

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

CASE NUMBER: 76755/2018

In the matter between:

JOAO RODRIGUES

Applicant

and

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

First Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Respondent

THE MINISTER OF POLICE

Third Respondent

IMITIAZ AHMED CAJEE

Fourth Respondent

**REPLYING AFFIDAVIT IRO FOURTH RESPONDENT'S ANSWERING
AFFIDAVIT**

I, the undersigned,

JOAO RODRIGUES

do hereby declare under oath as follows:

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1.

1.1. I am an adult pensioner presently residing at 835 Eleventh Avenue, Wonderboom South, Pretoria, Gauteng. I have been residing at the address for the past 54 years.

1.2. The facts contained in this affidavit fall within my personal knowledge unless stated to the contrary, and are both true and correct.

2.

I have read the answering affidavit deposed to on behalf of the Fourth Respondent and wish to indicate, already at this stage, to the Honourable Court that I dispute the correctness of such allegations insofar as these allegations are inconsistent to what I have stated in the founding affidavit. I again confirm the correctness of the allegations contained in the founding affidavit.


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AD ANSWERING AFFIDAVIT: FOURTH RESPONDENT:

3.

AD PARAGRAPHS 1 TO 8 THEREOF:

3.1. Apart from denying that all the factual allegations contained in the affidavit are correct in all respects I take note of the further allegations contained in these paragraphs.

3.2. I deny that the reason for not joining Fourth Respondent as a party to the proceedings initially was to exclude the family from participating in the matter. I was advised at the time that the First Respondent, in terms of its obligations in terms of our Constitution, is the party that should represent all alleged victims and/or their family members in proceedings of this nature.

4.

AD PARAGRAPH 9 THEREOF:

4.1. I take note of the motivation for the Fourth Respondent to intervene, but I am advised that it is not necessary to deal with these issues in view of the fact that Fourth Respondent had already been joined as

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a party by this Honourable Court. I wish to emphasise that I again deny that I was involved in any interrogation, torture and/or murder of the late Mr Timol ("Timol") and/or any other detainee and/or victim of the apartheid era.

5.

AD PARAGRAPHS 10 TO 20 THEREOF:

- 5.1. I deny that I was at any stage involved in the acts of torture, murder and/or other heinous acts, either as alleged or at all.

- 5.2. I agree with the allegation on behalf of the Fourth Respondent that the very State Institutions that the Constitution mandated to give effect to Constitutional compact dismally failed to comply with their obligations in terms of the Constitution. That is indeed the basis of this application.

- 5.3. I submit that it is not Constitutionally acceptable to allow the First Respondent, the very Institution that failed to comply with their obligations in terms of the Constitution, to proceed with a

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prosecution against me that is unfair for the reasons already set out in the founding affidavit.

5.4. In the above regard I am advised and respectfully submit that the seriousness of the offences that the security police committed during that era does not limit the fundamental rights provided for in the Constitution – i.e. the right to a fair trial. There is clearly no limitation in section 35 of the Constitution providing for the fundamental rights only to a certain category of offenders.

5.5. I also deny that my non-participation in the TRC proceedings should have any effect and/or limitation on my rights provided for in the Constitution.

5.6. I deny all further allegations contained in these paragraphs insofar as it is inconsistent with what I have already stated in the founding affidavit.

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6.

AD PARAGRAPH 21 THEREOF:

- 6.1. First Respondent clearly had ample opportunity since the dawn of democracy in 1994 comply with their constitutional obligations towards *inter alia* the Timol family.
- 6.2. Failure to comply with their obligations and to prosecute the main perpetrators of atrocities, when they were still alive and able to answer to the acquisitions, cannot be rectified by sacrificing my fundamental right of a fair trial.
- 6.3. It is common cause that the security branch officers such as Gloy, Van Niekerk and Buys were still alive at that stage.

7.

AD PARAGRAPHS 22 TO 24 THEREOF:

- 7.1. I take note of the allegations contained in these paragraphs but wish to emphasise that I was never involved in the murder and/or torture and/or interrogation of Timol.


