

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

CASE NO: 76755/18

In the matter between:

JOAO RODRIQUES

APPLICANT

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS OF SOUTH AFRICA**

FIRST RESPONDENT

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

SECOND RESPONDENT

MINISTER OF POLICE


THIRD RESPONDENT

FILING SHEET

DOCUMENTS: SECOND RESPONDENT'S ANSWERING AFFIDAVIT

SIGNED at PRETORIA on the 27TH day of NOVEMBER 2018.

FILED BY


**SECOND RESPONDENT'S ATTORNEYS
STATE ATTORNEY PRETORIA
SALU BUILDING, GROUND FLOOR
316 THABO SEHUME STREET
PRIVATE BAG X91
PRETORIA, 0001
Ref: 6002/18/Z65**

272

Tel: (012) 309-1545
Fax: (012) 309 1649/50
Dx: 298 PRETORIA
Enq: G.P SELEKA

**TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT, PRETORIA**

**AND
TO:**

**APPLICANT'S ATTORNEYS
BEN MINAAR ATTORNEYS
190 MELT MARAIS ATTORNEYS
WONDERBOOM A/H X 1
WONDERBOOM
PRETORIA
TEL: 082 446 2644
REF: BM/01/10/19**

Copy received

Date:

Time:

APPLICANT'S ATTORNEYS

273

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 76755/18

In the matter between:

JOAO RODRIGUES

Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS OF SOUTH AFRICA**

First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Respondent

MINISTER OF POLICE


Third Respondent

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

TSHILOLO MICHAEL MASUTHA

do hereby make oath and state:

 Both
T
26 T M


274.

1.

- 1.1 I am the Minister of Justice and Correctional Services ("the Minister"), and the Second Respondent;
- 1.2 save as may otherwise be stated or as may appear from the context, the facts herein deposed to are within my personal knowledge and belief;
- 1.3 to the extent that I make submissions of a legal nature herein, I do so from my own knowledge and on the basis of advice from counsel.

2.

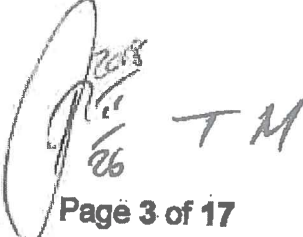
- 2.1 I have read the Notice of Motion and founding affidavit of the Applicant in this matter, together with the annexures thereto;
- 2.2 I do not propose to deal with each and every one of the allegations as they appear in Applicant's founding affidavit. I deal only with those specific allegations which are relevant to myself for the purposes of the relief sought against me in the Notice of Motion, and my failure to so address the said allegations is not to be construed as an admission of those allegations. I accordingly, to the extent necessary, deny them.

 2018
11/26 TM

Relief Sought

3.

- 3.1 In paragraph 1 of the Notice of Motion, a declarator order is sought that the criminal proceedings instituted against Applicant constitutes an unfair trial as envisaged in Section 35(3) of the Constitution of the Republic of South Africa, Act 108 of 1996;
- 3.2 in paragraph 2 of the Notice of Motion, a declarator order is sought that section 35 (3) of the Constitution must be read with section 342A of the Criminal Procedure Act, Act 51 Of 1977;
- 3.3 in paragraph 3 of the Notice of Motion, Applicant seeks an order authorising a permanent stay of prosecution on the charge of murder relating to the death of the late Ahmed Essop Timol on 27 October 1971;
- 3.4 in paragraph 4 of the Notice of Motion, an interdict is sought against First and Second Respondents in which they are prohibited from proceeding with a criminal prosecution against the Applicant on a charge of murder relating to the death of Ahmed Essop Timol;
- 3.5 in paragraph 5 of the Notice of Motion, an order is sought that First and Second Respondents withdraw the criminal proceedings against Applicant.



Handwritten signature and initials, including the letters 'T M'.

4.

4.1 The specific relief sought by the applicant against me appears in paragraphs 4 and 5 of the Notice of Motion, and I accordingly confine my response, in the main, thereto;

4.2 I submit that the relief sought against me in terms of paragraphs 4 and 5 is ill conceived. The initiation of the prosecution and the conduct of a criminal trial is the prerogative of the First Respondent as set out in the provisions of Section 179 of the Constitution and Section 32 of the National Prosecuting Authority Act 32 of 1998.

