Post-TRC Prosecutions in South Africa
Collection of documents

A. The State v. van der Merwe, Vlok, Smith, Otto, van Staden (*Chikane case*)

I. Charge sheet (*Afrikaans*)
II. Plea and Sentence Agreement (*English*)
III. Plea and Sentence Agreement (*Afrikaans*)

B. The State v. Nieuwoudt, van Zyl (*PEBCO-Three case*) charge sheet

C. The State v. Ronnie Blani

I. Charge sheet
II. Judgment

D. Prosecution Policy Amendment (related documents)

I. Prosecution Policy text
II. Minutes Justice Portfolio Committee
III. NPA presentation Justice Portfolio Committee
IV. NPA press statement
V. High Court judgment suspending the amendments

E. Motherwell-Four Case new amnesty hearing

I. New amnesty decision of 29 August 2005
II. Minority decision of 23 June 2005

F. National Party and others v. Truth and Reconciliation Commission

(High Court judgment of 1998 setting aside the granting of amnesty to 37 high ranking ANC officials)

G. NPA Press Statement on non-continuation of Basson prosecution

H. "Steyn Report" on dangerous SADF activities

A.

I.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(Transvaalse Provinsiale Afdeling)

DIE STAAT

teen

1. JOHANNES VELDE VAN DER MERWE
'n volwasse man en 'n Suid-Afrikaanse burger

2. ADRIAAN JOHANNES VLOK
'n volwasse man en 'n Suid-Afrikaanse burger

3. CHRISTOFFEL LODEWIKUS SMITH
'n volwasse man en 'n Suid-Afrikaanse burger

4. GERT JACOBUS LOUIS HOSEA OTTO
'n volwasse man en Suid-Afrikaanse burger en

5. HERMANUS JOHANNES VAN STADEN
'n volwasse man en Suid-Afrikaanse burger

(hierna die beskuldigdes genoem)

AKTE VAN BESKULDIGING

Die Spesiale Direkteur van Openbare Vervolging, wat as sodanig vervolg vir en namens die Staat, stel die hof hiermee in kennis dat die beskuldigdes skuldig is aan die misdade van:

1. **POGING TOT MOORD ALTERNATIEWELIK OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956**

2. **OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956**

AANKLAG 1: POGING TOT MOORD

DEURDAT die beskuldigdes op of omtrent **23 April 1989** en te of naby die **destydse Jan Smuts Lughawe** in die distrik van **Kempton Park** wederregtelik en opsetlik ter bevordering van 'n gemeenskaplike oogmerk gepoog het om vir **Eerwaarde Frank Chikane**, 'n volwasse manlike persoon, te dood deur sy klere **met 'n gifstof, te wete Paraoxon, te besmet.**

ALTERNATIEWE AANKLAG TOT AANKLAG 1: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE, WET 17 VAN 1956*

DEURDAT die beskuldigdes, **Sebastiaan Smit, Wouter Basson, André Immelman en persone onbekend aan die Staat, gedurende April 1989** en te of naby **Roodeplaat Navorsingslaboratorium en/of Pretoria** in die distrik van **Pretoria** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **Eerwaarde Frank Chikane**, te pleeg en/of by die pleging van die misdaad behulpsaam te wees en/of die pleging daarvan te bewerkstellig.

AANKLAG 2: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE, WET 17 VAN 1956*

DEURDAT die beskuldigdes, **Wouter Basson, André Immelman en persone onbekend aan die Staat, gedurende 1989** en te of naby **Roodeplaat Navorsingslaboratorium, Veiligheidspolisie Hoofkantoor** in die distrik van **Pretoria en/of ander plekke onbekend aan die Staat** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **persone onbekend aan die Staat** te pleeg en/of by die pleging van die misdaad behulpsaam te wees en/of die pleging daarvan te bewerkstellig.

In die geval van skuldigbevinding versoek die genoemde Direkteur vonnis ooreenkomstig die reg teen die beskuldigdes.

AR ACKERMANN SC
SPESIALE DIREKTEUR VAN OPENBARE VERVOLGING
KANTOOR VAN DIE NASIONALE DIREKTEUR VAN OPENBARE VERVOLGING

OPSOMMING VAN WESENLIKE FEITE INGEVOLGE ARTIKEL 144(3)(a) VAN WET 51 VAN 1977

AGTERGROND:

1. Die Suid-Afrikaanse Weermag het gedurende die tydperk 1982-1992 'n hoogs geheime projek bedryf wat as Projek Coast bekend gestaan het. Die hoofdoelstelling van die projek was om 'n defensiewe en beperkte offensiewe chemiese- en biologiese oorlogvermoë daar te stel.

2. Dr Wouter Basson was die projekoffisier.

3. Vanweë die sensitiwiteit van die projek is daar van frontmaatskappye gebruik gemaak om navorsing te doen sowel as om substanse te vervaardig en te verkry.

4. Die frontmaatskappy Delta G Scientific (Edms) Bpk (hierna genoem "Delta G") was vir die navorsing en vervaardiging van die chemiese been van die projek verantwoordelik.

5. Roodeplaat Navorsing Laboratorium (Edms) Bpk (hierna genoem "Roodeplaat") het navorsing op biologiese gebied en tot 'n mindere mate chemiese navorsing gedoen.

6. Dr A Immelman was 'n wetenskaplike wat by Roodeplaat as die hoof van navorsing op toksikologie werksaam was.

7. Dr Basson het ongeveer in die middel tagtigerjare vir Dr Immelman opdrag gegee om *inter alia* navorsing te doen oor die aanwending van toksiese substanse teen individue, die roete van aanwending, sowel as die opspoorbaarheid van die stowwe na die toediening daarvan. Hierdie toksiese substanse (onder andere Paraoxon) is by Roodeplaat vervaardig en sommige daarvan is aan Dr Basson oorhandig.

8. Gedurende ongeveer 1987 is die vermoëns van die projek aan ander afdelings van die Suid-Afrikaanse Veiligheidsmagte tydens 'n vergadering in Kaapstad voorgehou.

9. Na bovermelde vergadering het Dr Basson aan Dr Immelman opdrag gegee om met verteenwoordigers van ander afdelings van die Veiligheidsmagte op 'n klandestiene wyse te ontmoet en aan hul behoeftes te voldoen.

10. Dr Immelman het daarna verskeie klandestiene ontmoetings met lede van die onderskeie veiligheidsmagte gehad. Tydens hierdie ontmoetings is die

behoefte van die besondere afdeling bespreek en is die substanse later aan hulle oorhandig.

11. Ten einde rekord te hou van hierdie toksiese substanse wat aan die buitestaanders oorhandig is, het Dr Immelman 'n lys (aangeheg as **Aanhangsel "A"**) bygehou om die datum van lewering, die naam van die substans, sowel as die volume / hoeveelheid wat gelewer is, aan te dui.

DIE BESKULDIGDES:

12. Beskuldigde no 1 was gedurende die tydperk Januarie 1986 tot September 1988 'n generaal in die Suid-Afrikaanse Polisie (hierna genoem die "Polisie") en in bevel van die Veiligheidstak van die Polisie. Gedurende Oktober 1988 is hy bevorder tot adjunk-kommissaris van die Polisie.

13. Generaal Sebastiaan Smit het hom opgevolg as bevelvoerder van die Veiligheidstak.

14. Beskuldigde no 2 was die Minister van Wet en Orde van die Republiek van Suid-Afrika gedurende die tydperk Desember 1986 tot Augustus 1991.

15. Beskuldigdes no 3 tot 5 was gedurende die relevante tye tot die akte van beskuldiging senior offisiere verbonde aan die Veiligheidstak.

DIE SAMESWERING:

16. Gedurende die tagtigerjare was verskeie persone / organisasies aktief betrokke in Suid-Afrika onder andere met die doel om die afskaffing van die misdaad apartheid en/of die omverwerping van die regering van die dag teweeg te bring.

17. In 1987 was daar 'n besluit deur die leierkorps van die Veiligheidsgemeenskap geneem dat hoë profiel lede van die anti-Apartheids-vryheidstryd in uiterste gevalle om die lewe gebring moes word.

18. 'n Lys met die name van die geïdentifiseerde persone is aan die bevelstruktuur van die Veiligheidsgemeenskap oorhandig.

19. Beskuldigdes no 1 en 2 het die uitvoering van die bovermelde besluit bespreek.

20. Daar was toe besluit dat 'n spesiale eenheid in die Veiligheidstak gestig sou word om die opdrag uit te voer.

21. Beskuldigde no 3 was die bevelvoerder van hierdie eenheid.

22. Beskuldigdes no 4 en 5 was ten alle relevante tye verbonde aan hierdie spesiale eenheid.

23. Nadat Generaal Smit oorgeneem het as bevelvoerder van die Veiligheidstak, is hy ingelig ten aansien van die doelwitte van die spesiale eenheid.

24. Ten alle relevante tye het die beskuldigdes, Smit, Basson, Immelman en ander persone onbekend aan die Staat opgetree ter bevordering van die gemeenskaplike oogmerke vermeld in die akte van beskuldiging.

DIE SLAGOFFERS:

25. Eerwaarde Frank Chikane se naam was op die lys vermeld in paragraaf 18.

26. Eerwaarde Frank Chikane was 'n uitgesproke teenstaander van apartheid en die beleid van die destydse regering. Hy was onder andere sekretaris-generaal van die Suid-Afrikaanse Raad van Kerke en die vise-president van die United Democratic Front.

27. Gedurende April / Mei 1989 was Eerwaarde Chikane van voorneme om verskeie lande te besoek om onder andere die toepassing van ekonomiese sanksies teen Suid-Afrika te propageer.

28. Die eerste been van sy toer was 'n besoek aan Namibië. Hy het per vliegtuig vanaf die destydse Jan Smuts Lughawe na Windhoek gereis.

29. Nadat Eerwaarde Chikane op 24 April 1989 van die klere wat in sy tas gepak was, aangetrek het, het hy siek geword. Hy is in 'n hospitaal in Namibië opgeneem, maar is later op dieselfde dag dringend terug na Suid-Afrika vervoer, waar hy weer gehospitaliseer is.

30. Nadat daar 'n verbetering in sy toestand ingetree het, is hy ontslaan. Hy het daarop na die VSA vertrek om daar te gaan aansterk en afsprake na te kom. Sy bagasie, wat intussen vanaf Namibië gearriveer het, is met bykomende klere aangevul.

31. In die Verenigde State van Amerika het Eerwaarde Chikane weer eens siek geword, nadat hy van die klere wat in sy tas was, aangetrek het. Sy toestand het na hospitalisasie verbeter. Hierdie episode het homself op twee verdere geleenthede herhaal, waarop hy gehospitaliseer was.

32. Ekstensiewe mediese toetse is gedurende hospitalisering op Eerwaarde Chikane uitgevoer. P.Nitrophenole is in sy urine geïdentifiseer tesame met spesifieke simptome (onder andere 'n lae anticholienesterase) wat ooreenstem met organofosfaat vergiftiging. P.Nitrophenole is vinnig afbrekende metaboliete van Parathion, waarvan Paraoxon die aktiewe bestanddeel is.

33. Ten aansien van aanklag 2, is die slagoffers waarna daar verwys word, met die uitsondering van Eerwaarde Chikane, onbekend aan die staat.

DIE MISDADE:

34. Nadat Dr Basson die opdrag vermeld in paragraaf 7 aan Dr Immelman gegee het om navorsing te doen oor die aanwending van toksiese substanse, was daar verskeie klandestiene ontmoetings tussen Dr Immelman en beskuldigdes no 3, 4 en 5.

35. Gedurende die ontmoetings het die beskuldigdes inligting oor *inter alia* gifstowwe, bakterieë en kiere as gewenste toedieningsroete verlang. Dr Immelman het die substans, Paraoxon, vir die doel geïdentifiseer en verduidelik dat hierdie tipe gifstof op nousluitende kledingstukke, soos 'n hemp se boordjie en/of op 'n onderbroek, aangewend moet word. Die beskuldigdes het Dr Immelman daarop versoek om Paraoxon aan hulle te verskaf.

36. Paraoxon is 'n dodelike, toksiese substans.

37. Op 4 April 1989 het Dr Immelman die Paraoxon aan die beskuldigdes gelewer, soos in Aanhangsel "A" gereflekteer word.

38. Op 23 April 1989 sou Eerwaarde Chikane vanaf Jan Smuts Lughawe vertrek het na Windhoek.

39. Voor sy vertrek het beskuldigdes no 4 en 5 vir ene Zeelie, wat ook verbonde was aan die Veiligheidspolisie, genader en Zeelie versoek om hulle behulpsaam te wees om Eerwaarde Chikane se bagasie op die lughawe te onderskep en oop te maak, sodat die kiere met 'n gifstof besmet kon word.

40. Die aand van 23 April 1989 was beskuldigdes no 4 en 5 op die lughawe en is Eerwaarde Chikane se tas onderskep en aan hulle oorhandig. Beskuldigdes no 4 en 5 het van die inhoud van Eerwaarde Chikane se tas besmet met die Paraoxon wat Dr Immelman aan hulle verskaf het.

41. Die besmetting van Eerwaarde Chikane se klere het die gebeure soos uiteengesit in paragrawe 29 - 32 tot gevolg gehad.

42. Die Staat beweer dat beskuldigdes ter bevordering van 'n gemeenskaplike oogmerk opgetree het om Eerwaarde Chikane te dood.

43. Ten aansien van aanklag 2 is dit onbekend aan die staat wanneer en ten opsigte van wie die substanse toegedien is. Die staat beweer egter dat daar gedurende die vermelde tydperk 'n sameswering bestaan het om teenstanders van die regering van die dag te elimineer.

LYS VAN GETUIES INGEVOLGE ARTIKEL 144(3)(a) VAN WET 51 VAN 1977

1. Eerwaarde Frank Chikane
2. Dr André Immelman
3. Charles Alfred Zeelie
4. Paul Francis Erasmus
5. Pieter Jacobus Johannes Burger
6. Eugéne Alexander de Kock
7. Superintendent Marthinus Gert Thomas Swart
8. Jacobus Francois Kotze
9. Wynand Johannes Pretorius
10. Dr Daniël J Smith
11. Dr Tomas P Lynch
12. Mary Rook
13. Joan Emmerich

AANHANGSEL "A"

VERKOPE

Datum gelewer		Stof	Volume	Prys
19.03.89	JK	Phensiklidien Thallium asetaat	1 x 500mg 50g	Teruggebring
23.03.89	JK	Phensiklidien	5 x 100mg	
04.04.89	C	Aldicarb – Lemoensap	6 x 200mg	
04.04.89	C	Asied – Whisky	3 x 1,5 g	
04.04.89	C	Paraoxon	10 x 2ml	
07.04.89	C	Vit D	2gr	
15.05.89	C	Vit D	2gr	R300,00
15.05.89	C	Katharidien	70mg	R150,00
15.05.89	C	10ml Spuite	50	
16.05.89	C	Naalde 15Gx10mm	24	R18,00
16.05.89	C	Naalde 17Gx7,5mm	7	R7,00
19.05.89	C	Thallium asetaat	1g	
30.05.89		Fosfied tablette	30	
09.06.89		Spore en Brief	1	
20.06.89	K	Kapsules NaCN	50	
21.06.89		Bierblik Bot	3	
21.06.89		Bierblik Thallium	3	
21.06.89		Bottel bier Bot	1	
21.06.89		Bottel bier Thallium	2	
22.06.89	K	Suiker en Salmonella	200gr	
27.06.89	C	Wiskey en Paraquat	1x75ml	
20.07.89	K	Hg-sianied	4gr	
27.07.89	K	Bobbejaan foetus	1	
04.08.89	K	Vibrio cholera	16 bottels	

DATUM GELEWER		STOF	VOLUME	PRYS
10.08.89	K	Asied 4xgr	Kapsule sianied 7	
11.08.89	C	Sigarette B anthracis	5	
	C	Koffie sjokolade B anthracis	5	
	C	Koffie sjokolade Potulinum	5	
	C	Pepperment sjokolade Aldikarb	3	
	C	Pepperment sjokolade Brodifakum	2	
	C	Pepperment sjokolade Katharidien	3	
	C	Pepperment sjokolade Sianied	3	
16.08.89	K	Vibrio cholera	6 bottels	
16.08.89	K	Kapsules Propan NaCN	7	
16.08.89	K	Formalien en Piridien	50ml x 30	
		Naalde 10cm x no 16	12	
16.08.89	K	Katharidien - poeier in sakkie	100mg	
16.08.89	K	Metanol	3-30ml	
	C	Vibrio cholera	10 bottels	
06.09.89	K	Slange	2	
	K	Mamba toksien	1	Teruggebring
13.09.89	K	Digoksien	5 mg	
18.09.89	C	Whiskey 50ml + colchicines	75mg	
06.10.89	K	B.melitensis c	1 x 50	
		S.typhimurium in deodorant	1	
11.10.89	K	Kulture vanaf briewe	2	
21.10.89	K	B.melitensis c		
		S.typhimurium in deodorant	1	

A.

II.

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO:

In the matter between:

THE STATE

and

1. JOHANNES VELDE VAN DER MERWE

an adult male South African citizen

2. ADRIAAN JOHANNES VLOK

an adult male South African citizen

3. CHRISTOFFEL LODEWIKUS SMITH

an adult male South African citizen

4. GERT JACOBUS LOUIS HOSEA OTTO

an adult male South African citizen AND

5. HERMANUS JOHANNES VAN STADEN

an adult male South African citizen

(hereafter referred to as the accused)

PLEA AND SENTENCING AGREEMENT IN TERMS OF SECTION 105A OF ACT 51 OF 1977 (AS AMENDED)

THE PLEA AGREEMENT:

A. PARTIES TO THE AGREEMENT:

1. The State is the National Prosecuting Authority of South Africa and represents the complainant.

2. There are five accused, namely:

JOHANNES VELDE VAN DER MERWE

ADRIAAN JOHANNES VLOK

CHRISTOFFEL LODEWIKUS SMITH

GERT JACOBUS LOUIS HOSEA OTTO and

HERMANUS JOHANNES VAN STADEN;

B. AUTHORISATION:

3. The prosecutor who represents the Prosecuting Authority in this matter is **Adv AR Ackermann SC,** a Special Director in the Priority Crimes Litigation Unit in the Office of the National Prosecuting Authority, who is duly authorised to enter into this plea agreement on behalf of the State. The relevant authorisation is attached as **Annexure A.**

C. LEGAL REPRESENTATION:

4. At all times during the plea negotiations and these proceedings, the accused have been represented by **Adv Johann Engelbrecht SC** and **Jan Wagener**, of Attorneys Wagener Muller, 833 Church Street, Pretoria, 0001.

D. THE INVESTIGATING OFFICER:

5. The investigating officer was consulted regarding this plea agreement and has indicated that he has no objection to the pleas of guilty as set out in the agreement, or to the proposed sentences.

E. THE COMPLAINANT'S ATTITUDE WITH REGARD TO THE PLEA AGREEMENT:

6. The complainant, the **Reverend Frank Chikane**, has been consulted and has indicated that:

   6.1 He does not harbour a grudge against the accused.

   6.2 It is extremely important for him to have the true facts surrounding the attempt on his life disclosed.

   6.3 He is satisfied with the plea agreement and does not wish to make any further representations in connection with the matter.

F. THE RIGHTS OF THE ACCUSED:

7. Prior to entering into the plea agreement, the accused were duly informed about their constitutional rights..

8. They have been fully informed regarding the rebuttable presumption that they are innocent until guilt has been proved beyond reasonable doubt.

9. They were informed of their right to remain silent.

10. They were also fully informed of their right not to offer self-incriminating testimony.

11. The accused are fully aware of the fact that the Honourable Court is not bound by this plea agreement.

G. THE CHARGES:

12. The accused are charged with the following offences:

COUNT 1: ATTEMPTED MURDER

IN THAT on or about **23 April 1989** and at or in the vicinity of **the then Jan Smuts Airport** in the district of **Kempton Park,** the accused unlawfully and intentionally, and in furtherance of a common purpose, attempted to murder the **Reverend Frank Chikane,** an adult male person, by way of **administering a poison, to wit Paraoxon, to his clothing.**

ALTERNATIVE CHARGE TO COUNT 1: CONTRAVENTION OF SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT, NO 17 OF 1956

IN THAT the accused, together with **Wouter Basson**, **André Immelman** and **persons unknown to the State, during April 1989** and at or near **Roodeplaat Research Laboratory and/or Pretoria** in the district of **Pretoria,** unlawfully and intentionally conspired to commit the crime of **murder** against the **Reverend Frank Chikane,** and / or to assist in the commission of this offence and / or to further the commission of the offence.

COUNT 2: CONTRAVENTION OF SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT, NO 17 OF 1956

IN THAT the accused, **Wouter Basson**, **André Immelman** and **persons unknown to the State, during 1989** and at or near **Roodeplaat Research Laboratory, Security Branch Headquarters** in the district of **Pretoria and/or other locations unknown to the State,** unlawfully and intentionally conspired to commit the crime of **murder** of **persons unknown to the State** and / or to assist with the commission of such murders and / or to further the commission of such murders.

H. THE PLEA OF THE ACCUSED:

13. The parties to this plea agreement have concurred on the following:

13.1 That all the accused plead guilty to **Count 1,** as set out in the indictment:

COUNT 1: ATTEMPTED MURDER

IN THAT on or about **23 April 1989** and at or in the vicinity of **the then Jan Smuts Airport** in the district of **Kempton Park,** the accused unlawfully and intentionally, and in furtherance of a common purpose, attempted to murder the **Reverend Frank Chikane,** an adult male person, by way of **administering a poison, to wit Paraoxon, to his clothing.**

13.2 That the State will withdraw **Count 2** against all the accused.

1. FACTUAL SUMMARY OF EVENTS:

(i) BACKGROUND:

(For the sole and exclusive purpose of this agreement, the accused admit the contents of paragraphs 14 to 23 as set out hereunder, although at the time the relevant offence referred to in **Count 1** was committed, they had no knowledge whatsoever thereof.)

14. During the period 1982 – 1992, the South African Defence Force ran a Top Secret project, namely Project Coast. The primary objective of this project was to develop a defensive and limited offensive chemical and biological warfare capacity.

15. Dr Wouter Basson was the project officer.

16. Due to the sensitivity of the project, front companies were used to conduct research as well as to manufacture and procure substances.

17. The front company Delta G Scientific (Pty) Ltd (hereafter referred to as "Delta G") was responsible for research and manufacture of chemical substances for the project.

18. Roodeplaat Research Laboratory (Pry) Ltd (hereafter referred to as "Roodeplaat") conducted research in the biological sphere and to a lesser extent, also carried out chemical research.

19. Dr A Immelman was a scientist employed as the head of toxicological research at Roodeplaat.

20. Around the mid-1980s, Dr Basson instructed Dr Immelman to, *inter alia*, carry out research on the use of toxic substances against individuals, methods of application and the traceability of such substances following administration. These toxic substances (including Paraoxon) were manufactured at Roodeplaat and some of them were handed over to Dr Basson.

21. In approximately 1987, Dr Basson ordered Dr Immelman to meet clandestinely with representatives of other branches of the Security Forces and to supply them with whatever substances they needed.

22. As a result of this instruction, Dr Immelman had various clandestine meetings with members of the various Security Force components. During these meetings, the needs of particular components were discussed and toxic substances were in fact later supplied to them.

23. In order to keep a record of the toxic substances that were handed over to these outsiders, Dr Immelman maintained a list (attached to the indictment

as **Annexure "A"**) indicating the date of delivery, the name of the substance and the volume / quantity supplied.

(ii) THE ACCUSED:

24. During the period January 1986 to September 1988, accused No 1 was the commanding officer of the SA Police Special Branch. In October 1988, he was promoted to Deputy Commissioner of Police.

25. General Sebastiaan Smit succeeded him as commander of the Security Police and thereafter, accused No 1 had no further involvement with the project.

26. During the period December 1986 to August 1991, accused No 2 was the Minister of Law and Order in the Republic of South Africa.

27. During the period relevant to the indictment, accused 3 to 5 served as police officers attached to the Security Branch.

(iii) THE VICTIM:

28. The Reverend Frank Chikane was an outspoken opponent of apartheid and the policies of the then lawfully elected government. He was, *inter alia*, the secretary-general of the South African Council of Churches and the vice president of the United Democratic Front. It was the stated policy of the latter organisation to propagate and support countrywide unrest and violence for the direct purpose of rendering the country ungovernable.

29. During April / May 1989, Reverend Chikane was planning to visit various foreign countries with a view to propagating the imposition of economic sanctions against South Africa.

30. The first leg of his trip was a visit to South West Africa, now Namibia. He travelled by air from the former Jan Smuts Airport to Windhoek.

31. After dressing on 24 April 1989 in some of the clothes that had been packed in his suitcase, the Reverend Chikane took ill. He was admitted to a hospital in Namibia, but later the same day, he was transported back to South Africa as a matter of urgency and re-hospitalised on arrival.

32. His condition improved and he was discharged from hospital. He then flew to the USA, both to recuperate and to keep a number of scheduled appointments. Additional clothing was packed in his suitcase, which had arrived from Namibia in the interim.

33. In the United States, Reverend Chikane again fell ill after wearing clothing taken from his suitcase. Again, after being hospitalised, his condition improved. This pattern was repeated twice more.

34. During his third hospitalisation in the USA, extensive medical tests were carried out on Reverend Chikane. P-Nitrophenol was found in his urine and this, together with specific symptoms and other test results, indicated organophosphate poisoning. P-Nitrophenol is a rapidly biodegradable metabolite of Parathion, of which Paraoxon is the active ingredient.

(iv) THE CRIME:

35. During the 1980s, various individuals / organisations were actively involved in efforts to abolish apartheid in South Africa and/or overthrow the government of the day by violent means. Methods used included the promotion of economic sanctions against and the international isolation of South Africa, as well as direct propagation of civil disobedience in order to render the country ungovernable.

36. During 1987, at a meeting arranged by the South African Defence Force, accused No 1 took cognisance of an order to act against high profile members of the anti-apartheid liberation struggle in order to neutralise their influence. He also took note that, in extreme cases and only as a last resort, consideration could be given to killing them.

37. A list containing the names of persons identified in terms of this order was handed to senior members of the security establishment, including accused No 1. Reverend Chikane's name was among those on this list.

38. The execution of the above-mentioned order was discussed by accused No 1 and No 2.

39. Accused No 1 and No 2 then decided that a special unit should be set up within the Security Branch for the purpose of carrying out this order.

40. Accused No 4 and No 5 were attached to this special unit at all relevant times and from January 1989, accused No 3 served as the commander of the unit.

41. After General Smit assumed command of the Security Branch, he was informed about the objectives of the special unit.

42. Acting on the orders of General Smit, accused No 3 made contact with Dr Basson and requested him to assist the special unit in acquiring substances that could be applied against the enemy. Dr Basson arranged for contact to be made with Dr Immelman.

43. A number of clandestine meetings took place thereafter between Dr Immelman and accused No 3, 4 and 5. At these meetings, these three accused discussed the details of substances that could be used against the enemy. In respect of Reverend Chikane, a substance that would specifically lead to his death was required. Dr Immelman identified a certain substance for this purpose and explained that it should be applied to close-fitting clothing items, such as a shirt collar and/or underpants. The toxic substance, which was subsequently identified as Paraoxon, was supplied to them by Dr Immelman.

44. Paraoxon is a lethal toxic substance.

45. On 4 April 1989, Dr Immelman delivered the Paraoxon to the accused, as reflected in **Annexure "A" of the Indictment.**

46. Reverend Chikane was due to depart for Windhoek from Jan Smuts Airport on 23 April 1989.

47. On the evening of 23 April 1989, accused No 3 and No 4 were at the airport and Reverend Chikane's suitcase was intercepted. They then applied the Paraoxon supplied to them by Dr Immelman, to the contents of Reverend Chikane's suitcase.

48. The poisoning of Reverend Chikane's clothing resulted in the series of events set out in paragraphs 31-34.

49. The order to kill Reverend Chikane was issued by General Smit to accused No 3 in terms of an order conveyed to accused No 1 and No 2. The accused acted in pursuance of a common purpose to murder Reverend Chikane. At all relevant times, the accused acted unlawfully and with the necessary intent.

AGREEMENT REGARDING A JUST SENTENCE:

J. AGGRAVATING CIRCUMSTANCES:

50. The administration of poison in order to secretly eliminate opponents is an egregious, reprehensible and universally abhorrent act.

51. Accused No 1 was the Deputy Chief of the Republic of South Africa's Police at the time of commission of this crime.

52. Accused No 2 was a prominent political leader and member of the ruling party of the day.

53. Reverend Chikane was a religious leader.

54. The motive for the planned murder of Reverend Chikane was to prevent him from lobbying abroad for economic sanctions against South Africa and to deprive him of his role in promoting internal résistance against the government..

55. The **Promotion of National Unity and Reconciliation Act, No 34 of 1995,** made provision for persons who were guilty of committing gross human rights violations for political purposes, to apply for amnesty.

56. On several occasions, accused No 1 and 2 availed themselves of this right and testified before the Truth and Reconciliation Committee, each time under oath.

