

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

CASE NO 76755/18

PH NO 342

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

IMITIAZ AHMED CAJEE

Fourth
Respondent

FILING SHEET

KINDLY TAKE NOTICE THAT that the Fourth Respondent, hereby files his answering affidavit in the main application and the supporting affidavit of Piers Ashley Pigou:

Dated at **Johannesburg** on this 8th day of January 2019.



LEGAL RESOURCES CENTRE
Attorneys for the 4th Respondent
Braam Fischer Towers
15th and 16th Floor
20 Albert Street
Marshalltown, Johannesburg
Tel: 011 836 9831
Fax: 011 836 8680
Email: Lucien@lrc.org.za
Ref: Lucian Limacher

WEBBER WENTZEL
Joint attorneys for the 4th Respondent
10 Fricker Road, Illovo Boulevard
Johannesburg, 2196
PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa
Tel: +27 11 530 5539/5288
Fax: +27 11 530 6539
Email: moray.hathorn@webberwentzel.com
Ref: Moray Hathorn
3005789

To:
**The Registrar of the above
Honourable Court**

AND TO:
BEN MINNAAR ATTORNEYS
Attorneys for the Applicant
190 Melt Marais Street
Wonderboom AH x1
Wonderboom
Pretoria
Tel: 082 446 2644
Email: benjaminnaar@gmail.com
Ref: B M 01/10/18

Service via email

AND TO:
THE ACTING DIRECTOR OF PUBLIC PROSECUTIONS **Service via email**
First Respondent
c/o State Attorney
316 Thabo Sehume Street
Salu Building
Pretoria
Ref: Peter Seleka
Email: pseleka@justice.gov.za
mrsramaite@npa.gov.za / hzwart@npa.gov.za

AND TO:

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICE

Second Respondent

Service via email

c/o State Attorney

316 Thabo Sehume Street

Salu Building

Pretoria

Ref: Peter Seleka

Email: [pseleka@justice.gov.za/](mailto:pseleka@justice.gov.za)

THE MINISTER OF POLICE

Service via email

Third Respondent

c/o State Attorney

316 Thabo Sehume Street

Salu Building

Pretoria

Ref: Peter Seleka

Email: [pseleka@justice.gov.za/](mailto:pseleka@justice.gov.za)

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

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

IMITIAZ AHMED CAJEE

Fourth Respondent

FOURTH RESPONDENT'S ANSWERING AFFIDAVIT

Handwritten signature and initials in the bottom right corner of the page.

TABLE OF CONTENTS

INTRODUCTION.....	1
STANDING	3
OVERVIEW	3
THE STRUCTURE OF THIS AFFIDAVIT	7
BACKGROUND TO TIMOL'S STORY.....	7
Timol's Detention and Death.....	8
Events Following the First Inquest – A Family's Quest for Justice	13
The TRC process and the failure to prosecute	15
Post TRC efforts	17
Suppression of the political cases	20
Reopening the Inquest.....	23
The 2017 Inquest Finding – A Historical Moment	24
Timol Has Captured the Hearts and Minds of South Africans	27
THE APPLICATION SHOULD BE REFUSED	28
Delay.....	30
Reasons for the delay	30
Length of delay	36
Accused's assertion of his fair trial rights.....	41
Evidentiary Issues	41
Accused's Health	42
Stay of Prosecution and Withdrawal of Charges.....	43
Prejudice.....	43
Nature of the case	44
Systemic delay	44
Interests of justice	44
AD SERIATIM RESPONSE TO THE APPLICANT'S FOUNDING AFFIDAVIT.....	45
AD SERIATIM RESPONSE TO THE NPA'S ANSWERING AFFIDAVIT	61
AD SERIATIM RESPONSE TO THE APPLICANT'S REPLYING AFFIDAVIT.....	69
COSTS	70
CONCLUSION	71

Handwritten signature and initials in the bottom right corner of the page.

I, the undersigned,

IMITIAZ AHMED CAJEE

do hereby make oath and state:

INTRODUCTION

- 1 I am the nephew of the late Ahmed Timol ("**Ahmed**" or "**Timol**"), who was brutally tortured and murdered by members of the erstwhile South African Police's ("**SAP**") notorious Security Branch ("**SB**") on 27 October 1971.
- 2 The judgment of Mothle J in the Re-Opened Inquest into the Death of Ahmed Essop Timol (Case Number: IQ01/2017, Gauteng Division) ("Reopened Inquest") found that my late uncle had not committed suicide but had been murdered after he was thrown from the 10th floor or the roof of John Vorster Square ("**JVS**"). In particular, Mothle J found that the applicant ("**the accused**" or "**Rodrigues**") lacked all credibility as a witness and had fabricated a version to conceal the real truth (*First Inquest Judgment* para 315).
- 3 The accused has since been charged with Timol's murder as well as defeating and/ or obstructing the administration of justice. He now seeks a permanent stay of this prosecution.



- 4 I am the fourth respondent in this matter. Despite the Timol family's obvious interest in the accused seeking a stay of prosecution, the accused did not cite me as a party and thereby sought to exclude my family from participating in this matter. I had to bring a substantive application to intervene in these proceedings and satisfy this Court that my family had a direct and substantial interest worthy of legal protection.
- 5 On 19 December 2019, this Court by way of an *ex tempore* ruling found that we had the necessary interest to participate in this matter and ordered that I be admitted in these proceedings.
- 6 The facts herein contained are, save where otherwise stated or appears from the context, within my own personal knowledge and belief, and are true and correct. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which advice I accept as correct.
- 7 Where I make use of headings in this affidavit, I do so for convenience only and do not thereby intend to limit anything stated under a particular heading only to that topic. I pray that this affidavit be read as a whole. Certain references are made to the record of the Reopened Inquest (also referred to as the "second inquest") but in order not to burden these papers it has not been attached but can be made available on request.
- 8 Confirmatory affidavits from Advocates Vusumzi Patrick Pikoli and Anton Rossouw Ackermann SC, Frank Kennan Dutton, Moray Hathorn and Piers Ashley Pigou will be filed in due course.

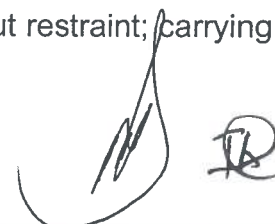
Handwritten signature and initials in the bottom right corner of the page. The initials appear to be 'TA' inside a circle, followed by a large, stylized signature.

STANDING



- 9 I sought leave to intervene, and oppose the application, in the interests of:
- 9.1 myself and that of the Timol family, as victims of my uncle's murder, as contemplated in section 38(a) of the Constitution.
 - 9.2 the memory of my late uncle, who was brutally murdered, and/ or whose torture and murder was covered up by the accused, as contemplated in section 38(b) of the Constitution;
 - 9.3 the victims of apartheid era crimes, of which my uncle's cruel and brutal murder is tragically but a single example, as contemplated in section 38(c) of the Constitution; and
 - 9.4 members of the South African public, who were abused and dehumanized by the apartheid regime and for whom prosecuting those responsible for apartheid era crimes represents an essential part of national reconciliation, healing and unity, as contemplated in section 38(d) of the Constitution.

OVERVIEW

- 10 Prior to our first democratic elections in 1994, South Africa was a country brutalized by the apartheid government's pathological obsession with race. To suppress freedom fighters, the apartheid government enlisted a legion of enforcers. They took their orders from the highest echelons of power and did whatever was necessary to quell dissent. They acted without restraint; carrying

Handwritten signature and initials in black ink, located at the bottom right of the page.

- out large numbers of enforced disappearances, acts of torture, murders and other heinous acts – all with complete impunity.
- 11 Rodrigues was one such person. A police officer, formerly employed by the notorious Security Branch (SB), on his own version, he placed himself as the only person in the company of Timol in room 1026 in the moments before his death and the last person to see him alive. Given the wholesale lying and deception of the SB it is hardly surprising that he has been charged with Timol's murder. Indeed, it was forensically demonstrated in the second inquest that the version of Rodrigues (and the police) was physically impossible. Rodrigues did not make the slightest effort to rebut such evidence, even though his legal expenses were paid by the State.
- 12 We now know that prior to his murder, Timol was badly, perhaps mortally injured following more than 4 days of unrelenting torture and interrogation at the hands of the SB. He did not take his own life as the first inquest court found but was pushed with "*such act having been committed with dolus eventualis as the form of intent and prima facie amounting to murder*". Before the Inquest Court's historic findings our family and South Africa had to endure the official lie that Timol committed suicide– a pain that we had to bear for forty-five years.
- 13 The preamble of our Constitution acknowledges that South Africa, as a people "*recognise the injustices of our past*" and "*honour those who suffered for justice and freedom in our land*". Together, we seek to "*heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights*" and build a "*democratic and open society*" in which



“every citizen is equally protected by law”. In opposing the applicant’s application for a permanent stay of prosecution we rely on these principles.

14 Having been betrayed by the very state institutions that the Constitution mandated to give effect to our constitutional compact, the Timol family seeks justice for his murder and cover-up at the hands of the accused.

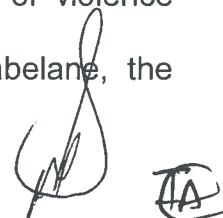
15 For the Timol family, the 12th of October 2017 was a profoundly emotional day. On this day the judgment of the second inquest Court, together with its recommendations that the accused face prosecution, vindicated our decades’ long quest for truth and justice. It was a powerful step in restoring my uncle’s legacy, along with my family’s pride and dignity.

16 The accused now applies to this Court to declare the criminal proceedings instituted against him to be an infringement of his constitutional rights and – flowing from this – a permanent stay and the withdrawal of the criminal proceedings in respect of the charge of murdering Timol.

17 The gist of the main application is that—

“it is inherently unfair and infringes my fundamental rights to a fair trial to charge me on a count of murder after the lapse of more than 47 years and under circumstances where a High Court, after a very detailed investigation and evaluation of all relevant evidence in this regard, found that I [the accused] was not involved in or even present at the time of the murder of the deceased.”

18 The application must be seen against the backdrop of the near total impunity for apartheid era perpetrators. Those behind the heinous acts of violence committed against Nokuthula Simelane, Neil Aggett, Moses Mabelane, the

Handwritten signature and initials in the bottom right corner of the page. The signature is a large, stylized cursive mark, and the initials 'TA' are written in a blocky, capital font to its right.

Cradock Four, Steve Biko, Hoosen Haffejee, Dulcie September, the Pebco Three, Victoria Mxenge, Suliman "Babla" Saloojee, Fabian and Florence Ribeiro and countless others have been shielded from justice for decades. These are but a few of the lives that were brutally taken by apartheid security forces and have since captured the hearts and minds of a nation that cries out for justice. In total some 73 political detainees died whilst in detention at the hands of the SB and hundreds more were murdered and enforceably disappeared in other circumstances.

- 19 Most of the perpetrators, including Rodrigues, refused to participate in the truth and reconciliation process. If they had they could have provided the families and the nation with much needed answers and closure. My family extended an open hand to Rodrigues and the surviving police witnesses in the 2017 inquest. We went on record to say that we were only interested in the full truth. We sought no vengeance or retribution. We advised that if the full truth was disclosed we would not seek a prosecution. Our plea was spurned by the police witnesses, particularly Rodrigues.

- 20 The accused continued with his cover-up before the 2017 inquest court and persists with his charade today. In the circumstances, my family and I seek justice against Rodrigues who we firmly believe played a pivotal role in the murder of my uncle and the cover-up of multiple serious crimes committed against him.

Handwritten signature and initials in black ink, located at the bottom right of the page.