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7.2. I agree that the Authorities dismally failed to comply with their obligations and that it was indeed an inexcusable lapse as alleged.

7.3. The question, however, remains whether I should now be subjected to an unfair trial because of the inexcusable failure by the relevant authorities.

8.

AD PARAGRAPHS 25 TO 34 THEREOF:

I take note of the allegations contained in these paragraphs. I must, however, emphasised that I have no personal knowledge of these facts and that I have never been involved in the operational activities of the security police. I was only a financial clerk dealing with financial issues of members.

9.

AD PARAGRAPHS 35 TO 39 THEREOF:

I do not wish to deal with the merits of the case at this stage. I wish, however, to emphasise again that it was found based on evidence led

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during the second inquest that I was not present at the time when Timol fell to his death at the John Vorster Police Station.

10.

AD PARAGRAPHS 40 TO 46 THEREOF:

10.1. I have already explained to the Honourable Court in the founding affidavit what transpired between me and Pigou of the TRC. I again confirm the correctness of my explanation.

10.2. I take note of the further allegations in these paragraphs but deny that it is relevant for purposes of this application.

11.

AD PARAGRAPHS 47 TO 55 THEREOF:

11.1. This application is based on the fundamental right to a fair trial provided for in the Constitution.

11.2. I am advised and respectfully submit that the TRC process and the question whether a person participated in the process is not relevant

in determining whether the right to a fair trial will be infringed by a Prosecution.

11.3. I further submit that there is no provision in the Constitution that provides for the limitation and/or restriction of fundamental rights due to non-participation in the TRC process.

12.

AD PARAGRAPHS 56 TO 63 THEREOF:

12.1. Although I have no knowledge of the allegations contained in these paragraphs, I take note of the steps taken by the deponent in this regard.

12.2. It appears from the facts set out in these paragraphs that the First Respondent clearly dismally failed to comply with their obligations in terms of the Constitution.

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13.

AD PARAGRAPHS 64 TO 65 THEREOF:

13.1. I take note of the allegations relating to the political interference in Prosecutions.

13.2. I am advised and respectfully submit that this illustrates the fact that the failure to proceed with the prosecution against me was apparently based on a deliberate decision by the relevant Authorities. I submit that this is a very material fact that should be considered when evaluating the question whether the First Respondent should now be allowed to prosecute me after almost 50 years. Legal argument will be addressed to the Honourable Court at the hearing of this matter to the effect that this is clearly an example where First Respondent should not be allowed to infringe my fundamental right to a fair trial under circumstances where the cause of the extreme delay was a deliberate decision by the First Respondent and the relevant Authorities.

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14.

AD PARAGRAPHS 66 TO 69 THEREOF:

I take note of the steps taken by the deponent as set out in these paragraphs. I have no personal knowledge of these facts.

15.

AD PARAGRAPHS 70 TO 73 THEREOF:

15.1. I take note of the summary of the findings by the Honourable Judge in the 2017 inquest. The judgment is before this Honourable Court and speaks for itself.

15.2. It is significant that the deponent himself refers to the fact that the Court found that my involvement related to the contradictory statements that I have made and that I *prima facie* became an accessory after the fact. It is of course common cause that this offence had prescribed in terms of the Criminal Procedure Act.

15.3. It is for these very reasons that I submitted in the founding affidavit that the First Respondent's decision to prosecute me on a charge of murder is without any factual basis.

Dr. [Signature]

16.

AD PARAGRAPHS 74 TO 76 THEREOF:

16.1. I do not understand what the deponent means by alleging that he brings this application not only in his own interests but also in the interest of his family. The objective facts are that the Fourth Respondent actually opposes my application.

16.2. I deny that it is in the National interest that I be prosecuted on a charge of murder under the circumstances already set out in the founding affidavit.

17.

AD PARAGRAPHS 77 TO 80 THEREOF:

I take note of the summary of the application as set out in these paragraphs. I refer the Honourable Court to the application papers in order to evaluate what the basis of the application indeed is.

