

**ANTON PRETORIUS**

Sixth Respondent

**FREDERICK BARNARD MONG**

Seventh Respondent

**MSEBENZI TIMOTHY RADEBE**

Eighth Respondent

**WILLEM SCHOON**

Ninth Respondent

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**SUPPORTING AFFIDAVIT OF ALEXANDER LIONEL BORAINÉ**

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I, the undersigned,

**ALEXANDER LIONEL BORAINÉ**

state under oath as follows:

- 1 I am an adult male. I am currently retired. I was formerly the Deputy-Chairperson of the Truth and Reconciliation Commission ("TRC" or "the Commission") constituted in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act" or "the TRC Act").
- 2 I founded the International Center for Transitional Justice (ICTJ) and served as its first president. The ICTJ assists governments and civil society in the

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*Alexander Lionel Borainé*

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construction and implementation of transitional justice programs in many countries around the world. A significant part of its work is based on South Africa's experience of the TRC, which is of great interest to governments and people around the world.

- 3 From 1998 to 2001, I served as professor of law at New York University and as director of the New York University Law School's Justice in Transition Program. From 1986 to 1995 I headed two South African non-profit organizations concerned with ending apartheid and addressing its legacy. I was a member of the South African Parliament from 1974 to 1986, and served as president of the Methodist Church of Southern Africa from 1970 to 1972, having been ordained as a Methodist Minister in 1956.
- 4 I hold degrees from Rhodes University in South Africa, Oxford University in England, and Drew University in the United States, as well as seven honorary doctorates from universities around the world. I was a Global Visiting Professor of Law at the New York University School of Law's Hauser Global Law School Program.
- 5 The facts contained in this affidavit are within my own personal knowledge, unless the contrary appears from the context, and are to the best of my knowledge and belief, both true and correct.

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**INTRODUCTION**

6 This application seeks to, among other things, compel the National Prosecuting Authority ("the NPA") to establish an inquest in the case of Nokuthula Simelane, who was abducted, tortured and forcibly disappeared by members of the Security Branch of the former South African Police ("SAP") in 1983.

7 I have read the founding affidavit of Thembisile Phumelele Nkadameng deposed to in this matter. I confirm that I agree with the submissions and views contained therein as they relate to the TRC and South Africa's transition.

8 The scheme of this affidavit necessitates me dealing with –

8.1 aspects of the TRC report;

8.2 the constitutional compact with victims;

8.3 concluding remarks.

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**THE TRC REPORT**

9 The TRC was obliged in terms of section 4(e) of the Act to prepare a comprehensive report setting out its activities and findings based on factual and objective information and evidence collected or received by it or placed at its disposal. On 29 October 1998, and in compliance with section 4(e) of the TRC Act, a report styled as the Truth and Reconciliation Commission of South African Report ("the TRC Report") was handed to President Nelson Mandela. The TRC Report was subsequently tabled in Parliament in accordance with section 44 of the TRC Act. The TRC Report comprises five volumes of approximately 2250 pages. A substantial portion of Volume 5 deals with victims of gross violations of human rights.

10 In its Final Report released on 21 March 2003 the Commission stressed that the amnesty provision should not be seen as promoting impunity; and highlighted the imperative of "a bold prosecution policy" in those cases where amnesty has not been applied for in order to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law. In Volume 6, Section 5, Chapter 1 at paragraph 24 we stated that:

**"it has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of**

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**impunity or of contravening its obligations in terms of international law."**

- 11 In Volume 5 of the Report at paragraph 14 we specifically called for the investigation and prosecution of those perpetrators who had refused to apply for amnesty.
- 12 At Volume 6, Section 5, Chapter 4 at paragraph 94 the Commission called upon the State and in particular the National Prosecuting Authority to investigate unsolved disappearance cases.
- 13 I have noted with despair that the South African Police Service (SAPS) and the NPA have done very little to pursue those cases in which amnesty was denied or not applied for. In fact their performance must be described as abysmal. In my considered view, this can only have been the result of a concerted decision or policy to abandon these cases. The evidence put up in this application supports this view.

