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

PRETORIA

In the matter between:

Case No.: 2018/76755

JOAO RODRIGUES

APPLICANT

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

OF SOUTH AFRICA

FIRST RESPONDENT

MINISTER OF JUSTICE

SECOND RESPONDENT

MINISTER OF POLICE

THIRD RESPONDENT

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

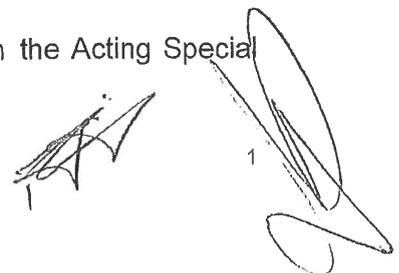
I, the undersigned:

JACOBUS PETRUS PRETORIUS

do hereby make oath and state as set out below:

1. INTRODUCTION

1.1 I am an admitted advocate of this Honourable Court and a member of the personnel of the National Prosecuting Authority (NPA) with offices at the Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. I am the Acting Special



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Director of the Priority Crimes Litigation Unit in the offices of the NPA. I make this affidavit on behalf of the First Respondent in this application to answer some of the submissions of the Applicant.

- 1.2 The facts contained in this affidavit are within my personal knowledge, unless it appears otherwise from the context and are both true and correct.
- 1.3 I am competent to depose to the contents of this answering affidavit for purposes of opposing the relief which the applicant seeks.
- 1.4 I have read the founding papers and wish to inform the Honourable Court that I oppose the application on behalf of the First Respondent.
- 1.5 I further wish to inform the Honourable Court that I will only deal with the facts and principles relating to matters that I was personally involved in. I will refrain from dealing with allegations against Second and Third Respondents and/or submissions made relating to them as well as matters relating to further particulars and the framing of the charges which was handled by the Director of Public Prosecutions South Gauteng. I will leave it to themselves and their legal teams to deal with allegations against them which do not have a direct bearing on the case against the National Prosecuting Authority and my involvement.
- 1.6 I am not part of the present prosecuting team but the prosecution is done by South Gauteng Division under the Director of Public Prosecutions, Adv. A Chauke. I therefore do not address the matter of further particulars and/or the framing of charges as I am not personally involved in these matters. These matters will be



addressed in the confirmatory affidavit of Adv R Du Toit, a senior Deputy Director of Public Prosecutions in the Johannesburg Office.

1.7 In my career I have been involved in a number of matters relating to state sponsored violence and covering up of such offences by those involved. Since the Goldstone Commission I have been involved in the investigation and prosecution of matters like the case of EA De Kock (Vlakplaas), - Dr Wouter Basson (chemical biological warfare) and a number of other matters like the Samora Machel plane incident and the Smit murders. These matters constitute extraordinary cases. Witnesses are reluctant to come forward, there is a conspiracy to silence and it takes a long time to solve these matters and to obtain the necessary evidence to prosecute any person.

I have considered the contents of the applicant's founding papers and I respond thereto below.

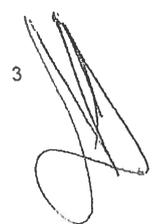
2. THE CONTEXT OF THE APPLICANT'S PROSECUTION

2.1 This application must be considered with due regard to the context of the applicant's prosecution.

2.2 The applicant's prosecution emanates from the criminal offences committed by the apartheid government, in particular members of the then South African Police, against those who opposed it.

2.3 With the advent of the new democratic dispensation in 1994, the Government of National Unity set up the Truth and Reconciliation Commission (TRC) to deal with what happened under Apartheid. The TRC was based on the Promotion of National Unity and



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Reconciliation Act, No 34 of 1995. One of the main purposes of this policy was to enable the perpetrators of the aforesaid crimes to come forward, make full disclosure of the nature and extent of the offences committed against the victims and their families and to then seek forgiveness and amnesty from prosecution.

- 2.4 The mere fact that amnesty from prosecution was required is a clear indication that it was considered that unless same was granted, prosecution would follow where a perpetrator was identified as having committed criminal offences. The applicant did not participate in the aforesaid reconciliation process despite being invited to do so. It would then follow that neither was he granted any amnesty.
- 2.5 The provisions of the abovementioned Act was intended to address the injustices of the past perpetrated by the apartheid government. It is for this reason that the preamble to the Constitution reminds the people of South Africa that they must not only recognize the injustices of the past, but they must also honour "*those who suffered for justice and freedom in our land*" and respect "*those who have worked to build and develop our country*".
- 2.6 In the context of this case, and in order to give meaning and effect to the Constitution, one must ask as to "*who suffered for justice and freedom in our land*" and who must be respected for having "*worked to build and develop our country*". The answer to this painful question is Mr. Ahmed Essop Timol ("Mr Timol").



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- 2.7 There is no dispute that Mr Timol was arrested for his political activism which formed part of the fight "*for justice and freedom in our land*" and the work "*to build and develop our country*". The Constitution obliges us to honour his ultimate sacrifice. He is not the only martyr who made this sacrifice.
- 2.8 The available evidence accepted by the 2017 inquest Court was to the effect that Mr. Timol was subjected to pain and suffering after his arrest. Mr Timol accordingly "*suffered for justice and freedom in our land.*"
- 2.9 The plight and suffering of the family of Mr. Timol ("the Timol family") cannot be ignored. Neither can the continued suffering be tolerated by the repeated denial to the truth of what really transpired in the final hours of Mr Timol's life. Justice demands that the evidence against the Applicant be presented by the State and that the Applicant be given the opportunity to state his case.
- 2.10 In his application, the applicant seeks an order, the effect of which would be to effectively deny the people of the Republic of South Africa the right to justice, the right to know the truth of what happened to their loved ones, and in particular, deny the Timol family the justice which the Constitution promises and to which they are entitled to.



THE ORIGINAL INQUEST OF 1972

- 2.11 There could not have been a prosecution in 1971 immediately after Mr. Timol' s death because:
- 2.11.1 The original inquest did not hear all the evidence relevant to Mr Timol' s death, in particular, the evidence of the only other person who was in company of Mr Timol on the evening of their arrest, namely Dr Saliem Essop. Not only would he have shed light on exactly what had transpired from the moment of their arrest until his subsequent hospitalization in a comatose state a day before Mr Timol died. His evidence would have revealed the stark reality of severe brutality and human rights abuses at the hands of the very police officers who were supposed to have protected them.
- 2.11.2 No other civilian witnesses who were detained, at least 55 in all, were ever called to testify. Their evidence would have revealed similar fact evidence of severe assaults and interrogation that they were subjected too repeatedly for months whilst held in comunicado.
- 2.11.3 The original inquest was unsatisfactory which reflected just how well orchestrated and well protected members of the security branch were. Mr Timol was not the first person to die in custody. Neither was he the last. Especially so at the notorious John Vorster Square Police Station. Had there really being a

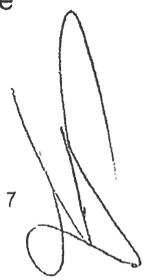


concerted effort made to expose the reality of how Mr Timol died, the court would have acknowledged that there was a startling similarities in the cause of deaths of the number of detainees at John Vorster Square under the very control of the Security Branch police officers.

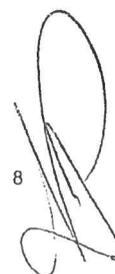
2.11.4 No evidence of the improbabilities of Mr Timol's physical ability to jump to his death was ever presented. In fact, apart from the parents of Mr Timol, and one or two unrelated witnesses, the State's case comprised only of security branch police officers.

2.11.5 The inquest court with respect ignored material evidence which included the evidence of the mother of Timol who informed the court that she had been told by the members of the security branch that her "child was being given a hiding" because she did not give him a hiding. The conversation to more- or- less that effect was not denied by the Security Branch police. In fact, the police officers went out of their way to convince the court that Timol was treated as a decent human being and had no injuries. This can hardly be accepted especially in view of our troubling past and the human rights violations at the height of Apartheid.

2.11.6 Furthermore, it is not as if there was no dispute about ante and post -mortem injuries on the body of the deceased during the inquest. In fact the only issue was when it had been sustained.

- 2.11.7 Furthermore, even then there were conflicting versions presented by the Applicant and the witnesses for the State, the police officers themselves, as to exactly how Mr Timol died. That should have immediately raised red flags. The presiding officer concluding, with no evidence, that Mr Timol must have been involved in a brawl prior to his arrest, was without any rational basis.
- 2.11.8 The original inquest held that no *“living person is responsible for”* Mr Timol’s death.
- 2.11.9 It also concluded that Mr Timol committed suicide;
- 2.12 On the basis of the above conclusions, the State could not prosecute any person; alternatively, it decided not to prosecute any person, because the only process established to identify a possible accused concluded that there was no *“living person”* to prosecute.
- 2.13 During the first inquest, the applicant gave evidence to the effect that he was not responsible for Mr. Timol’ s death and that Mr. Timol jumped out of window of the famous (or infamous) Room 1026 of the then John Vorster Square Police Station. It concluded that Mr Timol died after he committed suicide on 27 October 1971.



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THE RE-OPENED INQUEST OF 2017

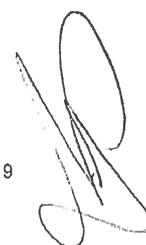
- 2.14 The second inquest was re-opened as a result of the Timol family's tireless efforts to find closure to the painful circumstances under which Mr Timol died.
- 2.15 The aforesaid efforts led to the Timol family approaching the first respondent *"with information that was not placed before or considered by the Magistrate conducting the inquest in 1972."* [See paragraph 4 of the 2017 inquest Court judgment]. It is this information which led to the re-opening of the second inquest, referred to herein as the 2017 inquest.
- 2.16 In paragraphs 10 and 12 of the 2017 inquest Court judgment(Annexure X) , the following is stated:

"10. This monumental task of re-opening the 1972 inquest was largely simplified by the evidence of witnesses who testified orally in court. The court is indebted to these witnesses as well as those who submitted affidavits. In particular, this court recognizes the courage with which the witnesses, who are former detainees, were able to share with this court and through this court, the public, as to how they had to endure abuse, humiliation and torture at the hands of the Security Branch. Their contribution has been of tremendous assistance to [these] proceedings.

...



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12. *It is through the persistent effort of Mr Imtiaz Cajee that this historic sitting of the re-opened inquest occurred. His efforts should be emulated as an example of how citizens have to assert their rights."*

2.17 In paragraph 15 of its judgment, the 2017 inquest court quoted from Marais NO v Tiley 1990 (2) SA 899 (A) that:

"... The underlying purpose of an inquest is to promote public confidence and satisfaction to reassure the public that all death from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences and so that persons responsible for such death may, as far as possible, be brought to justice ..."

2.18 The criminal trial which the applicant desperately seeks to avoid, permanently, is intended to serve the purpose of an inquest as described in *Marais NO*, i.e. *"to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences and so that persons responsible for such deaths may, as far as possible, be brought to justice ..."*

2.19 The 2017 inquest Court further said the following in its judgment:

"339. *The inquest also revealed that there are many more families which are seeking closure on the unanswered questions concerning the death of their relative in*

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detention. They, like all families whose relatives died in detention, need healing. They need closure.

340. *It is thus the view of this court that the families whose relatives died in detention, particularly those where the inquest returned a finding of death by suicide, should be assisted, at their initiative, to obtain the records and gather further information with a view to have the initial inquest re-opened ..."*

2.20 The reference to "*death of their relative in detention*" referred to in paragraph 339 of the 2017 inquest Court judgment is a reference to the deaths of detainees at the hands of the apartheid government security branch police. These deaths occurred decades ago, and very few perpetrators were prosecuted for those deaths that resulted from criminal action. It is for this reason that the 2017 inquest Court correctly said that the "*many more families*" affected by this death "*should be assisted*".

2.21 If the relief which the applicant seeks in this application is granted on the grounds relied upon by him, it would necessarily follow that there would be no purpose of assisting the "*many more families*" affected by the "*death of their relative in detention*" if the perpetrators are going to be entitled to a permanent stay of prosecution on the grounds that the applicant relies upon in this present application. In the premise, the outcome of this case will influence the direction



which the first respondent will take in relation to the cases of the *"many more families who are seeking closure on their unanswered questions concerning the death of their relative in detention."*

2.22 In simple terms, if this application succeeds on the grounds relied upon by the applicant, which grounds would potentially be available to other perpetrators in his position, no purpose would be served by the re-opening of other similar inquests and there are *"many more families"* affected by deaths in detention. In this regard, I attach hereto as **JPP 1** a supporting affidavit provided by one of the *"many more families"* contemplated in the 2017 inquest Court judgment.

2.23 When regard is had to the above context, it is not in the interests of justice for the applicant to be granted any of the relief which he seeks. This is more so when regard is had to the fact that the applicant is the last person to see and be with Mr Timol before Mr Timol allegedly got out of Room 1026 through the window.

