilhelm Johannes Coetzee he was in the employ of the South African Police so he was also as a logical consequence he was also infused with the right to invoke, to invoke standing order 9 if
20 he wanted legal if he wanted funding for legal representation which he did. So the position of Coetzee and accused 2 is analogous it is the same right. Accused 2 was employed as a member of the security branch of the South African Police, the same obtains for Coetzee also. He was also employed as such.

Now the question is the legal president established in the case of Coetzee is it also applicable as a legal president in the case of accused 2? In other words, what is a judgment? This court when it says it is bound by a judgment what is the court actually saying?

Well the court simply is saying that the establishment of the facts and the establishment of the legal principals in a particular judgment if there are saliently synonymous and analogous with the facts of another case that legal president
10 which is been established is binding to all other cases in the future which are argued and decided on analogous and similar salient facts. Judge Pretorius reviewed a decision of the South African Police Services and that decision was based on the application of standing order 109. That decision was predicated on the standing order of standing order 109 on the application of standing order 109. Accused 2 has applied for legal funding for legal representation for the charges against the charges he is facing. Such application is based on standing order 19. So these are similar salient features
20 which are analogous. It is not cat and mouse it is all chalk. Accused 2 uses the same standing order to apply for legal representation funding, Coetzee Johannes also used the same standing order 109 when he applied for legal funding and both applications were refused, both applications were refused.

But what is critical, sorry so many documents here I [indistinct]. An analysis of the facts predicated the judgment of Pretorius J in the Coetzee matter are the following. The issues which Judge Pretorius had to content with are the following as enunciated by herself; paragraph 10:

10 “The court has to decide whether the minister and or commissioner who are the 1st and 2nd respondents have a legal obligation to pay the criminal defence costs of the applicants accused in the criminal trial.”

Paragraph 11 he says:

 “The chronology of litigation is important when the court has to decide whether the decision by the 2nd respondent should be reviewed and set aside and if doing so, the matter should be remitted or whether this court should substitute itself for the decision of the 2nd respondent.”

Paragraph 12:

20 “On 26 February 2016 the three applicants were arrested and charged with murder with the alleged murder of Nokothula Simelani during September 1983”.

In the present matter before us on 20 August 2021 accused 1 and subsequently accused 2 in August 2021 were arrested and charged with offences which allegedly happened on 15

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February 1982. So the time period is also analogous. On 14 March 2016 all three applicants applied in terms of the standing order 109 to the police for legal assistance in a criminal matter. The same thing here. In November 2021 accused 2 applied to the same applicants it is not different applicants, the same parties, same party the respondents are constant in the two cases it is the Minister, the Commissioner and the National Commissioner and the Provincial Commissioner of Police.

- 10 These three respondents are constant in this equation. And then on 4 May 2016 the 2nd respondent refused the three applicant's application for legal assistance. In our case it was in ...[Intervenies].

MR MULLER: February.

- COURT: In February sorry; in February 2022 the application for legal assistance was refused. Right so the reasons for the refusal of the applications of Coetzee, Pretorius and Mung in the Coetzee case are predicated upon the applicability of standing order 109. In paragraph 28 of that Coetzee
20 judgment the judge states:

"The reasons dealt with by the 2nd respondent's legal team when refusing the application were that the applicants had exceeded their powers of duty. That it would be against the state and public interests to grant legal assistance. That there is a

conflict of interests as the applicant's version differs from that of the three witnesses and that the complainant is the state. And that it would be difficult to recover the debt as the 1st and 2nd applicants are no longer in the employ of the South African Police that is number 2".

Also that was one of the reasons which was argued by Mr Joubert that since he is no longer employed and he is no longer a member of the South African Police the state will not
10 be able to recover the legal funding if he is convicted. So the same reasons are advanced in the Coetzee matter. And also in the Coetzee matter the provincial head of Legal Services did not recommend the application of Coetzee and his colleagues and the reason furnished is that Coetzee the 1st applicant does not work for SAPS and the recovery of any debt due to SAPS will be problematic. The same reason which Mr Joubert argued in court pertaining to why there was a refusal to fund accused 2. And one of the reasons in paragraph 33 in the Coetzee case he was advised that he
20 must apply for assistance for legal aid. The same argument which was raised by Mr Joubert here. Why does he not apply for legal aid? So all the accused in the Coetzee case were told you must apply for legal aid assistance.

Mr Joubert argued that when he read the prescripts of standing order 19 he said Mr Rorich will find it hard-pressed

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to convince a court let alone the police that the charges he is facing namely allegedly kidnapping, allegedly murder were committed in the course and scope of his employment, were allegedly committed during the course and scope of his employment with the South African Police Services will find it hard-pressed when you read the litany of the prescripts, that it is a discretion which is used or applied by the South African Police Services in considering whether to fund a former member or a member like accused 2 or Coetzee whether when
10 you read objectively the indictment, that conduct is alleged conduct which is allegedly it is [indistinct] accrued to accused 2.

That conduct cannot pass the constitutional master as the exercise the reasonable exercise of a lawful conducting duties. That is what they are saying. Then this court interjected and said "no but accused says he is going to plead not guilty". These are allegations they are not proven. They are allegations. The state has still to prove those allegations before the accused can be convicted. And Mr Joubert in
20 essence was arguing that accused 2 cannot be here to argue that as a policeman he was obeying an illegal instruction it cannot be here to argue that but the judge here found that no that is a blunt statement. The state still has to prove whether accused 2's conduct was criminally liable, allegedly criminally liable.

Further clause 4(4)(b) of the standing order 109 provides that:

“An application for assistance may be refused in the event of information showing that
(b) It will be against the state or public interests to do so.”

And clause 4(1) and 4(2) of the standing order 109 sets out the grounds to approve or refuse applications for legal assistance.

10 Subsection (1) states:

“An employee may subject to sub paragraphs 2 and 3 only be provided with assistance in accordance with this order, that is the standing order, if at the time the alleged commission of the alleged commission of the offence such an employee acted or omitted to act when he or she should have acted in the execution of his or her duties.

(2) An employee does not qualify for assistance paid by the service if he or she at the time of the
20 alleged commission of the offence

(a) Intentionally exceeded his or her powers and it is clear that an employee at the time of the alleged commission of the offence was not disqualified in terms of paragraph 2(a) of the standing order.”

Right but the learned judge here said no those are not cogent

reasons which one can use to refuse an applicant legal funding because an accused person is constitutionally presumed to be innocent until the contrary is proved. You cannot look at the document and say hey, like Mr Joubert was arguing, you are charged with murder you will be hard-pressed you will be hard pressed to convince the South African Police Service or even the police themselves to furnish you, or provide you with the funding for legal costs because this you are accused of a criminal offence but infact
10 what he is saying he is saying you are presumed to be guilty of a committed murder.

It is by inferential reasoning that you lift that meaning. The guy is charged with murder; oh we cannot fund you but that murder has not been proven. This is what Judge Coetzee says, I mean Judge Pretorius says. The state still has to prove that and those regulations cannot subvert a constitutional stipulation of section 35 that an accused person is innocent until found guilty. So you do not have to be a hot lawyer to know that prescription is unconstitutional because it
20 reverses the onus of proof on an accused which onus has long been declared to be unconstitutional. Right, in paragraph 60 and 61 of the 2nd respondent's answering affidavit the reason for refusing the 1st and 2nd applicant's application for legal funding is that they were no longer in the employ of the South African Police Service.

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They accordingly could not qualify for assistance. This decision by the 2nd respondent was based on the definition of the employee in the standing online order where a employee is defined as an employee it means any person in the employment of the service but the fact is employment triggers the right to legal to funding legal representation, employment triggers that and when a person has resigned this major general wanted this court to accept is no longer in our employment, he has taken his pension we no longer deduct
10 tax from him therefore the employee-employer relationship has been terminated in 1987 after he resigned.

