

OPINION

for

NATIONAL PROSECUTING AUTHORITY

concerning

THE TRC COMPONENT AND TRC PROSECUTIONS

Instructed by

Office of the State Attorney
Pretoria

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ACRONYMS USED

AVFG	- Apartheid-era Victims Family Group
DNDPP	- Deputy National Director of Public Prosecutions
DPCI	- SAPS: Directorate of Priority Crimes Investigation
MPTT	- NPA: Missing Persons Task Team
NDPP	- National Director of Public Prosecutions
NPA	- National Prosecuting Authority
NPS	- NPA: National Prosecution Service
PCLU	- NPA: Priority Crimes Litigation Unit
SAP	- South African Police (apartheid-era)
SAPS	- South Africa Police Services

Legislation and Conventions:

Constitution	- Constitution of the Republic of South Africa, 1996
Commissions Act	- Commissions Act 8 of 1947
CPA	- Criminal Procedure Act 51 of 1977
ICC Act	- Rome Statute of the International Criminal Court Act, 2002
NPA Act	- National Prosecuting Authority 32 of 1998
SAPS Act	- South African Police Service Act 68 of 1995
TRC Act	- Promotion of National Unity and Reconciliation Act 43 of 1995
Apartheid Convention	- International Convention on the Suppression and Punishment of the Crime of Apartheid, UN General Assembly, 1973
Rome Statute	- Rome Statute of the International Criminal Court, 1998

EXECUTIVE SUMMARY

“Reconciliation must be accompanied by justice, otherwise it will not last. We all hope for peace, it should not be peace at any price, but peace based on principles, on justice.”¹

- 1 The investigation and prosecution of apartheid-era crimes in South Africa is an integral component of the South African reconciliation project. It is the component of justice and resolution.
- 2 The NPA’s TRC Component has been in place for 22 months, and we are instructed to review its structure and effectiveness. Where necessary, we are to make recommendations for improvement. In addition, we are to advise whether, given the findings and ***obiter dicta*** in the *Rodrigues* judgment,² there was political interference in the work of the TRC prosecutions and related matters between 2003 and 2017.
- 3 The need for a legal opinion of this type, some two and a half decades after the conclusion of the work of the Truth and Reconciliation Commission is a devastating indictment on South Africa. We, the people of South Africa, in the preamble of the Constitution 1996, have stated that we have recognised the injustices of our past, and that we believe that South Africa belongs to all who live in it. It is evident, though, that in our modern history, we have failed to honour those who suffered for justice and freedom in our land.

¹ Corazon Aquino, first female President of the Philippines (1986 – 1992)

² *Rodrigues v National Director of Public Prosecutions of South Africa and Others* 2019 (2) SACR 251 (GJ) specifically paras 61-65

- 4 South Africa made a constitutional pact to honour the men, women and children who sacrificed their lives for our democratic freedoms, and yet, in many cases, their bones have not been found and the truth behind their stories has not been unearthed. The TRC process had the central objective of healing the divisions of the past, of providing an opportunity for reconciliation, and of facilitating the just prosecution of perpetrators of gross violations of human rights. Only half of the work has taken place. The courage of all survivors who have carried their childhood wounds into their adult lives, and lived to tell the truth, did not receive reciprocal respect, dignity and compassion from the State, which had a duty to take their truths forward. The State could use its forensic skills in taking their truth forward and using the forensic skills, its investigation powers and prosecutorial might, to ensure that justice is served in the victims' (or survivors', as some prefer to be called) lifetimes. It is a task that requires commitment, courage, integrity, patience and resilience on the part of State agents entrusted with the task. There are simply no shortcuts.
- 5 In our Opinion, we note the work of the TRC Component over the past 22 months and make recommendations on how the TRC Component may increase its effectiveness and achieve results within the five-year timeframe it has set for itself.
- 6 The NDPP, Advocate Shamila Batohi, has acknowledged the failures of the past, and has submitted before the National Assembly Portfolio Committee on Justice and Correctional Services that ***“We realise that we need to act with a real sense of urgency in terms of trying to deliver justice to as many victims, survivors and families as we can. We need to learn from... lessons of the past and ensure that the NPA works independently, and thereby ensure its credibility”*** (1 June 2022).

- 7 Our finding is that the NPA, the State entity responsible for discharging the mandate to bring justice to the victims and survivors of apartheid-era crimes between 1 March 1960 and 5 December 1993, have failed in its mandate.

- 8 The consequences of this failure have manifested themselves in the vast number of cases that have now become irredeemable – memories have faded, witnesses have died, perpetrators have died, evidence which should have been archived, has, over time, got lost or destroyed—or both. Against these odds, one has to ask, how it is even possible to realise the national social compact struck with victims and all South Africans – to achieve accountability and justice.

- 9 Consequently, we recommend the followings, the details of which are set out in Part 6 of our Opinion:
 - 9.1 The DNDPP NPS Head and the TRC Component: DPP Special Director must exercise an integral role in the coordination of the investigatory and prosecutorial work carried out in the NPA regional divisions.

 - 9.2 The NPA should expedite the finalisation of the TRC prosecutor policy and training manual.

 - 9.3 The NPA Missing Persons Task Team (**MPTT**) should called upon to account for its work, should be called upon to share relevant intelligence with the investigating officers and prosecutors of the TRC Component.

 - 9.4 The NPA and DNDPP de Kock should engage urgently with their counterparts in the SAPS, in order to resolve any impasse concerning the allocation of

financial resources for work carried out by the SAPS Forensic Unit, and the streamlining of all authorisations for the payment of the reasonable legal costs of former SAP and Security Branch employees accused of apartheid-era crimes.

- 9.5 The NPA and DNDPP de Kock should engage with their counterparts in the NIA urgently, in order to secure the relevant and necessary intelligence for furthering the investigation and prosecution of TRC related cases.
- 9.6 The NPA should adopt a stance on whether it is prepared to pursue charges of a crime against humanity in respect of apartheid-era atrocities.
- 9.7 All investigation reports, investigating officer statements and affidavits obtained since 2003 should be uploaded into electronic format, should be text searchable and indexed and should facilitate connections between cases, witnesses, alleged perpetrators and the geographically tagged, for intelligence gathering of so-called death camps and sites of torture and disappearance.
- 9.8 The TRC Component should consider establishing an interactive website dedicated to the sharing of expertise on TRC investigations and prosecutions.
- 9.9 The NPA must pursue the establishment of an independent commission of inquiry under either section 84(2)(f) of the Constitution, or the Commissions Act, 1947 to investigate the extent of, and rationale behind, the political interference with the NPA between the period 2003 and 2017.

- 10 Our limited research has revealed that Truth and Reconciliation processes in other countries have shown that reconciliation requires political will, joint leadership, trust building, accountability and transparency, as well as a substantial investment of resources. The failure to investigate and prosecute TRC related cases points to an unwillingness on the part of the post-Apartheid establishment to exploit science and technology and human resources for purposes of investigating and prosecuting TRC related cases.
- 11 We are hopeful, however, that in the renewed focus that the NPA is placing on investigations and prosecutions of TRC related cases/crimes, there will be no continuation of the kind of political interference that characterised the progress – or lack thereof – in achieving the prime objectives of investigations and prosecutions of the TRC related matters in the almost three decades since 1998, to say nothing about the zero progress since 2003. We also urge that, in the renewed focus the NPA is placing in the TRC prosecutions and related matters, all organs of State should work in a collaborative manner, and with a unified focus, because we believe that it is not too late to bring justice to some of the remaining victims.³

³ We list in the Opinion the names of the families and the deceased for whom the two and a half decade delay has closed the door to reconciliation and justice.

INTRODUCTION

1 In September 2021, the National Prosecuting Authority (**NPA**) established a TRC Component within the office of the Deputy National Director of Public Prosecutions (**DNDPP**), Advocate Rodney De Kock, to manage all investigations and prosecutions of TRC related matters. The NPA, under DNDPP De Kock, has procured this Opinion for a review of the work carried out under the TRC Component for its effectiveness and extent to which it is fit for purpose. We are instructed that the intention is for the TRC Component to complete its work in five years. We are also tasked to consider whether there is sufficient evidence of a violation of sections 32(1)(b) read with 41(1) of the National Prosecuting Authority Act 32 of 1998 (**NPA Act**). The sections read, in relevant part:

s 32(1)(b) "Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state or any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.

s 41(1) "Any person who contravenes the provisions of section 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for period not exceeding 10 years or two both such fine and such imprisonment."

2 The legacy that the TRC has left on South African society is deep and fraught with frustration and a feeling of betrayal, by apartheid victims/survivors and their families, by the post-apartheid South African government. The approach taken by this country is, at best, infuriatingly incomprehensible.

3 Closure for victims/survivors, regrettably, has not happened.

I. THE TRUTH AND RECONCILIATION COMMISSION REPORT

4 By way of background, we recall that on 29 October 1998, the Truth and Reconciliation Commission (**TRC**) published a comprehensive report setting out its activities and findings based on factual and objective information and evidence collected or received by it or placed at its disposal. The Truth and Reconciliation Commission of South Africa Report (**TRC Report**) was compiled in terms of section 4(e) of the Promotion of National Unity and Reconciliation Act 43 of 1995 (**TRC Act**). The Report was handed to President Mandela.

5 The TRC was charged with the task of investigating and documenting gross violations of human rights spanning the period 1 March 1960 (the month in which the Sharpeville massacre took place) to 5 December 1993 (the date the final agreement was reached in the political negotiations).⁴

6 The TRC Report was tabled in Parliament in terms of section 44 of the TRC Act and the final Report comprising seven volumes was published on 21 March 2003.⁵ The transitional justice project that South Africa embarked in the 1990's has been interpreted internationally as setting the standard for a modern archetype of restorative justice in a transitional democracy.

⁴ The end date for the mandate of the work of the TRC was changed to the 10 May 1994, being the date on which President Mandela was inaugurated as the first post-apartheid, democratically elected President of the Republic of South Africa

⁵ The complete TRC Report is publicly available on the Department of Justice website on the following link: <https://www.justice.gov.za/trc/report/>

II. AMNESTY VERSUS PROSECUTION

- 7 The TRC Act provided that where amnesty was not applied for or was not granted under section 21 of the TRC Act, those who failed to get amnesty would be prosecuted. It was therefore incumbent on the democratic State to have a bold and fearless prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations under domestic and international law.⁶ The TRC referred to the NPA some 300 cases of those people who did not apply for or were not granted amnesty. These were mainly South African Police Security Branch or other police officers.
- 8 The TRC Component is currently seized with 133 cases for investigation and possible prosecution nationwide.
- 9 It is now 25 years since the TRC completed its work, and there have been only a handful of successful prosecutions.⁷ Between September 2003 and 2017 a mere handful of TRC related prosecutions took place, this includes G. Niewoudt, A. Tyani and Blani. It is shameful that the Simelane, Timol and Aggett families have had to carry out their own investigations into the deaths of their loved ones with the assistance of private investigators and the services of pro bono attorneys. We set out in **Annexure A**, a timeline of material events concerning the investigation and prosecution of TRC matters. We do not expand on

⁶ TRC Report Volume 6 Section 5: 595 par 24

⁷ These include the arrest and prosecution of Eugene de Kock, the former colonel of the apartheid government, *S v De Kock* 1997 (2) SACR 171 (T), concerning the murders and other atrocities committed in the Vlakplaas area. Also see the prosecution of Dr Wouter Basson, *S v Basson* 2007 (3) SA 582 (CC), who was the head of South Africa's chemical and bacterial weapons programme during the apartheid era.

each of the events listed in Annexure A, but we have found, however, this to be a useful context within which to consider the questions posed to us.

10 The suggestion that the NPA has acted in disregard of its domestic and international law obligations in pursuing TRC prosecutions is weighty, understandable and justified, in our humble view. We are seized with determining whether the NPA has carried out its constitutional and statutory duties in respect of investigating and where necessary, prosecuting TRC related matters, without fear favour or prejudice.

11 The ambit of our mandate is set out below.

PART 1 – TERMS OF REFERENCE AND SCOPE OF THE OPINION

12 On 6 March 2023, we were briefed with the terms of reference (TOR) for this Opinion.⁸

The TOR were clarified in correspondence dated 31 March 2023. The team is to:

12.1 **review** the measures adopted by the NPA to deal with the TRC and related matters;

12.2 **assess** whether the measures put in place are adequate and, if the measures are not adequate, to make recommendations to strengthen the measures;

12.3 **determine** whether there is reason to believe that there is information that amounts to a violation of section 41(1) of the NPA Act, AND to **escalate** same to the NDPP to address this appropriately.

13 In setting this mandate, the NPA accepts that the TRC matters must be dealt with by the NPA. The acceptance of the institutional and statutory obligation to deal with the TRC matters is noteworthy and, we understand, led to the NPA's decision to migrate all TRC matters from the NPA's Priority Crimes Litigation Unit (**PCLU**) to the relevant regional offices of the DPPs in April 2019.

14 In carrying out the inquiry into a possible violation of section 41(1) of the NPA Act, we are instructed to scrutinise the period 2003 to 2017, the period considered and dealt with in the *Rodrigues* judgment⁹ paragraphs 55-89 and specifically paragraph 65.