2.24. The position as it stands is simple. There are two mutually destructive versions which the court will be faced with. On the one hand is the State's case which avers that Mr Timol sustained at least 35 noted injuries, 27 of which were sustained ante-mortem. On the other hand, the Applicant maintains his 47 year old version with some consistency. He maintains that the deceased was fine, healthy and in good spirits. It is only the trial court which can decide whether Mr Timol, with extensive



bruising, a depressed skull fracture, a fractured left jaw, a dislocated left ankle, and extensive bruising on his body amongst other injuries was able to easily outrun and out maneuver the Applicant in a matter of seconds, open the window of the room where he was detained in, and jump out, landing a few meters from the wall of the police station.

3. THE RELIEF IS NOT COMPETENT

3.1 Before responding to each of the allegations contained in the applicant's founding affidavit, it is necessary that I set out the basis on which the first respondent contends that the relief which the applicant seeks in this application is not sustainable in law.

3.2 In his notice of motion, the applicant seeks five orders, all of which are aimed at achieving a permanent stay of his criminal proceedings. What the applicant seeks is an order to the effect that he shall not be prosecuted for any crime in relation to the death of Mr Timol.

3.3 At the centre of the applicant's case for a permanent stay of his criminal trial is an allegation that his right to a fair trial envisaged in section 35(3) of the Constitution and read with section 342A of the Criminal Procedure Act 51 of 1977 ("the CPA") has been violated by the State. I deny that this is so.



3.4 On the facts pleaded by the applicant, there is nothing to justify the conclusion that the applicant has suffered any trial prejudice or that he cannot have a fair trial at all, i.e. that a fair trial would be impossible.

3.5 Section 35(3) of the Constitution provides that:

"35. Arrested, detained and accused persons

(1) ...

(2) ...

(3) 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;

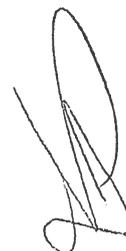
(b) to have adequate time and facilities to prepare a defense;

(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 would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the

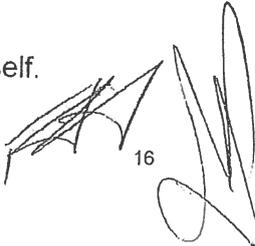


*offence was committed and the time of sentencing;
and*

(o) of appeal to, or review by, a higher court.

..."

- 3.6 The applicant has not made out a case to establish that any of the above listed rights have been violated – and even if they have been violated, which is denied, that they have been irreparably violated such that there is trial prejudice and that it would be impossible for him to exercise any of the above listed rights so as to enable him to have a fair trial.
- 3.7 In paragraph 7 of his founding affidavit, the applicant says that the pending criminal prosecution against him will infringe the following of his rights promised in section 35(3) of the Constitution:
- 3.7.1 the right to have a fair trial that is procedurally fair and is not instituted with an unlawful or improper motive;
- 3.7.2 the right to have the trial to begin and be concluded without unreasonable delay;
- 3.7.3 the right to be informed of the charge against him with sufficient detail to answer it;
- 3.7.4 the right to adduce and challenge evidence effectively;
- 3.7.5 the right to remain silent and not to incriminate oneself.


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- 3.8 None of the applicant's aforesaid rights have been violated or irreparably violated. I demonstrate this below.

Fair trial without unlawful or improper motive: (also ad par 42 and 37)

- 3.9 The applicant does not define these two concepts: unlawful of improper motive. An unlawful motive is one which is not authorized by law. An improper motive is a motive which is not related to the purpose for which the power to prosecute is exercised.
- 3.10 In paragraph 42 of his founding affidavit, the applicant says that his allegation of unfair, improper and unlawful motive is based "*on the charges as formulated in the indictment, more in particular the first count of murder ...*" In this regard, the applicant says that the charge of murder "*is therefore directly in contrast with the findings of the court in the judgment relating to the inquest.*" This will be answered by Adv Du Toit in his confirmatory affidavit.
- 3.11 In paragraph 37 of the founding affidavit the applicant also avers that the First Respondent request for an reopening of the inquest was inherent unfair and unlawful in the light that the relevant facts already concluded that the NPA would prosecute the applicant or were in a position to take such a decision if they properly applied their minds;

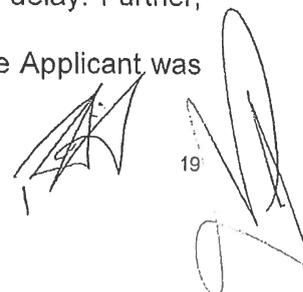


3.11.1 I deny that at the time of the request for the re-opening of the inquest that I had already concluded that the National Prosecuting Authority would prosecute the Applicant or anybody else or that we were in such a position to take such a decision if we properly applied our minds. The prosecution team and I were of the opinion that there was no reasonable prospect of success to prosecute any person at that stage. In fact it was only after the inquest was re-opened and two weeks before the re-opened inquest on the 26th of June 2017, after information was received on the whereabouts of the Applicant, that it was ascertained that the Applicant was alive and had been utilizing a different name. On a public holiday just before the inquest was reopened, I personally with the investigating officer, Captain Ben Nel, informed the applicant of his constitutional rights at his house, informed him to obtain legal representation and in fact ensured that I arranged for the legal representative to be present at the inquest when it re-opened. That much is evident from the record. I absolutely deny that we destroyed his right to remain silent. That right was always available to him and is borne out by the record of the inquest where he was repeatedly warned, in the present of both his present counsel of his rights and the implications of him testifying.



THE ALLEGED UNREASONABLE DELAY

- 3.12 There is no merit in the applicant's suggestion that there has been an unreasonable delay in commencing and concluding his criminal trial.
- 3.13 Mr Timol passed away on 27 October 1971. The Applicant was arrested and indicted on 30 July 2018. There are two time periods that need to be scrutinized namely a pre-trial phase and a trial phase.
- 3.14 Section 35(3) (d) promises a right "*to have their trial begin and conclude without unreasonable delay.*" Unlike its predecessor in the interim Constitution, section 35(3) (d) does not say that the reasonableness of the time to commence and conclude a trial must be assessed with reference to the "*time after having been charged*".
- 3.15 Despite the above, the correct position is that a trial can only commence after an accused person has been charged. Accordingly, the unreasonableness of any delay, of which there is none in this case, must be assessed with reference to the time after the applicant was charged with murder. Once this is done, it will become clear that there has not been any delay, let alone an unreasonable delay. Since the verdict of the 1972 inquest court was overturned, it took a mere nine months to enroll the matter for trial. This can hardly be termed a lengthy, unreasonable delay. Further, there were no lengthy opposed bail applications. The Applicant was



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warned to hand himself over on the very day he was arrested and charged. He was immediately charged and brought to court on the same day. The indictment was served on the same date. The matter was transferred to the High court and set down for pre-trial issues to be dealt with. And that is when the delay, caused by the Applicant, started.

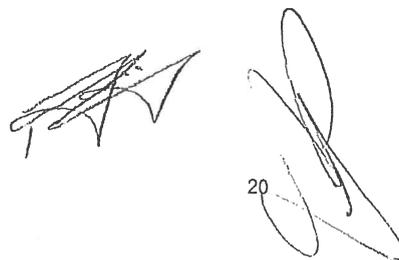
3.16 The applicant's version about when he was charged and the events thereafter is that:

3.16.1 he "was arrested on these charges on the 30th July 2018 and brought before the Regional Court in Johannesburg";

3.16.2 On the same date of his first appearance, and at an unopposed bail application, the matter was transferred to the High Court. He appeared for the first time in the High Court on 18 September 2018. On 18 September 2018, he informed the court that he wishes to bring an application for a permanent stay of prosecution. The matter was then postponed to 15 October 2018 for a pre-trial conference to take place and for the application.

3.16.3 he requested further particulars from the State on 1 October 2018;

3.16.4 he received the State's reply to his request for further particulars on 5 October 2018;



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- 3.16.5 he delivered an application to compel further and better particulars on 12 October 2018;
- 3.16.6 He, obviously through his legal representatives, attended a formal pre-trial on 12 October 2018.
- 3.17 In addition to the above, the applicant attended Court on 15 October 2018. The application for the permanent stay had still not been served on the NPA. The matter was postponed to 22 October 2018. The applicant's legal team then "*undertook to finalize this application and have it issued by 19 October 2018.*"
- 3.18 In the light of what is stated above, there is no delay, let alone an unreasonable delay, in commencing the applicant's criminal trial. On his own version, the applicant was only charged in July 2018 and he launched this application on or about 19 October 2018. This being the case, it cannot be concluded that the period between August 2018 and September 2018 that the trial had not commenced, constitutes an unreasonable delay in commencing the trial to justify a permanent stay of the applicant's prosecution.
- 3.19 The question of unreasonable delay does not in fact even have to be entertained because during the period complained of, the applicant himself had been meaningfully engaging with the State on the conduct of his trial by, amongst others, requesting further particulars and receiving such particulars and thereafter bringing an application to provide further and better particulars. In the premises, it cannot be

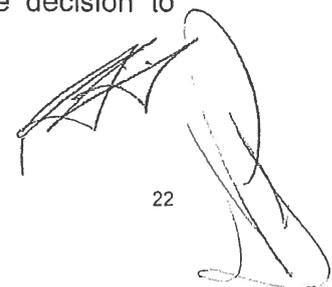
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said that the State has negligently forgotten to bring the applicant to trial so as to justify a conclusion that there has been an unreasonable delay.

3.20 In paragraph 49 of his founding affidavit, the applicant raises a new issue which is not based on section 35(3) (d) of the Constitution. Therein, the applicant says that the first respondent *“failed to act in a diligent manner in coming to a decision to institute a prosecution against me.”*

3.20.1 Section 35(3) (d) does not apply to the process leading up to the taking of the decision to institute criminal proceedings against an accused. The sub-section is very clear – it talks about the beginning and conclusion of a trial without unreasonable delay. It says absolutely nothing about the decision to prosecute. On a proper reading of section 35(3) (d) an accused person can only complain if a trial does not begin within a reasonable time – that reasonable time can only be assessed with reference to the date on which the accused person was charged. This is so because a criminal trial cannot begin until such time that an accused person has been charged.

3.20.2 Section 35(3) (d) is concerned with the commencement and conclusion of the criminal trial and not with the decision to prosecute.



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- 3.20.3 Even if this is so, the offences with which the applicant has been charged, one of which is Murder read with Section 51(1) of Act 105 of 1997, does not prescribe. In terms of section 18 of the Criminal Procedure Act 51 of 1977, the right to institute a prosecution for any offence...other than the offences of ...(a) Murder...shall unless some other period is expressly provided for by the law, lapse after the expiration of a period of 20 years from the time when the offence was committed.
- 3.20.4 The State is in law entitled to charge a person with that offence as soon as it is ready to do so – when the State has evidence that the relevant accused person *prima facie* committed the offence.
- 3.20.5 The State was not ready to charge the applicant at any time before July 2018 when he was charged. The time that had lapsed since the commission of the offence was 47 years.
- 3.20.6 The applicant does not suggest with reference to admissible evidence that the State had evidence of his guilt and full participation in the killing of Mr Timol all along. All he says is that Mr Cajee, the nephew of Mr Timol had furnished information in respect of his murder to the NPA in as early as 2002.



- 3.20.7 It is clear that only once the family members met with the NDPP that a decision was taken to present new evidence in a democratic South Africa.
- 3.20.8 The applicant must now know that new evidence which includes similar fact evidence of fellow detainees and medical and trajectory evidence, amongst other evidence presented, draws one to the conclusion that Mr Timol could not have jumped out of the window of room 1026. In fact, the most likely scenario was that he was in all probability rolled from the roof of John Vorster Square. In paragraph 19.16 of his founding affidavit, the applicant acknowledges the discovery of some new evidence. Therein, he says the following:
- "... Basically, the only material of recent origin relates to medical evidence from pathologists, with reference to the injuries and death of the deceased and expert evidence relating to the probable trajectory of the body falling from the tenth floor and/or roof of the building to the ground.*
- 3.21 The applicant deals with the issue of undue delay in paragraphs 44 to 50 of his founding affidavit. There is nothing contained in these paragraphs to suggest that:
- 3.21.1 the commencement of the trial was unreasonably delayed;
- 3.21.2 the State charged the applicant and thereafter neglected to commence the prosecution.



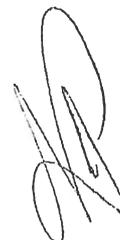
3.22 There is no merit in the applicant's suggestion that "*all material witnesses have passed away and I will not be in a position to consult with these witnesses and/or to adduce evidence*" because:

3.22.1 the applicant's version has been somewhat consistent with his version since 1971 in the statement he made to the investigating officer, his evidence at the 1972 inquest, and the evidence he gave at the re-opened inquest in 2017. He has been consistent in saying that there were only two people in the room, he and the deceased. That he was the last person to see the deceased alive. That there was nothing wrong with the appearance or demeanor of the deceased. And that the deceased outran (and outmaneuvered) him and jumped through the window of room 1026. For this reason, he is the only person who saw that fateful event and there are therefore, no other witnesses who were present there will be able to take his case any further.