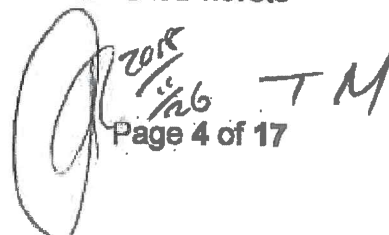
5.

I am advised that it is expedient, before dealing with the allegations contained in the founding affidavit and the Notice in terms of Rule 16A of the Uniform Rules of Court, to set out the background to this application in so far as it is applicable to my decision to reopen the inquest.

Background

6.

6.1 My office was in receipt of a memorandum, dated 25 October 2016, from the then First Respondent, a copy of which is annexed hereto

 2016
1/26 TM
Page 4 of 17

marked Annexure "TMM1", requesting the reopening of the Inquest into the death of Ahmed Timol in terms of section 17A of the Inquest Act 58 of 1959;

6.2 Section 17A of the Inquest Act 58 of 1959 reads as follows:

"(1) The Minister may, on the recommendation of the attorney general concerned, at any time after the determination of an inquest and if he deems it necessary in the interests of justice, request a Judge President of a Provincial Division of the Supreme Court to designate any Judge of the Supreme Court of South Africa to reopen that inquest, whereupon the Judge thus designated shall reopen such inquest."

6.3 The criterion set out clearly in the enabling legislation is *"the interest of justice"*;

6.4 I perused the memorandum and assessed the content to ascertain whether it was necessary, in the interests of justice, that the inquest be reopened;

TMM
2012
11/16

- 6.5 In arriving at this decision, I considered the content as set out in paragraphs 2.11 to 2.18 of Annexure "TMM1" with regard to the new evidence that was available to be placed before a presiding officer at the inquest;
- 6.6 I had regard to the background to this matter and the import of the new evidence coming to light for the first time, as set out in paragraphs 2.1 to 2.9 of Annexure "TMM1";
- 6.7 I am aware that our Courts have repeatedly said that the underlying purpose of an inquest is to promote public confidence and satisfaction that all deaths from unnatural causes will receive proper attention and investigation;
- 6.8 our Courts have also held that inquest proceedings require to be so thorough that the public and interested parties are satisfied that there have been full and fair investigations into the circumstances of unnatural deaths;
- 6.9 the abovementioned considerations informed my decision that it was indeed in the interests of justice to accede to the request of the First Respondent to reopen the inquest and to recommend that a Judge of the Supreme Court of South Africa be designated to preside upon such proceedings.

6.10 I accordingly approved the recommendation, as appears *ex facie* page 7 of Annexure "TMM1";

6.11 On 17 January 2017, I caused a communication, indicating my decision to be forwarded to the office of the Chief Justice of South Africa, and requesting that a judge be designated to preside over the reopened inquest. Copy of the correspondence is annexed hereto marked annexure "TMM2".

7.

I turn now to addressing the content of the founding affidavit, *ad seriatim*, insofar as it relates to me.

8.

Ad paragraph 1

Save for admitting the averment in paragraph 1.3, I have no knowledge of the further averments made herein.

9.

Ad paragraphs 2; 3; 4

The content herein is admitted.

TMM
2017
11/11/17

10.

Ad paragraph 5

I note the content herein.

11.

Ad paragraph 6

11.1 I note the purpose of the application as set out in paragraph 6;

11.2 I reiterate that the initiation and conduct of a prosecution is solely within the purview of the statutory duties of First Respondent;

12.

Ad paragraphs 7

12.1 I note the content hereof pertaining to the infringement of the right to a fair trial, allegations pertinent to First Respondent;

12.2 with specific regard to paragraph 7.1 and the reference to "fair procedure prior to the institution of the prosecution", it is not specifically averred that Applicant makes reference herein to my decision to reopen the inquest and I accordingly do not respond with any degree of particularity, thereto;

T.M.P.
2018
11
101

12.3 in the event that such reference is intended, I refer to the content of paragraph 6 above and the criteria apposite to my decision with regard to the request from the First Respondent.

