

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

CASE NO.: 72747/2016

In the application of:

**THEMBISILE PHUMELELE NKADIMENG**

Intervening Party

to intervene as the Fourth Applicant in the matter between:

**WILLEM HELM JOHANNES COETZEE**

First Applicant

**ANTON PRETORIUS**

Second Applicant

**FREDERICK BARNARD MONG**

Third Applicant

and

**THE MINISTER OF POLICE**

First Respondent

**THE PROVINCIAL COMMISSIONER FOR GAUTENG,**

**SOUTH AFRICAN POLICE SERVICE**

Second Respondent

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Third Respondent

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Dated at Johannesburg this \_\_\_\_ day of February 2017

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**To:**

THE REGISTRAR OF THE  
ABOVE HONOURABLE COURT  
PRETORIA

**And to:**

Steyn Wilson Attorneys  
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**And to:**

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ENQ: SI Mathebula

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<b>ANTON PRETORIUS</b>	Second Applicant
<b>FREDERICK BARNARD MONG</b>	Third Applicant

and

<b>THE MINISTER OF POLICE</b>	First Respondent
<b>THE PROVINCIAL COMMISSIONER FOR GAUTENG, SOUTH AFRICAN POLICE SERVICE</b>	Second Respondent
<b>NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS</b>	Third Respondent

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**NOTICE OF APPLICATION TO INTERVENE  
IN TERMS OF UNIFORM RULE OF COURT 12**

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**PLEASE TAKE NOTICE** that Thembi Nkadimeng (“Nkadimeng”) intends to make application to this Court on ..... at 10h00 or so soon thereafter as counsel may be heard, for orders:

1. Granting Nkadimeng leave to intervene as the Fourth Applicant in case number 72747/ 2016 in terms of Rule 12 of the Rules of this Court;
2. That the proceedings under case number 72747/ 2016:
  - a. be heard as a matter of semi-urgency; and
  - b. that any failure to adhere to the Rules of the above Honourable Court relating to form, time, periods, service and provisions of the record be and is hereby condoned; and
  - c. that new shortened timeframes be imposed for the filing of all future process and heads of arguments and setting down the hearing of this matter on an expedited basis.
3. Should the relief in prayer one above be granted, an order compelling the First and/ or Second Respondents to pay the reasonable legal defence costs of accused two to four in the criminal matter of **The State v MT Radebe and 3 Others (Case No.: CC19/16)**, who are the First to Third Applicants in case number 72747/ 2016.
4. Ordering that the National Director of Public Prosecutions ("NDPP") be joined as the Third Respondent, and directing the First to Third Applicants to serve a full set of the papers filed of record in case number 72747/ 2016 on the NDPP

within 7 (seven) court days from the date of this honourable Court's order so that he may consider his position vis-à-vis this matter; and directing that:

- a. Should the NDPP decline to participate in this matter he shall file a notice of intention to abide within 5 (five) court days from the date of service of the papers filed of record.
  - b. Should the NDPP wish to file affidavits in this matter he shall do so within 10 (ten) court days from the date of service of the papers filed of record.
5. Directing that the costs of this application are to be paid by the First Respondent, together with any other party that opposes this application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel; and
6. Further and/ or alternate relief.

**TAKE NOTICE FURTHER** that the affidavits of **THEMBISILE PHUMELELE NKADIMENG, MORAY HATHORN, DUMISA BUHLE NTSEBEZA** and **FRANK KENNAN DUTTON** and the annexures attached thereto will be used in support of this application.

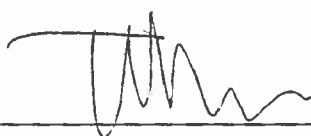
**TAKE NOTICE FURTHER** that NKADIMENG has appointed the offices of the attorneys described below at the address set out hereunder, at which it will accept service of all notices and process in these proceedings.

**TAKE NOTICE FURTHER** that if any applicant or respondent intends opposing this application then he or she is required -

- (a) to notify the intervening party's attorney in writing within 5 (five) days of receipt of this interlocutory application;
- (b) and to file any answering affidavits within 10 (ten) days of the filing of any notice of intention to oppose,

and further that you are required to appoint in such notification an address referred to in rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

DATED AT JOHANNESBURG THIS <sup>7<sup>th</sup></sup> 16<sup>th</sup> DAY OF FEBRUARY 2017



**WEBBER WENTZEL**

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c/o Stephen Leinberger

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To:

THE REGISTRAR OF THE  
ABOVE HONOURABLE COURT  
PRETORIA

And to:

Steyn Wilson Attorneys  
Attorneys for First, Second and Third Applicants  
C/o WA Du Plessis Attorneys  
Co/ Wagner Muller Vermaak Attorneys  
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**Ref: WA Du Plessis/ Lieb/ WW3008**

**And to:**

**The State Attorney**

**SALU Building**

**316 Thabo Sehume Street**

**Cnr Francis Baard and Thabo Sehume Streets**

**Private bag x91, Pretoria 0001**

**Ref: 6927/16/z51**

**Tel: 012 309 1627**

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**ENQ: SI Mathebula**

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Second Respondent

---

**FOUNDING AFFIDAVIT**

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I, the undersigned

**THEMBISILE PHUMELELE NKADIMENG**

state under oath as follows:

*M.S*

*TP*

## INTRODUCTION

1. I am an adult female. I am the Executive Mayor of the City of Polokwane. I reside at 82 General Viljoen Street, Welgelegen, Polokwane. I am the Intervening Party and, if this Court grants leave, the Fourth Applicant in this matter. I act in the interests of myself and my family.
2. The facts herein contained are, save where otherwise stated or appears from the context, within my own personal knowledge and belief, and are true and correct. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which advice I accept as correct.
3. I am the sister of the late Nokuthula Aurelia Simelane ("Nokuthula") who was an underground operative of the African National Congress and who was abducted, viciously tortured and enforcedly disappeared in a failed "kopdraai" operation by the South African Security Branch ("SB") of the former South African Police ("SAP") in 1983. Some 33 years later, during 2016 the Applicants were charged with her murder.

## THE PURPOSE OF THE AFFIDAVIT

4. The purpose of this application to intervene is to:
  - 4.1. seek relief converting this litigation into semi urgent proceedings with shortened timeframes in order to minimise the delay in the holding of the already long delayed criminal trial involving the applicants; and

M.S

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- 4.2. secondly, to seek an order compelling the First and/ or Second Respondents to pay the reasonable legal defence costs of the applicants; and
- 4.3. lastly, to join the National Director of Public Prosecutions as the Third Respondent.
5. First to second Respondents are as described in paragraphs 4 and 5 of the founding affidavit of Willem Helm Johannes Coetzee.
6. The Third Respondent is the National Director of Public Prosecutions (“the NDPP”), appointed by the President in terms of s 10 of the National Prosecuting Authority Act 32 of 1998 (“the NPA Act”), and who, in terms of s 5 of the NPA Act, is the head of the Office of the National Director of Public Prosecutions, which in turn is a component of the Single National Prosecution Authority (“the NPA”) established in terms of section 179 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The Third Respondent’s address for service is care of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria, Gauteng.
7. This case is about my late sister, Nokuthula. As mentioned above, she was brutalized by the applicants and other members of the SB in an official and authorised police operation in 1983 and disappeared while in their control. The police eventually opened an investigation docket in 1996 under case number: **Priority Investigation: JV Plein: 1469/02/1996.**

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More than 33 years after her disappearance, and notwithstanding countless pleas, my family and I are still waiting for answers and justice.

8. I submit that this gross neglect represents a deep betrayal of Nokuthula who gave her life for the struggle for liberty and democracy in South Africa. It has also added significantly to the emotional trauma and anguish of myself, my family and our wider community.

### **STRUCTURE OF THIS AFFIDAVIT**

9. The scheme of this affidavit is as follows –

9.1. First, I set out the requirements for leave to intervene;

9.2. Second, I set out the background to this application and an overview of Nokuthula's story, which demonstrates my direct and substantial interest;

9.3. Third, my grounds for semi-urgency, which includes the:

9.3.1. Interests of justice;

9.3.2. Constitutional obligation to act without delay;

9.3.3. Breach of rights to human dignity and life;

9.3.4. Violation of the rule of law.

M.S

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- 9.4. Fourth, the legal obligation on the First and Second Respondents to pay the criminal defence costs of the Applicants;
- 9.5. Fifth, the failure to join the National Director of Public Prosecutions;  
and
- 9.6. Sixth, matters arising from the Applicants' founding papers.

### **APPLICATION TO INTERVENE**

10. This is an application to intervene in terms of Rule 12 of the Uniform Rules of Court as Fourth Applicant in this matter. I am required to join in the hearing of this case as Fourth Applicant in order to pursue the relief I seek. I am advised and submit that there is no other option open to me.
11. The relief I seek is, in large part, similar to the relief sought by first to third applicants and is largely grounded on the same facts and principles of law.
12. I am advised that the test for intervention under the common law and under Rule 12 is whether the applicant for intervention has a direct and substantial interest in the subject matter of the litigation. Since I invoke constitutional rights in support of my application, I am advised that the ultimate test whether or not to allow intervention is whether it is in the interests of justice to grant leave to intervene.

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13. For the reasons set out below I submit that I meet both the common law and constitutional tests for intervention.
14. Furthermore, I intend to demonstrate that the applicants are entitled to have their legal defence paid by the SAPS since:
  - 14.1. The SAPS is the inheritor-in-title to the erstwhile South African Police (SAP) and the applicants were acting in the course and scope of their employment with the SAP when they committed various crimes against Nokuthula;
  - 14.2. The applicants were mere foot soldiers acting on orders of their superiors, who in turn, acted on instructions of the commanding officers of the former Security Branch and SAP;
  - 14.3. The abduction, torture, murder and concealing of the remains of Nokuthula Simelane fell squarely within the *modus operandi* of the Security Branch.
  - 14.4. There was a sufficient connection between the unlawful conduct of the Applicants and the work of the police at that time. They were indeed working within the scope of their employment as members of the Security Branch.
  - 14.5. The intransigence of First and Second Respondents is causing yet a further and unjustifiable delay in the start of the criminal trial of the

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Applicants.

## BACKGROUND

15. In order to set out why I have a direct and substantial interest in this matter I need to provide an overview of my sister's story.
16. In 1983, Nokuthula was a twenty-three year old university graduate and was a courier for Umkhonto we Sizwe ("MK"), the armed wing of the African National Congress ("ANC"), moving between Swaziland and South Africa. She was betrayed by one of her own and was abducted on 11 September 1983 in the parking garage of the Carlton Centre and thereafter brutally tortured by the Security Branch ("SB") of the former SAP. Notwithstanding extensive efforts of the SB, involving unrelenting callous and merciless torture, Nokuthula refused to become an informer or 'Askari' for the SB, which meant that she could never be released alive.
17. Nokuthula was never seen again. We know from the TRC hearings that my sister suffered terribly at the hands of the SB. We know that she refused to collaborate with the forces of Apartheid. For this she paid the ultimate price. My family and I have been searching for answers for more than 30 years. We have pleaded with authorities to take the necessary action to bring closure to this case. These pleas fell on deaf ears. Action was only taken after we were forced to go to court in 2015 to compel the National Prosecuting Authority to either conduct an inquest or prosecute

M. S

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the accused.

18. I have always refused to give up the search for the truth and justice. My family and I have not rested since we learned that my sister went missing. My family has not had any closure since the matter has never been brought to finality. My father and more recently my brother, both died not knowing whatever happened to Nokuthula. We know the most horrendous things about what she suffered. We know from evidence in the police docket and before the TRC Amnesty Committee that her hands and feet were cuffed virtually all the time. Her sleep was kept to a minimum. She was repeatedly punched, kicked and slapped. A bag was repeatedly pulled over her head suffocating her. She was given electric shocks. She was thrown into a zinc farm dam. The conditions of her captivity were dehumanising. She was not provided with any toiletries and sanitary towels to attend to basic hygiene needs. She was denied basic medical assistance, such as pain killers or antiseptic creams, to apply to her injuries inflicted by the police. When she was last seen alive by two of her black SB captors she could not walk unaided and her face was so badly swollen and injured she was unrecognisable.

19. It stands to reason that she could never be returned to society in such a grim state and that she would have to be eliminated and disposed of in a manner that would never implicate the police. This was entirely within the standard *modus operandi* employed by the SB at this time, especially in respect of failed "kopdraai" operations. In this regard I refer to the supporting affidavits of Dumisa Ntsebeza and Frank Dutton, which will

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accompany this affidavit.

20. But we still don't know for certain how she died, and where her body is today. All we know is that she was subjected to the most inhumane and brutal torture. We have spent three decades looking for Nokuthula. We even appointed private detectives to assist us. Until we find her remains, or get answers about what really happened to her, we remain trapped in the past.
21. In 2001, the Amnesty Committee of the Truth and Reconciliation Commission ("TRC") concluded that the white SB officers (the Applicants in this matter) had lied to the Commission about what had happened to Nokuthula during her unlawful captivity, in particular they lied about the severity of the torture she sustained and the duration thereof. While the white officers were denied amnesty for Nokuthula's torture they were granted amnesty for her kidnapping (**TRC Amnesty Committee Finding AC/2001/185: Abduction and Torture of Nokuthula Simelane**). The finding is available online<sup>1</sup> and a copy can be supplied on request.

### Struggle for justice

22. We did not expect the former South African Police to investigate themselves. However, we firmly believed that the new democratic South Africa would take the necessary steps. We were wrong as it took the family many years to force the authorities of the democratic South Africa

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<sup>1</sup> <http://www.justice.gov.za/trc/decisions%5C2001/ac21185.htm>

M. S

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to consider a prosecution. This was the second betrayal of Nokuthula and everything she stood for. This betrayal cut the deepest as it seemed that even her own comrades, who were now in government, sought to sweep things under the carpet. This deprived me and my family of closure and our right to dignity. My father, Matthew Simelane, went to his grave in 2001 without knowing what happened to Nokuthula. My brother, Antonio Lungelo Simelane, died last year after suffering from years of anxiety and depression. My mother, Sizakele Ernestina Simelane, now 76 years old and sick with nervous tension, fears that she will die without knowing; and without burying Nokuthula's remains with the dignity she deserves.

23. The new police service, the South African Police Service (SAPS) and the NPA could have pursued this case. However, even though a police docket was opened in 1996 little or no official action followed. After the amnesty decision the matter was referred to the NPA. During 2005 my legal representatives urged the NPA's Priority Crimes Litigation Unit ("PCLU"), which was responsible for the cases referred by the TRC to the NPA, to take various initial steps, including:

23.1. Prosecuting suspects who did not apply for amnesty for kidnapping, since kidnapping is listed as one of the exceptions to the 20 year prescription rule in section 18 of Act 51 of 1977;

23.2. Preferring charges of defeating the ends of justice against First and Second Applicants for allegedly intimidating a junior officer, Sergeant Lengene, into making a false statement and for attempting to coach

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a witness, Norman Mkhonza, into making a false statement, which were indicative of a cover up of Nokuthula's murder.

24. These requests were ignored. When I subsequently returned to the PCLU I was advised that their hands were tied as they were waiting for a new policy to deal with the so-called political cases. Until this new 'policy' was issued an effective moratorium on pursuing the TRC cases was in place. When the amendments to the NPA's Prosecution Policy emerged in late 2005 it essentially created a backdoor amnesty for perpetrators of so-called political crimes. It gave such perpetrators, like my sister's killers, a second opportunity to escape justice.
25. Together with the widows of the Cradock Four, the young freedom fighters murdered by a police hit squad in 1985, I went to court to challenge the policy in the matter of **Nkadimeng & Others v The National Director of Public Prosecutions & Others** (TPD case no 32709/07). In 2008 the High Court struck down the amendments to the Prosecution Policy, declaring them to be absurd and unconstitutional. A copy of the judgment of Legodi J is available online<sup>2</sup> and a hard copy can be made available on request.
26. We thought that the striking down of the amendments to the Prosecution Policy meant that the path was eventually cleared for justice to take its course. Again we were wrong. This time the prosecutors claimed that the police were refusing to provide investigators. Yet again they said their

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<sup>2</sup> <http://www.saflii.org/za/cases/ZAGPHC/2008/422.html>

hands were tied. It took a high-level intervention for an investigating officer to eventually be appointed to the case in 2010; but the docket had apparently gone "missing".

27. By the end of 2012, even after finding the docket, there was no progress. It was clear to me that the authorities were not taking Nokuthula's case seriously. As mentioned, they even declined to pursue those police officers involved in the kidnapping who did not apply for amnesty. At the beginning of 2013, the 30<sup>th</sup> year of Nokuthula's disappearance, and 18 years since the opening of the police docket, I gave up on a prosecution and demanded the holding of a judicial inquest into her death. This request was refused. Remarkably, the NPA claimed that their investigations were still not yet complete.
28. Since January 2013 my lawyers and I engaged in extensive communications with the NPA and the SAPS in an effort to persuade them to finalize their investigations or at least refer the case to a judicial inquest. For years, these efforts came to naught.
29. Out of sheer frustration, on 20 May 2015 I filed an application before the High Court in Pretoria in the matter **Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others, Case Number 35554/2015**. I sought an order compelling the South African Police Service (SAPS) to finalize their investigations and an order compelling the National Director of Public Prosecutions (NDPP) to make a decision in my sister's case. A copy of the notice of motion in that

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application is annexed hereto marked "TN1". These papers set out the very extensive efforts my family and I made to persuade the authorities to take action in Nokuthula's case over decades. The full papers are available online<sup>3</sup> and a hard copy can be supplied on request.