3.22.2 On his own version, the applicant saw Mr Timol before he died and there is no reason why he himself cannot testify about exactly what transpired during the final minutes of Mr Timol' s life.



- 3.22.3 Further, that the witnesses who the State intends to call are well and available to testify. That again, this is mere conjecture in an attempt to quash charges.
- 3.22.4 the applicant's perceived future loss of memory also does not take the matter any further when regard is had to the fact that the applicant's version is already on record and that it remains the same as it was in 1971 and 1972;
- 3.22.5 the applicant remains free to employ his own medical expert pathologists to study the post mortem reports and provide him with new expert evidence to the extent that he requires the same. In addition, the applicant remains free to challenge any evidence presented by the State. That is his prerogative and right in a democratic South Africa. Further he is in a very fortunate position when he has three counsels and access to experts, none of whom he funds personally.
- 3.23 It must always be borne in mind that our political dispensation is unlike most other countries. Offences committed in turbulent times, by those charged with protection of its citizens are often brought to justice, albeit decades later. South Africa is no different. It is expected that there might be other factors at play. In paragraph 341 on page 128 of the Re opened inquest the honourable Judge Motle refer to the improper "*role played by some in the magistracy, prosecuting authorities and medical experts in the past inquest proceedings. Bizo's evidence reveals the role of some of these public officials in being complicit in exonerating members of the Security Branch from the crimes they committed. The 1972 inquest*



into the death of Timol is one such example. From the outset, it had to take a Court order to allow Timol's family and their lawyers access to case documents, before the inquest commenced. The evidence of the 1972 inquest further demonstrate how the prosecution made no effort to obtain evidence other than that of the police and the magistrate attempting to explain away the ante mortem injuries, without any shred of evidence supporting his statement about a brawl." However, the very people who now ask for justice to take its course must be heard. This is a unique case, with a unique set of circumstances which resulted in a historic overturning.

- 3.24 In the premise, there was no unreasonable delay in commencing the applicant's trial. There is also no irreparable trial prejudice. Once the verdict turned on new evidence, it set in motion criminal proceedings.
- 3.25 In addition and in any event, section 342A of the CPA requires the trial court itself to investigate any delay in the completion of criminal proceedings which appears to it to be unreasonable and could cause substantial prejudice to both parties. The applicant has not correctly invoked this section. In addition, the applicant has not made out a case that the issues listed in section 342A (2) of the CPA ought to be decided in his favour – he cannot make out such a case without placing the necessary facts before the court.
- 3.26 In the circumstances, there is no merit in the suggestion that there has been an unreasonable delay and this point ought to be rejected. Section 35 does not lay down a remedy but it could hardly have

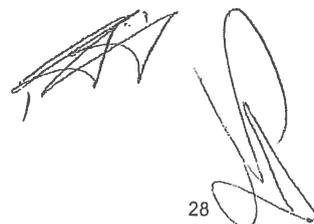


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been the intention in each and every case where there has been a delay, even if unreasonable, or prejudice, however slight, that a trial should be stayed.

- 3.27 There is nothing to indicate that the Applicant will be unable to make out a proper defence. There is also nothing indicating that the Applicant will not be fairly tried. Furthermore even if there is prejudice, but the delay does not affect the quality of his defence that the will put up, there should be no room for the extreme decision of staying a prosecution.
- 3.28 The Applicant had an opportunity to testify at the TRC as is borne out by Mr Piers Pigou. (JPP 2) His conduct towards the investigator speaks volumes.
- 3.29 In this matter, all the tools available for a prosecution are available. The docket with affidavits, experts, reports and the full transcribed inquest record of 2017 has been furnished to the Applicant. Witnesses are available to testify. The quality of available evidence is not materially flawed as a result of the lengthy lapse of time on the memories of the witnesses the State intends to call. The reasons that the Applicant advances are speculative. He has failed to establish prejudice. It is submitted that even if the State does not call all the witnesses called at the inquest, the charges are still sustainable.



Interests of justice

- 3.30 The relief which the applicant seeks is not only extra-ordinary, it is very drastic. It is not the norm to stay criminal prosecutions forever.
- 3.31 When extraordinary and drastic relief is sought, exceptional circumstances must exist to justify such relief because it amounts to a departure from the norm.
- 3.32 In addition, the test in an application such as the present is whether it is in the interests of justice to grant a permanent stay of the applicant's prosecution. The applicant has not made out a case to establish that it is in the interests of justice to grant the relief which he seeks. Without the applicant himself making out such a case in his founding affidavit, the Court cannot assume that the interests of justice favour the granting of the relief which the applicant seeks.
- 3.33 The following factors make it not in the interests of justice to grant a permanent stay of the applicant's criminal prosecution:
- 3.33.1 the context of this case set out above;
- 3.33.2 the nature of the crimes committed against Mr Timol during the period of Apartheid;
- 3.33.3 the fact that Mr. Timol' s rights to life and human dignity were so brutally and inhumanely violated in the manner in which he was treated and killed;



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- 3.33.4 the fact that the applicant had an opportunity to appear before the Truth and Reconciliation Commission to apply for amnesty – even if he wanted to argue that he was an accessory after the fact – and that he deliberately refused to be a part of that process by not participating in it. (In this regard, see the affidavit of Piers Ashley Pigou attached hereto as JPP 2 deposed to in London and for which I state that it is in the interests of justice that it be admitted);
- 3.33.5 the fact that this is not the only case in which people died in police detention at the brutal hands of the apartheid government and that few of such cases have been prosecuted;
- 3.33.6 the fact that the people of South Africa require that justice be seen to be done in this case by prosecuting the applicant;
- 3.33.7 the fact that the applicant does not have reasonable prospects of success in the criminal trial because the available evidence shows that Mr Timol could not have willingly jumped or pushed himself out of John Vorster Square building. Only one other person can testify as to what happened in room 1026.
- 3.33.8 the applicant with respect continues to persist with his unsustainable version that he played no part in the killing of Mr. Timol, forcing the State to run what he also says is going to be a long trial. A lengthy trial will depend on the evidence that the



State will lead and the cross examination of its witnesses by the Defence, which it is entitled to. In any event, there is no right to a shorter trial. It depends on the nature of the proceedings.

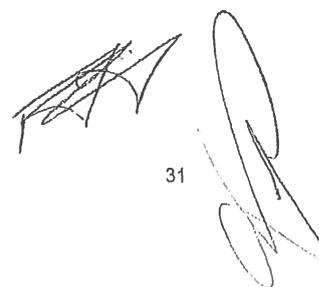
3.33.9 The fact that a permanent stay would deny the Timol family the justice which they deserve and for which they have been waiting since 1971. The reality is that both the Timol family and the Applicant deserve closure. It cannot be that the case "hangs in the air". The reality is that we need to move forward. And the way to move forward is to oblige both the Timol family and the Applicant. The Timol family wants the evidence to be presented and tested. The Applicants wants to clear his name and enforces his right to a speedy trial. The only way is to allow the prosecution to honor its mandate. Both interested parties get closure, one way or the other.

3.34 In the premises, the application ought to be dismissed with costs, including the costs consequent upon the employment of two counsels.

I now turn to deal with the contents of the applicant's factual and legal averments contained in the founding affidavit.

4. AD PARAGRAPHS 1 TO 10

4.1 The contents of paragraph 1.1 are not in dispute.

The page concludes with two handwritten signatures in black ink. The signature on the left is more complex and scribbled, while the one on the right is a large, stylized loop. Below the signatures, the number '31' is printed in a small, plain font.

- 4.2 I deny that the contents of the applicant's founding affidavit are true and correct to the extent that they are inconsistent with the contents of this answering affidavit and the 2017 Inquest Court judgment.
- 4.3 The contents of paragraph 2 are not in dispute.
- 4.4 The contents of paragraphs 3 to 5 are not in dispute and do not require a response from the first respondent.
- 4.5 The contents of paragraph 6 in which the nature or purpose of this application is restated, is not in dispute.

Ad paragraph 7

- 4.6 Paragraph 7 of the applicant's founding affidavit deals with the basis on which the applicant seeks the relief set out in his notice of motion.
- 4.7 I have already demonstrated elsewhere above in this answering affidavit that the prosecution which is sought to be permanently stayed will not in any way infringe upon the applicant's constitutional right to a fair trial.
- 4.8 In the premises and for the reasons stated above, there is no merit in the basis upon which the applicant seeks a permanent stay of his criminal prosecution as alleged in paragraph 7.

Ad paragraph 8

- 4.9 The applicants' reliance upon section 342A of the CPA is misplaced.

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- 4.10 Section 342A of the CPA does not contemplate an automatic permanent stay of criminal prosecution as a result of an alleged delay in commencing and concluding criminal prosecution. On the contrary, section 342A contemplates that the criminal court dealing with the criminal trial will conduct an inquiry into whether there has been an unreasonable delay "*which could cause substantial prejudice*" not only to the accused person, but also "*to the prosecution ... the State or a witness.*"
- 4.11 When regard is had to the wide ambit of section 342A, it must necessarily follow that a permanent stay of criminal prosecution in terms of section 342A would only be ordered if, in addition to what is stated therein, it is in the interests of justice to grant such an order.
- 4.12 In this case, the applicant has not even paid lip service to the question whether it is in the interests of justice to grant a permanent stay of his criminal prosecution.

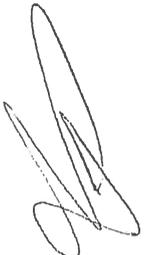
Ad paragraphs 9 and 10

- 4.13 The contents of paragraphs 9 and 10 are not in issue.

5. AD PARAGRAPHS 11 TO 18

Ad paragraph 11

- 5.1 The contents of paragraph 11.1 are not in dispute.

- 5.2 The contents of paragraph 11.2 are not in dispute.
- 5.3 The State has already advised the applicant that the reference to section 257 of the CPA in the indictment is incorrect and that the State will not be relying on the provisions of section 257 of the CPA. In this regard, and for purposes of good order and housekeeping, the indictment will be formally amended to reflect the sections of the legislation upon which the State intends to rely. Such an amendment, however, will not affect the main charge of murder levelled against the applicant. Reference ought to have been made to Act 105 of 1997, Criminal Law Amendment Act (or the Minimum Sentence Act.)

Ad paragraph 15

- 5.4 It is incorrect for the applicant to create an impression that the 2017 Inquest Court was called upon to make a finding on his involvement or otherwise in Mr. Timol's death.
- 5.5 As stated above, the function of the 2017 Inquest Court was to determine whether Mr. Timol' s death was as a result of an act or omission which *prima facie* involves an offence. As to what criminal offence the applicant or who of any accused persons must be charged with lies exclusively in the NPA's territory. For this reason, the NPA has decided to charge the applicant with murder and with defeating or obstructing the administration of justice.



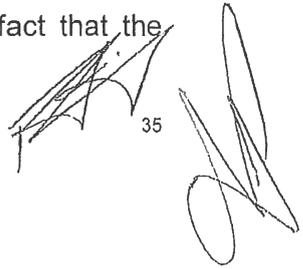
5.6 As I have stated above, the available evidence leads to one and only one conclusion which is clearly stated at paragraph 22 (page 69 of the Applicant's founding affidavit) of the summary of substantial facts "The State will allege that the accused at all relevant times committed the offence in count one above in the execution of a common purpose. Precisely when, where and how it was formed and who all the parties were, are at present unknown to the State. The State does however allege that the said common purpose was in existence from at least shortly before and for the duration of the commission of the crime."

5.7 Despite having attached the judgment of the 2017 Inquest Court, the applicant has not engaged therewith in his founding affidavit to make out a case that the evidence contained therein does not lead to a conclusion or inference that he is not responsible for the death of Mr. Timol. He is selective in sourcing what is favourable to him as opposed to being honest and forthcoming as to exactly what the findings of the court was.

Ad paragraph 16

5.8 The contents of paragraph 16 are denied.

5.9 The charge of murder levelled against the applicant was not influenced by the fact that the applicant could no longer be charged with being an accessory after the fact. The charge of murder levelled against the applicant was directly influenced by the fact that the

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available evidence, carefully analyzed and set out in the 2017 Inquest Court judgment leads to one and only one inference that the applicant was by virtue of the doctrine of common purpose involved in the murder of Mr Timol.