13.

Ad paragraph 8

13.1 I am advised that the reference to Section 342A of the Criminal Procedure Act 51 of 1977 is not apposite in these application proceedings;

13.2 The section reads:

" 342 A Unreasonable delays in trials

A Court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

....."

TM
2008
11/26

13.3 I am also advised that in terms of the above-mentioned section, the correct forum for the enquiry contemplated, as to the delay and any prejudice consequent thereupon, is the court dealing with the criminal charges.

14.

Ad paragraph 9 and 10 thereof

The content is noted. The Notice in terms of Rule 16A pertains to the conduct of the criminal trial, and I do not address the factual allegations pertinent thereto. I am advised that submissions will be made in argument at the hearing of this matter.

15.

Ad paragraphs 11 to 18

Whilst these allegations are pertinent only to First Respondent, I am advised that the averments are disputes that are more appropriately aired in the criminal court and that application proceedings in this Honourable Court is neither the correct procedure nor the proper forum to resolve disputes as enunciated in these paragraphs.

TMP
2018
11/11

16.

Ad paragraph 19

Save for admitting ad paragraph 19.6 that I was in receipt of recommendations from First Respondent to reopen the Inquest, I note the content hereof.

17.

Ad paragraph 20

The content is noted.

18.

Ad paragraphs 21 and 22

The content is noted.

19.

Ad paragraph 23

The content is admitted.

T M
P
11/26
26

20.

284.

Ad paragraphs 24 to 26

The content is noted;

21.

Ad paragraph 27

I am advised that Applicant incorrectly sets out the findings of the reopened Inquest herein.

22.

Ad paragraph 28 to 36

The content is noted.

23.

Ad paragraph 37

At the time I considered the request by the First Respondent for the reopening of the inquest, it did not appear *ex facie* Annexure "TMM1" that First Respondent had taken any position with regard to a prosecution of Applicant.

28s.

24.

With regard to the allegation that Applicant did not have the right to silence during the re-opened Inquest proceedings, I am advised that:

- 24.1 the Supreme Court of Appeal has held that a witness at inquest proceedings has a right to refuse to answer questions that might incriminate him;
- 24.2 Applicant was represented by counsel during the reopened inquest proceedings, who would have assisted Applicant to protect his rights;
- 24.3 it is open to Applicant during proceedings in a criminal court, to seek to exclude any evidence he alleges might have been obtained as a result of any infringement of his constitutional rights.

25.

In the premises, I deny that his constitutional rights have been infringed.

26.

Ad paragraphs 38 to 40

The content is noted.

TM
11/26

286

27.

Ad paragraph 41 to 43

The content is noted.

28.

Ad paragraphs 44 and 45

28.1 The content is noted;

28.2 I am advised that submissions will be made in argument *apropos* the legal authorities pertaining to unreasonable delay, and the considerations apposite to any prejudice consequent upon delays.

29.

Ad paragraph 46 to 48

The content is noted.

30.

Ad paragraphs 49 to 50

30.1 I note the content herein;

Q2018
TM
u

- 30.2 I reiterate that I am not involved in the institution of a prosecution or the subsequent criminal trial. That is within the purview of First Respondent;
- 30.3 in the circumstances, I deny the allegations herein insofar as they relate to me;
- 30.4 I am advised that some of the averments made herein will be addressed in legal argument at the hearing of this application.

31.

Ad paragraphs 51 to 66

The content is noted as being relevant to First Respondent.

32.

Ad paragraph 67

I have been advised that submissions will be made in argument as to the legal authorities pertaining to the issues raised in this application, which include, *inter alia*, some of the following:

- 32.1 the Constitutional Court has formulated a test to determine whether a permanent stay of prosecution should be granted. The test includes an analysis of the conduct of all the parties and a weighing up of

M2010
15/11/06
TM

factors such as the length of the delay, reasons given for the delay, prejudice to the accused and accused's assertion of his right to a speedy trial;

32.2 the delay relates to the period between when an accused was charged and the beginning of the trial;

32.3 the pertinent enquiry here is whether Applicant was an "accused person" at any time throughout the 47year period that is in issue;

32.4 the Constitutional Court and the Supreme Court of Appeal have held that the staying of prosecution is a "drastic remedy" because barring the prosecution before the trial begins is far reaching.