30. Only because of that case did the authorities agree to take action. This resulted in murder and kidnapping charges being preferred in the indictment of **The State v MT Radebe and 3 Others (Case No.: CC19/16)** (" the indictment") dated 14 March 2016. Accused numbers two to four are the applicants one to three herein. A copy of the indictment can be made available on request.
31. My application launched in 2015 disclosed evidence of gross political interference in the operations of the NPA (as per the supporting affidavits of Advocates Vusi Pikoli and Anton Ackermann SC) and explained how the political cases from the past, including Nokuthula's case, were deliberately suppressed.
32. The launching of this application eventually prompted the NDPP to take action which resulted in the issuing of the indictment described above. As a result of this step I instructed my lawyers to hold the civil litigation in abeyance.

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<sup>3</sup> The full papers (without annexes) can be downloaded at: <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africa-challenging-mpa-inaction-for-trc-related-prosecutions/>. The full papers with annexes can be downloaded at: [http://www.saha.org.za/news/2011/May/press\\_release\\_sactj\\_press\\_release\\_on\\_launch\\_of\\_the\\_nokuthula\\_simelane\\_matter.htm](http://www.saha.org.za/news/2011/May/press_release_sactj_press_release_on_launch_of_the_nokuthula_simelane_matter.htm) (Registration required).

## FURTHER DELAY

33. The accused first appeared in court on 26 February 2016 when they were granted bail of R5 000 each in the Pretoria Regional Court and have appeared subsequently on 4 occasions, 29 March 2016, 25 July 2016, 20 September 2016 and 25 November 2016. The reason for the ongoing postponements was to allow the applicants an opportunity to settle a dispute that had arisen between them and the SAPS on the question of legal costs. The police refused to pay the legal defence costs of the accused, and as a result the applicants launched the proceedings in this matter.
34. On 4 May 2016 the Provincial Commissioner for Gauteng SAPS advised the Applicants that their applications for assistance with their legal costs had been refused.
35. When it became clear to me that the start of the criminal trial was going to be delayed because of the dispute between the Applicants and the First and Second Respondents over the question of legal costs I instructed my attorney, Moray Hathorn of Webber Wentzel, to address a letter to Advocates Raymond Mathenjwa and Adele Barnard, the prosecutors in Nokuthula's case, to request them to vigorously oppose a long delay. This letter was dated 15 September 2016 and was transmitted on the same date. I quote from this this letter:

M. S

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**“Our clients have advised us that they have been waiting for resolution in this matter for more than 33 years and that they will not support any further long delay in this case. They have instructed us to request you to communicate to the judge their strong and vigorous objections to a further delay in this matter.”**

36. As the letter contains privileged information not relevant to these proceedings I have not attached it to this affidavit, but the confirmatory affidavit of my attorney, Moray Hathorn (“Hathorn”), will accompany this affidavit.
37. On 21 September 2016, Adv Mathenjwa responded and advised that before the NPA *“could enter this funding area”* the prosecution team would need to consult with the Directorate. No further communication has been received from the NPA in this regard. As this letter contains privileged information, which is not relevant to these proceedings, I have not attached it to this affidavit.
38. I also requested Hathorn to approach the Minister of Police to urge him to pay the reasonable legal costs of the criminal defence of the accused. This letter was transmitted to the Minister on 15 September 2016 and is annexed hereto marked **“TN2”**.
- 38.1. In this letter Hathorn pointed out that the litigation over legal costs *“could potentially delay the start of the trial for a considerable period of time, perhaps a year or longer.”*

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38.2. Hathorn advised the Minister that since *"the family has been struggling for closure for more than 33 years they strenuously object to any further delay"*.

39. Hathorn submitted that:

39.1. the crimes committed by the accused fell squarely within the course and scope of their employment with the erstwhile Security Branch of the SAP;

39.2. the Goldstone Commission and the Truth and Reconciliation Commission had concluded that *"the Security Branch was in large part a part a criminal enterprise aimed at neutralising the threat to the Apartheid state"*;

39.3. former senior police officers, including commanding officers of the Security Branch and the SAP have admitted under oath that the SB acted unlawfully on a routine basis;

39.4. the abduction, torture, murder and concealing of the remains of Nokuthula fell squarely within the modus operandi of the Security Branch and that:

**"The accused were mere foot soldiers who acted on orders of their superiors, who in turn, acted on instructions of the**

M.S

TP

**commanding officers of the former Security Branch and SAP. The real decision makers in the Simelane matter, and many other cases, have yet to face justice.”**

39.5. Unlawful conduct on the part of police members did not absolve the police from paying legal fees where there was sufficient connection between the unlawful conduct and the work of the SAP’s Security Branch.

40. The Minister did not respond to this letter.

41. In a further letter to Advocates Mathenjwa and Barnard (“the prosecutors”), dated 24 October 2016 my attorney, advised them that he had written to the Minister of Police urging him to pay the legal costs of the accused and encouraging them *“to similarly communicate with the Minister of Police”*.

42. Hathorn advised the prosecutors that the review application of the accused had not been brought on an urgent or semi urgent basis, notwithstanding the fact that in their correspondence with the police they had described their complaint as an urgent one. He advised further:

**“We are of the view that both our client and the NPA have a direct and substantial interest in the civil proceedings given the extraordinary long delay in getting the criminal case off the ground. In our view the failure to join the complainant and the NPA most likely constitutes a material non-joinder.**

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**We are currently taking instructions on whether to intervene in the civil matter and we suggest that the NPA also considers a possible intervention.”**

43. As this letter contains privileged information, which is not relevant to these proceedings, I have not attached it to this affidavit. Hathorn received no response to this letter.
44. In order to avoid unnecessary litigation I decided to wait for the outcome of the third hearing date on 25 November 2016. I was hoping that the prosecution would vigorously oppose a long postponement and that the accused would be given a period of no more than 3 or 4 months to resolve the question of their legal representation. This did not happen. As far as I am aware the prosecutors put up no vigorous opposition to a long postponement.
45. At the hearing, the criminal trial was postponed for some 8 months to 28 July 2017. I am advised that this is a provisional date that is dependent on the outcome of the civil litigation. It is more than likely that this will not be the last postponement. I am advised that the Second Respondent has filed the record and the Applicants have filed a supplementary founding affidavit. The Respondents have to file their answering affidavits on 30 January 2017. In the event of appeals taking place I am advised that this matter could drag on for 18 months to 2 years.
46. When I learned that the postponement was for 8 months I instructed

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Hathorn to apply to Court for leave to intervene in order to prevent such a long delay.

47. Although the papers and annexes filed by the applicants are replete with assertions that the resolving of the question of legal costs was urgent, they did not see fit to bring their application on the basis of urgency or semi urgency.

47.1. The correspondence addressed to the SAPS by the attorneys for the accused (contained in annexes "C2", "C3" and "C12" to the founding affidavit) were all marked as urgent.

47.2. In paragraph 24 of the founding affidavit, Coetzee describes their complaint as an urgent one.

47.3. In paragraph 58 Coetzee asserts that the criminal matter "*must be disposed of as soon as possible without any further delay*".

48. The applicants are aware that my family has been waiting for justice for more than 3 decades. Accordingly, the launching of an application in terms of the normal time limits, that could take months or years to finalize was done, in my respectful view, with the aim of further delaying the start of the trial.

49. When this long postponement was granted it became clear to me that neither the applicants nor the National Prosecuting Authority appeared to

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be interested in ensuring that justice is done without unreasonable delay, leaving me with no choice but to seek leave to intervene in these proceedings.

50. In the unlikely event that the civil litigation is finally resolved on 28 July 2017 and that the criminal trial proceeds on that day, the accused would have had some 17 months in which to arrange legal representation. This is an inordinate and excessive period of time in which to arrange a legal defence.

51. In the circumstances I submit that I have amply demonstrated that I have a direct and substantial interest in these proceedings. I beg this Honourable Court to come to the family's rescue in this regard.

#### **GROUND FOR SEMI-URGENCY**

71. I submit that I have a right to have these proceedings heard on an expedited basis. My rights are premised upon the following grounds:

- 71.1. The interests of justice and the need to prevent a grave injustice;
- 71.2. The constitutional obligation to act without delay;
- 71.3. My entitlement under the Constitution to have various rights respected, including my right to human dignity; and
- 71.4. The rule of law.

#### **The interests of justice**

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72. I am advised that the superior courts of South Africa have certain inherent powers to be exercised in the interest of the proper administration of justice. This includes when it may be necessary to act in order to prevent a grave injustice.
73. I submit that the exceptional circumstances of this case warrant the exercising of the Court's inherent powers to expedite these proceedings and order that they be held on a semi-urgent basis.
74. This is so because of the inordinate delay that has already been experienced in my late sister's case, lasting decades. In the circumstances, there was a clear duty on all the parties to expedite these proceedings.
75. The further delay seriously undermines the administration of justice, as well as my interests and that of my family.

#### **Constitutional obligation to act without delay**

76. I am advised that there is a constitutional obligation on the NPA and the courts to perform their duties without delay. Section 237 of the Constitution provides "*All constitutional obligations must be performed diligently and without delay.*" The prosecutorial function, the administration of justice and the adjudication process involve the exercise of constitutional powers and therefore constitute constitutional obligations.

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77. I submit that public accountability and social trust are built upon decision making by public bodies which are reasonable and responsive. The past delays in finalizing my sister's case is compounded by the latest delay. These delays have denied us our substantive rights. These rights are set out below.

### **Human Dignity**

78. The unreasonable and prolonged delay in finalizing my sister's case has violated my right to dignity. The closure of a most painful past is now even further away. Such lapses have denied me and my family, as well as that of our wider community, the acknowledgement of our intrinsic worth as human beings. For years, it has felt and still feels like Nokuthula's death is of no consequence to the authorities.

79. Those responsible for the inordinate delays have disrespected my family's rights as victims. Ultimately, the prolonged delay infringes upon my right to dignity, and that of my family, in that it:

79.1. protects the perpetrators responsible for the kidnapping, torture and enforced disappearance of my sister at the expense of me and my family;

79.2. causes suffering to me and my family by denying us justice without undue delay;

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- 79.3. prevents me and my family from reaching closure;
- 79.4. dishonours the respect, dignity and value of my family in the wider community
- 79.5. demeans South African society as a whole by betraying the constitutional compact made with victims as enshrined in the epilogue to the Constitution of the Republic of South Africa Act 200 of 1993 ("the Interim Constitution") and by undermining the purpose and spirit behind the TRC amnesty process.

#### **Right to life**

80. The right to life as protected in section 11 of the Constitution is infringed as the prolonged and ongoing delays severely undermines the prospects of a successful prosecution of the perpetrators who infringed this right by murdering my sister. The delay also devalues the life of my sister who gave her life for our freedom and South Africa's democracy.

#### **Rule of law**

81. The fact that serious crimes from the past, such as the kidnapping, torture and murder of my sister, have not been treated with any seriousness, implicates the rule of law, as upheld in section 1 of the Constitution.

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82. Serious crime committed by agents of the State should be viewed in a particularly serious light and addressed expeditiously. During apartheid the perpetrators of state sponsored crime enjoyed almost total impunity. The failure of the new South African State to timeously finalize such cases is deeply offensive to the rule of law.
83. Crime, particularly serious crime, undermines the fabric of our society and violates several fundamental rights. The State has a constitutional duty to expeditiously address crime which arises from its duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights.'
84. The obligation to ensure that justice is done without undue delay is also required in terms of the NPA's own Prosecution Policy which states that the maintenance of law and order within a human rights culture requires "*effective and swift prosecution*".
85. I submit that there is no constitutional justification for the limiting of the above rights.

### **Conclusions on grounds for semi-urgency**

86. I submit that I have demonstrated the unlawfulness of the ongoing delays. I have also demonstrated the serious undermining of the prospects of justice and the reaching of the truth with every day that goes by. In the circumstances I submit that I have established a clear right to the holding of these proceedings on an expedited or semi-urgent basis. .

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87. I submit further that I have demonstrated that the delays and the failure to take the said decisions have infringed my constitutional rights and that further delay will seriously prejudice my rights and that of my family. I have accordingly established a reasonable apprehension of injury.
88. The stress and trauma that we have endured for decades will be considerably magnified by any further delays. My mother is elderly and ill. It would assist if she died having buried the remains of her daughter and knowing that justice has been done.
89. With every day that goes by the prospects of justice or reaching the full truth and finding the remains of Nokuthula are seriously undermined. My mother is now elderly and not well. Witnesses are getting older. This ground alone justifies semi-urgency or at least shortened time periods for the purposes of filing of papers and the hearing of this matter.
90. In the circumstances, I submit that I have amply demonstrated that the balance of convenience favours me and my family and that we will suffer irreversible harm by any further delays. I submit that that I have no other viable or alternative remedy.
91. In the circumstances I submit that I have made out a case for these proceedings to be held on a semi-urgent basis.

#### **OBLIGATION OF POLICE TO PAY LEGAL FEES OF THE ACCUSED**

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92. In the first place I am advised that the SAPS is the successor-in-title to the former SAP. The SAPS accordingly assumes institutional responsibility for the wrongs committed by the erstwhile SAP, since it continues to be the same corporate or legal person regardless of organisational changes. Accordingly, the SAPS remains legally responsible for the actions and omissions of the erstwhile SAP.

93. I am advised that the question of when the police will pay the legal costs of its members is governed by standing orders. In 1983, when the alleged crimes took place, Standing Order (General) 109, promulgated in terms of s 33 of the Police Act 7 of 1958, was in place. This standing order is referred to by Coetzee in his founding affidavit at paragraph 36(b)(i), but he did not annex a copy to his affidavit. My attorney has obtained a copy of standing order 109, annexed hereto marked "TN3", which has been described as the 'previous standing order', but we are unaware whether this particular order was in force during 1983.

94. Assuming it was in force, clause 1(a) is pertinent as it stipulates that a member's criminal defence will be conducted by the State Attorney where the member has not forfeited the privilege of State defence by demonstrating that he:

(i) *acted in the execution of his duties or bona fide believed that he had done so;*

(ii) *did not exercise his powers in a reckless or malicious manner or did not knowingly exceed them; ...*

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95. This clause essentially says that that a member can rely on the support of the State Attorney where he or she acted in the course and scope of his employment. Importantly, the Standing Order imposes a subjective test, namely whether the member had a *bona fide* belief that he was acting in the course and scope of his employment.
96. Clause 1(b)(vi) requires an accused member to agree to fully reimburse the State at the conclusion of the case should the State Attorney require him to do so.
97. Clause 2(d)(ii) allows the State Attorney to decline to legally defend a member if it will be contrary to the interests of the State or of the public to undertake such defence. Significantly, clause 2(e) permits a State Attorney, after consultation with the Commissioner or Divisional Commissioner, to provide a legal defence where it is in the interest of the State or of the public, even where a member has forfeited the privilege of State defence as per Clause 1(a).
98. Where a member's application for assistance had been denied and he is subsequently acquitted, clause 3(a)(ii) allows him to apply in writing for a refund of his legal costs.
99. Much will depend on whether the applicants acted "in the course and scope of employment" or *bona fide* believed they were doing so, when they acted against Nokuthula. I am advised that the test that has been

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employed by our courts in making such a determination is to determine whether there is a 'sufficient connection' between the policeman's actions and policing work. In this regard I am advised that our courts have held that members of the police will act within the course and scope of their duties as policemen when:

- 99.1. They are subject to the direction and control of the State;
- 99.2. They act as servants of the State as opposed to carrying out conduct of a personal or private nature;
- 99.3. There is sufficient connection between their conduct and the work of the police;
- 99.4. They themselves intended to do police work and believed they were so doing;
- 99.5. They were exercising functions for which they were appointed;
- 99.6. They were carrying out instructions of their superiors; and/ or
- 99.7. Their police actions were dictated by what they considered was required of them as policemen.

### **Applying the principles**

100. The applicants are entitled to the legal support of the SAPS since they

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comply with all the aforesaid principles. It will be demonstrated below that the applicants were mere cogs in the larger security machinery of the state that acted violently and unlawfully against opponents of apartheid. This apparatus acted at the behest of the then head of state, the Cabinet and the erstwhile State Security Council (SSC). Kidnappings, torture and murder were the order of the day and specifically authorised, not only by the applicants' immediate superiors, but also by the commanders of the Security Branch, the commissioner of police, the Minister of Police and the SSC.

101. The applicants concede that they were involved in an unlawful but planned and routine operation. This much is clear from the letter dated 10 February 2016 addressed by the applicants' attorney to the SAPS (Annex "C2" to the founding affidavit):

"6.2 The police decided to ambush and kidnap Simelane before she could do any harm, and then to detain and question her with the ultimate purpose of recruiting her as an informer. **At the time, this proved to be normal and often successful strategy in matters of this nature; ...**

6.4 **As planned**, Simelane was confronted and abducted in the parking garage of the Carlton Centre and taken to the Norwood Police quarters where she was detained and questioned for a short period;..." (Emphasis added)

102. The applicants submit that they were compelled to act as they did since they acted under superior orders. In this regard annex C2 to the founding affidavit, which is a letter dated 10 February 2016 addressed by the attorney of the accused to the SAPS sets out the following at paragraph 6:

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"6.3 **Duly authorized by their commander**, a team led by Coetzee embarked on the operation as set out. The team included Pretorius, Mong and other members; ...

6.10 It should be noted that the operation in question was **not a "frolic of their own", but duly authorized** and for that reason full legal representation was granted by SAPS in respect of the TRC process;" (Emphasis added).