Ad paragraph 17

- 5.10 The contents of paragraph 17 are denied.
- 5.11 The applicant's denial that he did not assault or torture or interrogate Mr. Timol is his defense and he is entitled to put that version at his trial. It cannot be debated in this forum in an attempt to quash the charges and prevent the prosecution from presenting its case.
- 5.12 The applicant's denial that he interrogated Mr. Timol or that he participated in Mr. Timol's interrogation or assault is expected.
- 5.12.1 The applicant is the only person who was with Mr. Timol at the exact date and time shortly before he died.
- 5.12.2 The two mutually destructive versions of the Applicant and the State must be weighed up in a trial court. That can only be assessed once the evidence is presented.
- 5.12.3 The applicant's application is an abuse of process where an attempt is being made to establish the strength or weaknesses of the State's case. The applicant expects the issues which he must raise at his trial to be ventilated in this forum. The deliberate selective interpretation, with the full inquest judgment

attached, is proof that the applicant is abusing the process and the court. Thus contributing to the delay he so vehemently opposes and blames on the State. The Applicant, whilst being in possession of all the affidavits and evidence presented at the inquest court in 2017, together with the content of the police docket expects the evidence and arguments to be explained and interpreted to him.

5.13 The State has already indicated that it intends to rely on circumstantial evidence and similar fact evidence. It will argue that if logic dictates, both versions, that of the Applicant, and that of the State, cannot be reasonably possibly true. Conversely then one must be false. Only the trial court, after assessing all the evidence presented, can decide that. Further that both the functions of the Judiciary and Prosecution are clearly spelt out in their constituting Acts. That the prosecution should be entitled to present its case. The State persists that the applicant is criminally responsible for Mr. Timol's death.

Ad paragraph 18

5.14 The contents of paragraph 18 do not assist the applicant.

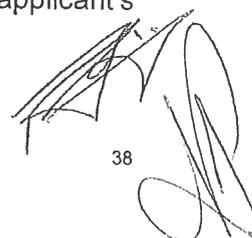
5.15 This is the version of the Applicant. These issues cannot be ventilated in this forum. The applicant abuses the process to test the strength of the State's case. It is the applicant himself who placed himself inside Room 1026 from which he alleges Mr. Timol left

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through the window. On the applicant's own version, he was the only person who was with Mr. Timol when Mr. Timol left the room through the window. Prior to that Mr Timol, for all intents and purposes, displayed no unusual tell-tale signs that might have led the Applicant to believe that he was unwell or unable to move. When regard is had to the evidence placed before the 2017 Inquest Court about Mr. Timol's physical condition, the only conclusion to be drawn from that evidence is that if both the pathologists found that 27 of the 35 injuries on Mr Timol were inflicted ante-mortem, and only the applicant was in the room then either the pathologists or the Applicant is lying.

5.16 Furthermore, that the applicant must be deterred from misusing this process to canvas issues that he feels will persuade the court in quashing the charges against him. Whether he was a fully- fledged police official performing clerical work is of no consequence. He will be given the opportunity to challenge the evidence presented in court. This is not the forum to request that the evidence be assessed.

5.17 For purposes of its case against the applicant, the State does not have to prove that the applicant participated or did not participate in other operational issues of the Security Branch of the apartheid police. This has already been canvassed and is apparent from the 2017 Inquest Court judgment which is attached to the applicant's own founding affidavit.



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6. AD PARAGRAPHS 19 AND 20

Ad paragraph 19.1

6.1 The contents of paragraph 19.1 are not in dispute.

Ad paragraph 19.2

6.2 Mr. Timol was interrogated and tortured.

Ad paragraph 19.3

6.3 Mr. Timol died as a result of having been thrown out of or rolled from the roof of John Vorster Square Building. The available evidence on this issue leads to one and only one irresistible inference: that Mr. Timol was severely assaulted and incapacitated whilst in the care of and in the detention of the security branch police officers. He could not have been in the position to jump to his death. It is for this reason that the State has charged the applicant with Mr. Timol's murder because his version directly contradicts the evidence in the State's possession, amongst other evidence.

Ad paragraph 19.4

6.4 The contents of paragraph 19.4 are not in dispute.

6.5 The 2017 Inquest Court, however, overturned the findings of the 1972 inquest court concluding that "Mr. Timol did not jump out of the



window of Room 1026, but was either pushed out of the window of room 1026 or rolled from the roof of the John Vorster Square building. Thus he did not commit suicide but was murdered" (page 124 of the Judgment).

Ad paragraph 19.5

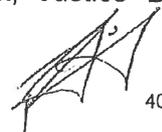
6.6 The contents of paragraph 19.5 are not in dispute.

The new evidence placed before the 2017 Inquest Court shows that the Timol family was correct in not accepting the findings of the first inquest.

Ad paragraph 19.6

6.7 The contents of paragraph 19.6 are not in dispute.

6.8 Once it was brought to my attention that Mr Saliem Essop, who was in the company of Mr Timol was available to attest to an affidavit, I immediately requested the inquest into the death of Mr Timol be re-opened. A 37 page affidavit from Dr Essop was obtained. This is evident from a Ministerial memorandum dated 25 October 2016. This is attached marked JPP 3. The National Director of Public prosecutions acted immediately and signed the memorandum on the same date. On 3 November 2016, the Deputy Minister of Justice and Constitutional Development, Mr J Jeffery and the Minister of Justice and Correctional Services approved the re-opening of the Inquest. On 17 January 2017, the Judge President, Justice D



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Mlambo was requested by the Minister of Justice and Correctional Services to "in the interests of justice ...to re-open the inquest (pertaining to Mr Timol) ". This is attached marked JPP 4. The inquest re-opened on 26 June 2017 and was finalized on 12 October 2017.

Ad paragraph 19.7

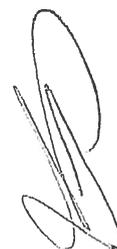
- 6.9 The contents of paragraph 19.7 are not in dispute and are irrelevant to the question whether a permanent stay of the applicant's criminal prosecution should be granted.

Ad paragraph 19.8

- 6.10 The contents of paragraph 19.8 are in dispute.
- 6.11 The mother of Mr Timol made an impassioned plea to the police officers involved in the interrogation and the death of her son to come forward and explain what happened to her son. She passed on ten months later with no answers. The contents of paragraph 19.8 clearly indicate that the applicant did not take any steps to assist the Truth and Reconciliation Commission in its investigation. The fact that the applicant simply informed the Truth and Reconciliation Commission's investigator that he was unable to assist "*at that stage, without having had the opportunity to jog my memory from my statement and/or evidence at the initial inquest*



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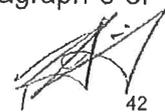


during 1972 to assist him" is clearly contradictory to the content of the affidavit of the investigator appointed by the TRC, Mr Piers Pigou. In any event it does not take the matter any further because the applicant did not thereafter provide the Truth and Reconciliation Commission with any information that could have assisted it in its investigation.

- 6.12 The applicant's aforesaid attitude confirms what I have stated above that he continues to refuse to take any responsibility in relation to Mr. Timol's death and, when regard is had to the purpose of the Truth and Reconciliation Commission, his conduct justifies the dismissal of this application and the granting of an order that his criminal prosecution should commence forthwith. Had he made full disclosure to the TRC, Gloy and van Niekerk were still alive at that stage. A prosecution could have ensued.

Ad paragraph 19.9

- 6.13 The contents of paragraph 19.9 are in dispute. The Applicant is not being honest when he advises that the affidavit of Piers Pigou, JPP 2, confirms that he was interviewed. In fact, no interview took place because according to paragraph 7 of his affidavit, Mr Pigou states: "he indicated when we spoke telephonically that he was willing to discuss the case. Several days later I drove to Pretoria as arranged and met with Mr Rodrigues at his place of work". At paragraph 8 of



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his affidavit, he states the following: "However, at this meeting he was no longer amicable nor was he willing to co-operate. He came across as reticent and insisted that our entire interaction be recorded with a voice recorder. He was not willing to talk to me about what has happened with Timol and our interaction was concluded rather quickly". At no stage does Mr Pigou say that the applicant requested an opportunity to jog his memory from his statement and/or evidence at the initial inquest during 1972 to assist him. The Applicant is being deliberately untruthful to create the impression that he would have willingly co-operated had this request being complied with. In fact, this is directly at odds with what Mr Pigou submits. Further, this affidavit was handed in at the 2017 inquest. This was never disputed and neither was this point ever raised.

Ad paragraph 19.10

6.14 The contents of paragraph 19.10 are not in dispute.

Ad paragraph 19.11

6.15 The contents of paragraph 19.11 are not in dispute.

Ad paragraph 19.12

6.16 It is correct that the applicant agreed to testify during the 2017 inquest proceedings. He was duly warned by the court of the purpose of the inquest court, of his rights and the ramifications of


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any findings it would make at the end of the inquest before he chose to participate.

6.17 The Applicant was given an opportunity to comment on the evidence presented, in particular the medical and trajectory evidence which were in direct contradiction to his version. It would be very strange for the applicant to have any comment to this evidence at the criminal trial in circumstances when he did not have any comment or had offered little objection to it, during the 2017 inquest proceedings.

Ad paragraph 19.13

6.18 The contents of paragraph 19.13 are not in dispute.

Ad paragraph 19.14

6.19 The contents of paragraph 19.14 are not in dispute.

Ad paragraph 19.15

6.20 The contents of paragraph 19.15 are not in dispute.

Ad paragraph 19.16

The content of paragraph 19.16 is disputed. Significantly, I draw the Court's attention to the fact that the applicant accepts that there is indeed "*material of recent origin*" upon which the State will rely in his criminal trial to prove that the only logical inference to be drawn is



that the Applicant was involved in the death of the deceased. The State also placed the Applicant in possession of all the exhibits and transcribed inquest record of 2017. It is incorrect and misleading to say that "basically the only material of recent origin" relates to medical and trajectory evidence. The inquest court also heard evidence from various witnesses and fellow detainees pertaining to torture and assaults at John Vorster Square. The court also heard evidence of collusion, cover ups, and forging of documents which the security branch relied on to justify deaths in detention.

Ad paragraph 19.17

6.21 The contents of paragraph 19.17 are not in dispute.

Ad paragraph 19.18

6.22 The contents of paragraph 19.18 are not in dispute.

Ad paragraph 19.19

6.23 The contents of paragraph 19.19 are in dispute. The averment that the reply to request for further particulars did not comply with the requirements of section 87 of the Criminal Procedure Act must be still is adjudicated before the trial court. An indictment with a detailed summary of substantial facts was served on the applicant. He was also furnished with the content of the docket and the entire transcribed inquest proceedings of 2017, including exhibits. Any

legal practitioner, on thorough perusal of the content of the docket, would have been in a position to plead. This application that the Applicant seeks to rely on in an attempt to get further and better particulars must be seen in the main as a "novel and unmeritorious attempt to get the State to deal with and reply to the Applicant's version of what he submits must be accepted, at this stage, as the true facts giving rise to the counts he faces". What the Applicant has in his possession is sufficient for him to plead and constitutes an abuse of process and a tactic to delay the prosecution from presenting its case.

Ad paragraphs 19.20 and 19.21

- 6.24 The contents of these paragraphs are not in dispute.
- 6.25 When regard is had to the contents of paragraphs 19.13, in particular the dates of the events referred to in those paragraphs, there could be no rational basis to contend, let alone find, that there has been an unreasonable delay in commencing with the applicant's criminal prosecution. For this reason, the suggestion that the applicant is entitled to a permanent stay of his criminal prosecution as a result of an alleged unreasonable delay in commencing and concluding his criminal trial is unfounded and ought to be rejected.

Ad paragraph 20

- 6.26 The contents of paragraph 20 are not in dispute.



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**7. AD PARAGRAPHS 21 TO 43: ALLEGED UNFAIR AND IMPROPER
MOTIVE**

Ad paragraph 21

7.1 The contents of paragraph 21 are not in dispute. There is nothing to suggest that the applicant will not have a fair trial.

7.2 As I have stated above, the applicant has not suffered any trial prejudice on the basis of which it could be concluded that he will not have a fair trial.

Ad paragraph 22

7.3 I have already dealt with the provisions of section 35(3) of the Constitution elsewhere above in this answering affidavit.

Ad paragraph 23

7.4 The contents of paragraph 23 are not in dispute.

Ad paragraph 24

7.5 The contents of paragraph 24 are in dispute. This was not the only consideration. As is evident from my draft memorandum, once the affidavit of the only other witness who was in the vehicle with Mr Timol when he was arrested and detained was obtained and other investigations conducted, that the request was made.



Ad paragraph 25

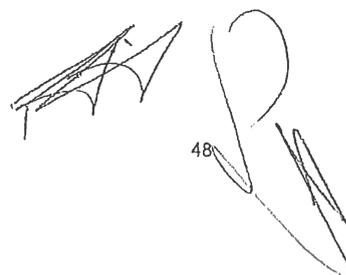
- 7.6 The exposition of the law in paragraph 25 are correct.
- 7.7 However when the request for re-opening was made by the NPA, the institution of Criminal Proceedings were not envisaged. In fact the prosecution did not even know the applicant was still alive at that stage. See answer supra.