33.

I am advised that it will be argued that the allegations made by Applicant herein, do not make out a basis for the relief sought.

WHEREFORE, I submit that the application be dismissed with costs.




DEPONENT



The Deponent has acknowledged that he/she knows and understands the contents of this Affidavit which was signed and sworn to at Pretoria before me this 26 day of November 2018 and that the provisions of the regulations contained in Government Notices R1258 of 21 July 1972 and R1648 of 16 August 1977 having been complied with.




 06888305
 De Swarth
 Capt.

COMMISSIONER OF OATHS

.....
 COMMISSIONER OF OATHS
 EX OFFICIO: SA POLICE SERVICE
 PRESIDIA BUILDING,
 255 PAUL KRUGER STREET
 PRETORIA

TMM 1

F 3/16/11 filels



OFFICE OF THE DEPUTY MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	CAPE TOWN
2016 -11- 03	
OFFICE OF THE DEPUTY MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	CAPE TOWN

OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Victoria & Griffiths Mound Building,
123 Westgate Avenue, Witsand Park, Silverton,
Pretoria, 0001

Private Bag X752, Pretoria, 0001

Contact number: 012 845 6758
Email: ndpp@npp.gov.za
www.npp.gov.za

MINISTERIAL MEMORANDUM

TO : T. M. MASUTHA, MP (ADV)
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

FROM : ADV. S.K. ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SUBJECT : REQUEST IN TERMS OF SECTION 17A OF THE INQUEST ACT, 58 OF 1959 TO REOPEN THE INQUEST INTO THE DEATH OF AHMED TIMOL.

DATE : 25 OCTOBER 2016

1. PURPOSE

The purpose of this memorandum is to request the Honourable Minister of Justice and Correctional Services to invoke the provisions of Section 17A of the Inquest Act 58 of 1959, by requesting the Judge President of the Gauteng Division of the High Court of South Africa to designate a judge to reopen the inquest into the death of Ahmed Timol ('Timol').

2. BACKGROUND

2.1. In *Timol v The Magistrate of Johannesburg* 1972(2) SA 281 (T), the Court *infor alia* held that:

MINISTRY OF JUSTICE AND CORRECTIONAL SERVICES PRETORIA
2016 -11- 07
PRETORIA MINISTERIE VIR JUSTISIE EN KORREKTIEWE DIENSTE

Post 11/26 TMM

"... the Inquest must be so thorough that the public and interested parties are satisfied that there has been a full and fair investigation into the circumstances of the death".

- 2.2 Timol was a member of the Communist Party who was detained on 22 October 1971 by the Security Branch of the then South African Police at the notorious John Vorster Square Police Station.
- 2.3 On 27 October 1971 he died in detention while under interrogation by members of the Security Branch.
- 2.4 According to his interrogators, Timol is alleged to have committed suicide by jumping out of a window on the 10th floor of the John Vorster Square Police Station building in Johannesburg.
- 2.5 The then Attorney General, Johannesburg, declined to prosecute and a formal inquest was held before a Johannesburg Regional Court Magistrate under reference Johannesburg 2361/71, which handed down a verdict that Timol had committed suicide and that the Police were not responsible for his death. The inquest commenced in late April 1972 and concluded on 22 June that same year.
- 2.6 The evidence comprised almost entirely of the Police Officers involved in his arrest, detention and interrogation, along with the medical evidence.
- 2.7 Due to the prevailing situation at the time, persons who were in detention or in exile did not testify. This resulted in the Regional Magistrate finding that Timol had committed suicide and had not been assaulted or ill-treated by the Police prior to his death.