#### **A CONSTITUTIONAL COMPACT WITH VICTIMS**

- 14 There is nothing in the constitutional and statutory design of the TRC process which contemplated the extension of the rights of perpetrators to amnesty or indemnity from prosecution. Indeed it was specifically envisaged that criminal

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investigations and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or had failed to apply for amnesty. This lay at the heart of the compact struck with victims.

- 15 An examination of the postscript to the *Constitution of the Republic of South Africa Act 200 of 1993* ("the Interim Constitution") reveals no direct or inferred suggestion that the TRC process would open the door to further opportunities for perpetrators to escape justice outside of the TRC's amnesty's provisions. The postscript reflected the outcome of a negotiated settlement between the former conflicting parties. In order to achieve the objectives of national unity and reconciliation there would be no pursuit of victor's justice, but neither would there be a blanket amnesty for perpetrators. The postscript accordingly contemplated the establishment of mechanisms, criteria and procedures, all regulated by law, through which amnesty would be dealt with:

#### **"NATIONAL UNITY AND RECONCILIATION**

**This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.**

**The pursuit of national unity, the well-being of all South African**

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**citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.**

**The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.**

**These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.**

**In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.**

**With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.**

**Nkosi Sikelel' i Afrika. God seën Suid-Afrika.**

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**Morena boloka sechaba sa heso. May God bless our country.**

**Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika."**

- 16 Such a far reaching programme required a severe limitation of the fundamental rights of the victims of human rights violations. This was justified in the postscript by the pressing need to promote national unity and reconciliation and to cross the historic bridge between the past of a deeply divided society to a future founded on democracy and peaceful co-existence. The conditional amnesty was authorised for the specific objective of facilitating a peaceful transition towards a democratic order.
- 17 The principles set out in the postscript were reflected in the design of the legislation. Perpetrators who were granted amnesty received amnesty or immunity from criminal prosecution and immunity from civil law actions. Victims in these matters were unable to proceed with claims for compensation against amnestied individuals or against organisations that may have been vicariously liable for the actions of such perpetrators. Victims who were registered as victims in terms of the Act were however entitled to reparations as approved by Parliament. Conversely, those perpetrators who were refused amnesty or who chose not to approach the TRC faced both criminal prosecutions by the State and civil law claims brought by victims.

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- 18 South Africa's truth and reconciliation design as encapsulated in the postscript to the Interim Constitution and the Act required the sacrifice of the fundamental rights of victims in order to advance national unity and reconciliation. In so doing the State entered into a compact with victims. This compact required the State to take all reasonable steps to prosecute deserving cases in respect of offenders who were not amnestied. It is with great sadness that I must note that the State has done little to meet its obligations to victims in terms of this compact.
- 19 Most victims accepted the necessary and harsh compromises that had to be made in order to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those who did not qualify for amnesty. This part of South Africa's historic pledge with victims has not been kept.
- 20 The Interim Constitution specifically authorised the suspension of justice and the rule of law in order to build a constitutional democracy. These measures were specifically intended to apply in the transitional period. They were never intended to roll over indefinitely. The TRC was intended to have a limited life in order to complete its constitutional mandate. The limitation of fundamental rights as permitted by the TRC Act was to be confined to the transitional period from the violent past to the democratic future. That democratic future is the current South Africa. The "historic bridge" has been crossed. Today,

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South Africa enjoys one of the most respected and stable democracies in the world. It cannot be said that prosecuting those who declined to participate in the TRC process will threaten our democracy.

- 21 Measures taken to limit justice in present times are not taken to ensure the survival of our constitutional democracy but rather for the sake of expedience. The barter of the rule of law for expedience is not acceptable. Indeed, such a barter is manifestly offensive to the values upon which the new South African democratic state is founded, namely human dignity, equality, the advancement of human rights, the supremacy of the constitution and the rule of law.