No what triggers the legal funding is the occurrence of the alleged criminal offence in respect of accused 2 it is alleged it happened on 15 February 1982 not the resignation in 1987. Further here another reason which was proffered by the South African Police Service, they say it will be problematic to recover their debt should it become necessary and the learned judge here says:

20 "Just because this incident took place in 1983 when they were members of the South African Police, just because they are no longer employed or they resigned cannot be regarded as a sufficient reason for denying the 1st and 2nd applicant's legal assistance."

And in any case, it is a blunt statement there will be no

evidence that could be impossible that it will be impossible to recover the debts from the 1st and the 2nd applicants. Those reasons cannot stand, correspondingly also. It was argued cogently by Mr Joubert that yes these persons they are no longer employed. They do not have pension from which we can get our security to recover the debt. So it is impossible. They have not taken any means to establish the financial credibility creditworthiness of accused 2.

They have not; maybe this gentleman he is the one who won
10 the Lotto of 230 the other day, R230 million. They do not know that they just say hey because he is no longer employed he cannot be able; he cannot be in a state to recover we cannot ask to recover the debt should he be convicted. How do they know that he will be convicted? How do they know that? How can that be that predicate the reason for the refusal to grant legal funding for accused 2? They have already decided he is going to be convicted which is constitutional nonsense because no evidence has been led in any court so that reason is rational and it cannot stand. This
20 is what judge Pretorius finds. And further in paragraph 52 he says that

“It is important to know that the 2nd respondent does not regard that is Commissioner of Police, does not regard the South African Police Services as a successor entitled to the South African Police

and does not concede all the liabilities and responsibilities attached to the South African Police that they will apply in equal measure to the South African Police Services. The successor entitled, being the South African Police.”

This actually was the reasoning which was proffered by Major Collin Hendricks, General Collin Hendricks in this court when he said that “we now deal with matters in terms of standing order 1 of 2017.” That is what is applicable not standing
10 order 109. And they also say no, we do not regard the South African Police Services as a successor entitled to the liabilities and responsibilities attached to the SAP but the fact of the matter is regarding accused 2 they interchangeably use standing order 109 and standing order 1 of 2017 depending which exigency suits their case; and this cannot happen they are not entitled to do that. Only one piece of legislation is applicable, standing order 109. This judge says

“The fact that the applications were dealt with in terms of standing order 109 confirms that the 2nd
20 respondent did consider the application but misdirected herself by finding that they were no longer in the employ of the South African Police.”

That is why even accused 2 here in court, Mr Joubert argue that he is no longer in the employment of the South African Police Service that is why you cannot give him legal funding

for legal representation because there is no security that if he is convicted we may discover, we may recover. And the learned Judge Pretorius says that finding that because he was no longer in the employee with [indistinct] predicates one of the reasons for the refusal to accord Coetzee and his colleague legal funding and that is wrong because the payment issue is not determinative of whether accused 2 has a right to legal representation funding flowing from 109 flowing from standing order 109 because he accused 2 was a
10 member of the South African Police at the time when the alleged offences occurred in 1982.

So the learned judge says, no this is a misdirection and the learned judge says this South African Police Service official did not take the provision of paragraph 4(1) of the standing order 19 where it specifically provides that at the time of the alleged commission of the offence into consideration because all three applicants were employees of the South African Police at the time of the alleged offences in 1983.

And consequently he found that the three applicants that is
20 Coetzee and his two colleagues were members of the South African Police and as such qualify for legal assistance. Consequently, also in this case relating to accused 2, one of the reasons they try, we cannot give you legal assistance funding because you are no longer a member of the South African Police. He says, this judgment says no that reason

cannot be a qualifying criteria. The qualifying criteria is at the time of the commission of the alleged offence accused 2 was a member and consequently because of that he qualifies for legal assistance. The court also dealt with the following prescriptions under Clause H of standing order 109.

(1) The member exceeded his powers when executing his duties.

10 (2) There is a conflict of interests existing due to different versions or facts offered by employees involved in the same incident.

(3) It will be against the state and public interests to offer assistance as the state is the complainant.

The judge Pretorius argued that look, there is no evidence when this member is allegedly accused of having exceeded his powers in executing of his duties and also it is interpretation nonsensical to state that there is a conflict of interests due to different versions or facts offered by the employees involved in the same incident because the learned judge correctly found that the employees are not the accused.

20 How can there be a conflict of interests between the accused, an accused person and a witness. These are two categorised identifiable positions in law. An accused person is standing trial, the witness gives evidence on behalf of whoever, the state or whoever and there is no conflict of interests because the employees are not charged.

And this, although the judged did not add this [indistinct] it will be against the state and the public interests to offer assistance as the state is a complainant. That is totally just nonsense. I mean the NPA prosecutes people on behalf of the state I mean, how can you argue that I mean the NPA prosecutes people or citizens on behalf of the state. Now here it says, they say it will be against the state and public interests to offer assistance as the state is a complainant.

When I steal, when I steal okay, I merely say if I steal state
10 capture funds if I steal those the layman speaks loosely and says you know the CEO of Eskom for instance is the complainant. He is not. The state is the complainant. The CEO proffers evidence or gives evidence on behalf of the state so the judge is correct to say that for instance Coetzee and Company are accused of having exceeded their powers of duty and then they have recourse to section 205(3) of the Constitution as well as the provisions of the South African Police Act of 1995, 68 of 1995 it is what I wanted earlier. The learned judge says

20 “These acts were not in existence during 1983 that is they were also not in existence during 1982 when the alleged commission of the offence [indistinct – 13:54] four is alleged to have occurred.”

This application has to be dealt with according to the

prevailing legislation in 1983 and therefore reliance on the constitution and provisions of the South African Police Act is totally flawed. This was the argument of Mr Joubert he introduced the decision of *Govender v NDPP* by Judge Veltman in the Western Cape High Court and he interpreted section 205 I regurgitated it what it implies of a police person that is employed to combat crime et cetera, et cetera, et cetera. And that in that case of Judge Veldtman Govender and Company were police but these guys were racketeering, 10 were conducting a racketeering operation and then he says

“By no stretch of imagination can one argue that racketeering is part of police work.”

But here it is different. In the case of accused 2 section 205(3) of the Constitution is not applicable because the Constitution interim constitution was in 1994 and Constitutional Act 108 of 1996 they were not in existence in 1982. So you cannot use legislation futuristic legislation to try and solve an existential issue of 1982. And the learned judge goes on he says:

20 “The applicants were not members of the South African Police Service in 1983.”

Because besides the fact that the act the Police Act Service Act of 1995 did not exist neither did the Constitution exist. But there were members of the erstwhile South African Police. There were not provisions in these acts referring to the

police. And the judge author finds that the 2nd respondent had to consider the applicant's application with reference to the prevailing conditions in 1983 meaning in our case same thing. And that in the Coetzee matter the three applicants at that time were members of the Security Branch.

Further the learned judge ventured into the prevailing conditions in 1983 which the court is not allowed to do so but in the Coetzee matter he says it is clear that during 1983 at the height of the resistance freedom fighters in the Republic
10 the police used all and any methods to safeguard the apartheid regime. And this judge says:

“Consequently I cannot find, and it is not incumbent on the judge, him to find whether the applicants acted in a manner that at that particular time which exceeded their powers. It will be for the trial court to make such a determination. The same thing with regards to accused 2 is being excused of having exceeded his powers.”

Judge Pretorius says

20 “No it is not for the decision taker, the administrative decision taker to surmise, to guess whether the applicant acted in that particular time and was acting in a particular manner which exceeded his powers.”

He says

“It is for the trial court to make such a determination.”

Consequently, he says

“The 2nd respondent erred in disqualifying the applicants for legal assistance on this ground.”