Ad paragraph 26

- 7.8 Paragraph 26 should be read with paragraph 37 of the founding affidavit. It is answered in paragraph 3.11.1 on page 18.

Ad paragraph 27

- 7.9 The contents of paragraph 27 are inconsistent with the contents of the 2017 Inquest Court judgment. The content of this paragraph are denied. The applicant is selective about which comments were made in his favour. He conveniently makes no reference to the fact that the court made adverse credibility findings against him. In fact, multiple contradictory versions emerged during his evidence.
- 7.10 Despite what I have stated above, there is nothing which prevents the NPA from conducting a thorough assessment of the record to determine whether a person such as the applicant in this case could



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be charged with a different offence from that contemplated in the inquest judgment.

Pursuant to the 2017 Inquest Court judgment the NPA assessed the evidence carefully summarized therein and concluded that such evidence leads to one and only one conclusion that the applicant was involved in the murder of Mr Timol.

Ad paragraph 28

- 7.11 The contents of paragraph 28 are in dispute. The findings of the Presiding Judge should be seen in the full context. The NPA is furthermore not bound by the findings of an inquest court.

Ad paragraph 29

- 7.12 The contents of paragraph 29 is denied and do not assist the applicant.
- 7.13 On the applicant's own version, there is material of recent origin which relates to medical evidence from pathologists and expert evidence relating to the trajectory of the body falling from the window of Room 1026.
- 7.14 The aforesaid evidence is extremely important and the State must be given an opportunity to place it before the criminal trial court for that Court to decide whether, when it is considered with all the other available evidence, it supports the State's contention that the only



conclusion or inference to be drawn therefrom is that the applicant is the person who, was involved in the killing of Mr. Timol.

7.15 In the circumstances, it does not assist the Court for the applicant to say what he says he has "no hesitation to submit" to this Court without him placing the correct context of the available evidence before the Court.

Ad paragraph 30

7.16 The contents of paragraph 30 do not take the matter any further and do not constitute a basis to grant a permanent stay of the applicant's criminal prosecution for the death of Mr. Timol. The state merely confirms that all documents and exhibits in its possession have been furnished to the Applicant. The applicant confirmed it received all the documents and exhibits.

Ad paragraph 31

7.17 The contents of paragraph 31 are not in dispute insofar as they correctly reflect the contents of the statutory provisions and the Directive referred to therein.

7.18 I state that there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution of the applicant for the murder of Mr. Timol.

7.19 I have already stated elsewhere above in this answering affidavit what the available evidence shows and what conclusion or inference

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could be drawn from that evidence. I state that the available evidence is sufficient to enable a Court to draw the conclusion that the applicant was involved in the killing of the deceased. For this reason, I persist that there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution.

7.20 In the premises, there is a legal basis to commence and continue with the criminal prosecution of the applicant.

Ad paragraph 32

7.21 The contents of paragraph 32 are not in dispute insofar as they correctly reflect the contents of the statutory provision referring to the Prosecution Policy Directives referred to therein.

Ad paragraph 33

7.22 The contents of paragraph 33 are not in dispute insofar as they correctly reflect the contents of the statutory provision referred to therein.

Ad paragraph 34

7.23 The contents of paragraph 34 are not in dispute. The NPA is exercising its functions without fear, favour or prejudice.

Ad paragraph 35

7.24 The contents of paragraph 35 are irrelevant.

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- 7.25 Even if it may be found that the contents of paragraph 35 are relevant, I deny them.
- 7.26 The correct position is that the Inquest Court is only required to record whether the death of the person who is the subject of the inquest was caused by an act or omission which *prima facie* involves an offence. If it does, as in this case, it is for the National Director of Public Prosecutions or the National Prosecuting Authority to decide whether or not to prosecute. In this case, the national prosecuting authority is exercising its constitutional mandate to prosecute the applicant for murder.
- 7.27 In the premises, nothing really turns out on contents of paragraph 35. It must be pointed out, that even if the submissions are made by the representative of the NPA, we are not bound by the findings of an inquest court. After the matter was referred to the National Prosecuting Authority, and after a thorough and critical analysis of the evidence, charges are preferred.

Ad paragraph 36

- 7.28 The contents of paragraph 36 are denied.
- 7.29 There is no prescription period for the first respondent to charge any person with murder.
- 7.30 The mere fact that there is no prescription period within which the first respondent is in law allowed to charge anyone with murder



necessarily means that a person such as the applicant could be charged with murder after 49 years from the date on which the murder in issue was committed. This is indeed such a case.

- 7.31 The findings of the 2017 Inquest Court as far as the exact charge to be levelled against the applicant are not conclusive and it is not binding upon the NPA. The NPA is in law required to consider the findings of the Inquest Court and then decide as to what charge to be preferred against the persons implicated in the death which is the subject of the inquest.

In this case, after having considered the evidence carefully summarized in the 2017 Inquest Court judgment, the NPA has correctly decided to charge the applicant with murder. There is respectfully nothing wrong in law with the decision taken.

I dispute that the Inquest Court found that the applicant was not involved or even present at the time of the murder of the deceased.

Ad paragraph 37

- 7.32 The contents of paragraph 37 are denied. It has been discussed supra on page 17 and 18 in paragraph 3.11.
- 7.33 The NPA respondent only decided to prosecute after the conclusion of the 2017 inquest proceedings.
- 7.34 In the circumstances, it is also not correct that the applicant no longer had a right to remain silent. The Applicant was ably

represented at the Inquest Proceedings and elected to give evidence. This was a voluntary decision. He also voluntarily provided a warning statement.

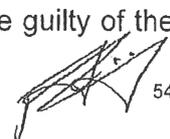
7.35 The applicant remains free to attend the criminal trial and thereat remain silent if that is what he wants to do. Section 35(3) of the Constitution is very clear in this regard. It says that every "*accused person*" has a right to a fair trial. An inquest is not a criminal trial. At the 2017 inquest proceedings, the applicant was not an "*accused person*". For this reason, the applicant was not thereat entitled to a right to remain silent as promised in section 35(3) of the Constitution.

7.36 In the event that the applicant wishes to exercise his right to remain silent at the pending criminal trial, the applicant remains entitled to do so.

Ad paragraph 38

7.37 It is correct that the crime of murder does not prescribe.

7.38 The right to a fair trial which the applicant seeks to enforce entitles him to be tried within a reasonable time from the date on which he is charged with an offence. In this case, on his own version, he was only charged in July 2018. The applicant only brought this application in October 2018. There were no previous attempts to subject the applicant to criminal prosecution and it is not suggested that the applicant is now considered by the public to be guilty of the

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killing of Mr. Timol such that it could be said that he has suffered trial prejudice to justify a permanent stay of his criminal prosecution. In any event, an accused person once he or she appears as an accused person will run the risk usually associated with being an accused person. But this does not outweigh the mandate of the NPA to prosecute offences of murder.

Ad paragraph 39

7.39 The contents of paragraph 39 are denied.

Ad paragraph 40

7.40 The contents of paragraph 40 are denied.

Ad paragraph 41

7.41 The contents of paragraph 41 are denied.

7.42 On the applicant's own version, the crime of murder does not prescribe.

7.43 The fact that all the police officers who were involved in the interrogation of Mr. Timol have died is irrelevant. This is so because the applicant is not being charged with the interrogation, assault or torture of Mr. Timol. They also could not have assisted his case because he placed himself, alone, in the room with Mr Timol before he died. Furthermore, his version that all was well with Mr Timol, is



supported by his colleagues "from their graves" because their affidavits and evidence was to a large extent "preserved" by the available record.

7.44 The case against the applicant is based on the fact that he is the only person, and the last person who was with Mr. Timol shortly before he died. Insofar as the only person, who was in that room with Mr Timol before he died, it must necessarily follow that the only inference to be drawn is that the Applicant is untruthful as to how and when Mr Timol came to meet his demise.

7.45 The fact that the medical experts who participated in the postmortem examination of Mr. Timol have passed away is irrelevant. Their findings have been preserved in a 77 page judgment. Photographs of the deceased are still available as well as a detailed medico-legal report. The reports remain available and there is nothing which prevents the applicant to employ new experts to consider those reports and file new reports in support of his defence, if he has any.

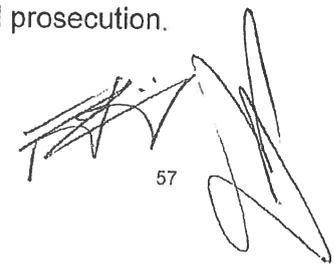
7.46 The contents of paragraph 41.3 are denied. The applicant refers to "*the memories of all possible witnesses, including myself.*" The applicant relies on his same old version. For this reason alone, the question of impairment on his memory is completely irrelevant and untruthful. The allegation he makes that all possible witnesses have problems with their memory is speculative and conjecture.



- 7.47 The applicant has not identified any possible witnesses whose memories may have been impaired as a result of the long time that has passed.

- 7.48 The contents of paragraph 41.4 are irrelevant because the evidence upon which the State would want the criminal trial court to draw the necessary conclusion or inference is already contained in the 2017 inquest judgment and in the docket which has already been provided to the applicant. Accordingly, the contents of paragraph 41.4 do not take the matter any further. In any event, the applicant does not take the Court into his confidence to tell the Court as to what "*crucial records pertaining to the incident*" and "*relevant to the incident*" have been destroyed. The applicant also does not tell the Court as to who destroyed what he says is the many "*crucial records pertaining to the incident.*"

- 7.49 The medical records upon which the Security Branch relied during the first inquest are still available and it is upon him to decide whether he wants to rely thereupon or whether he wants to engage new medical experts to review those records and provide new expert reports. The difficulty with this, however, is that the applicant did not tell the 2017 Inquest Court that the records, upon which he and his Security Branch relied in 1972, are not a true reflection. He only has himself to blame for this and this does not constitute a basis to grant an order to permanently stay his criminal prosecution.


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7.50 The contents of paragraph 41.5 are denied. The applicant has placed no medical records of his "*fragile health*" before the court to substantiate what he says in paragraph 41.5. In any event, as I have already stated above, the applicant has recently confirmed that his version remains as it was during the first inquest. His well-known and somewhat consistent version is that he is the only person who was with Mr. Timol when Mr. Timol left Room 1026 through the window. In his recent, unopposed bail application, marked XX, the applicant also confirmed that his memory was fine and that other than the usual ailments, he had no problems. This flies in the face of allegations of "*fragile health*" and must be seen as a feeble attempt to evade prosecution. It is also evident from the affidavit of the investigating officer, attached and marked, XX, that the Applicant has a selective use of his crutch. It seems to serve the purpose when it suits the Applicant.

Ad paragraph 42

7.51 I deny that the State has an unfair, improper or unlawful motive for prosecuting the applicant.

7.52 I have already extensively dealt with the alleged unfair, improper or unlawful motive elsewhere above in this answering affidavit.



- 7.53 The contents of paragraphs 42.1 to 42.12 are not in dispute and correctly reflect what is contained in the 2017 Inquest Court judgment.
- 7.54 The contents of paragraph 42.13 are not in dispute insofar as they correctly reflect a selection of the contents of the 2017 Inquest Court's judgment. In this regard, it is important to draw the Court's attention to the fact that the applicant's version is that he was present with Mr. Timol when Mr. Timol left Room 1026 through the window thereof. This version makes the applicant the last person to have seen and to be with Mr. Timol inside Room 1026.
- 7.55 In regard to 42.14 it should be noted that submissions by First Respondent to the Court in the re - opened inquest, not only related to role of the applicant "as accessory after the fact" It is specifically also stated "or as a co-conspirator. " The contents of paragraph 42.14 do not take the matter any further when regard is had to what the 2017 Inquest Court was required to do in terms of the Inquests Act 58 of 1959, i.e. to record whether the death of Mr. Timol was caused by an act or an omission which amounts to an offence. The fact that the 2017 Inquest Court may have gone further to express its views about who may or may not have killed Mr. Timol does not take the matter any further due to the fact that at the end of the day, the first respondent is still in law required to take an independent decision as to which person, if any, should be charged with the murder or any offence in relation to the death of Mr. Timol and as to which offence the person should be charged with.




Ad paragraph 43

7.56 The contents of paragraph 43 do not take the matter any further in the light of what I have already stated above.

7.57 It is important to again emphasize that the first respondent is in law not married to the findings of the Inquest Court as far as the charges to be preferred against an accused person is concerned. The NPA remains free to take an independent decision as to what charges, if any, should be preferred against any person who is responsible for the death of Mr. Timol.

8. AD PARAGRAPHS 44 TO 50: ALLEGED UNDUE DELAY

8.1 The contents of paragraph 44 are not in dispute. The delay contemplated in section 35(3) (d) can only be assessed from the time after the accused person has been charged. In this case, an unreasonable delay has not occurred when regard is had to the fact that the applicant was only charged with murder in July 2018.