⁸ NPA powerpoint presentation dd 3 March 2023, "TRC Matters"

⁹ *Rodrigues v National Director of Public Prosecutions of South Africa and Others* 2019 (2) SACR 251 (GJ)

- 15 The team was not restricted as to whom it may interview or from whom it may solicit additional background information. Given the limited timeframe afforded to the team, emphasis was placed on previous reports generated on outstanding TRC prosecutions and affidavits submitted in relation to allegations of political interference and bureaucratic stonewalling described in the affidavits submitted in the **Rodrigues** litigation and later before the Zondo Commission. We list in **Annexure B** the list of reports and affidavits on which we placed greater reliance.
- 16 In addition, the members of the team consulted with (1) one of the families pursuing a case in the Free State province, (2) two representatives of the Foundation for Human Rights who represent several victims' families. Other than the workshop the team had attended in Pretoria earlier in the year, the team also attended a feedback workshop hosted by the DPP: Kwa-Zulu Natal (KZN). The team attended the KZN meeting because the majority of the outstanding TRC cases are situated in the KZN province. Ideally, the team would have gone to all the provinces, but due to the strictures of time — and resources (see hereinbelow) — this could not happen.
- 17 We note the following important **caveat** to this Report and the recommendations made:
- 17.1 **First**, that the three-month period is not sufficient for a comprehensive due diligence of either the actions adopted by the NPA since the establishment of the TRC Component in September 2021, or a definitive assessment of the extent of political interference over a decade and a half, between 2003 – 2017.

17.2 **Second**, the team has not been given any investigatory powers or powers to subpoena or interrogate individuals or stakeholders who may have valuable information on the rationale behind certain NPA policy decisions adopted during 2003-2017 or the reasons why prosecutions were not pursued and charges under international law were not instituted against accused persons for the crime of apartheid.

17.3 **Third**, the allegations in the *Rodrigues* judgment against individual politicians and certain members of Cabinet are serious. In order for determinations to be made under section 41(1) of the NPA Act, a proper investigation, affording the principal players an opportunity to present their version of events should take place. This Opinion, therefore, can only accept, without more, the findings and dicta of the full bench and the SCA in the *Rodrigues* judgments.¹⁰

18 In what follows we turn to consider the duty to prosecute apartheid-era crimes for which amnesty under section 20 of the TRC Act was not granted and, thereafter consider the NPA's TRC Component established in September 2021.

¹⁰ *Rodrigues v National Director of Public Prosecutions and Others* 2021 (2) SACR 333 (SCA)

PART 2 – THE STATUTORY DUTY TO PROSECUTE APARTHEID-ERA CRIMES

I. PROSECUTORIAL POWER

19 In terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution, and the NDPP has exclusive power on whether a particular prosecution should or should not be instituted on behalf of the State. Section 179(4) of the Constitution enjoins the NPA to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this right. The NPA Act is this national legislation.

20 The powers to institute and conduct criminal proceedings are contained in section 20 of the NPA Act and are vested in the NPA to be exercised on behalf of the Republic. The DNDPP exercises this power to institute and conduct criminal proceedings, carry out all incidental functions, and discontinue criminal proceedings subject to the control and direction of the NDPP.¹¹

21 In exercising statutory authority, all prosecutors are to remain impartial and *“exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.”*¹² Section 32(1)(b) places an injunction on all organs of state and all people:

“Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state or any other person shall

¹¹ NPA Act, section 20(1) and (2)

¹² NPA Act section 32(1)(a) provides *“A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.”*

improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.”

- 22 A contravention of section 32(1)(b) is an offence under section 41(1).¹³
- 23 On prosecutorial policy, the NDPP must determine the prosecution policy. The NPA Prosecution Policy Directives, June 2022 provide, *inter alia*:
- 23.1 that the primary responsibility for instituting and conducting prosecutions vests in the DPPs in respect of offences committed within their areas of jurisdiction (paragraph 6); and
- 23.2 in Part 45B para 1(m), “*offences arising from the past committed between 1 March 1960 and 5 May 1994*” fall under the scope of the PCLU at the Office for the NDPP.¹⁴
- 23.3 in paragraph 3C, for prosecutions in the public interest and gives guidance on prosecutorial decision making in relation to prosecution of cases in the public interest, of which the TRC cases form part.
- 24 We are instructed that a draft TRC specific prosecution policy is under consideration. We have not been informed of when the draft policy is to be finalised and have not been provided with a copy thereof.

¹³ NPA Act section 41(1) provides, “Any person who contravenes the provisions of section 32(1)(b) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.”

¹⁴ This is quite evidently a reference to the mandate period of the TRC process in South Africa — 34 years of South African history under the Apartheid regime

- 25 Under section 22(2) of the NPA Act, the NDPP is empowered to intervene in any prosecution process when the prosecution policy is not followed and, after consultation, may review a decision to prosecute or not to prosecute.
- 26 It appears that despite the reassignment of the TRC prosecutions and related matters from the PCLU to the devolved provincial structures forming the TRC Component in September 2021, the Prosecution Policy Directives were not revised to reflect this change. There is accordingly a discrepancy in the NPA's adherence to its Prosecution Policy Directives. It is advisable that this discrepancy is corrected and the establishment and activities of the TRC Component are aligned to that of the NPA's governing policy documents.
- 27 The oversight powers of the NDPP are not to be interpreted to mean that the Office of the NDPP is wholly separate from the prosecution decision-making process, is unable to engage in or support the needs of a DPP in prosecutions or, where necessary, may not intervene to assist the needs of any DPP in ensuring the successful prosecution of a matter.

II. INTERNATIONAL LAW AND THE CRIME OF APARTHEID

- 28 The prosecution of gross violations of human rights as defined in the TRC Act is in part founded on the fact that under international law, apartheid is a crime.
- 29 At the time the TRC Act was promulgated in 1995, during the work of the TRC Commissioners, and on the publication of the final TRC Report in 2003, apartheid was

defined as a crime under international law, and had been so defined and regarded internationally, up to that point, for over two decades.¹⁵ That apartheid is a crime against humanity is confirmed in the Statute of the International Criminal Court (ICC).¹⁶

- 30 The Apartheid Convention, 1973, binds 109 State Parties and defines the crime of apartheid in article 2 to mean:

“inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”

- 31 In terms of section 84(5) of the 1977 Additional Protocol I to the Geneva Convention, 1949, practices of apartheid constitute grave breaches of the Protocol and are also regarded as war crimes.

- 32 The Rome Statute of the International Criminal Court (**Rome Statute**)¹⁷ deals in part with crimes against humanity. Article 7(1)(j) read with Article 7(2)(h) recalls the crime of apartheid as defined in the Apartheid Convention, accepts that this is a crime against humanity. It records that the crime includes, inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial

¹⁵ *The International Convention on the Suppression and Punishment of the Crime of Apartheid* (the Apartheid Convention), UN General Assembly (1973). The Convention is one of a series of General Assembly and Security Council resolutions condemning apartheid as a crime against humanity. This categorisation has been echoed in the jurisprudence of the International Court of Justice and the International Law Commission's Draft Articles on State Responsibility and Crimes against the Peace and Security of Mankind.

¹⁶ Adopted July 1998, entry into force 1 July 2002

¹⁷ 17 July 1998, in force 1 July 2002

group over any other racial group or groups and committed with the intention of maintaining that regime.¹⁸

33 Prof Dugard states that the principal features of apartheid evident in South Africa range from murder, torture and arbitrary arrest of members of a racial group to legislative measures calculated to prevent a racial group from participating in the political, social, economic and cultural life to the advantage of another domineering racial group.¹⁹ As such, individuals, members of organisations, and representatives of the State, regardless of their motives and their country of residence, are held criminally responsible under international law, if they:

33.1 commit, participate in, directly incite, or conspire in the commission of acts of apartheid; or

33.2 directly abet, cooperate with, or encourage the commission of the crime of apartheid.

34 In *Tadic*, the International Court of Justice (**ICJ**) confirmed that a crime against humanity is a charge that may be brought against a single individual for a single act in circumstance where that act is on a large scale, and/or the act falls within a systemic pattern of violations.²⁰

¹⁸ We note for purposes of this opinion that Article 11 of the Rome Statute confirms that its jurisdiction operates prospectively, only with respect to crimes committed after the entry into force of the Statute.

¹⁹ Dugard, *International Law: A South African Perspective* (2014) 157

²⁰ ICTY, *Tadic* judgment CC/P10/190-E (7 May 1997) par 649. Publicly accessible at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-94-1/JUD61R0000060781.TIF>

- 35 South Africa is infamous as the nation that conceived, implemented and brutally enforced this crime for decades. South Africa therefore may be considered as the State Party that is best able to give effect to the content of the crime, develop customary international law to reflect the horrors of the systemic gross human rights violations and contribute to the development of international law from the perspective of the global south.
- 36 This begs the question whether South Africa is under any international law obligation in domestic law to take cognisance of, and give effect to, its international law obligations.
- 37 Section 232 of the Constitution entrenches customary international law as part of South African domestic law and, as such, any conduct that at the time of its commission constituted a crime against humanity under customary international law is capable of prosecution under this provision. The application of section 232 of the Constitution arguably imposes an additional constitutional injunction on the NPA to pursue the charge of crimes against humanity against perpetrators of apartheid-era atrocities.
- 38 The implementation of the Rome Statute of the International Criminal Court Act, 2002²¹ (**ICC Act**) provides for domestic prosecution of war crimes, genocide, and crimes against humanity. Crimes against humanity, are defined to mean “*any of the following conduct when committed as part of a widespread or systemic attack directed against any civilian population, with knowledge of the attack*” and includes ***the crimes of apartheid, murder, torture, rape and enforced disappearance***.²² Although the ICC Act applies

²¹ Act 27 of 2002

²² ICC Act Schedule 1 Part 2

prospectively only,²³ and its application is therefore limited to offences committed after 2000, this limitation arguably does not apply to crimes that are continuous in nature, such as enforced disappearance.

- 39 This must read with the Criminal Procedure Act 51 of 1977 (**CPA**), which provides in section 18 that there is no statutory limitation on the prosecution of crimes against humanity and war crimes as contemplated in section 4 of the Rome Statute Act. All such crimes constitute an offence under Schedule 8 of the CPA.
- 40 To date, no person has been charged domestically with the crime of apartheid. On our reading of the submissions before us, there is no reason in law not to institute charges under international law against alleged perpetrators. We note that in the *Glenister* judgment,²⁴ the Constitutional Court considered the impact of international law on South African domestic law and held that, even where an international instrument is not domesticated (as is the case in the present matter), South Africa's obligations under international law infuse the interpretation of rights in the Bill of Rights and, as such, South Africa cannot ignore its international law commitments.
- 41 The NPA's exercise of its discretion not to charge accused persons with the crime of apartheid, however, is beyond the mandate of our opinion, and we make no findings on this aspect.

²³ Section 5(2) of the ICC Act

²⁴ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) par 189

PART 3 – THE STRUCTURE OF THE NPA’S TRC COMPONENT

42 The investigation and prosecution of TRC matters was previously carried out by the PCLU, a specialised unit established in terms of a Presidential Proclamation²⁵ to manage and guide investigations and prosecutions of specific crimes and offences of national and international security concern.

43 In September 2021, the TRC Component was established within the office of DNDPP, Advocate De Kock, who is head of the National Prosecution Service (**NPS**), one of the four specialised units of the NPA. The TRC Component is a separate portfolio with the specific purpose of dealing with the investigation and prosecution of TRC related matters.

44 In order to drive the investigation and prosecution process, a national co-ordinator, Adv Singh was appointed together with a Special Director, Deputy Director and administrative support personnel. In order to ensure dedicated attention is given to the TRC matters, 25 prosecutors and 40 investigating officers nationwide have been assigned to the TRC Component.