57. The accused did not apply for amnesty in respect of the charge to which they have now pleaded guilty.

58. On 10 July 1997, accused No 1 testified before the TRC that he was not aware of the existence of a so-called "internal hit list" that was circulated within the security community.

59. Acts of reconciliation towards Reverend Chikane by accused No 2 took place only after the National Prosecuting Authority had indicated that it had a *prima facie* case against accused No 3, 4 and 5 in respect of the poisoning of Reverend Chikane.

60. During the trial of Dr Wouter Basson, who was charged, *inter alia,* with the poisoning of Reverend Chikane, the accused, and in particular accused No 2, remained silent about their role in the attempted murder and avoided any suggestion of attempted reconciliation.

61. During the prosecution of Dr Basson, accused No 3, 4 and 5 were approached on several occasions by members of the prosecution team with a view to giving evidence as State witnesses. They were offered indemnity from prosecution in terms of Section 204 of Act 51 of 1977 in this regard. The accused consistently refused to offer their cooperation and persisted in furnishing the State with a false version of events. The accused offered instead to cooperate with Dr Basson's legal defence team.

62. After conclusion of Dr Basson's trial, Reverend Chikane wrote to accused No 3, 4 and 5 several times, pleading with them to reconcile with him. The accused consistently ignored all his requests.

K. MITIGATING CIRCUMSTANCES:

63. None of the accused has any previous convictions. Their respective ages are 71 (accused No 1), 70 (accused No 2), 69 accused No 3), 60 (accused No 4) and 63 (accused No 5).

64. The accused are all married.

65. The accused have all pleaded guilty.

66. Disposal of this case in terms of Section 105A of Act 51 of 1977 saves both the court and the State the cost and inconvenience of a protracted trial.

67. The accused have assisted the State by pleading guilty, in so far as it would otherwise have been difficult for the State to prove its case, since the State is not in possession of any evidence regarding the involvement of accused No 1 and No 2 and has been able to establish their role only as the result of their cooperation. In addition, accused No 3 and No 4 came forward to disclose their roles.

68. The accused have shown remorse for their deeds and have undertaken to act as State witnesses in the event of a prosecution being instituted against General Sebastiaan Smit.

69. Accused No 2 publicly washed Reverend Chikane's feet as a gesture of reconciliation. This act of contrition must be seen against the background that it was performed voluntarily by accused No 2.

70. The sincere remorse of accused No 2 in regard to past deeds is further illustrated by his act of reconciliation towards the mothers of 9 of the 10 Nietverdiend victims killed by the Security Forces, despite the fact that accused No 2 had no knowledge of this operation at the time and nor was it sanctioned by him.

71. At all relevant times, the accused were acting by virtue of their official positions and posts, in defence of the lawfully elected government of the day, to which they had sworn an oath of allegiance.

72. The offence was committed during a period of intense conflict and division between the various communities and structures in South Africa. On the one hand, the ANC and other anti-apartheid organisations that wished to overthrow the government by violent means, had thrown everything into the struggle to achieve their objectives. All members and spheres of society were drawn into the struggle in order to foment résistance in a variety of forms. On the other hand, the then lawfully elected government, in turn, used all the methods and powers at its disposal. The Security Forces, and in particular the SA Police, played a key role in combating the onslaught. Amid the violence raging countrywide as well as in Namibia, the SA Police were increasingly required to act against trained military operatives, which had a significant influence on normal policing. At times,

they were forced to sacrifice the principle of minimum force and, amid the violence and bloodletting, the distinction between lawful and unlawful action became blurred.

73. At the time of commission of the offence outlined in Count 1, accused No 1 was no longer head of the Security Police and was also no longer involved in the project.

74. Neither accused No 1 nor No 2 had knowledge of the specific attempt on Reverend Chikane's life. Notwithstanding the fact that accused No 2 had made it clear that he wished to be informed in advance if consideration was being given to killing a specific individual, he was not informed in this particular case.

75. Accused No 3 and No 4 were subordinates who acted in terms of a direct order issued by the Security Branch chief, General Smit.

76. The original project aimed at neutralising the influence of high profile members of the anti-apartheid liberation struggle, was not initiated by the accused, but by the SA Defence Force, which itself was acting on higher authority.

77. As secretary-general of the South African Council of Churches and vice president of the United Democratic Front, Reverend Chikane played a key role in fomenting resistance to the former government. The United Democratic Front succeeded in mobilising the masses countrywide, resulting in widespread unrest and violence.

78. In the run-up to the TRC process, accused No 1 did everything possible to encourage members and former members of the SA Police to participate in the process. When the incident involving Reverend Chikane came to his notice, he held discussions with former chiefs and generals of the SA Defence Force in an attempt to persuade them to take part in the process as well. Because members of the defence force were involved in the incident, any attempt to seek amnesty would necessarily have been unsuccessful without their cooperation. The military generals were of the opinion, however, that the **Promotion of National Unity and Reconciliation Act, No 34 of 1995,** contained one-sided provisions that rendered the process unacceptable to them.

79. After conclusion of the TRC process, accused No 1 and No 2 did everything they could to promote creation of a further process that could address shortcomings exposed by the TRC process. Following the decision to prosecute accused No 3, 4 and 5, accused No 1 and No 2 also held discussions with Reverend Chikane with a view to the institution of such a process. He showed empathy for the problems with which accused No 1 and No 2 were wrestling.

80. With the formulation of the National Prosecuting Authority's prosecutorial guidelines entitled "*Prosecuting policy and directives relating to the prosecution of offences emanating from conflicts of the past and which were committed on or before 11 May 1994*" (see **Annexure "B"**), a process was created that offered built-in protection for individuals who wished to make use of it, and the accused lost no time in coming forward and making full disclosure regarding this incident, which they had not been able to do in response to the letters from Reverend Chikane referred to in paragraph 62 above.

L. SENTENCE AGREEMENT:

81. In the light of the circumstances set out above, agreement has been reached on the following as appropriate sentences in respect of count 1:

Accused No 1 and No 2:

Each of the accused is sentenced as follows:

> "**10 (ten)** years' imprisonment, wholly suspended for 5 (five) years on condition that the accused are not convicted of a crime in which assault or the administration of poison or other hazardous substances form an element, or of conspiracy to commit such a crime, committed during the period of suspension and in respect of which a sentence of imprisonment without the option of a fine is imposed."

Accused No 3, 4 and 5:

Each accused is sentenced as follows:

> "**5** (five) years' imprisonment, wholly suspended for 5 (five) years on condition that the accused are not convicted of a crime in which assault or the administration of poison or other hazardous substances form an element, or of conspiracy to commit such a crime, committed during the period of suspension and in respect of which a sentence of imprisonment without the option of a fine is imposed."

SIGNED AT **PRETORIA** ON THIS DAY OF JUNE 2007.

AR ACKERMANN SC
Director of Public Prosecutions
Priority Crime Litigation Unit.

1. JOHANNES VELDE VAN DER MERWE

2. ADRIAAN JOHANNES VLOK

3. CHRISTOFFEL LODEWIKUS SMITH

4. GERT JACOBUS LOUIS HOSEA OTTO

5. HERMANUS JOHANNES VAN STADEN

JAN WAGENER
ATTORNEY FOR THE ACCUSED
WAGENER MULLER
833 CHURCH STREET
ARCADIA, PRETORIA
TEL: (012) 342-3525
DOCEX 321 PRETORIA
REF: JW0423

A.

III.

IN DIE HOOGGEREGSHOF VAN SUID AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

SAAK NR:

In die saak tussen:

DIE STAAT

en

1. JOHANNES VELDE VAN DER MERWE

'n volwasse man en 'n Suid-Afrikaanse burger

2. ADRIAAN JOHANNES VLOK

'n volwasse man en 'n Suid-Afrikaanse burger

3. CHRISTOFFEL LODEWIKUS SMITH

'n volwasse man en 'n Suid-Afrikaanse burger

4. GERT JACOBUS LOUIS HOSEA OTTO

'n volwasse man en Suid-Afrikaanse burger en

5. HERMANUS JOHANNES VAN STADEN

'n volwasse man en Suid-Afrikaanse burger

(hierna die beskuldigdes genoem)

PLEIT- EN VONNISOOREENKOMS INGEVOLGE

ARTIKEL 105A VAN WET 51 VAN 1977 (SOOS GEWYSIG)

DIE PLEIT-OOREENKOMS:

A. PARTYE TOT OOREENKOMS:

1. Die Staat is die vervolgingsgesag en verteenwoordig die klaer;

2. Daar is vyf beskuldigdes, naamlik:

JOHANNES VELDE VAN DER MERWE

ADRIAAN JOHANNES VLOK

CHRISTOFFEL LODEWIKUS SMITH

GERT JACOBUS LOUIS HOSEA OTTO en

HERMANUS JOHANNES VAN STADEN;

B. MAGTIGING:

3. Die aanklaer wat die Vervolgingsgesag hierin verteenwoordig, is **Adv. Anton R Ackermann SC**, 'n Spesiale Direkteur verbonde aan die Prioriteits Misdaad Litigasie Eenheid van die Nasionale Vervolgingsgesag en het die pleit-onderhandelinge in hierdie saak behartig, waartoe hy behoorlik gemagtig is. Die betrokke magtiging word hierby aangeheg as **Aanhangsel A**.

C. REGSVERTEENWOORDIGING:

4. Die beskuldigdes is gedurende die pleit-onderhandelinge en voer van die verrigtinge deurentyd verteenwoordig deur **Adv Johann Engelbrecht SC** en **Jan Wagener**, van Prokureurs Wagener Muller, Kerkstraat 833, Pretoria, 0001.

D. DIE ONDERSOEKBEAMPTE:

5. Die ondersoekbeampte is geraadpleeg in hierdie aangeleentheid en het geen beswaar teen die verrigtinge en die voorgestelde vonnisse nie.

E. DIE KLAER SE HOUDING TEN OPSIGTE VAN DIE PLEIT-OOREENKOMS:

6. Die klaer, **Eerwaarde Frank Chikane**, is gespreek.

6.1 Hy het te kenne gegee dat hy nie 'n wrok teen die beskuldigdes koester nie;

6.2 Dat dit baie belangrik vir hom is dat die ware feite aan die lig kom; en

6.3 Dat hy tevrede is met die pleit-ooreenkoms en geen verdere vertoë in verband met hierdie aangeleentheid wil rig nie.

F. DIE BESKULDIGDES SE REGTE:

7. Alvorens hierdie verrigtinge 'n aanvang geneem het, is die beskuldigdes behoorlik oor hul fundamentele regte ingelig.

8. Hulle is volledig ingelig oor die weerlegbare vermoede dat hulle onskuldig is totdat hul bo redelike twyfel skuldig bewys word.

9. Hulle is ingelig oor hul reg om te kan swyg.

10. Hulle is ook volledig ingelig oor die reg om nie inkriminerende getuienis teen hulself af te lê nie.

11. Die beskuldigdes is verder bewus van die feit dat die Agbare Hof nie gebonde is aan hierdie ooreenkoms nie.

G. DIE AANKLAGTE:

12. Die beskuldigdes word aangekla van die volgende aanklagte:

AANKLAG 1: POGING TOT MOORD

DEURDAT die beskuldigdes op of omtrent **23 April 1989** en te of naby **die destydse Jan Smuts Lughawe** in die distrik van **Kempton Park** wederregtelik en opsetlik ter bevordering van 'n gemeenskaplike oogmerk gepoog het om vir **Eerwaarde Frank Chikane**, 'n volwasse manlike persoon, te dood deur **sy klere met 'n gifstof, te wete Paraoxon, te besmet**.

ALTERNATIEWE AANKLAG TOT AANKLAG 1: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956

DEURDAT die beskuldigdes, **Wouter Basson, André Immelman** en **persone onbekend aan die Staat, gedurende April 1989** en te of naby **Roodeplaat Navorsings Laboratorium en of Pretoria** in die distrik van **Pretoria** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **Eerwaarde Frank Chikane**, te pleeg en / of by die pleging van die misdaad behulpsaam te wees en / of die pleging daarvan te bewerkstellig.

AANKLAG 2: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956

DEURDAT die beskuldigdes, **Wouter Basson, André Immelman** en **persone onbekend aan die Staat, gedurende 1989** en te of naby **Roodeplaat Navorsings Laboratorium, Veiligheidspolisie Hoofkantoor** in die distrik van **Pretoria en of ander plekke onbekend aan die Staat** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **persone onbekend aan die Staat** te pleeg en / of by die pleging van die misdaad behulpsaam te wees en / of die pleging daarvan te bewerkstellig.

H. DIE BESKULDIGDES SE PLEIT:

13. Die partye tot hierdie ooreenkoms het tot die volgende ooreengekom:

13.1 Dat die beskuldigdes skuldig pleit op **aanklag 1**, soos vervat in die akte van beskuldiging:

Aanklag 1:

DEURDAT die beskuldigdes op of omtrent **23 April 1989** en te of naby **die destydse Jan Smuts Lughawe** in die distrik van **Kempton Park** wederregtelik en opsetlik ter bevordering van 'n gemeenskaplike oogmerk gepoog het om vir **Eerwaarde Frank Chikane**, 'n volwasse manlike persoon, te dood deur **sy klere met 'n gifstof, te wete Paraoxon, te besmet.**

13.2 Dat die Staat **aanklag 2**, soos vervat in die akte van beskuldiging, terugtrek teen al die beskuldigdes.

I. FEITLIKE UITEENSETTING VAN DIE VOORVALLE:

(i) AGTERGROND:

(Vir doeleindes van hierdie ooreenkoms alleen erken die beskuldigdes die inhoud van paragrawe 14 tot 23 wat direk hierna volg, alhoewel hulle ten tye van die pleeg van die betrokke misdryf geen kennis van enige aard daarvan gedra het nie.)

14. Die Suid-Afrikaanse Weermag het gedurende die tydperk 1982-1992 'n hoogs geheime projek bedryf wat as Projek Coast bekend gestaan het. Die hoofdoelstelling van die projek was om 'n defensiewe en beperkte offensiewe chemiese- en biologiese oorlogvermoë daar te stel.

15. Dr Wouter Basson was die projekoffisier.

16. Vanweë die sensitiwiteit van die projek is daar van frontmaatskappye gebruik gemaak om navorsing te doen sowel as om substanse te vervaardig en te verkry.

17. Die frontmaatskappy Delta G Scientific (Edms) Bpk (hierna genoem "Delta G") was vir die navorsing en vervaardiging van die chemiese been van die projek verantwoordelik.

18. Roodeplaat Navorsing Laboratorium (Edms) Bpk (hierna genoem "Roodeplaat") het navorsing op biologiese gebied en tot 'n mindere mate chemiese navorsing gedoen.

19. Dr A Immelman was 'n wetenskaplike wat by Roodeplaat as die hoof van navorsing op toksikologie werksaam was.

20. Dr Basson het ongeveer in die middel tagtigerjare vir Dr Immelman opdrag gegee om *inter alia* navorsing te doen oor die aanwending van toksiese substanse teen individue, die roete van aanwending, sowel as die opspoorbaarheid van die stowwe na die toediening daarvan. Hierdie toksiese substanse (onder andere Paraoxon) is by Roodeplaat vervaardig en sommige daarvan is aan Dr Basson oorhandig.

21. Gedurende ongeveer 1987 het Dr Basson aan Dr Immelman opdrag gegee om met verteenwoordigers van ander afdelings van die Veiligheidsmagte op 'n klandestiene wyse te ontmoet en aan hul behoeftes te voldoen.

22. Dr Immelman het daarna verskeie klandestiene ontmoetings met lede van die onderskeie veiligheidsmagte gehad. Tydens hierdie ontmoetings is die behoefte van die besondere afdeling bespreek en is die substanse later

23. Ten einde rekord te hou van hierdie toksiese substanse wat aan die buitestaanders oorhandig is, het Dr Immelman 'n lys (aangeheg as **Aanhangsel "A" tot die Akte van Beskuldiging**) bygehou om die datum van lewering, die naam van die substans, sowel as die volume / hoeveelheid wat gelewer is, aan te dui.

(ii) DIE BESKULDIGDES:

24. Beskuldigde no 1 was gedurende die tydperk Januarie1986 tot September1988 die bevelvoerende offisier van die Veiligheidstak van die SA Polisie. Gedurende Oktober 1988 is hy bevorder tot adjunk-kommissaris van die Polisie.

25. Generaal Sebastiaan Smit het hom opgevolg as bevelvoerder van die Veiligheidstak en beskuldigde no 1 was daarna nie meer betrokke by die projek nie.

26. Beskuldigde no 2 was die Minister van Wet en Orde van die Republiek van Suid-Afrika gedurende die tydperk Desember 1986 tot Augustus 1991.

27. Beskuldigdes no 3 tot 5 was gedurende die relevante tye tot die akte van beskuldiging offisiere verbonde aan die Veilgheidstak.

(iii) DIE SLAGOFFER:

28. Eerwaarde Chikane was 'n uitgesproke teenstaander van apartheid en die beleid van die destydse wettige verkose regering. Hy was onder andere die sekretaris-generaal van die Suid-Afrikaanse Raad van Kerke en die vise-president van die United Democratic Front. Laasgenoemde organisasie het as verklaarde beleid gehad die propagering en ondersteuning van landswye onrus en geweld met as direkte doelstelling om die land onregeerbaar te maak.

29. Gedurende April / Mei 1989 was Eerwaarde Chikane van voorneme om verskele lande te besoek om onder andere die toepassing van ekonomiese sanksies teen Suid-Afrika te propageer.

30. Die eerste been van sy toer was 'n besoek aan Suidwes-Afrika, tans Namibië. Hy het per vliegtuig vanaf die destydse Jan Smuts Lughawe na Windhoek gereis.

31. Nadat Eerwaarde Chikane op 24 April 1989 van die klere wat in sy tas gepak was, aangetrek het, het hy siek geword. Hy is in 'n hospitaal in Namibië opgeneem, maar is later op dieselfde dag dringend terug na Suid-Afrika vervoer, waar hy weer gehospitaliseer is.

32. Nadat daar 'n verbetering in sy toestand ingetree het, is hy ontslaan. Hy het daarop na die VSA vertrek om daar te gaan aansterk en afsprake na te kom. Sy bagasie, wat intussen vanaf Namibië gearriveer het, is met bykomende klere aangevul.

33. In die Verenigde State van Amerika het Eerwaarde Chikane weer eens siek geword, nadat hy van die klere wat in sy tas was, aangetrek het. Sy toestand het na hospitalisasie verbeter. Hierdie episode het homself op twee verdere geleenthede herhaal, waarop hy gehospitaliseer was.

34. Ekstensiewe mediese toetse is gedurende hospitalisering op Eerwaarde Chikane uitgevoer. P.Nitrophenole is in sy urine geïdentifiseer tesame met spesifieke simptome (onder andere 'n lae anticholienesterase) wat ooreenstem met organofosfaat vergiftiging. P.Nitrophenole is vinnig afbrekende metaboliete van Parathion, waarvan Paraoxon die aktiewe bestanddeel is.

(iv) DIE MISDAAD:

35. Gedurende die tagtigerjare was verskeie persone / organisasies aktief betrokke in Suid-Afrika onder andere met die doel om die afskaffing van apartheid en/of die omverwerping van die regering van die dag met geweld teweeg te bring. Dit is onder andere gedoen deur die bevordering van ekonomiese sanksies teen en die internasionale isolasie van Suid-Afrika, asook die regstreekse bevordering van burgerlike ongehoorsaamheid ten einde die land onregeerbaar te maak.

36. Gedurende 1987 het beskuldigde no 1 op 'n vergadering, wat deur die Suid-Afrikaanse Weermag gereël is, verneem van 'n opdrag om teen hoë profiel lede van die anti-Apartheids-vryheidstryd op te tree ten einde hul invloed te neutraliseer en dat, slegs in uiterste gevalle, as 'n laaste uitweg, oorweeg kon word om hulle om die lewe te bring.

37. 'n Lys met die name van die geïdentifiseerde persone is aan senior lede van die Veiligheidsgemeenskap, insluitende beskuldigde no 1, oorhandig. Eerwaarde Chikane se naam het op hierdie lys verskyn.

38. Beskuldigdes nos 1 en 2 het die uitvoering van die bovermelde opdrag bespreek.

39. Daar was toe deur beskuldigdes nos 1 en 2 besluit dat 'n spesiale eenheid in die Veiligheidstak gestig sou word om die opdrag uit te voer.

40. Beskuldigdes nos 4 en 5 was ten alle relevante tye verbonde aan hierdie spesiale eenheid en vanaf Januarie 1989 het beskuldigde no 3 gedien as die bevelvoerder van die eenheid.

41. Nadat Generaal Smit oorgeneem het as bevelvoerder van die Veiligheidstak, is hy ingelig ten aansien van die doelwitte van die spesiale eenheid.

42. In opdrag van Generaal Smit het beskuldigde no 3 kontak met Dr Basson gemaak en hom versoek om hulle spesiale eenheid behulpsaam te wees om middels te bekom wat aangewend kon word teen die vyand. Dr Basson het reëlings getref dat kontak gemaak word met Dr Immelman.

43. Verskeie klandestiene ontmoetings het daarna tussen Dr Immelman en beskuldigdes nos 3, 4 en 5 plaasgevind. Gedurende die ontmoetings het die gemelde beskuldigdes inligting oor middels wat teen die vyand aangewend kon word, bespreek, en wat Eerwaarde Chikane betref, spesifiek 'n middel verlang wat tot sy dood sou lei. Dr Immelman het 'n bepaalde substans vir die doel geïdentifiseer en verduidelik dat dit op nousluitende kledingstukke, soos 'n hemp se boordjie en/of op 'n onderbroek, aangewend moet word. Die betrokke substans, wat nou blyk Paraoxon te gewees het, is deur Dr Immelman aan hulle verskaf.

44. Paraoxon is 'n dodelike, toksiese substans.

45. Op 4 April 1989 het Dr Immelman die Paraoxon aan die beskuldigdes gelewer, soos in **Aanhangsel "A" tot die Akte van Beskuldiging** gereflekteer word.

46. Op 23 April 1989 sou Eerwaarde Chikane vanaf Jan Smuts Lughawe vertrek het na Windhoek.

47. Die aand van 23 April 1989 was beskuldigdes nos 3 en 4 op die lughawe en is Eerwaarde Chikane se tas onderskep. Daarna het hulle van die inhoud van Eerwaarde Chikane se tas besmet met die Paraoxon wat Dr Immelman aan hulle verskaf het.

48. Die besmetting van Eerwaarde Chikane se klere het die gebeure soos uiteengesit in paragrawe 31-34 tot gevolg gehad.

49. Die opdrag om Eerwaarde Chikane te dood is deur Generaal Smit aan beskuldigde no 3 gegee in navolging van 'n opdrag van beskuldigdes nos 1 en 2. Die beskuldigdes het ter bevordering van 'n gemeenskaplike oogmerk opgetree om Eerwaarde Chikane te dood. Te alle relevante tye het die beskuldigdes met die nodige opset en wederregtelikheid opgetree.

OOREENKOMS TEN OPSIGTE VAN 'N REGVERDIGE VONNIS:

J. VERSWARENDE OMSTANDIGHEDE:

50. Die aanwending van giftstowwe om opponente heimlik te vermoor, is 'n uiters laakbare daad wat universeel verag word.

51. Beskuldigde no 1 was die Adjunk-Polisiehoof van die Republiek van Suid-Afrika tydens die pleeg van die misdryf.

52. Beskuldigde no 2 was 'n prominente politieke leier van die regerende party van die dag.

53. Eerwaarde Chikane was 'n geestelike leier.

54. Die motief vir die beplande moord op Eerwaarde Chikane was om hom te verhoed om ekonomiese sanksies teen Suid-Afrika in die buiteland te propageer en om sy rol om in die binneland verset teen die regering aan te wakker, aan bande te lê.

55. Die **Wet op die Bevordering van Nasionale Eenheid en Versoening 34 van 1995**, het daarvoor voorsiening gemaak dat persone wat hulle skuldig gemaak het aan die growwe skending van menseregte vir 'n politieke oogmerk, aansoek kon doen vir amnestie.

56. Beskuldigdes nos 1 en 2 het op verskeie geleenthede gebruik gemaak van hierdie reg deur te getuig voor die Komitee, welke getuienis elke keer onder eed gelewer is.

57. Die beskuldigdes het nie aansoek gedoen vir amnestie ten opsigte van die aanklag waarop hulle skuldig pleit nie.

58. Beskuldigde no 1 het *inter alia* op 10 Julie 1997 voor die WVK getuig dat hy nie bewus was van die bestaan van 'n sogenaamde "internal hit list" wat onder die Veiligheidsgemeenskap gesirkuleer is nie.

59. Beskuldigde no 2 se versoenende optrede teenoor Eerwaarde Chikane het eers plaasgevind nadat die Vervolgingsgesag aangedui het dat hy 'n *prima facie* saak ten aansien van die vergiftiging van Eerwaarde Chikane teen beskuldigdes nos 3, 4 en 5 het.

60. Gedurende die verhoor van Dr Wouter Basson wat *inter alia* tereg gestaan het op die vergiftiging van Eerwaarde Chikane, het die beskuldigdes, en in die besonder beskuldigde no 2, geswyg oor sy rol in die poging tot moord en was daar ook geen sprake van enige versoenende optrede nie.

61. Gedurende die verhoor van Dr Basson is Beskuldigdes nos 3, 4 en 5 verskeie kere deur lede van die vervolgingspan genader om as Staatsgetuies op te tree. Vrywaring ingevolge Artikel 204 van Wet 51 van 1977 is vir hulle aangebied. Die beskuldigdes het geweier om enigsins hulle samewerking te gee en het voortgegaan om 'n valse weergawe aan die Staat te verskaf. Beskuldigdes het hulle samewerking aan die verdedigingspan van Dr Basson aangebied.

62. Na afloop van die verhoor van Dr Basson het Eerwaarde Chikane verskeie skrywes aan Beskuldigdes nos 3, 4 en 5 gerig, waarin hy om versoening gepleit het. Die beskuldigdes het nie op hierdie skrywes gereageer nie.

K. VERSAGTENDE OMSTANDIGHEDE:

63. Beskuldigdes het geen vorige veroordelings nie en is onderskeidelik 71 (beskuldigde no 1), 70 (beskuldigde no 2), 69 (beskuldigde no 3), 60 (beskuldigde no 4) en 63 (beskuldigde no 5) jaar oud.

64. Die beskuldigdes is tans getroud.

65. Die beskuldigdes pleit skuldig.

66. Die afhandeling van die huidige saak by wyse van artikel 105A van Wet 51 van 1977 het die hof en die Staat die onkoste en die ongerief van 'n uitgerekte verhoor gespaar.

67. Die beskuldigdes het die Staat gehelp deur skuldig te pleit, deurdat die Staat andersins moeilik die aanklag sou kon bewys het, aangesien die Staat oor geen getuienis beskik het rakende die aandeel van beskuldigdes no 1 en 2 en slegs met hul eie samewerking bewus geraak het van hulle aandeel. Verder het beskuldigdes no 3 en 4 na vore gekom met die feite rakende hulle aandeel.

68. Die beskuldigdes het berou getoon vir hulle dade en onderneem om as staatsgetuies op te tree indien daar 'n vervolging teen generaal Sebastiaan Smit ingestel word.

69. Beskuldigde no 2 het sonder geheimhouding en as versoeningsdaad Eerwaarde Chikane se voete gewas. Hierdie versoeningsdaad moet beoordeel word teen die agtergrond dat beskuldigde no 2 self na vore gekom het vir soverre dit hierdie saak aangaan.

70. Dat beskuldigde no 2 opregte berou het oor optredes in die verlede word verder geïllustreer deur sy versoeningsdaad geopenbaar teenoor die moeders van 9 van die 10 Nietverdiend-slagoffers wat deur die veiligheidsmagte gedood is, dit ten spyte van die feit dat beskuldigde no 2

destyds nie enige kennis van hierdie optrede gedra het nie en dit ook nie gemagtig het nie.

71. Die beskuldigdes het uit hoofde van hulle ampte en poste te alle relevante tye opgetree ter beskerming van die wettige verkose regering van die dag, teenoor wie hulle 'n eed van getrouheid afgelê het.

72. Die voorval het plaasgevind tydens 'n tydperk toe daar intense konflik en verdeeldheid tussen die verskillende gemeenskappe en strukture in Suid-Afrika geheers het. Enersyds het die ANC en ander organisasies wat apartheid teëgestaan het en die vorige regering met geweld omver wou werp, alles in die stryd gewerp om hulle doelstellings te bereik. Alle lede en sfere van die samelewing is by die stryd betrek om verset in 'n verskeidenheid van vorme aan te wakker. Andersyds het die destydse wettige verkose regering op sy beurt al die middele en kragte tot sy beskikking gebruik. Die veiligheidsmagte, in besonder die SA Polisie, het 'n sleutel rol gespeel om die aanslag af te weer. Te midde van die geweld wat landwyd asook in Namibië gewoed het moes die SA Polisie al hoe meer teen militêr opgeleide aanvallers optree, wat normale polisiëring wesentlik beïnvloed het. Hulle was soms genope om die beginsel van minimum geweld prys te gee en te midde van die geweld en bloedvergieting het die skeidslyn tussen regmatig en onregmatig vervaag.