THE STRUCTURE OF THIS AFFIDAVIT

21 The remainder of this affidavit is structured as follows:

21.1 First, I provide this Court with the background to my uncle's story;

21.2 Second, I deal with the respondents' historical failure to hold the accused to account;

21.3 Third, I detail my family's stance to the application;

21.4 Fourthly, I respond *ad seriatim* to the affidavits filed by the accused and the first respondent (also referred to as the National Prosecuting Authority or "the NPA").

BACKGROUND TO TIMOL'S STORY

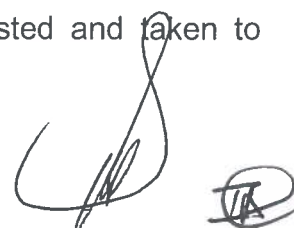
22 My uncle's story is a story of great injustice. It is the story of unbridled brutality meted out to detainees held on the 10th floor of John Vorster Square. It is the story of ugly collusion between police officers, who were meant to uphold law and order, but instead who covered up crimes of torture and murder. It is the story of a thoroughly corrupt investigating officer; as well as a story of a magistrate, his assessor, and a senior public prosecutor engaging in a charade of justice, happily playing their part in suppressing the truth. They all provided the imprimatur of legitimacy to the murderous conduct of the police. It is a story of how dark forces were able to suppress the truth of what happened to Timol for some 46 years.

Handwritten signature and initials in black ink, located at the bottom right of the page.

- 23 It is sadly, also a shameful story of great neglect, as the authorities in our new democratic order failed or declined to act while the key suspects were still alive. This was an inexcusable lapse. It regrettably points to a design on the part of the authorities in post-apartheid South Africa to permit the perpetrators of the past to avoid a reckoning with the truth and escape justice.
- 24 My uncle's story, however, is also one of great inspiration and perseverance. My family never gave up their quest for justice. Our efforts resulted in the re-opening of the inquest which culminated with a judgment that exposed the truth following 46 years of deceit and neglect.

Timol's Detention and Death

- 25 At the age of 29, Timol met his untimely death on 27 October 1971 after being arrested and detained for almost 5 (five) days at the then John Vorster Square in Johannesburg. He was a teacher at the then Roodepoort Indian High School. Timol had recruited a young medical student, Salim Essop ("**Essop**"), to help him distribute South African Communist Party ("**SACP**") literature. On Friday, 22 October 1971 at 23h00, Timol and Essop were stopped at a roadblock by at least 5 uniformed members of the South African Police (SAP), including, including Sergeant Leonard Kleyn and Constable Adam Thinnies, on Fuel Road, near the then Coronationville Hospital, Johannesburg.
- 26 The police discovered many political pamphlets and several of Timol's letters in the boot of the car, where after he and Essop were arrested and taken to

Handwritten signature and initials in black ink, located at the bottom right of the page. The signature is a large, stylized 'S' shape, and the initials are a smaller, circular mark.

Newlands Police Station ("**Newlands**"). Essop (and most likely Timol) was assaulted at Newlands and later transferred to John Vorster Square.

- 27 In the early morning of 23 October 1971, Lt Colonel Van Wyk summoned Captains Johannes Hendrik Gloy ("**Gloy**") and Johannes Zacharias van Niekerk ("**Van Niekerk**") to report to JVS (First Inquest, Van Wyk affidavit, Vol B, p8, para 9). Both had a reputation for brutality, as is evident from the personal file of Van Niekerk which disclosed multiple complaints of torture against him and Gloy, including assaults with an iron rod. Van Niekerk had already killed a detainee, but the charge of culpable homicide was reduced to assault (Second Inquest, Van Niekerk police file, Vol J2 pp8, 25 and 139.)
- 28 Van Niekerk and Gloy were called in to quickly and viciously break Timol during the 24 – 72 hours period before others connected to Timol could escape or hide. Warrant Officer Neville Els conceded under cross examination in the second inquest that it was a tactic of the SB to extract as much information in this initial period through "*intense questioning*" in order to go after "*collaborators*" (Vol 9B, p ZZZ (673), line 13 - p AAAA (673), line 23). This was corroborated by ex SB member, Paul Erasmus, at the re-opened inquest of 2017.
- 29 In the light of the compelling similar-fact evidence of Essop; Dr Dilshad Jetham ("**Jetham**"); and Professor Kantilal Naik ("**Naik**"), who were arrested and detained at John Vorster Square around the same time as Timol we now know that my uncle was savagely tortured until he was most likely beaten into a state of unconsciousness.

Handwritten signature and initials. The signature is a large, stylized 'S' shape. To its right are the initials 'JA' inside a circle.

- 30 On his arrival at John Vorster Square on Saturday 23 October 1971, Essop was viciously tortured until he collapsed into a coma on the morning of Tuesday, 26 October 1971. He had to be rushed in a comatose state to hospital. It subsequently emerged in the 2017 inquest that Essop was so severely tortured that he had to learn to walk again. Although held incommunicado in a Pretoria hospital, Essop's father was tipped off by a nurse and obtained an urgent and well publicised interdict restraining the police from perpetrating further violence against his son (Second Inquest, Essop affidavit, Vol C, paras 29 – 67).
- 31 Just as Essop's torture commenced at JVS upon his arrival on Saturday 23 October 1971, the situation was equally traumatic for Naik. Naik's torture was so severe that he needed physiotherapy treatment for almost four months to repair the acute damage sustained to the muscles in his hands. This serious damage to his hands resulted from the brutal method of torture known as "the helicopter treatment", which was inflicted upon him by the SB while at JVS (Second Inquest, Prof Naik affidavit, Vol C, pp108 – 110, paras 14 – 25).
- 32 Jetham was detained and tortured at JVS from Saturday 23 October 1971 until the morning of Wednesday 27 October 1971. On the evening of Sunday 24 October 1971, Jetham heard Timol screaming from a nearby room in the south wing of the tenth floor of John Vorster Square (where room 1026 is situated). On the evening of Monday 25 October 1971, she again heard Timol screaming nearby on the tenth floor. As the night of Tuesday 26 October 1971 wore on, Timol's screams grew louder and became more desperate. He was shouting and crying, begging his torturers to stop. According to Jetham, at

Handwritten initials 'M' and 'TD' in black ink.

dawn of Wednesday 27 October 1971, Timol's screams suddenly stopped. (Second Inquest, Dr Jetham affidavit, Vol C, pp90 – 104).

- 33 It is based on the evidence of the aforesaid witnesses, read with the new medical reports, that the 2017 Inquest Court concluded that Timol must have been brutally tortured. Given that he was regarded as "the big fish" (Translated De Villiers Finding, First Inquest, p 3, Vol A) he must have endured considerable more brutality than his fellow detainees and was probably tortured to the point where he was rendered entirely incapacitated.
- 34 The SB claimed that following a length interrogation Timol elected to dive or jump out of the 10th floor window of JVS in the presence of Rodrigues, who was apparently there to deliver pay cheques to Gloy and Van Niekerk. According to the accused, Timol committed suicide after hearing the supposedly dramatic news that the whereabouts of Quinten Jacobsen, Henry Jacobsen and Martin Cohen had been discovered. It was amply demonstrated at the second inquest hearing that this story was part of the cover-up fabricated by the SB to explain the claimed suicide.
- 35 On the accused's own version, he saw Timol allegedly "dive" or "jump" out the window of room 1026 and then saw Timol lying in the garden ten storeys below. There was accordingly an overwhelming legal duty on Rodrigues, more than anyone else, to pick up the phone and immediately call for an ambulance. This is what anyone else would have done, let alone a police officer in whose care Timol was left. When asked under cross-examination whether an ambulance should have been immediately summoned, Rodrigues answered:



"What I would say is that it would have been the logical thing to have been done but I do not know why they did not do that."
(Rodrigues oral testimony transcript, Vol 19, p 793, lines 12 – 19).

36 It is no answer to say that Timol could not have survived the fall. Indeed, he did survive the fall and might have lived had he received urgent medical attention and not been clumsily moved by the police on a blanket to the 9th floor. He was moved despite Rodrigues and the police knowing that persons with likely spinal or neck injuries should be stabilised pending medical attention. Indeed, Rodrigues knew this all too well, stating under cross examination: *"That is general knowledge in actual fact"* (Rodrigues oral testimony transcript, Vol 19p 793, lines 8 – 11). While the odds of survival are not high, there are numerous examples of people surviving falls considerably higher than 10 floors and onto harder surfaces than soil and grass. A list of such examples is annexed hereto marked **"IC1"**.

37 The failure of Rodrigues to call an ambulance, together with his moving of the critically injured Timol to the 9th floor, is entirely consistent with his intent to ensure that Timol would die. Rodrigues accordingly had the requisite intention to kill in the form of *dolus eventualis*. He is responsible for the murder of Timol on this basis alone.

38 The police investigation of Timol's death proved to be a cover-up from start to end. There was not even the slightest attempt to comply with the most basic standards of investigation (Reopened Inquest, Frank Dutton affidavit, exhibit H7; Transcript, Vol 8, pp 614 – 671). On 1 December 1971, a formal inquest



into Timol's death commenced at the Johannesburg Magistrates Court ("**the original inquest**" or "**the first inquest**") presided over by Magistrate J J L de Villiers ("**the Magistrate**"). The original inquest was concluded on 22 June 1972 when the Magistrate's found that Timol committed suicide and that no living person was to blame for his death.

- 39 The transparently false version advanced by the SB as to how my uncle met his death was accepted without question by the first inquest court. This became the official version that my family and the public had to contend with for more than 4 decades.

Events Following the First Inquest – A Family's Quest for Justice

- 40 With the advent of democracy in 1994, my family hoped that the truth would finally surface as to what really happened to Timol.
- 41 Our family participated in the Truth and Reconciliation Commission ("**TRC**") process. On 30 April 1996, my maternal grandmother, Hawa Timol ("**Hawa**"), testified in a 'victims' hearing' before the TRC. She explained my family's plight at losing Timol and our refusal to accept the finding in the original inquest. She expressed her desire to know who killed her son and strongly rejected the claim that he took his own life. A copy of the hearing transcript can be made available on request.
- 42 Hawa's testimony at the TRC at the Central Methodist Church in Johannesburg filled me with emotion. At that moment I made a silent vow to preserve my



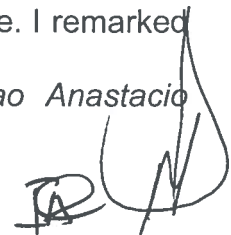
uncle's legacy from that day onwards. I was no longer going to just talk about Uncle Ahmed, but I was going to do something constructive. I wanted the full truth to be exposed.

43 I have expressed my feelings about the TRC process in my book *Timol a Quest for Justice*, a narrative written in tribute to my uncle which details his life and our struggle to obtain justice for his murder. In the book I remarked that "*I felt it was worthwhile because the process would now take its course*". My assumption was that the TRC process would finally shed light on the truth of what happened to my uncle and justice would come of his death.

44 But, following the amnesty process it quickly became clear that none of the perpetrators behind my uncle's torture and murder were willing to come forward to tell the truth and acknowledge their roles. In particular, Rodrigues refused to participate in the TRC's process or to apologise to our family or demonstrate any sense of remorse for the pain caused to us.

45 In this regard, in 1996 TRC investigator Piers Pigou met Rodrigues in Pretoria. However, at this meeting, he refused to cooperate with the TRC and declined to make a statement and declined to appear in a hearing. Pigou asked the TRC to subpoena the accused but regrettably this did not happen. Pigou filed an affidavit to this effect with the second inquest court which was not disputed by Rodrigues.

46 I was angered by the refusal of Rodrigues and others to cooperate. I remarked in my book that, "*while my grandmother was testifying, Joao Anastacio*

A handwritten signature in black ink, appearing to be 'JA' followed by a stylized, elongated flourish that resembles a large 'A' or 'O'.