2018
1/16
T M 26

- 2.8 The Regional Magistrate's finding was criticised by human rights organisations. Notwithstanding this, no further action was taken.
- 2.9 In addition, no one applied for amnesty for Timol's death during the Truth and Reconciliation Commission ('TRC').
- 2.10 As a result of representations received by the Priority Crimes Litigation Unit ('PCLU') in my office, the Directorate for Priority Crime Investigation ('DPCI') were requested to reopen the investigation into Timol's death.
- 2.11 It would appear that there is compelling new evidence relating to the torture, which if considered could result in a different finding.
- 2.12 In this regard, Dr Selim Essop ('Essop'), who was arrested with Timol on 22 October 1971, and who was subjected to severe torture at the hands of the self-same members of the Security Branch, was never permitted to testify at the in-the inquest into Timol's death.
- 2.13 In short, Essop, who had been subjected to severe torture at John Vorster Square Police Station to the extent that he was rendered unconscious on numerous occasions, collapsed again on the morning of 26 October 1971, whereafter he was examined by a district surgeon. Whilst unconscious he was taken to the General Hospital in Johannesburg by ambulance where he received emergency medical treatment. Although still in an extremely fragile condition, he was thereafter taken to HF Verwoerd Hospital in Pretoria.

T M R
2018
/ 11
/ 11

- 2.14 Essop was later taken to Pretoria Central Prison where he was held *incommunicado*. He was thereafter secretly admitted into hospital and later to a prison hospital where he remained until his first court appearance in the Johannesburg Magistrate's Court on 8 March 1972 whereafter he was remanded in custody. On 13 June 1972 he was indicted on terror related charges along with three other co-accused in the Pretoria Supreme Court (as it was known then).
- 2.15 Essop's trial ended on 31 October 1972 when he and his co-accused were convicted on terror related charges and sentenced to five years' imprisonment.
- 2.16 At no stage did Essop present the facts of his torture during any judicial proceedings in the Republic of South Africa, nor was he afforded the opportunity to do so.
- 2.17 Recently, in a 37-page affidavit dated 14 October 2016, Essop extensively explains the circumstances of his and Timol's arrest and his subsequent harrowing brutal torture and inhumane treatment at the hands of members of the Security Branch.
- 2.18 Essop's eye witness account of Timol's condition at the time of their arrest, his own torture and assault at the hands of the Security Branch Police, contradicts the version of the members of the Security Police in so far as their treatment of Timol and the injuries sustained by him.

3. THE RELEVANT LEGISLATION

- 3.1 Although there is more than one section of the Inquest Act 58 of 1958 that can be used to reopen an inquest, the most applicable is Section 17A, which reads as follows:

"(1) The Minister may, on the recommendation of the attorney-general concerned, at any time after the determination of an inquest and if he deems it necessary in the interest of justice, request a judge president of a provincial division of the Supreme Court to designate any judge of the Supreme Court of South Africa to reopen that inquest, whereupon the judge thus designated shall reopen such inquest."

- 3.2 There are compelling reasons as summarised above along with the high public interest in this matter to motivate for the reopening of the said Inquest.
- 3.3 Escep is a very credible and relevant witness who was not afforded an opportunity to provide his evidence during any judicial proceedings. The probability exists that there is a real likelihood that his version could result in a court coming to a different finding as to the circumstances surrounding the death of Timol than that of the Regional Magistrate Johannesburg in 1972.
- 3.4 As such, the interests of justice would justify the reopening of the Inquest into the death of Ahmed Timol.
- 3.5 The Acting Special Director of Public Prosecutions and Head of the PCLU have consulted with the Directors of Public Prosecutions (DPPs) of South and North Gauteng in terms of the provisions of Section 24(3) of the National Prosecuting Authority Act 32 of 1998. Both DPPs are in agreement and have recommended that the Honourable Minister be requested to invoke the provisions of Section 17A(1) of the Inquest Act 58 of 1959 by requesting the Judge President of the Gauteng Division of the High Court of South

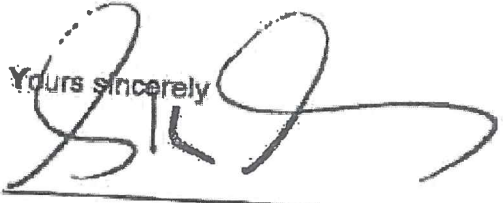
T M 2018 / 11

Africa to designate a judge to reopen the inquest into the death of Ahmed Timol.