Same thing with accused 2. Cannot disqualify because of that ground for not giving him legal assistance. And then there is the other reason which was stated in this case of Coetzee that it will be against the state or public interests to do so because of a conflict of interests which exists due to different versions or facts offered by the employees involved in the same incident. I have already dealt with this. But he says look, these employees are persons who the state may call during the criminal trial as witnesses. They are not co-accused of the applicants. Consequently, there cannot be a conflict of interests so any finding to that affect like pertaining to accused 2 that there could be a conflict of interests which would exist due to the different versions of fact offered by the employees involved in the same incident.

20 We already dealt with that.

And the learned judge in this case says the three policemen are not standing trial with three applicants and therefore no conflict of interests can arise. The three applicant's versions amongst themselves are not contradictory and the South African Police Services need not support employees where

they are co-accused who contradict one another. It is simply not the case in the present matter.

So these are the critically, these are the facts which were considered by Judge Pretorius and he says this:

10 “I have considered all the facts, arguments and authorities. I find that the decision by the 2nd respondent has to be set aside due to the finding at the time in 1983 the applicants were in the employ of SAP. It is further not for this court to decide whether the applicant had exceeded their powers of duty. The trial court will have to make that decision. In the event that the SAPS will have to recover the money for legal assistance after the trial, standing order 109 provides for such an eventuality.”

Now Advocate Joubert said

 “These are church mouse they do not have money. Once we have advanced these funds they cannot recover because they are no longer employed.”

20 But here the judge finds that standing order 109 provides for such eventuality for the recovery of funds. Okay I have as I stated in the beginning I have read the judgment of Coetzee and I have read the arguments raised and I have read the answers proffered and I have read Judge Pretorius’s reasons for rejecting some of the allegations proffered against the

three accused in the Coetzee matter. And those issues which were raised in standing order 109 are the same issues which are analogous and similar and salient as the same issues raised by the argument proffered by Advocate Joubert in this court. This court was not furnished with the reasons for the refusal of the application for funding but counsel who was briefed on behalf of the South African Police Services raised the very reasons which he by alluding to are these reasons which must have been predicated the decision taken by the

10 South African Police Services it is an advocate it is a creature of instruction. We cannot just take a reason from come to court and argue that we shall not be able to pay, where does he get it from? He gets instructions from the principal. So the fact that this court was not furnished with the reasons of the refusal by the South African Police Services does not detract from the fact that the South African Police Services can only, can only adduce legal, adduce the alleged failure of the legal conduct of accused 2 in the performance or conduct of his duties. All the failures the alleged failures infractions

20 which the South African Police Service can accuse accused 2 for having failed to comply with, they cannot be grabbed from the air they are predicated on standing order 109 which order Advocate Joubert had in court here and he was quoting from it. So the only document which could have been used lawfully to refuse the application for funding accused 2. That

document can only be the contents of standing order 9, 109.

Mr Dreyer wanted to argue that each case, he is correct; each case has to be judged on its own facts but here the facts are analogist that is anonymous. The document which is supposed to have been contravened by the Coetzee in their case and by accused 2 in this case it is standing order number 9, nothing else. There is no other document which is triable which we do not know of. The document which governs the application for funding for legal representation is

10 standing order 109 the document which entitles and empowers the South African Police Service for refusing to accord accused 2 legal representation funding is predicated on standing order 109. The court in the case of Coetzee dealt with the entirety of the document as quoted by Advocate Joubert in this court. And Judge Pretorius in the Coetzee case found that the interpretation by the South African Police Services of that the efficacy of that document was flawed and consequently he says the decision arrived at pertinently using the facts which are analogous to also accused 2 are flawed.

20 So this court must ask itself after the application, after the application of an enquiry in terms of section 342 of the Criminal Procedure Act, can it be cogently argued that this court did not have the right to conduct an enquiry as it did [indistinct] but the most compelling reason why this court says the judgment of Judge Pretorius is quite in having dealt

with the issues which emanate from standing order 109 is the fact that the same respondent, the South African Police Services who appeared in this court, who disqualified or refused to accord the 2nd accused legal funding for legal representation is the same respondent who was before Judge Pretorius in the Coetzee matter. Now [indistinct], the principal of [indistinct – 14:12] does it allow a litigant whose arguments in an analogous similar case are holus bolus rejected that he should be allowed to repeat the same, the same, the same arguments before this court which arguments were repeated, were rejected. Now the judgment of Pretorius is now the law of the land it is now the law of the land and the South African that is the respondent, the South African Police Services saw it fit not to appeal that judgment up to today it is not appealed. Actually Advocate Joubert consider that it is unlikely that condonation can be granted after the expiration of years. The judgment was not too; the judgment was delivered on 5 June 2018. I am giving judgment in this case of the Cosas Four, what is the date today?

20 MR NGOBENI: Today is the 4th.

COURT: The 4th of May 2022 still there is no indication or intention for by the South African Police Services that they intend to bring an application for condonation in order to appeal the judgment of Judge Pretorius which would in a sense act as a suspension of that judgment, in other words of

SS70/2021_rb
2022-05-04

66

JUDGMENT

Police Services of refusing to accord accused 2 legal funding. Yes, consequently I find that the South African Police Services as the successor entitled to the South African Police are in law obliged in terms of standing order 109 to provide legal assistance, funding for legal assistance and legal representation of accused 2 by not later than, when did we postpone the case to?

MT NGOBENI: 24 May.

COURT: By not later than 14 days hereof. We are fair we
10 want to give them an opportunity if they want to appeal or do whatever so that they must not say this judge hey, hey, hey [indistinct] because I could have said not later than tomorrow at 14:00 but I say not later than 14 days hereof which will be, what will be the date?

MR NGOBENI: The 24th

COURT: The 24th not later than the 24th okay and you want this matter to proceed on which day? The notice of set down.

MR NGOBENI: Was not yet determine.

COURT: Okay so when are you going to set the date down?

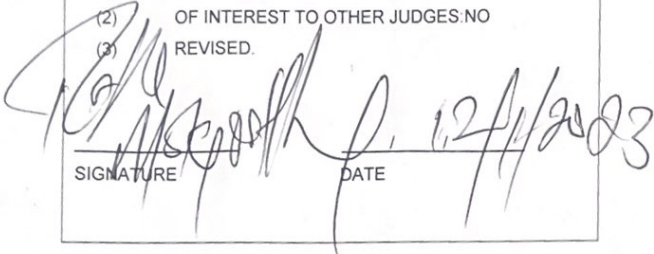
20 MR NGOBENI: Once we find out that accused 2 has attained his legal representative.

COURT: No he has attained it. The only question is what, why should the court not make an order that it must be reasonable costs of an advocate of not less than 10 years' experience?

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS70/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	DATE

In the matter between:

MAIDE CHRISTINA SELEBI

Intervening Applicant

In the matter between:

THE MINISTER OF POLICE

Applicant

And

RORICH CHRISTIAAN SIEBERT

First respondent

STATE

Third Respondent

COURT ORDER

Having heard Counsel and having read the record in respect of the applications in respect of;

1. The application for a condonation of the late filing of the application of the notice of appeal,
2. The application in respect of the notice of appeal,

The following Order is made,

1. The application for condonation of the late filing of the application for the notice of appeal is dismissed,
2. The application for the notice of appeal against the judgment delivered on the 4 May 2022 is dismissed.
3. The reasons of the judgment pertaining to the condonation application, and the application for the leave to appeal the judgment delivered on the 4 May 2022 will be furnished on 31 January 2023.

The Registrar

Date: 12 January 2022

The Minister of Police

The Commissioner of Police

The Intervening Parties

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 72747/2016

Date:

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
5/6/18 DATE	Pretorius SIGNATURE

In the matter between:

WILLEM HELM JOHANNES COETZEE

ANTON PRETORIUS

FREDERICK BARNARD MONG

THEMBISILE PHUMELELE NKADIMENG

1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

4TH APPLICANT

And

THE MINISTER OF POLICE

**THE PROVINCIAL COMMISSIONER FOR
GAUTENG, SOUTH AFRICAN POLICE SERVICE**

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

PRETORIUS J.