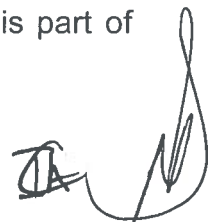
Rodrigues, Johannes Hendrick Gloy, Johannes Zacharia van Niekerk and all the others simply continued with their normal life unperturbed by their role in Ahmed's death".

The TRC process and the failure to prosecute

- 47 In its Final Report released on 21 March 2003 the TRC stressed that the amnesty should not be seen as promoting impunity; and highlighted the imperative of "*a bold prosecution policy*" in those cases where amnesty was not applied for in order to avoid any suggestion of impunity, or of South Africa contravening its obligations in terms of international law (Vol 6, Section 5, Ch. 1, para 24).
- 48 I am advised that there is nothing in the constitutional and statutory design of the TRC process which contemplated the extension of the rights of perpetrators to further leniency or indemnity from prosecution. Indeed, it was specifically envisaged that criminal investigations and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or had failed to apply for amnesty. This lay at the heart of the compact struck with victims.
- 49 An examination of the postscript to the *Constitution of the Republic of South Africa Act 200 of 1993* ("**the Interim Constitution**") reveals no direct or inferred suggestion that the TRC process would open the door to further opportunities for perpetrators to escape justice outside of the TRC's amnesty's provisions.



- 50 South Africa's ground-breaking transition required a severe limitation of the fundamental rights of the victims of human rights violations. This was justified by the pressing need to promote national unity and reconciliation and to cross the historic bridge between the past of a deeply divided society to a future founded on democracy and peaceful co-existence.
- 51 The principles set out in the postscript were reflected in the design of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the TRC Act"). Perpetrators who were granted amnesty received amnesty or immunity from criminal prosecution and immunity from civil law actions. Conversely, those perpetrators who were refused amnesty or who chose not to approach the TRC were meant to face criminal prosecutions.
- 52 South Africa's truth and reconciliation design as encapsulated in the postscript to the Interim Constitution and the TRC Act necessitated the sacrifice of the fundamental rights of victims to advance national unity and reconciliation. In so doing the State entered into a compact with victims. This compact required the State to take all reasonable steps to prosecute deserving cases in respect of offenders who were not amnestied. It is with great sadness that I must note that the State has done little to meet its legal and moral obligations.
- 53 Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those who did not qualify for amnesty. This part of South Africa's historic pledge with victims has not been kept.

A handwritten signature in black ink, consisting of stylized initials and a long, sweeping flourish extending to the right.

54 The failure to investigate and prosecute those who were denied amnesty or who spurned the process represents a deep betrayal of all those who participated in good faith in the TRC process. It completely undermines the very basis of South Africa's historic transition. The failure stands as a betrayal of victims who have been waiting for the criminal justice process to take its course and has added considerably to their trauma. Indeed, the policy or approach to allow perpetrators to escape justice adds insult to the suffering endured by victims.

55 Above all, the failure stands as a betrayal of all South Africans who embraced the spirit of truth and reconciliation in order to move beyond the bitterness of the past. The failure is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in dealing with crimes of the past.

Post TRC efforts

56 Following the TRC process, my family and I made attempts to persuade the NPA to investigate and launch criminal proceedings against those responsible for Timol's death, including the accused.

57 I started my investigations by reading and analysing the newspaper collection of all articles kept by the family; identifying and locating individuals linked to Uncle Ahmed. Sadly, my grandmother, Hawa, did not get the answers she hoped for. Her death in February 1997 inspired me to continue my investigations.



58 This led me to meet with TRC investigator, Piers Pigou, in 2001 who confirmed that Rodrigues had refused to participate in the TRC process. During my research, I engaged with numerous individuals who were detained with Ahmed. I worked closely with the Steve Biko Foundation which continues to support my initiatives to preserve the legacy of Uncle Ahmed.

59 I even went as far as calling the perpetrators I suspected were responsible for killing my uncle. On 27 September 2002, I gathered the courage to call Gloy. I confronted him with the results of my own investigation indicating that I knew that he was in the room at the time that Timol allegedly 'jumped'. Gloy denied that he was in the room and referred me to the finding in the first inquest that had exonerated him.

60 During my investigations, I ascertained that a number of police officials, directly involved in the interrogation of my uncle were still alive. This included Gloy and Van Niekerk.

60.1 I had three telephonic conversations in 2002 with Gloy. He played a leading role in the interrogation of Uncle Ahmed. During the first conversation, Gloy insisted that I had to look at the inquest records and that the case was closed.

60.2 In our second conversation, Gloy stated that he was advised by his lawyer not to conduct an interview with me. He claimed that my grandparents had come to court with a bunch of lies about torture that was rejected by the court.

Handwritten signature and initials. The initials 'JA' are written in a circle, followed by a large, stylized signature.

- 60.3 In our final conversation with Gloy claimed that he had no reason to apply for amnesty when the inquest court had already ruled. He threatened to obtain a court order against me if I continued calling him.
- 60.4 I attempted again to contact Gloy on 21 November 2002 requesting that we meet. Gloy refused to meet me again and it was clear that he was not going to cooperate with me or my family to assist us in reaching the truth.
- 60.5 I refrained from contacting him again but the overriding urge to hear the truth overwhelmed me. I wrote a letter to Gloy in 2007 pleading with him that it was almost 36 years since Timol's death; and since he was approaching the end of his life he may want to speak the truth. My appeal was for us to meet and find closure. I received no response from him.
- 61 In 2003 it had become clear that the TRC process had not led to results. My own investigations had been met with resistance. I accordingly approached the NPA's Priority Crimes Litigation Unit ("**PCLU**") (which was charged with investigating and prosecuting so called political cases) and asked them to investigate my uncle's case.
- 62 On 25 February 2004, Advocate R C Macadam of the NPA's PCLU ("**Macadam**") wrote to me advising of "*negative results*" of the investigation that had purportedly been launched. A copy of this letter is annexed hereto marked "**IC2**". On 29 November 2006, the NPA's task team assigned to investigate my uncle's case produced its internal report, titled: "**Report of the Progress made**



by the Task Team on TRC Cases”, confirming that it had closed my uncle’s case. In material part, the report stated that:

“The nephew of the deceased requested that an allegation that one of the police officers who had interrogated the deceased had confessed to a journalist be investigated.

The DSO traced and interviewed the journalist who denied the allegation. There was no other evidence to prove that the deceased had definitely been murdered and all other crimes had prescribed.

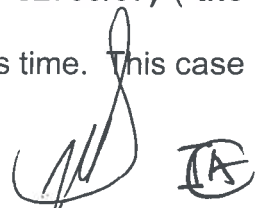
The matter was therefore closed.”

63 I was extremely disappointed that the NPA had closed its investigation into my uncle’s murder. I doubted that any actual investigation had ever been launched. It is quite apparent from Macadam’s affidavit dated 15 August 2017 (exhibit Q1 before the 2017 inquest) that apart from contacting one journalist, nothing else was done. Indeed, not even the most basic investigative steps that one would have expected were taken. In this regard I annex hereto marked “IC3” an online newspaper report titled *“History, suppressed: What didn’t get revealed at the Timol inquest”* by Kevin Bloom published in the Daily Maverick on 22 September 2017.

Suppression of the political cases

64 I was very disappointed by the approach of the NPA which I believed to be cavalier and uncaring. I fell into a debilitating depression fearing that the truth would forever remain concealed.

65 I learned later through the case of ***Nkadimeng & Others v The National Director of Public Prosecutions & Others*** (TPD case no 32709/07) (“the ***Nkadimeng case***”) that something sinister was going on at this time. This case



Handwritten signature and initials, possibly 'JA'.

brought by Thembi Nkadimeng, the sister of the slain heroine, Nokuthula Simelane, and the widows of the Cradock Four, (the young freedom fighters brutally murdered by a police hit squad), to set aside amendments to the NPA's Prosecution Policy (made in terms of section 179(5)(a) and (b) of the Constitution), which provided for a backdoor amnesty for political offenders.

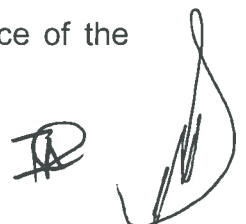
65.1 During the Nkadimeng case the National Director of Public Prosecutions ("NDPP") was forced to disclose a secret 2004 government report titled "**Report of the Amnesty Task Team**". It was revealed that on 23 February 2004 the government's Director-General's Forum appointed a secret "Amnesty Task Team" ("ATT") to address "*the absence of any guarantee that alleged offenders will not be prosecuted*". Its report explored ways of avoiding the state's responsibilities to prosecute offenders denied amnesty by the TRC or who had not applied for amnesty. A copy of the aforesaid report is annexed hereto marked "IC4". (The annexes to this report have not been attached but can be supplied on request).

65.2 On the recommendation of the ATT the NPA was required to amend its prosecution policy to facilitate impunity for apartheid era criminals. In striking down the amendments to the Prosecution Policy as "absurd" and unconstitutional. Judge Legodi held that:

"...crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted." (Nkadimeng & Ors v National Director of Public Prosecutions [2008] ZAGPHC 422)

Handwritten initials 'TA' in a circle and a large, stylized signature.

- 65.3 Also, on the recommendation of the ATT, former President Mbeki introduced a political pardons program to further accommodate perpetrators. Civil society organisations had to approach the high court urgently to stop these pardons being issued in the absence of any inputs by victims and others (*CSV & Others v President of the Republic of South Africa & Others*, Case no. 15320/09, North Gauteng High Court). The Constitutional Court confirmed that it was irrational and a violation of the rule of law to exclude victims from the process (*Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC)).
- 65.4 Notwithstanding the ruling of Judge Legodi in the Nkadimeng case the family of Nokuthula Simelane and the widows of the Cradock Four are still waiting for justice. Out of sheer frustration the family of Nokuthula Simelane was forced to file an application before the Gauteng Division of the High Court in Pretoria in the matter of ***Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others***, Case Number 35554/2015 on 20 May 2015. In this application they sought orders compelling the South African Police Service (“SAPS”) to finalize their investigations and an order compelling the NDPP to make a prosecutorial decision or refer the case to an inquest.
- 65.5 This application disclosed evidence of gross political interference in the operations of the NPA, as per the supporting affidavits of former NDPP, Adv Vusumzi Patrick Pikoli (“Pikoli”) and Anton Rossouw Ackermann SC, former Special Director of Public Prosecutions in the Office of the

Handwritten initials and a signature in the bottom right corner of the page.

NDPP and former head of the PCLU ("**Ackermann**"), and explained how the political cases from the past were deliberately suppressed. The aforesaid NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases. Copies of the notice of motion filed in the aforesaid matter and the affidavits of Pikoli and Ackermann are annexed hereto marked "**IC5**", "**IC6**" and "**IC7**". The full papers can be supplied on request.

Reopening the Inquest

- 66 I took all my research, thoughts, emotions and investigations and penned my book entitled, "***Timol – A Quest for Justice***". It was launched at JVS on 30 January 2005. As there remained numerous unanswered questions I continued conducting research for my second book which is at an advanced stage.
- 67 Ahmed's brother, Mohammad Timol, had over the years reminded me that it was important for us to reverse the findings of Magistrate de Villiers. The family never accepted this finding as we remain convinced that the first inquest was a complete farce and cover up.
- 68 I contacted former TRC Commissioner Yasmin Sooka in 2009 to discuss the Timol matter. After delaying for several years, due to my depression, I finally arranged to meet Advocate Howard Varney, Frank Dutton and Yasmin Sooka at a meeting on 6 February 2015. At this meeting I was advised by the aforesaid to seek the reopening of the inquest to reverse the finding of

Handwritten signature and initials in the bottom right corner of the page. The initials appear to be 'JA' inside a circle, followed by a stylized signature.