4. RECOMMENDATION

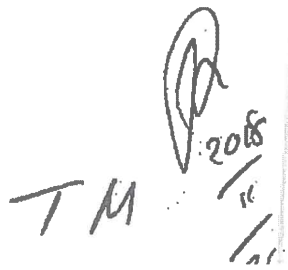
4.1 It is recommended that the Honourable Minister of Justice and Correctional Services invoke the provision of Section 17A(1) of the Inquest Act 58 of 1959 by requesting the Judge President of the Gauteng Division of the High Court of South Africa to designate a judge of the High Court to reopen the inquest into the death of Ahmed Timol.

4.2 A copy of a draft letter addressed to the Judge President is attached hereto for the Honourable Minister's consideration.

Yours sincerely


ADV. S.K. ABRAHAMS
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 25-10-2016

PARAGRAPH 4: SUPPORTED NOT SUPPORTED

JUSTICE DONSELA Esq
DIRECTOR GENERAL OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT
DATE: 02/11/2016



4. RECOMMENDATION

4.1 It is recommended that the Honourable Minister of Justice and Correctional Services invoke the provision of Section 17A(1) of the Inquest Act 58 of 1959 by requesting the Judge President of the Gauteng Division of the High Court of South Africa to designate a Judge of the High Court to reopen the inquest into the death of Ahmed Timol.

4.2 A copy of a draft letter addressed to the Judge President is attached hereto for the Honourable Minister's consideration.


✓
PARAGRAPH 4: RECOMMENDED/ NOT RECOMMENDED


MR J. JEFFERY, MP
DEPUTY MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
DATE: 3/11/16

PARAGRAPH 4: APPROVED/NOT APPROVED

LETTER NOT SIGNED - IT NEEDS AMENDMENT


T.M. MASUTHA, MP (ADV)
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES
DATE:

TM  20/11/16



MINISTER
JUSTICE AND CORRECTIONAL SERVICES
REPUBLIC OF SOUTH AFRICA
Private Bag X 278, Pretoria, 0001, Tel: (012) 467 4000; Fax: (012) 467 4040
Private Bag X 298, Cape Town, 8000, Tel: (021) 467 1700; Fax: (021) 467 4730

Judge President D Mlambo
Gauteng Provincial Division
Private Bag X67
PRETORIA
0001

Dear Judge President Mlambo

REQUEST IN TERMS OF SECTION 17A OF THE INQUEST ACT 58 OF 1959 TO APPOINT A JUDGE TO REOPEN THE INQUEST INTO THE DEATH OF AHMED ESSOP TIMOL:


JOHANNESBURG INQUEST NUMBER 2381/71


1. Section 17A(1) of the above Act reads that
"The Minister may, on the recommendation of the attorney-general concerned, at any time after the determination of an inquest and if he deems it necessary in the interest of justice, request a judge president of a provincial division of the Supreme Court of South Africa to reopen that inquest, whereupon the judge thus designated shall reopen such inquest."
2. In reference to the above, I attach hereto a copy of a memorandum received from the National Director of Public Prosecutions ("National Director"), requesting that I invoke the provisions of Section 17A(1) of Act 58 of 1959 in pursuance of reopening the inquest into the death of Mr Ahmed Essop Timol.
3. I have carefully considered the request by the National Director and I am satisfied that the interests of justice would be best served by the reopening of the inquest as contemplated in Section 17A(1).
4. I would be most grateful if you could designate a judge within your division to reopen the inquest into the death of Mr Ahmed Essop Timol.

TM
2018
11
26

5. The National Director will ensure that a prosecutor and all the evidence is made available once a judge has been appointed.

Yours sincerely


T.M. MASUTHA, MP (ADV)
MINISTER OF JUSTICE & CORRECTIONAL SERVICES
DATE: 17/01/2017


T.M. Masutha