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18.

AD PARAGRAPH 81 THEREOF:

I take note of the evaluation by the deponent of the legal position in considering applications of this nature.

19.

AD PARAGRAPH 82 THEREOF:

I take note of the allegations contained in this paragraph. I am, however, aware of various cases where members of the Police, including the Security Branch, were indeed prosecuted for criminal conduct during the period before 1994.

20.

AD PARAGRAPH 83 THEREOF:

I deny that the TRC process can provide an explanation for the deliberate failure by the First Respondent to comply with its obligations in terms of its mandate. I take note of the allegation that the failure by the First Respondent to explain the delay in this period is conspicuous if not downright suspicious. I agree that it is inexcusable that the First and/or Second Respondents did not even attempt to explain the delay since 1994,

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more so under circumstances where members of the Timol family had various requests addressed to the First Respondent in this regard.

21.

AD PARAGRAPHS 84 TO 94 THEREOF:

21.1. I take note of the allegations relating to the political interference in prosecutions after 1994.

21.2. There is no suggestion that I was involved in this deliberate decision by the relevant authorities not to institute prosecutions.

21.3. I, however, submit that this conduct by the Authorities cannot and should not have the effect of limiting my fundamental right to a fair trial.

21.4. I note with interest that it is correctly stated that the real decisionmakers behind unlawful conduct have not been prosecuted but that only foot soldiers who acted at the behest of Generals and the politicians are being prosecuted. This is clearly what the First Respondent attempts to do with me at this stage.



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22.

AD PARAGRAPHS 95 TO 98 THEREOF:

22.1. I again take note of the allegations of the complete failure by the authorities, including the First Respondent to comply with their obligations in terms of the Constitution.

22.2. I again emphasise that this issue is important in determining the question whether the First Respondent should be allowed to prosecute me almost 50 years after the alleged incident.

22.3. I deny again that my non-participation in the TRC process should be considered as a factor to limit my fundamental right to a fair trial as provided for in our Constitution.

23.

AD PARAGRAPHS 99 TO 100 THEREOF:

I take note of the examples of prosecutions notwithstanding the fact that a considerable time lapsed after the alleged crimes. I, however, submit that

these examples are clearly distinguishable from the present case. I refer *inter alia* to the following:

23.1. The first example relates to a sexual crime against children. The principles set for offences of this nature are clearly different from the present case.

23.2. In the other examples the accused persons were clearly the cause of the delay. It appears to be common cause in this case that I was not the cause of the delay, either directly or indirectly.

24.

AD PARAGRAPHS 101 TO 103 THEREOF:

24.1. Although I do not dispute that society demands that accused persons stand trial on serious charges such as murder, I submit that such demand can never have the effect of destroying fundamental rights provided for in the Constitution.

24.2. It should also be emphasised that this Court already in the second inquest found that I was not involved in the murder of Timol.

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24.3. I therefore deny that it can ever be suggested that it would be fair to prosecute me on a charge of murder under the relevant circumstances.

25.

AD PARAGRAPHS 104 TO 105 THEREOF:

I deny that the issues raised in these paragraphs are relevant for purposes of determining the fairness of the proceedings against me. I refer the Honourable Court to what I have already stated in this regard hereinbefore.

26.

AD PARAGRAPHS 106 TO 109 THEREOF:

26.1. The bases for the allegations in these paragraphs are clearly wrong. There is no suggestion that I at any stage attempted to evade justice for decades.

26.2. It is important to note that this deponent himself stated in no uncertain terms that the relevant authorities are clearly to be blamed for the inexcusable delay in proceeding with the judicial process in

this matter. I have not been blamed, clearly correctly so, for this delay.

26.3. I again confirm that these proceedings already had an will have in future a very detrimental effect on my health.

27.

AD PARAGRAPHS 111 AND 112 THEREOF:

27.1. I deny that the approached followed in these paragraphs is correct. I refer to what I have stated with reference to *inter alia* the TRC process and my non-participation in the process hereinbefore.