- (1) This is an application by the first, second and third applicants for the review and setting aside of the decision of the second respondent on 4 May 2016 to refuse the three applicants' applications for the payment of legal costs in the criminal trial. The first three applicants are accused numbers two, three and four in the indictment and are accused of the murder of Ms Nokuthula Simelane during 1983.
- (2) The three applicants furthermore require a declaration that the three applicants are legally entitled to assistance by the South African Police Service ("SAPS") for payment of the legal costs in the criminal trial and the necessary cost orders.
- (3) The fourth applicant was joined in this matter by court order on 29 March 2017. The fourth applicant supports the relief sought by the three applicants for the respondents to pay the reasonable legal fees of the three applicants in the criminal trial.

THE PARTIES:

- (4) The first applicant is Mr W J Coetzee, who in 1983 was the

Operational Unit Commander of the Security Branch ("SB") of the former South African Police ("SAP"). The first applicant and the second and third applicants were at the time members of the Soweto Intelligence Unit of the SB. It is common cause that this unit acted under instruction of Brigadier Hennie Muller, who is now deceased. He was then Divisional Commander of the SB, as well as Brigadier WF Schoon, who at the time was the Pretoria Headquarters Commander of Section C of the SB, the section in the SAP charged with combatting terrorism. The first applicant left the South African Police Services ("SAPS") on 30 April 1997.

- (5) The second applicant is Mr A Pretorius, who was second in command to the first applicant in the same unit in 1983. He left the SAPS on 30 April 1997.
- (6) The third applicant is Mr FB Mong, who was a subordinate member in the unit in 1983. He is currently still employed in the SAPS.
- (7) The fourth applicant is an adult sister of the deceased, Nokuthula Simelane, and acts on behalf of herself and her family, who was joined in this application by court order on 29 March 2017.
- (8) The first respondent is the Minister of Police. No relief is sought

against the first respondent, unless he opposes the present application.

- (9) The second respondent is the Provisional Commissioner of Police for Gauteng, SAPS.

ISSUES:

- (10) The court has to decide whether the Minister and/or the Commissioner, the first and second respondents, have a legal obligation to pay the criminal defence costs of the three applicants, as accused, in the criminal trial, State v MT Radebe and 3 Others (Case no.: CC19/2016).

CHRONOLOGY OF LITIGATION:

- (11) The chronology is important when the court has to decide whether the decision by the second respondent should be reviewed and set aside, and if doing so the matter should be remitted or whether the court should substitute the decision of the second respondent.
- (12) On 26 February 2016 the three applicants were arrested and charged with the murder of Nokuthula Simelane during September 1983. They were released on bail of R5 000 each and are currently still on bail.

- (13) On 14 March 2016 all three applicants applied, in terms of Standing Order 109, to the Police for legal assistance in the criminal matter. On 15 April 2016 the three applicants received a copy of the docket.
- (14) On 4 May 2016 the second respondent refused the three applicants' applications for legal assistance. On 15 June 2016 the attorneys for the applicants requested the second respondent to reconsider her refusal and on 7 July 2016 again requested a reconsideration. No reply was forthcoming.
- (15) On 27 September 2016 and 5 October 2016 the review application was served on the respondents respectively. Both respondents served a notice of intention to oppose – this notice was served out of time.
- (16) On 11 November 2016 the State Attorney was requested to file the record of proceedings by 18 November 2016. It was only filed on 24 November 2016.
- (17) On 8 December 2016 the applicants filed supplementary founding affidavits. On 17 January 2017 the State Attorney requested an extension until 30 January 2017 to file its answering affidavits. Once more the State Attorney did not adhere to the chosen date, but on 2 February 2017 requested a further extension until 9 February 2017.

Again the date was not adhered to, but the State Attorney requested a further extension to 17 February 2017. In the end the answering affidavits were only served on 22 March 2017 – more than a month after the date chosen by the State Attorney.

(18) After the joinder of the fourth applicant, she filed her founding papers on 30 March 2017. Once more the respondents' notice to oppose was served late. The respondents' answering affidavit was only filed on 18 May 2017, where after the applicants filed their replying affidavits, which was followed on 7 June 2017 by the fourth applicant's replying affidavit.

(19) On 7 July 2017 the fourth applicant filed heads of argument and on 14 July 2017 the applicants filed their heads of argument and practice note. The respondents only filed their heads of argument and practice note three months later on 13 October 2017. It is thus clear, that throughout these proceedings, the respondents failed to adhere to the Uniform Rules of Court in respect to time limits in which papers had to be filed.

BACKGROUND:

(20) The background to the application is common cause, but it is relevant and necessary to the facts in the current application. The criminal

case against the three applicants is that in 1983 the three applicants, whilst in the employ of the then South African Police, allegedly murdered Nokuthula Simelane ("Nokuthula"), a 23 year old university graduate and an underground operative of the African National Congress ("ANC"). Nokuthula was the sister of the fourth applicant.

- (21) She was viciously tortured and disappeared after the three applicants had failed in a "*kopdraai*" operation. This operation was allegedly perpetrated by the first, second and third applicants ("the applicants") as members of the Soweto Intelligence Unit of the SB.
- (22) Nokuthula was abducted at the Carlton Centre in Johannesburg during September 1983.
- (23) Nokuthula was detained at a safe premises, interrogated, tortured and assaulted by the three applicants for a number of weeks. This was done on the instructions of their commanding officers, Muller and Schoon. The purpose was to recruit her as an agent for the SB. This was admitted by the respondents. Nokuthula was treated in the most reprehensible, inhumane manner whilst in the custody of these members. She was repeatedly punched, kicked, slapped, suffocated with a bag, electrically shocked and denied toiletries and basic medicine. She could not walk unassisted and she was unrecognisable as her face was so badly swollen. According to the applicants they

dropped her at the Swaziland border after she had indicated that she would assist the SB. She was never seen again. To date the fourth applicant and her family still do not know what had happened to Nokuthula.

- (24) The fourth applicant tried through the years to get justice for her sister from the SAPS and the National Director of Public Prosecutions, to no avail. As a final resort she obtained a court order in 2015 to compel the National Prosecuting Authority to either conduct an inquest or prosecute the applicants. This resulted in the applicants being prosecuted for the murder of Nokuthula in the indictment of State v MT Radebe and 3 Others (Case No CC19/2016).
- (25) As a result of the indictment the applicants applied to the respondents to have their legal fees, in the criminal case, to be paid by the respondents. This application for assistance of payment of legal fees was in terms of Police Standing Order 109.
- (26) On 26 February 2016 the applicants appeared in the Pretoria Regional Court and were granted bail of R5 000 each. They have subsequently appeared on four further occasions; 29 March 2016, 25 July 2016, 20 September 2016 and 25 November 2016 when the matter was then postponed to 28 July 2017. On 4 May 2016 this application for assistance was refused by the second respondent. This refusal

resulted in the trial of the applicants to be delayed and postponed on several occasions so that the issue of payment of legal fees could be taken on review.

(27) After 35 years Nokuthula's family still do not know what had happened to her and where her body is. The Truth and Reconciliation Committee ("TRC") concluded in 2001 that the applicants had lied to the Commission about the severity of the torture and the duration thereof. They were thus only granted amnesty for her kidnapping, but were denied amnesty for the assault and torture. There was no application for amnesty for the murder of Nokuthula as the applicants deny that they had killed her.

(28) The reasons dealt with by the second respondent's legal team when refusing the application were that the applicants had exceeded their powers of duty, that it would be against State and public interest to grant legal assistance; that there is a conflict of interest as the applicants' version differs from that of three witnesses and that the State is the complainant. Furthermore, it was stated that two of the applications, that of first and second applicants were incomplete and that it would be difficult to recover the debt as the first and second applicants are no longer in the employ of the SAPS.

(29) It is important to note what the reasons for the decision not to provide

legal assistance were in the original decision and the reasons as set out in the Commissioner's, the second respondent's, answering affidavit.