73. Ten tyde van die handeling vermeld in aanklag 1 was beskuldigde no 1 nie meer die Veiligheidshoof van die polisie nie en ook nie meer betrokke by die projek nie.

74. Nóg beskuldigde no 1 nóg beskuldigde no 2 het kennis gedra van hierdie spesifieke aanslag op Eerwaarde Chikane se lewe. Ten spyte van die feit dat beskuldigde no 2 in elk geval vereis het om vooraf ingelig te word, indien dit oorweeg sou word om iemand spesifiek te dood, het dit in hierdie geval nie gebeur nie.

75. Wat betref beskuldigdes nos 3 en 4, was hulle ondergeskiktes wat gehandel het in terme van 'n direkte opdrag van die Veiligheidshoof, Generaal Smit.

76. Die oorspronklike projek om die invloed van hoë profiel lede van die anti-apartheids-vryheidstryd te neutraliseer, is nie deur die beskuldigdes geïnisieer nie, maar is deur die SA Weermag van stapel gestuur in opdrag van hoër gesag.

77. Eerwaarde Chikane het as sekretaris-generaal van die Suid-Afrikaanse Raad van Kerke en vise-president van die United Democratic Front 'n belangrike rol gespeel om verset teen die vorige regering aan te wakker. Die United Democratic Front het daarin geslaag om die massas landwyd te mobiliseer en burgerlike ongehoorsaamheid op groot skaal te weeg te bring, wat weer tot grootskaalse onrus en geweld gelei het.

78. Tydens die aanvang van die WVK-proses het beskuldigde no 1 alles moontlik gedoen om lede en voormalige lede van die SA Polisie aan te moedig om aan die proses deel te neem. Toe die geval van Eerwaarde Chikane onder sy aandag gekom het, het hy met voormalige hoofde en generaals van die SA Weermag samesprekings gevoer om hulle te probeer oorreed om ook aan die proses deel te neem. Omdat lede van die weermag by die voorval betrokke was, sou enige poging om amnestie te vra sonder hulle samewerking noodwendig misluk het. Die generaals van die weermag was egter van mening dat die **Wet op die Bevordering van Nasionale Eenheid en Versoening 34 van 1995**, eensydige bepalings bevat het wat dit vir hulle onaanvaarbaar gemaak het.

79. Beskuldigdes nos 1 en 2 het na afloop van die WVK-werksaamhede alles moontlik gedoen om 'n verdere proses tot stand te bring om die leemtes wat tydens die WVK-proses ontstaan het, uit te skakel. Na die besluit om beskuldigdes nos 3, 4 en 5 te vervolg, het beskuldigdes no 1 en 2 ook met Eerwaarde Chikane samesprekings gevoer met die oog op so 'n proses en het laasgenoemde begrip gehad vir die probleme waarmee beskuldigdes nos 1 en 2 geworstel het.

80. Met die daarstel van die Nasionale Direkteur van Openbare Vervolging se vervolgingsdirektief met die opskrif "*Prosecuting policy and directives relating to the prosecution of offences emanating from conflicts of the past and which were committed on or before 11 May 1994*" (sien **Aanhangsel "B"**), is 'n proses geskep wat ingeboude beskerming verleen aan persone wat daarvan gebruik maak en het die beskuldigdes onverwyld na vore gekom en oop kaarte gespeel met die Vervolgingsgesag ten aansien van die hierdie aangeleentheid, iets wat hulle nie kon doen in reaksie op die briewe van Eerwaarde Chikane na verwys in paragraaf 62 hierbo nie.

L. VONNIS-OOREENKOMS:

81. Dit word ooreengekom dat wat betref aanklag 1, die volgende 'n regverdige vonnis daarstel in die omstandighede hierbo uiteengesit:

<u>Beskuldigdes nos 1 en 2:</u>

Elke beskuldigde word soos volg gevonnis:

> "**10 (tien)** jaar gevangenisstraf wat in die geheel opgeskort word vir 5 (vyf) jaar op voorwaarde dat die beskuldigde nie skuldig bevind word aan 'n misdaad waarvan aanranding of die toediening van gif of ander skadelike stowwe 'n element is nie, of aan sameswering om so 'n misdaad te pleeg, gepleeg gedurende die periode van

Beskuldigdes nos 3, 4 en 5:

Elke beskuldigde word soos volg gevonnis:

> "**5 (vyf)** jaar gevangenisstraf wat in die geheel opgeskort word vir 5 (vyf) jaar op voorwaarde dat die beskuldigde nie skuldig bevind word aan 'n misdaad waarvan aanranding of die toediening van gif of ander skadelike stowwe 'n element is nie, of aan sameswering om so 'n misdaad te pleeg, gepleeg gedurende die periode van opskorting en ten opsigte waarvan gevangenisstraf sonder die keuse van 'n boete opgelê word."

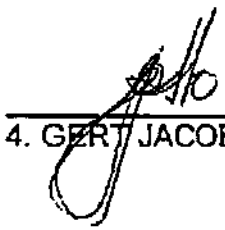
GETEKEN TE **PRETORIA**, OP HIERDIE 15 DAG VAN AUGUSTUS 2007.

AR ACKERMANN SC
Direkteur van Openbare Vervolging,
Prioriteits Misdade Litigasie Eenheid.

1. JOHANNES VELDE VAN DER MERWE

2. ADRIAAN JOHANNES VLOK

3. CHRISTOFFEL LODEWIKUS SMITH



4. GERT JACOBUS LOUIS HOSEA OTTO

5. HERMANUS JOHANNES VAN STADEN

JAN WAGENER
PROKUREUR VIR BESKULDIGDES
WAGENER MULLER
KERKSTRAAT 833
ARCADIA, PRETORIA
TEL: (012) 342-3525
DOCEX 321 PRETORIA
VERW: JW0423

B.

KONSEP AKTE VAN BESKULDIGING

IN DIE OOS KAAPSE PROVINSIALE AFDELING

Saakno: .....

Die Staat

teen

1. **Gideon Nieuwoudt**
2. **Johannes Martin Van Zyl**

(Hierna vermeld as die beskuldigdes)

Akte van Beskuldigding

AANKLAGTE 1 TOT 3 – MENSEROOF (3 AANKLAGTE)

Deurdat die beskuldigdes en die volgende persone:

(i) Roelf Venter;
(ii) Gert Beeslaar;
(iii) Johannes Koole
(iv) Joe Mamasela;
(v) Peter Mogai;
(vi) Onbekende lede verbonde aan die Veiligheidstak van die SA Polisie te Port Elizabeth,

ter bevordering van 'n gemeenskaplike oogmerk op of omtrent 8 - 10 Mei 1985 te of naby die Port Elizabeth lughawe en Post Chalmers in die regsgebied van die Oos-Kaapse Provinsiale Afdeling wederregtelik en opsetlik die vryheid en beweging van:

(i) Qaquwili Godolozi;
(ii) Champion Galela; en
(iii) Sipho Hashe

ontneem het.

AANKLAGTE 4 TOT 6 – MOORD (3 AANKLAGTE)

Deurdat die beskuldigdes en die volgende persone:

(i) Roelf Venter;
(ii) Gert Beeslaar;
(iii) Johannes Koole
(iv) Joe Mamasela;
(v) Peter Mogai;
(vi) Onbekende lede verbonde aan die Veiligheidstak van die SA Polisie te Port Elizabeth,

Ter bevordering van 'n gemeenskaplike oogmerk op of omtrent 10 Mei 1985 te of naby Post Chalmers in die regsgebied van die Oos-Kaapse Provinsiale Afdeling wederregtelik en opsetlik die volgende persone:

(i) Qaquwili Godolozi;
(ii) Champion Galela; en
(iii) Sipho Hashe

gedood het.

AANKLAGTE 7 – 9 : AANRANDING MET DIE OPSET OM ERNSTIG TE BESEER (3 AANKLAGTE)

Deurdat die beskuldigdes en persone vermeld in aanklag 1, ter bevordering van 'n gemeenskaplike oogmerk op of omtrent die 8 – 9 Mei 1985 te Post Chalmers in die regsgebied van die Oos- Kaapse Afdeling wederregtelik en met die opset om ernstig te beseer vir:

(i) Qaquwili Godolozi;
(ii) Champion Galela; en
(iii) Sipho Hashe

aangerand het.

OPSOMMING VAN WESENTLIKE FEITE

1. Die drie oorledenes was lede van 'n politieke organisasie wat bekend gestaan het as "Port Elizabeth Black Civic Organization" hierna genoem PEBCO.

2. Die oorledenes het leidende rolle gespeel in die aktiwiteite van die organisasie en het onderskeidelik die volgende ampte bekleë:

   (i) Qaquwili Godolozi was die President;
   (ii) Champion Galela was Organiserings-Sekretaris; en
   (iii) Sipho Hashe was die Sekretaris.

3. PEBCO was geaffilieer by die "United Democratic Front" en het oorhoofs ten doel gehad die afskaffing van die misdaad apartheid in Suid-Afrika.

4. Die SA Polisie het die standpunt gehuldig dat die "United Democratic Front" en PEBCO bloot verlengingstukke was van die toe verbode "African National Congress" en dat die organisasies verantwoordelik was vir die voortdurende onrus en geweld wat in die Port Elizabeth gebied geheers het.

5. Die beskuldigdes was verbonde aan die Veiligheidstak van die SA Polisie te Port Elizabeth.

6. Die aktiwiteite van die drie oorledenes was deur die bovermelde Veiligheidstak gemonitor.

7. Daar is besluit dat die drie oorledenes gedood moes word.

8. Gedurende die relevante tydperk was lede van die Veiligheidspolisie wat verbonde was aan die Vlakplaas eenheid werksaam in die Port Elizabeth gebied.

9. Ene Roelf Venter het bevel gevoer oor hierdie lede.

10. Beskuldigde 2 wat verbonde was aan die Veiligheidstak Port Elizabeth het Venter versoek om hulle behulpsaam te wees met die ontvoering van die drie oorledenes.

11. Op 8 Mei 1985 is die drie oorledenes onder valse voorwendsels na die Port Elizabeth lughawe gelok.

12. Gedurende die aand van 8 Mei 1985 was die drie oorledenes ontvoer vanaf die lughawe. Die volgende persone was daadwerklik betrokke by hierdie ontvoering:

    (i) Die beskuldigdes;
    (ii) Venter;
    (iii) Lotz;
    (iv) Beeslaar;

(v) Koole;
(vi) Mogai; en
(vii) Mamasela.

13. Die oorledenes is na 'n verlate Polisiestasie, Post Chalmers, in die Cradock distrik geneem waar hulle aangehou is.

14. Die oorledenes is daardie nag ondervra en herhaaldelik aangerand.

15. Die aanranding het die volgende dag voortgeduur.

16. Op 10 Mei 1985 het al die Vlakplaas-lede wat teenwoordig was onttrek vanaf Post Chalmers. Die oorledenes het op daardie stadium nog geleef en was onder die beheer van die beskuldigdes en ander lede van die Port Elizabeth se Veiligheidstak.

17. Die Staat beweer dat die beskuldigdes en ander lede van die Port Elizabeth Veiligheidstak die oorledenes gedood het, in omstandighede wat onbekend is aan die Staat.

18. Die lyke van die oorledenes is nooit gevind nie.

C.

I.

CALENDER

EASTERN CAPE DIVISION

GRAHAMSTOWN A

BEFORE THE HONOURABLE MR. ACTING JUSTICE

D.P.P	Ref. No Registrar or Magistrate	Accused	Charge(s)	District	Witnesses
TUESDAY 12 OCTOBER TO FRIDAY 15 OCTOBER 2004					
CC81/04 1.	9/2/4/1-63/04 KIRKWOOD CR42/8/85	BUYILE RONNIE BLANI	1. MURDER 2. MURDER 3. HOUSEBREAKING WITH INTENT TO COMMIT ROBBERY AND ROBBERY (with aggravating circumstances as defined in section 1(1)(b) of Act 51 of 1977)	KIRKWOOD	5 WITNESSES
MONDAY 18 OCTOBER TO FRIDAY 29 OCTOBER 2004					
2.			TO BE FINALIZED		

IN THE HIGH COURT OF THE EASTERN CAPE

The Director of Public Prosecutions for the area of jurisdiction of the High Court of the Eastern Cape, who prosecutes for and in the name of the State, informs the Honourable Court that

BUYILE RONNIE BLANI, a 40 year old male of the Military Base, Grahamstown

(hereinafter called the accused)

is guilty of the following crimes:

1. **MURDER**

2. **MURDER**

3. **HOUSEBREAKING WITH INTENT TO COMMIT ROBBERY AND ROBBERY (with aggravating circumstances as defined in section 1((1)(b) of Act 51 of 1977)**

COUNT 1: MURDER

IN THAT on or about 17 June 1985 and at or near the farm Enhoek in the Kirkwood magisterial district, the accused unlawfully and intentionally killed **KOOS DE JAGER,** a 72 year old male.

COUNT 2: MURDER

IN THAT on or about the date and at or near the place referred to in count 1, the accused unlawfully and intentionally killed **MYRTLE LOUISA DE JAGER,** a 65 year old female.

COUNT 3: **HOUSEBREAKING WITH INTENT TO COMMIT ROBBERY AND ROBBERY WITH AGGRAVATING CIRCUMSTANCES**

IN THAT on or about the date and at or near the place referred to in count 1, the accused unlawfully and intentionally broke into and entered the house of **KOOS** and **MYRTLE LOUISA DE JAGER** and by intentionally using force and violence to induce submission by the said **KOOS** and **MYRTLE LOUISA DE JAGER** took and stole from out of their care and protection certain property as per the attached annexure, being in their lawful possession and thereby robbing them of same.

In the event of a conviction, the said Director of Public Prosecutions requests sentence against the accused according to law.

In terms of section 144(3) of Act 51 of 1977 a summary of substantial facts and a list of certain state witnesses are attached.

J P M MARAIS
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS: EASTERN CAPE

ANNEXURE TO COUNT THREE

1. One ,22 Rifle (serial number: 210934)
2. One Pellet Gun
3. One long knife
4. One bayonet
5. R180.00 cash
6. One portable radio
7. Two torches
8. One thermos flask
9. One 1976 model Datsun pick-up truck (Registration number: CB 8978)
10. Linen (assorted)
11. Foodstuffs

SUMMARY OF SUBSTANTIAL FACTS

1. The two deceased were an elderly married couple who resided on the farm Enhoek.

2. The accused was associated with an organization known as the "Addo Youth Congress".

3. At a certain stage the accused conspired with other members of the organization to attack the farm of the deceased.

4. On the night of 17 June 1985 the accused and his co-conspirators ("the group") armed themselves and traveled to the farm of the deceased.

5. Upon arrival, the group cut the telephone connection to the farm and proceeded to the farmhouse.

6. The group then broke into the house despite attempts by the deceased in count 1 to defend himself with a firearm.

7. Both deceased were assaulted and killed inside the house. A child who was also present in the house was, however, not harmed.

8. The group ransacked the house and removed the items set out in the annexure to count three.

9. The group then left the scene in a Datsun pick-up truck that was in the possession of the deceased in count 1. The vehicle was driven to Motherwell, near Port Elizabeth where it was set on fire and burnt out.

10. At medico-legal post mortem examinations conducted on the bodies of the two deceased, the cause of death was determined as "Breinbesering" and "Akute bloedverlies" respectively.

11. At all relevant times the group acted in pursuance of a common purpose to break into the house of the two deceased, and to rob and kill them.

LIST OF STATE WITNESSES

1. Insp. G Le Roux
   Serious and Violent Crime Unit
   PORT ELIZABETH

2. Dr. D S Gerber
   District Surgeon
   KIRKWOOD

3. Casper Jonker
   Directorate Special Operations
   VGM Building
   PRETORIA

4. James Ronald Beyl
   C/o Investigating Officer

5. Supt. Victor Leonard Clive Meyer
   SAPS
   PORT ELIZABETH

In terms of section 144(3)(a)(ii) of Act 51 of 1977 the names and addresses of other witnesses have been withheld.

C.

II.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

GRAHAMSTOWN

CASE NO.: CC81/2004

DATE: 25 APRIL 2005

In the matter between:

THE STATE

versus

BUYILE RONNIE BLANI

SENTENCE

LEACH J

The accused is charged with two counts of murder and one count of robbery with aggravating circumstances. Although he initially pleaded not guilty to those charges he amended his plea to one of guilty and explains that his plea of not guilty had been based upon a misconception of the legal position in that although he admitted participation in the events, he was not the person who actually killed the two deceased.

The material facts had been read into the record and the accused has confirmed that he agrees with those facts.

The charges against him arise out of an incident which occurred on 17 June 1985 when the accused and certain companions went to the farm Enhoek in the district of Kirkwood. There entry was gained into the house and the deceased, Mr Koos de Jager and his wife, Mrs Myrtle Louisa de Jager were both overpowered and killed. The accused states that this was done as he was a member of the Youth Congress which was affiliated to the African National Congress and that instructions had

been received to attack farmers to destabilise the country. During the course of the incident I understand that Mr De Jager was shot to death and his wife was stabbed to death. In the course of the incident a number of items were stolen including a rifle, a pellet gun, a knife, a bayonet, cash, a radio, torches, a flask, linen, foodstuffs and a light delivery van. It seems clear that the accused was guilty of the offences of which he was charged on the basis that he participated with a common purpose in all three of these charges.

The parties are agreed that a just sentence in the circumstances, taking the three counts together as one, is one of 5 years' imprisonment of which 4 years is suspended for 5 years on various conditions. At first blush that appears to be an alarmingly light sentence for the predetermined killing of other human beings, especially as section 105A of the Criminal Procedure Act obliges me to take the minimum sentencing legislation into account which, although it would not be of application because the actions in question were committed before the minimum sentencing legislation came into effect, does provide an indication of how severe murders committed with premeditation should be regarded.

However, the parties are agreed that one of the co-perpetrators of these crimes, a person by the name of Malgas, had applied for amnesty to the Truth and Reconciliation Commission and had been granted amnesty for the same crimes. It is further agreed that after the commission of these crimes the accused went into exile and returned to this country only after the Further Indemnity Act of 1992 had been enacted. In terms of that Act, provision was made for any outstanding warrants relating to exiled persons who wished to return to this country

to be stayed on condition that, when they did return, they would then formally apply for amnesty. The accused misunderstood the position and was under the impression that as he had been granted leave to come back to the country, it was not necessary for him to apply for amnesty. It is agreed that if the accused had applied for amnesty and made the confession that he has made to this Court today, his application for amnesty would have been granted. It would seem to me to be an injustice for his misunderstanding of the provisions of the Act to be held against him and for him to go to gaol for a long period of time, whereas if he had understood the legislation properly and applied for amnesty, he would not be in that position at all.

What is also of relevance is that another co-perpetrator who committed these offences and who had been tried and sentenced for his crimes has been granted a Presidential pardon. These are political considerations which normally would not count with the Court, because a Court must, in general, impose whatever sentence it feels appropriate and then leave the political machinations up to the politicians. But in these particular circumstances, bearing in mind that it is an element of justice that people who commit the same offences should be treated more or less the same way, it would seem to me that the sentence which has been agreed upon is in fact a just sentence and I should have regard to what has happened to his two co-perpetrators in deciding in what should happen to him.

I am therefore satisfied, that the accused has admitted all the elements of the offences with which he is charged, that he is guilty of those offences and that the sentence upon which agreement has been

other is just.

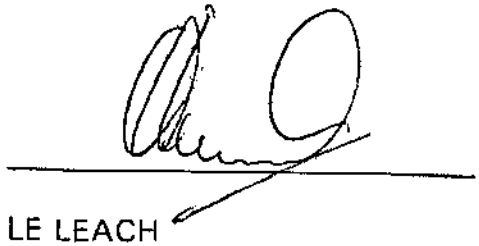
The accused is therefore found guilty on all three counts.

Taking all three counts together for the imposition of sentence I impose a sentence of 5 years' imprisonment of which 4 years is suspended for 5 years on the following conditions:

Firstly, that the accused is not found guilty of murder or culpable homicide committed during the period of suspension.

Secondly, that the accused is not found guilty of housebreaking with the intent to commit a crime, committed during the period of suspension.

Thirdly, that the accused is not found guilty of robbery committed during the period of suspension.



LE LEACH

JUDGE OF THE HIGH COURT

D.

I.

TABLE OF CONTENTS

PROSECUTION POLICY

PREFACE

Crime cannot be allowed to undermine the constitutional democracy in South Africa. The efforts of the Prosecuting Authority should therefore be directed at reducing pervasive criminal activities. An efficient Prosecuting Authority will also enhance public confidence in the criminal justice system.

Prosecutors are the gatekeepers of the criminal law. They represent the public interest in the criminal justice process.

Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.

Offenders must know that they will be arrested, charged, detained where necessary, prosecuted, convicted and sentenced.

The Prosecution Policy is aimed at promoting the considered exercise of authority by prosecutors and contributing to the fair and even-handed administration of the criminal laws.

This Policy is the end result of a process of intense consultation amongst all prosecutors in the country. It has also been circulated to a number of criminal justice organizations, government departments, academic institutions and community organizations.

The wealth of their combined knowledge and experience has helped significantly to shape the contents of this document.

1. INTRODUCTION

The Constitution of the Republic of South Africa provides for a single National Prosecuting Authority, consisting of—

- the National Director of Public Prosecutions, who is the head of the Prosecuting Authority,
- Deputy National Directors,
- Directors,
- Deputy Directors, and
- Prosecutors.

As an organ of state the Prosecuting Authority must give effect to the laws of the country; as an instrument of justice it must exercise its functions without fear, favour or prejudice.

The Prosecuting Authority has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

The Constitution requires the National Director of Public Prosecutions to determine, with the agreement of the Minister of Justice and after consulting the Directors of Public Prosecutions, a "*prosecution policy which must be observed in the prosecution process*".

This Prosecution Policy must be tabled in Parliament and is binding on the Prosecuting Authority. The *National Prosecuting Authority Act* also requires that the *United Nations Guidelines on the Role of Prosecutors* should be observed.

The Prosecuting Authority is accountable to Parliament and ultimately to the people it serves. Every prosecutor is accountable to the National Director who, in turn, is responsible for the performance of the Prosecuting Authority.

The law gives a discretion to the Prosecuting Authority and individual prosecutors with regard to how they perform their functions, exercise their powers and carry out their duties. This discretion must, however, be exercised according to the law and within the spirit of the Constitution.

2. PURPOSE OF POLICY PROVISIONS

The aim of this Prosecution Policy is to set out, with due regard to the law, the way in which the Prosecuting Authority and individual prosecutors should exercise their discretion.

The purpose of this Prosecution Policy is, therefore, to guide prosecutors in the way they perform their functions, exercise their powers and carry out their duties. This will serve to make the prosecution process more fair, transparent, consistent and predictable.

By promoting greater consistency in prosecutorial practices nationally, these policy provisions will contribute to better training of prosecutors and better coordination of investigative and prosecutorial processes between departments.

Since the Prosecution Policy is a public document, it will also inform the public about the principles governing the prosecution process and so enhance public confidence.

These principles have been written in general terms to give direction rather than to prescribe. They are meant to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local conditions.

3. THE ROLE OF THE PROSECUTOR

Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community.

The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example:

- the decision whether or not to institute criminal proceedings against an accused;
- the decision whether or not to withdraw charges or stop the prosecution;
- the decision whether or not to oppose an application for bail or release by an accused who is in custody following arrest;
- the decision about which crimes to charge an accused with and in which court the trial should proceed;
- the decision whether or not to accept a plea of guilty tendered by an accused;
- the decision about which evidence to present during the trial;
- the decision about which evidence to present during sentence proceedings, in the event of a conviction; and
- the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings.

Members of the Prosecuting Authority must act impartially and in good faith. They should not allow their judgement to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender. Prosecutors must be courteous and professional when dealing with members of the public or other people working in the criminal justice system.

4. CRITERIA GOVERNING THE DECISION TO PROSECUTE

(a) General

The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. This often happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated.

The prosecutor should consider whether to—

- request the police to investigate the case further;
- institute a prosecution;
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- decline to prosecute without taking any other action.

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.

Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.

This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements.

Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused must also be considered, before a decision is made.

This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.

The review of a case is a continuing process. Prosecutors should take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute has been made.

This may occur after having heard and considered the version of the accused and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution.

(b) Factors to be considered when evaluating evidence

When evaluating the evidence prosecutors should take into account all relevant factors, including—

How strong is the case for the State?

X Is the evidence strong enough to prove all the elements of an offence?

X Is the evidential material sufficient to meet other issues in dispute?

Will the evidence be admissible?

 Will the evidence be excluded because of the way in which it was acquired or because it is irrelevant or because of some other reason?

Will the state witnesses be credible?

 What sort of impression is the witness likely to make?
 Are there any matters, which might properly be put by the defence to attack the credibility of the witness?
 If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

Will the evidence be reliable?

- If, for example, the identity of the alleged offender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

Is the evidence available?

- Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

How strong is the case for the defence?

 Is the probable defence of the accused likely to lead to his or her acquittal in the light of the facts of the case?

(c) Prosecution in the public interest

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.

There is no rule in law, which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

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

The nature and seriousness of the offence:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.

- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.

- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.

- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of a complainant's wish not to proceed.

- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.

- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.

- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the*

accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial).

- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.

- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

5. CASE REVIEW

(a) Stopping of proceedings

Criminal proceedings may sometimes be stopped after a plea has already been entered. This would normally only occur when it becomes clear during the course of the trial that it would be impossible for the State to prove its case or where other exceptional circumstances have arisen which make the continuation of the prosecution undesirable.

If a prosecution is stopped, an accused will be acquitted and may not be charged again on the same set of facts. A prosecutor may therefore not stop a prosecution, unless the Director of Public Prosecutions or his or her delegate has consented thereto. Such decisions should therefore be made with circumspection.

(b) Restarting a prosecution

People should be able to rely on and accept decisions made by members of the Prosecuting Authority. Normally, when a suspect or an accused is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter.

There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include:

- an indication that the initial decision was clearly wrong and should not be allowed to stand;

- an instance where a case has not been proceeded with in order to allow the police to gather and collate more evidence, in which case the prosecutor should normally have informed the accused that the prosecution might well start again; and

- a situation where a prosecution has not been proceeded with due to the lack of evidence, but where sufficient incriminating evidence has since come to light.

A number of statutes provide that a prosecution for an offence under a particular law cannot be commenced or proceeded with unless the consent of a Director of Public Prosecutions has been obtained.

The inclusion of such requirements in legislation is intended to ensure that prosecutions are not brought in inappropriate circumstances.

Other reasons for these requirements may involve the use of the criminal law in sensitive or controversial areas where important considerations of public policy should be taken into account.

Similarly, rules of practice require that certain matters be referred to a Director of Public Prosecutions before a prosecution is proceeded with.

As a matter of policy, it is important that certain decisions are made at the appropriate level of responsibility to ensure consistency and accountability in decision-making.

6. FORUM OF TRIAL, DETERMINATION OF CHARGES AND ACCEPTANCE OF PLEAS

(a) Forum of trial

The law directs and policy considerations suggest that certain types of prosecutions sometimes be conducted at specified jurisdictional levels.

In practice this results in certain types of cases being heard in the District Court, some in the Regional Court and others in the High Court.

In terms of certain legislation and rules of practice, the instruction of a Director of Public Prosecutions is required to determine the forum in which the trial should proceed.

In determining whether or not a case is appropriate for hearing in the High Court, the following factors, *inter alia*, should be taken into account:

- the nature and complexity of the case and its seriousness in the circumstances;
- the adequacy of sentencing provisions in the lower courts and whether a conviction in the High Court carries a greater deterrent effect;
- any specific legal provision on, or any implied legislative preference for, a particular forum of trial;
- any delay, cost or adverse effect that witnesses may have to incur if the case is heard in the High Court; and
- the desirability of a speedy resolution and disposal of some prosecutions in available lower courts, aimed at reducing widespread criminal activity.

The decision regarding the court in which to prosecute an accused is determined by the complexity and seriousness of an offence, and the need for the Prosecuting Authority to guard against making decisions that will bring the law into disrepute.

(b) Determination of charges

The process by which charges are selected must be compatible with the interests of justice.

Prosecutors should decide upon, and draw up charges based on, available evidence which will—

- reflect adequately the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction;
- provide the court with an appropriate basis for sentence; and
- enable the case to be presented in a clear and simple way.

This means that prosecutors may not necessarily proceed with the most serious charge possible.

Additional or alternative charges may be justified by the amount of evidence and where such charges will significantly enhance the likelihood of a conviction of an accused or co-accused.

However, the bringing of unnecessary charges should, in principle, be avoided because it may not only complicate or prolong trials, but also amount to an excessive and potentially unfair exercise of power.

Prosecutors should therefore not formulate more charges than are necessary just to encourage an accused to plead guilty to some. Similarly, a more serious charge should not be proceeded with as part of a strategy to obtain a guilty plea on a less serious one.