Magistrate De Villiers. Frank Dutton was appointed to investigate and uncover new evidence.

- 69 Dutton uncovered considerable evidence and a meeting was convened with the NDPP, Adv. Shaun Abrahams on 19 January 2016 at the NPA offices in Pretoria. Dutton presented compelling new evidence that was not before the first inquest. My lawyers made representations that it was in the interests of justice to reopen the inquest. Advocate George Bizos SC was invited to this meeting and he too made representations. The NDPP announced on 26 October 2016 that he had accepted our application to re-open the inquest.

The 2017 Inquest Finding – A Historical Moment

- 70 In its judgment, the 2017 Inquest Court firmly rejected the police version, finding that it was a fabrication from start to end. The Court found that my uncle, Salim Essop and others were viciously tortured and that the police murdered Timol to cover up the torture.

- 71 History will now reflect the official finding of the second Inquest Court that—

71.1 “at the time Timol was pushed either out of the window of room 1026 or at the roof top, he was in the company of members of the Security Branch in charge of his interrogation on duty”;

71.2 “the push occurred during interrogation under circumstances where the Security Branch involved, resorted to torture”;



71.3 it was “probable, on the evidence, that the Security Branch foresaw that their methods of interrogation carried the risk of death occurring, but nevertheless persisted unrestrained with the torture, appreciating that death might well occur”; and

71.4 “Timol did not jump as alleged. He was pushed by someone and there is thus a case that members of the Security Branch conducting interrogation at that time had to answer. Timol was in their custody as a detainee. They had complete control over him and they thus owed him a duty of care, for which they should have been held to account.”

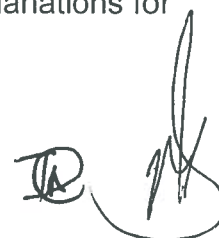
72 The upshot was that the Court concluded that:

“Timol’s death was brought about by an act of having being pushed from the 10th floor or roof of the John Vorster Square building to fall to the ground, such act having been committed through dolus eventualis as the form of intent and prima facie amounting to murder. There is prima facie evidence implicating Gloy and Van Niekerk who were on duty and interrogating Timol at the time he was pushed to fall to his death. Rodrigues, [the accused] on his own version, participated in the cover up to conceal the crime of murder as an accessory after the fact, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He [the accused] should accordingly be investigated with a view to his prosecution.”

73 The Court was particularly scathing of Rodrigues:

73.1 He contradicted himself in his testimony and affidavit before the first inquest (para 296); and he gave different and conflicting accounts of the events that transpired in room 1026 (para 297);

73.2 His evidence was contradicted, and he could not provide explanations for the contradictory evidence of others (para 298);



73.3 He belatedly introduced a new version (para 299). And, that:

"The impression gained by the Court from this statement was that Rodrigues wanted to paint a picture of a person who is independent and not easily influenced. He clearly fabricated this version so as to bolster the credibility of his evidence. He could not satisfactorily explain why he had not disclosed this aspect of his evidence in the affidavit, to the 1972 inquest or at any time thereafter. It seems to the court that this version was intended to bolster the credibility of its own story and to present him as a person who was stating the truth and being intolerant of any influence. This version is contradicted by his own statement that Buys asked him to add in his statement that Timol was not assaulted to which he agreed. The Court is of the view that there was no need for him to agree to any statement on assault as he was an officer from Compol Building in Pretoria who was employed as a salary clerk and therefore would not have known, on his own version, what goes on in the interrogation. He had repeatedly told the Court that he was not allowed to go into the area of interrogation as what goes on there was "uiters geheim" (utmost secrecy)."

73.4 Rodrigues made material contradictions in his evidence that cast serious doubts on his credibility (para 301); and his version was filled with "*contradictions and improbabilities*" (para 306);

73.5 "[T]here is no merit or credibility in the evidence of Rodrigues... The version was clearly fabricated to conceal the real truth as to what caused Timol to fall. The Court rejects this version." (para 315);

73.6 If he had been brought to office 1026, he "*was brought there to legitimise the cover up narrative*" (para 320.8);

73.7 "Rodrigues placed himself on the scene as a party to the cover up to conceal the truth. He thereby prima facie, by his conduct became an accessory after the fact of murder" (para 331);



73.8 “Rodrigues should be investigated for making contradictory statements whilst under oath. He has a previous conviction on perjury” (para 334); and

73.9 “Rodrigues, on his own version, participated in the cover up to conceal the crime of murder as an accessory after the fact, and went on to commit perjury by presenting contradictory evidence before the 1972 and 2017 inquests. He should accordingly be investigated with a view to his prosecution” (para 335(d)).

Timol Has Captured the Hearts and Minds of South Africans

74 As I have submitted, I bring this application not only in the interests of myself and my family, but in the interests of all victims of apartheid era crimes and in the interests of the South African nation, which our Constitution prescribes is founded on the values of national reconciliation and unity.

75 My uncle’s case has remained squarely in the public domain as a matter of profound public interest. In this regard, I attach a table marked as “**IC8**” that summarises a small number of the numerous media articles that demonstrate the public’s sustained interest in following my uncle’s case, including:

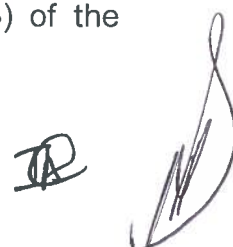
75.1 Thirty articles published between 1997 and 2015 and published in local, provincial and national newspapers. These articles pay tribute to my uncle, question the circumstances surrounding his death and recognise my family’s quest for justice.

Handwritten signature and initials in the bottom right corner of the page.

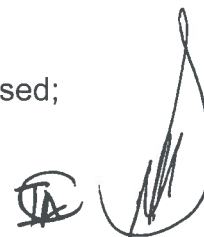
- 75.2 Twelve articles published between 2016 and 2018 in local newspapers and online. These articles demonstrate the public's desire to see justice done for my uncle's murder.
- 75.3 Two full-length documentaries that have been aired on national television and have been published online. The first, *Indians Can't Fly*, was aired in 2015. The second, *Someone to Blame – The Ahmed Timol Inquest* premiered on SABC 3 on 14 October 2018.
- 76 I submit that there has been, and remains overwhelming national interest in my uncle's case, including the pending prosecution of the accused.

THE APPLICATION SHOULD BE REFUSED

- 77 Rodrigues currently faces two charges:
- 77.1 First, murder read with section 51(1) of the Criminal Law Amendment Act, 51 of 1997 (as amended) ("**the CPA**");
- 77.2 Second, Defeating and/or obstructing the administration of justice read with section 256 of the CPA.
- 78 The accused hopes to escape the murder charge by seeking the following relief in the main application as set out in his notice of motion:
- 78.1 A declaratory order that the criminal proceedings instituted against him constitute an unfair trial against him in terms of section 35(3) of the Constitution;

Handwritten initials "TA" and a signature.

- 78.2 A declaratory order that the criminal proceedings instituted against him constitute an infringement to his fundamental rights to a fair trial in terms of section 35(3) of the Constitution read with section 342A of the CPA;
- 78.3 A permanent stay of the charge of murder in the criminal proceedings against the accused relating to the death of Timol;
- 78.4 The first and second respondents are prohibited from proceeding with the criminal prosecution against the accused on a charge of murder relating to the death of Timol;
- 78.5 The first and second respondents are ordered to withdraw the criminal proceedings against the accused relating to the death of Timol.
- 79 Rodrigues alleges that the prosecution against him will violate a number of his constitutional rights. He claims that his rights in terms 35(3)(a)(d) and (i) of the Constitution as well as his rights to remain silent and not incriminate himself have been violated. He claims that he is also seriously prejudiced by the fact that a prosecution has been instituted against him some 47 years after Timol's death.
- 80 I set out below my consideration of the merits of the accused's case, with reference to the following themes:
- 80.1 First, I deal with the issue of delay, including the reasons for the delay and the length thereof;
- 80.2 Second, I deal with the evidentiary issues raised by the accused;

Handwritten signature and initials in the bottom right corner of the page.

80.3 Third, I discuss the accused's age and health; and

80.4 Finally, I analyse the accused's allegations that his rights have been infringed and that a stay is appropriate.

Delay

81 I am advised that when considering the question of delay that a "*balancing act*" must take place in which both the conduct of the prosecution and the accused are weighed. The following considerations are considered when performing this balancing act, including:

81.1 the reasons the government assigns to justify the delay;

81.2 the length of the delay; and

81.3 the accused's assertion of his right to a speedy trial; and the prejudice to the accused.

Reasons for the delay

82 Under apartheid the police, in particular the SB, could not have been expected to investigate themselves. Indeed, it would be safe to assume that all murders and crimes carried out by the SB, probably without exception, were covered up. Moreover, prosecutors and magistrates routinely did the bidding of the SB or simply turned a blind eye to the atrocities. This naturally explains the inaction between 1971 and 1994.



83 The TRC and the amnesty process, which eventually wound up in 2002, perhaps explains the delay post 1994. It is the subsequent period between 2002 and the reopening of the Inquest that requires examination ("**the post-TRC period**"). The failure of the NPA and the police to explain the delay in this period is conspicuous, if not downright suspicious.

84 In the post-TRC period the NPA and its officials dealing with my uncle's case, as well as other so-called political crimes from the past, became subjected to severe political constraints. Such pressures served to shape the approach or policy of the NPA and the SAPS in relation to the so-called political cases (also referred to as the "**TRC cases**"). Indeed, it is my submission that such political pressure made it extremely difficult, if not impossible, for them to carry out their responsibilities under law. This in turn rendered their conduct, in relation to Timol's case and other so-called political cases, questionable, if not unlawful. It also explains the inordinate delay in re-opening the inquest into my uncle's death and, now, prosecuting the accused.

85 This policy or approach is evidenced by various steps aimed at ensuring political control over prosecutorial decisions dealing with the TRC cases as reflected in the documents described below:

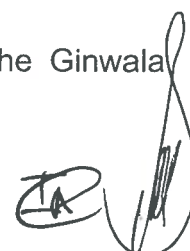
85.1 The 2004 secret government report, titled "*Report: Amnesty Task Team*", which was disclosed during the proceedings in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07), which made proposals, most of which were



accepted, to guarantee impunity for apartheid-era perpetrators (annex "IC4").

85.2 An affidavit made by Adv. Pikoli, filed in *T P Nkadimeng v National Director of Public Prosecutions & Others*, (Case No.: 3554/2015, Gauteng Division), in which he sets out how the independence of his office was seriously compromised (annex "IC6"). Pikoli details how he was subjected to withering pressure from political forces, including the then Minister of Justice, Mrs. B S Mabandla, and the then Commissioner of the SAPS, the late Jackie Selebi, to abandon the TRC cases. When he ultimately decided to proceed with one case (the attempted murder of the Rev. Frank Chikane by the SB) he was suspended by President Mbeki on 23 September 2007. (The Chikane matter led to a soft plea bargain with former Minister Adriaan Vlok, former Commissioner Johann van der Merwe and others on 17 August 2007).

85.3 A secret memorandum addressed by Pikoli to Minister Mabandla titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007. In this memorandum Pikoli concludes that there had been improper interference in relation to the TRC cases and that he had been obstructed from taking them forward. He complained that such interference impinged upon his conscience and his oath of office. Since this document was entered into evidence in the Enquiry into the Fitness of Advocate VP Pikoli to hold the Office of National Director of Public Prosecutions (also known as the Ginwala

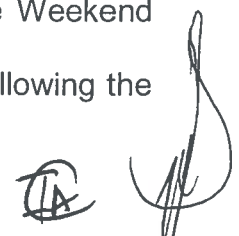


Enquiry) it is in the public domain and is accordingly annexed hereto marked "IC10."