(30) In the application form for assistance by all the applicants it is stated under clause "H": *"If the application is refused, the reasons for the refusal must be recorded in full."*

(31) The legal administration official of the second respondent did not recommend that the application for legal assistance be granted, but set out on 11 April 2016:

"(1) The member exceeded his powers when executing his duties.

(2) There is conflict of interest existing due to different versions of facts offered by employees involved in the same incident.

(3) It will be against the State and public interest to offer assistance as the state is a complainant."

(32) The Provincial Head: Legal Services similarly did not recommend the application and furnished the reason that the first applicant does not work for SAPS and *"recovery of any debt due to SAPS will be problematic"*.

- (33) The second respondent only noted that the application is not approved and that *"the member to apply for assistance for legal aid"*. There was no further reasons furnished by the second respondent, neither did she confirm the reasons furnished by the legal administration official, or the Provincial Head: Legal Services. Both these parties furnished the same reasons for not granting the application of the second applicant.
- (34) The same reasons were given by the legal administration official, but the Provincial Head: Legal Services noted *"I agree with the above reasons. The member was obeying an illegal instruction. Member must apply to Legal Aid"*.
- (35) The second respondent made the same note on the second and third applicant's application when refusing to grant legal assistance, namely *"the member to apply for assistance for legal aid"*. The recommendation by Colonel Nomdoe, the commander of the third applicant, that the third applicant should receive legal assistance from the SAPS and set out his reason for doing so as: *"member was on duty and obeying his commander's instructions"*.
- (36) There is no indication by the second respondent that she had considered the applications and reasons of her legal assistants, but

only a terse note that *“the member to apply for assistance for legal aid”*.

LEGAL BACKGROUND:

(37) Clause 4(4)(b) of the Standing Order 109 that provides:

“An application for assistance may be refused in the event of information showing that –

(b) it will be against state or public interest to do so;”

(38) Clause 4(1) and (2)(a) of Standing Order 109 sets out the grounds on which the second respondent can approve or refuse applications for legal assistance:

“(1) An employee may, subject to subparagraphs (2) and (3), only be provided with assistance in accordance with this Order if, at the time the alleged commission of the offence, such an employee acted or omitted to act when he or she should have acted in the execution of his or her duties.

(2) An employee does not qualify for assistance paid for by the Service, if he or she, at the time of the alleged commission of the offence, -

(a) intentionally exceeded his or her powers;”

- (39) It is clear that an employee, *“at the time of the alleged commission of an offence”* who was not disqualified in terms of paragraph 2(a) of the Standing Order, would be granted legal assistance. Clause 8 of the Standing Order deals with a separate procedure after conclusion of the criminal case.
- (40) The **South African Police Service Act and Internal Security Act**¹ conferred the police with extraordinary and draconian powers.
- (41) Section 35(3) of the **Constitution** provides:
- “Every accused person has a right to a fair trial, which includes the right-*
- (a) *to be informed of the charge with sufficient detail to answer it;*
- (b) *to have adequate time and facilities to prepare a defence;*
- (c) *to a public trial before an ordinary court;*
- (d) *to have their trial begin and conclude without unreasonable delay;*
- (e) *to be present when being tried;*
- (f) *to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;*
- (g) *to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice*

¹ Act 74 of 1982

would otherwise result, and to be informed of this right promptly;"

- (42) In considering the grounds of review the court has to keep in mind that the principle is that a review is not concerned with the correctness of a decision made, but whether and how the second respondent performed the function with which she was entrusted².

- (43) In **Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another**³ Navsa ADP held:

"So, both the process by which the decision is made and the decision itself must be rational. If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose."

- (44) The test to establish bias was set out in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others**⁴ *"whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has*

² MEC for Environmental Affairs and Development Planning v Clairison's CC 2013(6) SA 235 (SCA) at paragraph 18

³ [2017] 4 All SA 726 (SCA) at paragraph 82

⁴ 1999(4) SA 147 (CC) at paragraph 48

not or will not bring an impartial mind to bear on the adjudication of the case". This test applies in the present matter.

- (45) It is so that the party who relies on bias, or reasonably suspected bias bears the onus to prove this. The importance of procedural fairness is dealt with in **Joseph and Others v City of Johannesburg and Others**⁵:

"The importance of procedural fairness is well described by Hoexter:

'Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy'."

- (46) In **Minister of Health and Another v New Clicks South Africa**⁶ the Constitutional Court held that affected parties cannot make meaningful representations when they do not know what factors will be taken into consideration in a decision to be taken. In this instance it is alleged that the second respondent failed to inform the applicants of her decision to have regard to the TRC findings, as well as the statements

⁵ 2010(4) SA 55 (CC) at paragraph 42

⁶ 2006(3) SA 311 (CC) at paragraph 152

of the three witnesses.

- (47) In **Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another**⁷ the Full Bench found:

"Furthermore, the DG made his decision without having heard the applicant and without even being aware of the nature and substance of the applicant's submissions. In these circumstances, I am driven to the conclusion that the process that underlay the decision of the DG was procedurally unfair and falls to be set aside."

- (48) Section 8(1)(c)(ii) of **PAJA** provides:

"The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(c) setting aside the administrative action and-

(ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;"

⁷ 2005(3) SA 156 (WCC) at paragraph 78

NO LONGER IN EMPLOY OF SAPS AND DIFFICULT TO RECOVER DEBT:

- (49) In paragraphs 60 and 61 of the second respondent's answering affidavit her reason for refusing the first and second applicant's application was, *inter alia*, that they "...were no longer in the employ of the SAPS, they accordingly could not qualify for assistance...". This decision by the second respondent was based on the definition of "employee" in Standing Order 109, where "employee" is defined as "employee means any person in the employment of the Service...".
- (50) Although the first and second applicants left the SAPS on 30 April 1997, they were members of the SAP in 1983 when this incident took place. The decision that it would be problematic to recover their debt, should it become necessary, can in no manner be regarded as sufficient reason for denying the first and second applicants' legal assistance. Such a reading and interpretation of the Standing Order would lead to absurdities where members resigning from the SAPS are prosecuted for alleged crimes committed whilst in the SAPS, at the behest of their superiors and will not be able to rely on legal assistance from the SAPS. There is no evidence that it would be impossible to recover the debts from the first and second applicants. This reasons cannot stand.
- (51) If one applies this decision to the application of the third applicant, the

same reason should apply as he was not a member of the SAPS, but also a member of the SAP at the time and is still in the employ of the SAPS.

- (52) It is important to note that the second respondent does not regard the SAPS as the successor in title of the SAP and does not concede that all the liabilities and responsibilities attached to the SAP, will apply in equal measure to the SAPS, the successor in title of the SAP. This cannot be correct. The fact that the applications were dealt with in terms of Standing Order 109 confirms that the second respondent did consider the applications, but misdirected herself by finding that they were no longer in the employ of the SAPS. She did not take the provisions of paragraph 4(1) where it specifically provides that "*at the time of the alleged commission of the offence...*" into consideration. All three applicants were employees of SAP at the time of the commission of the alleged offences in 1983 and were under command and instruction of Brigadier Hennie Muller. The court has to consider the prevailing circumstances during 1983, at the height of the apartheid government's war against the liberation movements. This cannot simply be negated. I find that all three applicants were members of the SAP and as such qualify for legal assistance.

- (53) I must agree with the applicants that this is such a serious misdirection by the second respondent that it justifies the setting aside of her

decision not to provide legal assistance to the applicants.

INCOMPLETE APPLICATION FORMS:

- (54) The incompleteness of the application forms were no longer an issue when the matter was argued and I will not deal with it, save to comment that it was impossible for first and second applicants to get their commanding officers to complete the forms, as Brigadier Muller is deceased.

LAWFUL, REASONABLE AND PROCEDURALLY FAIR:

- (55) When making a decision, the decision must be lawful, reasonable and procedurally fair. The second respondent set out in her decision in the first applicant's application:

"Not approved member to apply for assistance for legal aid."