103. At paragraph 10 of the founding affidavit Coetzee states that he and his team were authorised by Brigadier H Muller, the Divisional Commander of the Security Branch, Soweto to "*apprehend*" Simelane and to "*recruit her as an informer*".
104. Coetzee also testified that he was instructed by Brigadier Muller to accompany him to "*Head Office*" to meet Brigadier Schoon to secure "*authorisation*". This is set out in the second and third paragraphs of his signed statement made under oath on 10 March 2016 at page 9 of annex "C8" to his founding affidavit.
105. Accordingly, the applicants, on their own version, were ordered to conduct the operation by officers lawfully placed in authority over them. These officers were lawfully constituted superior officers and were authorised under law to issue orders to the applicants. The accused were obliged under law to obey orders issued by their superiors. While s 199(6) of the Constitution of the Republic of South Africa, 1996 (the Constitution) stipulates that "[n]o member of any security service may obey a manifestly illegal order" no such constitutional provision was in place in 1983.

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106. The accused most likely did no more than was necessary to carry out their orders. The *modus operandi* employed by the Security Branch at that time involved 'kopdraai' operations which routinely included torture and the elimination of captives who refused to become informers. This *modus operandi* was endorsed and confirmed not just by their commanders, but also the most senior commanding officers in the SAP, including officers commanding the Security Branch and the commissioners of the SAP. Such authorisation also came from the political hierarchy, including cabinet ministers and the erstwhile State Security Council. In this regard I refer to the supporting affidavits of Frank Dutton and Dumisa Ntsebeza SC filed evenly herewith.
107. In the context of the 1980s, orders to carry out such operations, even involving torture and murder, against perceived terrorists seen to be part of the "Total Onslaught", were viewed as routine police work by the Security Branch. Indeed, such operations were entirely consistent with the national security approach of the government at the time. Security Branch members would have believed that obeying such orders was necessary since they were issued by their superiors and sanctioned by the highest commanding officers and political structures in the country.
108. The 2 officers, Brigadier Willem Frederick Schoon and the late Brigadier H C Muller, who both authorised the operation against my sister were no strangers to unlawful actions, including abductions, torture and murder. The supporting affidavit of Dumisa Ntsebeza sets out a non-exhaustive list of unlawful activities involving the two as reflected in the Final Report of

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the Truth and Reconciliation Commission (TRC). These included multiple criminal acts of torture, murder, conspiracy to murder, attempted murder, kidnapping, bombing, and setting up arms caches, cover-ups and perjury.

109. Amnesty records reveal that during the 1980s multiple serious crimes were committed by first and second applicants, Willem Coetzee (AM 4122/96) and Anton Pretorius (AM4389/96), collaborating closely with others such as Eugene de Kock (AM 0066/96). They worked under the command of Brigadier Schoon (AM 4396/96), who in turn was authorised by the then Commander of the Security Branch, Johannes Velde Van Der Merwe (AM4157/96). These crimes included murder, conspiracy to murder, attempted murder, kidnapping and establishing an arms cache. Van der Merwe subsequently became the Commissioner of Police.
110. As is evident from what I have set out above, as well as from the supporting affidavits of Dumisa Ntsebeza and Frank Dutton, there can be no doubt that the Applicants were subject to the direction and control of the State when committing such crimes, including the crimes committed against my sister. That they acted as servants of the State, rather than engaging in private frolics, cannot be seriously disputed. While these operations were unlawful they were intimately connected to the work of the SAP's Security Branch at the time. There can also be no doubt that the Applicants sincerely believed that they were doing police work and what was expected of them by their superiors and political masters.

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## FAILURE TO JOIN THE NPA

111. I am advised that a party must be joined in proceedings if it has a direct and substantial interest in any order the court might make, or when an order cannot be effected without prejudicing it. In these circumstances, such a party has a legal interest in the proceedings and must be joined.
112. I submit that given the nature of these proceedings the NPA has a direct and substantial interest in that it is has an interest in ensuring both a fair trial and a trial that is not unduly delayed.
113. The Prosecution Policy made in terms of section 179(5)(a) and (b) of the Constitution, which "*must be observed in the prosecution process*" stipulates in the preface that "[e]ffective and swift prosecution is essential to the maintenance of law and order within a human rights culture." The NPA's Policy Manual at Policy Directive, Part 17 obliges prosecutors to ensure that accused are tried "*without unreasonable delay*".
114. It has been some 21 years since a criminal investigation docket was opened in my sister's case in 1996. Nearly 16 years have elapsed since the amnesty decision was handed down on 23 May 2001. Some 14 years has passed since the referral of the case to the NPA's Priority Crimes Litigation Unit. The fact that this matter has been outstanding for more than three decades speaks to the gross neglect of the relevant authorities and the unreasonableness of the delay.

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115. Given the legal and constitutional obligations imposed upon the NPA, and given the excessive and unreasonably long delay, the further delay in getting my sister's case to trial ought to be of great and pressing concern to the NPA. If judgment in these proceedings is only going to be delivered at the end of July, and potentially even later, the NPA will be prejudiced, in that it will be unable to ensure that no further long delays take place.
116. In the circumstances, it cannot be said that the interest of the NPA is limited or indirect. The NPA, in my respectful view, should at the very least, be given the opportunity to make its own submissions on whether this matter should be heard on an expedited basis or not.
117. I am advised that there is no evidence before this Honourable Court to indicate that correspondence was addressed to the National Director of Public Prosecutions (NDPP) from the Applicants' attorney asking him whether he wished to intervene in the proceedings.
118. Accordingly I submit that there is sufficient warrant for the relief sought ordering the NDPP to be joined as Third Respondent, and an order compelling the Applicants to serve a full set of papers on the NDPP within the suggested timeframes, in order that the NDPP may consider what action to take.

#### **MATTERS ARISING FROM THE APPLICANTS' PAPERS**

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119. I am advised that for purposes of this application I do not need to respond to each and every allegation made by the Applicants. Accordingly any failure on my part to respond to specific allegations should not be construed as admissions thereof. However, I do wish to respond to certain claims which require refutation for the record and in order to preserve the honour and memory of my sister.

120. The First Applicant, Willem Coetzee, claims at paragraphs 11 and 12 of his founding affidavit that my sister was abducted and kept at "*safe premises for a few weeks*" for "*interrogation and recruitment*" which was "*successful*". As a result she was released at the Swaziland border, "*in order to go home*". However when she "*failed to make any follow-up contact*", in his words, "*it could only be assumed that she must have passed away under unknown circumstances*".

121. These allegations are falsehoods aimed at covering up the murder of Nokuthula. It is particularly curious that Coetzee "*could only*" assume that Nokuthula "*must have passed away*" when on his version he had absolutely no idea of what happened to her following her "*release*". It is noteworthy that Coetzee omitted to disclose that the Amnesty Committee flatly rejected his claims. Contrary to the assertions of Coetzee and his colleagues, the Amnesty Committee found, on the basis of the evidence of the black officers, that:

121.1. Nokuthula did not cooperate with the Security Branch and did not

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- furnish any material information to them (page 6, Amnesty Finding);
- 121.2. All attempts to recruit her as an informant proved "*fruitless*"(page 7, Amnesty Finding);
- 121.3. She sustained serious and prolonged torture to the point where she was hardly recognizable and could barely walk (page 7, Amnesty Finding);
- 121.4. She was not returned to Swaziland following her captivity (page 6, Amnesty Finding).
122. In paragraphs 14 and 15 of his founding affidavit Coetzee makes the remarkable claim that he and the Applicants had the "*willingness to come forward and put facts before the Amnesty Committee*". This appears to be a suggestion that they came forward out of the goodness of their hearts to speak the truth. In fact, as mentioned above, the Amnesty Committee found that they had been untruthful on key elements of their versions.
123. Moreover, the Applicants had little choice but to come forward to apply for amnesty in order to avoid criminal prosecution. They did so for no other reason than self-preservation. They came forward because they had been implicated by some of the black members involved in the abduction and captivity of Nokuthula.
124. Indeed, the writing was on the wall for the Applicants the moment the

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Sowetan newspaper published two stories about Nokuthula's disappearance on 27 January 1995 and, in particular, on 6 February 1995. Copies of the newspaper reports were annexed to my High Court application (case number: 35554/15) marked "TN11" and "TN12", which can be supplied on request. The newspaper articles prompted the police to open an investigation docket under case number CAS1469/02/1996.

125. The next patently false claim is that if the Applicants had killed Simelane they would have applied for amnesty for this crime. There were no witnesses to Nokuthula's murder and on the face of it nobody could implicate them directly. The black officers were only witnesses to the kidnapping and torture, which only necessitated them applying amnesty for these offences.
126. The black officers in question were not witnesses to the murder, although they strongly suspected that she was murdered, which was the normal practice of the SB in such cases. According to the black officers Nokuthula was last seen alive in the boot of Coetzee's vehicle with her hands cuffed behind her back and her ankles also cuffed. She was so badly tortured she was barely recognizable.
127. I submit that a perusal of amnesty applications reveals a general trend of perpetrators only applying for amnesty in cases where they could be directly implicated. Indeed in every other amnesty application made by First and Second Applicants they faced the risk of being implicated by Eugene de Kock who was cooperating with the authorities. In this regard

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see the supporting affidavits of Frank Dutton and Dumisa Ntsebeza.

128. Significantly, the TRC concluded that there was a discernible pattern which reflected that most security force amnesty applicants came forward only when there was a likelihood of a case proceeding against them. In the TRC Final Report in the chapter titled "*Former South African Government and its Security Forces. Part One: Overview of Amnesty Applications*" at Volume 6, Section 3 paragraph 19, the TRC found that:

**"... in a number of instances, it is clear that applicants chose not to apply for incidents where they believed that there was little interest or likelihood that the state would make headway with a case against them."** (Emphasis added)

129. In conclusion, I submit that I have demonstrated that I have a direct and substantial interest in the subject matter of this litigation and that it would be manifestly in the interests of justice to grant me leave to intervene. I seek no injustice or revenge against the applicants. My interest is closure, justice and finding the remains of Nokuthula.

Wherefore I pray that the Honourable Court grants the relief as set out in the Notice of Motion.



THEMBISILE PHUMELELE NKADIMENG

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I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at *ORTIA SAPS* on this the *08* day of February 2017 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



*CST*  
*7176713-4*  
*Maklamohlaka*

COMMISSIONER OF OATHS

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IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

REGISTRAR'S OFFICE SOUTH AFRICA GAUTENG DIVISION, PRETORIA PRIVATE BAG/PRIVAATSAK X57 PRETORIA 0001
2015 -05- 20
T. MALELE REGISTRAR'S CLERK GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

Case Number: 3554/2015

In the matter between:

**THEMBISILE PHUMELELE NKADIMENG** Applicant

And  
**NATIONAL DIRECTOR OF  
PUBLIC PROSECUTIONS** First Respondent

**THE NATIONAL COMMISSIONER OF THE  
SOUTH AFRICAN POLICE** Second Respondent

**THE MINISTER OF JUSTICE AND  
CORRECTIONAL SERVICES** Third Respondent

**THE NATIONAL MINISTER OF POLICE** Fourth Respondent

**WILLEM HELM COETZEE** Fifth Respondent

**ANTON PRETORIUS** Sixth Respondent

**FREDERICK BARNARD MONG** Seventh Respondent

**MSEBENZI TIMOTHY RADEBE** Eighth Respondent

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WILLEM SCHOON

Ninth Respondent

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NOTICE OF MOTION

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**KINDLY TAKE NOTICE THAT** on a date and at a time to be arranged with the Registrar, the applicants intend to apply to this Honourable Court for an order in the following terms:

1. The rules relating to forms and service are dispensed with and the application is heard in terms of shortened time periods.
2. Compelling the first and third respondents to take the necessary steps, within 30 days of the granting of this order, to refer the kidnapping, torture, disappearance and murder of NOKUTHULA AURELIA SIMELANE ("the deceased") (Priority Investigation: JV Plein: 1469/02/1996) in 1983 to a formal inquest before the High Court in terms of sections 5 and 6 of the Inquests Act 58 of 1959 in the interests of the proper administration of justice and in order to prevent a failure of justice.
3. Declaring that:

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- 3.1 the prolonged delay by the first and second respondents in investigating the kidnapping, torture, disappearance and murder of the deceased in 1983;
- 3.2 the ongoing failure or refusal of the first respondent to take a decision whether to prosecute or not to prosecute the known suspects (a prosecutorial decision); or,
- 3.3 the ongoing failure or refusal of the first respondent to refer the abovenamed case to a formal judicial inquest.

is a gross violation of my rights to human dignity and equality; and is inconsistent with the rights to life, freedom and security of the person, the rule of law and South Africa's international law obligations to uphold the right to justice and to investigate, prosecute and punish violations of human rights.

- 4. Declaring that the conduct referred to in paragraphs 3.1 and 3.2 above is inconsistent with the provisions of the South African Police Service Act 68 of 1995, the National Prosecuting Authority Act 32 of 1998 ("the NPA Act"), the Prosecution Policy issued in terms of s 179(5) of the Constitution, and the Policy Directives issued in terms

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of s 21 of the NPA Act and serves to defeat the purposes of said laws, policy and directives in that it prevents the family of the deceased from reaching closure and substantially impairs the prospects of justice being served.

5. Declaring that the conduct referred to in paragraph 3.3 above is inconsistent with the provisions of the Inquests Act 58 of 1959 ("the Act") and serves to defeat the purpose of the Act in that it prevents the family of the deceased from reaching closure and substantially erodes the confidence of the public that deaths from unnatural causes will receive attention and be properly investigated.
  
6. Alternatively to prayer 2 above, reviewing and setting aside the refusal to take the decisions referred to in paragraphs 3.2 and 3.3 as unconstitutional and invalid; and compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; alternatively compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.
  
7. Alternatively to prayers 2 and 6 above:

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- 7.1 Reviewing and setting aside the failure or refusal to take the decisions referred to in paragraphs 3.2 and 3.3 above in terms of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").
- 7.2 Compelling the first respondent to refer the matter to a formal judicial inquest within 30 calendar days of the granting of this relief; alternatively compelling the second respondent to finalize any investigations in this matter within 14 days of the granting of this relief; and compelling the first respondent to take a prosecutorial decision within 30 days of the date of this order.
8. Ordering the public release of the memorandum titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' dated 15 February 2007 addressed by the then National Director of Public Prosecutions to the then Minister of Justice and Constitutional Development.

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9. Ordering the first to fourth respondents to pay the costs of this application and that such of the other respondents who may oppose the matter to pay the applicant's costs.
10. Granting the applicant further and/or alternative relief.

**KINDLY TAKE NOTICE FURTHER** that the affidavits of the Applicant, **Sizakele Ernestina Simelane, Antonio Lungelo Simelane, Junior Mzwandile Nkosinathi Simelane, Frank Dutton, Vusi Pikoli, Anton Ackermann, Dumisa Ntsebeza, and Alexander Boraine** and the annexures thereto will be used in support of this application.

**KINDLY TAKE NOTICE FURTHER** that the *in camera* founding affidavit of the Applicant and the *in camera* supporting affidavit of **Vusi Pikoli** and the annexures thereto will be used in support of this application. The former affidavit is to be served only on the first respondent (the National Director of Public Prosecutions) and the latter affidavit is to be served only on the first and third respondents (the Minister of Justice and Correctional Services). The aforesaid affidavits are to be held by the Registrar of this honourable Court as part of an *in camera* record and only to be released to the other respondents or the public on the order of this honourable Court.

**TAKE NOTICE FURTHER THAT** the Applicant has appointed the **LEGAL**

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RESOURCES CENTRE as its attorneys of record at whose address the Applicant will accept service of all process in these proceedings.

TAKE NOTICE FURTHER THAT that should you intend opposing this application you are required:

- a) to notify the Applicant's attorneys in writing within 15 (fifteen) court days of service of this application on you;
- b) within 30 (thirty) court days after having given such notice to oppose this application to deliver your answering affidavits, if any; and further that you are required to appoint in such notification an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose is given, the application will be made to the above Honourable Court as soon as counsel for the Applicant may be heard.

DATED AT JOHANNESBURG ON THIS 19<sup>th</sup> DAY OF May 2015.

  
\_\_\_\_\_  
LEGAL RESOURCES CENTRE

M.S

TP

Applicants' Attorneys  
15<sup>th</sup> Floor Bram Fischer Towers  
20 Albert Street  
Marshalltown  
Tel: 011 836 9831  
Fax: 011 836 8680  
Ref: 1100514J/CVDL  
**C/O GILFILLAN DU PLESSIS**  
Democracy Centre,  
357 Visagie Street  
Pretoria.  
Ref: J56

TO: THE REGISTRAR OF THE ABOVE  
HONOURABLE COURT, PRETORIA

AND TO:

**THE NATIONAL DIRECTOR OF  
PUBLIC PROSECUTIONS**

First Respondent  
c/o The State Attorney  
SALU Building  
316 Thabo Sehume Street  
Pretoria  
GAUTENG

**SERVICE PER SHERIFF**

**THE NATIONAL COMMISSIONER OF  
POLICE**

M.S

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Second Respondent  
Wachthuis, 7<sup>th</sup> Floor  
229 Pretorius Street  
Pretoria  
GAUTENG

**SERVICE PER SHERIFF**

**THE MINISTER OF JUSTICE**

Third Respondent  
c/o The State Attorney  
SALU Building  
316 Thabo Sehume Street  
Pretoria  
GAUTENG

**SERVICE PER SHERIFF**

**THE NATIONAL MINISTER OF  
POLICE**

Fourth Respondent  
Wachthuis, 7<sup>th</sup> Floor  
231 Pretorius Street  
Pretoria  
GAUTENG

**SERVICE PER SHERIFF**

**WILLEM HELM COETZEE**

Fifth Respondent  
28 Augusta

**SERVICE PER SHERIFF**

M.S

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Helderkrui  
Roodepoort  
1724  
GAUTENG

**ANTON PRETORIUS**

Sixth Respondent  
20 Duneden  
152 Malcolm Road  
President Ridge  
Randburg  
2194  
GAUTENG

SERVICE PER SHERIFF

**FREDERICK B MONG**

Seventh Respondent  
12 Pecan Place  
831 Mortimer Avenue  
Mayville  
Pretoria  
0084  
GAUTENG

SERVICE PER SHERIFF

**MSEBENZI TIMOTHY RADEBE**

Eight Respondent  
8 Roma Street  
Carenvale  
Honeyhills  
1724

SERVICE PER SHERIFF

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GAUTENG

alternatively

36 Stumke Street

Witpoortjie

Roodepoort

1724

GAUTENG

**WILLEM SCHOON**

Ninth Respondent

689 Verecunda Street

Dorandia Ext 2

0182

GAUTENG

**SERVICE PER SHERIFF**

M.S

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**WEBBER WENTZEL**

in alliance with &gt; Linklaters

The Minister of Police

**BY EMAIL**90 Rivonia Road, Sandton  
Johannesburg, 2196PO Box 61771, Marshalltown  
Johannesburg, 2107, South Africa

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Your reference

Our reference

Date

Mr M Hathorn  
3002208

15 September 2016

Dear Minister,

**THE STATE VERSUS MSEBENZI TIMOTHY RADEBE, WILLEM HELM COETZEE, ANTON PRETORIUS AND FREDERICK BARNARD MONG, CASE NO.: CC 16/2016****KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JHB CENTRAL CAS: 1469/02/1996)**

The above matter refers.