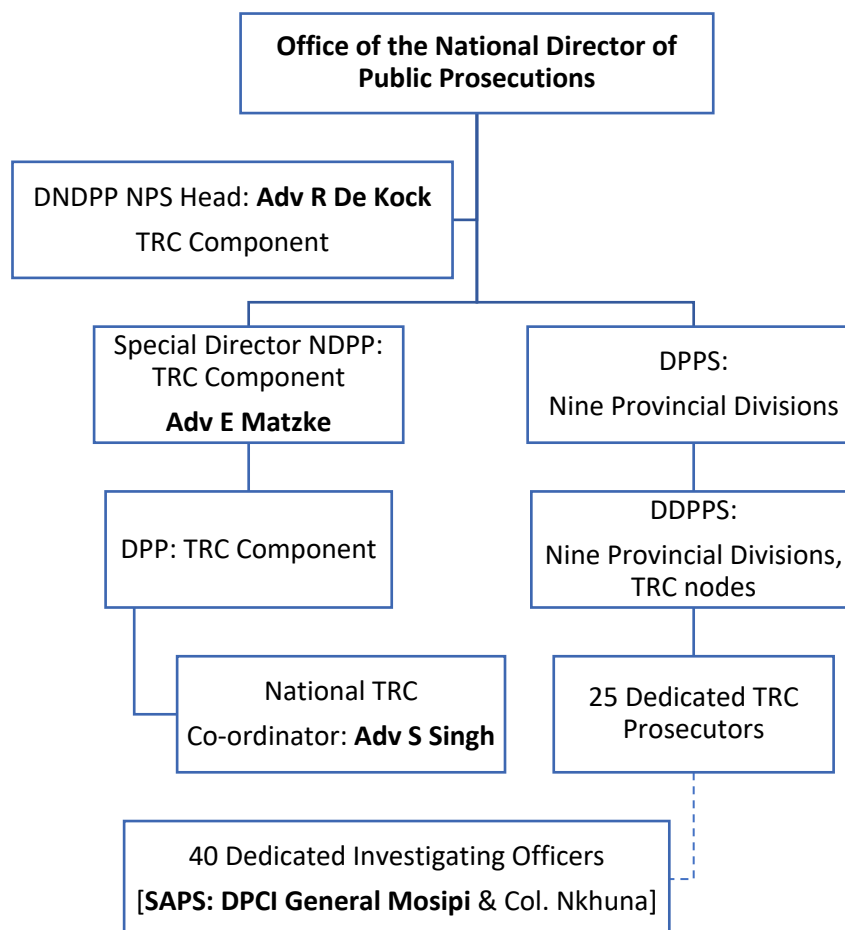
44.1 To ensure that there is no disruption in the work of the Component, the Department of Public Service and Administration has granted a deviation for three-year contracts for prosecutors in the TRC Component as opposed to one-year employment contracts. These contracts are due to expire in 2024.

²⁵ 24 March 2003

44.2 The investigating officers are appointed through the SAPS: Directorate for Priority Crime Investigations (**DPCI**) in terms of the mandate under section 17D(1)(a) of the SAPS Act 68 of 1995.²⁶ The investigating officers are appointed in the various divisions, being the Central Region, Coastal Region, Eastern Region, Western Region and the Karoo Region.

45 We set out below the organogram of the TRC Component as provided to us.

Table: Organogram of the TRC Component



²⁶ The subsection provides, “The functions of the Directorate are to prevent, combat and investigate — national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Minister and approved by Parliament ...”

- 46 We are instructed that the structure of the TRC Component was chosen primarily to avoid the centralised control of all TRC prosecutions and related matters in the national office. The NPA considers that centralised control over TRC prosecutions and related matters rendered the work particularly vulnerable to political interference.
- 47 Where one person or unit, in the case of the PCLU, is responsible and accountable for all prosecutions, including oversight over the extent and diligence of investigations carried out, susceptibility to improper interference is a continuing concern. While the likelihood of such an eventuality cannot in the ordinary course be presumed, the history of the TRC prosecutions and the findings in *Rodrigues*, make clear that this has indeed been the case.
- 48 The introduction of 25 dedicated prosecutors with a fixed-term contract of three years provides certainty and accountability. This is not only in respect of any key performance indicators and organisational accountability of individual prosecutors but, more importantly, ensures that the prosecutors do not have other case load responsibilities that detract from the TRC prosecutions. Given that the NPA has given the TRC Component a timeframe of 5 years within which to complete its work, the three-year contracts for each of the dedicated prosecutors will need to be renewed for a further three-year term before the contracts lapse in 2024.
- 49 We are advised that the office of the DPP KZN has the most TRC cases and, accordingly, the majority of the dedicated prosecutors are situated in KZN. The distribution of prosecutors and investigating officers across the regional offices is set out in the Table below.

TABLE: Allocation of NPA prosecutors and DPCI investigators to TRC cases²⁷

DPP Regional Office	Dedicated Prosecutors	Dedicated DPCI Investigating Officers	Cases under investigation
DPP: Kwa-Zulu Natal	5	7	27
DPP: Mthatha & Makhanda	7	8	10 + 13
DPP: Western Cape	3	4	10
DPP: Northern Cape	-	2	7
DPP: Free State	-	(DPCI Karoo Region)	3
DPP: South Gauteng	3	19	25
DPP: North Gauteng	3	(DPCI Central Region)	15
DPP: Limpopo	1		13
DPP: Mpumalanga	-		6
DPP: North-West	1	-	5
DPP: Head Office	2	-	-
TOTAL	25	40	134 ²⁸

50 The distribution of dedicated NPA and DPCI officials is properly contextualised when the figures are considered against the distribution of the total number of 134 TRC prosecutions and related matters throughout the country. This is set out in the fourth column of the Table. We list in **Annexure C**, all 133 cases currently under investigation.

51 From the above table it appears that:

51.1 Special Director Matzke and Adv Singh in the Head Office are included as part of the 25 dedicated prosecutors, even though they are not part of the regional prosecution teams.

²⁷ The data has been taken from the briefing documents and PowerPoint presentations provided to us by the TRC Component

²⁸ We note that the briefing document reflects the correct number of cases in each DPP region but incorrectly arrives at a total of 135 cases.

- 51.2 The basis for the allocation of prosecutors per region is not clear when regard is had to the number of cases or workload in each division. For example, DPP Mthatha and DPP Western Cape both have 10 TRC cases for investigation. The Western Cape has been allocated 3 dedicated prosecutors and Mthatha has been allocated 7 dedicated prosecutors to be shared with DPP Makhanda. This is contrasted with DPP Northern Cape and DPP Free State, which together also have 10 TRC case investigations, but there is no indication of even 1 dedicated prosecutor. The apparent failure to have even one dedicated prosecutor in these two divisions is bound to have consequences for the effectiveness of the TRC Component, its responsiveness to families of victims/survivors, and third party stakeholders.
- 51.3 We are informed that the role of Special Director Matzke and Adv Singh is one of supervision, co-ordination, sharing of information amongst the dedicated prosecutors, and carrying out necessary interventions where similar challenges or procedural hurdles arise in a number of investigations or prosecutions. We are of the view that this is critical to ensuring a uniform approach to the TRC prosecutions — an approach which should be guided by an agreed understanding of questions of law that may frequently arise. This includes, for example, questions of delayed prosecutions, payment of legal costs, presumption of death for missing victims or victims whose remains were destroyed, the probative value of evidence secured on affidavit where the witnesses are now deceased and the admissibility of testimony given before the TRC.

52 In explaining the TRC Component, the NPA emphasised that:

52.1 The TRC Component has adopted a hands-on approach and that all matters taken over from the PCLU were audited to determine the work already completed on the file, the progress made on the investigation, and the measures adopted to fast-track matters.

52.2 Following the audit, it was found that 59 matters were under investigation and 55 matters were awaiting referral for prosecution. The decision to fast-track certain cases was made taking into account the age of the matter, whether the accused and key witnesses are still alive, the progress of the investigation thus far, and question of prescription that may arise.

52.3 Internal and external collaboration on the TRC prosecutions and related matters is handled by Adv Singh, the national coordinator, and this includes both the divisions of the NPA and stakeholders such as the DCI and the MPTT.

52.4 The appointment of dedicated prosecutors for a fixed term of three years and the allocation of dedicated investigating officers serves an addition purpose of capacity building within the NPA. The prosecution of historical atrocities, international crimes and war crimes are specialised fields of practice and it is important that the NPA strengthens its expertise and experience in this area of law.

53 On the monitoring and oversight role, the TRC Component has adopted a monthly reporting system, whereby memoranda on decisions taken and inquests that have been reopened are channelled from the DPP regional divisions to the national office. Of

significance, we were informed that no decision is made in the DPP divisions until such time as it is confirmed by DNDPP de Kock.

- 54 In addition, accountability sessions are convened at which matters are critiqued and analysed. The sessions are attended by the TRC national coordinator, the DPPs of each division, the TRC DPCI heads in the divisions, and the TRC dedicated prosecutors. These NPA / DPCI workshops and sessions are important for specialised training, sharing of common challenges and an assessment of when intervention by the DNDPP or the national coordinator is warranted.
- 55 The NPAs preference for a regionally based structure for the TRC Component (as opposed to the centralised structure under the PCLU), is coupled with a centralised oversight and endorsement process that is implemented from the Office of the DNDPP: NPS. We were informed however, that because the DNDPP has review powers under section 22(2)(c) of the NPA Act,²⁹ the primary decision-making responsibility in respect of prosecutorial decisions remains the DDP of the relevant division, in accordance with section 20(5) of the NPA Act.³⁰
- 56 It emerges from the material with which we have been briefed that NDPP Batohi made a presentation to the National Assembly portfolio committee on 1 June 2022, in which

²⁹ Section 22(2)(c), “In accordance with section 179 of the Constitution, the National Director — may review a decision to prosecute or not to prosecute, after consulting the relevant Director and after taking representations, within the period specified by the National Director, of the accused person, the complainant and any other person or party whom the National Director considers to be relevant.”

³⁰ Section 20(5), Any prosecutor shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the National Director, or by a person designated by the National Director.

she explained that progress on all investigations is monitored and divided into three categories, A, B and C on the following basis:

56.1 A Category – where the matter is focussed on securing the available evidence, docket, inquest report, etc;

56.2 B Category – where the matter is focussed on obtaining the necessary expert reports, including scene reconstruction and analysis, DNA evidence, etc; and

56.3 C Category – where the investigatory aspect of the matter is nearing completion and a decision is to be taken whether or not to prosecute the matter.

57 As at February 2023, we have been informed that the 134 cases fall into the above categories A to C, in each of the DPP divisions:

TABLE: *Categorisation of progress made on the cases in the TRC Component*

DPP Division	A	B	C	Total
Western Cape	4 (40%)	2 (20%)	4 (40%)	10
Free State	1 (33%)	1 (33%)	1 (33%)	3
Mthatha	8 (80%)	2 (20%)	-	10
Makhanda	11 (85%)	1 (7,5%)	1 (7,5%)	13
North West	2 (40%)	2 (40%)	1 (20%)	5
Kwa-Zulu Natal	13 (48%)	5 (19%)	9 (33%)	27
Mpumalanga	3 (50%)	-	1 (16%)	6 ³¹
Northern Cape	6 (86%)	-	1 (14%)	7
Johannesburg	19 (76%)	1 (4%)	5 (20%)	25
Pretoria	9 (60%)	-	6 (40%)	15

³¹ Information on the progress for each of the 6 cases was not provided

DPP Division	A	B	C	Total
Limpopo	10 (77%)	-	3 (23%)	13
TOTAL	86 (64%)	14 (10%)	32 (24%)	134

58 The detailed list included as Annexure C to this Opinion lists 138 cases, as that list includes:

58.1 The additional case in KZN of Michael Ncetywa-Mcetywa. The case was closed in April 2023.

58.2 The additional three cases in Pretoria of Cajee, Sons & Els and the cases of Shonyeka and Hamakwayo. The former concerns charges of perjury in the regional court and the latter two have been determined not to fall within the TRC related cases.

59 The above table therefore does not take into account these four matters.

60 It is apparent that the majority of cases STILL remain at the beginning stage of the investigation and require the location of and access to available evidence, the docket, and the inquest report, for example. It is surprising and concerning that the majority of the cases remain in Category A despite the passing of some 22 months of dedicated and focused work by investigating officers and prosecutors working together.

61 On a national basis, the following ten matters were in court and have been finalised since the establishment of the TRC Component in September 2021.

	Case / matter	Date	Outcome
1	S v Roderigues	30/9/21 SG	Accused passed away on 7 September 2021. Charges withdrawn
2	Inquest – Dr NH Aggett	4/3/2022 SG	Verdict overturned.
3	Mr Sithembile Zokwe	12/07/2022 EC 10/3/5/2022)	Death in detention. Two SB police officers were convicted in former Transkei of murder: sentenced to 20 years imprisonment on 25/11/2005
4	Peter Thabuleka	July 2022 NG	Decline to prosecute. No evidence of assault.
5	Mr Eric Mntonga	July 2022 EC	Death in detention: Accused were tried and convicted in March and September 1989 for death of deceased.
6	Mr Goodwill Collin Sikhakhane	July 2022 KZN	All the suspects were granted amnesty . Decision was taken to not prosecute.
7	Mr Paris Malatjie	5/7/83	Deceased was shot and killed by Sgt van As at the Protea Police station. He was convicted of culpable homicide in the Johannesburg High court, sentenced to 10 years imprisonment
8	Mr Michael Ncetywa (Mcetywa)	Waiting for Information: KZN	The Accused, Mr Emmanuel Mavuso, applied for amnesty for the murder of the deceased. Amnesty was refused on 22 November 2000. He was charged and sentenced to 25 years imprisonment.
9	Mr Mqiniseni Simon Zwane	KZN	Investigation has been closed. Main suspect is deceased. Charge of attempted murder has prescribed.
10	Johannes Sweet Sambo	MP	Suspects were granted amnesty. (Eugene de Kock plus three others), McIntyre, Els and Venter were charged with Assault GBH under SH 177/92 and were acquitted. They were then charged with murder in <i>McIntyre and other v Pietersen NO and another</i> , the special plea was upheld in terms of s106(1)(d) of the CPA.