In the third applicant's application she noted her decision as follows:

"The member must not receive legal assistance, he can apply for legal aid."

- (56) The applicants contend that the second respondent failed to conduct a fair and unbiased investigation. In her answering affidavit she disclosed that she had considered the statements by the three witnesses, namely, M E Sephufhi, N L Selamolela and N N Veyi. The

applicants were not aware that she had done so until the answering affidavit was served. They did not have an opportunity to deal with these statements. Counsel for the second respondent conceded, during argument, that it is problematic that she did not inform the applicants of this fact.

- (57) It is also clear from her answering affidavit that she had taken into consideration what had taken place at the TRC. She had formed a view in this regard without granting any of the applicants an opportunity to deal with her reliance, *inter alia*, on the findings of the TRC. She should have informed the applicants that she would take the findings of the TRC into consideration and not have waited to disclose it in her answering affidavit. There was no indication on their application forms by either the Legal Administration Officer or the Legal Executive Officer that the findings by the TRC would be considered.

- (58) There is no indication whether she considered all the facts before her or which facts she had considered. Even if it is so that she need not give reasons, she must at least indicate that she had considered the matter and that she had taken the facts into consideration when making her decision. In the application form, under clause "H", it is set out:

“(1) The member exceeded his powers when executing his duties.

(2) There is conflict of interest existing due to different versions of facts offered by employees involved in the same incident.

(3) It will be against the State and public interest to offer assistance as the state is a complainant.”

These reasons were the reasons as ascertained and set out by the Legal Administration Official and the Executive Legal Officer of the second respondent. There is no indication which of these reasons, or whether any of these reasons persuaded her not to grant legal assistance.

- (59) In these circumstances I find that the applicants have a reasonable apprehension of bias and that the second respondent followed an unfair procedure. The process was not impartial and there is thus a reasonable apprehension of bias against the three applicants.

EXCEEDED POWERS OF DUTY:

- (60) In her answering affidavit the second respondent deals⁸ with section 205(3) of the **Constitution**⁹, as well as with the provisions of the **South African Police Service Act**¹⁰. These Acts were not in

⁸ In paragraph 39

⁹ Act 108 of 1996

¹⁰ Act 68 of 1995

existence during 1983. This application has to be dealt with according to the prevailing legislation in 1983 and therefor her reliance on the Constitution and provisions of the **South African Police Service Act** is totally flawed. The applicants were not members of the SAPS in 1983, but members of the erstwhile SAP. There was no provision in these Acts referring to the police.

- (61) The second respondent had to consider the applicants' applications with reference to the prevailing conditions in 1983.
- (62) All the applicants dealt with the *de facto* situation during 1983 with reference to the Truth and Reconciliation Committee's findings. The three applicants' position, at the time, was that they were members of the Security Branch. It was at the height of the resistance against the apartheid regime by the ANC and other freedom organisations.
- (63) It is apposite to take into consideration what the Amnesty Committee said in Jan Hattingh Cronje's application for amnesty in terms of the **Promotion of National Unity and Reconciliation Act**¹¹:

"...Both van der Merwe and Vlok gave evidence of a general nature explaining circumstances under which members of the police worked during the time of political turmoil in the country,

¹¹ Act 34 of 1995

and also how they might have understood their instructions in the light thereof...

It may shorten future proceedings if the evidence could be summarised in this decision and simply be referred to in future without the necessity of repeating it in all future hearings. Almost all policemen appearing before us joined the police force after the National Party became the government of South Africa in 1948 and implemented the apartheid policy. They were brought up under this doctrine which was supported by schools and all the Afrikaans churches. There was rarely any voice in the circles they moved in, condemning the policy. On the contrary the churches proclaimed the policy to be in accordance with the scriptures and even acted against preachers like the Rev. Beyers Naudé who spoke out against it. As policemen they were indoctrinated to defend the policy and the government of today even with their lives should it be necessary. They accepted the legally enforced environment as the accepted and acceptable social structure of the country...

Their functions were extended beyond the primary police functions of combating crime. A security branch was created with the ultimate task of keeping the government in power to enable them to work out a political solution if and when they could succeed in doing so...

They did the work of soldiers, became involved in killing

contrary to the normal police function of keeping the peace and combating crime in accordance with the ordinary and customary laws applicable to police forces generally. Violence escalated since 1976 and during the 1980's a full scale revolutionary war developed in South Africa."

- (64) The expert evidence of Adv Ntsebeza SC and Mr Dutton, furnished by the fourth applicant, cannot be disregarded. This evidence was not dealt with by the Commissioner, as she only made a bare denial dealing with their affidavits.

- (65) Adv Ntsebeza SC explains the situation as follows:

"The kidnapping, torture and murder of Nokuthula Simelane in 1983 by members of the Security Branch happened in a particular context which must be brought to the attention of this Honourable Court. This context is one where state sanctioned extra judicial killings and rampant criminality was the order of the day."

And:

"The TRC in its Final Report concluded that at a certain point, which coincided with PW Botha's accession to power in 1978, the South African state through its security forces, and in particular, the SAP, ventured into the realm of criminality as a matter of state sanctioned policy (TRC Report, Vol 5 Ch. 6,

Findings and Conclusions, p 212). This period ran from the late 1970's to the early 1990's."

Mr Dutton, an international policing and investigation expert, came to the following conclusion in the present matter:

"I conclude that the accused acted under the direct and indirect instruction of their SAP commanders. An important function of the SB was to obtain, frequently by illegal means, operational information from arrested or captured activists. The modus operandi employed by the Security Branch at that time also involved so-called "kopdraai" operations which routinely included abduction, torture and the elimination (murder) of captives who refused to become informers."

- (66) It is clear that during 1983, at the height of the resistance of the freedom fighters in the Republic of South Africa, the police used all and any methods to safeguard the apartheid regime. I cannot find, and it is not incumbent on me to find whether the applicants acted in a manner, at that particular time, exceeding their powers. It will be for the trial court to make such a determination.
- (67) I have considered all the arguments, documents and evidence and find that the second respondent erred in disqualifying the three applicants for legal assistance on this ground.

**AGAINST THE STATE AND PUBLIC INTEREST AND IN CONFLICT BY
OTHER EMPLOYEES:**

(68) The second respondent set out in the answering affidavit¹² “...*the facts relied on by the State in prosecuting the applicants are exceptionally serious and this in itself is indicative that it would be against the State or the public interest to offer financial assistance to the applicants*”.

(69) According to the second respondent an application may be refused if it shows “*that it will be against the state or public interest to do so or a conflict of interest exists due to different versions of fact offered by employees involved in the same incident*”.

(70) This averment by the second respondent is in relation to statements by Messrs Sephuthuli, Selamolela and Veyi who were also allegedly involved in the incident. First of all it must be mentioned that these are persons who the State may call during the criminal trial as witnesses – they are not co-accused of the applicants. It is evident that the second respondent took the contents of the affidavits of the three witnesses into consideration when deciding whether to provide legal assistance.

(71) It was not conveyed to the three applicants that she had these three

¹² Paragraph 5

statements in her possession. She further did not inform the applicants that she intended considering these statements when deciding whether the three applicants qualify for legal assistance. She failed to grant the applicants the opportunity to deal with the contents of these conflicting statements and to make representations to her in respect of the three statements. Her reason for doing so is set out as *“...a conflict of interest exists due to the different versions of fact offered by the employees involved in the same incident...”*.