We are instructed to write to you by our clients, the family of the late Nokuthula Simelane who was abducted by the Security Branch in 1983, brutally tortured and disappeared while in their hands.

After a long struggle by the family, spanning decades, to seek justice and closure, four erstwhile members of the Security Branch were indicted earlier this year on murder and kidnapping charges. This case only materialised following the launch of an application before the High Court in Pretoria seeking an order compelling, amongst other relief, the NDPP to make a decision in this matter (Case No.: 35554/ 2015).

The trial was set down for 25 July 2016 but did not proceed, largely because the accused, all former policemen with the erstwhile Security Branch, alleged that they had not secured financial support for their legal defence from the South African Police Service (SAPS). According to their legal counsel they do not qualify for legal aid as they do not satisfy the means test applied by Legal Aid South Africa. Their counsel has indicated that they will litigate against the SAPS in

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**Senior Partner:** JC Els **Managing Partner:** SJ Hutton **Partners:** RB Africa NG Alp OA Ampofo-Anti RL Appelbaum AE Bennett DHL Booysen AR Bowley PG Bradshaw EG Brandt JL Brink S Browne MS Burger RI Carrim T Cassim RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies PM Daya L de Bruyn JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt JB Forman MM Gibson SJ Gilmour H Goolam CI Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis XNC Hlatshwayo S Hockey CM Hoffeld PM Holloway HF Human AV Ismail KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston CJ Kok MD Kota JLamb L Marais S McCafferty V McFarlane MC McIntosh SJ McKenzie M McLaren SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu VM Movshovich H Mtshali SP Naicker RA Nelson BP Ngoepe A Ngubo ZN Ntshona MB Nzimande L Odendaal GJP Ollivier N Page AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips HK Potgieter S Rajah D Ramjettan GI Rapson NJA Robb DC Rudman M Sader JW Scholtz KE Shepherd DMJ Simaan AJ Simpson J Simpson N Singh P Singh MP Spalding L Stein PS Stein MW Straeuli LJ Swaine Z Swanepoel A Thakor A Toefy PZ Vanda SE van der Meulen M van der Walt N van Dyk A van Niekerk JE Veeran D Venter B Versfeld NG Versfeld TA Versfeld DM Visagie J Watson KL Williams K Wilson RH Wilson J Moolman M Yudaken **Chief Operating Officer:** SA Boyd

Webber Wentzel is associated with ALN

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order to compel the police to pay for their legal defence. This could potentially delay the start of the trial for a considerable period of time, perhaps a year or longer. The next hearing date is set down for 20 September 2016.

Since the family has been struggling for closure for more than 33 years they strenuously object to any further delay. In this regard they wish to make the following submissions to you on the question of legal costs for the accused.

1. The SAPS is presumably refusing the four accused legal assistance on the basis that their alleged conduct does not constitute policing work in that it fell outside the course and scope of their employment with the erstwhile South African Police (SAP).
2. This contention presumably rests on the view that the four accused were acting outside of applicable law or policing procedure in that they were carrying out a private frolic of their own.
3. The family does not support this view since it flies in the face of the facts and the well-known history of the Security Branch in the 1980s. Both the Goldstone Commission and the Truth and Reconciliation Commission found that the Security Branch was in large part a criminal enterprise aimed at neutralising the threat to the Apartheid state. It acted unlawfully on a routine basis. This has been conceded under oath by former senior officers, including commanding officers of the Security Branch and the SAP.
4. The abduction, torture, murder and concealing of the remains of Nokuthula Simelane fell squarely within the approved modus operandi of the Security Branch. The four accused were mere foot soldiers who acted on orders of their superiors, who in turn, acted on instructions of the commanding officers of the former Security Branch and SAP. The real decision makers in the Simelane matter, and many other cases, have yet to face justice.
5. It is established law in South Africa that members of the police may act "within the course and scope of their duties as policemen" without necessarily acting in terms of the law. All that has to be demonstrated is that there was sufficient connection between their unlawful conduct and the work of the SAP's Security Branch. The state presumably remains liable to pay for the legal defence of the accused unless it can demonstrate that the acts in question were of a purely personal nature wholly outside the scope of their employment as Security Branch officers. In our respectful view, there is no prospect of demonstrating this.

For the reasons outlined above the family instructs us to request that you reconsider the refusal of the police to decline legal support for the accused. The refusal is further delaying the start of the trial and thereby seriously undermining the interests of justice. We accordingly request that you instruct the police to authorise support to the accused at reasonable tariffs (perhaps at rates comparable to the Legal Aid tariff) to ensure the timeous start of the trial.

We look forward to hearing from you at your earliest convenience.

Yours faithfully



Moray Hathorn

Partner

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**WEBBER WENTZEL**

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Page 3

Webber Wentzel

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Copied to: The NDPP, Adv. Shaun Abrahams  
The Acting Head of the PCLU: Adv. Torie Pretorius SC  
Adv. Raymond Mathenjwa, NPA  
The Commissioner of the SAPS  
The Head, Legal Services, SAPS

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STANDING ORDER (GENERAL) 109

PART II

PERSONNEL AFFAIRS

DISCIPLINARY MEASURES

LEGAL REPRESENTATION IN CRIMINAL COURTS

109. (1) (a) If a member of the Force is to be tried in a criminal court, his defence, should he so elect, will be conducted by the State Attorney; provided that he has indicated in the application prescribed in subparagraph (b)(viii), or if the evidence reflects that he did not forfeit the privilege of State defence in that he, where applicable:
- (i) acted in the execution of his duties or bona fide believed that he had done so;
  - (ii) did not exercise his powers in a reckless or malicious manner or did not knowingly exceed them;
  - (iii) did not, without first consulting the State Attorney, make an admission of guilt which is to the detriment of the case of the defence;
  - (iv) did not disregard or neglect to observe the provisions of Standing Orders of which he had knowledge or of which he could reasonably be expected to have had knowledge (with the exception of a case arising from the handling of the use of a Government vehicle);
  - (v) did not use liquor or drugs in excess, which possibly could have resulted in the alleged offence or contributed thereto;
  - (vi) did not drive the Government vehicle concerned without proper authorization;
  - (vii) did not use the Government vehicle concerned, for other than official purposes;
  - (viii) did not drive the Government vehicle concerned while not being suitable licensed;
  - (xi) did not allow a person not authorised to do so, to drive the Government vehicle; or
  - (x) was not under the influence of liquor or a drug that has a

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narcotic effect or the alcohol concentration in his blood was not 0,08 or more grammes per 100 millilitres when he handled or drove the Government vehicle concerned or sat in the driver's seat.

- (b) (i) The Commanding Officer who referred the case docket to the Attorney-General (or to the authorised State Prosecutor) must, when it is received with an instruction that a member, mentioned in subparagraph (a), is to be criminally prosecuted, ensure that the member is informed thereof without delay and also that he, should he so prefer, can apply for State defence in the prescribed manner.
- (ii) This officer must also ensure that timeous arrangements are made for the relevant case not to be entered in the court roll before the member's application has been finalised, or if the case has already been entered in the court roll, that it is postponed for this reason.
- (iii) As a member, referred to in paragraphs (1)(c) and (4) of SO 107, may immediately require legal advice, there should be no hesitation to use the telephone and/or telex machine, if circumstances so dictate, to submit the member's application for State defence. If necessary, timeous arrangements must be made for the postponement of the relevant case.
- (iv) The member must briefly mention in his application the reasons why he is of the opinion that he is entitled to State defence.
- (v) If the Attorney-General (or the authorised State Prosecutor) in his instruction for criminal prosecution, permits a fixed amount to be deposited as an admission of guilt, the member in his application for State defence, must indicate whether he is willing, if the State Attorney agrees thereto, to admit guilt and pay the prescribed amount.
- (vi) An application for State defence will, however, only be considered if it is undertaken that, should the State Attorney at the conclusion of the relevant criminal case decide that the full amount of the legal costs incurred in respect of the defence, must be paid to the State, it would be done.
- (vii) Should the State Attorney decide to instruct a private legal practitioner to undertake the defence of a member on his

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behalf, the member may, if he so wishes, request the State Attorney to instruct a private legal practitioner of his choice; provided that this written application reveals such legal practitioner's full postal address and telephone number and he undertakes to pay the difference in fees, if any.

(viii) The application must be worded as follows:

I, No..... (Rank) ..... (full names) .....the undersigned, hereby request the State Attorney to undertake my defence in the criminal case in which I am charged with [mention charge(s) as well as CR reference number(s)] .....

The reasons why I am of the opinion that I am entitled to State defence, are as follows:

I did not forfeit the privilege of defence, as described in Standing Order 109(1)(a). (Mention any other applicable reasons).....

\*If my application for State defence is successful, but my defence cannot be conducted by a legal practitioner attached to the office of the State Attorney, resulting in the State Attorney appointing a private legal practitioner to do so, I request that he appoints advocate/lawyer, (state initials, surname as well as postal address and telephone number and name of the firm of lawyers, if applicable) ..... to conduct my defence on behalf of the State Attorney.

I undertake to:

\*pay the difference in fees, if any, or should the State Attorney, upon conclusion of the case, find that I forfeited the privilege of State defence, repay all costs incurred by the State Attorney in respect of my defence, to the State.

I hereby authorise the State to recover from my salary any amount for which I, in terms of this undertaking, am liable, in a single amount or in such instalments as the Commissioner may think fit.

I certify that I am aware of the provisions of Section 2(3) (a)

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of the General Pensions Act, 1979 [Act 29 of 1979], regarding deductions which may be made, in terms of and in accordance with this Section, on my retirement or discharge, from any annuity or benefit payable to me in terms of the Government Service Pension Act, 1973 [Act 57 of 1973], in respect of an amount which I owe to the State on the grounds contained in this agreement.

I am aware that the State Attorney may possibly, at a later date, act on behalf of the State against me in a case resulting from or relating to this matter, and I hereby agree that any information obtained from me in this present action, may be used against me and that having acted for me in this case, will not prevent him from taking action against me in any other case.

SIGNATURE

PLACE .....

DATE .....

WITNESSES(1) .....

(2) .....

[Note: A paragraph or line preceded by \* should, if not applicable to the case, be omitted or deleted, initialled and dated by the member.]

(c) If the member, whether or not he has already applied for State defence, states his intention of making his own arrangements for his defence, he must furnish a written indemnity, worded as follows:

I, No. .... (Rank)..... (full names)....., the undersigned, was informed on (date)..... by (number, rank and name) ..... that because of [mention charge(s) and CR reference number(s)] ..... I am to be prosecuted and that I could possibly qualify for State defence.

I do, however, not require State defence in the above-mentioned case(s) and intend making my own arrangements for my defence, consequently, I indemnify the State from any costs which I may

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incur in this regard.

.....  
SIGNATURE

PLACE .....

DATE .....

WITNESSES(1) .....  
(2) .....

- (2) (a) (i) The application referred to in paragraph (1)(b), as well as clearly legible copies of the statements of the member concerned and/or other witnesses for the defence must without delay be forwarded in triplicate in the usual manner to the Divisional Commissioner in whose Division the alleged offence(s) was/were committed. Should the member, however, so elect, he must be allowed to submit his written explanation in a sealed envelope which must be forwarded to the State Attorney. [Also read Standing Order 145(3).]
- (ii) The offence(s) on which the member is to be tried, a complete description of the circumstances under which it was allegedly committed and whether State defence is recommended, must be mentioned in the letter accompanying the afore-mentioned documents. If paragraph (1)(b)(v) is applicable, the member's indication must also be mentioned in the letter.
- (b) When a member intimates that he intends making his own arrangements for his defence, his written indemnity, in duplicate, shall be forwarded to the Divisional Commissioner, in accordance with paragraph (1)(c).
- (c) (i) The Divisional Commissioner must then carefully consider all the facts at his disposal (including the member's explanation and the available evidence for the defence) in order to determine whether the member did not forfeit the privilege of State defence, as set out in paragraph (1)(a) of this Order. This will determine whether he has to instruct the State Attorney to conduct the member's defence. In case of doubt the member must enjoy the benefit of the doubt, as the legal costs can, if necessary, always be

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recovered from his salary at the conclusion of the case.

- (ii) If the Divisional Commissioner is of the opinion that the member should be defended by the State, he must forward a clearly legible copy of each of the documents mentioned in subparagraph (a)(i) to the relevant State Attorney with an instruction to conduct the member's defence. Such an instruction must be embodied in the covering minute on more or less the following lines:

"From the information at my disposal I am of the opinion that the member concerned has not forfeited the privilege of State defence and that it is in the interest of the State that his defence be undertaken by the State. Consequently, I recommend that his request be acceded to and his defence be undertaken by you."

- (iii) Except for the documents mentioned in subparagraph (ii), the relative case docket, any other document or statements of witnesses, or a copy of the memorandum of the evidence, may not under any circumstances be supplied to the State Attorney.
- (iv) The Divisional Commissioner must, however, mention the offence(s) on which the member is to be tried, supply a complete description of the circumstances under which they were allegedly committed, the indication of the member concerned in terms of paragraph (1)(b)(v) [if applicable] and the place of trial, in his letter.
- (v) In his letter to the State Attorney, the Divisional Commissioner must emphasise specifically that the request in terms of paragraph (1)(b)(vii), would only be supported if a legal practitioner attached to the State Attorney's Office is unable to personally conduct the member's defence.
- (vi) Seeing that the Commissioner has delegated his powers as Accounting Officer, in respect of the employment of the services of State Attorneys, to Divisional Commissioners, the Divisional Commissioner must personally sign the letter to the State Attorney. [The control areas of the various offices of the State Attorneys are indicated in SO 143(33).]
- (d) The State Attorney will be entitled to decline to defend a member if there is evidence indicating that:
- (i) a crime had been committed and the State is the

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complainant; or

- (ii) it will be contrary to the interests of the State or of the public to undertake such defence; or
  - (iii) the member was under the influence of intoxicating liquor or narcotic substances, or the concentration of alcohol in his blood was not less than 0,08 grammes per 100 millilitres when the alleged offence was committed.
- (e) Although a member may have forfeited the privilege of State defence as described in paragraph (1)(a), the State Attorney may undertake the member's defence at State expense where he, after consultation with the Commissioner or with the Divisional Commissioner concerned, considers it to be in the interest of the State or of the public.
- (f) (i) As soon as the State Attorney's decision in respect of a member's application for State defence is known, the member must be informed thereof without delay and arrangements must be made for the criminal prosecution to be instituted at the earliest opportunity.
- (ii) Should the State Attorney decide that the member's defence is to be conducted by a legal practitioner attached to his office and the member declines this, the member may appoint any other legal practitioner to conduct his defence; but he must identify the State in accordance with paragraph (1)(c) and will himself be liable for the full legal costs.
- (iii) If there are valid complaints against the correspondent appointed by the State Attorney, it must be brought to the State Attorney's notice without delay so that he can take whatever steps he may deem necessary.
- (g) In a case mentioned in paragraph (1)(b) and (c), (whether or not the charge is of a serious nature) the Divisional Commissioner must forward the following documents to Head Office:
- (i) A copy of the memorandum [if this has not already been done in accordance with Standing Order 107(6)(d)] and of any statements made by the accused member and witnesses for the defence;
  - (ii) the original written application in accordance with paragraph (1)(b) [or the indemnity in accordance with paragraph (1)(c)]; and

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- (iii) copies of all correspondence to and from the State Attorney. (Head Office must also be informed in writing of any verbal communication between these offices.)
- (h) When, because of conflicting interests, it is impossible for the State Attorney to arrange for the defence of a member indicted to stand trial, together with another member or members, in a criminal court, Head Office must be informed immediately. Head Office will then arrange for a private legal representative to conduct the defence of such a member, provided that -
  - (i) the member has not forfeited State protection;
  - (ii) the member is prepared to furnish an application and undertaking in this regard; and
  - (iii) it is recommended by the State Attorney.

**SO 109(2)(h) added by FO(G) 18/1989**

- (3) (a) (i) As soon as a member is informed that his application for State defence has not been approved, he can make his own arrangements for his defence.
- (ii) If the member is acquitted in the particular case or if the charge(s) against him is/are withdrawn without him being asked to plead thereto, and he is of the opinion that the charge(s) was/were made as a result of/or in connection with the execution of his official duties, he may apply in writing for a refund of his legal costs. It is, however, to be clearly understood that any request for the refund of expenses which has been incurred before the decision regarding State defence was taken, will not be considered.
- (b) The application must be well motivated and must inter alia include the following:
  - (i) Date and nature of the alleged offence;
  - (ii) date upon which the application was made for State defence, stating the result;
  - (iii) date and reasons for acquittal or withdrawal of charge(s);
  - (iv) the remarks (if any) by the judge or the magistrate; and
  - (v) which legal representative conducted his defence, stating

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SO 109 - 9

the costs involved, supported by certified copies of the specified account(s) and receipt(s).