85.4 An affidavit made by Adv. Ackermann SC which was also filed in the aforesaid Nkadimeng case (annex "IC7."). In this affidavit Ackermann explains in detail how he was stopped from pursuing the investigation and prosecution of the TRC cases. He recounts that following the suspension of Pikoli in September 2007 he was summoned to the office of Adv. Mokotedi Mpshe, then acting NDPP, who advised him that he was relieved of his duties in relation to the TRC cases with immediate effect.

86 Both Pikoli and Ackermann state that it was no coincidence that there has not been a single prosecution of any TRC matter since September 2007. The indictment in the Nokuthula Simelane case in 2016 was only issued because of the litigation launched in the abovementioned Nkadimeng case in which an order was sought compelling the NDPP to make a prosecutorial decision or refer the case to an inquest.

87 It is of great significance that in those proceedings ((Case No.: 3554/2015, Gauteng Division) the NPA and SAPS never filed an answering affidavit. They never went on the public record to dispute the averments of the political suppression of the TRC cases, notwithstanding the considerable publicity that the case attracted. As an example of the publicity, I annex hereto a newspaper article dated 31 May 2015 authored by Ms Zenzile Khoisan in the Weekend Argus marked "IC11". Those proceedings were held in abeyance following the

Handwritten initials 'TA' in a circle and a signature.

issuing of indictments against four SB officers who were accused of murdering Nokuthula Simelane.

88 I submit that the manipulation of the criminal justice system to protect individuals from prosecution serves an ulterior and illegal purpose, constitutes bad faith, is irrational, interferes with the independence of the NPA and amounts to gross subversion of the rule of law. Perpetrators, such as Rodrigues, have directly benefitted from such unlawfulness since the closure of the TRC.

89 This is the real reason for the delay in investigating and prosecuting apartheid-era perpetrators like Rodrigues in the democratic era. After being protected from investigation and prosecution in the post TRC years, Rodrigues now seeks to use this delay to permanently stay the prosecution.

90 Until the 2015 Nkadimeng case referred to above, victims of apartheid crimes were entirely unaware of the state policy to suppress the political cases of the past. This pernicious and illegal strategy should not be held against the Timol family and the other the families of apartheid-era atrocities.

91 Staying the prosecution would serve to validate the position taken by perpetrators in political cases. It would also serve to validate and reward the interference orchestrated by dark political forces and executed by subservient, unethical and dishonest police officers and prosecutors.

92 Families and victims would be punished for the political interference and inaction by the authorities, when they took no part in such obstructions and were entirely oblivious of such machinations. This would be iniquitous and unjust, particularly in circumstances where families, such as mine, have been persistently and diligently campaigning for justice for decades.

93 I submit that staying the prosecution in such circumstances would play into the hands of unscrupulous elements who have engineered near total impunity for apartheid era crimes. This is precisely the perverse outcome that they have sought. It would stand as a deep betrayal of the sacrifices made by victims such as Timol, Biko, Simelane and others. It would also be deeply offensive to our constitutional order.

94 I should add that the third respondent, the Minister of Police, has chosen not to take part in these proceedings. The role of the police in the post-TRC years has been equally shameful. The conduct of the late Commissioner Jackie Selebi, who led the charge to suppress the TRC cases, was nothing less than disgraceful. Even today it appears that the police remain, to some extent, captured by forces from the past:

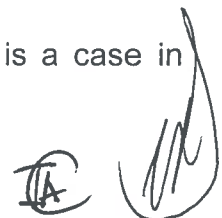
94.1 An additional 9 deaths in SB detention, as well another 11 cases dealing with murder, kidnapping and torture (in which all the suspects were former SB members who had not been amnestied, which includes Cradock 4 and Pebco 3 murders), were placed before the Directorate for Priority Crimes Investigations ("DPCI" or "the Hawks") and the NPA in January 2018.

Handwritten initials 'IA' and a signature.

- 94.2 Astonishingly, two former SB officers were appointed to lead these investigations. One of the investigators, indeed the senior investigator in charge, was implicated in the torture of a detainee in the 1980s. This detainee, together with his wife, were subsequently shot dead by the SB, after he sued the SAP for damages.
- 94.3 Although the two officers have since been removed from these investigations following complaints, it is hardly surprising that absolutely no progress has been made in any of these 20 cases. In addition, the team members appear to be complacent and unwilling to rise to the challenge. All the above leads me to conclude, that in relation to the TRC cases, it is still business as usual.
- 94.4 Finally, I note that it is no surprise that the real decision makers behind the atrocities committed by the SB have not been investigated and prosecuted. Individuals, such as Eugene de Kock and those recently indicted in the Nokuthula Simelane case, were mere foot soldiers. While junior officers must face justice, they acted at the behest of the generals and politicians who remain shielded from accountability. The failure to pursue those most responsible is inexcusable and speaks volumes about the state of our criminal justice system.

Length of delay

- 95 There is no doubt that the long delay in prosecuting Rodrigues is unfortunate and regrettable. As mentioned above there was no prospect of any meaningful investigations of SB crimes under apartheid. The Timol matter is a case in



point. The investigating officer, Major General Buys, who was the head of the Criminal Investigation Department ("the CID") of the SAP, was appointed to investigate Timol's death in police custody. On 31 October 1971, before the investigation had been completed, Buys proclaimed to the media that Timol had committed suicide. He was little more than the SB's sweeper.

96 Post the advent of democracy in 1994 it was open to Rodrigues to come forward to the TRC and come clean about his role and claim his amnesty. Had he done so, he would have earned my gratitude and that of my family. He chose not to, notwithstanding the fact that that he was specifically invited to come forward. Rodrigues chose to stay silent and keep my family in persistent pain and trauma. Moreover, once it was announced that the inquest was to be reopened Rodrigues did not come forward. Our investigator, Frank Dutton, had to track him down. Remarkably, even the investigating officer and the NPA assumed that he was dead.

97 Post the TRC, the story of post-apartheid justice in South Africa is a shameful story of terrible neglect. Both the SAPS and the NPA colluded with political forces to ensure the deliberate suppression of the bulk of apartheid era cases. Even though the TRC had handed over a list of several hundred cases to the NPA with the recommendation that they be investigated further, virtually all of them were abandoned. All these cases involved gross human rights violations such as torture, murder and enforced disappearances in which amnesty was either denied or not applied for (hereinafter referred to as the "TRC cases").



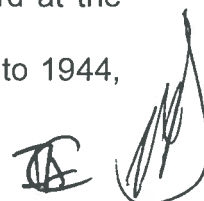
98 In respect of the TRC cases the SAPS and the NPA became captured by political forces. The few prosecutors with the courage to stand up to the political interference were either removed from their positions or frozen out from these cases. The rest acquiesced and ensured that the TRC cases never saw the light of day.

99 Notwithstanding the neglect of these state institutions, there is considerable precedent for the bringing of prosecutions in respect of serious crimes even many decades later. Courts, both domestic and foreign, have grappled with prosecutions in adverse circumstances and instituted prosecutions after extended periods. Examples include:

99.1 In 2016, former South African tennis champion Bob Hewitt was successfully prosecuted for the rape and sexual assaults of three teenage girls dating back to the 1980s. He was sentenced to six years imprisonment. I attach the relevant media report as "**IC12.**"

99.2 A 94-year-old former SS guard presently faces trial in November 2018 charged with complicity in mass murders at the Nazi concentration camp Stutthof during World War II. According to regional court prosecutors at Muenster he stands accused of complicity in the murders of several hundred camp prisoners between 1942 and 1945, more than seven decades after the end of World War II. I attach the relevant media report as "**IC13.**"

99.3 In 2016, 95 year old Reinhold Hanning, who was an SS guard at the Auschwitz concentration camp in occupied Poland from 1942 to 1944,

Handwritten initials 'JA' and a signature.

was convicted in the Detmold court as an accessory to 170 000 murders. He apologized for participation in Holocaust atrocities saying "*I am ashamed that I saw injustice and never did anything about it, and I apologize for my actions*". Hanning was sentenced to five years in prison and died while an appeal to the Federal Court of Justice was pending. I attach the relevant media report as "**IC14.**"

99.4 According to German media reports, as at June 2017, some 28 prosecutions were still under way against alleged war criminals and concentration camp guards. The accused are generally over 90 years old (annex "**IC14.**").

99.5 In July 2018 eight retired Chilean military officers were sentenced to 15 years in prison for the murder of popular folk singer, Victor Jara, during the 1973 coup that installed late dictator Augusto Pinochet in power. A judge handed down the sentences after a long-running inquiry into Jara's death on 45 years ago. A ninth suspect was jailed for five years for his role in covering up the killings. I attach the relevant media report as "**IC15.**"

99.6 In May 2016, former Argentine junta leader, Reynaldo Bignone, was sentenced to 20 years in prison for multiple kidnappings and murder committed under Operation Condor - a conspiracy between South America's dictators in the 1970s. Bignone and 14 other military officers were found guilty by a court in Argentina after a three-year trial. I attach the relevant media report as "**IC16.**";

Handwritten initials and a signature in the bottom right corner of the page.

- 99.7 In 2016, the former head of the Argentine Air Force, Brigadier Omar Graffigna, went on trial in a Buenos Aires provincial court for forced disappearances during the military rule that took place from 1976 to 1983. He was 90 years old at the time. I attach the relevant media report as “**IC17.**”;
- 99.8 In 2018, four former high-ranking Guatemalan military officers, once considered untouchable, were convicted of crimes against humanity, including forced disappearance and sexual abuse that took place in 1981. A sentence of fifty-eight years’ imprisonment was imposed. I attach the relevant media report as “**IC18.**”
- 100 In addition to these cases, several high-profile prosecutions have taken place across the world where former military and police officials have been convicted for crimes committed during pre-democratic regimes. Examples include:
- 100.1 In Spain, Adolfo Scilingo, a former Argentine naval officer, was convicted in 2005 for torture and crimes against humanity committed between 1979 and 1983. He was sentenced to 640 years in prison. I attach the relevant media report as “**IC19.**”
- 100.2 In France, Alfredo Astiz, a former Argentine naval intelligence officer, was convicted in 2011 for torture and enforced disappearances committed between 1976 and 1983. He is serving a life sentence in prison in Argentina. I attach the relevant media report as “**IC20.**”

Handwritten initials "IA" and a signature.

Accused's assertion of his fair trial rights

101 Rodrigues claims that his rights contained in sections 35(3)(a), 35(3)(d), 35(3)(i) of the Constitution as well as his rights to remain silent and not incriminate himself have been infringed.

102 The accused's fair trial rights must be balanced against the profound social interest in bringing a person charged with a serious criminal offence to trial. Society benefits as a whole when a prosecution takes place in a structured legal system before a public forum and where the liability of the accused is resolved.

103 Considerations of the accused's claimed violation of rights must be juxtaposed against the societal demand that those accused of serious offences, such as murder, must stand trial. This is one of the reasons why the crime of murder in South Africa never prescribes, no matter how old the crime is.

Evidentiary Issues

104 The accused complains about various evidentiary issues that arise from the delay in prosecuting him, including material disputes relating to the circumstances of Timol's death, the unavailability of medical experts, the impairment of witnesses' memories and the destruction of crucial records.

105 However, the accused's complaints are without foundation.

- 105.1 First, in criminal proceedings, it is not the accused but the prosecution that bears the evidentiary *onus*. Moreover, the standard of proof is an onerous one – the guilt of the accused must be established beyond reasonable doubt.
- 105.2 Second, any prejudice that the accused claims may arise from an absence of evidence may be remedied by the accused applying for a discharge in terms of section 174 of the CPA at the end of the prosecution's case.
- 105.3 Third, judicial officers have the expertise to assess the credibility and reliability of witness testimony, and to assess this holistically.