(c) Acceptance of pleas

An offer by the defence of a plea of guilty on fewer charges or on a lesser charge may be acceptable, provided that -

- the charges to be proceeded with readily reflect the seriousness and extent of the criminal conduct of an accused;
- the plea to be accepted is compatible with the evidential strength of the prosecution case;
- those charges provide an adequate basis for a suitable sentence, taking into account all the circumstances of the case; and
- where appropriate, the views of the complainant and the police as well as the interests of justice, including the need to avoid a protracted trial, have been taken into account.

7. THE TRIAL PROCESS AND RELATED MATTERS

Prosecutors work in an adversarial context and seek to have the prosecution sustained. Cases should therefore be presented fearlessly, vigorously and skilfully.

At the same time, prosecutors should present the facts of a case to a court fairly. They should disclose information favourable to the defence (*even though it may be adverse to the prosecution case*) and, where necessary, assist in putting the version of an un-represented accused before court.

This notion also applies to bail proceedings. On the one hand, prosecutors should aim to ensure that persons accused of serious crimes are kept in custody in order to protect the community and to uphold the interests of justice. On the other hand, the prosecutor should not oppose the release from custody of an accused if the interests of justice permit.

Prosecutors should show sensitivity and understanding to victims and witnesses and should assist in providing them with protection where necessary. In suitable cases the prosecutor should advise the victim of the possibility of being compensated for the harm suffered as a result of the crime.

As far as it is practicable and necessary, prosecutors should consult with victims and witnesses before the trial begins. They should assist them by giving them appropriate and useful information on the trial process and reasons for postponements and findings of the court, where necessary.

Prosecutors are not allowed to participate in public discussion of cases still before the court because this may infringe the rule against comment on pending cases and may violate the privacy of those involved.

During the sentencing phase of a criminal case, prosecutors should assist the court by ensuring that the relevant facts are fully and accurately brought to its attention.

They should also make appropriate recommendations with a view to realizing the general purposes of sentence. These include the need for retribution, the deterrence of further criminal conduct, the protection of the public from dangerous criminals and the rehabilitation of offenders.

The Prosecuting Authority should give special attention to the effective and speedy disposal of cases identified as priority matters.

Prosecutors should specialize in the prosecution of certain offences where desirable and practicable.

The Prosecuting Authority should, as far as possible, make its senior trial prosecutors available to conduct the most difficult cases.

8. CO-OPERATION AND INTERACTION WITH POLICE AND OTHER CONSTITUENT AGENCIES

Effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. If a case is not efficiently prepared initially, it will less likely lead to a prosecution or result in a conviction.

The decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The Prosecuting Authority is usually not involved in such decisions although it may be called upon to provide legal advice and policy guidance.

In major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.

In practice, prosecutors sometimes refer complaints of criminal conduct to the police for investigation. In such instances, they will supervise, direct and co-ordinate criminal investigations.

Provision is made for Investigating Directors of the Prosecuting Authority to hold inquiries or preparatory investigations in respect of the commission of certain offences brought to their attention.

Prosecutors have the responsibility under the *National Prosecuting Authority Act* to determine whether a prosecution, once started, should proceed.

Such decisions are made independently, but prosecutors should consult the police and other interest groups where required.

It is therefore desirable, wherever practicable, that matters be referred to prosecutors by the police before a prosecution is instituted. In most cases suspected offenders are arrested and charged before the police can consult with prosecutors.

However, in cases where difficult questions of fact or law are likely to arise, it is desirable that the police consult the prosecutors before arresting suspected persons.

With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close co-operation, with mutual respect for the distinct functions and operational independence of each profession.

Prosecutors should work together with other departments and agencies such as Correctional Services, Welfare, lawyers' organizations, non-governmental organisations and other public institutions, to streamline procedures and to enhance the quality of service provided to the criminal justice system.

8A. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.

The Prosecutorial Policy and Directives, in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994, are hereby determined in terms of section 179(5) of the Constitution, with effect from 1 December 2005.

9. CONCLUSION

The Prosecuting Authority is a public, representative service, which should be effective and respected. Prosecutors should adhere to the highest ethical and professional standards in prosecuting crime and should conduct themselves in a manner which will maintain, promote and defend the interests of justice.

This Prosecution Policy is designed to make sure that everyone knows the principles that prosecutors apply when they do their work.

Applying these principles consistently will help those involved in the criminal justice system to treat victims fairly and prosecute offenders effectively.

The Prosecution Policy is not an end in itself.

The challenge which faces the Prosecuting Authority is to implement this Policy in a manner that will increase the sense of security of all people in South Africa.

APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy, are the following:

   (a) It was recognized that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.

   (b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.

   (c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.

   (d) Therefore, persons who had committed crimes, before 11 May 1994, which emanate from conflicts of the past, could enter into agreements with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:

   (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.

   (b) The constitutional right to life.

(c) The non-prescriptivity of the crime of murder.

(d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.

(e) The *dicta* of the Constitutional Court justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See ***Azanian Peoples Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC***).

(f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

(g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.

(h) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See ***The State v Wouter Basson CCT 30/03.).***

(i) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(j) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(k) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.

(l) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.

3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the following:

(a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court

trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others—

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process;

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire prosecution.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interest.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994:

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.

2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.

3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.

4. The Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.

5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.

6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

   (a) The National Intelligence Agency.

   (b) The Detective Division of the South African Police Service.

   (c) The Department of Justice & Constitutional Development.

   (d) The Directorate of Special Operations.

7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.

8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.

9. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.

10. A decision of the NDPP not to prosecute and the reasons for that decision must be made public.

11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.

12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.

13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.

14. The NDPP may provide for any additional procedures.

15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past:

1. The alleged offence must have been committed on or before 11 May 1994.

2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.

3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to prosecute or not:

   (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.

   (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:

      (i) The motive of the person who committed the act, commission or offence.

      (ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.

      (iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.

      (iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed—

         (aa) for personal gain; or

         (bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

(c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—

(i) the truth of the conflicts of the past, including the location of the remains of victims; or

(ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.

(d) The personal circumstances of the alleged offender, in particular—

(i) whether the ill-health of or other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;

(ii) the credibility of the alleged offender;

(iii) the alleged offender's sensitivity to the need for restitution;

(iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;

(v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and

(vi) the degree of indoctrination to which the alleged offender was subjected.

(e) Whether the offence in question is serious.

(f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.

(g) Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.

(h) If relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general.

(i) Consideration of any views obtained for purposes of reaching a decision.

(j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

D.

II.

JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
17 January 2006
BRIEFING AND DELIBERATION ON THE AMENDMENT OF THE PROSECUTING POLICY TO PROVIDE FOR DIRECTIVES FOR THE PROSECUTION OF MATTERS BEFORE 11 MAY 1994.

Chairperson: Ms F Chohan-Khota (ANC)

SUMMARY
The National Prosecution Authority (NPA) briefed the Committee on its proposals to amend its Prosecution Policy to allow it to decide whether or not to prosecute cases arising from conflicts of the past and were committed before 11 May 1994. The President had made it clear that there would be no general amnesty as this would fly in the face of the TRC process. The President's proposal was to leave the matter in the hands of the National Directorate of Public Prosecutions (NDPP) to pursue any cases that, as is normal practice, it believed deserved prosecution and could be prosecuted. The NPA emphasised that all their proposals were within current legislation such as the Criminal Procedure Act. In determining whether or not to prosecute, the NDPP had issued general criteria governing such a decision. In deciding whether some matters of the past were prosecutable, the guidelines were insufficient and required specific policy guidelines. The NPA recommended that policy be determined in terms of section 179(5)(a).

The amendments proposed by the NDPP were submitted and approved by the Minister of Justice and Constitutional Development, who also submitted them to Cabinet which noted the amended Prosecution Policy. All the Directors of Public Prosecutions also supported the amendments. The amended Prosecution Policy came into effect on the 1st of December 2005.

Members of the Committee asked how a prosecution could be triggered, if the NPA had an idea of how many cases were pending and what the effect of the amendments would be on the budget of the NPA.

MINUTES
Adv G Nel, the Deputy Director of Public Prosecutions, said that according to section 179(5)(a) and (b) of the Constitution, the National Director of Public Prosecution with the concurrence with the Minister determine Prosecution Policy. Any amendments to this policy were to be included in the report referred in section 35(2)(a) of the National Prosecution Authority Act. As a matter of public interest, the amendments in question were tabled before Parliament.

Adv Nel said that in his statement to Parliament on the tabling of the Report of the Truth and Reconciliation Commission (TRC) on the 25th of April 2003, the President made it clear that there would be no general amnesty as this would fly in the face of the TRC process. The President said that the matter could not be resolved by setting up another amnesty process which would mean suspending the constitutional rights of those on the receiving end of gross human rights violations. Thus, any amnesty process, whether general, individualised or in any other form, had been categorically excluded by Government as an option, not least because it was unconstitutional.

The President's proposal was to leave the matter in the hands of the National Directorate of Public Prosecutions (NDPP) to pursue any cases that, as is normal practice, it believed deserved prosecution and could be prosecuted. The NDPP would leave its doors open for those willing to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that were standard in the normal execution of justice, and which were accommodated in legislation. Adv Nel emphasised that all their proposals were within current legislation such as the Criminal Procedure Act. The President also said that the involvement of victims was crucial in determining the appropriate course of action.

Section 179(1) of the Constitution stated that there was a single prosecuting authority, and section 179(2) gave the prosecuting authority the power to institute criminal proceedings on behalf of the state and any functions incidental to this. Thus the NPA was independent constitutional institution. In determining whether or not to prosecute, the NDPP had issued general criteria governing such a decision. In deciding whether some matters of the past were prosecutable, the guidelines were insufficient and required specific policy guidelines. Adv Nel recommended that policy be determined in terms of section 179(5)(a).

The amendments proposed by the NDPP were submitted and approved by the Minister of Justice and Constitutional Development, who also submitted them to Cabinet which noted the amended Prosecution Policy. All the Directors of Public Prosecutions also supported the amendments. All the cases were centralised in the office of the NDPP to ensure consistency in decision-making especially given the complexities in some of these cases. The Priority Crimes Litigation Unit (PCLU) was responsible for

overseeing the investigations and instituting prosecutions. Since this task team was based in Pretoria, it was desirable that the cases be centralised in the office of the NDPP.

The Prosecution Policy was amended by the insertion of a new paragraph 8A. This gave the NDPP power to supplement or amend the Prosecution Policy so as to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest. In line with this amendment, the NDPP determined the criteria in Appendix A relating to the prosecution of cases arising from conflicts of the past and were committed before 11 May 1994. Appendix A had three parts. Paragraph A was an introduction and paragraph B set out the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. Paragraph C set out the criteria governing the decision to prosecute or not. This amended Prosecution Policy came into effect on the 1st of December 2005.

Discussion

Ms S Camerer (DA) asked how a prosecution could be triggered. Now that the guidelines were in place, would the workload of the PCLU greatly increase, and how many people were involved?

Adv Nel replied that a prosecution could be triggered firstly by a complaint being lodged by a victim. The PCLU had already looked at some of the cases from the TRC where amnesty had not been given. Some matters could be brought by the intelligence agency as well as the police. Thus there was a pro-active aspect to the triggering of prosecutions. It was not necessary at present to appoint new personnel given their current workload, but it may become necessary later on. It was hard to predict.

Mr G Solomon (ANC) asked what would happen where the victims did not want to prosecute an accused as the crime may have occurred many years ago.

Adv Nel said that the NDPP looked at all the circumstances of the case, such as the seriousness of the case, and whether there had been full disclosure for instance. It was for the NDPP to decide whether or not it would prosecute, not the victim.

Mr L Joubert (IFP) asked if the NPA had an idea of how many cases were pending. Also, in the case of a private prosecution, what was the situation regarding *locus standi*?

Adv Nel replied that at present it was impossible to know exactly how many cases were pending especially as the amendments were new. With regards to *locus standi,* anyone with an interest in the matter could bring an action.

Adv C Johnson (NNP) asked if looking at the circumstances of the accused created a loophole in the system for example where they claimed to be too old or infirm to stand trial. Could the NDPP be taken on review by an unsatisfied victim if they decided not to prosecute?

Adv Nel replied that it was important to consider things like the health of the accused. The Chairperson added that there was no hierarchy of criteria. Each case had to be decided on its merits. The whole basket of criteria had to be examined in making the determination of whether or not to prosecute. The NDPP could be taken on review.

Mr B Magwanishe (ANC) asked what the effect of the amendments would be on the budget of the NPA.

Adv Nel said that he did not see a major effect on the NPA’s budget given the number of cases they were dealing with now. It was hard to predict how many more people would come forward and how this would affect their budget.

The meeting was adjourned.

D.

III.

PROSECUTION POLICY AND DIRECTIVES RELATING TO PROSECUTION OF CRIMINAL MATTERS ARISING FROM CONFLICTS OF THE PAST

1. In his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003 the President, when dealing with the "issue of amnesty", **made it clear that there shall be no general amnesty.** He argued that such an approach would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.

2. However, the President did not stop there. He went further and stated in respect of any further process of amnesty, as follows:

"Yet we have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process….This reality cannot be avoided. .."The President then concludes that Government is of the firm conviction that **we cannot resolve this matter by setting up yet another amnesty process,** which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human rights violations. Thus, any amnesty process, whether general, individualised or in any other form, has been categorically

excluded by Government as a future option, not least because it would be unconstitutional.

3. The President then went on to explain Government's proposal as follows:

"We have therefore, left this matter in the hands of the **National Directorate of Public Prosecutions**, for it to pursue any cases that, as is normal practice, it believes deserve **prosecution** and can be prosecuted. This work is continuing."; and

"However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and **to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.";** and

"…in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the **involvement of the victims** will be crucial in determining the appropriate course of action.". (Emphasis added)

4. It is important for the Prosecuting Authority to deal with these matters on a uniform basis in terms of specifically defined criteria.

5.1 In terms of **section 179(1) of the Constitution** of the Republic of South Africa, 1996, there is a single national prosecuting authority in the Republic consisting of a National Director of Public Prosecutions (NDPP), who is the head of the prosecuting authority, and Directors of Public Prosecutions and prosecutors.

5.2 In terms of **section 179(2) of the Constitution** the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. This means that the National Prosecuting Authority (NPA) is an independent constitutional institution and that the NDPP has full discretion regarding whether a particular prosecution should or should not be instituted.

5.3 **Section 179(5)(a) of the Constitution** provides that the NDPP must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process. To assist the prosecutors at arriving at a decision whether to prosecute or not, the NDPP has, in terms of the above provision, **issued general criteria governing such a decision**. These general Criteria are set out in paragraph 4 of the Prosecution Policy.

These criteria could be defined as general policy guiding decision makers in arriving at informed decisions in the above regard. The question arises whether these guidelines are sufficient to assist the NDPP in arriving at decisions relating to offences which arise from conflicts of the past as contemplated by the President. The answer is no. Therefore, it is recommended that this process requires specific policy guidelines to facilitate the structured conclusion of the matter. It is therefore recommended that policy be determined in terms of section 179(5)(a) of the Constitution to deal with the matter under discussion.

6. Before dealing with the amendments to the Prosecution Policy, it is important to deal with the requirements for the determination for such Policy as required by section 179(5)(a) of the Constitution.

(a) In the first instance this provision requires that the Policy must be determined **"with the concurrence of the Cabinet member responsible for the administration of justice".** The amendments proposed by the NDPP were submitted and approved by the Minister for Justice and Constitutional Development. In view of the fact that the President requested the NPA to deal with the matter, the Minister also submitted the amendments and guidelines to Cabinet. Cabinet noted the amended Prosecution Policy.

(b) Secondly, section 179(5)(a) of the Constitution requires that the Prosecution Policy must be determined **"after consultation with the Directors of Public Prosecutions"**. The amended Prosecution Policy was submitted to all Directors of Public Prosecutions. All the Directors supported the amended Prosecution Policy.

7. It was decided to centralise all these case in the Office of the NDPP for the following reasons:

(a) A prosecution should not undermine nation building and it is therefore important that all these cases be synchronised in the Office of the NDPP in order to ensure that there is consistency in decision-making.

(b) The decision is consistent with the request of many DPPs to the NDPP, namely, that the National Office should take over these cases, because of the complexities implicit therein.

(c) As indicated in paragraph B4 of the amended Policy, the Priority Crimes Litigation Unit (PCLU) shall be responsible for overseeing the investigations and instituting prosecutions. Furthermore, senior designated officials of various departments and other components of the NPA must assist the PCLU in the execution of its duties. Since this Task Team will be based in

Pretoria, it is desirable that the cases be centralised in the Office of the NDPP.

8. The Prosecution Policy is amended by the insertion of a new paragraph 8A. In terms of this amendment the NDPP may supplement or amend the Prosecution Policy so as to **determine prosecutorial policy and directives in respect of specific matters**, for example, in respect of new legislation and matters of national interest. In accordance with this amendment, the NDPP determined the criteria in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994.

9. Appendix A consists of three parts, namely, an introduction part (par A); the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past (par B); and the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past (par C).

10. (a) **Paragraph A1** sketches the background and motivation for the amended Policy and guidelines.

(b) **Paragraph A2** sets out the various factors to be taken into account in developing and applying the prosecuting policy, directives and guidelines. See subparagraphs (a) to (l).

(c) **Paragraph A3** emphasises that Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the application of—

- **section 204 of the Criminal Procedure Act**, 1977 (Act No. 51 of 1977), in terms of which a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution;

- **section 105A of the Criminal Procedure Act**, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

- the processes determined and set out in the current Prosecution Policy, and the fact that such processes would not indemnify a person from private prosecution or civil liability. Therefore, if someone feels aggrieved regarding the process followed by the NPA, it can be tested in court.

11. **Paragraphs A1 to 15** provide for the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. In summary the following process must be followed:

(a) A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, must submit a **written sworn affidavit or solemn affirmation** to the NDPP containing such representations (par 1).

(b) The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations (Par 2).

(c) All representations must contain **a full disclosure of all the facts**, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security (par 3).

(d) The PCLU in the Office of the NDPP is responsible for overseeing investigations and instituting prosecutions in all such matters (par 4).

(e) The regional DPPs must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP (par 5).

(f) The PCLU shall be assisted in the execution of its duties by a senior designated official of the National Intelligence Agency, the Detective Division of the South African Police Service, the Department of Justice & Constitutional Development and the Directorate of Special Operations (par 6).

(g) The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute (par 7). The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the

bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements (par 8).

(h) The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, **and must obtain the views of any victims,** as far as is reasonably possible, before arriving at a decision (par 9).

(i) A decision of the NDPP not to prosecute and the reasons for that decision must be made public and in accordance with section **179(6) of the Constitution**, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past (par 10 and 11).

12. **Paragraphs C1 to C3** set out the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past. In the first instance the alleged offence must have been committed on or before 11 May 1994 and secondly the NPA must ascertain whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA. If the answers to these questions are in the affirmative, the further criteria set out in paragraph C3 (a) to (j) must be applied. These criteria are in line with the criteria followed in the TRC process as well as the general criteria laid down for the prosecuting authority.

13. This amended Prosecution Policy came into effect on 1 December 2005.

D.

IV.

Media Statement

DATE: 24th January 2006
EMBARGO: 11H30

AMENDED PROSECUTION POLICY AND DIRECTIVES RELATING TO PROSECUTION OF CRIMINAL MATTERS ARISING FROM CONFLICTS OF THE PAST

In his statement to Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003 the President of the Republic, when dealing with the issue of amnesty, made four very important points regarding the future handling of cases arising from conflicts of the past:

- In the first instance the President made it clear that there shall be no general amnesty.

- Secondly, he pointed out that we have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. However we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending the constitutional rights of those who were at the receiving end of gross human rights violations.

- Thirdly the President directed that any further processes should be left in the hands of the National Prosecuting Authority (NPA), for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. In this regard he further pointed out that, as part of this process and in the national interest, the NPA, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

- In the final instance the President indicated that in each case where any legal arrangements are entered into between the National Director and particular perpetrators as proposed, the involvement of the victims will be crucial in determining the appropriate course of action.

Following the President's announcement, and realising the importance for the NPA to deal with these matters on a uniform basis in terms of

specifically defined criteria, the NPA started a consultation process to determine uniform Prosecuting Policy to deal with criminal matters arising from conflicts of the past.

In the process, the NPA consulted with other law enforcement agencies, relevant departments, the Minister of Justice and Constitutional Development (Minister), the Directors of Public Prosecutions and Unit Heads within the NPA.

These cases will be centralised in the Office of the National Director for the following reasons:

- To ensure that there is consistency in decision-making.
- The complexities implicit in these cases.
- The Priority Crimes Litigation Unit (PCLU), which Unit is based within the Office of the National Director, shall be responsible for overseeing the investigations and instituting prosecutions. Furthermore, senior designated officials of various departments and other components of the NPA will assist the PCLU in the execution of its duties.

During the middle of 2005 a draft Amended Prosecution Policy was submitted to the Minister for her approval as required by the provisions of the Constitution and the NPA Act. The Amended Prosecution Policy was submitted to Cabinet for its information and towards the end of last year the Policy was tabled in Parliament by the National Director and the Minister. This amended Prosecution Policy came into effect on 1 December 2005.

The Amended Prosecution Policy gives effect to the proposals of the President. Some of the most important features of the Amended Prosecution Policy are the following:

- It emphasises that Government did not intend to mandate the National Director to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the application of—

(a) **Section 204 of the Criminal Procedure Act,** 1977, in terms of which a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution;

(b) **Section 105A of the Criminal Procedure Act,** 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA

(c) The processes determined and set out in the current Prosecution Policy, and the fact that such processes would not indemnify a person from private prosecution or civil liability. Therefore, if someone feels aggrieved regarding the process followed by the NPA, it can be tested in court.

- The amended policy provides for the procedural arrangements that must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past.

- Furthermore, the policy sets out the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past. In the first instance the alleged offence must have been committed on or before 11 May 1994. Secondly, the NPA must ascertain whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA. If the answers to these questions are in the affirmative, the further criteria set out in paragraph C3(a) to (j) must be applied. These criteria are in line with the criteria followed in the TRC process as well as the general criteria laid down for the prosecuting authority.

Issued by the National Director of Public Prosecutions, Advocate Vusi Pikoli.

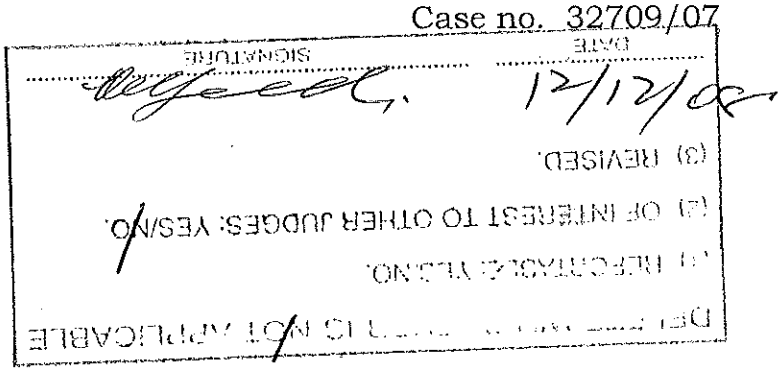
D.

V.

32709/07

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
Held in PRETORIA

Case no. 32709/07



In the matter between:

THEMBISILE PHUMELELE NKADIMENG	1st Applicant
NYAMEKA GONIWE	2nd Applicant
NOMBUYISELO NOLITA MHLAULI	3rd Applicant
SINDISWA ELIZABETH MKHONTO	4th Applicant
NOMONDE CALATA	5th Applicant
KHULUMANI SUPPORT GROUP	6th Applicant
CENTRE FOR STUDY OF VIOLENCE AND RECONCILIATION (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	7th Applicant
INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	8th Applicant

And

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	1st Respondent

THE MINISTER OF JUSTICE	2nd Respondent
ERIC ALEXANDER TAYLOR	3rd Respondent
GERHARDUS JOHANNES LOTZ	4th Respondent
JOHAN MARTIN VAN ZYL	5th Respondent
HERMANUS BAREND DU PLESSIS	6th Respondent
WILLEM HELM COETZEE	7th Respondent
ANTON PRETORIUS	8th Respondent
FREDERICK BARNARD MONG	9th Respondent
MSEBENZI TIMOTHY RADEBE	10th Respondent

JUDGMENT

Judgment reserved: 24 November 2008
Judgement handed down: 12/12/08.

LEGODI J,

INTRODUCTIONS

1. In this application, the applicants seek relief as follows:

> *"1. Pending the final outcome of this application, the coming into force and operation of the amendments to the National Prosecution Policy dated 1 December 2005 ("the policy amendments") is suspended and stayed.*
>
> *2. Declaring the policy amendments to be inconsistent with the Constitution of the Republic of South Africa, 1996 and unlawful and invalid.*
>
> *3. Alternatively to prayer 2 above*
>
> *3.1 Reviewing and setting aside the adoption of the policy amendments in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).*

3.2 To the extent that it is required, condoning the applicants' non-compliance with the time period set out in section 7(1) of PAJA

4. Ordering that such of the respondents as may oppose the matter pay the applicants costs.

5. Granting the applicants further and/or alternative relief.

PARTIES

2. This application was instituted by the first five applicants and other applicants, whose particulars and interests are briefly set out hereunder as follows:

2.1 The first applicant is the sister to one Nokuthula Aurelia Simelane (hereinafter referred to as Nokuthula) who disappeared after being abducted by the then Security Brach. In the early eighties she operated as a courier for Umkhonto We Sizwe, the armed wing of African National Congress).

2.2 During the Truth and Reconciliation Commission (TRC), it was established that Nokuthula disappeared while on a mission in Johannesburg after meeting with one Norman Mkhonza, who was apparently working with the Security Branch.

2.3 It emerged during the TRC proceedings that she was abducted by the Security Branch with the help of Mkhonza. To date, Nokuthula has not been found nor has her remains been found.

2.4 During the TRC, evidence emerged that implicated a number of people in the possible abduction, assault and or killing of Nokuthula. No one has however been charged. The first applicant is challenging the

prosecution policy amendments in question as the sister of Nokuthula.

2.5 The second and fifth applicants are challenging the policy as the widows of what is commonly referred to as the "Cradock four".

2.6 Their husbands were on the 27 June 1985 scheduled to attend a meeting in Port Elizabeth. This was a meeting which was arranged by the United Democratic Front (UDF).

2.7 On the way, they were apparently, intercepted and or stopped by the security branch members. Few days thereafter, their bodies were found burnt, mutilated and spread all over a wide area in the Redhouse or Bluewater Bay, on the outskirts of Port Elizabeth.
Their bodies and especially their faces were deliberately dosed with petrol and set on fire with the intention or rendering them unrecognisable and not identifiable.

2.8 During the TRC, several security branch officials were implicated, some of them are still alive. These people who were implicated many of them have not been prosecuted yet.

2.9 The second to the fifth applicants are challenging the prosecution policy amendments referred to in paragraph 1 above. They are challenging these policy amendments as the widows of the Cradock Four.

3. The sixth to the eighth applicants are non-governmental organizations challenging the prosecution policy and directives concerned as interested parties in the protection of the constitution.

4. In terms of section 179(5) (a)(b) of the Constitution, the first respondent with the concurrence of the second respondent, and after consulting with the Directors of Public Prosecutions, must determine prosecution policy which must be observed in the prosecution.

5. Section 21(2) of the National Prosecuting Authority Act 32 of 1998 provides that the first prosecution policy issued under the Act shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first National Director.

6. The first prosecution policy was issued some time before 2005. The applicants are challenging the amendments to the first prosecution policy issued by the first respondent.

BACKGROUND

7. During or about 2005, the first respondent produced amendments to the prosecution policy. In terms of the amendments paragraph 8A was added to the first prosecution policy.

8. In terms of the addition, the first respondent purporting to act in terms of section 179(5) of the Constitution, introduced prosecution policy and directives in Appendix A (hereinafter referred to as policy amendments), to deal with prosecution of cases arising from conflicts of the past which were

committed before the 11 May 1994. The policy and directives aforesaid in Appendix A are repeated as follows:

APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCE EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. *In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy are as follows:*

   (a) *It was recognised that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.*

   (b) *A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take party in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.*

   (c) *As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.*

   (d) *Therefore, persons who had committed crimes before 11 May 1994, which emanate from conflicts of the past, could enter into agreements*

with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these works still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. *In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:*

   (a) *The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.*

   (b) *The constitutional right to life.*

   (c) *The non-prescriptivity of the crime of murder.*

   (d) *The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed political motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.*

   (e) *The dicta of the Constitution justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See* ***Azanian People Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC****).*

   (f) *The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.*

   (g) *Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.*

   (h) *The dicta of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See* ***The State v Wouter Basson CCT 30/03****).*

(i) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations and for them to be dealt with.

(j) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.

(k) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.

3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President include the following:

(a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes the provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others-

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process:

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a prima facie case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire protection.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interes.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the

NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994.