- (72) As was pointed out by counsel for the fourth applicant the second respondent misconstrued this requirement. The three policemen are not standing trial with the three applicants and therefor no conflict of interest can arise. The three applicants' versions amongst themselves are non-contradictory and the SAPS need not support employees, where they are co-accused, who contradict one another, as it is simply not the case in the present matter.
- (73) The version that the third applicant had provided these statements cannot be true as the three applicants' applications for assistance were submitted to the second respondent on 14 March 2016. Thereafter, on 15 April 2016, almost a month after submitting their applications, the case docket was handed to the applicants. The record for review in terms of Rule 53 was prepared by the second respondent and her office and was served on the applicants' attorneys on 24 November

2016. According to this record¹³ the statements of the three persons were already on file on 11 April 2016 and it appears that it was received by the respondents on 23 March 2016. This was done after the applicants had applied for legal assistance. The court finds that the applicants were not aware that these documents would be used by the second respondent to reach a decision. The *audi alteram partem* rule was breached as the applicants were not granted the opportunity to deal with the contents of these statements.

- (74) It is clear that the second respondent did not have the indictment and summary of substantial facts in her possession when she had initially made the decision. She could only have become aware of it when she read the applicants' founding affidavit in this application. She did not rely on this ground when dealing with the applications for legal assistance as she did not have the indictment at the time. She supplemented her reasons in the answering affidavit when she set out:

"43. The torture of Ms Simelane, which may well have culminated in her murder and perpetrated under the apartheid regime, is against both the State and public interest and therefore the decision not to approve the applications for assistance on this basis was rational or reasonable and in line with the Standing Order.

44. The seriousness of the offence also cannot be

¹³ Page 50

overlooked."

Once more the applicants were not afforded the opportunity to deal with this reason and therefor the *audi alterem partem* rule was once more not adhered to. This reason was thus unreasonable and procedurally unfair.

STATE AS COMPLAINANT:

(75) Counsel for the respondents conceded that this ground should be disregarded as incorrect in this application.

(76) I have considered all the facts, arguments and authorities. I find that the decision by the second respondent has to be set aside due to finding that at the time, in 1983, the applicants were in the employ of the SAP. I further find that the second respondent did not act in a reasonable, lawful and fair manner by not adhering to the *audi alteram partem* rule and not informing the applicants that she had considered the applications. Her investigation was not fair and unbiased if one has regard to the reasons for her decision set out in her answering affidavit. It is furthermore not for this court to decide whether the applicants had exceeded their powers of duty. The trial court will have to make that decision. In the event that the SAPS will have to recover the money for legal assistance, after the trial, Standing Order 109 provides for such an eventuality. The last reason that there were conflicting versions by employees shows that the second respondent

had not carefully considered this averment. It is quite clear that the three witnesses who are, or were, in the employ of either the SAP, or SAPS, may be giving conflicting versions as to what had transpired in 1983, but they will be witnesses and not co-accused. Taken cumulatively I find that the first respondent acted in a biased, unfair and irrational manner when I apply the test as set out in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** and the principles as discussed in the cases quoted above. The decision has to be set aside.

SUBSTITUTION:

(77) The court was requested by all the applicants that should the court find in favour of the applicants and review and set aside the decision that the court should substitute its decision in terms of section 8 of the **Promotion of Administrative Justice Act**¹⁴ ("PAJA").

(78) In **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another**¹⁵ the court dealt with exceptional circumstances and held: *"an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances"*.

The court dealt with the necessary factors and set out¹⁶:

¹⁴ Act 3 of 2000

¹⁵ 2015(5) SA 245 (CC) at paragraph 35

¹⁶ 2015(5) SA 245 (CC) at paragraph 47

“The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.”

The court held¹⁷ that where the court has found an administrator to be biased it would be *“unfair to ask a party to resubmit itself to the administrator’s jurisdiction”*.

- (79) This court has firstly to determine whether it is in as good a position as the administrator to make the decision, secondly whether the decision is a foregone conclusion and thirdly, whether remitting the decision will result in a further delay which would cause prejudice to all four applicants and, in this instance, to the community at large.

- (80) I must agree with counsel for the fourth applicant that the respondents

¹⁷ 2015(5) SA 245 (CC) at paragraph 54

have not covered themselves in glory from the inception of the present litigation. Not only did the respondents not adhere to time limits and court rules, but the state machinery had throughout, failed the deceased and her family abysmally.

(81) The delay has lasted decades. Since the indictment of the three applicants, four postponements had already been granted in order to resolve the issue of legal assistance.

(82) The state has the duty in terms of section 7(2) of the **Constitution** to *“respect, protect, promote and fulfil the rights in the Bill of Rights”*. The National Prosecuting Authority’s prosecution policy states the maintenance of law and order within a human rights culture requires *“effective and swift prosecution”*.

(83) The fourth applicant has been pleading for years, and had to resort to litigation, to have the State institute criminal proceedings against the three applicants. This has caused suffering to the fourth applicant and her family – her father and brother had passed away before getting closure as to the whereabouts of Nokuthula. Her mother is an elderly lady, suffering from ill-health.

(84) According to counsel for the fourth applicant this delay has betrayed

the constitutional compact which was envisaged by the **Interim Constitution** and the spirit in which the TRC process was instituted.

(85) In **Mvumvu and Others v Minister for Transport and Another**¹⁸ the Constitutional Court stated:

"In our young democracy, and because of our history, which was characterised by inequalities and discrimination, constitutional breaches such as the present must be redressed effectively, by, where possible, vindicating the infringed rights fully. This court in Fose v Minister of Safety and Security said:

'Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility

¹⁸ 2011(2) SA 473 (CC) at paragraph 48

in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal."

- (86) It would be in the public interest if this trial commences as soon as possible to ensure justice not only to the applicants, but to the fourth applicant and her family as well, and society as a whole. It is further in the public interest that the applicants should have proper legal representation and a fair trial as soon as possible. The commencement of the trial has already been unduly delayed due to the decision not to assist the three applicants with payment.
- (87) I find that I am in as good a position as the second respondent to make the decision. All the facts are before me. There is no expert knowledge required to make a decision. Due to the history of the matter, the reasons for the decision by the second respondent, I find that on a balance of probabilities the decision by the second respondent is a foregone conclusion.
- (88) The second respondent's refusal is against the rights of the fourth applicant and her family and the community at large, as well as the three applicants.
- (89) The present matter is such a matter as mentioned in the **Trencon** and

Mvumvu case. I find that, as I have found that the second respondent was acting procedurally unfair and biased, that there is no merit in the reasons provided by the SAPS to justify the decision. An effective remedy, in the current situation will be a swift decision. Having regard to not only the history of the problems the fourth applicant encountered to get the National Prosecuting Authority to institute proceedings, but also the tardy manner in which the defence dealt with the present application, I am satisfied that a further, prolonged delay will be caused should the matter be remitted. It has taken more than 30 years for Nokuthula's family to get to the stage where they may be granted truth, justice and closure. The severe continued delay to deal with this case can never be in the interest of justice. This is reason enough to substitute the second respondent's decision with that of the court.

(90) The applicants are entitled to proper legal assistance which can only be achieved, in the circumstances, where such assistance is provided by SAPS to pay their legal costs in the criminal trial.

(91) In the result the following order is made:

1. The decision by the second respondent as communicated to the applicants on 4 May 2016, to refuse their applications for assistance with the payment of legal costs in a criminal matter, namely *The State v MT Radebe and 3 Others* (case no. CC19/2016) is reviewed and set aside;

2. The applicants are legally entitled to assistance by the SA Police Service with the payment of reasonable legal costs in the criminal matter of The State v MT Radebe and 3 Others (case no. CC19/2016);
3. The first and second respondents are ordered to pay the costs of the applications including the costs of two counsel, where applicable, jointly and severally, the one paying the other to be absolved.