Accused's Health

- 106 Rodrigues who is 79 years old alleges he will "*suffer serious prejudice to my health should this trial proceed*", including adversely affecting his health. He claims that he is suffering from multiple ailments.
- 107 At the outset, I must point out that the accused's claim of fragile health is an entirely bald claim. He puts up no evidence to support this claim. No medical reports or doctor's certificates accompany the founding affidavit. If Rodrigues was genuinely in poor health, it would have been a simple matter to put up basic proof. The accused's claim is most likely false.
- 108 In any event I submit that there is considerable domestic and international precedent for prosecuting elderly and unwell accused. I have pointed to

several examples where prosecutions were brought after a thirty-year plus delay and some even more than 70 years. In all these cases, the accused were elderly, several in their 80s and 90s.

109 It would send a terrible and counter-productive message if this Court were to signal that those who have managed to evade justice for decades would be accordingly rewarded. Rather, perpetrators of all crimes, particularly serious crime, should know that they will have to account for their actions, no matter how old they are.

Stay of Prosecution and Withdrawal of Charges

110 My family opposes the permanent stay of prosecution sought by the accused. I am advised and submit that the factors that a court will consider when granting a permanent stay are:

- 110.1 The nature of the prejudice suffered by the accused;
- 110.2 The nature of the case;
- 110.3 Systemic delay.

Prejudice

111 While having to face justice at an advanced age is unpleasant, Rodrigues brought this situation onto himself. As mentioned above, Rodrigues had several opportunities to come clean and simply provide the truth in exchange for his



freedom. He chose however to remain obstructive and un-cooperative and to prolong my family's pain.

112 In any event it is open to Rodrigues to raise his age and any special circumstances at mitigation of sentence, should he be convicted.

Nature of the case

113 Rodrigues faces serious charges, including murder and defeating and/ or obstructing the administration of justice. Both crimes are very serious, particularly that of murder.

Systemic delay

114 I have already analysed the delay occasioned in prosecuting the accused. Moreover, such delay does not outweigh the special circumstances of this case together with the interests of justice and the overwhelming public interest in seeing justice done.

Interests of justice

115 Our highest court has held that the ultimate consideration in granting a stay is the "*interests of justice*", which denotes an equitable evaluation of all the circumstances of each case. Having regard to everything I have set out, I submit that the present case is of the exceptional sort where the interests of justice cry out for a prosecution to proceed against the accused.

A handwritten signature and initials in black ink, located in the bottom right corner of the page. The signature is stylized and appears to be 'M. J. Rodrigues'.

AD SERIATIM RESPONSE TO THE APPLICANT'S FOUNDING AFFIDAVIT

116 I set out below my answers to the individual averments made by the applicant in his founding affidavit. To avoid undue repetition, everything I have set out above must be read as an answer to the contentions advanced by the applicant.

117 Ad paragraphs 1 to 5

117.1 The contents of these paragraphs are noted. I point out that despite my family possessing an obvious and clear interest in this application, the accused elected not to cite the family in the application. This forced us to bring a substantive application to intervene in these proceedings, thereby causing further delay and costs.

118 Ad paragraph 6

118.1 I note the form of the relief sought by the accused but deny that the accused is entitled to this relief. I point out that despite the accused's criminal prosecution pending before the Johannesburg High Court, he elected to institute the application in piecemeal fashion before the Pretoria High Court.

118.2 In my intervention application, I originally sought to declare this to be an abuse of this Court's process but have since not pursued this relief in view of the matter being subject to case management by the Johannesburg High Court in which it will be heard.

Handwritten signature and initials in the bottom right corner of the page.

119 Ad paragraphs 7 and 8

119.1 I note the various rights relied upon by the accused. While the accused is entitled to assert his fair trial rights, I repeat that these must be juxtaposed against the societal demand that those accused of serious offences, such as murder, must stand trial.

119.2 I deny that the accused has made out any case for an infringement of his rights in terms of section 12 of the Constitution. Despite pleading this right, Rodrigues has failed to provide any factual and legal basis to demonstrate any actual or threatened arbitrary deprivation of his freedom, detention without trial or cruel or inhumane punishment.

120 Ad paragraphs 9 and 10

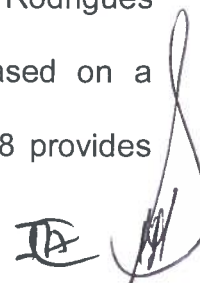
The contents of these paragraphs are noted.

121 Ad paragraphs 11 to 13

I have no knowledge of how the first respondent framed the charges against the accused, however the genesis of the prosecution against the accused was the judgment of the Reopened Inquest, which made serious credibility findings against Rodrigues (para 315).

122 Ad paragraph 14

122.1 The contents of this paragraph are denied. The attempt by Rodrigues to make something of the removal of section 257 is based on a misreading of sections 18 and 257 of the CPA. Section 18 provides



that the NPA's right to institute a prosecution in respect of murder does not prescribe by effluxion of time. Chapter 26 of the CPA (which includes section 257) empowers a court to grant competent verdicts in the alternative to a main charge if a main charge, such as murder, cannot be proven. Section 257 accordingly does not have the effect of creating an offence, but merely permits a court to convict an accused as an accessory after the fact to murder if it cannot be proven that the accused himself meets all the requirements for criminal liability in respect of murder.

122.2 Rodrigues not only participated in the cover up of Timol's murder in the first inquest, but doggedly persisted with the cover up before the 2017 re-opened inquest. This was a specific finding made by the re-opened inquest court noted in its judgment. While Rodrigues can no longer be held criminally liable for his cover up before the 1972 Inquest he can be held liable for pursuing the cover-up before the 2017 Inquest.

123 Ad paragraphs 15 to 16

123.1 The contents of these paragraph are denied. The accused claims that the re-opened inquest court concluded in its findings that he was not involved in the causing the death of the deceased; and at worst he was only found to be an accessory after the fact to murder. However, a close reading of the judgment discloses not a single reference or finding anywhere in the judgment to Rodrigues playing no role in the death of the Timol.

Handwritten signature and initials in the bottom right corner of the page. The initials appear to be 'TA' inside a circle, followed by a large, stylized signature.

- 123.2 Indeed the fact that the Inquest Court found that the fall had taken place in the morning not the afternoon and that the version of Rodrigues on this point "*was fabricated and stage-managed as part of a cover up to conceal the facts around the death of Timol*" (paras 245 and 320.8) can only mean that the Court left the door wide open to the possibility that he was involved in the criminal program a lot earlier, making him an accomplice or co-conspirator.
- 123.3 Once it is accepted that the fall took place in the morning not the afternoon then everything stated by Rodrigues in relation to what happened on 27 October 1971 is, without exception, patently false.
- 123.4 It can be safely concluded, at the very least, that Rodrigues continued to conceal the commission of multiple offences in the second inquest and in so doing, he continued to single-mindedly defeat the course of justice. Through his cover-up in both inquests he associated himself with the main offences of torture and murder, with knowledge of their commission.
- 123.5 Rodrigues willingly allowed himself to be used as a pawn of the SB interrogators. By his own admission he knew Gloy and Van Niekerk "*very well*" and even shopped for their groceries and transported their children when they were away (Rodrigues evidence, Vol 9, p 744, line 14 – p 745, line 12; p 746, lines 7 – 15, Reopened Inquest).
- 123.6 It is probably no coincidence that Rodrigues was recruited into the SB by the notorious Brigadier Theunis Jacobus 'Rooi Rus' Swanepoel

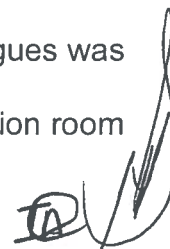


("Rooi Rus Swanepoel") who he knew "very well" (Rodrigues testimony, Vol 9, p 687, lines 15 – 20, Reopened Inquest). Rooi Rus Swanepoel was deeply implicated by the TRC in several crimes committed against detainees, including the demise of Suliman "Babla" Saloojee who fell to his death in 1964 from the 7th floor of Gray's Building, then HQ of the Johannesburg SB (TRC Final Report pp 540-541, Exhibit H12). Gloy accompanied Rooi Rus Swanepoel to France in 1968 to receive training in "*interrogation and counter-interrogation techniques*" (TRC Report Vol 2 Ch. 3 subsect. 14, para 125).

123.7 Rodrigues admitted, for the first time at the 2017 inquest, that he stopped short of pretending that he had a fight with Timol, to explain away the torture injuries, when asked to do so by Major General Christoffel Andries Buys ("**Buys**"), the investigating officer (and Gloy and Van Niekerk). Presumably he realised that such a fabrication would open himself to taking the blame for the multiple non-fall injuries on Timol (Rodrigues oral evidence, Vol 9, p 675 line 10 – p 677, line 10; p 683, line 12 – p 684, line 9; p 719, line 22 – p 720, line 10)

124 Ad paragraph 17

124.1 The contents of these paragraphs are denied. Rodrigues, on his own version, spent time with Timol in room 1026, indeed the moments before Timol died. Not counting the time Rodrigues was left alone with Timol he spent some 20 minutes in the office with Timol, Gloy and Van Niekerk (First Inquest finding, p 5 of translated version). Rodrigues was unable to explain why he spent so much time in the interrogation room



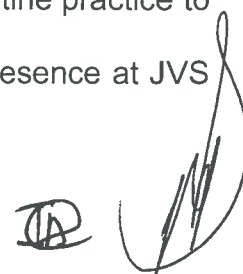
when, on his version, his only task was to drop off pay cheques and a secret envelope; and he was not drinking any beverage (Rodrigues testimony, Vol 9, p 690, 696 – 697; Vol 10, p 768 – 769). It is yet another tall story that only a compliant and corrupt magistrate would buy.

124.2 According to expert evidence placed before the re-opened inquest, Rodrigues must have observed considerable injuries on Timol, including bruising and swelling of his upper lip, left wrist and hand; abrasions on his forehead and neck; fracture of his left upper jaw posterior and fracture of his left lower jaw at the angle of jaw (Reopened Inquest, evidence of Dr S Holland read with the post mortem report). This was also a finding made by the inquest court in 2017.

124.3 The claim of Rodrigues that Timol was injury free when he saw him in room 1026 on 27 October 1971 is manifestly false. The veracity of his various denials is for a criminal court to finally determine.

125 Ad paragraph 18

125.1 The contents of this paragraph are denied. The accused claims that he was stationed at SB HQ in Pretoria and would go to SB offices to attend to administrative issues such as salary and payment enquiries. Rodrigues attempts to give the impression that it was routine practice to attend at SB branches to deliver pay cheques, so his presence at JVS

Handwritten initials 'TA' and a signature.

on the fateful day was nothing out of the ordinary. This was yet another patently transparent lie.

125.2 Rodrigues testified at the re-opened inquest that his visit on 27 October 1971 was in fact his very first visit to JVS (Rodrigues testimony, Vol 10, p 777). Indeed, on his own version he had no idea where to go on arrival at the building. JVS was in fact the biggest SB branch office with the most members outside of Pretoria, yet he had never been there before. This is even more incredulous given that at the time he had been a Paymaster Clerk at Security Branch HQ for nearly 2 years.

125.3 It is quite apparent that Rodrigues was not called over to JVS for administrative purposes. He was called over to collaborate in the crimes to be committed by Gloy, Van Niekerk and others. Ultimately, he was to be used to shield Gloy and Van Niekerk from scrutiny as to what happened in room 1026. In this, he was a willing participant.

125.4 Rodrigues further asserts that *"it would have been regarded as a very serious breach of security should I have involved myself in any operational issues and/ or should anybody have allowed me to participate in operational matters"*. And yet this is precisely what happened, at least on his version, on the afternoon of 27 October 1971.