1. *A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above, (the applicant) must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.*

2. *The NDPP must confirm receipt of the affidavit or affirmation and my request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The applicant may also mero moto submit further written sworn affidavit or solemn affirmation to the NDPP containing representations.*

3. *All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.*

4. *The Priority Crimes Litigations Unit (PCLU) in the office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.*

5. *The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.*

6. *The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:*

    (a) *The National Intelligence Agency.*

    (b) *The Detective Division of the South African Police Services.*

    (c) *The Department of Justice and Constitutional Development.*

    (d) *The Directorate of Special Operations.*

7. *The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.*

8. *The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status a section 204 witness and all section 105A plea and sentence agreements.*

9. *The NDPP may obtain the vies of any private or public or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.*

10. *A decision of the NDPP not to prosecute and the reasons for the decision must be made public.*

11. *In accordance with section 179(6) of the Constitution, the NDPP must inform the Minister of Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this proceeding policy relating to conflicts of the past.*

12. *The NDPP may make public statements on any matter arising from the policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.*

13. *The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representatives, guidelines and established practice. The victims must, as far as reasonably possible be consulted in any such further process and be informed should the accused's representations be successful.*

14. *The NDPP may provide for any additional procedures.*

15. *All stage agencies, in particular those dealing with the prosecution of all alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the*

prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. *CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST*

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past.

1. *The alleged offence must have been committed on or before 11 May 1994.*

2. *Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.*

3. *If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must,* ***in a balanced*** *way, be applied by the NDPP before reaching a decision whether to prosecute or not;*

   (a) *Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.*

   (b) *Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered.*

      (i) *The motive of the person who committed the act, commission or offence.*

      (ii) *The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.*

(iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or supporter.

(iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued but does not include any act, omission or offence committed-

(aa) for personal gain; or

(bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

(c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose-

(i) the truth of the conflicts of the past, including the location of the remains of victims; or

(ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.

(d) The personal circumstances of the alleged offender, in particular-

(i) whether the ill-health of the other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;

(ii) the credibility of the alleged offender;

(iii) the alleged offender's sensitivity to the need for restitution;

(iv) *the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;*

(v) *renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and*

(vi) *the degree of indoctrination to which the alleged offender was subjected.*

(e) *Whether the offence in question is serious.*

(f) *The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.*

(g) *Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.*

(h) *If relevant, the alleged offender's role during the TRC process, namely in respect of co-operation, full disclosure and assisting the process in general.*

(i) *Consideration of any views obtained for purposes of reaching a decision.*

(j) *Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision*

9. These prosecution policy amendments and directives are challenged by the applicants briefly on the following grounds:

9.1 that the policy amendments introduce a prosecutorial indemnity;

9.2 that such prosecutorial indemnity is in breach of the Constitution on various grounds including:

9.2.1 infringement of the rule of law;

9.2.2 infringement of various constitutional rights,

9.2.3 non-compliance with international law, etc. All of the rights challenged as aforesaid are set out in details in paragraphs 42 and 43 of the applicants' founding affidavit,

9.2.4 that the prosecutorial indemnity is inconsistent with the right to just administrate action contained in section 33 of the Constitution and the requirements of Administrative Justice Act 3 of 2000,

9.2.5 that the applicants seek to review the policy amendments in terms of section 6 of PAJA.

10. The respondents resist these challenges on the basis that the policy amendments do not allow the respondents to make a decision not to prosecute on the basis of the criteria in A, B and C of the policy amendments referred to above, where there is sufficient evidence to support prosecution. Secondly, that even if the policy allows this, it does not amount to an effective indemnity from prosecution, because the perpetrators would still be exposed to private prosecutions and civil remedies.

11. Further, the defence raised by the respondents appears to be that, until such time as a decision not to prosecute is made on the basis of the policy amendments, the challenge is not justifiable at the instance of the applicants. Lastly, the defence is that the applicants' claim is not justified because the first respondent does not intend to ever implement the

policy amendments in the manner complained by the applicants.

12. In the supplementary heads of argument submitted on behalf of the respondents, another issue is raised. It is contended that what the applicants are claiming for, do not relate to resolution of real and concrete controversies involving persons who have interest in the resolution of the disputes. The facts upon which the applicants rely on for the relief sought are said to be totally unconnected to the prosecutorial policy. In short, it is contended that the matter is not ripe for adjudication by the court. The relief sought by the applicants is said to be academic and does not relate to material prejudice.

ISSUES RAISED

13. As I see it, the issues raised narrowed and argued before me are as follows:

- **Whether the application is academic, unripe and having no material effect to the applicants?**

- **Whether the policy amendments allow for an amnesty, indemnity or a re-run of the TRC? Or**

- **Whether the policy amendments in relation to a decision not to prosecute will have the effect of allowing for an amnesty or indemnity equivalent to a re-run of the TRC?**

DISCUSSIONS, SUBMISSIONS & FINDINGS

14. I find if necessary to deal with the two latter issues identified in paragraphs 13 above.

14.1 In a somewhat introduction to the issue, counsel for the respondents in paragraph 30 of his written heads of argument stated as follows:

"30. As stated above, the policy amendments were adopted with the object to achieve the Constitutional mandate placed on the NDPP, which mandate is the prosecution of crime. If the applicants' case is not about the intentions of the NPA, in relation to the application of the policy amendments, or mala fide on the part of the NDPP, then it must be accepted that when the amendments to the prosecution policy were adopted, they were adopted in accordance with constitutional mandate placed on him by the Constitution with the objective of the prosecution of crime. Therefore, the applicants' contention that the policy amendments were adopted for an ulterior purpose is without merit".

14.1.1 Surely, the intention by the first respondent (NDPP) to comply with its constitutional mandate to prosecute crimes is one thing. But the issue as I see it is, whether such intention is implicit in the policy amendment? If not, the next issue is whether the policy amendments should be allowed to exist in their apparent contrast to the intention and constitutional mandate and obligation of the first respondent.

14.1.2 It appears therefore, that one should look closely at the policy amendments, with a view to find in them,

purported intention of the first and second respondents, in having brought about the policy amendments.

14.2 The applicants' contention is that, the purpose of the policy amendments is to allow the first respondent to conduct what is effectively a "re-run" of the Truth and Reconciliation Commission (TRC)'s amnesty process. Remember, TRC was specifically introduced and authorised in terms of the Interim Constitution. The main objective thereof was to deal with political commissions of offences in the past and, in particular the objective being to forge or bring about reconciliation in our country.

14.2.1 The response to this contention by the applicants was disputed and summed up as follows in the respondents' written heads of argument:

"32. It was submitted that the policy amendments correctly considered are not intended to be a process that can become a constitution or a re-run of the amnesty process of the TRC.

33. It must be appreciated that the purpose of the amendment policy is to ensure that the objects for which the Interim Constitution authorised the reconciliation process through the TRC process, should not be undermined.

34. The TRC process was a specific legislative process that authorised amnesty subject to the terms and conditions of that legislation.

35. The policy amendments are conscious that they are not a process in terms of which individuals are to receive any amnesty. The NDPP is not authorised to grant any amnesty.

36. It is therefore denied that the policy amendments can be considered to be re-run of the TRC process or to have an impact of undermining the constitutional compact that the South African society made with the victims of human rights"

14.2.2 What is quoted above, in my view captures the essence of the attack against the applicants' cause of complaint. In addition to this, it is the respondents' case that, as the first respondent exercises its power and obligation to institute prosecution proceedings, it would prosecute and if need be, only conclude agreements as envisaged in sections 204 and 105A of the Criminal Procedure Act.

14.3 The applicants in their heads of argument seek to identify the issue as follows:

"Firstly, the applicants do not allege that the policy amendments allow for an amnesty, indemnity or a re-run of the TRC, as the respondents suggest. Rather, the applicants allege that, the application of the policy amendments in relation to a decision not to prosecute will have this effect. As it will be seen below, the applicants alleged that, in light of the enormous difficulties associated with private prosecutions, a decision not to prosecute (on grounds other than the absence of evidence) on the basis of criteria that are strikingly similar to those applied by the

TRC amnesty committee constitute an effective re-run of the amnesty provisions of the TRC"

15. Before I turn to deal with the documents that contain the policy amendments under attack, I find it necessary to refer to the debate that ensued during the discussion. During the discussion, issues were further raised as follows:

- *Whether the applicants have demonstrated the existence of a prima facie case on which factors enumerated in part C of the policy amendments were relied upon in taking a decision to grant prosecutorial indemnity?*

- *Whether parts A, B and C confer a power not to prosecute where a prima facie case is established? And if so,*

- *Which provisions of the policy amendments empower the first respondent, a power not to prosecute, where prima facie is established?*

15.1 I see the question raised above as refining the issues to be decided. According to Mr Marcus on behalf of the applicants, in a response to an enquiry by the court, whether he understands part C as entitling the first respondent not to prosecute in the face of a prima facie evidence, he stated as follows:
"It says so, much explicitly. It says what it means"

15.2 I must pause for a moment to deal with the documents containing the policy amendments. Such policy amendments are quoted in paragraph 9 of this judgment.

I found it necessary to quote the policy amendments in their entirely for completeness sake and better understanding of the amendments. For this purpose, and in dealing with the interpretation or construction of the policy amendments, I will not repeat the quotation unless it becomes necessary to do so.

15.3 Apart from parts A and B of the policy amendments, the actual amendments are contained in part C. Part A deals with the introduction and the basis for bringing about the policy amendments as contained in part C. Part B deals with the procedure that has to be strictly followed in respect of persons wanting to make representations to the NDPP and in respect of those cases already received by the office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994. Any reference to any provision in parts A, B and C of the policy amendments will be referred to in this judgment as "paragraph".

15.3.1 Two classes of persons can seemingly make representations in terms of Part B paragraph 1 thereof, namely, those who are facing possible prosecution and secondly, those who wish to enter into an arrangement with the NPA as contemplated in paragraph1 of part A. Remember, in terms of section 179 (5)(d) of the Constitution, the first respondent may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the first respondent, from the accused person, the complainant and any other person or party whom the first respondent considers to be relevant.

15.3.1.1 In my view, the representations envisaged in paragraph 1 of part B of the policy amendments are not covered and sanctioned by the Constitution. Such representations as sanctioned in section 179(5)(d), are for a review of a decision, the review being in respect of a decision previously taken to prosecute or not to prosecute. For example, if a decision was previously taken not to prosecute A on a charge of murder of B, but later review such a decision and decide to charge A on the murder of B, A might be required to make representations in terms of section 179(5)(d), as to why the initial decision not to prosecute should not be reviewed.

15.3.1.2 Invitation for representations in terms of paragraph B.1 of the policy amendments are in my view, in respect of those who are facing possible prosecution, where a decision is not taken on their fate. Secondly, the representations relate to those persons in respect of whom their cases have already been received by the first respondent, but a decision is not taken to prosecute or not to prosecute them in respect of offences relating to the conflict of the past and committed before 11 May 1994.

15.3.1.3 In terms of paragraph A1 (c) of the policy amendments as part of the normal legal processes and in the national interest, the first respondent working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements, that are standard in the normal execution of justice and prosecuting mandate and are accommodated in the existing legislations (my own emphasis). During the discussion

Mr Semenya on behalf of the respondents, was quizzed on the reasons for the representations as envisaged in paragraph B1 of the policy amendments. His answer thereto was firstly, that the legislations referred to in paragraph A1 (c) of the policy amendments are sections 204 and 105A of the Criminal Procedure Act. Secondly, he contended that such agreement referred to in A.1.(c) are therefore in terms of the two sections.

15.3.1.4 Mr Semenya obviously had some difficulties in expanding on his submission as referred to in 15.3.1.3 above. His submission cannot be correct, for the following reasons: Firstly, representations in terms of paragraph B1 of the policy amendments are aimed at enabling the first respondent to decide whether or not to prosecute. Secondly, section 105A relates to a situation where a decision to prosecute has already been taken. Thirdly, section 204 can only take place where a decision to prosecute has already been taken against other persons or person and indemnity is granted by the court and not by the prosecution to a witness who testified in the proceedings. Implementation of sections 105A and 204 is therefore subject to judicial consideration, and are entirely matters of discretion by the trial court. The decision to prosecute or not to prosecute in terms of the first respondent's constitutional obligation and also as envisaged in the policy amendments, is entirely a matter falling within the domain of the first respondent.

15.3.2 All of these, in my view, raise another question. If indeed the policy amendments are intended to and or should be understood to be subject to the provisions of section 204 and 105A, why then the need for the amendments? Or to

put it differently, if indeed the policy amendments are not intended to authorise the first respondent to grant indemnity or amnesty, why then the need for the amendments? Remember, when the first prosecution policies were introduced, clear guidelines relating to prosecution of offences were set out. For example, reference is made in paragraph C.2 of the policy amendments to paragraph 4 of the said first prosecuting policy of the first respondent. The first prosecuting policy and directives, in my view, are adequate enough to deal with any decision to prosecute or not to prosecute in respect of any offence whether or not committed in conflicts of the past.

15.4 In my view, there is no need in the light of detailed first prosecuting policy to introduce and adopt a procedure as set out in parts A and B of the policy amendments. Of course, this has to be seen in the light of the ultimate policy amendments as contained in part C thereof. This should then bring me to deal with the interpretation of part C of the policy amendments as fully set out in paragraph 9 of this judgment.

15.4.1 Remember, when Mr Marcus on behalf of the applicants, was quizzed by the court, whether his understanding was that the prosecution can in terms of the policy amendments decline to prosecute in the face of a prima facie case, he stated as follows"

"It says so, much explicitly. It says what it means"

15.4.2 Part C, of the policy amendments sets out criteria that should be followed for the prosecution of cases arising from conflicts of the past. Paragraphs C1 and C2 thereof

in my view, are important, in particular C2 (read paragraph C.2 quoted in paragraph 9 of this judgment).

15.4.3 If the answer to paragraph C 2 of the policy amendments is in the affirmative other criteria set out in paragraph C 3(a) to (L) must still be considered. Immediately the question is "*What else is required for the purpose of taking a decision to prosecute or not to prosecute in the face of the strength of adequate evidence* (my own emphasis). Of course, the question must be seen amongst others in the light of the following criteria which must still be considered in terms of paragraph C 3:

15.4.3.1 the extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society. (**see paragraph C 3 of the policy amendments quoted in paragraph 9 of this judgment**). This should be seen in the light of an introduction to these policy amendments as set out in paragraph A1 quoted in paragraph 9 of this judgment. The respondents wished to seek to deny that there is any reference to consideration of reconciliation and reconstruction in the policy amendments. Of course this is incorrect. The wording of the policy amendments should be seen in context. In my view, they were correctly referred to by Mr Marcus as a copy or duplication of the guidelines set out for and used during the TRC hearings. For example, "Why should the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation have any bearing on the decision to prosecute or not to prosecute, especially in the light of the

strength of adequate evidence? Why should the extent to which the prosecution or non-prosecution of the alleged offender, be dictated by national project of nation-building through transformation, reconciliation, development of our society? (**See paragraph C 3 (f) of the policy amendments**). What is stated in paragraphs C 3 (d) (iv) and C.3 (f) is indeed like a "copy cat" of the TRC's guidelines.

15.4.4 When there is sufficient evidence to prosecute, the first respondent must comply with its obligation. Entitlement by the first respondent, to refuse to prosecute where there is a strong case and adequate evidence to do so, would in my view be unconstitutional. Paragraph C 2 read with paragraph C 3 of the policy amendments, allow the first respondent even where there is a strong case and adequate evidence not to prosecute. This is contrary to the first respondent's constitutional obligation to ensure that those who are alleged to have committed offences are prosecuted.

15.4.4.1 Perhaps Mr Marcus was right in expressing himself, as indicated in paragraphs 15.1 and 15.4.1of this judgment. I am mindful of the first respondent's assertion that, it was not and it is still not its intention not to prosecute where there is a strong case and adequate evidence to backup the prosecution. Surely, this is understandable, because the very existence of the first respondent is to prosecute crimes. The submission as I understood it is that, there is no need for the applicants to panic. That might be so, however, the real issue as I see it is whether the policy amendments which do not properly reflect the

intention of the respondents should be allowed to remain in the book. I do not think so.

15.5 In paragraph 14.3 of this judgment, I quoted paragraph 2.1 of the applicants' written heads of argument. At the risk of repetition, the applicants aver that it is not their case that the policy amendments expressly allow for an amnesty, indemnity or a re-run of the TRC, rather that the application of the policy amendments in relation to a decision not to prosecute will have this effect. This submission should be seen in the light of paragraph C 2 read with C 3 of the policy amendments.

15.5.1 This submission on behalf of the applicants, suggests a broader interpretation or construction of the policy amendments. I do not intend referring to legal principles and case laws dealing with the manner of interpretation, where a literal meaning does not seem to make sense or does not properly reflect the intention of the legislature, in the instant case, the intention of the respondents who produced the policy amendments. The policy amendments have the effect of legal binding.

15.5.2 The many criteria referred to in paragraph C3 are to enable the first respondent in deciding whether or not to prosecute offences committed before 11 May 1994 arising from conflicts of the past. However, many of these criteria in my view, are not relevant in deciding whether or not to prosecute. Remember, these criteria as contained in paragraph C3 are subject to two factors. Firstly, the offence or offences must have been committed on or before 11 May 1994. (**See paragraph C1**). Secondly,

there must be a strong case supported by adequate evidence (**see paragraph C2**).

15.5.2.1 As I said, once criteria C 2 presents itself in a particular case, the first respondent is constitutionally bound to prosecute. The many factors referred to in C3 are factors which in my view, should be considered when the first respondent decides to enter into negotiations or agreement in terms of section 105A. Section 105 A, has nothing to do with the decision to prosecute or not to prosecute. It can only be invoked once a decision to prosecute has been taken and an accused person is on trial. It is a provision which is under judicial consideration. Decision to prosecute or not to prosecute is not. Many factors as set out in C3 in my view, are relevant and important in deciding whether a sentence agreed upon in terms of section 105A is appropriate or not, but not in deciding whether to prosecute or not to prosecute.

15.5.2.2 As I said earlier in this judgment, section 204 is a process which is followed on the strength of a state's case and on whether a particular individual who participated in the commission of the offence is prepared to assist in successfully prosecuting his or her co-perpetrators. The section does not require representations and I do not think it is necessary for such representations to be made. The question again arises, why then representations as envisaged in paragraph B1 of the policy amendments if not to give indemnity other than in terms of section 204?

15.5.3 Looking at what is envisaged in paragraph B 1, one sees a recipe for conflict and absurdity. What is conspicuous in

paragraph B 1 regarding the representation is absence of the status of such representations. Put it differently, how does the first respondent intend dealing with representations in terms of paragraph B1 in a situation where it decides to prosecute a person referred to in C3 after having made such representations in terms of paragraph B 1?

15.5.3.1 If indeed representations in terms of B1 are intended to enable the first respondent to take a decision to prosecute, and not to grant indemnity, how does it hope to have a full disclosure as intended in B1? Surely, unless it intends not to prosecute those who make a full disclosure, in terms of paragraph B1, it cannot hope that any person who runs the risk of being prosecuted by his or her own full disclosure will come forward as envisaged in B1. Remember, this full disclosure as envisaged in B1 is emulation of a full disclosure as it was in terms of the TRC guidelines.

15.5.4 The whole procedure as envisaged in part B1, is a recipe for conflict and absurdity, because on the one hand it does not provide protection for such a disclosure. On the other hand, the first respondent says it is not indemnity or amnesty. It is a recipe for conflict, for example, the first respondent may wish to use the representations once it has decided to prosecute and the person who made such representations is on trial. It is a recipe for absurdity, because the first respondent insists that it does not intend to grant indemnity. The need for the procedure does not prevail, unless the intention is to grant indemnity or amnesty. Broad interpretation or construction of parts A, B, and C of the policy

amendments displays amnesty or indemnity or agreement, contrary to that allowed in terms of section 204 and 105A of the Criminal Procedure Act and also contrary to the intention of the first respondent seen in the light of its insistence that it was never its intention to act other than in terms of its obligation to prosecute and to utilise sections 204 and 105A The result of this is that the policy amendments are not only unconstitutional but absurd and cannot continue to exist.

16. I now turn to deal with the other issue which was intended to be raised as a preliminary issue. The issue was in detail dealt in the respondent's supplementary written heads of argument. The argument was that the applicants' application is not ripe. The issue was introduced as follows in the first respondent' heads of argument:

"1. One of the cardinal policies or principles of judicial function is the adjudication of real and concrete disputes between the parties. Stated differently domestic, foreign, as well as international courts have consistently said that the function of the courts is never to answer abstracts, academic or hypothetical questions"

16.1 Having said this, Mr Semenya then at length dealt in detail with the principles applicable to the issue as raised. Having referred to the applicable principles the submission was concluded as follows on pages 8 to 9 of the respondents' supplementary heads of argument:

"2. The authorities said above, more than amply demonstrate that as a matter of policy, the courts should concern themselves with the resolution of real and concrete controversies involving persons who

have interests in the resolution of those disputes. We submit in the present case, what the applicant call the "stories of five South African families" is totally unconnected to the prosecutorial policy under question. We say so for the following reasons:

2.1 There is no evidence that any one has been arrested in connection with the victims of the cases cited in the applicants' papers (Nokuthula Aurelia Simelane; Mathew Goniwe, Sicelo Stanley Mhlauli; Sparrow Thomas Mkhonto and Fort Calatha).

2.2 The applicants have furnished no evidence indicating that the police have secured sufficient evidence to mount a prima facie case against anyone in respect of the victims on whose behalf the application is launched;

2.3 There is no basis offered by the applicants that the first respondent has taken any decision to grant "prosecutorial indemnity/immunity" to anyone;

2.4 More importantly, the applicants have not shown any concrete facts which meet the facts cited in the prosecutorial policy to inform the decision whether to prosecute or not to prosecute. For instance, whether there is "adequate evidence" whether there has been full disclosure of all relevant factors alleged in the offences; whether the offences were associated with political objectives" the motive of persons who committed the acts; the personal circumstances of the offender" or whether the offences are serious". All of these factors must be first established before the applicants can contend for the "effective indemnity".

4. *The other reason why the application should fail, is that the applicants are seeking a declarator, a power which a court exercises in terms of section 19(1)(a)(iii) of the Supreme Court Act, which courts have a discretion to grant even where a proper case has been made out. The courts have consistently said"*

16.2 I do not intend referring to authorities relied upon for the submission as quoted above. However, I find it necessary to look at the submission closely.

16.2.1 The contention by the first respondent should be seen in the light of its insistence that it intends enforcing the policy amendments as they are. In other words, that, it will continue to require persons who qualify in terms of the policy amendments to make representations in terms of paragraph B1. Secondly, that it will continue to decide whether or not to prosecute and to consider other factors as set out in paragraph C3, once a strong case and adequate evidence are established as envisaged in paragraph C2 in respect of offences referred to in paragraph C1 (**refer to the provisions of the paragraphs as quoted in paragraph 9 of this judgment**).

16.2.2 Coming back to the submission as quoted in 16.1 above, it is necessary to elaborate on the submission.

16.2.2.1 The stories of the first five applicants are described as totally "unconnected to the prosecutorial policy". I do not think so. Firstly, their stories relate to conflicts of the past committed before 11 May 1994. Secondly, the five applicants have direct interest in the prosecution of those

who are connected to the crimes alluded by them in the founding affidavit. Thirdly, some of these persons who were involved or might have been involved have not been granted indemnity, either because they did not apply or they were found not to have given a full disclosure. Lastly, the first respondent is under obligation to prosecute them once a strong case and adequate evidence is established.

16.2.3 The reasoning for the submission as set out in paragraph 2 of the first respondent' supplementary heads of argument quoted above should also be considered closely.

16.2.3.1 I do not think that anyone connected with the commission of the crimes cited in the applicants' papers need to be arrested before the applicants could be entitled to bring the application on the basis that their application would then be ripe or not academic. The essence of the application as I see it is prompted by the introduction of the policy amendments and the desire by the first respondent to enforce the policy amendments complained of. I did not understand counsel for the respondents to suggest that any of the applicants is not a party or persons referred to in section 38 of the Constitution. This concession in my view, should settle the score.

16.2.3.2 Clearly, the second to the fifth applicants are widows of the Cradock four who were killed in gruesome manner during 1985. The killings were politically motivated. Some of the people who were involved or might have been were not granted amnesty during the TRC proceedings. Some did not apply for amnesty and have not been prosecuted yet. If the first respondent was to deal with

these people receive their representations as contemplated in paragraph B1 and receive adequate evidence suggesting a strong case for prosecution as contemplated in paragraph C 2; the first respondent may still decide not to prosecute as contemplated in paragraph C3, after having considered the criteria therein. The applicants' interests lie in the first respondent's obligation to prosecute in circumstances as might prevail under paragraph C 1 and C 2. Paragraph C3 is threatening such interest. Therefore, such people as referred to in B1 in respect of offences referred to in C 1 do not have to be arrested before the applicants could be entitled to bring an application of this nature.

16.2.3.3 The basis of the attack against the policy amendments really is not much of what the applicants can provide to the first respondent regarding possible prosecution of particular persons. The applicants are not asking for prosecution of certain people, that is not part of their prayers. In any event, I do not think that they have to furnish evidence as suggested in paragraph 2.2 of the respondents' supplementary heads of argument. Crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted. Victims of crimes rely on these institutions for investigation and prosecution. As I said, the essence of the complaint is that the policy amendments allow the first respondent not to prosecute even in circumstances where there is a prima facie case seen in the light of paragraphs C 2 and C 3 of the policy amendments.

16.2.3.4 The respondents did not have to take a decision not to prosecute, to grant indemnity, and or immunity to anyone, before the applicants could bring the application. **(See paragraph 2.3 of the respondents' supplementary heads of argument)**. Lastly, the applicants did not have to show any concrete facts which meet the factors cited in paragraph C 3. of the policy amendments as suggested in paragraph 2.4 of the respondents' supplementary heads of argument. At the risk of repeating myself, paragraphs C 2. and C 3 state or suggest that the first respondent may still not prosecute, despite adequate evidence against a particular individual having committed an offence referred to in C 1. Alternatively paragraphs C 2 and C 3 broadly interpreted confer such a power to the prosecution, contrary to its constitutional obligation. This is a real threat to the applicants' constitutional rights. This threat cannot be side stepped by an undertaking that it will not happen. For as long as the first respondent insist that it will enforce the policy amendments, the applicants should be entitled to have the policy amendments impugned on the ground that it is unconstitutional.

COSTS

17. The first to the fifth applicants have direct interest in the institution of the present proceedings. They should therefore be entitled to costs. The first five applicants having decided to institute the present proceedings, I do not think that it was necessary for the other applicants to join forces.

CONCLUSION

18. Consequently I make the order as follows:

18.1 The policy amendments to the National Prosecution Policy dated the 1 December 2005 is hereby declared to be inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid.

18.2 The first respondent to pay the costs of the application for the first to fifth applicants.

M F LEGODI
JUDGE OF THE HIGH COURT

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E.

I.

BEFORE THE SPECIAL AMNESTY COMMITTEE OF THE TRUTH AND RECONCILIATION COMMISSION

[HELD AT PORT ELIZABETH]

In the applications of :

NICOLAAS JACOBUS JANSE VAN RENSBURG	FIRST APPLICANT
GIDEON JOHANNES NIEWOUDT	SECOND APPLICANT
WYBRAND ANDREAS LODEWICUS DU TOIT	THIRD APPLICANT
MARTHINUS DAVID RAS	FOURTH APPLICANT

In re:

THE MOTHERWELL INCIDENT ON 14 DECEMBER 1989

DECISION

These are unusual proceedings involving applications for amnesty and launched in terms of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 as amended ("the Act"). This is a special sitting of the Amnesty Committee which falls under the Truth and Reconciliation Commission established under the Act.

The operation of the provisions related to amnesty ceased during December 2000 or January 2001 after being extended a few times prior to that.

During the operation of the Act, the Applicants and others made application for amnesty in respect of the murders of Sergeant Amos Temba Faku, Warrant Officer Mbala Glen Mgoduka, Sergeant Desmond Daliwonga Mapipa and Xolile Shepherd Sakati, alias Charles Jack ("the deceased") on or about 14 December 1989. The applications were refused.

The Applicants were charged together with others for the murders of the deceased and convicted accordingly in the South Eastern Cape Local Division of the High Court during June 1996. The first three deceased were members of the Security Branch of the South African Police in Port Elizabeth and the latter was an informer who was a converted ANC operative. All four Applicants were also members of the Security Branch in the South African Police.

The decisions of the original amnesty committee to refuse amnesty to these applicants were taken on review to the Cape of Good Hope Provincial Division of the High Court of South Africa. The decisions to refuse amnesty to the Third and Fourth Applicants were unanimously

set aside and the majority of that court also set aside the decision to refuse amnesty to the Second Applicant.

The court consequently ordered that the Minister of Justice establish an Amnesty Committee (presumably in terms of the Act) which would consider applications for amnesty by the Second, Third and Fourth Applicants (in respect of the same incident) afresh.

Consequently this committee was established in terms of the Act and the four applicants brought these applications before it. The applications are opposed by the families of the deceased. The family of Sakati were only represented later in the hearing.