8.2 The contents of paragraph 45 are not in dispute. In this case, there is nothing which prevents or makes it impossible for the applicant to exercise his fundamental right to adduce and challenge the State's evidence.

8.2.1 As far as adducing evidence is concerned, the applicant's version remains what it was in 1972 when he gave evidence at the first inquest. For this reason, the applicant has not suffered



and will not suffer any trial prejudice as far as his ability to adduce evidence at his pending criminal trial is concerned.

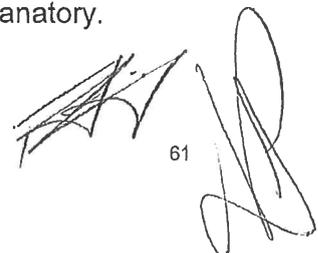
8.2.2 There is no impediment to the applicant being able to challenge any of the State's evidence intended to be led at his criminal trial. On his own version, the applicant is now fully aware of all the available evidence and it is not suggested that he will not be in a position to challenge any of the evidence which he now knows is available.

8.2.3 Without the applicant, being aware of all the available evidence, telling the Court as to what evidence would be impossible for him to challenge at his criminal trial, the Court cannot simply accept that the applicant's right to adduce and challenge evidence has been infringed or that it would be impossible for the applicant to exercise such a right.

8.3 It is correct that the applicant has only been charged 47 years after Mr. Timol's death. This, however, does not constitute a violation of his right to a fair trial.

Ad paragraph 47

8.4 The contents of paragraph 47 are irrelevant. The applicant again directly contradicts what evidence was already handed in at the re-opened inquest. An attempt was made by a TRC investigator to interview him. The content of that affidavit is self-explanatory.



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Ad paragraph 48

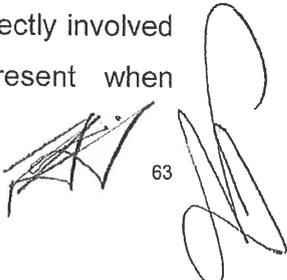
- 8.5 It is not the State's case that the applicant took any steps to evade justice or cause any delay in his criminal trial.
- 8.6 In any event, the contents of paragraph 48 are completely irrelevant to the question whether there has been an unreasonable delay in commencing and concluding the applicant's criminal trial prosecution.
- 8.7 The applicant did not have a choice but to hand himself over. A J50 had been authorized for his arrest. A "gentleman's agreement" was put in place which enabled him to hand himself over. Had the State really intended to be malicious and have ulterior motive, they could easily have executed the warrant and kept him in custody. Or opposed bail for that matter.

Ad paragraph 49

- 8.8 I deny that the first and second respondents failed to act in a diligent manner in coming to the decision to prosecute the applicant.
- 8.9 In the context of this case, the right to a fair trial has not in any way been violated or irreparably violated by the time that it took the first respondent to take a decision to prosecute the applicant.
- 8.10 The contents of paragraph 49.1 are not in dispute.
- 8.11 The contents of paragraph 49.2 are not in dispute.




- 8.12 The contents of paragraph 49.3 are not in dispute and do not constitute a basis for a conclusion that there has been an unreasonable delay in commencing and concluding the applicant's criminal trial.
- 8.13 The contents of paragraphs 49.4 and 49.5 are not in dispute.
- 8.14 In response to paragraph 49.6 it can be stated that even if there is likelihood that cases of this nature were deliberately suppressed by the State, why should the families of victims suffer? The administration of justice will fall into disrepute if perpetrators and alleged perpetrators are allowed to continue with carefree living, after the truth surrounding the mysterious deaths of their loved ones comes to the fore only to be ignored by prosecution and investigation services. In any event, it is the function of the prosecution to prosecute and the function of the police to investigate. It is not for the victims to engage in investigation and prosecution. It will be a sad day in history when where even if it is found that organizations seized with these mandates fail in their functions and our Constitutional democracy whilst acknowledging our painful past, continues to exacerbate the pain of the families by granting permanent stay of prosecutions against alleged perpetrators because of interference, political or otherwise.
- 8.15 The contents of paragraph 49.7 are not in dispute. However I deny that there was an unreasonable delay. I was not directly involved in the matter until January 2016. I was present when



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representations were made to the NDPP and the Head of NPS on Tuesday, 19 January 2016. Adv. George Bizos, Adv. Varney, Frank Dutton and members of Webber and Wentzel also attended this meeting and did a presentation. It related to two matters to wit:

the late Ahmed Timol, and
Dr Niel Aggett.

I immediately started to read and study all the relevant material and gather the material relating to the Timol inquest. I consulted a number of witnesses, the investigating officer and obtained documents and statements. Obviously I also consulted with Adv. Macadam and I confirm his affidavit as far as it relates to me. (Annexure **JPP 5** attached hereto) When Dr Saliem Essop who resided in the UK, could be seen in South Africa, an interview was held with him. This was done on the 13 October 2016. I ensured that a statement under oath be obtained as soon as possible. This was done on the 14 October 2016. Thereafter I immediately submitted a memorandum to the National Director of Public Prosecutions requesting a reopening of the Inquest in terms of Section 17A. This was done on the 19 October 2016. (See annexure **JPP 3**⁽²⁾ attached hereto) The NDPP addressed a letter to the Minister on the 25 October 2016. (See Annexure **JPP 4** attached hereto.) I was involved in numerous other matters during that time. From the above it is clear that there was no inordinate delay in this matter once the affidavit from Dr Saliem Essop was obtained. I deny that failed to act in a diligent manner in coming to a decision to reopen an inquest.

8.16 The contents of paragraphs 49.8 are not in dispute.

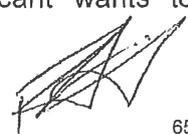
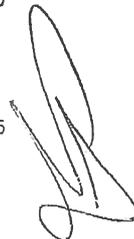
8.17 The content of paragraph 49.9 is in dispute. Since the overturning of the finding of the 1972 inquest court on 12 October 2017, the applicant became aware of the investigation when he was

approached for a warning statement in June 2018. Eight months is a relatively short period of time in which to conclude investigations, and indict and bring an accused before court.

8.18 The contents of paragraph 50 are denied and do not constitute a basis to conclude that there has been an unreasonable delay in commencing and concluding the applicant's criminal trial such that his right to a fair trial has been irreparably violated for the following reasons:

8.18.1 On the applicant's own version, there were no other people inside Room 1026 when Mr. Timol left that room through the window other than himself and Mr. Timol. For this reason, the suggestion that "*all material witnesses have passed away and I will not be in a position to consult with these witnesses and/or to adduce evidence*" is wrong and misleading.

8.18.2 The question whether Mr. Timol "*was able to move at the time prior to his death and/or whether he was incapacitated as a result of injuries already sustained prior to his fall from the tenth floor*" is irrelevant as far as the applicant is concerned. This is so due to the fact that the applicant's version is that Mr. Timol was able to move and that he moved from one side of Room 1026 to the door thereof and again to the window through which he left that room. That is the applicant's version and one fails to understand as to which witnesses the applicant wants to


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consult with and what further evidence the applicant wants to adduce in relation to that version which he has been consistent about. The state has always indicated its state of trial readiness. It is the applicant who delays the matter repeatedly by abusing the process with flimsy applications.

9. AD PARAGRAPHS 51 TO 59: RIGHT TO ADDUCE AND CHALLENGE EVIDENCE

In the light that these facts are within the personal knowledge of the prosecution team, Adv Du Toit will address these averments of 51 – 19 in his confirmatory affidavit.

10. AD PARAGRAPHS 60 TO 67: ALLEGED PREJUDICE

Ad paragraph 60

10.1.1 I deny that the first respondent has infringed the applicant's rights to a fair trial.

10.2 I deny that there has been an "undue and excessive delay to begin with the prosecution." As I have stated above, a prosecution can only begin once an accused person has been charged. What is contemplated in section 35(3) of the Constitution is an unreasonable delay in commencing and concluding a criminal trial with reference to the date after the accused person has been charged with an

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offence. The question of unreasonable delay does not arise until such time that the person has been charged with an offence.

10.3 In this case, the applicant was only charged in July 2018 and he brought this application in October 2018.

10.4 The contents of paragraph 60.2 are denied. This is based on speculation.

10.5 I deny that the applicant has suffered any irreparable trial prejudice.

10.6 The contents of paragraph 60.4 are denied. There is nothing to suggest that the new evidence upon which the State seeks to rely which was unearthed during the 2017 inquest was available to the State in 1996 when the matter was investigated by the Truth and Reconciliation Commission or in 2003.

Ad paragraph 61

10.7 The contents of paragraph 61 are denied. It is disrespectful of the Applicant to place himself in the same position as that of the family of Mr Timol.

Ad paragraph 62

10.8 The contents of paragraph 62 are denied. Even if this was the case, once new evidence emerged, the NPA acted on the evidence. It is unacceptable that the status quo must then remain because of a



denied "culpable and reckless inactivity". That would defeat the interests of justice and bring the administration of justice into disrepute.

Ad paragraph 63

- 10.9 The contents of paragraph 63 are denied for the reasons which I have already stated above.

Ad paragraph 64

- 10.10 I deny that there is no evidence available to sustain a charge of murder against the applicant. I have already stated above the basis on which the State seeks to contend that the applicant is guilty of Mr. Timol's murder.
- 10.11 The contents of paragraph 64.2 do not take the matter any further in the light of the fact that the NPA is not bound to charge the applicant with what the Inquest Court thought he should be charged with. The NPA respondent remains free to take an independent decision as to what charges to be preferred against an accused person based on the available evidence. The available evidence clearly shows that the applicant is guilty of Mr. Timol's death.
- 10.12 The contents of paragraph 64.3 do not take the matter any further. In any event, the applicant's remedy for the complaint in paragraph 64.3 is to bring an application to compel the production of the



requested further particulars or such information as he may in law be entitled to.

Ad paragraph 65

- 10.13 The contents of paragraph 65 do not constitute a bar from commencing and continuing with the applicant's criminal trial.
- 10.14 It would not be for the first time that a person of the applicant's age and health is subjected to a criminal trial.
- 10.15 The fact that the applicant stays in Pretoria and that the trial is scheduled to take place in Johannesburg is irrelevant to the question whether the criminal prosecution should be stayed. Accused persons are always tried at the jurisdiction at which the offence was committed regardless of their place of residence. It is strange that the "dismal" state of health is now being raised as a bar to prosecution. These are neutral factors.

Ad paragraphs 66 and 67

- 10.16 The contents of paragraphs 66 and 67 are denied.
- 10.17 In the premises, the applicant has not made out a case for the relief which he seeks and the application ought to be dismissed with costs.



WHEREFORE, I pray that it may please the Court to dismiss the application with costs, including the costs consequent upon the employment of two counsels.

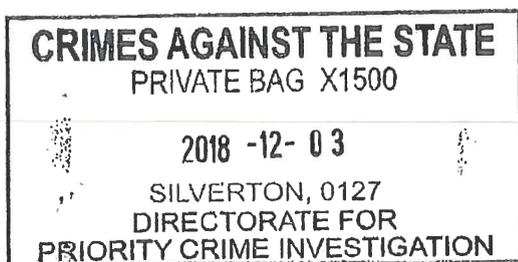


JACOBUS PETRUS PRETORIUS

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on the 3rd day of December 2018, 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.



 Colonel .
 COMMISSIONER OF OATHS
 FULL NAMES:
 BUSINESS ADDRESS:
 OFFICE:
 ALBERTUS MARTINUS MATHYS FRANK
 218 Visagie Street: Pretoria .
 Crimes Against the State .
 Colonel .



JPP 1

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES

Applicant

and

NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS OF SOUTH AFRICA

First Respondent

MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES

Second Respondent

THE MINISTER OF POLICE

Third Respondent

FIRST RESPONDENT'S SUPPORTING AFFIDAVIT BY JOHANNES
LASCH MABELANE

I,

JOHANNES LASCH MABELANE

state under oath:

1. I am an adult male with I.D. Number 5212085665087 residing at number 88 Nkomo Street, Diepkloof Extention Phase 3 Soweto. I am the brother of the late Matthews Mabelane ("Deceased"), who died while in custody at John Vorster Square Police Station on 15 February 1977.
2. This affidavit is provided in support of the First Respondent's opposition to the above application. I depose of this affidavit personally and on behalf of the Mabelane family ("Family") in the interests of justice for my family, and the families of all of those whose relatives died at the hands of the

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apartheid police. I am duly authorised to represent the Family in these proceedings.

- 3. The facts contained herein are true and correct and based on documents the Family has gathered. Where I make statements that relate to legal matters, I do so on the advice of my legal advisers.

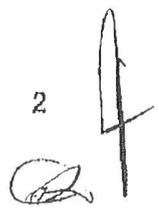
- 4. The Applicant in the proceedings is Mr Joao Rodrigues, an adult male person who was found to be an accessory after the fact of the murder of Ahmed Timol, under the Re-opened Inquest Into the Death of Ahmed Essop Timol, case number: IQ01/2017, Gauteng Division ("Ahmed Timol Case"). He is now applying for permanent stay of prosecution in the above matter.