- (c) The original application, together with the annexure, must be forwarded to Head Office by the Divisional Commissioner, together with -
- (i) his reasons why State defence was not approved of;
  - (ii) his comments and recommendation; and
  - (iii) a written opinion of the State Attorney as to whether the legal costs incurred under the present circumstances are reasonable and whether it should be paid.
- (4) (a) (i) If a member is defended by a legal practitioner attached to the State Attorney's office and it appears at the end of the criminal case concerned that the member forfeited the privilege of State defence, the State Attorney may charge a fee for his services.
- (ii) The fee shall be charged in accordance with the tariff which the State Attorney pays in a similar case to a correspondent who acts under his commission.
- (iii) Such a fee shall be paid by the SA Police to the State Attorney, whereafter it will be recovered from the member concerned.
- (b) (i) All recoverable legal costs incurred by the State Attorney in connection with a member's defence, are paid from the suspense account of the Department of Justice, whereafter, for the purpose of reimbursement, Head Office is supplied monthly with details of such payments.
- (ii) After the criminal case has been conducted, the State Attorney shall, as soon as the amount of the legal costs is known, notify the Divisional Commissioner thereof in writing, with an indication as to whether or not it is recoverable. Where a legal practitioner, who is not attached to the State Attorney's office, conducted the member's defence on the instructions of the State Attorney, the State Attorney will attach a copy of that legal practitioner's report to his report. The provisions of paragraph (2)(g)(iii) must then be complied with.
- (iii) However, if the Divisional Commissioner does not agree

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with the State Attorney's decision regarding the member's liability in respect of the legal costs, he must submit a motivated report to the State Attorney with a request that his decision be reconsidered. When a case such as this is considered it must be determined whether or not the member forfeited the privilege mentioned in paragraph (1)(a) and whether or not his action could be attributed to an error of judgement or to provocation.

- (iv) If the State Attorney is not willing to alter his decision, the Divisional Commissioner must submit a detailed report, in duplicate, in this regard, together with all other relevant documents, to Head Office for the consideration of the legal costs committee, who was appointed by the Commissioner for this purpose.
- (c) Unless there is a difference in the fees in accordance with paragraph (1)(b)(vii), a member who had State defence will not be held responsible for the legal costs incurred, if he:
  - (i) is acquitted on the charge(s); or
  - (ii) is found guilty but it is clear from the evidence that he did not forfeit the privilege of State defence in any of the ways mentioned in paragraph (1)(a).
- (d)
  - (i) In any of the cases mentioned in subparagraph (c), the Divisional Commissioner must, however, after receiving the State Attorney's final report, establish whether the member is to be held responsible for a difference in fees in accordance with the provisions of paragraph (1)(b)(vii).
  - (ii) Should there be a difference in fee, but it has not been indicated as such in the above-mentioned final report, it must be brought to the attention of the State Attorney in order that the difference can be specified in his report.
  - (iii) The Divisional Commissioner must then act according to the provisions of paragraph (2)(g), after which Head Office will recover the specified amount from the salary of the member concerned.
- (5) If the State Attorney is of the opinion that an appeal should be lodged against the member's conviction and/or sentence, this may be done provided:
  - (a) the member concerned, subject to the conditions of his original

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application and undertaking, agrees thereto; or

- (b) it is considered imperative, in the interests of the State, to do so.
- (6) (a) (i) When a member's commitment with the Force is terminated, (eg. by way of notice, purchase of discharge, superannuation or discharge because of misconduct or medical unfitness) or if he dies and it is reported to Head Office in the prescribed manner, it must also be stipulated in the report whether or not any legal costs, or criminal cases from which legal costs may result, are outstanding. [Note: Cases where a member is not entitled to State defence need not be mentioned in the report concerned.]
- (ii) A copy of the application, referred to in paragraph (1)(b), shall be appended to the report, or shall follow as soon as possible thereafter, if it was not done in accordance with paragraph (2)(c).
  - (iii) Progress in a case such as this must be reported to Head Office until finality has been reached on the question of possible legal costs.
- (b) (i) In all the cases mentioned in subparagraph (a)(i), where it is not yet known what the legal costs are or will be, the State Attorney concerned must be consulted for estimated legal costs. By informing him of the probable number of witnesses for the prosecution and by making allowance in his estimate for possible eventualities which may increase the final legal costs, he ought to be able to assess the amount fairly accurately.
- (ii) This estimated amount must be stated in the report mentioned in subparagraph (a)(i), or must be reported as soon as possible thereafter.
  - (iii) Only the estimated amount will then be retained from the pension and/or other moneys due to the ex-member, and will later be disposed of, depending on the result of the case and the decision of the State Attorney.

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

CASE NO.: 72747/2016

In the application of:

**THEMBISILE PHUMELELE NKADIMENG**

Intervening Party

to intervene as the Fourth Applicant in the matter between:

**WILLEM HELM JOHANNES COETZEE  
ANTON PRETORIUS  
FREDERICK BARNARD MONG**

First Applicant  
Second Applicant  
Third Applicant

and

**THE MINISTER OF POLICE  
THE PROVINCIAL COMMISSIONER FOR GAUTENG,  
SOUTH AFRICAN POLICE SERVICE**

First Respondent  
Second Respondent

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**SUPPORTING AFFIDAVIT**

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I, the undersigned

**MORAY HOWARD HATHORN**

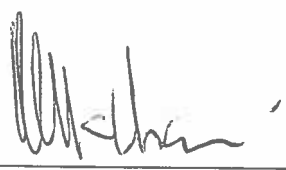
do hereby make oath and state:

1. I am an adult male South African citizen. I am an attorney of this Honourable Court practising as a partner at Webber Wentzel attorneys, Johannesburg.
2. The contents of this affidavit are within my personal knowledge and are true and correct.

*M*

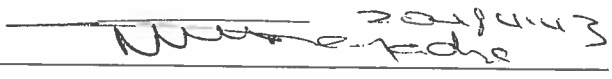
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3. I am the attorney for the Intervening Party. I have perused her Founding Affidavit. In so far as it refers to me and Webber Wentzel attorneys, Johannesburg, I confirm that it is true and correct.



M.H.HATHORN

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at ROSEBANK SAPS on this the 01 day of February 2017 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO.: 72747/2016

In the application of:

**THEMBISILE PHUMELELE NKADIMENG**

Intervening Party

to intervene as the Fourth Applicant in the matter between:

**WILLEM HELM JOHANNES COETZEE**

First Applicant

**ANTON PRETORIUS**

Second Applicant

**FREDERICK BARNARD MONG**

Third Applicant

and

**THE MINISTER OF POLICE**

First Respondent

**THE PROVINCIAL COMMISSIONER FOR GAUTENG,**

**SOUTH AFRICAN POLICE SERVICE**

Second Respondent

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**SUPPORTING AFFIDAVIT**

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I, the undersigned,

**DUMISA BUHLE NTSEBEZA**

state under oath as follows:

  
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- 1 I am an adult male Senior Counsel at the Johannesburg Bar. I was formerly a Commissioner and Head of the Investigation Unit of the Truth and Reconciliation Commission ("TRC" or "the Commission") constituted in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act" or "the TRC Act").
- 2 I have practiced law for more than 30 years. I was admitted as an attorney in 1984, practicing in the Eastern Cape, mainly in the area of human rights. I represented a number of political prisoners throughout the 1980s and early 1990s. Between 1993 and 1996 I taught law at the University of the Transkei (now the Walter Sisulu University). I was called to the Bar in 2000 and took Silk in 2005. I have been an acting judge in three divisions of the High Court of South Africa, as well as the Labour Court.
- 3 In 2004 I was appointed by the Secretary-General of the United Nations as a member of the International Commission of Inquiry on Darfur, which was established pursuant to a UN Security Council Resolution passed under Chapter VII of the United Nations Charter to investigate violations of international humanitarian law and human rights law in Darfur.
- 4 I am a founder of South African National Association of Democratic Lawyers and served as its President. I also served as president of South Africa's Black Lawyers Association. I am a member of the Judicial Service Commission (JSC) and a visiting professor of Political Science and Law at the University of Connecticut in the United States. I am a former Chairperson of the Desmond



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Tutu Peace Trust. I am also a former trustee of the Nelson Mandela Foundation.

5 The facts contained in this affidavit are within my own personal knowledge, unless the contrary appears from the context, and are to the best of my knowledge and belief, both true and correct.

6 I have read the founding affidavit of Thembisile Phumelele Nkadimeng deposed to in this matter. I confirm the accuracy of her submissions contained therein as they relate to the TRC.

7 I have structured this affidavit as follows:

7.1 First, I provide an overview of the investigation into the late Nokuthula Simelane ("Nokuthula") conducted by the TRC.

7.2 Secondly, I provide the context in which the Security Branch ("SB") of the former South African Police ("SAP") operated. In this regard I highlight that the apartheid state, and in particular the SAP, entered a realm of rampant criminality when combating the perceived 'total onslaught' against South Africa.

7.3 Next I describe the chain of command in ordering criminal actions and demonstrate that this involved not only the most senior officers in the SB and SAP, but also cabinet ministers, the State Security Council ("SSC") and the State President himself.



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- 7.4 I then set out the typical '*modus operandi*' of the SB and demonstrate how this involved:
- 7.4.1 routine abductions and torture, including murders when attempts at recruiting ANC cadres failed, or when other operatives or information had to be protected;
- 7.4.2 the destruction and concealing of human remains to ensure they would never be recovered; and
- 7.4.3 the fabrication of stories to suggest that, murders and other crimes committed by the SB, were carried out by the ANC and other opposition groups.
- 7.5 I then describe the broader criminal and unlawful roles of the 2 SB officers who authorised Nokuthula's kidnapping and 'kopdraai'.
- 7.6 Finally, I provide my conclusions. In particular, I assert that the notion that Applicants were involved in a private frolic of their own to be a proposition that is manifestly inconsistent with the facts and findings of the TRC. The evidence and pattern of the apartheid's extra-judicial killings amply demonstrate that such killings were state sponsored and followed the known chain of command used to eliminate anti-apartheid activists and those considered to be threats to the apartheid regime.



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## INVESTIGATION BY THE TRC

- 8 I confirm that the case of Nokuthula Simelane was investigated by the TRC as part of the amnesty matter with case number: AC/2001/185.
- 9 This case was also considered as part of the TRC's inquiries into abductions, interrogations and killings (TRC Final Report: Volume 2, Chapter 3, Subsection 31). It was also considered in relation to the TRC's investigations into the Soweto Intelligence Unit, which was a key component of the Soweto Security Branch of the SAP (TRC Final Report: Volume 6, Section 3, Chapter 1, Subsection 19).
- 10 The TRC found Nokuthula to be a victim. Her name appears on the TRC's list of disappeared and missing persons with the registration: "JB00280/01MPWES" (TRC Final Report: Volume 6, Section 4, Chapter 1, Subsection 21). I confirm further that Nokuthula's case was one of the cases that the TRC recommended that the NPA investigate further with a view to prosecution.

## THE CONTEXT: A REALM OF CRIMINALITY

- 11 The kidnapping, torture and murder of Nokuthula Simelane in 1983 by members of the Security Branch happened in a particular context which must be brought to the attention of this Honourable Court. This context is one where state sanctioned extra judicial killings and rampant criminality was the order of the day.



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- 12 During the 1980s the South African State and its homeland authorities were facing unprecedented resistance from anti-apartheid groupings. Some of this resistance took the form of violent attacks against structures of the state. The South African government under PW Botha perceived the threat as a revolutionary '*total onslaught*'. The response of the security apparatus was a strategy labelled the '*Total Strategy*' aimed at combatting the revolutionary threat at several levels. The security apparatus had since the 1960s embraced the principles of Counter Revolutionary Warfare and by the 1980s these principles dictated government policy at every level.
- 13 The TRC in its Final Report concluded that at a certain point, which coincided with P W Botha's accession to power in 1978, the South African state through its security forces, and in particular, the SAP, ventured into the realm of criminality as a matter of state sanctioned policy (TRC Report, Vol 5 Ch. 6, Findings and Conclusions, p 212). This period ran from the late 1970s to the early 1990s.
- 14 Johannes Velde van der Merwe occupied the posts of, *inter alia*, second-in-Command of the Security Police, Commander of the Security Branch, Deputy Commissioner of Police (1988 – 1990) and Commissioner of Police (1990 – 1996). In his testimony to the Armed Forces hearing of the TRC he conceded that state criminality was the order of the day:

**“All the powers were to avoid the ANC/SACP achieve their revolutionary aims and often with the approval of the previous government we had to move outside the boundaries of our law. That inevitably led to the fact that the capabilities of the SAP, especially the security forces, included illegal**



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**acts. People were involved in a life and death struggle in an attempt to counter this onslaught by the SACP/ANC and they consequently had a virtually impossible task to judge between legal and illegal actions.”**

15 Van der Merwe disclosed that State President P W Botha personally ordered him to bomb a building housing civilian activists (TRC Report, Vol 5 Ch. 6, Findings and Conclusions, p 224). Botha is likely to have ordered his security offences to commit a large number of criminal acts. The TRC found that during this period the state committed a host of gross violations of human rights in South Africa (TRC Report, Vol 5 Ch. 6, Findings and Conclusions, p 222). These included, amongst other violations:

- 15.1 extra-judicial killings in the form of state-planned and executed assassinations,
- 15.2 attempted killings, so-called ‘entrapment killings’, where individuals were deliberately enticed into situations;
- 15.3 the mutilation of body parts;
- 15.4 torture,
- 15.5 abduction or kidnapping and disappearances,
- 15.6 severe ill treatment, abuse and harassment;
- 15.7 destruction of homes or offices through arson, bombings or sabotage;
- 15.8 the deliberate manipulation of social divisions in society with the intention of mobilising one group against another, resulting, at times, in violent clashes;
- 15.9 incursions across South Africa’s borders with the intention of killing or abducting opponents living outside of South Africa;
- 15.10 establishment and provision of support to offensive paramilitary units or hit squads for deployment internally against opponents of the government.



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- 16 Senior officers such as Van der Merwe and former Police Minister, Adriaan Vlok, who served as Minister of Police between 1986 and 1991, were at the heart of the state machinery that carried out massive organised state sponsored crime over several years.

## THE ROLE OF THE SECURITY BRANCH

- 17 The Police Act 7 of 1958 mandated the SAP with *inter alia* the preservation of internal safety. The Security Branch ("SB"), a division of the South African Police, was charged with spearheading this function. The SB was the effective intelligence wing of the former SAP, falling directly under the Commissioner of the SAP. It operated in a separate and parallel structure to the Uniform and Detective branches of the SAP.
- 18 According to evidence provided to the TRC at various amnesty hearings (such as *Amnesty Hearing into the Murder of K McFadden and Z Nyanda*; and *Amnesty Hearing into Murder of Griffiths Mxenge*) by General Johann van der Merwe; Brigadier Willem Schoon, Eugene de Kock and Dirk Coetzee, the commanders and members of the SB saw their function of preserving internal safety as a political task to entrench and support the Nationalist Party controlled government. The SB became infamous for the cruel, inhumane and illegal methods used (TRC Report, Vol 2 - *State Security Forces between 1960 and 1990*: Appendix, Page 316).



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19 The *Commission of Inquiry regarding the Prevention of Public Violence and Intimidation* ("Goldstone Commission"), under the chairpersonship of Justice Richard Goldstone, was appointed by former President F W de Klerk on 24 October 1991, in terms of The Prevention of Public Violence and Intimidation Act No. 139 of 1991, to investigate incidents of public violence and intimidation in South Africa prior to the 1994 general election. Other members of the Goldstone Commission included Adv. Danie Rossouw, SC (Vice-Chairperson), Adv. Solly Sithole, Ms Lillian Baqwa, and Mr Gert Steyn.

19.1 In April 1994, the Goldstone Commission handed over to a newly appointed International investigation team, (and also provided to State President, FW de Klerk), a report titled '*Report to the International Investigation Team*'. This report detailed various criminal conduct of the SB including murder, fraud, blackmail and political disinformation.

19.2 The Commission's "Third Force" report of the 18 March 1994 (*Interim Report on Criminal Political Violence by Elements within the South African Police, the KwaZulu Police and the Inkatha Freedom Party*) drew attention to the criminal activities of the Security Branch in the 1980s. Under the heading '*Comments*' the report reads as follows:

**"7.1. We would like to draw attention to the fact that [former Security Policeman, Paul] Erasmus has opened only one window into the frightening operation of the Security Police in South Africa. Their involvement in violence and political intimidation is pervasive and touches directly or indirectly every citizen in this country. The documents we have been given by one warrant officer can only be a tiny sample of the whole.**



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**7.2 The whole illegal criminal and oppressive system is still in place and its architects are in control of the SAP. It cannot be coincidence that in most senior ranks of the SAP there is such a predominance of officers who have led the Security Branch over the past couple of decades.**  
(Underline added).

19.3 The report led directly to the establishment of a special team of investigators under the Transvaal Attorney-General, Dr D' Oliveira. The operations of this investigation prompted several Security Branch members to apply for amnesty in order to avoid prosecution and potential criminal sanction.