Amongst the applications, there was one by Nicholaas Jacobus Janse Van Rensburg who was cited as the First Applicant. The committee was informed that his application was included in anticipation of review proceedings being brought in the Cape of Good Hope Provincial Division of the High Court seeking relief that would allow him to make a fresh application for amnesty as the Second, Third and Fourth Applicants had been allowed to do in terms of the aforementioned court order.

No such order was placed before this committee and it seems that no review proceedings were ever launched by or on behalf of the First

Applicant in the Cape of Good Hope Provincial Division of the High Court. Consequently the application for amnesty on behalf of the First Applicant is not properly, if at all, before this committee. The contents of Van Rensburg's application can therefore not be taken into consideration, especially because it was never tested, even in deciding the applications of the other applicants. However for the sake of convenience, the other Applicants will be referred to in this decision as cited in the papers and in the heading hereof.

When the proceedings commenced, Mr Ntsebeza, counsel for Mrs Faku, Mrs Mgoduka and Mrs Mapipa, wives of the first three deceased, applied for a postponement so that the families of the deceased would have an opportunity to obtain the services of other counsel. He explained that his withdrawal was voluntary and based on a possible perception that he had a conflict of interest in appearing for the families when in fact he was an erstwhile member of the Truth and Reconciliation Commission established in terms of Section 2 of the Act. The postponement was granted.

Upon resumption, Mr Naidoo appeared for the families of Faku, Mgoduka and Mapipa. Later in the course of the proceedings, Mr Naidoo informed the committee that at that stage, he was also representing the family of deceased, Sakati, having been briefed shortly before then. There were no objections in this regard and Mr

Naidoo continued to represent the families of all the deceased for the remainder of the hearing.

There are one or two aspects which need mention at this juncture.

Firstly, during the course of the evidence, there was a suggestion that Mr Carl Edwards, who was a colleague of Mr Niewoudt, knew of the plan to kill the deceased and had had prior knowledge that he would be hosting some of those involved in the plan to do so and/or its implementation. On account of the possibility that he might therefore be implicated in the killings in one way or another, proceedings were adjourned so that he could be informed of the situation as required by law.

Mr Mpshe, the evidence leader, was directed to inform Mr Edwards of the situation and that he should attend the hearing the next morning at 09H30 in order to indicate what his attitude was and in particular to request time to employ representation if he wished to do so.

The next morning, the committee was informed by Mr Mpshe that he had communicated with Mr Edwards as directed and had handed him a written résumé of the situation. Mr Mpshe told the committee that Mr Edwards signed a copy of the written résumé which was handed to him and indicated that he had no interest in the proceedings and did

not wish to attend the hearing. Mr Edwards had no objection to it proceeding without him. The proceedings continued accordingly.

Before any oral evidence was tendered, counsel for the three Applicants sought to amend their applications for amnesty. Written amendments were submitted on behalf of Third and Fourth Applicants and read as follows:

> "Ek doen hiermee aansoek om amnesties (sic) vir moord, sameswering tot die pleging van moord, medepligtigheid tot moord, beginstiging, opsetlike saakbeskadiging, as ook enige ander misdryf en/of delik wat voortspruit of afgelei word uit die voorval waartydens Adjudant-Offisier Glen Mogoduka, Sersant Amos Faku, Sersant Desmond Mapipa en Xolile Sheperd (sic) Sakati (ook bekend as Charles Jack) gedood is te Motherwell".

It must be pointed out that while not specifically referred to, the amendment was clearly intended to include any offence incidental to the commission of the murders and any offence by any of the Applicants in keeping secret the manner in which the deceased were murdered and the identity of those involved in the commission thereof. The Second Applicant made the same application.

There was no objection to the amendment(s) and the applications, including that of the Second Applicant. It follows in any event that should amnesty be granted in respect of the murders which are the

focal offences, then amnesty for any other offence incidental to the commission or concealment thereof should also be granted. The converse of this also applies.

We were informed that the parties had agreed that the committee would not be presented with certain relevant records or portions thereof. These included the record of the criminal trial related to this incident and the record of the previous amnesty application. Despite them being informed that the committee did not consider itself bound by their agreement, the committee did not refer to any of these records in considering these applications.

It is common cause that the deceased were all killed while travelling in a motor vehicle in which explosives were installed by Third Applicant and others. The Second Applicant was the source of information in terms of which the decision to kill the deceased was made and he activated the explosives which caused the deaths of the deceased. The Fourth Applicant was party to the said operation and attended in order to put into operation an alternative operation should the death of any of them not have ensued in the first instance.

The Third and Fourth Applicants merely acted on the instructions of their superiors in this regard.

The Second Applicant's written application is contained in two–hundred and eleven pages. Much of the written part of his application deals with his personal circumstances, and his connection with the Security Police of the time. He proceeded with his oral evidence and confirmed, in very general terms, the correctness thereof.

His written application also contained an attached document entitled "Submission to the Truth and Reconciliation Commission", dated 21 October 1996 and authored by General J. van der Merwe. Attached thereto is a document titled "The role of the South African Police in the conflict of the past" and authored by Generals Geldenhuys, Coetzee, De Wit and van der Merwe, all of whom were Commissioners of the South African Police at various times in the past.

The Second Applicant also associated himself with the contents of both documents and sought them to be read into his application and within the context thereof.

He explained that he became a member of the Security Branch of the Police on 1 April 1975. He was stationed at Port Elizabeth. Previously he was a member of the South African Police stationed at Johannesburg and Transkei before being transferred to the Security Branch in Port Elizabeth where he was always stationed until he left the force.

His application also contained a general background of his experiences and evaluation of circumstances which led to this specific incident. He broadly confirmed the allegations in this regard as contained in his written application.

While the written application was broadly referred to, he was specifically led by his counsel on the material aspects related to the relevant incident(s).

The committee was informed that while he would not be led on all the details save for what he and his representatives considered important, he was nonetheless also willing to answer specific questions about the allegations contained in his written application. Counsel was informed that the application should be placed before the committee as Second Applicant and his representatives thought fit.

In dealing with the events, the Second Applicant explained that from 1983 he was in charge of the Intelligence Component of operations within the Port Elizabeth Security Branch. In 1986, during the State of Emergency, he was transferred to the investigation unit and in 1989 he became the Head of the Regional Intelligence Component of the Security Police in the region.

He testified that during 1989, Brigadier Gilbert was Head of the Security Police in Port Elizabeth and Colonel Isaac Nel was second in command. Under them, the hierarchy consisted of the administrative component, the black component, the white component, and the coloured and Asiatic component. He explained that these components were administrative sections of the Security Police all of which investigated what was termed 'black organisations'.

The Second Applicant explained that part of his duties in the intelligence component during 1989 was to establish covert intelligence capacity. This included the assessment of the political climate of the time, the development of an effective database in regard to organisations and individuals, groups and institutions who were responsible for what he referred to as the anarchy of the time. This clearly referred to organisations, individuals, groups and institutions that opposed the system of apartheid. This information was used for *inter alia* counter espionage operations.

The Second Applicant then proceeded to testify about the deceased. He testified that Warrant Officer Mgoduka joined the Security Branch in 1977, when he shared an office with the Second Applicant in the aforementioned black component.

Sergeant Amos Faku joined the Security Branch in 1980 also as part of the black component. Sergeant Desmond Mapipa was transferred to the Security Police in 1986 and attached to the investigation component which was part of the black component.

He described the deceased Xolile Shepperd (sic) Sakati alias Charles Jack as a 'trained terrorist' who was arrested in 1983, and later testified on behalf of the state in criminal prosecutions against those accused of subversive activities. Ultimately he was placed within the black component. He also provided information to the Security Police.

The Second Applicant stated that on one occasion he was interrogating a 'trained terrorist' in the company of the four deceased. He explained that because of the situation prevailing at the time, he used the opportunity to enhance his employment goals broadening the network and database. In pursuance thereof he managed to get the interrogatee to write a letter for him and wherein he (the interrogatee) requested from an ANC operative in Swaziland, weapons and the establishment of a Dead Letter Box (DLB) within South Africa. He explained that a DLB is a safe place where weapons within South Africa could be kept.

The letter was sent to Swaziland with an agent who was incarcerated a short while later at Quattro Camp, a detention camp in Angola, where

people who were suspected of being untrustworthy were held by the ANC.

The Second Applicant then went on to testify about the killing of a person in Lesotho. It was clearly not the agent with whom the aforementioned letter was sent but everything points to the fact that it was one Toto Mbali.

It is quite apparent from the evidence of the Second Applicant that only he and Warrant Officer Mgoduka knew Toto Mbali had been recruited by the Security Branch. This piece of evidence was obviously intended to demonstrate that Warrant Officer Mgoduka was the source of this information to the ANC. No other evidence was tendered in this regard.

The Second Applicant proceeded to explain that he then suspected the four deceased, in particular Warrant Officer Mgoduka, of being the source (s) of the leaking of confidential information to the ANC. He gave no details of the 'confidential information' he referred to and allegedly leaked by all of the deceased.

He testified that as a result thereof, he discussed the issue with Brigadier Gilbert as a matter of urgency because the whole information/ intelligence system was at risk and the names of Security Police and

their agents and certain important addresses where some of the agents and Security Police resided could be revealed to the ANC. This could result in attacks on Security Police and agents as a result of which they could be killed.

He however testified that the late Mr Sakati was only involved in the incident of acquiring the letter sent to Swaziland and that it was only to that extent that he was a potential threat to the system which the second Applicant sought to protect. This was over and above the identity of persons he (Sakati) had got to know over the time he spent with the Security Police.

The Second Applicant however did not believe that the deceased had knowledge of the identity and addresses of all the Security Police agents but certainly some important information in that regard and other important information.

The Second Applicant stated that he told Brigadier Gilbert of the situation in this regard during July 1989. As a result, Gilbert then ordered him to initiate a discreet investigation into the source(s) of the leaks and the role of the four deceased therein.

In pursuance of this order, he arranged the installation of a listening device in the tea room at the offices of the Security Police at Port

Elizabeth. He also intercepted mail. He explained that he arranged with members of the technical division who used to fetch the mail from the post office to intercept certain mail, open it and read it. The operation also included monitoring telephone conversations and following and monitoring the four persons in question.

The Second Applicant said that during the investigation, he discovered that Warrant Officer Mgoduka had registered a post box under a false name at the Korsten Post Office, Port Elizabeth. He stated that this was established from the intercepted mail and the aforementioned observations. The Second Applicant personally established that the false name of 'Thandoxolo' was used. He checked the official form at the Post Office and discovered that it had been completed in Warrant Officer Mgoduka's handwriting, which he recognised. The Second Applicant then arranged for the mail received in that post box to be intercepted and monitored.

According to the Second Applicant the monitoring of the mail revealed that communication in this regard was by means of codified language. Consequently this raised further questions and strengthened the suspicion that Warrant Officer Mgoduka was in contact with the ANC. The foreign addresses were of places such as Lesotho, London and Canada and were known to the Security Branch. This fact

ultimately confirmed to the Second Applicant that Warrant Officer Mgoduka had contact with the ANC.

The Second Applicant also testified that when the four deceased were talking in the tea room, he detected that they had already made contact with an overseas ANC aligned relative of Warrant Officer Mgoduka, Christopher Mgoduka. He also concluded from what he overheard that they had changed allegiance and also that they felt used in protecting the white government and keeping it in power. He interpreted their position as one in which they were dissatisfied with the government and the way they were being treated.

Finally, he referred to a letter sent from a Korsten address to Mr Isaac who, according to the Second Applicant, was known to the Security Police in Port Elizabeth as 'Roje Skenjana', an ANC commander in Lesotho. The content of the letter was encoded, as was customary and referred to as pending wedding. The Second Applicant stated that he recognised the handwriting therein as being that of Warrant Officer Mgoduka. As had become practice, the letters were steamed open, copied, resealed and sent on to its intended destination.

The Second Applicant later testified that this letter was typed and he identified the type as that of the manual typewriter used in Warrant Officer Mgoduka's office.

Second Applicant explained that he was aware of a request by Mr Skenjana for Mr Mgoduka to identify a motor vehicle for the purposes of placing a limpet mine in it.

As a result of all this information, he was convinced that the four deceased, in particular Warrant Officer Mgoduka, were a serious security risk.

The Second Applicant then reported the situation to Brigadier Gilbert during the first half of December 1989. He testified that the options of how to deal with the matter were discussed between them and they arrived at the conclusion that all the deceased should be killed.

While he did not volunteer details of these options, upon being questioned, he explained that amongst the options was that they should be subjected to criminal prosecution. He could not remember why this option was rejected but he was wary that his whole network could have been exposed and that it was not clear to him at the time how criminal charges could be proffered against them.

Nonetheless, he and Brigadier Gilbert parted, and about two days later, Brigadier Gilbert spoke to him directly and gave him an order to go and see General van Rensburg in Pretoria at the Security Police Head Office about this situation. Brigadier Gilbert gave him a ticket to

travel to Johannesburg by air and then on to Pretoria. According to the Second Applicant, he had Head Office authority to carry out the said covert operation.

Second Applicant also testified that Brigadier Gilbert mentioned at that time that Brigadier Strydom, head of detectives in Port Elizabeth, had informed him that Warrant Officer Mgoduka and Shepperd Sakati were suspects in a scam involving the defrauding of what was termed 'anti-government organisations and workers' unions'. This aspect further complicated matters and had the potential of embarrassing the Security Police and exposing the role of the Security Police in serving the political ends of the government of the day, because the two were also involved in other hitherto undisclosed covert criminal offences committed by the Security Police. According to the Second Applicant, though he did not know much about this, he was told that they had threatened to disclose the role of the Security Police in Port Elizabeth in the 'Cradock Four' killings as it is known. He further stated that they were using their knowledge of the Cradock Four incident to negotiate a position for themselves in terms of which they would avoid the risk of being charged for fraud. He, however, did not pay much attention to this. All he was interested in was the plan to kill them.

The Second Applicant then left for Pretoria on 12 December 1989, with instructions to meet General Van Rensburg at his home early the next

morning. He knew General Van Rensburg, who had previously been stationed within the Security Branch at Port Elizabeth.

He met Van Rensburg as arranged and the latter was clearly not fully briefed about the situation. Second Applicant stated that he then tendered further information to Van Rensburg.

He explained that Colonel De Kock later joined them at the invitation of Van Rensburg. He briefly told De Kock what the situation was. He could not remember everything he told De Kock, but stated that he told him that some of the deceased had already made contact with the ANC.

He testified that because Brigadier Gilbert was senior to Van Rensburg and De Kock, neither could change a decision to kill the four deceased. He explained that the purpose of going to Pretoria was to fill in the details and reasons for the proposed elimination of the four deceased so that the logistics in connection with the implementation thereof, could be arranged accordingly. This explanation was tendered after he was constrained to concede that Van Rensburg had the authority to direct that the operation be aborted. I will refer to this aspect presently.

After he had explained to De Kock why the operation had to take place, Van Rensburg instructed De Kock to arrange the technical requirements to ensure the success of the operation. According to Second Applicant, he left Van Rensburg's home with De Kock and they proceeded to the Third Applicant's office where they were introduced to each other. He testified that he briefly explained the situation to the Third Applicant. In particular, he explained that the four deceased had made contact with an anti-apartheid organisation and that the effects of the proposed operation should be made to look like the work of the ANC. He could not remember if he had told the Third Applicant that authority had been obtained to do what was being prepared for. Again he explained that he tendered this brief explanation to the Third Applicant in order to help him understand what was logistically required.

Thereafter De Kock and Second Applicant went to Vlakplaas where they contacted the Fourth Applicant, amongst others. Later the Second and Fourth Applicants and two others, Snyman and Vermeulen, drove to Port Elizabeth in two motor vehicles. Fourth Applicant was not informed of anything by the Second Applicant who seemed to suggest that it must have been De Kock who tendered the details to him, if any.

Second Applicant, without going into any detail, testified that during their journey he explained everything to them including the motivation for what was obviously going to occur.

The Second Applicant then explained that he took the other passenger of the motor vehicle he was travelling in to a safe place in Port Elizabeth and thereafter went home to rest. He had left the others with one of his local colleagues.

He received the expected telephone call from Third Applicant early in the morning. He collected him in a suburb known as Summerstrand and took him to a secret place where they met the other Vlakplaas operatives.

The Second Applicant then left that place to look for a motor vehicle in which explosives would be installed. He succeeded in obtaining a motor vehicle and delivered it to the place where the others were waiting in the area of Greenbushes near Rocklands. The bomb was then installed in the motor vehicle as was planned.

He stated that he was given instructions as to how to detonate the bomb by means of a remote controlled device. He explained that in the late afternoon, they went to a place identified as the Monument Crossing in the Motherwell suburb. He showed Third and Fourth

Applicants and Vermeulen where he intended the said motor vehicle to be when he activated the planted explosives, so that they could ensure that they were out of danger when it happened.

He further confirmed the contents of his written application in respect of the actual detonation and what occurred immediately before then. He explained that he held the relevant motor vehicle in safe keeping at Louis le Grange Square and at about 20H00 that night, he consulted an informant from whom he allegedly received information about a freedom fighter hiding in Motherwell and who intended to commit an offence by installing explosives in a police vehicle on 16 December 1989 and then blowing it up. He used this opportunity to put his plan into operation and at the same time, enhance the impression that it was the work of the ANC because it coincided with its alleged plan to blow up a police vehicle.

He then arranged for the four deceased to come to where he was and explained that they should use a motor vehicle which was not known to be that of the Security Police in order to facilitate the observation and possible arrest and interrogation of the alleged freedom fighter.

Eventually the four deceased boarded the motor vehicle, which was brought to the rendezvous point in Motherwell by Warrant Officer Lotz.

The four deceased then left *en route* to Hintsa Street where the freedom fighter was allegedly hiding.

The remote control was in the possession of the Second Applicant who had insisted that he be the one to activate the explosives when it was opportune to do so. The Vlakplaas members, including Third and Fourth Applicants, were hiding a distance away.

When the motor vehicle had travelled a short distance but still within view, the Second Applicant detonated the explosives in that motor vehicle by means of the remote control. The resultant blast killed all four of the deceased instantly.

The Second Applicant testified that he then went to the scene of the blast and planted a detonator, the use of which was at the time associated with the ANC. This ploy was obviously employed to fortify the impression that the blast was committed by members of the ANC in terms of its offensive against the police and other institutions regarded as supportive or protective of apartheid and in line with its planned attack scheduled for 16 December.

He confirmed that the political aims of his actions, as set out in the written section of his application, were to protect the government of the day.

In summary, this included compliance with his obligation of ensuring the safety of South Africa, protecting the country, protecting the government of the day and the National Party from attack by liberation armies and movements. It was also intended to protect the integrity of South Africa, the government and the National Party as well as its continued existence and control of government. In particular, it was intended to avoid sensitive information related to the aforementioned aims from being divulged to the opposition, in order to protect the lives and property of members of the South African Police, agents, informants and colleagues within the Security Police and to protect the earlier successes in attaining those aims, especially in the light of the trouble it would involve in replacing the system under threat.

The Second Applicant testified that he was unable to say whether all the information he sought to protect had been revealed to the opposition or to what extent this had been done over the period of approximately five months prior to the killing and during which the alleged communication between the deceased and the ANC had continued.

The Second Applicant also conceded that after the blast, he did not follow up the situation in respect of the freedom fighter allegedly hiding in Hintsa Street, Motherwell. He stated that he mentioned the matter to

another section of the Security Police, Port Elizabeth because, as he was in the Intelligence Section, it was not within his formal competency. He was unable to say if anything was done in respect thereof even from an intelligence perspective.

Eugene Alexander De Kock ("De Kock ") was called by the Evidence Leader of the Amnesty Committee, Mr Mpshe, to testify about the events and the subsequent killing of the deceased.

De Kock joined the Uniformed Branch of the police force during January 1968 and was stationed in the East Rand. He stayed there until he was transferred to the then South West Africa and stationed within the Security Unit at Oshakati during 1983. He was a founder member of the Combat Unit known as 'Koevoet' akin to the Selous Scouts, which countered revolutionaries in the mid-African area. Through infiltration they neutralised South West African Peoples Organisation and other opposing structures in South West Africa within two years of formation. Koevoet existed until the end of 1989 / 1990 when there were peace negotiations for Namibia.

In 1983 he was transferred back to South Africa. He became the commander of Vlakplaas on 1 July 1985 and was placed in charge of Section C-1, which was under Brigadier Schoon. Section C-1was entrusted with combating terrorism, and specifically the activities of the

ANC and Pan-Africanist Congress. Members of both organisations who infiltrated the country were either killed or recruited and converted into members known as “Askaris”. The Askaris were a group of converted members of liberation armies used by the Security Police to identify insurgents and generally provide information about their former revolutionary organisations.

De Kock obtained his orders from Brigadier Schoon as to how the ANC and PAC insurgents were to be killed. When attacking the “enemy” and in the field of operation, he had a wide discretion to deal with situations as they unfolded in any given operation. These operations were inside the country as well as outside the borders of South Africa, e.g. Lesotho and Swaziland. Some of the members of the ANC and PAC were identified by Askaris through photographs. These Askaris would also give information about safe places of either the ANC or PAC members inside and outside South Africa.

De Kock is currently serving a sentence of life imprisonment imposed in October 1996.

He stated that he testified in the criminal trial in respect of this incident against the Applicants and others.

He testified that during December 1989 he was instructed by General Van Rensburg, who was then his chief, to consult with him at his Security Branch offices. He was informed that the Second Applicant, of the Port Elizabeth Security Branch, would be arriving the next day and that he should accompany the Second Applicant to Van Rensburg's house, which was situated in a complex for police officials. De Kock was living in the same complex.

At 06H00 Second Applicant came to De Kock. They walked to General Van Rensburg's house. Van Rensburg invited Second Applicant to tell De Kock the purpose of his visit. Second Applicant explained that two Security Branch members and an Askari, a former member of the ANC, were involved in fraud. They intercepted cheques in the post which were destined for the unions, liberation movements and the South African Council of Churches. They exchanged these cheques and utilised the money for their own purposes. The exposure of this scam would put the integrity of the Security Branch in Port Elizabeth at risk. This led one of the members to threaten that should they be charged, he would expose some of the other crimes, such as motor vehicle theft, committed by the Security Branch in Port Elizabeth. He did not identify this person.

A short discussion ensued between the three. General Van Rensburg told De Kock to render assistance to Second Applicant so that these

members should be prevented from making such disclosures. They had to be 'silenced'. This was a euphemism used in the Security Branch for killing people. Thereafter the discussion focused on the methodology of how the deceased should be blown up and killed.

This would also make it appear as if it was an operation carried out by the ANC and that no suspicion could be cast on the Security Branch in that regard. No personnel from Port Elizabeth should be involved, lest for unforeseen reasons they may be recognised.

De Kock would deploy members from Vlakplaas. He would arrange for the Third and Fourth Applicants, together with some other members, to ensure the successful execution of the operation.

This was at the time when the Harms Commission had been appointed to investigate the alleged atrocities perpetrated by Vlakplaas members. De Kock was then on compulsory leave in order to assist General Engelbrecht to cover up the operations of Vlakplaas. De Kock would then not be suspected of any involvement in Vlakplaas operations.

Whilst walking back to his house with Second Applicant, he became concerned about the reasons for the intended killings. He said he questioned why people who worked on the same side with them and

had meted out untold harm on the ANC should be killed for reasons of hiding fraud.

When he reached home he drove to General van Rensburg's office. He does not know what happened to Second Applicant but assumed that he arrived by a motor vehicle since he had flown from Port Elizabeth to Johannesburg and must have left the same way.

His feeling was that if it was only to conceal the fraud, the Port Elizabeth members should themselves kill the deceased as this was not foreign to Second Applicant and his colleagues. All of them had in the past killed without hesitation. The situation here was different. He was prepared to help but not kill for something so minor. The fraud(s) could have been covered up or alternatively they would have been removed from the machinery of the law or in some illegal way, as had often been previously done.

At his office, Van Rensburg, in response to De Kock's query about the reason for the intended killing of the deceased, explained that the members would even disclose the Goniwe killings and other details of the activities of the Security Branch, their safe houses, details of the *modus operandi* and so forth. This was sensitive since it touched on the security of the country. The Cradock Four incident concerned General Van Rensburg and De Kock because they were also involved in it. This

convinced De Kock that they should then be killed since it would reveal the political agenda of the government and the lengths that the security forces would go in order to protect themselves and the Nationalist Party.

According to De Kock, when they were briefed by Second Applicant the discussion did not concern the Cradock Four or the PEPCO three (3) murders or any other murders which were perpetrated by the Security Police members in Port Elizabeth. The discussion only centred around the fraud. The revelation would have put pressure on the state structures. The image of the state would have suffered irreparable harm and it would have involved senior personnel as well as the generals who had always denied their involvement in such atrocities. What had to be borne in mind was that these incidents were secretive and committed to protect the State from these “insurgents”.

De Kock despatched his personnel under the command of the Fourth Applicant. The Third Applicant and others were deployed only in case it became necessary to implement an alternative plan. On his return to Pretoria, the Fourth Applicant reported to him that the operation was successful.

Under cross-examination he stated that it seemed that the decision to kill the deceased had already been taken prior to the discussion

between Van Rensburg, Second Applicant and himself. Second Applicant was sent to Pretoria to elicit expert assistance on how the plan to blow up the deceased should be implemented. De Kock was adamant that this was however not discussed but he conceded that it might have been. He was emphatic though, that when Van Rensburg arranged the meeting, his impression was that Second Applicant was to apprise them of the situation and how to prevent the deceased from making any of these disclosures.

He was resolute that Second Applicant spoke of two members and one Askari. The meeting was called for Second Applicant to inform him of the situation in Port Elizabeth. He was only told of fraud. He used strong language that Second Applicant lied to him about the reason. He believed that he should kill and fraud was not a good enough motivation for such drastic action nor was anything said about the deceased wanting to defect to the ANC. He said the Third and Fourth Applicants were involved because he instructed them to carry out the elimination. Had it not been his instructions, they would not have participated.

Lionel Snyman testified on behalf of the Second Applicant and stated that he had joined the police force in 1971. He subsequently joined the Section C-1 under De Kock. At the time of the incident, he was a Warrant Officer.

During December 1989 Vermeulen, Fourth Applicant and himself were called by De Kock and instructed to accompany Second Applicant to Port Elizabeth. He testified that it was explained that there was a problem because some members within the Security Branch in Port Elizabeth and an Askari wanted to defect to the ANC. They had received information about that from the Security Branch in Port Elizabeth. He was however, not sure who disclosed this information. He was also informed that members from Vlakplaas would have to arrange for the killing of those troublesome persons.

He said that at some stage he also heard about fraud but was not sure from whom. He was furthermore, not sure how many people were to be killed.

After the operation he returned to Pretoria.

Under cross-examination it became quite apparent that Snyman had no independent recollection of whatever happened in regard to this incident either before, during or after it occurred. He said that he only heard of the Cradock Four incident after this operation had been completed. He admitted that his evidence consisted of what he had heard, reconstruction and guesswork. His evidence could not be relied upon to assist the committee in any way.

Third Applicant testified that he prepared his application without any legal assistance.

At the time of the incident he was the Officer Commanding of the Technical Division of the Mechanical Section of the South African Police. He rendered service to the Security Branch and also to the Vlakplaas component.

He further testified that on the morning of 13 December 1989 he was visited by Colonel De Kock and the Second Applicant. They informed him that there were problems in which members of the Port Elizabeth Security Branch were involved. De Kock did most of the talking although he could not remember "who said what".

At a later stage he was told that these people were also involved in fraud. It was also mentioned to him that these people were about to defect to the ANC with all the information regarding networks of the Security Branch which they had at their disposal.

He said that he was informed that the operation to kill these people had been decided upon at Head Office, more particularly by Brigadier Van Rensburg, that it was urgent and that it was necessary for the Technical Division to assist with the execution of the decision. He was not in a position to check the information conveyed to him and he

accepted the version and orders as conveyed to him by De Kock in a *bona fide* manner as correct and properly authorised.

He was further informed that it was decided at Head Office that explosives should be used. He was not involved in the identification of the victims, the planning of the operation or in the decision-making. He was told that the operation was to be conducted in such a way that it should appear that the ANC or a similar organisation was responsible for it.

He immediately proceeded to task Kobus Kock, a member of his staff, to pack all the tools, explosives and radio apparatus needed for the operation.

De Kock had made a vehicle available to him and Kock, who was to accompany him to Port Elizabeth. Since the Technical Division only had marked vehicles, none of them could be used for such a covert operation. He was given a key to an unmarked motor vehicle and an envelope which contained money to cover their expenses. They left for Port Elizabeth that evening.

He testified that they arrived in Port Elizabeth early the next morning, where they were met by Second Applicant and taken to a house

where they found Vermeulen and Snyman. He could not remember whether the Fourth Applicant was present or not.

The Commanding Officer of the Security Branch in Port Elizabeth, Brigadier Gilbert, arrived later and outlined the situation to them. Gilbert told them that the persons were in the process of defecting to the ANC with sensitive information regarding the information networks and other secret operations that were conducted by the Security Branch in the Eastern Cape. He could not remember whether Niewoudt (Second Applicant) was present at the safe house at the time.