Judge C Pretorius

Case number : 72747/2016

Matter heard on : 15 May 2018

For the 1st, 2nd & 3rd Applicants : Adv. M. D. du Preez SC

Instructed by : Steyn Wilson Attorneys

For the 4th Applicant : Adv. Muzi Sikhakhane SC

Adv. Howard Varney

Instructed by : Webber Wentzel Attorneys

For the Respondent s : Adv. N H Maenetje SC

Adv. S. Tilly

Instructed by : State Attorney

Date of Judgment : 5 June 2018

05 December 2022

OPEN LETTER TO THE MINISTER OF POLICE

Dear Honourable Minister Bheki Cele,

APARTHEID ERA CASES: COSAS 4 & CAIPHUS NYOKA: REFUSAL OF SAPS TO PAY LEGAL COSTS OF FORMER SAP OFFICERS

We write to you on behalf of the families of apartheid-era victims in the [COSAS 4](#) and [Caiphus Nyoka](#) cases, whom we support in their efforts to reach justice and closure.

The COSAS 4 murders took place more than 40 years ago while Caiphus Nyoka was murdered more than 35 years ago. The window of opportunity to bring justice to the perpetrators in these cases is fast closing. Most of the suspects have already died and the few remaining are in their twilight years and could die at any time or become medically unfit to stand trial.

Ms Maide Selebi, the sister of the late Eustice Madikela; Ms Tryphina Mokgatle, the sister of the late Zandisile Musi; Ms Thandi Nhlapo, the niece of the late Fanyana Nhlapo; Mr Tshepo Matabane, the son of the late Ntshingo Matabane (the families of COSAS 4); and Ms Alegria Nyoka, the sister of the late Caiphus Nyoka have asked us to bring to your attention their disappointment with the [refusal](#) of the South Africa Police Service (SAPS) to pay the legal costs of the former South African Police (SAP) officers accused of the murders of the COSAS 4 and Caiphus Nyoka in official police operations during the 1980s.

But for the refusals, both trials could very well have been concluded this year, bringing much needed closure to the families and their communities. It would also have demonstrated the commitment of the State to finalizing the long-delayed apartheid-era cases.

The refusals will result in the delay of both trials by several years, leading to their likely collapse. The approach of SAPS has become the biggest obstacle to the finalisation of the few remaining apartheid era cases. Ironically, this means that the work of the Directorate for Priority Crimes Investigations (DPCI) in unearthing evidence of these decades old crimes is likely to come to naught.

The refusal flies in the face of the 2018 [judgment](#) in the *Coetzee case* in which the SAPS were ordered by the Pretoria High Court to [pay the legal fees](#) of the former Security Branch officers accused of the murder of Nokuthula Simelane in 1983. Your office declined to appeal this judgment. The litigation delayed the criminal trial by years during which time 2 of the 4 accused died. That case is now further delayed, potentially for years, as one of the two remaining accused prepares to challenge an assessment declaring him mentally fit to stand trial.

Although there is no material distinction between *the Coetzee case* and the COSAS 4 and Nyoka cases, the SAPS have refused to pay the reasonable legal costs in the latter cases. The refusal in the COSAS 4 matter is also in defiance of a [court order](#) handed down by Judge Mokgoathleng on 4 May 2022. Your office has appealed this order on purely technical and procedural grounds. This appeal will take years to resolve.

The intransigence of SAPS on this matter is also inconsistent with its past practice of covering the legal costs of former police officers in the reopened inquests into the deaths in detention of Ahmed Timol, Neil Aggett and Hoosen Haffeejee. Had the SAPS refused such payments these historic cases would not have proceeded.

While the payment of the legal fees of police officers who murdered anti-apartheid activists sticks in the throat, the officers in question were acting under orders and carried out such crimes in the course and scope of their employment with the former SAP. The extra-judicial killing of opponents of apartheid was state sanctioned policy at the time. The SAPS is the successor in title to the SAP and must assume its legal responsibilities, as held by the court in the Coetzee matter.

It is not clear why you would want to associate yourself with an approach that is likely to see the collapsing of the last few remaining apartheid era cases. Aside from the long delayed Nokuthula Simelane case there are currently only 2 apartheid era cases before the courts (COSAS 4 and Nyoka). The [political interference](#) that suppressed the investigation and prosecution of the apartheid-era cases has ensured that the vast majority can never be resurrected. This is because most suspects and witnesses have already died. It is likely that only a handful of these cases will ever make it to court. Accordingly, the impact on the policing budget will be modest.

Since the financial implications on the State are not unduly substantial, it must be asked what is driving the approach of the SAPS that is upending decades-long delayed criminal trials, involving cases of great significance to South Africa's struggle for freedom and democracy.

The families are of the view that there are elements within the SAPS who wish to protect apartheid-era perpetrators from justice through the orchestrating of further delays, which will result in the collapse of the few remaining cases. In this regard it is telling that the former Security Branch accused in the COSAS 4 case, Lt Col C S Rorich, is not opposing your appeal of the court's 4 May 2022 order compelling you to pay his legal costs.

We urge you to change course and not inadvertently advance the interests of apartheid-era perpetrators. It is their strategy to engineer endless delays in order to escape justice. Your current approach to the legal costs question plays directly into their hands.

After waiting some 40 years for justice and closure the families should not have to endure the pain, suffering and indignity of further delay. Should the accused die or become mentally unfit to stand trial at the end of the litigation, the prejudice visited upon the family and the community will be irreversible and incalculable. Responsibility for such an outcome will be laid squarely at your door.

Please do not hesitate to contact the writer should you need any further information or if you would like to meet with the Foundation and the families.

Yours faithfully,

Dr Zaid Kimmie



Executive Director

Foundation for Human Rights

For media queries, please contact Mx. Kholekile Mnisi, Media and Communications Specialist
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A just society for all

05 December 2022

OPEN LETTER TO THE MINISTER OF POLICE

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Foundation for Human Rights, NPC, (Registration No.: 95/08044/08)

Supervisory Board: Ms Y Sooka (Chairperson), Adv L Mofokeng (Deputy-Chair), Mr A Stofile (Treasurer), Dr P Lehohla, Prof L Cairncross, Judge M Chetty, Prof J Klaaren, Dr Z Kimmie (Executive Director)

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While the payment of the legal fees of police officers who murdered anti-apartheid activists sticks in the throat, the officers in question were acting under orders and carried out such crimes in the course and scope of their employment with the former SAP. The extra-judicial killing of opponents of apartheid was state sanctioned policy at the time. The SAPS is the successor in title to the SAP and must assume its legal responsibilities, as held by the court in the Coetzee matter.

It is not clear why you would want to associate yourself with an approach that is likely to see the collapsing of the last few remaining apartheid era cases. Aside from the long delayed Nokuthula Simelane case there are currently only 2 apartheid era cases before the courts (COSAS 4 and Nyoka). The [political interference](#) that suppressed the investigation and prosecution of the apartheid-era cases has ensured that the vast majority can never be resurrected. This is because most suspects and witnesses have already died. It is likely that only a handful of these cases will ever make it to court. Accordingly, the impact on the policing budget will be modest.

Since the financial implications on the State are not unduly substantial, it must be asked what is driving the approach of the SAPS that is upending decades-long delayed criminal trials, involving cases of great significance to South Africa's struggle for freedom and democracy.

The families are of the view that there are elements within the SAPS who wish to protect apartheid-era perpetrators from justice through the orchestrating of further delays, which will result in the collapse of the few remaining cases. In this regard it is telling that the former Security Branch accused in the COSAS 4 case, Lt Col C S Rorich, is not opposing your appeal of the court's 4 May 2022 order compelling you to pay his legal costs.

We urge you to change course and not inadvertently advance the interests of apartheid-era perpetrators. It is their strategy to engineer endless delays in order to escape justice. Your current approach to the legal costs question plays directly into their hands.

After waiting some 40 years for justice and closure the families should not have to endure the pain, suffering and indignity of further delay. Should the accused die or become mentally unfit to stand trial at the end of the litigation, the prejudice visited upon the family and the community will be irreversible and incalculable. Responsibility for such an outcome will be laid squarely at your door.

Please do not hesitate to contact the writer should you need any further information or if you would like to meet with the Foundation and the families.

Yours faithfully,

Dr Zaid Kimmie



Executive Director

Foundation for Human Rights

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