20 The Security Branch served as the effective 'political wing' of the SAP.

20.1 The notorious *Koevoet* unit fell directly under the Security Branch Headquarters.

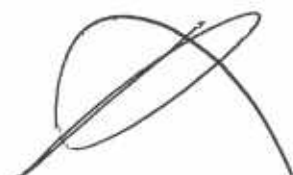
20.2 Around the country, the Security Branch was organised in divisions. Each division in turn was divided into branches. The Security Branch division closest to each neighbouring state was also responsible for carrying out SB operations in that country.

20.3 Central to the structure of the Security Branch were Sections A-G, each of which was headed by a colonel.



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- 20.3.1 The most controversial of the sections were Section A, which dealt with Intelligence, and Section C, which was the ANC/ PAC Desk. Section C1 became known as Vlakplaas.
- 20.3.2 The purpose of Vlakplaas was ostensibly as a place to rehabilitate 'turned terrorists' or, as they were called, 'Askari'. The Askaris were eventually divided into units and supervised by the SB, and it was this change that transformed Vlakplaas into a counter-insurgency unit. The units responded to requests that were channeled to them via the head of Section C or via branch commanders (TRC Final Report, Vol 2, Ch. 3, *State Security Forces between 1960 and 1990*: Appendix p 316).
- 20.3.3 Coetzee and the applicants operated in a sister unit to Vlakplaas also reporting to the officer commanding Section C, Brigadier Willem Schoon.
- 20.4 The target of the SB was any person or organisation which opposed the government and its policies. Its activities included the close monitoring of the affairs and movements of individuals, the detention of tens of thousands of citizens and the torture of many, as well as trials and imprisonment of suspects.
- 20.5 Gavin Cawthra in his book, *Policing in South Africa*, (p 65) quotes former Security Branch chief, General Coetzee, stating in 1982 that "*our target is that collection of individuals and organisations, operating from within and without, who practice or attempt subversion or revolution*". Opponents to



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Apartheid were perceived and represented by the Security Branch as part of a world-wide communist conspiracy. Against this onslaught, the SAP saw themselves as defenders of the 'Free World' and of 'Christian civilisation' (Cawthra, p 65).

20.6 In January 1990, General Basie Smit disclosed that the Security Branch had "given attention to" 314 000 individuals and 9 500 organisations" since it was formed in the late 1940s (Cawthra, p 65). The TRC found (Vol 2, Ch. 3, *The State inside South Africa between 1960 and 1990*, p288) that:

20.6.1 Extra-judicial killings were undertaken by a number of different security branch divisions and by the special forces and occurred across the country but with a concentration in areas adjacent to South Africa's borders with its immediate neighbours as well as within those states;

20.6.2 Extra-judicial killings were often the end result of a process of operationally directed intelligence collection on targeted individuals. all three primary security intelligence arms – National Intelligence Service (NIS), Section C2 of the Security Branch and Military Intelligence;

20.6.3 Coordinated their information through joint participation in so-called target workgroups formed in 1986 in certain selected strategic areas whose role was *inter alia* to target individuals for killing outside of South Africa's borders.



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20.6.4 Evidence presented during the amnesty application of Brigadier Jack Cronje (AM2773/96), (former Divisional Commander of the Northern Transvaal Security Police and former Commander of C1 Section (Vlakplaas) 1983 – 1985), and 4 other former security policemen revealed that a multi-departmental “*Counter-revolutionary Intelligence Target Centre*”, known by its Afrikaans acronym “Trewits” (Teenrewolusionere Inligtingstaakspan), was responsible for the drawing up of hit lists of prominent activists for “*elimination*” and the planning of the hits. According to the TRC, the second applicant, Lieutenant Colonel Anton Pretorius of the Soweto Intelligence Unit, attended regional TREWITS meetings (TRC Final Report, Page (Original) 284, Para 494, Vol 2, Ch. 3, Subsection 52).

20.7 The most senior SB offices routinely covered up crimes. See for example the finding of the TRC that SAP generals Johannes Van der Merwe and Basie Smit were responsible for defeating the ends of justice by helping to cover up the crimes of hit squad members (TRC Final Report, Vol 3 Ch. 3, *Regional Profile: Natal and KwaZulu*, p220).

## THE CHAIN OF COMMAND

21 Brigadier Jack Cronje, former Divisional Commander of the Northern Transvaal Security Police in his testimony before the TRC (TRC Final Report, Vol 3 Ch. 6, *Regional Profile: Transvaal*, p629) explained the nature of the chain of command involving the Commander of the SB, the Commissioner of Police, the

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State President and the SSC in a 'false-flag' operation known as 'Operation Zero Zero' in 1985:

**“This instruction was given to me in Springs by General van der Merwe and during this instruction he specifically indicated to me that this came directly from Minister le Grange and that it had indeed been authorised by President PW Botha, as well as Commissioner Johan Coetzee, both of whom knew about this and authorised it ... If it should be claimed therefore by anyone that the State Security Council was not aware of the actions of the security forces and the security police or of any specific incidents this would not be true.” (Underline added).**

- 22 Ultimate authority came from President PW Botha, his senior ministers and the State Security Council (SSC). The State Security Council was a special cabinet committee on security set up in 1972 in terms of the *Security Intelligence and State Security Council Act, 62 of 1972* (the SSC Act).
- 22.1 It was composed of the State President (as the Chairperson); senior cabinet ministers, including Foreign Affairs, Defence, Law & Order and Justice; the Chief of the South African Defence Force (SADF), Commissioner of Police and the Director Generals of National Intelligence, Foreign Affairs and Justice.
- 22.2 In terms of the SSC Act it was to play an advisory role to the Cabinet with regard to: formulation and implementation of national policy and strategy in respect of the security policy. However, in reality the SSC assumed actual decision-making powers. It was in the SSC, and not Cabinet, where matters of greatest sensitivity and importance were deliberated and agreed upon and the Cabinet merely provided a rubber stamp.



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- 22.3 The TRC noted that at the Commission's hearings on the SSC, "*senior politicians and some senior military and intelligence heads argued emphatically that although what they referred to as "ambiguous language might or could have been interpreted as authorising illegal conduct, it was not the intention of the SSC or the cabinet that any illegal acts or actions should be undertaken."* (TRC Final Report, Vol 5 Ch. 6, *Findings and Conclusions*, p217).
- 22.4 The Commission doubted this assertion in the light of the testimony of senior police officers, including General van der Merwe that the word '*eliminate*' could, in certain circumstances, mean 'kill', or that they interpreted it as meaning 'kill'. Van der Merwe, himself a member of the SSC, testified thus: If you tell a soldier "*eliminate your enemy*", depending on the circumstances he will understand that means "*killing*" (TRC Final Report, *Armed Forces Hearing*, transcript, p. 32).
- 22.5 The TRC accordingly found that certain members of the SSC (the State President, Minister of Defence, Minister of Law and Order and heads of Security Forces) did foresee that the use of words such as '*take out*', '*wipe out*', '*eradicate*', and '*eliminate*' would result in the killing of political opponents (TRC Final Report, Page (Original) 215, Paras 90 to 99, Vol 5, Ch. 6, Subsection 9).
- 22.6 The TRC found State President Botha responsible for personally ordering former Minister of Law and Order Adriaan Vlok and former police



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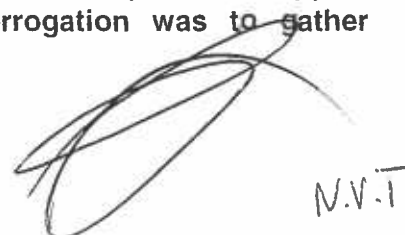
commissioner Johann van der Merwe to destroy Khotso House, the head office of the South African Council of Churches in Johannesburg (TRC Final Report, Vol 5 Ch. 6, *Findings and Conclusions*, p224). Other unlawful operations found by the TRC to have been ordered by PW Botha or senior members of his cabinet included:

- 22.6.1 acts of sabotage by blowing up public facilities such as the diplomatic mission of the ANC in London, the head office of the South African Catholic Bishops' Conference (Khanya House in Pretoria) in 1988 and COSATU House, the headquarters of the Congress of South African Trade Unions (COSATU) in 1987;
- 22.6.2 'false-flag' operations, such as the placing and uncovering of arms caches in order to provide a pretext for the state's armed forces to attack targets in neighbouring countries (TRC Final Report, Vol 5 Ch. 6, *Findings and Conclusions*, p219).

### **MODUS OPERANDI OF THE SECURITY BRANCH**

- 23 In relation to *modus operandi* of abductions, interrogation and killings, the following findings of the TRC (TRC Final Report, Page Number (Original) 234, Paras 278 to 280, Vol 2, Ch. 3, Subsection 31) are instructive:

**“278. This section deals with a different category of killings – where the primary purpose was to obtain information, and death followed, apparently in order to protect the information received. Victims in almost all of these cases were suspected of having links with underground military structures or with networks that provided support for such structures. The purpose of interrogation was to gather**



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intelligence on issues such as modus operandi, guerrilla infiltration routes and possible planned operations. This information was considered vital, not only to enable countermeasures to be taken, but for the ongoing and effective penetration of such structures by agents or askaris.

279. Amnesty applicants suggested that such intelligence had value only for as long as the 'enemy' was not aware that the information had been uncovered. Detainees – even those kept in solitary confinement – sometimes managed to smuggle out information about their detention and interrogation. Moreover, in the nature of clandestine work, once a detention was known about, old routines, codes and meeting places would be regarded as compromised and therefore changed. It was for this reason, the Security Branch argued, that it was preferable to abduct rather than officially detain, and to kill the abductee once information had been extracted. In some instances, the Security Branch attempted to 'turn' (recruit) the individual; where this proved unsuccessful, killing was regarded as necessary.

280. This modus operandi allowed for greater freedom to torture without fear of consequences. It should also be noted, as is evident in some of the cases below, that confessions and admissions were sometimes obtained only after brutal torture. ..." (Underline added)

- 24 Colonel Roelof Venter (Northern Transvaal Security Branch) in his amnesty application dated 13 October 1996 [AM2274/96] testified that if someone could disclose the identity of an informant that would justify his or her murder. In this regard note the following extracts from the document "*Algemene Agtergrond*" attached to his amnesty application:

98. Dit was uiteraard van die grootste belang om die identiteite van sodanige beriggewers ten alle koste te beskerm, ten einde wraakaanvalle op huile en hulle gesinne te verhoed.

99. Soms het hierdie beskerming veroorsaak dat bepaalde ondersteuners van bevrydingsbewegings eerder geelimineer is as om hulie aan te laat kla of vry te laat, uit vrees vir die bekendmaking van die identiteit van die beriggewer wie se inligting gelei het tot die arrestasie van die ondersteuner.

- 25 The former Commander of the Security Branch, Johannes Velde van der Merwe (AM 4157/96), and 9 others applied for amnesty for their roles in, *inter*

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*alia*, the murder of Maisha Johannes "Stanza" Bopape and/ or their participation in the unlawful disposal of the deceased's body and the cover-up of his death in 1988. The killing of Bopape was covered up by staging a "mock escape". In granting amnesty to the applicants the Amnesty Committee (AC/2000/059) found

**"The applicants were all members of the security forces of the State. The evidence establishes that at all relevant times the applicants acted in the course and scope of their duties as members of the Security Branch of the police force.... the 6th and 7th Applicants were involved in the incidents for no other reason than they were the senior officers of the Witwatersrand Division, the 8th Applicant was approached with the problem concerning the Deceased in his capacity as the commanding officer of the Security Branch and he arrived at the decision and issued the instruction to dispose of the Deceased's body and cover up his death when acting in such capacity; and all the other Applicants participated in the cover-up by acting on such instructions." (Underline added).**

26 In the Stanza Bopape amnesty hearing, Van der Merwe, testified on day one (1 September 1998) that:

**"It was expected of members of the South African Police and the South African Defence Force to stop the violent onslaught at any price even if they had to act outside the law as in a war situation." (Underline added).**

27 It is important to note that Security Branch members frequently desecrated and violated the bodies of their victims to ensure that the remains could never be found. This was done by either cremation (after which the ashes of the body were disposed of in various ways); or by blowing the bodies into fragments with explosives. Dirk Coetzee testified (Amnesty Hearing Transcript, Durban, 5



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November 1996) that the bodies of those eliminated would typically be burned on a pyre of tyres and wood and then the SB would:

**...give the impression that the person has fled into the neighbouring country, back to the African National Congress, or, if his body is left on the premises, implicate the ANC, the African National Congress, as the perpetrators of the specific murder.** (Underline added).

- 28 Dirk Coetzee testified that he was ordered by C section head, Brigadier W Schoon to carry out such operations (TRC Final Report, Page (Original) 234, Paras 284, Vol 2, Ch. 3, Subsection 31). Coetzee explained:

**The burning of a body to ashes takes about seven hours, and whilst that happened we were drinking and even having a braai next to the fire. Now, I don't say that to show our braveness, I just tell it to the Commission to show our callousness and to what extremes we have gone in those days ... the chunks of meat, and especially the buttocks and the upper part of the legs, had to be turned frequently during the night to make sure that everything burnt to ashes. And the next morning, after raking through the rubble to make sure that there were no pieces of meat or bone left at all, we departed and all went our own way.**

- 29 The TRC reported on its special investigation into the *Secret Burial of Activists and Report on Exhumations*. It concluded that in most cases, it was found that the perpetrators had covered up the identity of the victims and their final burial places. The TRC had to use police sniffer dogs to seek out the presence of lime below the soil surface, as lime was often poured over the bodies to hasten their decomposition. The TRC (TRC Final Report, Page (Original) 556, Paras 37 – 45, Vol 6, Section 4, Ch. 2, Subsection 4) found that:

**"In a number of cases, operatives were abducted and attempts were made to turn them into askaris. Those who did not co-operate with the**

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police were brutally killed and often buried in secret locations or in unnamed graves in cemeteries.” (Underline added)

- 30 Some fifty bodies were exhumed, but almost 200 cases were not finalised. The lengthy procedures necessitated by each exhumation made it impossible for the Commission to complete this task (TRC Final Report, Page (Original) 543, Paras 1 to 13, Vol 2, Ch. 6, Part 5, Subsection 1).
- 31 The *Missing Persons* Task Team (MPTT) of the NPA continues with the task of the recovery of remains to this day. As of July 2016, the MPTT had recovered 103 bodies and was still searching for some 500 bodies (Interview with MPTT Head, Madeleine Fullard, Radio 702, 1 July 2016).
- 32 Many of the cases which are cited in the TRC Report under this section (*“Abduction, Interrogation and Killing”*) demonstrate the tactic of deflecting suspicion away from the Security Branch.
- 32.1 Cases are mentioned where victims are falsely said to have returned to exile; where Eastern Block weaponry was planted on bodies to provide misleading evidence that the dead were “terrorists”; bodies were mutilated by means of Eastern Block landmines to provide misleading evidence (see for example: TRC Final Report, Page Number (Original) 237, Para 301, Vol 2, Ch. 3, Subsection 32).
- 32.2 The TRC found evidence that the strategy of fabricating stories to suggest that murders were the result of factional conflict was formulated at the



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highest levels. It was discovered that this strategy of misinformation was conceived by the Strategic Communications Branch ('Stratcom') of the SSC Secretariat (TRC Final Report, Page (Original) 297, Paras 559 to 560, Vol 2, Ch. 3, Subsection 57; and TRC Final Report; and Page (Original) 227, Para 251, Vol 2, Ch. 3, Subsection 28).

## THE ROLE OF THE AUTHORISING OFFICERS

33 The 2 officers who authorised the operation against my sister, Brigadier Willem Frederick Schoon (Commander of Section C of the Security Branch, 1981 – 1990) and the late Brigadier Hennie Muller, (Divisional Commander of the Security Branch, Johannesburg), were no strangers to unlawful actions, including abductions, torture and murder. Set out below is a non-exhaustive list of crimes in which the two were implicated by the Truth and Reconciliation Commission (TRC).

33.1 The TRC found that Lieutenant H C Muller (as he then was) was one of the officers responsible for assaulting and torturing Suliman Saloojee in 1964, who subsequently fell to his death from the 7<sup>th</sup> floor of Security Branch Headquarters in Johannesburg (TRC Final Report, Page (Original) 540, Vol 3, Ch. 6, Subsection 7, para 54).

33.2 Brigadier Muller authorised the detention of Dr Neil Aggett who died in Security Branch detention and was the officer in charge overseeing Aggett's interrogation (Testimony of Brig H Muller, Neil Aggett Inquest, 1982). The TRC held the Security Branch responsible for the torture and



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death of Dr Aggett (TRC Final Report, Para 194, Vol 3, Ch. 6, Subsection 25).

33.3 The TRC found that various false flag or “*credibility operations*” involving bombing attacks on a power station and on the railways were authorised by both Brigadiers Muller and Schoon. These operations were aimed at giving the impression that such attacks were carried out by the ANC (TRC Final Report, Page (Original) 293, Vol 2, Ch. 3, Subsection 56, para 545).

34 Muller died in 1992 some years before the TRC commenced operations in 1995. Willem Frederick Schoon was implicated by the TRC in a large number of criminal incidents. He also made multiple applications for amnesty for murder, conspiracy to murder, kidnapping, bombings and perjury. I annex hereto marked “**DN1**” a fuller list of incidents in which Schoon was implicated. Set out below are highlighted examples of his rampant criminality:

34.1 Testifying before an Amnesty Committee Brigadier Willem Schoon testified that the total onslaught of the ANC/SACP forced the Security Branch to operate outside the boundaries of the law (Amnesty Committee Hearing, Pretoria, 14 June 1999: *Murders of K. McFadden and Z. Nyanda in Swaziland during 1983*).