125.4.1 Firstly, Rodrigues claimed he was asked to transport a secret document in an envelope to Gloy and Van Niekerk. It is a fabrication. He had no security clearance to carry out such a task and it is quite obviously not the job of a paymaster clerk.



125.4.2 Secondly in room 1026 in JVS, Rodrigues was supposedly asked by Gloy and Van Niekerk to guard Timol on his own. On the police version, Timol was the SB's most important detainee in years. This was an operational matter for which Rodrigues was not trained or authorised to do. Indeed, in his haste to rebut the case against him he concedes that his version of what took place on 27 October 1971 was a "*very serious breach of security*". It is a scenario that is simply not believable, especially since at JVS at the time there would have probably been a hundred or more SB and SAP members available to guard a detainee. Such inconsistencies invariably emerge when a version is concocted.

126 Ad paragraphs 19.1 to 19.6

In the accused's overview of events, he notably fails to mention that the investigating officer, Buys, and the interrogators, Gloy and Van Niekerk, asked him to fabricate a version, namely to pretend that he and Timol had fought in room 1026. He never disclosed this to the first inquest and indeed kept it secret until the re-opened inquest in 2017. Rodrigues could have come disclosed it to the TRC but specifically chose not to.

127 Ad paragraph 19.7

It is difficult to believe that the accused did not possess the TRC's report on Timol's death. The TRC report is a public document that is freely available on several websites and is accordingly easily accessible.

128 Ad paragraph 19.8

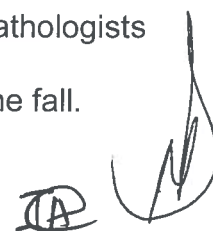
Rodrigues notably omits to mention that he flatly refused to participate in the TRC process, including appearing before the TRC. He attempts to give the impression that had he been able to 'jog his memory' by reading his 'statement and/ or evidence' from the initial inquest he would have happily cooperated with the TRC. This is another false claim and is disputed by TRC investigator, Piers Pigou.

129 Ad paragraph 19.12

The accused did not agree to voluntarily testify before the re-opened inquest court. The learned Mothle J had to subpoena the accused to appear before the re-opened inquest court.

130 Ad paragraph 19.16

130.1 The contents of this paragraph are denied. Rodrigues attempts to mislead this Court by claiming that the only new evidence generated in the reopened inquest was the evidence of the two forensic pathologists and the aeronautical engineer, dealing with the trajectory of the fall.

Handwritten initials 'TA' and a signature.

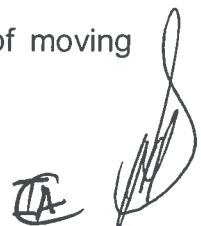
130.2 While the forensic evidence was instrumental in demonstrating that the police version of Timol's death, and that of Rodrigues, was impossible to have occurred, it was far from the only new evidence. (It is worth noting that his legal team made no serious attempt to dispute the forensic evidence, notwithstanding that his expenses were paid by the State). The accused overlooks considerable other evidence including:

130.2.1 The similar fact evidence of horrendous torture endured by Dr Salim Essop, Dr Dilshad Jetham and Professor Kantilal Naik as well as some 11 affidavits setting out accounts of torture by the SB at JVS.

130.2.2 This similar fact evidence on torture and cover-ups was reinforced by the testimony of former SB officer, Paul Erasmus, and the expert evidence of Professor Don Foster who had extensively researched abuses in apartheid era detention.

130.2.3 The affidavit and testimony of the family's investigator, Frank Dutton, who demonstrated how the original investigation was a complete sham aimed at suppressing the truth and protecting the officers involved.

130.2.4 Professor Kenneth Boffard, Trauma Director and Academic Head at the Department of Trauma Surgery at Milpark Hospital, who testified that, following the fall, Timol should not have been moved until an ambulance arrived; that the police would have known this and that they knew the consequences of moving him and not calling an ambulance.

Handwritten initials 'IA' and a signature.

- 130.2.5 Three unconnected civilian witnesses who testified as to what they saw and heard on 27 October 1971 and all put the timing of the fall at mid-morning.
- 130.2.6 Two witnesses who saw Timol not long before his arrest and saw him to be in good shape with no visible injuries.
- 130.2.7 Evidence from his brother, Mohammed Timol, who testified that his brother would not have opted for suicide; as well as the evidence of 3 associates in the underground who debunked the so-called 'suicide' document, '*Inkululeko Freedom No.2*', introduced surreptitiously into evidence by the SB in the first inquest, as a blatant forgery.
- 130.2.8 The personal police files of Timol, Naik, Jetham, Mohamed Timol and Quinten Jacobsen which demonstrated the round the clock system of interrogation to enforce sleep deprivation. One detainee could have up to 17 interrogators.
- 130.2.9 The police files of six SB officers, including Rodrigues, Van Niekerk and others. The file of Rodrigues disclosed that he had a prior conviction of perjury and had bizarrely received a letter of commendation 2 days before the first inquest finding was handed down. The file of Van Niekerk disclosed a conviction for 2 counts of assault (in which the victim died) and multiple complaints of torture against him and Gloy.

Handwritten initials 'TA' and a signature.

131 Ad paragraphs 23 to 27

- 131.1 The contents of these paragraphs are denied. The accused makes the remarkable claim that the NPA knew it would prosecute before the start of the second inquest. This claim is made without reference to any evidence or facts but simply on the basis that the NPA confirmed in its response to a request for further particulars that it had supplied all documentation and exhibits. No explanation is offered as to why this supposedly follows.
- 131.2 The claim of Rodrigues that he did not enjoy a right to silence in the inquest, suggests that he was placed at risk of incriminating himself. The right against self-incrimination is routinely invoked in inquests. The accused was represented by an attorney and counsel throughout the proceedings and he could easily have claimed his right against self-incrimination.
- 131.3 The procedure employed in the Reopened Inquest was in strict accordance with the Inquests Act 58 of 1959 ("**the Inquests Act**"). Nonetheless Rodrigues complains that the use of his testimony in the inquest proceedings in a prosecution infringes his constitutional rights. If this was a serious complaint, then he would have challenged the constitutionality of the relevant provisions of the Inquest Act. Rodrigues did not do so.

Handwritten initials "IA" in a circle and a signature.

132 Ad paragraphs 27 to 28

The contents of these paragraphs are denied for the reasons already set out above.

133 Ad paragraphs 29 to 30 (including sub-paragraphs)

133.1 The contents of these paragraphs are denied and have been previously addressed. I further point out that the accused's allegations are nothing more than pure speculation. The true position is that the decision to reopen the inquest was made primarily on a consideration of a single statement, that of Salim Essop.

133.2 This statement was taken by the family's legal representatives and provided to the NPA. The bulk of the remaining evidence adduced in the inquest was procured after the decision to reopen the inquest.

134 Ad paragraphs 35 to 43

134.1 The allegations made in these paragraphs are largely repetitive and have been dealt with. The inquest court made no positive finding that Rodrigues was not involved in the murder of Timol. The NPA is in any event not bound by the findings or recommendations of an inquest court.

134.2 I point out that it is not the accused, but the NPA that bears the *onus* of establishing the accused's guilt beyond a reasonable doubt.

Accordingly, the absence of witnesses, evidence and records does not prejudice the accused but places a greater burden on the NPA.

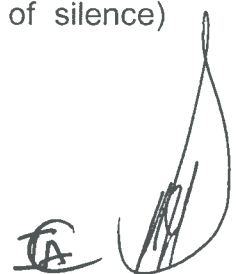
134.3 As mentioned above the accused's claim of fragile health (in para 41.5) is an entirely bald claim. If Rodrigues was in such poor health, it would have been elementary enough to put up basic proof.

134.4 The allegation that the Timol family was represented by senior counsel at the re-opened inquest (para 42.9) is untrue. The family was represented by junior counsel (who acted pro bono) and a baby junior counsel.

135 Ad paragraph 47

135.1 The allegations in this paragraph have been addressed previously. Rodrigues maintained his silence for 45 years. This is hardly the conduct of someone who always cooperated with investigators.

135.2 His wall of silence is particularly egregious since he knew that my family was campaigning for the truth. He notes in his founding affidavit at paragraph 49.1 that Timol's mother testified before the TRC in April 1996 and that her "*testimony, relating to the death of the deceased was widely covered, not only locally but also internationally, by the media.*" Rodrigues was well-aware of our plight but chose to remain silent. This is the same cruel modus operandi (the so-called code of silence) employed by virtually all former SB members.

Handwritten initials 'TA' and a signature.

135.3 I reiterate that, in 1996, when TRC investigator Piers Pigou met the accused in Pretoria, the accused refused to cooperate with the TRC and declined to make a statement or appear in a hearing. Again, this is hardly the conduct of a cooperative witness, let alone an honest one.

135.4 Pigou did not trace Rodrigues at his home but rather at his place of work at SanParks.

136 Ad paragraph 48

The contents of this paragraph are denied for the reasons already set out above. There were no proceedings until 2017. He took no steps to come clean or even to bring to the attention of the TRC or the authorities that he had been asked to cover up the torture of Timol by fabricating a version of a fight (which he only belatedly disclosed in the reopened inquest).

137 Ad paragraph 49 and subparagraphs

I have dealt with the various lapses of the SAPS and NPA elsewhere in this affidavit. These lapses have caused our family indescribable pain and hurt. I note with considerable irony that Rodrigues wishes to use the regrettable lapses of the police and prosecutors in pursuing apartheid-era cases, which directly benefitted him, in order to elude justice.

Handwritten signature and initials in the bottom right corner of the page. The signature is a large, stylized cursive mark, and the initials are a smaller, more compact mark.

138 Ad paragraphs 50 to 66

- 138.1 The contents of these paragraphs have been addressed elsewhere in this affidavit and are accordingly denied to the extent necessary, alternatively it is for the NPA to respond to claims made in respect of the pre-trial process.
- 138.2 I point out again that it is not the accused, but the first respondent that bears the *onus* of establishing the accused's guilt beyond reasonable doubt. Until then his presumption of innocence will be respected by the criminal justice process.
- 138.3 As my legal representatives did in the reopened inquest, it is always open to the accused to adduce his own expert and forensic evidence in rebuttal, regardless of the delay.
- 138.4 I repeat that there is not a shred of evidence before this Court that the accused is of fragile health.
- 138.5 Rodrigues has not been charged either with assault or assault with intent to cause grievous bodily harm.
- 138.6 If the NPA's case is as flawed as Rodrigues claims, he is free to bring an application for discharge at the close of the State's case in terms of section 174 of the CPA.

Handwritten initials 'TA' and a signature.

139 Ad paragraph 67.

The contents of this paragraph are denied. The accused's application should be dismissed with costs.

AD SERIATIM RESPONSE TO THE NPA's ANSWERING AFFIDAVIT

140 I set out below my answers to the averments made by the NPA in its answering affidavit. To avoid unduly burdening this affidavit I will not repeat background or answers already provided, but these should be read as an answer to the contentions advanced by the NPA's deponent.

141 Ad paragraphs 1.1 to 2.24

The contents of these paragraphs are noted. It is however particularly conspicuous that no explanation is provided for the near total inaction of the NPA in the post-TRC period (between approximately 2002 and the lead-up to the 2017 inquest.

142 Ad paragraphs 3.14 to 3.15 and 3.20 (including sub-paragraphs)

142.1 While I agree that the period in section 35(3)(d) of the Constitution refers to the period between the issuing of an indictment and the commencement of a trial, the period leading up to the decision to institute criminal proceedings cannot be ignored.