#### **THE FAILURE TO INVESTIGATE AND FINALIZE THE TRC CASES**

- 22 The failure and/ or extended delay in investigating and resolving the enforced disappearance of Nokuthula has caused unimaginable pain to her family. In addition, the interference with the work of the NPA and the abandonment of the TRC cases has:

- 22.1 Seriously eroded the human rights culture established by the Constitution;

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- 22.2 Undermined the recommendation by the TRC that the NPA should prosecute those who failed to apply for amnesty or who were refused amnesty;
- 22.3 Interfered with the ability of the NDA to uphold and protect the Constitution and the fundamental rights entrenched therein;
- 22.4 Violated the fundamental rights of victims of apartheid-era crime;
- 22.5 Allowed perpetrators to escape justice and accountability without any obligation to publicly acknowledge their wrongdoing and perform community service or reparation.
- 23 It seems to me that the government has gone out of its way to afford perpetrators every last avenue to escape justice and accountability. Given that Apartheid era offenders were afforded a special and generous dispensation during the life of the TRC to apply for amnesty and escape criminal sanction, it is not acceptable that those from this group who chose to spurn the TRC process; and those who were denied amnesty, are now afforded further avenues to escape justice.

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**CONCLUSION**

- 24 The failure or refusal of the authorities to attend to Nokuthula's case timeously represents a terrible betrayal of Nokuthula herself. It is a betrayal of what she struggled and died for.
- 25 The abandonment of the TRC cases also represents a betrayal of all those who participated in good faith in the TRC process. It completely undermines the very basis of the South African TRC amnesty process which required that those who spurned the process and those denied amnesty would face the consequences.
- 26 The gross neglect of the TRC cases is a betrayal of victims who have been waiting for the prosecutions of those who failed to apply for amnesty or who were denied amnesty. The failure of the State to act against perpetrators of the past has added considerably to the trauma of victims. Allowing perpetrators to escape all justice and accountability adds insult to their injuries.
- 27 The abandonment of the TRC cases is a betrayal of those perpetrators who came forward in good faith to apply for amnesty during the operation of the TRC. Above all, it stands as a betrayal of all South Africans who embraced

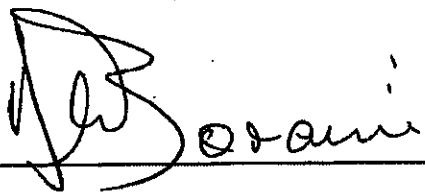
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the spirit of truth and reconciliation in order to move beyond the bitterness of the past.

28 The interference with the work of the NPA on the TRC cases is deeply offensive to the rule of law and is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in dealing with crimes of the past.

29 I accordingly endorse this application, and respectfully urge this honourable court to grant the order in the terms set out in the notice of motion.




DEPONENT

Thus signed and affirmed at *Constantia Place* on this *27.8.*  
day of *Nov* 2015, the deponent having acknowledged that s/he  
knows and understands the contents of this affidavit, having affirmed that the  
contents hereof are true and correct and that s/he considers the affirmation  
binding on his / her conscience.



COMMISSIONER OF OATHS

**MICHAEL ALTMANN**  
COMMISSIONER OF OATHS  
MANAGER: OLD AGE HOME/VILAGE  
CAPE PENINSULA ORGANISATION FOR THE AGE

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

Case Number:

In the matter between:

**THEMBISILE PHUMELELE NKADIMENG**

Applicant

And

**NATIONAL DIRECTOR OF  
PUBLIC PROSECUTIONS**

First Respondent

**THE NATIONAL COMMISSIONER OF THE  
SOUTH AFRICAN POLICE**

Second Respondent

**THE MINISTER OF JUSTICE AND CORRECTIONAL  
SERVICES**

Third Respondent

**THE NATIONAL MINISTER OF POLICE**

Fourth Respondent

**WILLEM HELM COETZEE**

Fifth Respondent

**ANTON PRETORIUS**

Sixth Respondent

**FREDERICK BARNARD MONG**

Seventh Respondent

**MSEBENZI TIMOTHY RADEBE**

Eighth Respondent

TPM

V.P. K