62 A further 14 cases are before the criminal court:

	Case / matter	Division	Outcome
1	Inquest: Mr Ernest Dipale	SG	Arguments heard on 1 November 2022; Judgment outstanding

	Case / matter	Division	Outcome
2	S v Rorich and Ano. (COSAS 4)	SG	Trial – February 23: Postponed to April 2023 for pre-trial conference.
3	Inquest: Dr HH Haffejee	KZN	Arguments heard on 18 and 9 October 2022, Inquest judgment outstanding
4	S v Coetzee (Simelane)	NG	Trial: Postponed to 9 December 2022 for outcome of section 79 assessment. Accused found fit to stand trial, postponed to 12-15 June 2023 for pre-trial and further particulars to be attended to.
5	S v Marais (Nyoka)	NG	Trial-First appearance scheduled for 6 February 2023 in the High Court Pretoria, representation to add <u>charges of CAH</u> . First appearance on 6 February 2023. The matter was postponed to 17/4/2023 for further particulars.
6	Mr A Haroon	CT	Inquest: 7-22/11/2022, Inquest commenced
7	Ms N Kubheka	KZN	Inquest: 22 March 2023 (Umlazi) for former SB members to obtain legal representation
8	Mr Sbo Phewa	KZN	Inquest: 22 March 2023 (Umlazi) Inquest commenced, postponed to allow SB members to obtain legal representation
9	Mr Zama Sokhulu	KZN	Inquest: 22 March 2023 (Umazi) Inquest commenced, postponed to allow SB members to obtain legal representation
10	Mr James Mngomezulu	KZN	Inquest: 28 March 2023 (Pongola). Outcome of legal representation from former employer SAPS
11	Mr Mthunsi Vlemeseni	KZN	Inquest: 10 March 2023 (Durban Magistrate Court). The chief magistrate proposed that a meeting be held to discuss pre-inquest conduct
12	Siphelele Mxolisi Nxumalo	KZN	Indictment is underway for murder of the deceased
13	Mr Seth Sons	PTA	Decision taken to charge accused in the Regional Court on charges of perjury, defeating the ends of Justice and contravening the inquests Act. Summons to be issued.
14	Mr Neville Els	PTA	Decision taken to charge accused in the Regional Court on charges of Perjury, defeating the ends of Justice and contravening the Inquests Act. Summons to be issued.

PART 4 – SUBMISSIONS/INFORMATION/AFFIDAVITS CONSIDERED

63 We are grateful to the organisations and individuals who submitted to the team their views on difficulties faced when dealing with the prosecutors and investigators responsible for the TRC prosecutions, and the systemic challenges that they have encountered in these matters. We summarise four submissions below, all of which indicate that those seeking to pursue TRC prosecutions and related matters have been frustrated, black-balled, marginalised or ignored in their efforts.

I. THE NPA

64 The NPA convened a briefing session on 6 March 2023. The team was subsequently invited to attend a briefing session on 4-5 April 2023 between the TRC national component, including DNDPP De Kock, Special Director Matzke and Adv Singh, with the DPP KZN, the 5 dedicated prosecutors and the 7 DPCI investigating officers. In addition, the NPA provided to the team a lever-arch file of documents for further context and consideration.

65 The NPA accepted that the delay in finalising the TRC prosecutions and related matters cannot be justified. Progress in the investigation and prosecution of TRC related cases is long overdue. This acceptance of its past failures by the NPA is sensible.

66 We were urged to consider the various affidavits concerning the work of the NPA in relation to the TRC matters as an important context to the present structure of the TRC

Component. We have done so and the affidavits on which we placed greater reliance are included in Annexure B.

67 The common challenges identified by the investigators and prosecutors working in the TRC Component and communicated to us, include:

67.1 access to documents, including dockets and inquest records and documents forming part of the docket, such as post-mortem reports and photo albums;

67.2 engagement with and access to records held by the MPTT;

67.3 tracing potential witnesses and tracing relevant information from previous investigations;

67.4 facilitating and securing witness protection for key witnesses;

67.5 delays in securing legal representation for accused persons who are former South Africa Police (SAP) and Security Branch members;

67.6 lack of cooperation from former Security Branch members, including those who were granted amnesty by the TRC process; and

67.7 budgetary constraints of the SAPS Forensic Unit that delay essential work such as scene reconstruction and simulation.

68 We do not have the data for the progress of the work carried out in each of the provinces and the specific challenges faced by each region. We do have detailed data for DPP: KZN and, for illustrative purposes, we categorise the cases by identifying the

challenges the investigating officers and prosecutors face and whether or not the matter is to proceed to prosecution.

DPP KZN allocation [27 cases], challenges identified	No of cases
Access to documents (previous investigation reports / post-mortem / etc)	15
Tracing of and consultation with witnesses	17
Cooperation from witnesses and SB members granted amnesty	2
Scene reconstruction and simulation (SAPS: Forensic Unit)	5
Payment of the reasonable costs of legal representation	8

- 69 It is of great concern that out of the 27 KZN cases, 62% are experiencing difficulties with tracing or consulting with witnesses who may be old, infirm or whose addresses and contact details are unknown. In 55% of the cases access to documents such as the docket, previous investigation reports or port-mortem reports is a problem. It is unclear whether these statistics are representative of all the TRC related cases in the DPP divisions or whether these specific to the DPP: KZN division.
- 70 A number of these challenges underscore that the work of the TRC Component is not carried out in a silo. There can be little patience with challenges such as lack of access to dockets, inquest records or relevant information and intelligence from previous investigations. Surely, the records can be sourced from the PCLU archives or duplicates located in the records of the MPTT?
- 71 Similarly, the delays in securing legal representation for former SAP and Security Branch members ought to be readily capable of resolution, given the high court judgment in S

v Mfalapitso & Others,³² in which the Court confirmed that the SAPS authorities are legally obliged to provide legal representation to accused persons who are former members of the SAP. The Minister of Police did not appeal the judgment and this is a clear matter in which direct engagement between the DNDPP and the SAPS ought to resolve the apparent impasse on the necessary approvals for the funding of legal representation for accused perpetrators.

- 72 The consequence of the impasse is of serious concern because any delay by the SAPS in authorising the funding of legal representation to alleged perpetrators means that the matter is incapable of proceeding in court. This creates a backlog on the court roll and raises the grave possibility of the prosecution being struck from the court roll. It is lamentable that even after a decision to prosecute has been taken, cases are capable of being held hostage by another organ of State.
- 73 It is apparent that the SAPS is similarly capable of effectively stymying the progress of TRC related cases at the investigation stage. The impasse concerning payment for essential work carried out by the SAPS Forensic Unit in Pretoria, particularly for scene reconstruction and simulation, and the finalisation of the report, also falls to be addressed at the national level. It is these systemic obstructions which may well result in the TRC Component not meeting its five-year target.

³² Case no. SS70/2021 dated 4 May 2022.

II. THE FOUNDATION FOR HUMAN RIGHTS

- 74 The Foundation for Human Rights (“FHR”) is an NPC established in 1996 through a cooperation agreement between the European Union and the South African government, and works to protect human rights in South Africa. The Unfinished Business of the TRC is one of four human rights programmes on which the FHR works and we are informed that it is working with families in respect of 23 TRC cases that remain unresolved.
- 75 The FHR has produced a number of publications dealing with the prosecution of crime of particular atrocities, including crimes against humanity. This includes extensive research on comparative governments’ national policies and approaches that have been adopted elsewhere to guide decisions to prosecute these types of crimes. This research is carried out with the aim of understanding what governments and prosecuting authorities have determined is the most effective way to ensure successful prosecutions in both civil and common-law jurisdictions.
- 76 In its submission, the FHR emphasised the irreparable harm caused to the families of victims, the effect of political interference on investigations and prosecutions. They identified key challenges to successful investigations and prosecutions, the importance of public accountability, the relevance of international law charges, and nature of the relationship between the NPA and third parties.
- 77 The FHR submitted that It is readily apparent that a siloed approach to the investigations and prosecutions will necessarily undermine the adequacy of the investigations carried out. It will also result in continued delays in the work of the TRC

Component, thus frustrating affected families and effectively inhibiting the NPA's target to complete the work of the TRC Component in five years.

78 We summarise the contentions made in respect of each issue raised by FHR.

The irreparable harm caused to the families of victims

79 Families have had to wait decades for the truth of what happened to their loved ones, to reconcile themselves with the atrocities carried out to individuals in furtherance of the apartheid regime, and to see justice enforced against the perpetrators. South Africa's failure to place the TRC project and subsequent prosecutions at the forefront of the national project shows a callous disregard to those who have sacrificed for democracy.

80 It is readily apparent that a number of TRC cases have been closed because the accused persons have died or have been declared medically unfit to stand trial.

81 The clearest way to emphasise the impact of the two and a half decade obfuscation and delay is by listing the names of the deceased and/or the families who are now unable to get closure or any form of public acknowledgement or justice.

81.1 In the case of the COSAS Four, Eustice "Bimbo" Madikela, Ntshingo Mataboge, Zandisile Musi and Fanyana Nhlapo – Three of the five perpetrators behind the operation to murder the students have died, Mr J Coetzee, A Grobbelaar and Brigadier W Schoon. The remaining accused, Messrs Rorich and Mfalapitsa are aged 75 and 68 respectively.

- 81.2 In the case of the Cradock Four, (Fort Calata, Mathew Goniwe, Sicelo Mhlauli, and Sparrow Mkhonto) – all the perpetrators have died, including all six members of the Police death squad, the Commander of Security and SAP Commissioner, J van der Merwe and the Head of the Security Branch: Black Affairs Unit, Eastern Cape, H Du Plessis. Mr Matthew Goniwe’s spouse, Mrs Nyameka Goniwe, died on 29 August 2020 before seeing the prosecution of the perpetrators of her husband’s murder. There is no one left to peruse or hold accountable.
- 81.3 In the case of Nokuthula Simelane – two of the four accused perpetrators have died, Messrs T Radebe and F Mong in 2019 and 2021 respectively. It is unclear whether the third accused, Mr W Coetzee is mentally fit to stand trial. In addition, several family members and witnesses in the Simelane case have passed on; three have died during the past 12 months.
- 81.4 In the case of Neil Aggett – the lead interrogator and torturer of Dr Aggett, Lieutenant S Whitehead, died in April 2019.
- 81.5 In the case of Hoosen Haffejee – the arresting officer and lead interrogator of Dr Haffejee, Security Branch Col. J Taylor, died in August 2019.
- 81.6 In the case of Ahmed Timol – a key witness, Ernest Matthis died in May 2019 and the murder accused, Security Branch Sergeant J Rodrigues, died in September 2021.
- 82 These are only the more prominent cases that remain in the public consciousness. There are many more missing and murdered people in relation to whom the

perpetrators, accomplices and witnesses with vital information have died. The legacy is tragic.

Political interference:

- 83 The allegation of political interference is well-known and is broadly considered to have started in 2004, with the mooted of back-door amnesties for perpetrators of gross human rights violations who did not apply or were refused amnesty.³³ The subsequent launch by former President Mbeki of the Special Dispensation for Political Pardons, was set aside in 2010.³⁴
- 84 In the cases of both *Nkadimeng* and *Rodrigues*, affidavits were submitted by senior officials of the NPA confirming that there was continued political interference on the NPA's prosecutorial discretion and which resulted in the decision not to investigate or prosecute any of the several hundred criminal cases in which amnesty had been denied or had not been applied for.
- 85 More recently the Zondo Commission accepted that political interference in the prosecutorial discretion on TRC related cases formed a part of State Capture. Mr Lukhanyo Calata submitted representations to the Zondo Commission on the role played by the South African executive in the suppression of TRC investigations and prosecutions.

³³ Amnesty Task Team Report, accessible as part of the pleadings filed in *Nkadimeng & Oths v NDPP & Oths* [2008] ZAGPHC 422; *CSV & Others v President of the RSA & Others*, Case no. 15320/09

³⁴ *Albutt v Centre for the Study of Violence and Reconciliation & Oths* 2010 (3) SA 293 (CC)

86 The FHR informed us of the steps it has taken to have an independent commission of inquiry established for the specific purpose of establishing the sources of political interference and the full reasons for the stifling of TRC investigations and the suppression of prosecutions.

87 We note that on 5 November 2021, Minister of Justice Lamola publicly announced that he had appointed persons to carry out an inquiry to investigate the suppression of the cases referred by the TRC to the NPA. We are not aware of the work carried out pursuant to the inquiry or the findings thereof.

III. MR TEBOGO RAMAGELE

88 A consultation was held with Mr Ramagele and his colleagues who are family members of the disappeared **Ladybrand Four**, uMkhonto weSizwe (MK) cadres Joyce 'Betty Boom' Koekanyetswe, Nomasonto Mashiya, Tax Sejaname and Mbulelo 'Khaya Kasibe, all of whom were abducted from Lesotho by members of the Orange Free State Security Branch.

89 We were informed that although the family has repeatedly submitted written statements and affidavits to investigating officers over the decades, the frustration and pain the families have experienced is a result of the failure of the investigating officers and prosecutors assigned to the case to retain records. Each time a new investigating officer is assigned to the matter fresh interviews and statements are taken. Thus far there have been 6 investigating teams on the matter and each time, the investigation starts afresh and the families are told there is nothing in the file.