He stated that Second Applicant thereafter met up with them in a white Volkswagen Jetta motor vehicle. It was then taken to an uninhabited area where it was equipped with explosives. The explosives were placed under each of the seats of the motor vehicle in such a way that it could be detonated by a remote control, the operation of which was demonstrated to Second Applicant.

After the vehicle had been so prepared, he returned to Pretoria. He had not gained any benefit from the operation and did not harbour any personal feelings of malice or resentment towards any of the victims. He did not know any of the deceased, how many victims

there were to be killed and did not have any problem with any of them.

Fourth Applicant testified that he was a former member of the operational group “Koevoet” and later became a member of the Vlakplaas group. Acts committed by him were acts as a member of the South African Police in the execution of his duties. He was intent on protecting the government of the day. He testified that he supported the system of apartheid, but that he did not have any problem with black people as such. For him the real issue was terrorism against the country.

He met De Kock at Head Office on 13 December 1989 and accompanied him to the office of Brigadier Van Rensburg. De Kock told Van Rensburg that he would be sending him (Ras), Snyman and Vermeulen to Port Elizabeth whereupon Van Rensburg wished him good luck. He then left and De Kock remained behind.

Later on that day he again met up with De Kock at Vlakplaas, where he was given the order to assist the Second Applicant in the operation. He was told that he would fall under the Second Applicant’s command during the trip to and during his stay in Port Elizabeth. He could not remember the details of the discussion with the Second Applicant whilst travelling to Port Elizabeth, but he did remember a

conversation with the Second Applicant about the persons who wanted to defect to the ANC and the dangers thereof.

He did not see the Third Applicant at the safe house the next morning and remembered that he had been out to the shop. On his return, the Third Applicant was not there. They all later departed to the area where the motor vehicle was equipped with explosives and whereafter the Third Applicant and Kock returned to Pretoria. He and his colleagues from Vlakplaas assisted in the installation of the explosives and devices in the said motor vehicle.

They were then taken to the proposed scene of the explosion during the afternoon in order to familiarise themselves with the terrain so that they could keep safe at the time of the explosion. The rest of the afternoon was spent at the beach and at a braai at the home of Security Branch policeman, Carl Edwards. He testified that during this period, Edwards mentioned to him that two of the members were involved in fraud, in that they appropriated money intended for banned organisations for their own benefit. It was explained to him that on the instructions of former State President P W Botha, the said money was meant to be intercepted by the Security Branch. Such intercepted money had to be paid into a secret fund, but there were instances when it was retained by members and not paid into the secret fund.

Later that evening, he and his colleagues, including the Second Applicant, gathered at the scene of the planned explosion and attended to the activation of the ignition device. He and Snyman then hid in the bushes but were unable to observe who arrived or how many persons arrived. He was in any event not in a position to have aborted (even if he wanted to) the operation at that late stage since the Second Applicant was in charge of the operation.

He explained that the primary reason for travelling to Port Elizabeth was that if the main operation did not succeed, he and the other members from Vlakplaas could assist in an alternative operation to kill the deceased.

He testified that the deceased arrived in what is referred to as a 'combi' motor vehicle and, as previously arranged by the Second Applicant, switched vehicles. They drove off in the Jetta motor vehicle. Shortly thereafter, the Second Applicant detonated the explosives in the motor vehicle and as a result, the vehicle exploded and all of the deceased were killed. They then went to the scene where he took the remote control from the Second Applicant, then left for Pretoria with the other Vlakplaas members. He later returned the device to De Kock at Vlakplaas.

In regard to what De Kock told him, he testified that he was told that the intended victims were about to defect to the ANC and that they wanted to disclose Security Branch involvement in the Cradock Four killings.

During the Second Applicant's evidence in chief, an application for postponement was made and granted. It seemed that his representative thought it wise for him to attend a psychiatrist. The postponement was for a substantial period.

On resumption, it turned out that the Second Applicant was indeed seen by Dr Crafford, a qualified psychiatrist who was called to testify before the Second Applicant resumed his evidence. Dr Crafford's qualifications were not challenged and consequently, this need not be dealt with.

Dr Crafford's evidence relates to two distinct aspects of the Second Applicant's case. The first involves the question of the Second Applicant's mental health and secondly, the impact thereof on the testimony he gave during the period prior to seeing Dr Crafford in April 2004, when the hearing was postponed.

It is important to bear in mind that, according to his evidence, Dr Crafford's initial contact with the Second Applicant was in 1995 when

the latter was referred to him by the Old Mutual Insurance Company for an opinion regarding disability. Dr Crafford had then diagnosed that the Second Applicant suffered from post-traumatic stress disorder. There is no reason to doubt that diagnosis as was suggested by counsel for the families, who initially clearly stated that he did not challenge the diagnosis.

However, the more important aspect of Dr Crafford's evidence relates to his opinion of the effect the Second Applicant's state of mind had on that part of his evidence tendered prior to the postponement. He stated *inter alia*, that in cases of post-traumatic stress disorder, *"... there is often a problem with concentration and this had become very bad with Mr Niewoudt when he last went to see me in April. People with post-traumatic stress disorder ... lose track of conversations of what they are saying ... or they might lose track of what is being said to them in a conversation – this was the case with Niewoudt in April 2004. He is certainly a lot better now."*

The import of his evidence is that he saw the Second Applicant in April 2004, after the application for postponement was granted and his opinion was based on the assumption that the Second Application was again suffering from post-traumatic stress disorder. He stated that the Second Applicant has since improved sufficiently and was capable of resuming his testimony free from any negative effect of his condition.

Under cross-examination, however, it turned out that Dr Crafford had not tested the Second Applicant's information by applying any of the customary psychiatric tests which investigates the possibility of feigning symptoms and so forth. He explained that he could confirm his diagnosis as genuine by just looking at the Second Applicant. He could not say how he could make this diagnosis about the mental condition of the Second Applicant during April 2004 in this manner.

In challenging the objectivity of Dr Crafford's report, Mr Naidoo put it to Dr Crafford that he was biased in favour of the Second Applicant and queried his conclusion "... *that prior to the said postponement, the Second Applicant was having difficulty in following what was going on in court, he was having difficulty in getting his thoughts together and answering questions clearly*." Dr Crafford conceded that apart from speaking to his counsel he relied on the Second Applicant for that deduction.

In the light of the above, Dr Crafford's evidence in regard to the impact the Second Applicant's state of mind had on his initial evidence, must be approached with a great deal of circumspection. The lack of any scientific support for his conclusion makes it extremely difficult to accept the evidence of Dr Crafford as reliable, especially in relation to the effect of the Second Applicant's state of mind on his

initial evidence. Clearly, Dr Crafford had not properly established the Second Applicant's mental condition at the material time.

In the circumstances, Dr Crafford's evidence with regard to his conclusion of the Second Applicant's mental condition is tainted, especially, by the lack of objectivity. Dr Crafford's testimony with regard to any negative effect the Second Applicant's mental state might have had on his evidence in this hearing prior to the postponement, can therefore not be relied upon.

George Andre Johannes Steenkamp was called to testify on behalf of the families. He was at the material time a Superintendent in the South African Police Services.

Steenkamp's evidence revolved around a docket that he handed to Colonel Eric Strydom, a former Head of the Murder and Robbery Unit of the Police in Port Elizabeth. He stated that Colonel Strydom had said to him that the Security Branch should sort out their problems. Steenkamp did not elaborate on this.

Steenkamp further testified about an alleged invitation by the Second Applicant to have tea at his office. He stated that the Second Applicant had a criminal docket with him.

Counsel for the Second Applicant then objected to this evidence on the ground that it had not been put to the Second Applicant when he testified.

Counsel for the families conceded that this was an oversight on his part and he subsequently requested that Steenkamp's evidence be disregarded. In the circumstances, it will be disregarded.

It might be well to point out that the process as established by the Act is *sui generis*. As it developed during its relatively short life span, the Act and in particular decisions as to amnesty applications were not subject to the system of precedent. Indeed it could not have been so because, by the very nature of the commission, there was no time to develop precedents. In any event, panels were dealing with Applications at the same time and hence they could not have been subject to any precedent in doing so. There is no reason to deal with these applications differently.

All that is required in terms section 20 (1), is that the [sitting] Committee be satisfied (own emphasis) that the requirements as set out therein have been complied with.

It would be convenient to deal with the applications of the Third and Fourth Applicants first and then with that of the Second Applicant.

Section 20 of the Act is of application and the relevant portions of subsections (1) and (2) provide that:

"(1) If the Committee, after considering an application for amnesty, is satisfied that –

(a) the application complies with the requirements of the Act;

(b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3); and

(c) the applicant has made a full disclosure of all relevant facts,

it shall grant amnesty in respect of that act, omission or offence."

In assessing whether section 20 (1) and in particular subsection (1) (c) has been complied with, it must be noted that human frailties such as forgetfulness can have an impact on the evidence. With the passage of time it is possible to forget details pertaining to certain fundamental aspects. Applicants should not be penalised for forgetting certain details as long as the relevant fundamental aspect(s) are covered in the evidence.

If the relevant fundamental aspects are indeed covered by the evidence, then, I would think that section 20 (1) (c) would have been substantially, and therefore satisfactorily complied with. If these aspects are not properly and acceptably testified to, then section 20

(1) (c) cannot be said to have been complied with, substantially or otherwise.

Section 20 (2) provides that :-

> "(2) In this Act, unless the context otherwise indicates, 'act associated with a political objective' means any act or omission which constitutes an offence or delict which, according to the criteria in subsection (3), is associated with a political objective, and which was advised, planned, directed, commanded, ordered or committed within or outside the Republic during the period 1 March 1960 to the cut-off date by –
>
> (a) any member ... ;
>
> (b) any employee of the State or any former state or any member of the security forces of the State or any former state in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against a publicly known political organisation or liberation movement engaged in a political struggle against the State or a former state or against any members or supporters of such organisation or movement, and which was committed *bona fide* with the objective of countering or otherwise resisting the said struggle;
>
> (c) any employee ...;
>
> (d) any employee ...;
>
> (e) any person ...;
>
> (f) any person ...;
>
> (g) any person ..."

The Second, Third and Fourth Applicants clearly fall within the category of persons referred to in section 20 (2) (b).

The Third and Fourth Applicants became involved in the killing of the deceased when they were instructed to provide logistical assistance to the Second Applicant by their commander, Colonel De Kock. In the light of such directives emanating from a senior officer, both assumed that proper approval had been secured for the intended operation and hence their participation as members of the Vlakplaas Unit. In the case of the Fourth Applicant, such *bona fide* belief was fortified by a visit to Brigadier Van Rensburg, who had wished him luck on his trip to participate in the operation.

They were both employees of the State and members of the South African Police Services, attached to a unit attending to the security of the country. They both had express authority to act within the course and scope of their duties as such against, as they believed, supporters and intended members of liberation movements engaged in a political struggle against the State and who were about to divulge sensitive information to the self same movement.

Each had the *bona fide* belief that they were acting in the interests of the State and were countering and resisting an attack(s) on the government of the day. The explanation and motivation provided to both were broad and scant. Even on their way to Port Elizabeth, they were merely advised about the broad reasons for the operation. Both accepted what they were told and relied thereon. Neither of them

were furnished with any details which led to the conclusion that the deceased were such threats to the State that they had to be killed.

Viewed in the context that they were given instructions by Colonel De Kock (supplemented by Van Rensburg's good wishes), it is not too difficult to understand that they accepted that their superiors would have sanctioned the operation after having satisfied themselves (superiors) about the appropriateness thereof.

It is understandable therefore, that they did not bother themselves with the underlying details by which the decision to kill the deceased was arrived at.

Their conduct clearly demonstrates that they acted in terms of instructions and did not go further than that. Both did not know any of the deceased and clearly did not participate in the operation for personal gain. There is also no suggestion that either of them acted out of personal malice, ill-will or spite directed at any of the deceased. Given their positions and what they were told and understood, they believed that this operation was urgent and the only solution.

In the circumstances, it is clear that their applications comply with the requirements of the Act, that their specific roles were associated with a political objective and committed within the course of the conflicts

as envisaged in section 20 (1) (b), read with section 20 (3) of the Act. We are satisfied that both have also made a full disclosure of all the relevant facts in so far as they were affected in this regard. Consequently, their applications for amnesty as applied for herein, must be granted.

It is now necessary to deal with the application of the Second Applicant.

The Second Applicant was involved from the beginning of the series of events which culminated in the deaths of the deceased.

It seems that Van Rensburg, as ultimately conceded by the Second Applicant, had the power to veto any planned operation sanctioned by Brigadier Gilbert and/or the Second Applicant. This then acquired much importance in the leading of evidence and so much so that the dispute between De Kock and the Second Applicant as to what the latter told Van Rensburg was focused on for a substantial time during the hearing and in argument.

This is understandable because of the nature of the dispute with regard to this aspect. If the Second Applicant had told Van Rensburg, as testified to by De Kock, that the deceased were to be killed to prevent them from disclosing the common law crimes of fraud, then the deaths

could not be considered to be politically motivated, as required by the Act and amnesty could not then be granted. The application would fail at that point and on that ground alone.

If he did tell Van Rensburg, as he testified, that the planned killings were motivated by the necessity to protect the image of the government, the security network of agents, members of the force and their addresses then the operation would clearly fall within the definition of 'political motivation' and then further enquiry into the application would follow.

Colonel De Kock testified broadly on the secret operation of his unit.

He testified about the conversation between Van Rensburg and the Second Applicant in his presence. It is in this respect that there is a dispute between his evidence and that of the Second Applicant.

However, towards the end of his testimony, De Kock stated that the Second Applicant had lied about the motives for killing the deceased. It is not absolutely clear in what context he alleged that the Second Applicant had lied. It is possible that he referred to the evidence of the Second Applicant in this hearing or he could have been referring to the conversation between the Second Applicant and Van Rensburg.

In this event, such a 'lie' would give rise to a number of interpretations on the import of his evidence.

It is too dangerous to speculate or even second guess De Kock's evidence in this regard. There are a number of other criticisms levelled at Colonel De Kock's evidence and in particular, reference was made to his emotional state and attitude towards his erstwhile superiors and his feeling that he had been betrayed by them. His evidence should therefore be approached with even greater care before accepting it and relying on it.

The argument that he might have a score to settle with certain people who were then his superiors and that, his evidence might therefore be tainted, does not hold water. There is no evidence to support this line of reasoning and is at best, speculative.

It is, however, not necessary to deal with all the other criticisms levelled against him because of the ultimate approach adopted towards his evidence.

In view of the uncertainty of the context in which he stated that the Second Applicant had lied, it would, without making any finding on his credibility, be safer to ignore the evidence of Colonel De Kock in determining the application of the Second Applicant. This approach

would in any event satisfy the argument that his evidence was untrue and unreliable.

Having adopted that approach, the application will then have to be decided on the evidence of the Second Applicant and the other acceptable evidence in so far as it is relevant to his application.

The Second Applicant was the sole source of the relevant information and having provided the information to the authority upon which he relies in his application, it is imperative to examine his evidence as to the reasons for the ultimate decision to kill the deceased in order to establish whether section 20 of the Act has been satisfactorily complied with. Furthermore, other evidence, especially that of the other applicants cannot serve to support the Second Applicant's version since he was the source of the information they were given in this regard. Hence, on the fundamental information, he stands alone.

Section 20 (1) (a) seems to have been complied with, if it is to be interpreted as 'formalities' that had to be complied with. The subsection could not have been intended to refer to requirements of the Act, as there are so many requirements to be found in the Act, many of which would not be of any application in this type of application. e.g. procedures related to certain types of applications by victims of apartheid.

It is subsections 20 (1) (b) and (c) which are of particular relevance in the application of the Second Applicant.

It is necessary to deal with the evidence of the Second Applicant. It must be pointed out that aspects such as demeanour do not play any role in assessing his evidence because of the possibility of his unsound mental state during the first part of his evidence in chief. It must be noted that there is no intention to create any precedent in this approach to his evidence.

Nonetheless, although he carries no onus to provide evidence himself, (such evidence can be received from another source), it so happens that the only person who had first hand information about the events and factors relied upon to arrive at the decision to kill the deceased, is the Second Applicant himself. It is against this backdrop that the success or otherwise of the application must be based.

In examining the evidence of the Second Applicant, there are a number of fundamental and material aspects which must be dealt with.

It must be pointed out that, at this stage, the scrutiny of his evidence is not directed at the wisdom and/or the merits of the decision to kill the

deceased, but at whether section 20 (1) (c) of the Act has been complied with or not.

The Second Applicant relied mostly on the authority of his superiors as the basis to explain the murders. In this regard he referred to his superiors *viz* Gilbert and Van Rensburg. While he relied on this authority, combined or otherwise, it is clear that he was the only source of the information which was relied upon to make this decision and to execute it. The others, particularly the Third and Fourth Applicants, relied on what they were told.

His evidence on the very authority he relies on is unsatisfactory. At first he maintained that it was the authority of Gilbert which was irreversible and upon which he relied. Yet, later in his evidence, he conceded that if Van Rensburg was not satisfied with the reasons for the planned murders, he was able to give instructions that the plans, though authorized by Gilbert, be aborted. The Second Applicant would then have gone back to Gilbert to deal with the issue further. However, he stated that Van Rensburg in fact approved of the proposed killings.

As his evidence proceeded, it became apparent that he began to rely more and more on the hierarchy and rank of his superiors in making the decision to kill the deceased. For example, initially he stated that he fed the information to Gilbert and that they discussed the situation with

one another. It is clear that the Second Applicant did not play an insignificant role in the decision making process and indeed rejected certain less drastic suggestions made by Gilbert. At some stage in his evidence he said that they took the decision together. Yet, later in his evidence he placed such responsibility squarely on the shoulders of Gilbert. While technically this is correct, he clearly tried to minimise his role in the decision towards the latter part of his evidence.

This raises doubt as to what he disclosed to Gilbert and to Van Rensburg for that matter, in order for them to grant authority for the murders.

This in turn raises questions as to what his actual role in the developments really was.

During his evidence it seems that divulging information of Security Police complicity in the Cradock Four incident played a role in the decision making process. As far as the Second Applicant is concerned, and on his own evidence, this did not play a role, as the decision to kill the deceased had already been made by the time mention of the Cradock Four was made.

He furthermore explained that he used the opportunity of the alleged presence of a trained ANC member to lure the deceased into the

motor vehicle which was subsequently blown up. Yet, especially in the light of his position as Head of Intelligence, he did not follow up on what had happened to this ANC member after the incident. He testified that he mentioned it to another section for steps to be taken in that regard. However, he did not find out what transpired in that regard thereafter, and if this person was found and arrested, whether anything important was disclosed during any interrogation. This raises serious doubt as to whether this person, and indeed the circumstances of his presence, ever existed. The Second Applicant's inability to explain why he did not follow this issue to its logical conclusion exacerbates the situation.

When he went to collect his travel documents prior to going to Pretoria, Gilbert told him about the threat by some of the deceased to divulge information regarding offences committed by members of the Port Elizabeth Security Police if charges regarding fraud were not withdrawn or in some way made to disappear. It is strange that Gilbert seemed to mention this almost by chance when the Second Applicant collected his air-ticket. It is to be expected that the threat of such disclosures, which would have had a similar effect of passing on information to the ANC, would specifically and pointedly have been reported to the Second Applicant who was personally dealing with the situation and indeed the future of this group of would-be turn-coats. Such

information would be cardinal to the material considerations at the time.

In the circumstances, the almost casual allusion to the fraud, as referred to by the Second Applicant, is illogical and far fetched. Moreover, the Second Applicant's virtual disinterest in it is similarly unbelievable and indeed improbable.

It is also significant that he did not provide details of the information he obtained through the scheme of intercepting mail allegedly belonging to Warrant Officer Mgoduka.

He alleged that such information gleaned from the intercepted mail played an important role in assessing the situation and in arriving at the conclusion that at least Warrant Officer Mgoduka was in the process or about to cross over to the ANC. Such details would in all probability have been unusual and not experienced on an everyday basis. This operation of eavesdropping on and intercepting mail of colleagues was indeed, by all accounts very unusual in itself. The details of who did the interception, when it was done and why no action was taken to counter the plans contained in the correspondence, cannot be easily forgotten and the failure to testify in regard thereto is significant. Indeed, the alleged information provided sufficient grounds to arrest

Warrant Officer Mgoduka and possibly charge him in terms of the security laws. The failure to do so remains unexplained.

The information the Second Applicant alleges that he had, was markedly different to that which he said pertained to Warrant Officer Mgoduka and that which he stated pertained to the rest. The information that he testified to in relation to the rest was meagre to say the least. This raises the question as to whether he really had any or sufficient information to base a decision on or, more importantly, whether the situation he attributed to them indeed existed at all.

He testified that he thought that one or some if not all of the deceased were leaking information to the ANC. He explained that he discovered that the agent he sent out of the country after being briefed in the presence of all four of the deceased, had been arrested by the ANC. He concluded that it had to be one or more of the deceased who had betrayed the agent to the ANC. At the time he had no other information against any of the deceased. When he went to Gilbert, he intended to obtain formal authority from his superior to kill all the deceased. His intention to kill them was clearly based on suspicion and indeed could not, in the circumstances, have been directed at a specific person or persons. It is difficult to believe that such drastic conduct would be resorted to on such flimsy grounds. This begs the question as to what information, if anything at all, remotely suggested

that any of them had, at the time, links with the ANC, let alone that any of them had intentions to divulge sensitive information and in doing so, cross to the ANC, so as to justify killing them.

As it turns out, probably in an attempt to justify the ultimate decision to murder, he testified that the courier of the letter elicited from an ANC member had been betrayed and as a result, had been killed.

When it was pointed out to him that this could not be so, he stated that the person who had been killed was one Toto Mbali. From the context of his initial evidence, it is clear that the courier was not Toto Mbali. The Second Applicant did not explain this contradiction. It is furthermore noteworthy that the name of Toto Mbali did not feature prior to that, either in his testimony or his written submission. In any event he gave no detail as to the role Toto Mbali or his alleged killing played in the killing of the four deceased germane to this application.

In regard to the evidence of the Second Applicant, the aforementioned are, *inter alia*, material issues which give rise to concern. Each on its own present sufficient disquiet so as to cast doubt on the veracity of his evidence. Most of the issues defy logic, while others are either improbable or are self-contradictory. What is more, their importance is fortified by the fact that each is alleged to have played a significant role in arriving at the conclusion that all the

deceased were in contact with the ANC and consequently, because they were each a risk, had to be murdered.

The globular effect of these criticisms enhance the reservations in respect of his evidence, in particular, those relating to the reasons for these murders. On the conspectus of the relevant evidence, it is still not clear what was taken into consideration in deciding to murder the deceased either as a suggested solution or in terms of granting authority to commit these murders.

In the circumstances it is extremely doubtful as to whether the Second Applicant has fully disclosed all the relevant facts pertaining to why and how the decision to kill all the deceased was arrived at. From the evidence, it cannot be said that the Act has been sufficiently complied with in this regard.

In the circumstances therefore, the Second Applicant has not, even substantially, complied with section 20 (1) (c). We are not satisfied that the Second Applicant has substantially made full disclosure in regard to this application.

Furthermore, even if the version of the Second Applicant were to have been regarded as a full disclosure, which we do not find, there is also another aspect in this application that needs to be dealt with. In

considering section 20 (1) (b), the committee must have regard to section 20 (3) of the Act.

Section 20 (3) reads as follows:-

"Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

(a) the motive of the person who committed the act, omission or offence;

(b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;

(c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

(d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and

(f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objectively pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted –

(i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or

(ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed."

Section 20 (3) of the Act directs that in establishing whether section 20 (1) (b) has been complied with, reference to the criteria listed therein must be had. While it has been argued that this list of criteria is an exhaustive one, the approach of the amnesty committee in the form of the panels which presided in similar hearings always regarded the list as not exhaustive. There does not seem to be any reason to adopt any other approach in this hearing.

In any event, the facts of this application do not seem to require consideration of criteria which fall outside the list. Indeed none were suggested. Of importance in this list, are *inter alia*, subsections (c) and (f).

The gravity of the acts in question is most important because the deceased were killed. Not much importance can be placed on the manner in which they were killed as this was intended to be made to

look like the work of the ANC. However, in the context of the situation as described by the Second Applicant, the gravity of his actions is not insignificant.

According to the Second Applicant, the political objective sought to be achieved by his actions, was to protect his network of operation within the area of his duties as Head of the Intelligence Section of the Security Police in Port Elizabeth. He suspected all of the deceased of having contact, in varying degrees, with the ANC over the previous approximately five to six months.

At the time, there were various pieces of legislation available to the Security Forces of the country to use in order to curtail or deal with persons considered a threat to the safety of the citizens of the country, the government of the time and the erstwhile ruling party.

Specifically, the Internal Security Act No. 74 of 1982 was in operation at the material time. That Act contained clear provisions for the arrest and/or detention of persons suspected of being a threat to the Internal Security of South Africa.

Indeed, history records that many people were arrested and detained for long periods of time in terms of that Act and without a hearing and/or trial. The provisions also included detention designed to obtain

information to the satisfaction of the interrogator. This was regularly used by the Security Forces of the time.

Then there was also the common law crime of treason available and with which people were charged from time to time.

In applying these criteria to the version of the Second Applicant, the conduct of the applicant must be measured in terms of the directness and proximity of his conduct in relation to what was sought to be achieved thereby and indeed the proportionality of the conduct in relation to what was being sought to be achieved, so as to place his conduct into proper perspective and context in order to determine whether the act, omission or offence in question falls within the provisions of the Act.

Second Applicant stated that in discussing the options with his superior, Gilbert, all the alternatives, including less drastic actions, were considered. These were discussed between them and killing the deceased was regarded as the only option in the circumstances. Save for stating that other lesser options were not appropriate, he did not venture any explanation as to why those options were regarded as inappropriate. The argument that he might have been wrong in making the ultimate choice raises the question of whether, in

considering notions such as proportionality, the conduct in question must be measured objectively or subjectively.

In applying the directives of the Act, it is clear from section 20 (3) that the conduct under scrutiny must have been proportionate to the purpose of the objective of the conduct. This must be measured objectively. In testing the severity and deleterious effects of the conduct, the standards set by society in general in determining the justification must be used as the social barometer to do so. It is this social yardstick that places the exercise within the boundaries of objectivity.

Placed within an objective context, the killing of the deceased must be measured against the interests sought to be protected, which must of necessity fall within the political objective pursued. In examining the proportionality between the consequences of the Second Applicant's conduct and the political objective sought to be achieved, it is clear that the conduct cannot be justified if the purpose it was intended to serve was either non-existent or objectively of insufficient importance or if it would clearly not achieve its intended purpose.

The more severe the deleterious consequences of the conduct, the more important the achievement of the objective must be if the

conduct is to be objectively regarded as reasonable and justified in the circumstances.

See : *R v Oakes* [1986] 1 SLR 103 – CANADA

There must also be proportionality between the conduct and the intended beneficial consequences of that conduct.

The conduct must be proportionate to the ultimate benefit sought.

See : *Dagnenais v Canadian Broadcasting Corporation* [1994] 3 SLR 835 - CANADA

While these decisions serve to assist in gaining insight into the objective approach required to deal with this aspect of proportionality, the enquiry must be put into the South African context.

The benefit sought by the Second Applicant in this case was the protection of the identities and addresses of his colleagues and security police agents and hence the government of the day and its image.

The victim in the Johnson application, Mrs Hanabe, was a school principal and a member of the Klipplaat Municipal Council. During

1991, the local ANC Youth League, of which Johnson, the applicant in that matter, was an executive member, decided to pressurise the councillors to resign from council in order to render that tier of government ineffective. The strategy seemed to be very important to the youth league and its members took it very seriously. Mrs Hanabe refused to do so and after her house was set on fire, she fled to Uitenhage.

In February 1991, the Executive Committee of the local ANC Youth League discussed the matter and decided that Mrs Hanabe should be killed. Later that month, Johnson and some of his fellow members followed Mrs Hanabe to church and waited for her. When she came out, Johnson shot at her in an attempt to kill her in pursuance of the decision. She did not die but sustained serious injuries as a result of which she was rendered disabled. Accepting that the campaign to end the system of apartheid entailed, *inter alia*, strategies such as non-collaboration with such a system, the amnesty committee accepted that the strategy fell within and complied with the provisions of the Act in so far as it was based on political considerations and pursued with a political objective.

However, it reasoned that in considering section 20 (1) it had to refer to section 20 (3) of the Act. It reasoned further that the aim to render to municipality ineffective had in any event been achieved when Mr

Hanabe fled Klipplaat. The political objective had therefore been achieved in that regard. It followed therefore, that the subsequent attempt to kill her was not proportional to achieving what it sought to achieve because despite her not resigning, she had been rendered ineffectual in that regard. The attempt to kill Mrs Hanabe was consequently found not to be proportional *vis-à-vis* the objective so pursued, and as a result the offence for which amnesty was applied for was not an act associated with a political objective. The application was thus refused.

The reasoning in the decision of Ntsikelelo Don Johnson, clearly illustrates the approach adopted in the Second Applicant's present application. Reference to this decision is made for illustrative purposes only, and nothing else.