27.2. I further deny that the circumstances relied on should only have a bearing of on the sentence should I be found guilty. The main question is whether I will have a fair trial under the relevant circumstances.



28.

AD PARAGRAPH 113 THEREOF:

I agree that a charge of murder is very serious. I, however, deny that there is any evidence that I committed murder. The contrary is true and I refer the Honourable Court to what I have already stated in this regard above. I further again emphasise that the seriousness of the crime is no basis for the limitation of the fundamental right involved.

29.

AD PARAGRAPH 114 THEREOF:

I deny the allegations contained in this paragraph and refer the Honourable Court to what I have already stated hereinbefore.

30.

AD PARAGRAPH 115 THEREOF:

I agree that the interest of justice is a material factor to be taken in consideration in this application. I, however, submit that it can never be in the interest of justice to continue with an unfair trial because of the seriousness of the allegations. I refer the Honourable Court to what I have already stated in this regard hereinbefore.

31.

AD PARAGRAPHS 117 AND 118 THEREOF:

31.1. I refer to what I have already stated in this regard hereinbefore.

31.2. I am advised that it was the proper procedure to institute this application in the Pretoria High Court. The reason obviously being that the First, Second and Third Respondents are domiciled within the area of jurisdiction of the Pretoria High Court.

32.

AD PARAGRAPH 119 THEREOF:

I submit that a proper case has been made in the founding papers for the relief sought. I deny the allegations in these paragraphs insofar as it is inconsistent with what I have stated in the founding affidavit and hereinbefore.

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33.

AD PARAGRAPH 121 THEREOF:

33.1. It is significant to mention that the negative credibility findings against me was made on the basis that it was found that I was not involved nor present at the time of the death of Timol. It was further found that I was only involved to provide a cover version for the perpetrators in the death of Timol.

33.2. This can clearly not justify a prosecution on a charge of murder against me.

34.

AD PARAGRAPH 122 THEREOF:

34.1. I deny the correctness of the interpretation of section 257 of the CPA. However, I am advised that it is not necessary to burden these papers in this regard. The fact is that it is common cause that any prosecution in terms of section 257 of the CPA has prescribed at this stage.

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34.2. While it may be correct that I can be held liable for pursuing a coverup during the 2017 inquest if it is to be found that I was indeed pursuing the coverup. This, however, can clearly not justify a prosecution on a charge of murder. I refer the Honourable Court to what I have already stated hereinbefore as well as in the founding papers in this regard.

35.

AD PARAGRAPHS 123 TO 128 THEREOF:

35.1. I deny the allegations contained in these paragraphs and refer the Honourable Court to the relevant judgment that speaks for itself.

35.2. I wish not to deal with the merits of the case at this stage but further wish to submit that the allegations in these paragraphs clearly do not provide a basis for a charge of murder against me.

35.3. I deny that I was ever involved in any wrongdoing against Timol and/or any other detainee.

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35.4. I again confirm the correctness of the allegations contained in the founding affidavit and deny any factual allegation that is not consistent with what I have stated in the founding affidavit.

36.

AD PARAGRAPH 129 THEREOF:

I maintain that I indicated to my legal representatives at all relevant times that I was willing to appear before the learned Mothele J.

37.

AD PARAGRAPH 130 THEREOF:

37.1. I take note of these allegations and deny that I at any stage attempted to mislead this Honourable Court.

37.2. I submit that these allegations are not relevant for purposes of determining the merit of this application. It does not deal with the question whether I will have a fair trial under the relevant circumstances. It further does not provide an explanation for the extreme long and deliberate delay in the proceedings caused by the authorities including the First Respondent.

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38.

AD PARAGRAPH 131 THEREOF:

I maintain with the allegations set out in the founding affidavit in this regard. I wish to emphasise that I do not blame the Honourable Mothle J for any improper conduct from his side. My criticism was levelled and is still levelled against the First Respondent in this regard.

39.