90 Mr Ramagele said that it is clear that the graves of one or more of the **Ladybrand Four** are situated in Rosendal in the Free State. Through great effort, the families were able to convince the Free State MEC to assist in putting together a unit to look for the burial sites in Rosendal but this unit was almost immediately dissolved before any work was carried out. No satisfactory reason for this about turn has been provided to the family.

91 In addition, the MPTT met with the families three times over the years. At the third meeting the families were informed that the investigation team had started talks with Mr E. de Kock and discussions were held offering not to prosecute De Kock in exchange for complete disclosure and, in this way obtain closure for the families. The families do not know what has happened since this communication, and Mr Ramagele is vehemently against any such negotiated agreement or plea bargain.

92 The family is increasingly frustrated with the investigating officers that have been assigned to their case. At one point, the investigating officer turned out to have been a former policeman who is retired and was brought back on contract to work only on the TRC and related matters. The family is highly distrustful of this type of officer because their intentions are unknown and, given the officer's long history in the police force, it is unclear whom they serve, or whether their true political objectives are not to stymie the investigation and prevent it from reaching the prosecution stage.

93 We note from the above that:

93.1 Families have deep distrust of the investigation and prosecution process.
Given the evidence on affidavit as part of both the **Rodrigues** case, and that

submitted before the Zondo Commission, this distrust is not without foundation.

- 93.2 It is unclear what the motive for taking repeated statements or affidavits is. While memories fade and witnesses and individuals with pertinent information die, it is undesirable for witnesses to give numerous written statements over many decades. When the matter goes to trial (which is the ultimate objective) cross-examination on the discrepancies between different statements is likely and may lead to adverse credibility findings against the particular witness giving evidence.
- 93.3 It is unknown whether the loss of witness statement and key intelligence information is due to sheer incompetence, misconduct and dereliction of duty by investigating officers and prosecutors assigned to cases, or whether it is due to a malicious and intentional targeting of TRC investigations aimed at preventing the prosecution of any of the 300 cases originally referred to the NPA by the TRC.
- 93.4 It is unclear to whom the written evidence is being submitted to if it is not retained in the case file. This is a question of concern given that all criminal investigations ought to be kept confidential not only to protect sensitive information, but to aid in intelligence gathering and witness protection. Given that the information in the TRC investigations impacts, directly or indirectly, **politically exposed persons (PEPs)** people with the power to undermine investigations and intimidate witnesses with sensitive

information, the loss of witness statements and key investigation leads are of great concern.

- 94 The family strongly believes that the way forward is a Commission of Inquiry with powers to subpoena key people and the authority to search for and seize information. This is the only effective solution, especially when, they say, it is clear that the military, crime intelligence, the NPA and the State Security Agency hold pertinent information.
- 95 Rather than the siloed retention of information between the various structures, the TRC investigations and prosecutions are serious and important enough to warrant collaboration between all organs of State for the furtherance of the democratic project.

IV. MR IMTIAZ CAJEE

- 96 Mr Cajee is the nephew of **Ahmed Timol** who was killed in police detention in October 1971. Mr Cajee's relentless pursuit to uncover the truth and find justice for his uncle, led to the reopening of the inquest into Ahmed Timol 2017. In the first inquest, in 1972 the record runs into some 1,157 pages and the magistrate handed down a 77 page judgment while, in the 2017 inquest, Judge Mothle handed down a judgment of 130 pages, in which it was held that Ahmed Timol's death *"was brought about by an act of having been pushed from the 10th floor or roof of the John Voster Square building to all to the ground, such act having been committed through dolus eventualis as the form of intent and prima facie amounting to murder"*.³⁵

³⁵ *The re-opened inquest into the death of Ahmed Essop Timol (IQ01/2017) [2017] ZAGPPHC 652 para 335(d)*

- 97 The judgment recognised the monumental task of re-opening the 1972 inquest, given that some 650 pages of the original inquest record had been lost and critical pages of sworn statements were missing.³⁶ These difficulties are likely to arise in other TRC related cases too and valuable lessons may be learned from the Timol inquest for other inquests that are still to be re-opened.
- 98 Since Mr Cajee's dogmatic persistence to force the State's hand to carry out its constitutional obligations, he has assisted the families of other victims to carry out the groundwork necessary to re-open other apartheid-era inquests.
- 99 The affidavit filed by Mr Cajee explained the steps he took since 2001 by approaching the lead investigator at the time, Mr Pigou, of the PCLU in 2003, the PCLU's decision to close the case due to insufficient evidence in 2006 and, finally, the collaborative effort in 2016 with the FHR to campaign for the reopening of the Timol and Aggett inquests.
- 100 Mr Cajee has said that the true intention of the NPA in response to the TRC cases is evidenced in the back-door amnesty policy introduced in 2008. In his view the TRC prosecutors were always guided by PCLU prosecutors, who consisted of a number of DPP special directors. The conduct of the individual prosecutors coupled with the back-door amnesty policy demonstrated the NPAs unwillingness to pursue these cases.
- 101 Mr Cajee said that the marginalisation of TRC cases is glaring from the facts of Rodrigues prosecution:

³⁶ *The re-opened inquest into the death of Ahmed Essop Timol* (above) paras 8-10 and 337-339

- 101.1 Following the inquest decision in October 2017, Mr Cajee convinced the NPA to lay criminal charges against Rodrigues, Els and Sons for the murder of his uncle. While case numbers were issued, **for six months the docket languished** between the PCLU and the DPP Johannesburg division. A new investigator was tasked with the file, a decision was made to charge Rodrigues and he had his first court appearance on 30 July 2018.
- 101.2 **Rodrigues made 19 court appearances between July 2018 and his death on 7 September 2021.**
- 101.3 After appearances in both the high court and the SCA, and a budget of R3,5 million on counsel for the respective parties, **not even one witness' evidence had been led at the time of Rodrigues' death.**
- 101.4 On 20 May 2020 Mr Cajee was informed that the NPA decided not to charge Els or Sons. This decision was taken without interviewing the witnesses who had given testimony at the 2017 inquest and provided affidavits attesting to the torture they had suffered.
- 101.5 Mr Cajee has reviewed the May 2020 decision and, **despite a three-year delay, the review has not been finalised.**
- 102 Mr Cajee has also been involved in three task teams in 2018 and 2020 to maintain pressure on the NPA to pursue TRC investigations and prosecutions and to assist families in doing the investigatory groundwork in respect of their cases. Mr Cajee's affidavit of his experiences in the task teams, reads as follows:

“The team was made-up of a single prosecutor and multiple handpicked investigators. It was evident that investigators were afraid of their seniors. At the last meeting, a senior DPCI official made insensitive remarks about the 101h floor. Police officers were judge, jury and executioners in their own matters. I raised concerns about the involvement of former white officers in investigating their former colleagues and families would not trust them. Despite these challenges, progress was been [sic] made, when I was informed by my legal representatives that Adv [Toerie(?)] Pretorius had asked for my removal citing that I might have a conflict of interest. This was unfounded as my sole purpose was to assist other families. Despite the excellent progress been made, and a training manual created by me for investigating officers on how to conduct these investigations my removal resulted in the task team investigating TRC matters collapsing around April 2018.

...

In mid-September 2020, a task team comprising of senior comrades from the ANC's Luthuli House, FHR and members of the Apartheid-era Victim's Family Group (AVFG) held numerous meetings to pave the way forward. The Minister and Deputy Minister of Justice participated in these meetings. A detailed plan was presented that involved lobbying the support of law students from academic institutions, legal firms in the public domain that included Black Lawyers' Association (BLA), the National Democratic Lawyers Association (NADEL). Again, significant progress was made when the task team collapsed. It was evident to me that pursuing post-TRC prosecution had become political and a business proposition that did not always benefit victims.”

103 Mr Cajee noted the positive commitment of the TRC Component under DNDPP de Kock.

He confirmed that the Apartheid-era Victims Family Group (AVFG) have held meetings with the DPPs in the regional divisions and the investigating officers and prosecutors

where the AVFG members reside (save for the Johannesburg region). The benefit of these meetings, convened at the instance of the DNDPP, is that the AVFG families have direct access and contact with the investigating officers and prosecutors responsible for their respective case/s. We are informed that this approach was not followed by the PCLU.

104 A concern raised by Mr Cajee, that is reflective of that raised by Mr Ramagele, concerns the dedicated investigating officers assigned to work on the TRC Component:

"I have been critical of the appointment of former apartheid-era police officers to investigate TRC cases. They are required to investigate their former colleagues and their loyalty will be tested. During the re-opened Dr Neil Aggett Inquest, Investigating Officer Ben Nel testified that he was called "verraier" (sell-out) by his colleagues when investigating TRC cases. These appointments have been done and cannot be reversed. However, their performance must be assessed before renewing their contracts. It must be noted that investigating officers appointed by some attorneys are also former apartheid South African Police Force employees."

105 It is during the Rodrigues proceedings that the affidavits of then NDPP Advocate Vusi Pikoli, then head of the PCLU, Advocate Ackermann and Advocates Macadam and Pretorius were filed before the court setting out the depth and extent of alleged political interference in the prosecution of TRC cases. Additional supplementary affidavits were filed in answer to Mr Cajee's affidavit to explain to the court why the NPA was not responsible for the delays in prosecuting Rodrigues.

106 The Pikoli affidavit, in relevant part, stated the following:

“8. As a result of my decision to authorise prosecution of a former Commissioner of Police on corruption charges, I was suspended from duty by the then President, Mr T Mbeki on 23 September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the truth and reconciliation commission ... contributed to the decision of President Mbeki to suspend me ...”

14. ... I confirm that there was political interference that effectively barred or delayed investigation and possible prosecution of the cases recommended for prosecution by the TRC, ...” [emphasis added]

107 Importantly, the affidavit records Adv Pikoli’s belief that the Minister of Justice preferred that the deadlock between the NPA and the SAPS, National Intelligence Agency and Department of Justice remain in place.³⁷ This reluctance was attributed to the *“fear of opening the door to prosecutions of ANC members, including government officials”*.³⁸

108 The Pikoli affidavit records that in early 2006, the then Commissioner of Police, Mr J Selebi, objected to Adv Ackermann’s participation in the TRC cases. The affidavit also records a subsequent meeting, later in 2006, to which NDPP Pikoli was called. The meeting was attended by the then Ministers of Social Development, Safety and Security, Defence and Justice and Constitutional Development and the Chief Director in the Office of the President. In the meeting, NDPP Pikoli was warned that any prosecution of any suspects in the Rev. Chikane matter, could open the door to further prosecutions of

³⁷ Pikoli affidavit para 54

³⁸ Pikoli affidavit para 60. The Ackermann affidavit supports and underscores the contents of the Pikoli affidavit.

other ANC members.³⁹ The perpetrators in the Rev. Chikane matter, Adriaan Vlok, Johan Van der Merwe and three others ultimately entered into a plea and sentence agreement in August 2007.⁴⁰

109 The Ackermann affidavit gave a number of additional examples of political interference with the prosecutorial discretion of the NPA. One example is of correspondence dated 6 December 2006, from the Head of the SAPS: Legal Support Division purporting to advise the NPA PCLU Head, Adv Ackermann that before any prosecutorial decisions were made, the multi-departmental committee (or Task Team)⁴¹ would submit a final recommendation to a committee of relevant Directors-General in respect of each case and that this committee of Directors-General would in turn advise the NPA on whom it may or may not prosecute.⁴² Of its face, this is obvious contemporaneous documentary evidence of organs of State seeking to interfere with prosecutorial decision-making contrary to section 179(4) of the Constitution and section 39(1)(b) of the NPA Act, in that the SAPS: Legal Support Division is improperly interfering, hindering or obstructing the NPA (or any member thereof) in the exercise, carrying out or performance of its, his or her powers, duties or functions. The suggestion that another organ of State may usurp the prosecutorial discretion of the NPA or any individual prosecutor is *ultra vires* the powers of the that organ of State or government official, is contrary to section 179(2) of the Constitution and is thus unconstitutional.

³⁹ Pikoli affidavit paras 30-33

⁴⁰ In terms of section 105A of the CPA and in terms of which Vlok and Van der Merwe were sentenced to 10 years imprisonment

⁴¹ The Task Team comprised of members of the NIA, the SAPS, the Department of Justice and representatives of other government departments

⁴² Ackermann affidavit paras 17.1 – 17.3

110 The Pretorius affidavit placed the following before the court.⁴³

110.1 the delays were a result of severe political constraints and interference in the work of the NPA.⁴⁴

110.2 the NPA did not deny that the executive branch of the State took political steps to manage the conduct of criminal investigations and possible prosecutions of the perpetrators of the politically motivated murders. The NPA could not be held responsible for these delays nor was it occasioned by malice on the part of the NPA.⁴⁵

110.3 The secret Amnesty Task Team and the guidelines issued by former President Mbeki are two such examples.⁴⁶

111 The affidavits filed by Messrs Pikoli, Pretorius, Ackermann and Macadam, taken at face value, reveal a concerted political objective to stymie any investigation or prosecution into the TRC cases.