34.2 The late Dirk Coetzee, former Vlakplaas commander, testified at the TRC, that in 1981, Brigadier Schoon ordered the murder of Peter Dlamini, who had been kidnapped and underwent a failed operation to turn him into an ‘Askari’. Dlamini and Vuyani Mavuso were subsequently murdered (TRC



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Final Report, Page (Original) 270, Vol 2, Ch. 3, Subsection 47, paras 436-7).

34.3 The TRC reported that in 1986 a senior MK operative and two ANC members were murdered in a raid on house in Mbabane. The attacking party included Captains Willem 'Timol' Coetzee and Anton Pretorius (the first and second applicants). Following the attack, Eugene de Kock reported to a meeting, which included police commissioner, Johan Coetzee and Willem Schoon (TRC Final Report, Page (Original) 110, Vol 2, Ch. 2, Subsection 28, paras 261-2). The then head of the security police, General van der Merwe [AM4157/96], Schoon (AM 4396/96), De Kock (AM 0066/96), Willem Coetzee (AM 4122/96), Anton Pretorius (AM4389/96) and others were granted amnesty for the 3 murders.

34.4 Brig Schoon and 4 others were refused amnesty for the murder of 2 persons and the attempted murder of 1 arising from a bombing in Krugersdorp in February 1982. The crimes were considered by the Amnesty Committee to be wholly disproportionate to the political objective pursued. Brig Schoon and his colleagues were not prosecuted for these crimes, notwithstanding the refusal of amnesty.

## CONCLUSION

35 I have no hesitation in concluding that the Applicants were part of the official security apparatus when they committed crimes against Nokuthula. The suggestion that they were engaged in a private frolic of their own is not only an



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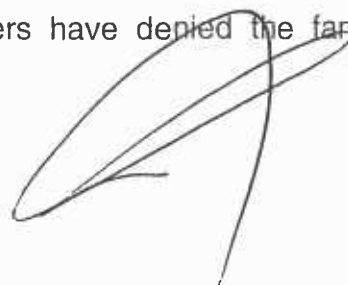
absurd proposition, it is an expedient and wholly false claim. They were mere junior officers acting at the behest of a powerful and brutal organisation which specifically authorised and condoned their actions. They were most certainly acting subject to the direction and control of the State.

36 The fact that the NPA is only focusing on junior perpetrators and ignoring the real decision makers and those who gave the orders speaks volumes. This shameful neglect represents gross contempt for the rule of law and remains a stain on South African society.

37 I have frequently gone on record stating that there has been a disgraceful lack of political will to deal with the issue of accountability for the apartheid-era victims of gross human rights violations. I fully endorse Archbishop Desmond Tutu's statement made in 2013 that the failure to prosecute those who failed to apply for amnesty undermined those who did.

38 Nokuthula's story is rooted in South Africa's bitter and divided past. She paid the ultimate price for her uncompromising resistance to apartheid. Nokuthula was not however cut down on the battlefield while in the line of fire. She was abducted by all-powerful State forces meant to uphold law and order, and then brutally tortured and forcibly disappeared. Her sacrifice helped to lay the basis for South Africa's democracy with its enshrined freedoms.

39 Nokuthula Simelane's family members still do not know where her remains are. The lies and deceit of Simelane's killers have denied the family the basic



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human right of laying her remains to rest with the respect and dignity that she deserves.

40 More than 30 years after the atrocities that forever changed the lives of Nokuthula's family, they continue to be denied truth, justice and closure. The continued delay in bringing this case to trial severely undermines the interests of justice. This is, in my view, unforgiveable.


41 I accordingly endorse this application, and respectfully urge this Honourable Court to grant the order in the terms set out in the notice of motion.

  
DEPONENT

Thus signed and affirmed at SANDTON on this 13<sup>th</sup> day of February 2017, the deponent having acknowledged that s/he knows and understands the contents of this affidavit, having affirmed that the contents hereof are true and correct and that s/he considers the affirmation binding on him/herself.

**Nokuthula Venter**  
Commissioner of Oaths  
Practising Attorney SA  
ENSAfrica 150 West Street  
Sandown Sandton 2196



 13 / Feb / 17  
COMMISSIONER OF OATHS

## ANNEX DM1

## WILLEM FREDERICK SCHOON BEFORE THE TRC

- 1 Set out below is a non-exhaustive list of crimes in which Willem Frederick Schoon was implicated by the TRC or for which he applied for amnesty:
  - 1.1 Testifying before an Amnesty Committee Brigadier Willem Schoon testified that the total onslaught of the ANC/SACP forced the Security Branch to operate outside the boundaries of the law (Amnesty Committee Hearing, Pretoria, 14 June 1999: *Murders of K. McFadden and Z. Nyanda in Swaziland during 1983*).
  - 1.2 Brigadier Schoon testified at the TRC that in 1988 he established an arms cache of Eastern Bloc weapons that was then ascribed to MK units in Botswana, in order to provide a pretext for a cross-border attack.<sup>1</sup>
  - 1.3 Dirk Coetzee, former Vlakplaas commander, testified at the TRC, that in 1981, Brigadier Schoon ordered the murder of Peter Dlamini, who had been kidnapped and underwent a failed operation to turn him into an 'Askari'. Dlamini and Vuyani Mavuso were subsequently murdered.<sup>2</sup>

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<sup>1</sup> TRC Final Report, Page (Original) 214, Paras 145 to 154, Vol 6, Section 3, Ch. 1, Subsection 151, paras 150-1

<sup>2</sup> TRC Final Report, Page (Original) 270, Vol 2, Ch. 3, Subsection 47, paras 436-7



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- 1.4 Brigadier W F Schoon [AM4396/96] applied for amnesty for the murder of four unarmed persons in 1988 arising from an ambush carried out by the Security Branch near Piet Retief.<sup>3</sup>
- 1.5 The TRC reported that in 1986 a senior MK operative and two ANC members were murdered in a raid on house in Mbabane. The attacking party included Captains Willem 'Timol' Coetzee and Anton Pretorius (first and second applicants). Following the attack, Eugene de Kock reported to a meeting, which included police commissioner, Johan Coetzee and Willem Schoon.<sup>4</sup> The then head of the security police, General van der Merwe [AM4157/96], Schoon (AM 4396/96), De Kock (AM 0066/96), Willem Coetzee (AM 4122/96), Anton Pretorius (AM4389/96) and others were granted amnesty for the 3 murders.
- 1.6 According to the amnesty application of Brigadier Schoon, he supplied Dirk Coetzee with a revolver and ammunition and instructed him to murder Marius Schoon in Botswana. Coetzee apparently passed the weapon on to an operative who failed in the mission.<sup>5</sup>
- 1.7 In an operation authorised by the head of the Security Branch and Willem Schoon, [AM4396/96] in 1983 a MK commander and another were murdered in Manzini, Swaziland.<sup>6</sup>

<sup>3</sup> TRC Final Report, Page (Original) 249, Vol 2, Ch. 3, Subsection 37, paras 346-7

<sup>4</sup> TRC Final Report, Page (Original) 110, Vol 2, Ch. 2, Subsection 28, paras 261-2

<sup>5</sup> TRC Final Report, Page (Original) 107, Vol 2, Ch. 2, Subsection 27, para 247.

<sup>6</sup> TRC Final Report, Page (Original) 107, Vol 2, Ch. 2, Subsection 27, paras 248-9.

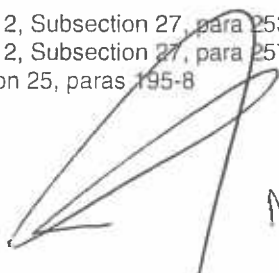
- 1.8 Brigadier Schoon and General Albertus Steyn applied for amnesty for an attack on the house of a South African exile in 1985 in Gaborone.<sup>7</sup>
- 1.9 Eugene de Kock testified that C section head, Willem Schoon instructed him to carry out an attack on a house in Lesotho which killed 7 persons. In his amnesty application Schoon said that his orders came from “*heelbo*” (the very top). General Johan Coetzee [AM4116/96] confirms that the raid was discussed and approved at the level of the State Security Council.<sup>8</sup> Brigadier Schoon, Johannes Velde Van Der Merwe (AM4157/96), Eugene Alexander De Kock (Am0066/96), Butata Almond Nofemela (AM0064/96), Willem Albertus Nortje (AM3764/96) and others applied for amnesty for these crimes.
- 1.10 The TRC found that Brigadier Schoon was responsible for ordering the murder of three COSAS students in 1982 who were lured into a trap with the offer of military training.<sup>9</sup>
- 1.11 Brigadier Schoon, together with Adriaan Vlok, the then Minister of Law and Order, Johannes Velde van der Merwe, the then Commissioner of Police, Eugene de Kock and others were granted amnesty for the bombing of COSATU House on 7 May 1987, as well as the covering up of this crime.

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<sup>7</sup> TRC Final Report, Page (Original) 107, Vol 2, Ch. 2, Subsection 27, para 253..

<sup>8</sup> TRC Final Report, Page (Original) 107, Vol 2, Ch. 2, Subsection 27, para 257-9..

<sup>9</sup> TRC Final Report, Volume 3, Chapter 6, Subsection 25, paras 195-8



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- 1.12 Brig Schoon (AM 4396/96), Dirk Coetzee (AM 0063/97) and another were granted amnesty for the attempted murders of Marius Schoon and Joe Slovo and for carrying out a bombing in Lusaka.
- 1.13 Brig Schoon (AM 4396/96), Eugene de Kock (AM 0066/96) and Almond Nofomela (AM 0064/94) were granted amnesty for the murder of Zweli-Banzi Nyanda and Keith McFadden.
- 1.14 Brig Schoon and De Kock were granted amnesty for the abduction and torture of Jabulani Sidney Msibi, who was killed in unknown circumstances shortly after his release from detention.<sup>10</sup>
- 1.15 Brig Schoon, De Kock, General Johann van der Merwe and others were granted amnesty for the murder of 8 persons and the attempted murder of 7 others in the so-called Zero-Zero Hand-grenade incident on the East Rand during June 1985. They also received amnesty for covering up the crimes.
- 1.16 Brig Schoon and 4 others were granted amnesty for the murder of a woman known as Matura and the attempted murder of Aaron Mkwanazi at the end of 1986 in Botswana.
- 1.17 Brig Schoon was granted amnesty for a range of other offences including:
- 1.17.1 Murder of 2 unknown ANC operatives during 1972;

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<sup>10</sup> TRC Final Report, Page (Original) 222, Vol 6, Ch. 3, Subsection 18, para 184-6..



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- 1.17.2 Murder of 2 unknown PAC operatives during 1981 – 1982;
- 1.17.3 Covering up the kidnapping of Joe Pillay from Swaziland in 1981;
- 1.17.4 Covering up the murder of Griffiths Mxenge in 1981;
- 1.17.5 Perjury in respect of evidence he gave to the McNally Commission of Enquiry in 1989 and the Harms Commission during 1990.
- 1.18 Brig Schoon and 4 others were refused amnesty for the murder of 2 persons and the attempted murder of 1 arising from a bombing in Krugersdorp in February 1982. The crimes were considered by the Amnesty Committee to be wholly disproportionate to the political objective pursued. Brig Schoon and his colleagues were not prosecuted for these crimes, notwithstanding the refusal of amnesty.
- 1.19 Brig Schoon, De Kock, Willem Coetzee (first applicant) and others were granted amnesty for the conspiracy to murder Porta Shabangu and 2 other persons in Swaziland, including the covering up of the crimes.
- 1.20 Brig Schoon, De Kock, Willem Coetzee (first applicant), Anton Pretorius (second applicant), Albertus Steyn (AM4513/97) and others were granted amnesty for a range of crimes committed between 1980 and 1985, including the creation of an arms cache in Krugersdorp, the attempted murder of Martin Thembisilie Hani, the murder of unknown persons in Botswana, the murder of MK Naledi, conspiracy to murder Nat Serache, murder of Roger Nkadimeng, kidnapping of Peter Lengene and conspiracy to murder Johannes Mnisi.



M.V.T

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO.: 72747/2016

In the application of:

**THEMBISILE PHUMELELE NKADIMENG**

Intervening Party

to intervene as the Fourth Applicant in the matter between:

**WILLEM HELM JOHANNES COETZEE  
ANTON PRETORIUS  
FREDERICK BARNARD MONG**

First Applicant  
Second Applicant  
Third Applicant

and

**THE MINISTER OF POLICE  
THE PROVINCIAL COMMISSIONER FOR GAUTENG,  
SOUTH AFRICAN POLICE SERVICE**

First Respondent  
Second Respondent

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**SUPPORTING AFFIDAVIT**


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I, the undersigned

**FRANK KENNAN DUTTON**

do hereby make oath and state:

1. I am an adult male South African citizen with ID Number 4905204085086. I reside at 18 Lawrence Place, Waterfall, 3650, KwaZulu Natal.
2. I am an International policing and investigation expert and provide expertise on a consultancy basis internationally as well as locally. I have played leading roles in complex investigations in South Africa and many other countries. Including


  
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Bosnia, Croatia, Kosovo, Sudan (Darfur), Afghanistan, DRC, Cameroon, Uganda, Nigeria, Rwanda, Kyrgyzstan, Liberia, Mozambique, Zimbabwe, Brazil and East Timor. I have 38 years of policing experience in South Africa and I was the first head of the former Directorate of Special Operations (also known as the Scorpions).

3. In 2012 I was awarded the Order of Baobab in Gold by the President of South Africa for my policing work both locally and abroad. The citation to this award is as follows:

*Frank Kennan Dutton: THE ORDER OF BAOBAB IN GOLD. Awarded for his exceptional contribution to and achievement in his investigative work as a dedicated and loyal policeman, for exposing the apartheid government's "Third Force"; for his role in working for peace in KwaZulu-Natal; his international work in investigating and exposing war crimes and crimes against humanity in Bosnia, Kosovo and Darfur; and assisting in establishing the causes of violence in East Timor and Sudan.*

4. In order to demonstrate my expertise in policing and investigations I annex hereto marked "FKD1" a fuller list of my experiences in policing and investigations in South Africa and abroad. I carried out private investigations into the crimes committed against Nokuthula Simelane ("Nokuthula") on behalf of the Simelane family.
5. The purpose of this affidavit is to assess whether the accused in *State v MT Radebe and 3 Others* (Case No.: CC19/16) acted under instruction of their South African Police ("SAP") superiors, who were lawfully placed in authority over them

  
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when they kidnapped, tortured and allegedly murdered Nokuthula Simelane ("Nokuthula"). Secondly, I consider whether the kidnapping, torture and murder of Nokuthula was consistent with the typical *modus operandi* of the erstwhile Security Branch ("SB") of the SAP.

6. I conclude that the accused acted under the direct and indirect instruction of their SAP commanders. An important function of the SB was to obtain, frequently by illegal means, operational information from arrested or captured activists. The *modus operandi* employed by the Security Branch at that time also involved so-called '*kopdraai*' operations which routinely included abduction, torture and the elimination (murder) of captives who refused to become informers.
7. In this affidavit I deal with the following:
  - 7.1. My insight into the involvement of senior police commanders in political violence;
  - 7.2. Various motivations for murder as explained by Security Branch members in 54 amnesty applications;
  - 7.3. Whether the accused engaged in a private frolic when committing various crimes against Nokuthula Simelane.

#### **INSIGHT INTO SAP COMMANDER INVOLVEMENT IN POLITICAL VIOLENCE**

8. I first gained knowledge that the most senior commanding officers of the SB and the SAP were deeply involved in violent crime against political opponents of the apartheid regime from the following experiences:



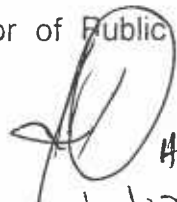
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- 8.1. In August 1988 I commenced investigating a series of murders of political leaders who served on the Clermont Advisory Board, which was a representative body elected by ratepayers of Clermont. The Board was composed of mainly United Democratic Front ("UDF") aligned businessmen who were opposed to the inclusion of Clermont into the KwaZulu Government territory. Samuel Jamile, then the Deputy Minister of Transport in the KwaZulu government was campaigning for Clermont's inclusion into the KwaZulu.
- 8.2. During this period several UDF supporting Clermont Advisory Board members were murdered. My investigation into these cases resulted in murder convictions against Samuel Jamile and another. The Divisional Commanders of the SAP in Natal; the Commissioner of the KwaZulu Police and senior members of the Security Branch directly interfered in my investigation in order to stop the criminal proceedings against Jamile.
- 8.3. I again experienced similar attempts at interference during my investigation of the 1988 Trust Feed Massacre, which resulted in the murder conviction of SAP Captain Brian Mitchell and four others. At the conclusion of this trial, the Judge, Justice Wilson, ordered an inquiry into the conduct of senior SAP personnel, both at the national and provincial level, in respect of their interference in the investigation and their assistance provided to the perpetrators to evade justice. Unsurprisingly, this inquiry was never carried out by the SAP.



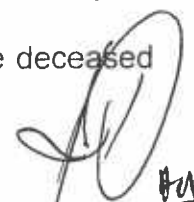
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- 8.4. In August 1993 I was seconded as an investigator to the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation ("the Goldstone Commission"). Amongst other investigations, I assisted in the investigation which resulted in the Commission's report on 18 March 1994 which found that it was probable that the Deputy Police Commissioner Lt-Gen. Basie Smit, the head of counterintelligence Gen. Krappies Engelbrecht, and the commander of the central investigation department Lt.-Gen. Johan le Roux, had masterminded a third force which conducted a campaign of criminal violence against those opposing apartheid.
- 8.5. This emanated mainly from evidence given to the Goldstone Commission by Security Branch 'insiders', including Chappies Klopper, Brood van Heerden and Willie Nortje. They revealed that SAP top management were linked with various atrocities, such as vigilantism, political murders, and the manufacture, purchase, smuggling and supply of weapons to Inkatha that took place in the Transvaal (now known as Gauteng) and Natal (now known as KwaZulu Natal) with the aim of making the country ungovernable prior to the democratic elections of 1994.
- 8.6. I learned that a prosecution docket was opened against General Engelbrecht and the others, but inexplicably, it was never pursued by the NPA. I can only assume that this case was deliberately suppressed along with all the other so-called political cases from the apartheid era, as disclosed in the affidavits of former National Director of Public

  
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Prosecutions ("NDPP") Vusumzi Patrick Pikoli and Anton Rossouw Ackermann SC, former Special Director of Public Prosecutions and Head of the Priority Crimes Litigation Unit ("PCLU") filed in the 2015 Pretoria High Court case under Case Number 35554/ 2015. Copies of these affidavits can be made available on request.