- 5. This affidavit sets out the Family's basis on which we support the opposition by the First Respondent to the relief sought by the Applicant for a permanent stay of his prosecution. The Applicant is applying for a permanent stay, and the withdrawal, of the criminal proceedings in respect of the charge of being an accessory after the fact for the murder of Ahmed Timol on the ground of time lapse since the events took place and his lack of involvement in, or presence at, the time of the murder of Ahmed Timol.

- 6. From the Family's intensive research we have found that:



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6.1 On the 22nd of January 1977, the Deceased was arrested and was taken to John Vorster Square Police Station. He died in custody on the 15th of February 1977 as the result, I submit, of being thrown from a 10th story window of John Vorster Square by the apartheid police officers who were interrogating him.

7. It was alleged by the police at the time that the deceased died as a result of him accidentally falling from the 10th floor of the John Vorster building. The documents attached to this affidavit contains the State's allegation at the time of the deceased's cause of death:

7.1 The version of the police was given as follows according to the United Nations Special Committee against Apartheid:

Major General W.H. Kotze, Divisional Commission of Police, said he was being interrogated in a room with an un-barred window on the tenth floor at Security Policy headquarters, John Vorster Square, Johannesburg, by Warrant Officer D. Jordaan, Warrant Office Viljoen, and Detective Sergeant I. Cilliers, at about 9 a.m. on 15 February. Warrant Officer D. Jordaan left the room to answer a telephone call. A moment later, Mabelane jumped on to a chair, forced the window open, climbed on to a 130cm furrowed ledge that ran alongside the north side of the building and was walking on the ledge. The police were unable to stop him but called to him to come back. As he looked back he lost his balance and fell to his death. Senior police officers do not believe that he was attempting suicide when he went through the

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window. The other police officers in the room were taken by surprise. Mabelane had been sitting calmly at a table moments earlier." (Annex JLM1)

7.2 The inquest findings dated 30 May 1977 states that the cause or likely cause of death was "multiple injuries – sustained the deceased whilst questioned by the police jumping through a window and walking along a ledge on the outside of the building at the 10th floor loosing his balance and falling to the ground below – Accidental." (Annex JLM2)

7.3 The police version and the inquest findings are beyond belief and will be tested at a re-opened inquest in due course.

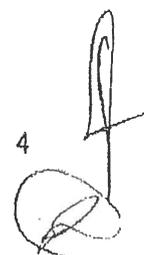
8. The United Nations Special Committee against Apartheid report, dated 20 February 1979 did not accept the above finding. (Annex JLM1).

9. The Truth and Reconciliation Committee report, 2006 Vol 5 also disputes the police allegations. (Annex JLM3)

10. In the Ahmed Timol Case the Pretoria High Court found that Ahmed Timol was pushed to death by members of the South African Security branch out of a window from the 10th floor of the John Vorster building in 1971.

11. As per the Ahmed Timol Case recommendations, the Family together with the South African Police and the National Prosecuting Authority, are currently investigating the circumstances surrounding the Deceased's



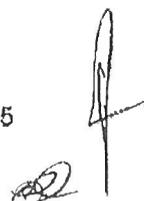
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death with a view to reopening the inquest and to criminally prosecuting those responsible.

12. The Applicant who was found to be an accessory after the fact in the Ahmed Timol Case, Mr Joao Rodrigues, is applying for permanent stay of prosecution in relation thereto on the ground of the time lapse since the events and his lack of involvement in, or presence at, the time of the murder of Ahmed Timol. The Family is of the opinion that a finding in favour of the Applicant on the basis of lapse of time will have negative implications in their own intention to see that those responsible for the death of the Deceased are prosecuted.
13. The circumstances alleged by the police at the time relating to the death of Ahmed Timol and of Matthews Mabelane are disturbingly similar.
14. There were, according to the Truth and Reconciliation Report (2006) Vol 2, Chapter 3 (Annex JLM4) five cases where death of detainees whilst in police custody was the result of jumping from a window. There are other equally incredible stories to explain the murders of many other detainees by police officers, like "slipping on soap".
15. If the Applicant is successful and his prosecution is stayed on the grounds of lapse of time it will create a precedent for all similar prosecutions and claims that will be pursued by the families of such victims who have, like the Mabelane family, been encouraged by the Timol matter to seek a



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proper finding as to the death of their relative with the prospect of consequent criminal and civil proceedings against those responsible.

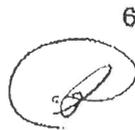
16. I therefore respectfully request that, representing as I do the Family of the Deceased, who died as a probable result of being murdered by the apartheid police, the Court should consider the impact the granting of the application would have on our family. My father died at the age of 95 years, heartbroken and still trying to find out the truth about his son's death. A precedent should not be created that murder has an extinctive prescription period for criminal proceedings and civil claims

17. I submit that it will not be in the interest of justice if the application sought by Mr Rodrigues is granted on the grounds of lapse of time. My family, and the families of all those whose relatives died at the hands of the apartheid police, will be prejudiced in that the only opportunity we have to find out the circumstances surrounding my brother's death, and then pursuing those responsible who did not avail themselves at the truth and reconciliation process, will be taken from us.

18. A judgment in favour of the applicant in the above proceedings will affect the following Constitutional rights of the Family, and all other families with similar rights as the families of the victims, and as emotional victims themselves, of murders committed by the apartheid police namely:

18.1. The right of victims to equal protection and benefit of the law;



6




18.2. The right to have the dispute regarding the circumstances of the deaths in detention and the parties gully of the crimes being resolved by the application of law decided in a fair public hearing before a court;

18.3. The right of the Family to have their dignity respected and protected by having access to the justice system to reveal the truth about the wrong that was caused to them by the murder of their family member and subsequent cover-up of the deed.

19. For all the reasons set out in this affidavit, I support the opposition by the First Respondent to the above application.



DEPONENT

Signed at ILLOVO on this 26th day of November 2018.

I certify that:

- I. the Deponent acknowledged to me that :
 - A. He knows and understands the contents of this declaration;
 - B. He has no objection to taking the prescribed oath;
 - C. He considers the prescribed oath to be binding on his conscience.
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- III. the Deponent signed this declaration in my presence at the address set out hereunder on



ALICIA FELICITY DANIELS
Commissioner of Oaths (ex-officio)
Admitted Attorney of the High Court of South Africa
The South African Institute of Chartered Accountants
17 Fricker Road, Illovo, Johannesburg, 2196

Designation and Area:
Full Names:

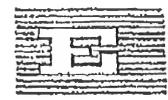
Street Address

ALICIA FELICITY DANIELS
Commissioner of Oaths (ex-officio)
Admitted Attorney of the High Court of South Africa
The South African Institute of Chartered Accountants
17 Fricker Road, Illovo, Johannesburg, 2196

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JPP1 JLM1



UNITED NATIONS
ECONOMIC
AND
SOCIAL COUNCIL



Distr.
GENERAL
E/CN.4/1327/Add.2
27 February 1979
Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Thirty-fifth session
Agenda item 16

IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON THE
SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

Note by the Secretary-General

The information reproduced in the annex to this note relevant to the preparation of the list of individuals, organizations, institutions and representatives of States alleged to be responsible for crimes enumerated in article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid has been received from the Special Committee against Apartheid in accordance with resolution 7 (XXXIV) of the Commission on Human Rights.

GE.79-11018

JPP 1 390

UNITED NATIONS  NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE: PO 230-SOAF (2-2-1)

20 February 1979

Sir,

The Special Committee against Apartheid has been gravely concerned over the continuing crimes of the apartheid régime of South Africa and its officials, despite the adoption of the International Convention on the Suppression and Punishment of the Crime of Apartheid by the General Assembly on 30 November 1973 and the coming into force of the Convention on 18 July 1976.

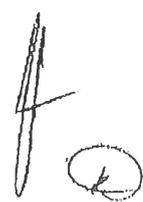
The brutality of the apartheid régime has, infact, escalated since the liberation of Angola and Mozambique and the Soweto massacre of 18 June 1976, as it attempted to stem the advance of the struggle of the oppressed people for liberation.

The Special Committee hopes that the Commission on Human Rights will soon prepare a list of individuals, organizations, institutions and representatives of States who are guilty of the crime of apartheid in terms of the International Convention and take appropriate action to secure the punishment of criminals.

In accordance with the International Convention and the requests of the Commission, the Special Committee has undertaken, with the assistance of an expert consultant, a study of the torture and murder of detainees in South Africa in recent years in order to assist the Commission in the discharge of its responsibilities under the International Convention. I have the honour to transmit herewith, for the attention of the Commission, a report on some cases, providing particulars on the persons - officers of the Security Police and magistrates - responsible for the crimes.

In this connexion, I wish to emphasize that the policy of apartheid has been recognized as a crime against humanity and all those who are concerned in the enforcement and administration of the laws of apartheid and the application of that policy are guilty of the crime of apartheid.

H. E. Mr. Yvon Beaulne
Chairman
Commission on Human Rights
Palais des Nations
Geneva



A N N E X

SOME CASES OF MURDER, TORTURE AND DEPRIVATION OF LIBERTY

The accused and their victims

<u>Case No.</u>	<u>The Accused</u>	<u>Page</u>
A	JOINTLY - The Natal Inland Division, Pietermaritzburg, and The Port Natal Division, Security Police, Durban	2
B	The Port Natal Division, Security Police, Durban	19
C	The Natal Inland Division, Security Police	38
D	Woman Warder Vorster	46
E	Brigadier L. P. Neethling	47
F	The Eastern Cape Division, Security Police, Port Elizabeth ..	48
G	Sergeant K. F. Landman	72
H	The Witwatersrand Division, Security Police, Johannesburg ..	73
J	The Western Cape Division, Security Police, Cape Town	97
K	1 Colonel T. G. du Plessis 2 Sergeant Oscar Ntsiko 3 Sergeant du Plessis	103
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XA	Magistrate T. L. Blunden	113
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XG	Magistrate W. P. Dormehl	117
XH	Magistrate J. C. Maritz	118
XJ	Magistrate P. L. May	119
XK	Magistrate Booysen	120
XL	Magistrate J. van Reenen	120
XM	Magistrate D. F. Smith	121

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JPP1.

CASE NO. A

THE ACCUSED: NATAL INLAND DIVISION, SECURITY POLICE, PIETERMARITZBURG,
AND PORT NATAL DIVISION, SECURITY POLICE, DURBAN

All the persons named as the accused in Cases Nos. B and C

PARTICULARS:

<u>CHARGE</u>	<u>DATE</u>	<u>VICTIM</u>	<u>WITNESS</u>
Torture	30.11.1975 to ?	Michael Oumede	The victim
Torture	30.11.1975 to ?	Anton Fano Xaba	The victim
Torture	5.12.1975	William Fano Khanyile	The victim
Torture	5.12.1975 to ?	Russell Maphanga	The victim
Torture	5.12.1975 to ?	Harold Bekisisa Nxasana	The victim
Torture	December 1975 to ?	Mdelwa Frans Kunene	The victim
Torture	March 1976 to April 1976	Cleophas Melayibone Ndhlovu	The victim
Torture	24.6.1977 to 7.10.1977	Sihle Khumalo	The victim
Torture	8.12.1977 to ?	Ernest Sabelo Ngobese	The victim

JPP1

Medical evidence

No medical evidence appears to have been given at the inquest.

Result of inquest

Mr. W. P. Dormehl, the inquest magistrate, found that Mabelane fell accidentally and died of the multiple unjuries he sustained as a result of the fall. No person was to blame.

Some remarks

- 1) It is probably correct that Mabelane climbed out of the window, walked along the ledge and fell to his death. Any passer-by might have seen this.
- 2) A passer-by might also have seen the policemen at the window. He could not have heard whether Mabelane was being called back or told to go further.
- 3) The magistrate did not address himself to the reason why Mabelane climbed out of the window. It would be absurd to suggest that he attempted to escape through a window of the tenth floor of a building. There is no suggestion of an attempted suicide. There is a strong and in the circumstances, irresistible inference that he was forced to climb out of the window while he was being tortured.
- 4) No medical evidence was submitted at the inquest. It does not appear that a post mortem examination was carried out. The inquest court had no information before it as to whether any injuries were present on the body that could have been caused other than by the fall, or earlier than the time of the fall.

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JPPA

5) The speed with which the inquest was disposed of is extremely significant. The family could not engage a pathologist or retain counsel. On this score alone the innocent explanation of how he came to be on the ledge and his accidental fall becomes unacceptable.



J.P.P.A.