V. THE CALATA AFFIDAVIT SUBMITTED TO THE ZONDO COMMISSION

112 Mr Lukhanyo Calata is the son of Fort Calata, who together with Mathew Goniwe, Sicelo Mhlauli, and Sparrow Mkhonto (**the Cradock Four**) were murdered by the apartheid-era security personnel near Gqeberha on 27 June 1985.

⁴³ Pretorius supplementary affidavit dd. 4 February 2019

⁴⁴ Pretorius supplementary affidavit (above) paras 2.3, 2.8 and 2.12

⁴⁵ Pretorius supplementary affidavit (above) para 2.11

⁴⁶ Pretorius supplementary affidavit para 2.15

113 The Calata affidavit was filed before the Zondo Commission on behalf of his family and other victims of apartheid-era crimes.⁴⁷ The principal submission is that these families have been pursuing justice for their loved ones for decades and that all the cases referred by the TRC to the NPA were deliberately suppressed and the perpetrators of the crimes shielded from justice. This, it is said *“was the result of political interference from the highest levels of government which was brought to bear on the NPA and the ... SAPS”*.⁴⁸

114 The affidavit suggests that both the SAPS and the NPA have colluded with political forces, including the ANC, to ensure the deliberate suppression of the several hundred apartheid-era cases. Virtually all the cases handed over to the NPA with the recommendation that they be investigated were abandoned. The affidavit recalls two examples in the form of the work of the Amnesty Task Team and former President Mbeki’s Special Dispensation on Political Pardons. Both initiatives were discontinued only following recourse to the courts.

115 The affidavit draws together the disclosures made in the Pikoli, Ackermann and Macadam affidavits, and the fruitless attempts to persuade DSO Special Director Ledwaba to reconsider his refusal to investigate TRC cases.⁴⁹ The complicity or acquiescence of the NPA and the SAPS in the relentless political interference remains unclear. The Calata affidavit therefore motivates that the only way to bring the political

⁴⁷ This included the sister of Nokuthula Simelane, the brother and nephew of Ahmed Timol, the brother of Mathews Mabelane, the sister and nephew of Neil Aggett, the daughter and son of Imam Haron, and the sister and brother of Hoosen Haffejee.

⁴⁸ Calata affidavit dated 29 August 2019 para 7

⁴⁹ Lukhanyo Calata affidavit dd. 29 August 2019 paras 63.1 to 63.5

interference out into the open and to provide victims' families with the answers they deserve is through a commission of inquiry.

PART 5 – FINDINGS

116 The findings below are categorised under headings that correspond to the TOR. We consider below, a review of the measures adopted by the NPA to deal with the TRC prosecutions and related matters or investigations and prosecutions of TRC related cases, whether the measures put in place are adequate, and if we find that they are inadequate, to suggest what needs to be done to make them fit for purpose. We do give our reasons why we do not, or cannot, appropriately make a finding under section 41(1) of the NPA Act.

I. THE REVIEW OF MEASURES ADOPTED BY THE NPA

117 We find that the measures adopted and implemented in the TRC Component are, **in large part**, adequate.

118 Any review of the structure and work of the TRC Component must of necessity take into account alternative structures that have been mooted and presumably jettisoned by the NPA. An obvious relevant comparison is with the structures adopted by other countries who have needed to set up dedicated investigative and prosecutorial units to focus exclusively on particularly egregious crimes, and mostly international crimes against humanity. It is critical that victims/survivors and families of victims/survivors of

such crimes are able to see accountability and justice being done, particularly for high-level perpetrators.

119 Specialised investigation and prosecution units are not unfamiliar to South Africa, and the PCLU is one such unit established by Presidential Proclamation. Yet, it is precisely the centralised structure of this unit that led to its ineffectiveness and susceptibility to political interference.

120 Whether or not specialised units are more effective is considered in a research report published by the International Centre for Transitional Justice, *Gearing up the fight against Impunity: Dedicated Investigative and Prosecutorial Capacities (ICTJ Report 2022)*.⁵⁰ The report notes that the generally accepted rationale behind specialised units includes:

120.1 the concentration of national efforts under one organisational unit to facilitate coordinated work and the exchange of information and leads;

120.2 ensuring clear lines of responsibility and accountability;

120.3 the skilling up of a team of motivated investigators and prosecutors with the necessary expertise; and

120.4 the fostering of close cooperation between investigators and prosecutors.

⁵⁰ Varney and Zdunczyk, *Gearing up the fight against Impunity: Dedicated Investigative and Prosecutorial Capacities* (March 2022) (“ICTJ Report”)

121 It is said⁵¹ that countries in which in fact dedicated prosecution units, have worked well. They include Argentina,⁵² Germany⁵³ and France.⁵⁴ Countries that have left prosecutions to the general national criminal justice system have less impressive track records and this can be observed in, for example, Peru,⁵⁵ the United Kingdom,⁵⁶ Kenya⁵⁷ and Tunisia.⁵⁸

122 Of significance to the task before us, is that while a dedicated unit that is adequately resourced may be critical to the effective and successful prosecution of past atrocities, this alone is no guarantee of success *if the political will is absent*. Where a government does not accept as part of the national identity, the importance of accountability and justice for crimes or atrocities that imprint on the national consciousness, accountability through successful prosecutions will not be achieved.

123 In the present case, the hybrid structure the NPA has created through the TRC Component:

⁵¹ ICTJ Report, 2022 chapter 2

⁵² Concerning dictatorship-era crimes, particularly that of the disappeared persons, see National Commission on Disappeared Persons, *Nunca Más (Never Again) Report* (1984)

⁵³ The prosecution of Nazi Crimes under the Central Office of the Land Judicial Administration for the Investigation of National Socialist Crimes established in 1958. See also the specialised international crimes unit established in the Federal Prosecutor's Office in 2010 with the primary objective of pursuing universal jurisdiction cases.

⁵⁴ The establishment of the Crimes Against Humanity Unit within the Office of the Prosecutor in 2011 to deal with the crime of impunity following the Rwandan criminals fleeing Rwanda for France after the 1994 genocide.

⁵⁵ Concerning human rights violations and committed during the internal armed conflict between 1980 and 2000 that resulted in some 70,000 fatalities, see the Comisión de la Verdad y la Reconciliación (TRC) Report, 2003

⁵⁶ Concerning the significant human rights violations that took place in Northern Ireland, known as "the Troubles", between 1968 and 1998. In 2005 the Historical Enquiries Team was established as a special unit of the Police Service of Northern Ireland to investigate some 3,269 unsolved murders during the Troubles.

⁵⁷ Concerning the atrocities committed between 1963 and 2008, including the post-election violence of 2007, see the Truth, Justice and Reconciliation Commission Report, May 2013. All efforts to establish a special tribunal or an international crimes division of the Kenyan High Court have failed.

⁵⁸ Concerning the popular uprising, the Révolution de la Dignité in 2010 and 2011, that ended President Bin Ali's authoritarian rule, see the Truth and Dignity Commission, 2014 and the 13 specialised criminal chambers created in 2013 to deal with atrocities committed during this period. No provision was made for the establishment of dedicated investigative or prosecutorial units.

- 123.1 retains the aspect of centralised control under the sole responsibility and authority of DNDPP de Kock;
 - 123.2 ensures that all investigating officers and prosecutors are assigned solely to the TRC investigations and prosecutions and have no other responsibilities;
 - 123.3 requires that each DPP regional division accounts to the national coordinator in writing on a monthly basis on updates for each of the cases in that division;
 - 123.4 convenes regular briefing sessions between the national TRC Component and the DPP regional divisions of investigating officers and prosecutors to discuss areas of particular complexity, problems that arise and are common to a number of cases, and areas that require the intervention of the DNDPP to move issues forward or to liaise with other organs of State to ensure cooperation and assistance.
- 124 We are informed that in this way, prosecutors remain directly accountable to the victims' families and are expected as part of their duties to provide regular updates to the families on the progress of their case. When asked about making the names of all prosecutors public in order to facilitate transparency and accountability over the TRC cases, we were advised that the prosecutors had liaised with all families, had set up appropriate communication channels and no public notice of individual prosecutors was warranted.
- 125 On this point, we are of the view that the TRC Component has overlooked the public significance of the cases they are entrusted to manage. The progress of each of the 134

cases is not only important to the victims' families but is part of the national consciousness for all South African from all walks of life. We also accept that organisations like the AVFG, victims' families and civil society may choose to pool their information, including the names of the prosecutors seized with a case, the state and progress of their investigations, and the extent to which key information or challenges may arise in several cases. The information is thus neither confidential nor secret in the true sense.

126 In adopting this view we do not underestimate the possibility that if all 25 dedicated prosecutors' names were made public, they may be subjected to undue influence, intimidation or threats from PEPs and other interested parties. However, this possibility exists in many high profile cases or cases involving particularly dangerous or financially well-resourced accused persons. It is indeed the role of the NPA to provide support and security to their prosecutors and there is no reason for the TRC Component to be treated differently.

127 We find that the hybrid structure of the TRC Component is satisfactory. Whether it is fit for purpose, and is able to achieve its stated objective, however, is a result not so much of its composition and the checks and balances incorporated therein, a function of whether it is sufficiently resourced, and its investigating officers and prosecutors are sufficiently supported and protected from political interference.

128 We consider below whether the structure and checks and balances that form part of the TRC Component are adequate.

II. WHETHER THE MEASURES ADOPTED BY THE NPA ARE ADEQUATE

129 The *Rodrigues* judgment requires that there must be “*public assurance, from both the Executive and the NPA, that the kind of political interference that occurred in the TRC cases will never occur again*” and that the NPA “*should indicate the measures, including checks and balances that will be put in place to prevent a recurrence of the unacceptable breaches of the Constitution*”.⁵⁹

130 In the Timol inquest judgment, Judge Mothle recommended:

*“It is thus the view of this Court that the families whose relatives died in detention, particularly those where the inquest returned a finding of death by suicide, should be assisted, at their initiative, to obtain the records and gather further information with a view to have the initial inquest re-opened. The Human Right Commission, working in consultation with the law enforcements agencies, should be sufficiently resourced to take on this task.”*⁶⁰

131 Judge Mothle suggested that it would be of assistance if the Human Rights Commission and the IPID, for example, are sufficiently resourced to undertake the task of preparatory work, in consultation with the NPA, for the re-opening of such inquests at the request of the families concerned. Against these recommendations, we consider the approach adopted by the NPA.

⁵⁹ *Rodrigues* (above) para 65

⁶⁰ *The re-opened inquest into the death of Ahmed Essop Timol* (IQ01/2017) [2017] ZAGPPHC 652 para 340

132 The measures, checks and balances adopted by NPA in establishing the TRC Component and creating the feedback channels on monitoring progress, reporting on decisions taken, and accessing intervention of the DNDPP where necessary, is set out in Part 3 above.

133 It appears that one of the most important measures that have been introduced is the provision for monitoring and accountability sessions with the DPPs of each division, the TRC DPCI heads in each division and the prosecutors, sitting together to update one another on approaches adopted and developments made in each of the cases. This has the dual effect of specialised training on prosecutions of historical crimes and sharing of intelligence resources.

134 That having been said, we have observed three areas of concern with the TRC Component.

135 The **first concern** is the adequacy of the audit of all TRC investigations, prosecutions, and related matters.

135.1 Although the TRC referred some 300 cases to the NPA for further investigation and prosecution where amnesty was not applied for or was not granted, no clear account was provided to us regarding **each** of the **approximately 300 cases**.

135.2 We also accept as correct the contents of the internal DSO Memorandum to NDPP dated May 2003, which claims to be an audit of all TRC cases prepared for prosecution and which list a total of 48 cases.⁶¹

135.3 We are instructed that the TRC Component was initially seized with 114 cases (59 matters under investigation and 55 matters awaiting referral). Following an audit carried out by the TRC national coordinator, the number of cases has now increased to 134 matters. We are advised that it is possible that additional cases will arise as the audit and investigation processes continue.

136 The importance of the audit and the total number of cases considered by the TRC Component goes to the heart of the rationale for pursuing these apartheid-era crimes. It is not sufficient to make these cases a priority of the NPA to fast-track certain cases; it is necessary to disclose frankly the reasons why these cases are being investigated and the other 215 cases are no longer being pursued. It should not be left to the public to speculate why 215 apartheid-era atrocities are no longer suitable for or capable of further investigation or prosecution.

137 The **second concern** is the pace of the work carried out thus far. The TRC Component was established in September 2021. We are told that the unit requires an additional 5 years to complete its work. Thus far, in the past two years the statistics given to us indicates that in many of the cases, and just over half in the KZN division, the challenges faced by the dedicated investigating officers and prosecutors remain at the very first leg

⁶¹ Internal DSO "Scorpions" Memorandum to NDPP re: Audit of all TRC cases being prepared for Prosecution, Macadam affidavit "RCM2" in the *Rodrigues* case

of the investigation, namely, that of sourcing relevant and necessary information in the case file or docket, which then impacts on access to previous investigation reports, post-mortem reports and previous witness statements. If the documents cannot be located over 22 months, in circumstances where there are full-time investigators and prosecutors on the task, it is inconceivable that these matters will move forward at an expedited rate and be prosecuted over the next five years.