TA



142.2 I point out that the deponent has failed to mention that page 7 of the NPA's Prosecution Policy demands that the period between the committal of crime and the trial date be considered. The Prosecution Policy provides that:

"When considering whether or not it will be in the public interest to prosecute, prosecutors must consider all relevant factors, including:

...

- *Whether there has been an unreasonably long delay **between the date when the crime was committed, the date on which the prosecution was instituted and the trial date....**" (Emphasis added)*

142.3 Accordingly, what transpired during this time-period must be explained by the NPA, which it has inexplicably chosen not to do. This gives rise to suspicion that the NPA is shielding itself from embarrassment as well as violations of its obligations and duties under the Constitution, the National Prosecuting Authority Act 32 of 1998 ("**the NPA Act**"), and its Prosecution Policy.

142.4 In the post-TRC period no investigation into my uncle's murder was conducted by the NPA or SAPS until 2016. This was notwithstanding my request to the NPA in 2002. Aside from speaking to one journalist in Cape Town nothing was done. This singular act does not constitute an investigation. So much more could have done.

142.5 At that time, the key role players were still alive, such as the investigating officer General Stoffel Buys and the two primary interrogators, Captain Johannes van Niekerk and Captain Johannes Gloy. None of these individuals were approached.

142.6 Experienced investigator, Frank Dutton expressed his dismay at the approach of the NPA in the abovementioned article written by Kevin Bloom (annex "IC3"). It reads that:

"It is clear that the PCLU task team did not bother itself with 'studying' the Timol matter (which amongst other facts, disclosed several potential witnesses who had not been interviewed), before making an irrational recommendation (based on the report of a journalist rather than the facts contained in the filed material) not to prosecute and to close the matter without interviewing the potential witnesses.

...

Chris Macadam followed a similarly unreasoned course of action (concerning himself only with the journalist, and not determining the facts of the matter or following up on the potential witnesses). He however also called on the Timol family to provide any additional relevant material in respect of the death so that the case could be reconsidered in light thereof. This was obviously a ploy to move the onus for investigation from the authorities to the Timol family. It effectively meant that if the family failed to provide additional material, the PCLU would not move, and the case would remain 'closed'.

On 31 October 2006 Van Niekerk died; on 25 February 2007 Buys died; on 30 July 2012 Gloy died. Ultimately, Macadam had nearly 9 years to carry out the most elementary and basic investigation. He had nine years to interview Salim Essop (who was arrested with Timol and brutalised into a coma), as well as other detainees who could testify to their own torture as well as what they had heard and seen on the 10th floor. He had nine years in which to identify the whereabouts of police officers who had interrogated or guarded Timol. He had nine years in which to peruse the police files for evidence linking the latter to brutality. He had nine years to trace Rodrigues and interrogate his version of what transpired in room 1026. He had nine years in which to do a walkabout around the building to discover potential witnesses to the fall (which is how the family's lawyers discovered witnesses 45 years later). He had nine years to consult forensic pathologists and trajectory experts to determine whether the police version was possible or not. But Macadam did none of the above in these nine years."

143 I will be calling for an inquiry into those prosecutors and police who failed in their duties to uphold the rule of law.

TA



144 Ad paragraph 3.20.7

144.1 The impression is gained from this paragraph that it was smooth sailing from the moment that the NPA met with the family's representatives in January 2016. In fact, my lawyers had to threaten the NPA with litigation on several occasions to get the reopened inquest off the ground:

144.1.1 Following several earlier communications, my attorney, Moray Hathorn of Webber Wentzel ("**Hathorn**"), emailed the deponent on 21 June 2016 to remind him that the witnesses in the Timol and Neil Aggett cases were old, and their evidence may be lost if there was any further delay in reopening these inquests. Hathorn pointed out that this would have a devastating impact on the interests of justice and he called upon Advocate TP Pretorius SC to reach a decision in "*the next few days, or at the very latest within the next 2 weeks*". A copy of this email is attached as "**IC21**".

144.1.2 On 8 July 2016, Hathorn addressed a letter to the then NDPP, Adv Shaun Abrahams, in which he indicated that "[s]hould a decision not be taken imminently our instructions are to take the necessary legal steps to secure such a decision." A copy of the letter is attached as "**IC22**".

144.1.3 A further letter was written on 11 August 2016 to the deponent, referring to communiques exchanged in July 2016, seeking an update on whether a recommendation had been made to the

TA

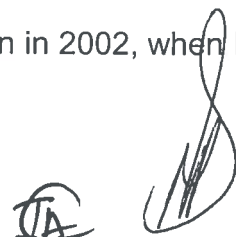


NDPP. The urgency of the matter was stressed with the letter concluding that “[s]hould we not receive such advice by that time [17 August 2016] our instructions are to take appropriate action”. A copy of the letter is attached as “**IC23**”.

144.1.4 Following on a telephonic conversation between the family’s attorney of record and the deponent, a further letter was authored on 23 August 2016. In this letter it was pointed out that the NPA was palpably delaying the process and that the deponent did “not have to finalize every last aspect of the investigations before these steps are taken”. It was placed on record that the delay was prejudicial. Detailed evidence was provided as to why the Timol and Aggett inquests were ripe for re-opening. The letter concluded with the following threat: “In the circumstances we hereby demand that the necessary recommendations to the Minister of Justice in terms of section 17A of the Inquest Act 58 of 1959 to reopen the aforesaid inquests be made by no later than 30 September 2016.” A copy of the letter is attached as “**IC24**”.

145 Ad paragraph 6.12

While it is correct that if Rodrigues had made full disclosure to the TRC, Gloy and van Niekerk could have been prosecuted, it is equally true that if the NPA and the SAPS had conducted even the most basic investigation in 2002, when I

Handwritten initials 'TA' and a signature.

requested them, then Buys, Gloy, Van Niekerk and others could have been prosecuted and held to account.

146 Ad paragraph 7.50

The NPA has omitted to attach the affidavit of the unnamed investigating officer marked "XX".

147 Ad paragraph 8.14

147.1 There is considerable irony to the claim made in this paragraph that "*it is not for victims to engage in investigations and prosecutions and that it will be a sad day in history if it's found that organisations seized with these mandates fail in their functions*". This is in fact precisely what happened.

147.2 If my family had not investigated my uncle's murder and, had we not engaged in intensive lobbying, the reopened inquest and these criminal proceedings would never have happened. It was the investigations of our private investigator, Frank Dutton, that opened the door to this case. The decision by the NPA to reopen the inquest was made on the back of his investigations.

147.3 The bulk of the investigations and preparation were carried out by the family's investigator and legal representatives.

Handwritten initials 'VA' and a signature.

147.3.1 Dutton located Salim Essop and it was our family's legal representatives that took his statement and presented same to the NPA.

147.3.2 The instrumental role of the family's representatives is starkly illustrated by the final exhibit list in the re-opened inquest (which can be supplied on request):

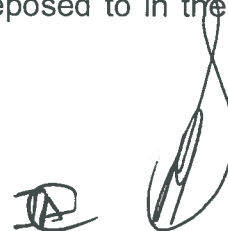
(a) Of the 30 documents listed in Volume C, 27 were prepared or obtained at the instance of our family's legal representatives.

(b) Of the 36 documents or bundles of documents in Volume H, 33 were prepared or obtained at the instance of the legal representatives of the Timol family.

(c) All 11 documents in Volume M were prepared or obtained at the instance of the legal representatives of the Timol family.

(d) In addition, all of the documents in Volumes N1 to N3, O, P, P1, R and T of the re-opened inquest were prepared by the legal representatives of the Timol family.

147.4 Not only did the "*organisations seized with these mandates fail in their functions*" in the post-TRC period, they purposely blocked the TRC cases on instructions from politicians. In this regard I refer to the abovementioned affidavits of Pikoli and Ackermann deposed to in the Nkadimeng case.



148 Ad paragraph 8.15

148.1 Adv Pretorius SC states that he '*obviously also consulted with Adv Macadam*' and he confirmed Macadam's affidavit attached as "JPP6" as far as it related to him. This presumably was in respect of the period prior to January 2016. However, Macadam's affidavit was not attached to the affidavit of Pretorius. This is a most curious and extraordinary omission since it means that the NPA has not dealt with the pre-January 2016. It is unclear whether this was a mere oversight or a deliberate decision to keep the information in Macadam's affidavit out of the public eye.

148.2 The deponent states that he interviewed Salim Essop in October 2016 and ensured that a statement was taken from him. This account does not reflect exactly what happened.

148.2.1 Frank Dutton located Dr Salim Essop who lives in the UK through a trusted intermediary, Mr Prema Naidoo. Dutton eventually met with Essop on 24 November 2015 when he visited Johannesburg on personal business. Dutton interviewed Essop and he reported that he had been severely tortured whilst detained in October 1971 by SB members.

148.2.2 Dutton requested Essop to return to South Africa again and he arranged a consultation between Essop and the Timol family's legal representatives on 6 October 2016. A further consultation took place between 10 and 12 October 2016 when my lawyers took a detailed statement from Essop.



148.2.3 On 11 October 2016 Advocate Pretorius was advised that the family representatives were taking an affidavit from Essop and he was asked whether he wished to see the affidavit before signature. A consultation was then arranged with Pretorius on the afternoon of 13 October 2016 at the NPA office in Pretoria. Essop signed the affidavit the following day at the Legal Resources Centre in Johannesburg and the affidavit was then submitted to the NPA.

AD SERIATIM RESPONSE TO THE APPLICANT'S REPLYING AFFIDAVIT

149 I set out below the answer to the individual averments made by Rodrigues in his replying affidavit. In order to avoid undue repetition, everything I have set out above must be read, where appropriate, as an answer to the contentions advanced by the accused.

150 Ad paragraph 25

The contents of this paragraph are denied. The claims made by the accused here and elsewhere that he was willing to engage with the TRC, if Mr Pigou provided him with "evidentiary material" from the first inquest to refresh his memory, are simply false.

Handwritten initials 'JA' and a signature.

151 Ad paragraph 30.2

The allegations made in this paragraph are denied. On the accused's own version, he was present at the murder scene. In any event, his physical presence is not a *sine qua non* for him to have played a role in Timol's murder.

COSTS

152 I oppose this application to permanently stay the prosecution of Rodrigues on behalf of myself, my family, victims of apartheid era crimes and in the public interest. I seek to vindicate the founding values of our Constitution and to promote the values of national reconciliation and unity. This Court has already confirmed that my family has a clear, direct and substantial interest in this application.

153 I submit that, in these circumstances, it was reasonable for me to oppose the relief sought by the accused. If the application succeeds I should be protected against a potentially ruinous costs order in circumstances where I have intervened in these proceedings in the public interest to vindicate constitutional rights and principles. I submit that I have acted *bona fide* and have made out a proper and motivated case for the relief sought.



CONCLUSION

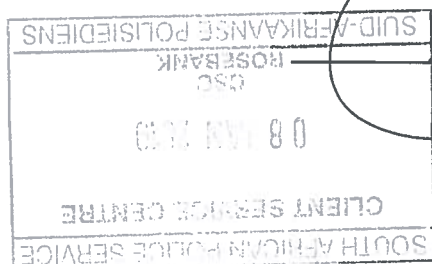
154 In conclusion, I submit that I have demonstrated that it would not be in the interests of justice to grant the application of the accused. My family and I seek no injustice or revenge against Rodrigues. We simply seek closure.

155 I pray that the application be dismissed with costs, including those of two counsel.



IMITIAZ AHMED CAJEE

I certify that the deponent has acknowledged that he knows and understands the content of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and affirmed to before me at ROSEBANK on this 08 of January 2019 the regulations contained in Government Gazette Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



Ms A. Madlopha
 185907
 Commissioner of Oaths

Ms. Madlopha

Constable

15 Sturdee Avenue

011 7784 700