JLMZ

A.G. 1/4/3/1/216/77

/Jd

O.P.S. 1977-78-300 (A-5)

1 56

No. 287 1977

INQUEST: ACT 58 OF 1959 GEREGTELIKE DOODSONDERSOEK: WET 58 VAN 1959

Holden of
Gehou te **JOHANNESBURG**

in the district of
in die distrik **JOHANNESBURG**

by
voor nmr. **W.P. Dormehl**

esquire, Magistrate for the said district
Landdroes van genoemde distrik en

with
as assessor(s) on the **14** day
an assessor(s) of die **30** dag

of **April** 19**77**, into the circumstances attending the death of the person mentioned below.
van **1977** nangaande die omstandighede in verband met die dood van ondergenoemde persoon

Findings in terms of section 16 of the Act:
Bevindings ingevolge artikel 16 van die Wet:

MATHEWS MABELANE

(a) Identity of the deceased person
Identiteit van die oosledene
Bantu male 22 Years Unknown

(State full name, race, sex, age and occupation/Meld volle naam, ras, geslag, ouderdom en beroep.)

(b) Date of death **15.2.77**
Datum van sterftesval

(c) Cause or likely cause of death **MULTIPLE INJURIES - Sustained the deceased whilst**
Oorsaak of waarskynlike oorsaak van dood **questioned by the police jumping through a window and walking along**
a ledge on the outside of the building at the 10th floor losing
his balance and falling to the ground below - Accidental.

(d) Whether the death was brought about by any act or omission involving or amounting to an offence on the part of any person
Of die dood veroorsaak is deur 'n handeling of versuim, wat 'n misdryf aan die kant van iemand insluit of uitmaak
No

W.P. Dormehl
Magistrate/Landdroes

Date **14 April 1977**
Datum

NOTE - Section 16 (3) of the Act provides that if the Magistrate is unable to record any of the findings set out above
OPMERKING - Artikel 16 (3) van die Wet bepaal dat indien die Landdroes nie in staat is om enige van die bevindings
he shall record that fact.
hierbo vermeld aan te teken op, hy die feit moet boekstaaf.

THE ATTORNEY-GENERAL,
DIE PROKUREUR-GENERAAL,

PRETORIA
In terms of section 17 (1) of the Inquests Act, 1959 (Act 58 of 1959), I submit herewith the record of proceedings.
Ingevolge artikel 17 (1) van die Wet op Geregtelike Doodsondersoek, 1959 (Wet 58 van 1959), word die akte van
verrigtinge hiermee voorgelê.

Date **14 April**
Datum

W.P. Dormehl
Magistrate/Landdroes

The record is returned herewith for filing. My reference number is
Die stukke gaan hiermee terug vir lussiering. My verwysingsnommer is

Date
Datum

Chief Clerk to the Attorney-General
Hoofklerk van die Prokureur-generaal

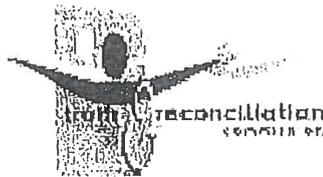
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JLH3

JPP1

VOLUME FIVE

Truth and
Reconciliation
Commission
of South Africa
Report



399
JPP 1

Victims of gross violations of human rights

■ INTRODUCTION

The list which follows was taken from the database of the Truth and Reconciliation Commission (the Commission) on 30 August 1998. It contains the names of all those people who, by that date, had been found by the Commission to have suffered a gross violation of human rights. The cut-off date of 30 August was necessary in order that the list could be checked and prepared for inclusion in this report.

If people do not find their name on this list, there is no cause for concern. There are thousands more names to come, because the process of making finding and of dealing with queries, reviews and appeals has continued beyond that date. In addition, there will be further victims of human rights violations who will be identified through applications for amnesty.

It is the intention of the Commission to publish a complete list at a later date, as an addendum to this report. At that stage, the list will include not only names, but a brief summary of the finding made in every case.

- | | | |
|--------------------------------|-----------------------------|---------------------------|
| AARON, Thabo Simon | ADOONS, Phineus Zenzile | ANDREWS, Lavona |
| ABRAHAM, Nzallseko Christopher | ADRIAANSE, Noel John | ANDREWS, Piet September |
| ABRAHAMS, Achmat Fardiel | AFRIKA, Anna | ANDREY, Kari |
| ABRAHAMS, Annalene Mildred Ann | AFRIKA, Jan | ANGLESS, Edwin |
| ABRAHAMS, Ashraf | AFRIKA, Pieter | APHANE, Dolly Elizabeth |
| ABRAHAMS, Derrek | AGGETT, Neil Hudson | APHANE, Kari Malsela |
| ABRAHAMS, John | ALA, Wezeka Getrude | APHANE, Tiny |
| ABRAHAMS, Moegsion | ALBERT, Nombuyiselo Francis | APIES, Katrlena |
| ABRAHAMS, Moegsien | ALFRED, Nomthandazo Amella | APLENI, Sicelo Wellington |
| ABRAHAMS, Rashid | ALLAM, Ernest | APOLOSI, Khobone Vernon |
| ABRAHAMS, Toyer | ALLAM, Joyce | APPIES, David |
| ACKERMAN, Marita | ALLAM, Noziphio | APPOLS, SImphtwe |
| ADAMS, Koos | ALLIE, Abdurahman | APRIL, Cecil Patrick |
| ADAMS, Magadlen | ALSET, Walter Titus | APRIL, Doreen |
| ADAMS, Noel | AMTHENJA, Billy Vell | APRIL, Gibson Mxollisi |
| ADAMS, Sandra Joyce | ANDERSON, Cynthia Valerie | APRIL, Lindile |
| ADAMS, Zwelinzima Sidwell | ANDERSON, Kid | APRIL, Lungephi Lunga |
| ADONIS, Jacques | ANDERSON, Peter | APRIL, Ngubeni Stanley |
| ADONIS, Sandra Noreen | ANDREAS, Niklaas | APRIL, Ntsundu |

KHUZWAYO, Sigana
KHUZWAYO, Simama
KHUZWAYO, Sindiwe Thulelenf
KHUZWAYO, Siphiso James
KHUZWAYO, Sphe
KHUZWAYO, Sthembiso
KHUZWAYO, Sthomba Lillian
KHUZWAYO, Terrosa Ntomblifuthi
KHUZWAYO, Thembinkosi Enoch
KHUZWAYO, Thembisile Agnes
KHUZWAYO, Thokozani
KHUZWAYO, Tholakele
KHUZWAYO, Vusi
KHUZWAYO, Vusumuzi
KHUZWAYO, Vusumuzi Vincent
KHUZWAYO, Winnifred
KHUZWAYO, Xolani Eric
KHUZWAYO, Zazi
KHUZWAYO, Zwi
KHWELA, Balekile
KHWELA, Bonga Dominic Boysie
KHWELA, Jabulani Timothy
KHWELA, Makhosazana Ethel Makho
KHWELA, Mandlakayise Barthemilus
KHWELA, Mzwamanka Cyprian
KHWELA, Patricia Themba
KHWELA, Richard Mpuvele
KHWELA, Thandani Siphiso
KHWEZI, Mabila Ju
KIBI, Bhutiki John
KIKI, Theophyllis
KIKABE, Sharon Raymond Lethusang
KILANI, Mbuzell Robble Norontose
KILANI, Nomonde Sylvia
KILANI, Toto Lawrence
KILI, Jerry Simmango
KILIBANE, Zolisa
KILLEEN, Peggy Shona
KIMBILI, Stoto
KING, Dorothy
KING, Gerard Quintin
KING, Gwen
KING, Russel
KINIKINI, Lulamile Patrick
KINIKINI, Luvuyo Stanley
KINIKINI, Mzoxolo
KINIKINI, Qondile
KINIKINI, Silumko Welcome
KINIKINI, Thamsanqa Benjamin
KINIKINI, Zamuxolo Eric
KIRSTEN, Rene
KIVITI, Mxolisi Desmond
KLAAS, Buysite Nicholas
KLAAS, Livingstone Pawulezi
KLAAS, Mbuyiseli Sidwell
KLAAS, Phumeliso
KLAAS, Sillio Joseph
KLAAS, Thembisile John
KLAAS, Vuyelwa
KLAASEN, Boetman Matanzl
KLAASEN, Johanna Aleta
KLAASEN, Nombulelo Mira
KLAASSEN, Andile Amos
KLAASTE, Aubrey
KLAASTE, Gerald

KLAASTE, Rubln
KLEIN, Brenda
KLEINBOOI, David
KNOUWDS, Salomon Jacobus
KOAHO, Lalula
KOAHO, Moya Kleinbooi
KOAPENG, Johannah Refllwe
KOBÉ, Andile Anton
KOBÉSE, James
KOBOKA, Bubele
KOBOLA, Phaladi Phineas
KODISANG, Shadrack
KODISANG, Siphiso Adam
KOEÉ, Aobakwe Gilbert
KOELMAN, Bernard
KOELMAN, Noma-Efese Nlelmary
KOEN, Chrissie
KOENA, Anna
KOHLE, Allston Phillip
KOHLEKALU, Ntontle
KOHLE, Qalsile John
KOITENG, Moses Mothuphi
KOKA, Ben France
KOKI, Mamokgela Rostlyn
KOKOME, Betty Onini
KOLA, Elizabeth
KOLA, Thomas
KOLE, Ntali David
KOLISANG, Daniel Khopotso
KOLISANG, Pevus Lepekola
KOLISANG, Tsepiso Faith
KOLISI, Tatana
KOLISILE, Gampimpi Doctor
KOLITI, Nontle
KOLO, Tomas
KOLOBE, Henry Malapile
KOLOI, Kenathatha Alice
KOLOI, Machaya Phineas
KOLOI, Ohenise Richard
KOLOTI, Elvis Radimakatso
KOLOTLA, James Madebe
KOLWANE, Eliyot Mosimanegape
KOM, Gladys Nomgcobo
KOMANE, Nombuselo
KOMANI, Brian
KOMANI, Nonesi Nocawa
KOMANI, Vumile
KOMAPE, Mosima Ellsa
KOMAPE, Phaka Maphuti
KOMAPE, Phuli Etelie
KOMETSI, Isaac Modikeng
KOMO, Bashintshile
KOMO, Bonakabi
KOMO, Reginald Wonder
KOMSASI, Sikade Council
KONDILE, Gcinisizwa
KONDLO, Thembekile
KONE, Mmbengani Bernard
KONGO, Lawrence Thobile
KONILE, Zabonke John
KONTYO, Siphiso Hendry
KONYA, Tom
KONYANE, Paphala Richard
KONYANE, Ralepheto Jackson
KOPELE, Philemon

KOPELEDI, Kebarileng Hagal
KOPOLO, Albert Magayiva
KOPUNG, Paulos
KORDOM, Kerneels
KOROTSOANE, Franscis Tahleho
KOTA, Mzollisi Simon
KOTA, Vuyo
KOTANE, Tumeleng Ernest I.ebalda
KOTELQ, Mathabo Johannes
KOTLOLO, Walesela Daniel
KOTO, Andries Odrie
KOTOPE, Motsamal Albert Zapu
KOTOTSI, Mosipili Paulina
KOTSELE, Zwelandle Simon
KOWA, Phanglwe Irene
KOZA Kasbay
KOZA, Mandla Aaron
KOZA, Tembani Ntombinkulu
KRATSHANE, Tswinana Alfred
KRATSHI, Mandlenkosi
KRECKIE LEKONE, Sonny
KRECKIE, Loot Peter
KRECKIE, Rocky
KRIEL, Ashley James
KROLI, Phumzile Samuel
KROMA, Siphiso
KROMBERG, Anita Helen
KRUGER, Franz
KRUGER, Ryan Christopher
KRUSER, Gary John
KUAPE, Mantwa Lydia
KUBAYI, Solomon Muzamane
KUBEKA, Zamokwakhe
KUBEKA-MODISE, Abtgale Sibongile
KUBEKA, Albertina
KUBEKA, Amos Bongani
KUBEKA, Bongani
KUBEKA, Bool
KUBEKA, Clement
KUBEKA, Dumisani
KUBEKA, Dumisani Wilfred
KUBEKA, Elvis
KUBEKA, Fakazi Jerome
KUBEKA, Jeffrey
KUBEKA, Joshua
KUBEKA, Linda Bethuel
KUBEKA, Mondl Petros
KUBEKA, Mphikeleli Kenneth
KUBEKA, Ndoda
KUBEKA, Nkosinath
KUBEKA, Percelval Mamuli
KUBEKA, Phumelele Beula
KUBEKA, Plat
KUBEKA, Pijone John
KUBEKA, Sabatha
KUBEKA, Siphiso Patrick
KUBEKA, Siphiso Hamilton
KUBEKA, Solomon Mandla
KUBEKA, Swenkl Aury
KUBEKA, Thandi Anna
KUBEKA, Themba Petros
KUBEKA, Thoko Tryphina
KUBEKA, Thusi Hezekiel
KUBEKA, Vusumuzi Joseph
KUBEKA, Zozo Jerry