138 There are two possibilities that arise from this inaction. Either this is a glaring indication of incompetence of the dedicated 40 investigating officers and 25 prosecutors who are seized with no other task than to take these matters forward or it is evidence of the deliberate slow pace of work. In our view, the failure to access information, to compel the MPTT to hand over its records, to reconstruct the documentary evidence from the national archive, or obtain duplicate copies of records from other organs of State, such as the NIA or SAPS over almost two years, cannot be placed solely at the door of the inaction of the last decade and a half between 2003 and 2017.

139 Things must move now. There is a plan, and a target, and a structure. The NPA Leadership must insist on results, on outcomes of the investigative process, of prosecutions that are based on solid evidence, on cooperation demanded from all other organs of State. There is no nice way to state this demand that needs to be made from the NPA. The DNDPP must crack the whip.

140 The **third concern** is whether the TRC Component receives adequate support from other departments and organs of State. This concern does not appear to be solely a question of political interference, nor do we have sufficient information to suggest that

this is the case. What is apparent is that there are clear areas of engagement that individual prosecutors and DPPs of the divisions are unable to effectively manage in a siloed manner. The DNDPP and the national TRC Component must exercise their authority in an unequivocal manner. We note below those entities that have come to our attention and whose participation and support is integral to the success of the work of the TRC Component.

140.1 **The Missing Persons Task Team (MPTT).**⁶² The MPTT was established in 2005 and is responsible for locating the graves of the deceased who were killed during the apartheid era. The MPTT falls under the NPA and used to be located in KZN. The four members of the MPTT now reside in Cape Town and it is unclear whether the members of the MPTT have taken all records and intelligence with them. The importance of accurate and reliable intelligence in the successful prosecution of TRC cases cannot be underestimated. It is imperative that the intelligence held by the MPTT is electronically saved, backed up and made freely available to investigating officers and prosecutors seized with a docket. Electronic records of when and who accessed the records should be retained together with a record of any changes or additions to the information as a necessary security measure. It is unclear whether this valuable research collated and secured over decades is readily available to the TRC Component. Given that the MPTT falls under the auspices of the NPA, we are of the view that there can be few

⁶² The MPTT was established on recommendation of the TRC and is responsible for locating the graves of the deceased under apartheid, exhuming their remains, and identifying the remains for reburial to take place. They have uncovered the remains of 138 missing persons as of 20 April 2018. The above overview is taken from the advice given to us

reasons why the information may not be securely and reliably accessed by the members of the TRC Component.

140.2 **The SAPS Forensic Unit.** The NPA and the SAPS are working collaboratively on the TRC Component and the 40 dedicated investigating officers are testament to the SAPS's support for the TRC work. However, it is apparent that financial consideration and claims of budget constraints have been mooted as reasons for the delay and/or refusal to process evidence until it is clear whether the laboratory tests are to be covered by the SAPS or the NPA TRC Component. Budget allocation concerns of this kind are not unique, but it is important that the national TRC Component is able to deal with this question with urgency and decisiveness. The need for forensic work, including DNA collection and identification of human remains, and scene reconstruction and simulation, are essential to any decision to prosecute. It would be inefficient and counter-productive for issues of this kind to be dealt with at a divisional level.

140.3 **The SAPS.** A related concern is reliance on, and an integral involvement of retired SAPS investigating officers as part of the team of dedicated investigating officers in the TRC Component. While this was explained to us as necessary on account of the vast years of experience and skills these officers hold in investigating cold cases, the reality of TRC investigations is sufficiently distinctive to warrant a considered and different approach. A large number of the cases to be investigated are those of ex-policemen. The decision to bring these individuals back into a central role to spearhead the

investigation is a decision with obvious susceptibility to abuse and stonewalling. We note, for example, the evidence submitted in the Calata affidavit before the Zondo Commission. The affidavit records that in January 2018 civil society activists placed 20 cases before the NPA and the Hawks for investigation. While the Hawks did allocate investigating officers to the cases, it was later discovered that the officers leading the investigations were former senior Security Branch or associates of the Security Branch. Egregiously, the most senior investigating officer was implicated in the torture of a political detainee in the 1980s.⁶³ Investigating officers are instrumental to the calibre of work of the dedicated prosecutors and their integrity and commitment to the work must be steadfast. It is important that the TRC Component reassure the public that the inept conduct of the past is over. It is also important that the SAPS support the investigating officers that have been seconded or brought in as dedicated TRC investigating officers and that they are not instructed to divide their time on other non-TRC criminal investigations.

140.4 **The National Intelligence Agency (NIA).** For successful prosecutions the sharing of intelligence is key. The custodianship of important information and intelligence resources lie not only in the hands of the MPTT and the forensic unit but also in information held by the NIA. To the extent that information is marked classified or sensitive, it is imperative that inter-governmental agencies cooperate in the national agenda of holding to

⁶³ Calata affidavit para 21

account perpetrators of apartheid-era atrocities and assist in identifying remains of victims located at death camps and related sites.

141 In each of the above areas of concern, it is not the integrity or commitment of individuals that is questioned. Rather, we note that the TRC Component operates in a political context in which the executive arm of government has evidently, for two and a half decades, orchestrated itself to thwart any progress on apartheid-era investigations and prosecutions. Despite the dicta in the *Rodrigues* judgment, neither the State nor the SAPS nor the NPA have articulated a concerted national commitment to support the investigation and closure of TRC cases and the prosecution of perpetrators of apartheid-era atrocities.

142 The NPA's current commitment to pursuing investigations and prosecution of persons implicated in TRC related offences is noted and the commitment made by NDPP Advocate Batoji, before the National Assembly Portfolio Committee aforementioned, are evidence of the seriousness of the undertaking to the people of South Africa. In our view, this public undertaking and assumed accountability further justifies the establishment of a commission of inquiry to investigate the narrow question of whether the allegations of political interference between 2003 and 2017 rise to the level of an offence under section 41(1) of the NPA Act.

143 The success of the TRC Component will only be judged finally in five years' time. Any praises the TRC Component receives in the future will be wholly dependent on all organs of State committing the necessary financial and human resources and intelligence records to support the work.

III. THE REASONS FOR NOT MAKING A FINDING UNDER SECTION 41(1) OF THE NPA ACT

144 The affidavits filed by senior members of the NPA and the PCLU point to a conclusion that the NPA was swayed from its constitutional and statutory obligation to ***“exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law”***.⁶⁴

145 It appears that in circumstances where some prosecutors had the courage to stand up and resist political interference, they were removed from their positions or removed from the responsibility of handling certain cases. It is not controversial that those individuals involved in manipulating the criminal justice system and seeking to introduce policy and strategic interventions to prevent the NPA from carrying out its prosecutorial function must be held to account. Our opinion, however, suffering from the limitations of the terms of reference of our brief, and the lack of an investigative arm, and related strictures regrettably, is not a fit for purpose vehicle to carry out that task. Indeed, no opinion without proper investigation, could carry a burden of that kind.

146 The Calata affidavit, for example, filed before the Zondo Commission, names 16 prominent political individuals and officials who held positions between 2003 to 2017 in the Office of President, the Ministry of Justice, the Ministry of Safety and Security, the SAPS, the DSO, the NIA, the Ministry of Defence and the NPA.⁶⁵

⁶⁴ Section 32(1)(a) of the NPA Act

⁶⁵ Calata Affidavit paras 68-73

147 This information is in the public domain and the procedure for a comprehensive investigation is by no means complex. If the NPA is unable to find sufficient basis to investigate and charge any implicated person/s for an offence under section 41(1) of the NPA Act at this stage, it is important that in any commission of inquiry, the implicated individuals are given an opportunity to respond to the grave allegations against them.

148 The commission of inquiry is to be established under section 84(2)(f) of the Constitution,⁶⁶ alternatively, section 1 of the Commissions Act 8 of 1947, as amended. The commission would have a very narrow scope of inquiry centred on section 32(1)(b) read with section 41(1) of the NPA Act – to determine whether the conduct of individuals holding senior political office and positions between the period 2003 and 2017 acted improperly to dissuade, interfere, hinder or obstruct the investigation and/or prosecution of the cases the TRC referred to the NPA in 2003. The terms of reference and powers of the commission would have to:

148.1 authorise the subpoena of individuals who have already submitted evidence on affidavit, such as advocates Pikoli, Ackermann, Macadam and Messrs Calata and Cajee.

148.2 authorise the subpoena of persons implicated in the above mentioned affidavits, including former President Mbeki and the former ministers of justice, police and defence, and the former heads of the NIA, SIU and DSO.

⁶⁶ The section provides, “The President is responsible for appointing commissions of inquiry”

148.3 permit limited cross-examination of witnesses who testify so as not to unduly broaden the ambit of the inquiry.

149 We are making this latter recommendation without the benefit of submissions or evidence from the PEPs and those implicated in the affidavits in our possession. It would be imprudent to express any opinion on whether the interference amounts to a contravention of section 41(1) of the NPA Act. In our view, a commission is the only sensible way forward in order to get to the bottom of why the TRC cases were never investigated or prosecuted with zeal, and whether any one or more PEPs are to be considered for prosecution under section 41(1).

PART 6 – RECOMMENDATIONS

150 We make the following recommendations:

- 150.1 The DNDPP NPS Head and the TRC Component: DPP Special Director must exercise an integral role in the coordination of the investigatory and prosecutorial work carried out in the NPA regional divisions, specifically in areas of common challenges, obstructions and obfuscations by other organs of State.
- 150.2 The NPA should expedite the finalisation of the TRC prosecutor policy and training manual.
- 150.3 The NPA Missing Persons Task Team (MPTT) should be called upon to account for its work, should be called upon to share relevant intelligence and/or information with the investigating officers and prosecutors of the TRC Component.
- 150.4 The NPA and DNDPP de Kock should engage urgently with their counterparts in the SAPS, in order to resolve any impasse concerning the allocation of financial resources for work carried out by the SAPS Forensic Unit, and the streamlining of all authorisations for the payment of the reasonable legal costs of former SAP and Security Branch employees accused of apartheid-era crimes.

- 150.5 The NPA and DNDPP de Kock should engage with their counterparts in the NIA urgently, in order to secure the relevant and necessary intelligence for furthering the investigation and prosecution of TRC related cases.
- 150.6 The NPA should adopt a stance on whether it is prepared to pursue charges of a crime against humanity in respect of apartheid-era atrocities that occurred during the period of the TRC's investigative mandate.
- 150.7 All investigation reports, investigating officer statements and affidavits obtained since 2003 should be uploaded into electronic format, should be text searchable and indexed and should facilitate connections between cases, witnesses, alleged perpetrators and the geographically tagged, for intelligence gathering of so-called death camps and sites of torture and disappearance. The database must be secure and capable of tracing the activity of all users logging onto the database.
- 150.8 The TRC Component should consider establishing an interactive website dedicated to the sharing of expertise on TRC investigations and prosecutions. The website would act as a central repository of publicly available information, such as pleadings filed in prosecution, progress updates on matters finalised, human remains that have been successfully identified by the MPTT, an indication of which TRC investigations have been closed or referred for prosecution and disclose the official contact details for the national office of the TRC Component.

150.9 The NPA must pursue the establishment of an independent commission of inquiry under either section 84(2)(f) of the Constitution, or the Commissions Act, 1947 to investigate the extent of, and rationale behind, the political interference with the NPA between the period 2003 and 2017.

150.9.1 The inquiry should take into consideration the multiple state entities involved, including the executive, the SAPS, South African intelligence agencies and politically exposed (connected) persons (PEPs) and specifically the 16 individuals named in the Calata affidavit filed before the Zondo Commission.

150.9.2 It is important that any inquiry is public and is empowered with sufficient authority to carry out the investigation and is clothed with powers of search and seizure and is able to subpoena people of interest.

150.9.3 The inquiry must be empowered to make recommendations of possible prosecution under section 41(1) of the NPA Act.