AD PARAGRAPHS 132 AND 133 THEREOF:

I maintain the correctness of the allegations contained in the founding affidavit.

40.

AD PARAGRAPH 134 THEREOF:

I submit that the issues raised in these paragraphs do not detract from my case to the effect that the present proceedings will infringe my right to a fair trial. I therefore maintain with what I have already stated in the founding affidavit in this regard.

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41.

AD PARAGRAPH 135 THEREOF:

I deny the correctness of the allegations in these paragraphs and further submit that these allegations do not and cannot have the effect to limit my right to a fair trial.

42.

AD PARAGRAPHS 136 TO 137 THEREOF:

I maintain that the allegations contained in the founding affidavit are correct and deny any allegation in these paragraphs insofar as it is not consistent with what I have stated in the founding affidavit.

43.

AD PARAGRAPH 138 THEREOF:

I am advised that the approach by the deponent as set out in these paragraphs is wrong. It is clearly not a proper approach to suggest that I can ask for a discharge at the close of the State's case. That would clearly render the provision for a fair trial as set out in section 35 of the Constitution without any value and/or consequence. Clearly the First

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Respondent should not be allowed to proceed with a trial against me if such trial would result in an unfair trial against me.

44.

AD PARAGRAPH 139 THEREOF:

I maintain that a proper case has been made out in the founding papers and beg the Honourable Court for an order in terms of the notice of motion.

45.

AD PARAGRAPHS 141 TO 143 THEREOF:

45.1. I agree that it is absolutely conspicuous that no explanation is provided by the First Respondent for the total inaction of the First Respondent, not only since 1994 but for the full period since the death of Timol.

45.2. I do not agree that section 35(3)(d) of the Constitution refers only to the period between the issuing of an indictment and the commencement of a trial. Legal argument will be addressed to the Honourable Court at the hearing of this application in this regard.

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45.3. I fully agree with the further allegations by the deponent relating to the complete failure of the First Respondent to explain its inaction for the period mentioned.

45.4. I further submit that it is totally unfair to charge me now on a count of murder against all available evidence for the reason that I am the only member of the Security Branch that is still alive.

46.

AD PARAGRAPH 144 THEREOF:

I take note of the allegations contained in these paragraphs and it is clear that First Respondent attempted to mislead the Honourable Court in this regard.

47.

AD PARAGRAPHS 147 AND 148 THEREOF:

I take note of the allegations contained in these paragraphs.

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48.

AD PARAGRAPHS 149 TO 151 THEREOF:

I deny that Fourth Respondent is entitled to reply to my replying affidavit relating to First Respondent's answering affidavit.

49.

AD PARAGRAPHS 152 TO 153 THEREOF:

I deny that the Fourth Respondent is entitled to the costs of this application even if the application is unsuccessful. There was clearly no reason for the Fourth Respondent to join the proceedings. Legal argument will be addressed to the Honourable Court at the hearing of this application on this issue.

50.

AD PARAGRAPHS 154 TO 155 THEREOF:

I deny that Fourth Respondent demonstrated that it would not be in the interest of justice to grant my application. I therefore maintain that I am entitled to an order in terms of the notice of motion.

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DEPONENT

SIGNED and SWORN to at PRETORIA on this 15 day of JANUARY 2019 by the Deponent who stated that:

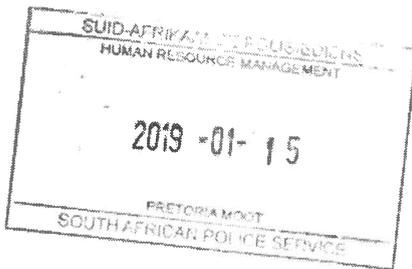
1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

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ANDAMBA

COMMISSIONER OF OATHS

FULL NAMES: *Lesetja Samuel N. MAMALEA*
 BUSINESS ADDRESS: *586 17TH Avenue Rietfontein*
 AREA: *PRETORIA N207*
 DESIGNATION: *CO-12136*



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