- 8.7. In April 1994 I was seconded to the D' Oliveira Investigation Team and was directly involved in investigations against former Vlakplaas commander, Eugene de Kock. These investigations ultimately resulted in De Kock's conviction on multiple charges of murder and other crimes on 30 October 1996 and demonstrated the veracity of what witnesses had said about SAP command's involvement in political violence.
- 8.8. At the end of 1994 I was appointed as the Commander of the Investigation Task Unit, Natal and was mandated to investigate "Hit Squads" within the KwaZulu Police. This culminated in the exposure of "Operation Marion" and the controversial trial of General Magnus Malan, the former Minister of Defence, together with other senior commanders of the military and several police officers for the 1987 KwaMakhutha massacre.
- 8.9. The Operation Marion files which were seized from Military Intelligence Headquarters under the authority of a search warrant revealed that the former Government of South Africa, its top military and police command conspired, through the State Security Council, to instigate and promote political violence. While the prosecution failed the then Ministry of Defence paid the civil damages claims of the families of the deceased

  
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and the TRC found that that the military had conspired with the Inkatha political party to deploy a “*covert, offensive paramilitary unit (or hit squad)*” against opponents of the government and Inkatha (TRC Final Report, Volume 5, Chapter 6, page 234).

9. The knowledge that I derived from the above investigations and sources led me to conclude that the involvement of the SAP (and other Security Forces) in political violence was sanctioned not only by the most senior commanding officers in the SAP, including Commissioners of the SAP and commanders of the SB, but also by the highest levels of Government.
10. This conclusion is reinforced by the fact that senior SAP commanders not only failed to undertake credible investigations into the many disclosures that came to light concerning State sponsored political violence. Indeed, many of these cases were suppressed or ‘covered-up’ by senior SAP Commanders. Those responsible for such violations not only remained immune from discipline or criminal investigation they were rewarded with steady promotion through the ranks.
11. Even where direct orders were not given, such criminal violence was routinely condoned and encouraged by the most senior officers of the SB and SAP. The TRC made several findings that the South African state condoned unlawful killings, both within and outside South Africa (TRC Final Report, Page (Original) 212, Paras 77 to 83, Vol 5, Ch. 6, Subsection 7); condoned the practice of torture (TRC Final Report, Page (Original) 617, Paras 16 to 30, Vol 6, Section 5, Ch. 2, Subsection 3); failed to discipline or criminally charge SB members involved in

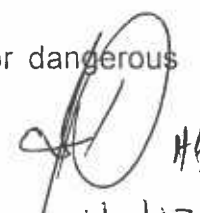
  
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unlawful conduct (TRC Final Report, Page (Original) 254, Paras 333 to 344, Vol 6, Section 3, Ch.1, Subsection 30).

## MOTIVATIONS FOR MURDER

12. During the latter part of 2016 I studied 54 cases of politically motivated murders and kidnappings as disclosed to the Truth and Reconciliation Commission's Amnesty Committee by members of the former Security Branch for the period 1972 to 1992. In doing the study I examined the transcripts of evidence and findings of the Amnesty committees of the TRC. The study is some 60 pages long and has not been annexed to my affidavit but can be made available on request.
13. In particular, I paid attention to the specific reasons put up under oath by members of the Security Branch to explain the crimes they had committed. The SB perpetrators asserted that these crimes were committed either as a result of direct instructions given to them or issued indirectly by the South African Police command structure and Nationalist Party leaders.
14. Senior SAP commanding officers, (in some cases even the former Commissioner of Police, General Johann van der Merwe) were co-applicants for amnesty in a number of these cases. They supported the averments that these acts were committed either as a result of direct or indirect orders.
15. There were often several motives that justified a decision to murder. The most common reason was simply to eliminate a prominent activist or dangerous

  
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terrorist. Other motives for murder included the need to cover up kidnappings and torture. Another motivation was the need to "protect" information extracted during interrogation. The most effective way of achieving this was to cause the disappearance of the victims to conceal the fact that they had fallen into police hands. Another reason to murder was to protect the identity of SB members and to conceal knowledge of their networks and methodologies. A further reason was to protect informers who played a role in the "capture" of the victim. There was often more than one motivation in each case.

16. The principal motivations for murders perpetrated by SB members in the 54 cases surveyed are as follows:
  - 16.1. Deceased was a prominent activist and/ or dangerous "terrorist" – 30 instances.
  - 16.2. Failed attempt to turn deceased into a SB agent ("kopdraai") – 9 instances.
  - 16.3. Deceased murdered to protect informer who turned them in – 9 instances.
  - 16.4. Murdered to protect information that was extracted – 3 instances.
  - 16.5. Deceased could not be prosecuted or was acquitted but SB believed to be guilty - 5 instances.
  - 16.6. Murdered to protect identity of SB members and their networks – 17 instances.
  - 16.7. Potential recruits for MK murdered to discourage the MK recruiting programme – 3 instances.



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- 16.8. Need to eliminate suspected ANC agents within SAP structure – 11 instances.
- 16.9. Death during torture – 6 instances.
- 16.10. Other or unknown motive – 2 instances.
17. The study only reflects the cases where SB perpetrators applied for amnesty for murder. As was pointed out by the TRC, most applicants only applied for amnesty in cases where they were at risk of being exposed and charged (TRC Report, Volume 6, Section 3 paragraph 19).
- 17.1. In this regard, following a perusal of amnesty applications and decisions, I am of the view that SB members tended only to apply for amnesty when there was a real possibility of being implicated by other SB operatives who had already come clean, most notably Eugene de Kock, Dirk Coetzee, Chappies Klopper, Brood van Heerden, Willie Nortje. Almond Nofomela, Manuel Olifant, Mzimkulu Veyi, Sampina Bokaba, Simon Radebe, Eric Sefadi, Christopher Mosiane and Philemon Mathebula.
- 17.2. Alternatively, perpetrators would apply for amnesty when they became aware that they were at risk of being prosecuted after incriminating information came to the attention of investigators through other sources.
18. It is accordingly quite likely that the bulk of criminal conduct committed by the SB did not come to the attention of the TRC's Amnesty Committee. In this regard



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note the following Government Gazette NO.31723 3, dated 12 December 2008 at paragraph 2:

*“The Promotion of National Unity and Reconciliation Act, 1995 (Act No. 34 of 1995), mandated the TRC to make recommendations to the President. The TRC recommended, among others, the establishment of a task team to investigate the nearly 500 cases of missing persons that were reported to the TRC, but remained unsolved. The President endorsed this recommendation in April 2003, upon tabling the TRC’s Final Report in Parliament.”*

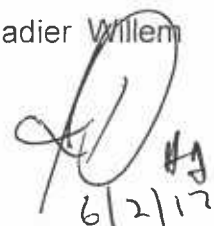
19. It is reasonable to assume that many, if not most of these 500 missing persons died at the hands of the SB in unknown circumstances and their bodies destroyed or well concealed.

#### **WERE THE ACCUSED ENGAGED IN A PRIVATE FROLIC?**

20. In view of the above it is my opinion that the accused in *State v M T Radebe and 3 Others* (Case No.: CC19/16) were following instructions in perpetrating crimes against Nokuthula Simelane. My reasons for this conclusion are as follows:

20.1. Their testimony before the Amnesty Committee that they were instructed and authorised to kidnap, torture and turn (kopdraai) Nokuthula Simelane by Brigadiers Schoon and Muller. Schoon and Muller were their direct commanders (supervisors) who were lawfully placed in authority over them.

20.2. At the time of Ms Simelane’s disappearance, the late Brigadier H Muller was the Commander of Security Branch, Soweto. The Special Intelligence Unit, Soweto fell under his command. Brigadier Willem

  
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Frederick Schoon was the Pretoria HQ Commander of Section C (the section charged with combatting terrorism) of the Security Branch. These officers were lawfully constituted superior officers and were authorised under law to issue orders to the applicants. The accused were obliged under law to obey orders issued by their superiors.

20.3. The Special Intelligence Unit, Soweto under Willem Coetzee's command had sought and received authority from Brigadier Schoon for the kidnapping and torture of Ms Simelane for the purpose of "turning her". This is apparent from the evidence of the white Security Branch members before the Amnesty Committee. It is noted that Brigadier Schoon applied for amnesty in respect of the Simelane matter, but did not proceed with his application. In my view, it is particularly remarkable and curious that Brigadier Schoon has escaped prosecution in this case, and other cases in which he did not apply for amnesty or was refused amnesty.

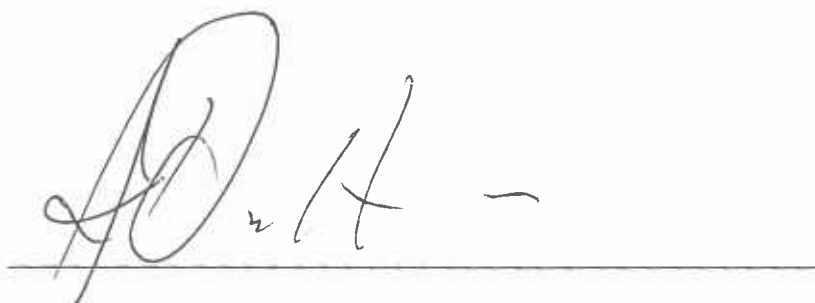
20.4. The conduct of the accused in respect of Nokuthula Simelane was not out of the ordinary. It fell within the general, approved conduct of SB members who were combatting the so called "terrorist onslaught against South Africa". This included abduction, torture and murder, where a 'kopdraai' operation failed, and where the identities of other informants had to be protected.



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20.5. Nokuthula Simelane was held captive on a remote farm at Northam which is 215 km from Protea SB HQ, Soweto over a four to five week period. The accused travelled between their offices and Northam frequently for purposes of guarding and interrogating Simelane. This would have resulted in considerable travel and subsistence costs. All these costs and claims had to be formally approved by SAP management. Approval would only have been given if it was a properly authorised 'official operation'.

20.6. The frequent and prolonged absences from their work place, for reasons explained in the preceding paragraph, could not have been sustained unless their supervisors had knowledge of and approved the 'operation' against Nokuthula Simelane.



**F K DUTTON**

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at K100(-) on this the 6 day of February 2017 the regulations contained in Government Notice No R1258 of 21 July

1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

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H. S. S. S. S.

SOUTH AFRICAN POLICE SERVICE  
COMMUNITY SERVICE CENTRE  
06 FEB 2017  
PINETOWN  
KWAZULU-NATAL

COMMISSIONER OF OATHS






**Annex FKD1****EXPERIENCE AND EXPERTISE**


1. My experience and expertise is as follows:

- 1.1. I joined the South African Police on 1 August 1966. After undergoing a year's police training in Pretoria, I was posted to KwaZulu-Natal where I performed general policing duties at Greenwood Park, Glendale and Tongaat police stations.
- 1.2. Whilst serving at Tongaat in 1971 I was appointed as a detective. Since then I have worked as a detective/investigator for the rest of my career.
- 1.3. I was transferred to Pinetown Detective Branch in 1979 and held the rank of Detective Warrant Officer.
- 1.4. In 1983 I was promoted to a Commissioned Officer. I was appointed as the Head of the Durban West Field Unit. This Unit was responsible for investigating serious violence related cases.
- 1.5. Political violence escalated in KZN from the mid-1980s and in consequence the unit which I headed investigated many cases of political violence. Hundreds of political violence cases were investigated under my command. Some of these cases exposed the hidden hand of the then South African

  
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government and its security forces in instigating and fuelling political violence.

- 1.6. The most prominent of these investigations was the murder investigation and conviction of Samuel Jamile (the former Deputy Minister of Interior for the KwaZulu Government); and the Trust Feed case in which South African Police Captain Brian Mitchell and several KwaZulu police officers were convicted on thirteen counts of murder.
- 1.7. In an address to the OAU Ad Hoc Committee for Southern Africa on 28 April 1992 in Arusha, Tanzania, President Nelson Mandela highlighted Trust Feed case and the contribution that this case had made towards the successful negotiations for a democratic South Africa.
- 1.8. In 1992 I was appointed to head the KwaZulu-Natal investigation team of the Goldstone Commission. This led to, among other things, the exposure of the workings of the SAP Security Branch's activities under the command of former Colonel Eugene de Kock at Vlakplaas and the role and association of the South African Police top command in political violence.
- 1.9. In March 1994, after the Goldstone Commission had published its report on "State Sponsored Violence" implicating senior government Cabinet Ministers and the Command structure of the South African Security Forces I was appointed to serve on a Special Investigation Team headed by the then Attorney General of the Transvaal, Dr D'Oliviera. This Team was

  
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charged with conducting criminal investigations into the issues raised by the Goldstone Commission's report. I assisted in debriefing witnesses in Denmark and obtaining comprehensive affidavits from them. This resulted in the arrest of Eugene de Kock and others.

- 1.10. In August 1994, I was appointed by the Minister of Safety and Security, Sydney Mufamadi, to establish and command the Investigation Task Unit (ITU) to investigate hit squads within the KwaZulu Police. In 1995 I was promoted to the rank of Colonel.
- 1.11. In 1996 President Nelson Mandela seconded me to the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), where I assisted in the ICTY's investigations into genocide, war crimes and crimes against humanity in Bosnia and Croatia. At the end of 1997 I was appointed to head the ICTY Office in Sarajevo where I facilitated all ICTY investigations (including the exhumations of mass graves) in Bosnia. In 1998 I was promoted to the rank of Commander (a P5 position) and commanded all field investigations in Bosnia, Croatia and Kosovo.
- 1.12. Early in 1999 I facilitated the initial field investigations into the forced evictions of Albanians from Kosovo by the Serb Security Forces. To achieve this I established Investigation Units in Tirana, Albania and Skopje, Macedonia. I headed these initial investigations. These investigations resulted in indictments being issued against President Milosevic and other senior officials for crimes against humanity.

  
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1.13. I returned to South Africa in December 1999 after being recalled by the South African Government and was appointed as a Director General within the Department of Justice and tasked to establish and head the new Directorate of Special Operations (also known as the "Scorpions") a specialised investigative unit. I remained in this position until my retirement from the South African Government Service in April 2004 after 38 years of service.

1.14. Since my retirement I have worked both internationally and locally as a policing expert and private investigator.

1.15. The work that I have done for the past ten years is summarised below:


1.15.1. I was selected by a United Nations Security Council appointed Commission of Inquiry to investigate and assist the Commission in determining the causes of violence in Darfur during the latter part of 2004.

1.15.2. I was appointed in 2005 by UN Mission in the DRC (MONUC) to investigate incidents of sexual abuse against women.


1.15.3. I investigated incidents of violence for a Security Council appointed Panel of Experts for Sudan in 2005/2006.

  
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- 1.15.4. On behalf of the UN Development Program (UNDP) I investigated the cause of an explosion in the living quarters of UN staff members in Afghanistan during 2006.
- 1.15.5. I headed an Investigation Team for a Commission of Inquiry appointed by the United Nations General Assembly to determine the causes of violence in East Timor during 2006.
- 1.15.6. I investigated and recovered missing SAM 6 missiles in Afghanistan during 2007 on behalf of UNDP.
- 1.15.7. I was selected to serve on a South African panel to review the evidence against South African Police National Commissioner, Jackie Selebi during 2007 and to make a recommendation to the Director of National Prosecutions in respect of prosecution.
- 1.15.8. I conducted an investigation on behalf of the World Bank into procurement irregularities in the awarding of a multi-billion US\$ hydro-electric power contract in the DRC. The contract was shown to be corrupt and was subsequently withdrawn.
- 1.15.9. I conducted investigations on behalf of UNDP into incidents of serious staff corruption in South Africa, Mozambique, Brazil, Liberia, Cameroon, Ghana, Ethiopia and Zimbabwe at various times between 2006 and 2011.

  
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- 1.15.10. Working from Geneva I conducted an investigation into embezzlement of funds from the malaria programme of "The Global Funds" in Kyrgyzstan, India and various African countries in 2009 and 2010.
- 1.15.11. In September 2011 I was appointed by United Nations Office on Drugs and Crime (UNODC) to conduct an assessment on the Seychelles Police Service.
- 1.15.12. In January 2012 I was appointed by the Seychelles Government and tasked to re-structure the Seychelles Police Service to bring about a reduction in spiralling national crime. Over a two year period these efforts resulted in a 30% decrease of serious crime in the country; and a significant increase in police productivity.
- 1.15.13. While serving in the Seychelles I headed the investigations into international piracy incidents which occurred in the high sea surrounding Seychelles - as a result more than a hundred Somalian pirates were convicted in the Seychelles. This, together with other international measures, particularly the assistance of International naval forces, significantly reduced incidents of piracy in this region.

  
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- 1.15.14. In September 2015 I was appointed as a Commissioner to serve on the National Planning Commission.
- 1.15.15. On 17 January 2017 I was appointed to serve on a Task Team to advise KZN Provincial Government on steps to reduce Rhino poaching in KZN.

A handwritten signature in black ink, consisting of a large, stylized initial 'D' with a smaller 'A' written below it.

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