30 June 2023

Chambers, Sandton

Johannesburg

ANNEXURE A

CHRONOLOGY OF MATERIAL EVENTS

	DATE	EVENT	REFERENCE
1	21 March 2003	Truth and Reconciliation Commission Final Report, emphasising the need for a bold prosecution policy.	https://www.justice.gov.za/trc/report/
2	November 2004 – December 2005	The National Prosecution Authority (NPA) did not prosecute apartheid era cases on the basis that a new policy was to be developed for TRC prosecutions and related matters	
3	March 2003	The Priority Crimes Litigation Unit (PCLU) was established through Presidential Proclamation and is located in the Office of the National Director of Public Prosecutions (NDPP). The PCLU has the mandate to manage and direct the investigation and prosecution of crimes contemplated in the Rome Statute, 2002 and serious international and national crimes against the State.	Presidential Proclamation, 2003; Adv. Ackermann affidavit in Simelane case no. 3554/2015 (see below)
4	May 2003	Internal DSO “Scorpions” Memorandum to NDPP, audit of all TRC cases being prepared for prosecution (8 cases listed; 7 additional cases under evaluation; 12 cases of high interest; 9 cases in which public representations had been made; 8 cases that are in the process of being closed; and 4 cases on hold for conspiracy to commit crimes outside the RSA)	Macadam affidavit “RCM2” in the Rodrigues case
5	15 July 2003	Adv Ledwaba of the DSO issued internal memorandum stating that the SAPS are to take over the investigation of all TRC cases handled by the Macadam. The “files must be closed off and all the material given to the PCLU...”. The DSO did not appoint investigators to the TRC cases.	Adv Pretorius and Macadam affidavits (RCM3”) in the Rodrigues case.
6	February 2004	The Director General: Justice and Constitutional Development chaired the Amnesty Task Team to look consider the options of amnesty for perpetrators of TRC atrocities who have made a full disclosure	Report: Amnesty Task Team, Calata affidavit annexure “LC1”.
7	1 February 2005	Adv Pikoli appointed NDPP (previously DG: Department of Justice)	
8	2005	NPA’s Prosecution Policy, specifically para 8A and Appendix I, which provided for the possibility of an alternative amnesty regime	
		Establishment of the NPA: Missing Person Task Team (MPTT)	

	DATE	EVENT	REFERENCE
10	October 2006	PCLU Internal Memorandum, Audit of Cases emanating from TRC Process (4 cases finalised in court; 25 cases closed by PCLU plus an additional 80 cases against members of the liberation movement closed by SAPS; and 22 potential prosecutions identified by PCLU)	Macadam affidavit annexure "RCM12" in the Rodrigues case
12	8 February 2007	Letter from Minister of Justice Mabandla to NDPP Pikoli re "TRC Matters" in which the Minister expressed surprise at the media reports that the NPA will go ahead with prosecutions of TRC matters	Pikoli affidavit annexure "VVP2"
14	15 February 2007	NPA Secret Internal Memorandum to Minister Mabandla re Prosecution of Offences emanating from conflicts of the Past: Interpretation of Prosecution Policy and Guidelines	Macadam affidavit annexure "RCM17" in the Rodrigues case
16	August 2007	Plea and sentencing agreement in the Rev. Chikane matter under section 105A of the CPA on behalf of Messrs A. Vlok, J. Van der Merwe and three others.	
18	23 September 2007	Suspension of NDPP Pikoli. Adv Mpshe was appointed as the acting NDPP.	
19	11 October 2007	Report of the Amnesty Task Team	Calata affidavit annexure "LC1"
20	2007 - 2009	Former President Mbeki established a Special Dispensation to process applications for pardons by offenders who had not participated in the TRC amnesty process but who had claimed their offences were politically motivated. A multi-party Pardons Reference Group (PRG) was established to consider applications for pardons for politically motivated crimes committed before June 1999.	<i>CSVR & Others v President of the RSA & Others</i> , Case no. 15320/09, North Gauteng High Court
21	December 2008	The high court declared the 2005 amendments to the Prosecution Policy be inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid.	<i>Nkadimeng & Oths v NDPP and Others</i> [2008] ZAGPHC 422
22	February 2010	In <i>Albutt</i> , Ngcobo CJ held at para 61, that "the principles and the spirit that inspired and underpinned the TRC amnesty process must inform the special dispensation process whose twin objectives are nation-building and national reconciliation."	<i>Albutt v Centre for the Study of Violence and Reconciliation & Oths</i> 2010 (3) SA 293 (CC)
23	May 2015	Following the delays in the investigation, the Simelane family filed a court application seeking a finalisation of the investigation into Nokuthula Simelane and the NPA's prosecutorial decision. The supporting affidavits of Adv V Pikoli and Adv A Ackermann provide accounts of political interference, by people including then Minister of Justice Mabandla and the circumstances on which the investigation was stopped.	<i>Nkadimeng v NDPP and others</i> , 3554/2015 (application to compel)

	DATE	EVENT	REFERENCE
24	October 2017	Ahmed Timol inquest judgment, (IQ01/2017). The Judge recommended that the former security branch officers Els and Sons be prosecuted for perjury.	The re-opened inquest into the death of Ahmed Essop Timol [2017] ZAGPPHC 652
25	June 2018	Coetzee judgment handed down. The SAPS were ordered to pay the legal fees of the former Security Branch officers accused of the murder of Nokuthula Simelane in 1983. The judgment was not appealed.	<i>Coetzee & Others v Minister of Police & Others</i> , 2018
26	3 April 2019	NDPP decision that all TRC matters to be migrated from PCLU to relevant provincial DPPs.	
27	2019	The Zondo Commission decided to accept representations regarding the political interference in the prosecution of TRC cases and related matters as a form of State Capture.	Representations by Lukhanyo Calata & accompanying chronology
28	2019	Establishment of the Apartheid-era Victims Family Group (AVFG), with the Our primary objective was for families to have their own voices and not to be only represented by legal counsels.	
29	February 2019	Former TRC Commissioners call on President Ramaphosa to offer an apology to apartheid-era victims and to appoint a commission of inquiry into the political inference in the investigation and prosecution of TRC cases	https://www.scribd.com/document/398985821/TRC-members-write-letter-to-Ramaphosa#from_embed
30	August 2019	Minister of Justice released a press statement announcing that the inquests into the deaths of Aggett and Haffejee would be reopened.	
31	2019 - 2021	Following his indictment in 2018, Joao Rodrigues filed an application for a permanent stay of his prosecution. In 2019 the Full Bench of the High Court (and the SCA in 2021) dismissed his application. The Macadam affidavit (dd. November 2018) recalls meetings with the Directorate of Special Operations (DSO), in which he was informed that the DSO would not investigate any TRC cases. In the affidavit, Macadam confirmed that a moratorium had been placed on all TRC investigations and prosecutions. In 2017, Macadam discovered a number of documents further indicating political interference, including a secret memorandum by Adv Pikoli to the Minister of Justice Mabandla.	<i>Rodrigues v National Director of Public Prosecutions and Others</i> 2019 (2) SACR 251 (GJ); <i>Rodrigues v National Director of Public Prosecutions and Others</i> 2021 (2) SACR 333 (SCA)
32	June 2021	NPA and the DPCI issue press statement concerning the new approach to investigations and prosecutions of the cases arising from the TRC process	NPA press statement dd 27.06.2021

	DATE	EVENT	REFERENCE
33	July 2021	The application to compel in the Cradock 4 matter, following the NPA's failed to make a prosecutorial decision.	Case No. 3S447/21
		The Justice Portfolio Committee requested that the NDPP provides a progress on the TRC prosecutions and related matters to the Committee every 6 months.	Parliamentary Monitoring Group (PMG) Reports
37	August 2021	Reopened inquest, Hoosen Haffejee .	
38	6 September 2021	NDPP establishes separate portfolio within the Office of the DNDPP, the TRC Component.	
39	2022	Reopened inquest, Abdullah Haron .	Case No. I01/2022
40	4 March 2022	Neil Aggett inquest judgment, 445/2019; 139/1985. Allegations of intimidation made by the investigating officer, Nel, from his colleagues in DPCI.	Re-opened Inquest into the Death of Dr Neil Hudson Aggett [2022] ZAGPJHC 110
41	May 2022	The question of the payment of legal costs re-emerged in the trial proceedings in the COSAS 4 and Caiphus Nyoka matters. The high court confirmed the judgment in <i>Coetzee</i> above.	
42	June 2022	NDPP Batoyi informed the Justice Portfolio Committee that the PCLU was no longer in existence.	
43	October 2022	NPA and DPCI issued a joint statement that formal inquests will be held in respect of the deaths of Ntombikayise Kubheka, Musawenkosi Phewa, Zamukwenzani Bright Mlobeli/Sokhulu, and Jameson Ngoloyi Mngomezulu	NPA press statement dd 24.10.2022

LIST OF PRIMARY DOCUMENTS AND AFFIDAVITS CONSIDERED

In addition to the briefing sessions and consultations carried, we were provided with following documents, reports and affidavits to consider. The most relevant of which are listed below.

1. Affidavits:

- 1.1. Adv Pikoli dated 6 May 2015
- 1.2. Adv Ackermann dated 7 May 2015
- 1.3. Adv Pretorius dated 4 February 2019
- 1.4. Mr Calata dated 29 August 2019
- 1.5. Mr Cajee dated 6 June 2023

2. Documents and Reports:

- 2.1. TRC Matters presentation to Adv Ntsebeza SC and team, 6 March 2023
- 2.2. NPA Presentation to Parliament Portfolio Committee on TRC Cases, 1 June 2022
- 2.3. NPA TRC Report: February 2023 (Confidential)
- 2.4. Ministerial Memorandum from NDPP Batohi to Minister Lamola, 5 October 2022
- 2.5. KZN DPP, TRC accountability briefing session outline, April 2023 (Confidential)
- 2.6. DPP KZN, various reports on TRC Matters April 2023 (Confidential)

ADDENDUM TO THE OPINION

1. Following the finalising of the Opinion, we received correspondence from the Client raising a number of concerns with certain facts recorded.
2. We appreciate the opportunity to clarify our Opinion and to address the concerns raised by the NPA and the MPTT. We present this addendum to the Opinion in which we set out the revisions made. We trust that this will clarify what has been interpreted as an unfair indictment against the work of the MPTT.

3. **Ad par 9.3 (p 6)**

- 3.1. This paragraph forms part of the executive summary and is copied directly from our recommendations. We do not respond to this concern here but rather at the appropriate paragraph in the body of the Opinion.

4. **Ad para 9 (p 11)**

- 4.1. We are advised that the statement "*between September 2003 and 2017 there was not a single prosecution of a TRC related matter*" is incorrect. We noted three cases that were finalised between 2003 and 2017 and the sentence has been corrected.

- a) *S v Ferdi Barnard*: This case was finalised in 1998, ie before 2003.
- b) *S v Eugene de Kock*: This case was finalised in 1997, ie before 2003 (see Opinion p 11, fn 7)
- c) *S v Gideon Niewoudt and two others*: Charged in 2004, died in 2005
- d) *S v Wouter Basson*: This is noted in the Opinion p 11 footnote 7
- e) *S v Magnus Malan and others*: This case was finalised in 1998, ie before 2003
- f) *S v Kwezi Ngoma and others*: The date on which this case was finalised could not be confirmed
- g) *S v Aron Tyani and another*: This case was finalised in 2005.
- h) *S v Eugene Terblance*: This case was finalised in 2003.
- i) *S v Blani*: This case was finalised in 2005

5. Ad para 67.2 (p 35)

5.1. This paragraph lists the concerns raised by the TRC Component.

5.2. The MPTT has requested that this sentence be redacted from the Opinion. There is no reason that the particular concern should be redacted from the Opinion when it accurately records the views of the TRC Component. The sentence, therefore, is retained in the Opinion.

6. Ad para 70 (p 36)

6.1. The MPTT raises this paragraph as a concern but no context is provided as to what aspect of the paragraph is incorrect or misleading. The MPTT has stated that its work goes beyond the work of the TRC Component and stated that its records do not relate to intelligence records but rather to *"mortuary records and cemetery records, post-mortems, forensic reports, with a small subset of LCRC (formerly PVAK) photographs and dockets in respect of missing persons. The MPTT faces exactly the same challenges regarding tracing of old documents as the current TRC investigators"*.

6.2. The paragraph does not suggest that the MPTT hold classified, national intelligence information. The reference is only to "intelligence" or information about inquests.

6.3. There is no reason for the redaction or removal of this paragraph.

7. Ad para 140.1 (p 43)

7.1. This paragraph is said to *"contain[s] seriously erroneous information regarding the composition and location of the MPTT and the nature of its records. The overwhelming bulk of its records are not relevant for TRC investigations and therefore electronic scanning will not assist their work and would take an enormous amount of time. This will be a future project of historical importance. Relevant records have been shared"*.

7.2. To contextualise this paragraph, the team has included a new footnote 62 clarifying the MPTT and its mandate as obtained from the NPA records. The following text is included:

“The MPTT was established in 2005 and is responsible for locating the graves of the deceased under apartheid, exhuming their remains, and identifying the remains for reburial to take place. They have uncovered the remains of 138 missing persons as of 20 April 2018. The above overview is taken from the advice given to us.”

8. Ad para 150.3 (p 70)

8.1. The MPTT states that the recommendation is inaccurate, that it holds no “intelligence” information and that the recommendation does not specify to whom the MPTT is to account. The MPTT emphasised that, *“Any document that has relevance to a TRC investigation that we are made aware of is shared with the relevant investigator or prosecutor”*.

8.2. The NPA requested the Opinion, the MPTT is a component of the NPA, and therefore the MPTT should account for its work to the NPA. To the extent that the MPTT has already accounted for its work by the time that this Opinion was finalised and had already convened meetings with the KZN TRC Component to resolve any misunderstandings and concerns of that unit, the recommendation may be considered to be satisfied.

8.3. To provide additional clarity, the team has inserted the words, *“and/or information”* into para 150.3 after the word “intelligence”.