It has been argued in regard to proportionality, that other policemen were granted amnesty for similar crimes and therefore the Second Applicant should benefit in the same way. Without wanting to embark on a debate on this aspect and bearing in mind that the process is not based on precedent, it is necessary to point out that this application is unique.

The murders of members of liberation movement by members of the State Security Staff was based on the necessity to avoid international

focus and political embarrassment which would arise during such political trials of members of liberation movement. It therefore became a norm for the Security Forces to resort to covert means to deal with certain members of liberation movements in such a manner in order to avoid unwanted focus.

Charging members of the Security Forces would attract far less international (and indeed local sympathy) and attention that would be the case when charging members of liberation movements. Within this context, the murdering of members of the Security Force would therefore be far less objectionable than would be the case in the killing of members of liberation movement. (It must however be emphasised that in neither event are the murders condoned). It would consequently attract far less attention.

Furthermore, in order to be accepted into the ranks of the ANC, it is common knowledge that the deceased would have had to prove their *bona fides* and prove their loyalty to the organisation. It is also improbable that after five months of communication with the ANC, the deceased would not have divulged the key information which the Second Applicant sought to protect. In the circumstances it is probable that the information had already been communicated to the ANC. There was therefore nothing to protect and the deaths of the

deceased would not, in the circumstances, have served any political objective as envisaged by the Act.

The Second Applicant's application must therefore fail on this ground also.

The failure of a family member of any of the deceased to testify and deny that any of the deceased were connected to the ANC, was raised as a matter which should enhance the application of the Second Applicant. It does not follow that the failure of any of the deceased's family members to testify would have assisted the committee any way. None of them were privy to the planning or commission of the murders. Neither does it follow that such failure would attract any inference which dilutes their opposition to the application. The fact of the matter is that this process is conducted under the umbrella of a commission, the decision (of which) must be based on the evidence placed before it. Consequently the absence of evidence on behalf of the families of the deceased does not enhance the application of the Second Applicant.

We have therefore not been satisfied that the Second Applicant has complied with Section 20 (1) of the Act.

In the circumstances, the Second Applicant's application falls to be dismissed.

In the result,

1. Second Applicant's application for amnesty is refused;
2. Third Applicant's application for amnesty is granted;
3. Fourth Applicant's application for amnesty is granted;
4. In the light of the next of kin of the deceased already having been declared victims for the purposes of the Act and were referred to the Committee on Reparation and Rehabilitation for consideration in terms of section 26 of the Act, it is not necessary to deal with their status in this regard again.

Dated at _____ on this _____ day of _____ 2005

_____
R PILLAY
JUDGE OF THE HIGH COURT

_____
N J MOTATA
JUDGE OF THE HIGH COURT

E.

II.

BEFORE THE SPECIAL AMNESTY COMMITTEE OF THE TRUTH AND RECONCILIATION COMMISSION

(HELD AT PORT ELIZABETH)

In the applications of:

NICOLAAS JACOBUS JANSE VAN RENSBURG	FIRST APPLICANT
GIDEON JOHANNES NIEUWOUDT	SECOND APPLICANT
WYBRAND ANDREAS LODEWICUS DU TOIT	THIRD APPLICANT
MARTHINUS DAVID RAS	FOURTH APPLICANT

In re:

THE MOTHERWELL INCIDENT ON 14 December 1989

MINORITY DECISION

I have read the decision of Pillay and Motata JJ.

I do not agree with the decision in so far as it concerns the refusal of amnesty in the application of the Second Applicant, Gideon Johannes Nieuwoudt. My reasons for disagreeing are set out below.

The Second Applicant's application for amnesty was refused by Pillay and Motata JJ on the grounds: (a) that they "were not satisfied that the Second Applicant has substantially made full disclosure in regard to his application" and (b) that even if the version of the Second Applicant were to be regarded as a full disclosure "the deaths of the deceased would not in the circumstances, have served any political objective as envisaged by the Act."

The facts relating to the incident and the evidence presented at the hearing have been adequately summarised in the majority decision. I shall, however, in dealing with Second Applicant's application highlight some differences in my approach to and my understanding and assessment of his evidence.

Furthermore, I generally agree with the majority's assessment of the evidence tendered by the other applicants and by witnesses who testified at the hearing.

In so far as the Second Applicant's application is concerned, it is common cause that he has complied with all the formal requirements of the Act.

I also agree that the Second Applicant falls within the category of persons referred to in section 22(2)(b) of the Act. He was an employee of the state and a member of the South African Police Services attached to a unit attending to the security of the country. He had express authority to act within the course and scope of his duties as such, against, as he believed, supporters and intended members of a liberation movement engaged in a political struggle against the State and who were about to disclose sensitive information to that organisation. He had the *bona fide* belief that he was acting in the

interest of the state with the objective of countering or resisting the said struggle.

Although the Second Applicant knew all the deceased and most probably their families well, there was no evidence or even a suggestion that he acted out of personal malice, ill-will or spite directed at the deceased. Like the applicants, Du Toit and Ras, he acted upon the orders of a superior, in his case, Brigadier Gilbert, and to some extent Van Rensburg, the latter having given the order in regard to the logistical support to be rendered to Second Applicant to effect the killings.

Admittedly, the Second Applicant's position differs from that of the other two applicants in that he had set in motion a series of discussions and events when he first reported to Gilbert his suspicions in regard to the deceased. He also participated in discussions, even pressing for a decision that the suspects should be eliminated. However, he did not have any independent decision-making authority, nor did he have the authority to order the killing of the deceased. Indeed, he obeyed the instructions of his superior when he was told to first monitor the activities of the deceased and later to kill them. The fact that he was a more than willing participant in the execution of the order that the deceased be killed does not make him the author of the ultimate decision.

The Second Applicant did not deny that other factors, such as the threat of the disclosure of the Goniwe murders, had entered into the picture at the time that Gilbert ordered him to go to Pretoria. At this stage, the names of the perpetrators of the Goniwe incident were not within his knowledge. All he knew was that the threat of prosecution for fraud had caused the deceased or at least two of the deceased to threaten that they would disclose other misdeeds ("wandade") of the

Security Police to the ANC. The issue of the fraud, according to the Second Applicant, was not the reason for the decision to kill because the decision that they should be eliminated had already been taken. It was, as he put it "the catalyst" for the order issued by Gilbert. It is perhaps understandable that the Second Applicant was not particularly perturbed by the threat of disclosure of the Goniwe incident because a decision had already been taken to kill them and he had no personal interest in the Goniwe matter. Van Rensburg and De Kock would have been the persons to feel perturbed since they had participated in the murder of Goniwe and this probably account for their willingness to have readily lent logistical support in the killings.

Admittedly, the Second Applicant's evidence is not without any difficulties and there were certain inconsistencies as well as certain instances where his evidence differed from that of the other applicants. Thus, for example, Du Toit was under the impression that the number of persons to be killed was three while Ras testified that he did not know the exact number. Taking into account the time period that has lapsed between the date of the incident and the hearing, as well as the agitated mental state of the Second Applicant, which in my view was clearly evident during the hearing, it cannot be said that these differences and inconsistencies render the Second Applicant's evidence so flawed that it justifies a finding that he had not made a full disclosure of all relevant facts.

The only real challenge to the Second Applicant's evidence was the evidence of De Kock which was tendered to show that the deceased were killed as a result of their participation in acts of fraud. As stated in the majority decision, De Kock's evidence should be approached with great care and I fully agree "that it is safer to ignore the evidence of De Kock in determining the application of the Second Applicant". I

therefore accept Second Applicant's testimony that the fraud issue arose after the decision to kill had been taken.

There is one common thread that runs through the evidence placed before the Committee and that is that the prime reason for the killing of the deceased was the fact that they were about to defect to the ANC. Especially Ras, the Fourth Applicant, was emphatic in his evidence that he had been told by both De Kock and Second Applicant that the deceased were about to defect to the ANC. He added that Second Applicant, on their way to Port Elizabeth to carry out the order to kill the deceased, had also told him that they had already disclosed some information to the ANC. Having regard to the fact that the Fourth Applicant's application was prepared independently of that of the Second Applicant and that he was presented by a different lawyer, there is little reason to doubt the veracity of his evidence. His evidence in my opinion clearly militates against any conclusion that the Second Applicant's evidence on why the deceased were killed is not true or is a mere fabrication.

In regard to what De Kock told him the Third Applicant testified:

> "Mnr Kock (sic) het my meegedeel dat daar 'n probleem in die Oos Kaap was waar lede van die Mag betrokke was, wat onder andere betrokke was by koverte operasies en dat hulle, hierdie mense, by bedrog betrokke was en het hulle my dit eers later meegedeel Voorsitter die bedrog, maar dit is aan my genoem, maar hierdie mense het op die punt gestaan om oor te loop na die ANC met al die inligting waaroor hulle beskik het in terme van die inligting strukture van die Oos-Kaap."

Although later in cross-examination Du Toit conceded that he was not sure who had said what to him, it is not without significance that he too, believed that the deceased were about to defect to the ANC.

I shall now deal more fully with some of the more detailed reasons for the refusal of amnesty to the Second Applicant on the ground of not having made a full disclosure of relevant facts, dealt with in the decision of Pillay and Motata JJ.

In the majority decision it is stated that: "[as] the evidence proceeded, it became apparent that he [Second Applicant] began to rely more and more on the hierarchy and rank of his superiors in making the decision to kill the deceased."

In my reading and assessment of the Second Applicant's evidence he never tried to steer away from the fact that the decision to kill was taken on the information supplied by him. He never changed his evidence that he regarded the elimination of the deceased as the only solution or that he was more than a willing participant in all the activities that finally led to the killing of the deceased. What he emphasised throughout his evidence was that he operated within a very strict hierarchy of powers and that he did not have any independent decision-making powers in regard to the killing of the deceased, neither was he competent to give an order that they be killed.

The picture that emerged of the Second Applicant, on his own evidence, was that of a ruthless security policeman, but one who would only have acted within the structures, strictures and hierarchy of powers that prevailed at that time. Had he not disclosed the fact that the decision-making powers lay with his superiors and that they had

issued the final order, it could certainly have been construed as him not having made a full disclosure in order to protect his superiors. His uncertainty or even contradiction as to whether Van Rensburg could have reversed Gilbert's order cannot in my view be regarded as material. Only Gilbert and Van Rensburg, both dead now, could have clarified what transpired between them. It is of significance, however, that in his written application Van Rensburg application states that the order was given by Gilbert and approved by a member or members at Head Office.

The fact that the Second Applicant did not follow up on what became of the trained ANC member whose presence he had used to lure the deceased into the vehicle in which they were killed certainly presents a difficulty in regard to credibility and he was extensively questioned on this. His testimony that his instructions to the deceased in regard to the ANC cadre was just a ploy to get them into the vehicle and his explanation that the arrest of the ANC cadre was a matter to be dealt with by the investigation unit who had been fully appraised of his presence do not make his evidence in this regard so improbable as to reject it as false. He testified that the presence of the suspected cadre was generally known amongst the security police and that "die swart lede reeds aan diens geplaas was om patrollies uit te voer." Had his instructions to the four deceased been intended to be carried out by him, the inference sought to be drawn in the majority decision would have been a fair one.

I also find myself in disagreement with the statement in the majority decision that the Second Applicant did not provide details of the information he obtained through the scheme of intercepting mail. There was clear evidence by the Second Applicant of an encoded letter from the deceased Mgoduka addressed to one Mr Isaac

(identified by the Second Applicant as Roje Skenyana, a commanding officer of the ANC in Lesotho) mentioning a forthcoming "wedding". This letter was later decoded by him (Second Applicant). He also testified where letters came from and from whom.

There is no onus on the victims to give evidence at a hearing. However, in a matter such as this, one would have expected the families of the deceased to have assisted the Committee were they able to do so. Surely, if the families truly believed that the deceased had no contact with the ANC, they must have had some factual basis for this belief which could have assisted the Committee. Where the loyalties of the deceased lay, especially in the politically charged atmosphere at the time of the incident, must surely have been within the knowledge of their immediate family members who also had to suffer the consequences in their own communities as a result of their husbands' activities as members of the Security Branch.

The fact that no member/s of the families testified at the hearing, for example, precluded Counsel for the Second Applicant perhaps to have obtained some clarification on the question as to how it came about that it was stated by Counsel for the families at the inquest proceedings regarding their death, that the reason for the killing of the deceased was their contact with the ANC. The argument put forward by Counsel for the Families that it would have been embarrassing for the families to testify at the hearing as a result of the deceased's involvement with the security forces of the time is not convincing

The issue of proportionality was also raised.

In this respect too, I do not agree with my fellow committee members. Even if it were to be accepted that Second Applicant, Nieuwoudt, was

the co-author of the actual decision to kill the deceased, the issue of proportionality should not be allowed to stand in the way of granting him amnesty. I do not agree with the argument that as a result of the five months that had lapsed between the time that the deceased were first suspected of leaking information to the ANC and their killing, "the deceased would not have divulged the key information which the Second Applicant sought to protect". Admittedly some information may have slipped through the net, but, according to the Second Applicant, they were at all times under surveillance, their mail was being monitored and security measures been tightened.

Proportionality was always a difficult issue to deal with in amnesty applications and although the precedent system does not apply in amnesty applications, a committee should at least strive towards some degree of consistency in applying the various provisions of the Act. Amnesty was granted in a number of applications where persons who were only suspected of having been collaborators of the Apartheid Regime were necklaced in a most brutal way. In the case of the murder of Amy Biehl, who was a foreigner and an innocent outsider, and in the case of the St James Massacre, innocent churchgoers were killed. In all these case the issue of proportionality did not prevent amnesty being granted.

It is true that on Second Applicant's own evidence the possibility of transferring the deceased and other steps were mentioned and discussed when he first reported the situation around the deceased to Gilbert. However, the situation had become more problematical as time progressed. It must also be borne in mind that at this time the leaking of information to the liberation movements had become a real threat to the Government of the day as a result of the disclosures made by Dirk Coetzee and other former security policemen. Surely,

proportionality must be judged within the context of prevailing thought and circumstances at the time.

Furthermore, if proportionality were to be an obstacle in the application of Second Applicant it is hard to understand how amnesty could have been granted in any of the applications of security policemen. In all those instances, other options available in terms of the law were also available.

In the result, I am of the opinion that amnesty should also be granted to the Second Applicant, Gideon Johannes Nieuwoudt, for the murder of the deceased in Motherwell on 14 December 1989.

F J Bosman
Member of the Special Amnesty Committee

F.

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 3626/98
3859/98
3729/98

Before the Honourable Mr Justice Conradie
Before the Honourable Mr Justice Foxcroft
CAPE TOWN: Friday 8th May 1998

In the matter between:

THE NATIONAL PARTY OF SOUTH AFRICA	1st APPLICANT
JAMES MARREN SIMPSON	2nd APPLICANT
AND	
THE CHAIRPERSON, COMMITTEE ON AMNESTY OF THE TRUTH AND RECONCILIATION COMMISSION	1st RESPONDENT
THE TRUTH AND RECONCILIATION COMMISSION	2nd RESPONDENT
JANUARY BOY MASILELA	3rd RESPONDENT
DUMISANI HENRY MAKHAYE	4th RESPONDENT
LORD WILFRED HENDRICK MATSANE	5th RESPONDENT
COLIN CECIL COLEMAN	6th RESPONDENT
CHARLES NQAKULA	7th RESPONDENT
BARRY PHILIP GILDER	8th RESPONDENT
ABDULAH MOHAMED OMAR	9th RESPONDENT
BASIL KENYON DUMISANI MAFU	10th RESPONDENT
MONGANE WALLY SEROTE	11th RESPONDENT
BALEKA MMAKOTA MBETE-KGOSITSILE	12th RESPONDENT
PETER RAMOSHOANE MOKABA	13th RESPONDENT
NOSIVIWE NOLUTHANDO MAPISA	14th RESPONDENT
THABO MVUYELWA MBEKI	15th RESPONDENT
SATHY ANDRANATH R. MAHARAJ	16th RESPONDENT
JACOB GEDLEYIHLEKISA ZUMA	17th RESPONDENT
JOHN KGOANA NKADIMENG	18th RESPONDENT
P.R.F. MDLULI-SEDIBE	19th RESPONDENT

LAMBERT LEHLOHONOLO MOLOI	20th RESPONDENT
BILLY LESEDI MASETLHA	21st RESPONDENT
RUTH SEGOMOTSI MOMPATI	22nd RESPONDENT
JACOB SELLO SELEBI	23rd RESPONDENT
ZWELEDINGA PALLO JORDAN	24th RESPONDENT
GARTH RICHARD STRACHAN	25th RESPONDENT
ESSOP GOOLAM PAHAD	26th RESPONDENT
NAKEDI MATHEWS PHOSA	27th RESPONDENT
PRAVIN JAMNADAS GORDHAN	28th RESPONDENT
SIPHO SIDNEY MAKANA	29th RESPONDENT
ALFRED NZO	30th RESPONDENT
JOE JOHANNES MODISE	31st RESPONDENT
ANDREW MANDLA LEKOTO MASONDO	32nd RESPONDENT
LINCOLN VUMILE NGCULU	33rd RESPONDENT
SNUKI JOSEPH ZIKALALA	34th RESPONDENT
KEITH MATILA MOKOAPE	35th RESPONDENT
JOSEPH MBUKU NHLANHLA	36th RESPONDENT
BIKI SAMUEL VICTOR MINYUKU	37th RESPONDENT
MTIKENI PATRICK SIBANDE	38th RESPONDENT
JOHANNES MUDIMU	39th RESPONDENT

Having heard Counsel for the APPLICANTS

and having read the documents filed of record;

IT IS ORDERED THAT:

1. In Case No 3626/98, the decisions made by the Committee on Amnesty (First Respondent) at Cape Town on 28 November 1997, to grant amnesty to the Third to Thirty-Ninth Respondents under the provisions of the Promotion of National Unity and Reconciliation Act, 34 of 1995, are reviewed and set aside.

2. The Committee of Amnesty is to consider afresh the applications for amnesty of the Third to Thirty-Ninth Respondents, including the issue of whether such applications properly comply with the relevant requirements of the Promotion of National Unity and Reconciliation Act. 34 of 1995.

../2

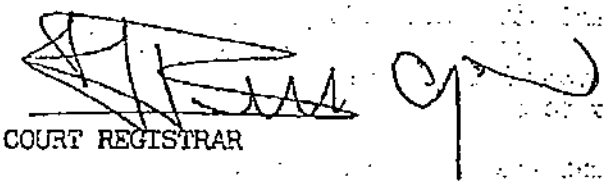
3. In consolidation application, Second Respondent in Case No 3626/98 (The Truth and Reconciliation Commission) is ordered to pay to Applicants in Case No 3626/98 the costs of one counsel taxed at the senior rate.

4. In the main application under Case No 3626/98, Second Respondent (the 'TRC') is ordered to pay to the applicants in that application their costs on an unopposed footing which are to include the costs of two counsel and the costs of today.

5. In the application for substituted service (Case No 3859/98) the Second Respondent ('TRC') is ordered to pay to Applicants (the National Party and Mr Jmaes Warren Simpson) 50% of their costs which are to include the costs of two counsel.

6. In regard to the intervention application (brought under Case No 3729/98) the Truth and Reconciliation Commission is to pay the wasted costs of the National Party and Mr James Warren Simpson on the footing that the costs of two counsel are allowed.

BY ORDER OF THE COURT



COURT REGISTRAR

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Groote Kerk Building
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/mg

G.

NPA decides not to re-charge Wouter Basson

The National Prosecuting Authority of SA (NPA) has concluded that a fresh prosecution of Dr. Wouter Basson on the charges originally quashed by the Pretoria High Court is in law not permissible.

This follows the NPA's thorough consideration of the judgment by the Constitutional Court passed several weeks ago, and all the relevant principles relating to the doctrine of double jeopardy.

Dr. Basson was originally prosecuted in the Pretoria High Court on charges ranging from conspiracies to assassinate members of the liberation movements, misappropriation of State funds and dealing in drugs.

The trial court quashed charges relating to conspiracies to murder persons outside the borders of the Republic on the basis that the South African courts lacked jurisdiction to try such offences. The trial court later granted the accused discharge on other charges and ultimately acquitted him on the remainder of the charges.

The State sought to appeal to the Supreme Court of Appeal on legal grounds. The trial Court only granted the State leave to appeal on limited and conditional grounds. The State petitioned the Chief Justice in respect of the other grounds where leave to appeal was refused.

The Supreme Court of Appeal found that the State was only entitled to appeal on grounds of law and in that regard, was bound further by its earlier ruling. The Court found that all the grounds relied on by the State were factual and consequently, no appeal could result therefrom, even if such findings were incorrect. The Court also implied that the State had no right to a fair trial and that the Constitution protected only the rights of an accused. Consequently, the State was denied leave to appeal.

The NPA took the decision of the SCA to the Constitutional Court. The appeal was based on three grounds, namely:

* Bias on the part of the Trial Court
* The exclusion of the bail record as evidence in the main trial; and
* The quashing of the conspiracy charges

At a preliminary hearing in November 2003, the Constitutional Court found that the State was entitled to the protection of the Constitution in the prosecution of the criminals and that the above grounds were in fact constitutional matters in respect of which the State could appeal.

The leave to appeal was argued in February 2005 and the judgment was handed down in September 2005. On the issue of bias the Constitutional Court found that although the State was entitled to appeal on this ground, it had failed to establish that the judge was in fact biased, although it accepted that the judge had made a number of incorrect findings in law and on facts and found that the version of the accused on the commercial charges was improbable. On the second issue, the Constitutional Court likewise found that the State was entitled to appeal against the exclusion of the bail record, but it failed to prove that the judge's ruling was incorrect. In respect of both these grounds, the appeal was dismissed.

On the third ground, the Constitutional Court found that both the Trial Court and the SCA had erred in finding that a South African Court could

not try the conspiracy charges. It set aside the order quashing the charges and indicated that the State could now, at its discretion, re-institute these charges, provided that it could overcome the obstacle of double jeopardy. It decided that the issue of double jeopardy had to be adjudicated by the Trial Court if a fresh prosecution was instituted.

It is an intrinsic principle of South African law that an accused cannot be tried twice on the same offence or on substantially the same offence irrespective of whether he was convicted or acquitted in the first trial.

In this matter, the State had originally formulated six individual charges of conspiring to kill persons outside the boarders of the Republic as well as other charges relating to conspiracy to kill persons inside the boarders. The State also added an additional charge, namely count 63, which incorporated all the conspiracies which had been charged as individual counts, in essence therefore, count 63 was an exact duplication of the individuals counts.

The Trial Court quashed the individual counts relating to external conspiracies on the basis that it lacked jurisdiction to try them, but allowed the State to lead evidence on the self same charges for the purposes of count 63. In its final judgment on count 63, the Trial Court analyzed the evidence presented by the State on these charges, found that the evidence failed to established the guilt of the accused and acquitted him.

The NPA's view is that had the trial court been consistent, it would have refused to make a finding on the external conspiracies referred to in count 63 as it had earlier ruled that it lacked jurisdiction on such charges. The upshot of this is that Dr. Basson has in fact already been acquitted on the quashed charges.

Issued by Makhosini Nkosi, NPA Spokesman. Tel: 012 845 6760 or 082 824 2576. E-mail: media@npa.gov.za.

H.

G.P.-S. 12/01

LÊER • FILE No.

Z 20
(81/30381)

VOL.

81/30381

LÊER • FILE No.

ONDERWERP • SUBJECT

APPENDICE "B" HANDED IN BY

GENL. K'NOBEL

VERWYSING • REFERENCE	TYDPERK • PERIOD TOT • TO	BESKIKKING • DISPOSAL

KANTOOR • OFFICE

DEPARTEMENT • DEPARTMENT

LÊER • FILE No.

VOL.

B

STAFF PAPER PREPARED FOR THE STEYN COMMISSION ON ALLEGED DANGEROUS ACTIVITIES OF SADF COMPONENTS

DECEMBER 1992

A van der Merwe
SANDF

General Knobel
Sanjen Genl.
Copy 5 of 5 Copies.

MF KENNEDY
GENERAL MANAGER
COUNTER-ESPIONAGE
25/2/93

STAFF PAPER PREPARED FOR THE STEYN COMMISSION ON ALLEGED DANGEROUS ACTIVITIES OF SADF COMPONENTS

INTRODUCTION

1. **Background.** Annexure A (attached) was compiled from various sources of information, and the document has already been handed to Lt-Gen Steyn. Based on the allegations contained in the document, the following has surfaced:

   a. Some members, contractual workers and co-workers of certain SADF components were involved. In some instances they are still involved in illegal and unauthorised activities that are detrimental to the safety, interests and welfare of the state.

   b. To a great extent some members of the senior command structure are trapped in the momentum of activities of the past, activities which are being subjected to prominent negative publicity at present. However, it cannot be ruled out that other members might be furthering an own agenda.

2. The conclusion reached after an all-inclusive examination of the information picture reflected in Annexure A, is that a revolutionary intervention will be required to eradicate all identified corrupt practices at once.

3. **Instruction.** Chief Director CI has instructed that the above information as well as other relevant information/intelligence be evaluated with a view to submit meaningful recommendations to the Steyn Commission.

4. **Aspects that will affect the execution of the assignment**

   a. **Unverified information.** The greater part of the information available is unverified allegations that need to be substantiated/refuted before proper evaluation is possible. However, indications and weight of allegations were of such a nature that the all-inclusive information picture, as reflected by the allegations, could serve as point of departure in the argument.

b. **Period.** The short period allowed for a very comprehensive assignment might have a negative effect on the quality and evaluation.

c. **Manpower.** The sensitive nature of the matter has required that only one person could handle the matter.

OBJECTIVE

5. The purpose of the document is to make recommendations for action in respect of alleged precarious activities of components/individuals in the SADF on the basis of an evaluation of available information.

AREA

6. The report is structured as follows:

a. Evaluation/summary of/comment on information of precarious activities as contained in Annexure A. Details appear in Annexure B.

b. Evaluation/summary of/comment on information of individuals mentioned in Annexure A and detailed in Annexure C.

c. Summary of other relevant information/intelligence at the disposal of Division Intelligence (SDCI) that has been submitted to the Steyn Commission, and of which particulars are contained in Annexure D, E and F.

d. List of general conclusions.

e. Comment on possible actions.

f. Recommendations.

EVALUATION/SUMMARY OF/COMMENT ON INFORMATION OF PRECARIOUS ACTIVITIES OF SADF COMPONENTS

7. Annexure A is a complete base document containing precarious activities of SADF

components, compiled from source reports. Further details of the events appear in Annexure B.

8. Essential aspects regarding the SADF components can be summarised as follows:

a. **Directorate Reconnaissance (Special Forces)**

i. It would appear that Project Pastoor had served as a peg for nearly all official operations/activities of Directorate Reconnaissance. In terms of the Project's objectives, it would appear that the Project had come into being in view of the conventional threat. However, the Project is still running. At the same time, it would appear that individuals are abusing Project Pastoor for activities not in line with Government policy, e.g. alleged weapons caches in Portugal for utilisation during an internal uprising, weapons caches in the RSA and Southern Africa, and clandestine transport of weapons by means of a modified aeroplane; alleged instruction to murder two Portuguese operators in detention; alleged training provided to resistance movements of other countries; alleged involvement in violence on the East Rand and alleged involvement in train murders in cooperation with Transnet's communications network.

ii. Even if the initial objective of Project Pastoor would have been kosher and would remain needful, it apparently developed and/or had been distorted to such a degree that even unauthorised and self-initiated actions of individuals are regarded as having been authorised by those concerned themselves.

iii. **Conclusion.** Project Pastoor and all other related projects/operations must be investigated in detail in terms of :

(1) Desirability to continue with the project in this point of time.

(2) Possible deviations from the original objective, with special reference to possible self-initiated actions under official pretext.

b. Allegation regarding DCC

i. Allegedly, especially members of the Terrorism Section are involved in destabilisation actions against the ANC on own initiative and in cooperation with Brig Ferdie Van Wyk of GS2, Col Mielie Prinsloo of Directorate Reconnaissance (Special Forces) and Col Eugene De Kock of the SAP. A specific group of persons is said to include individuals whose agenda includes the discrediting of the AN; instigation of violence; facilitation for the failure of negotiations with the Government, etc. Alternatively, previous approved projects/actions are continued in a self-perpetuating manner or extended on own initiative to maintain an official slant.

ii. A proper evaluation of alleged activities on the basis of a "miscalculation table" ("verrekeningblad ???") with a view to come to a meaningful conclusion, is not feasible without further investigations and knowledge of normal duties of those involved. Whether additional alleged activities have been officially sanctioned or not (including instructing PAC members to murder AN members in Transkei; involvement to overthrow Holomisa; the training and arming of IFP members and involvement in SAP Col Eugene De Kock's Askaris), they are not in line with the Government's political objectives. This could create a serious credibility problem for the SADF and the Government.

iii. Allegedly various DCC members are involved in corruption or criminal activities, which likewise might lead to serious embarrassment for the SADF and the Government. It would appear that individuals involved in the above agendas integrate them in such a way with activities of an official nature that not only court-related evidence is being hampered, but those concerned might also implicate the SADF as "partner" (which is not the case).

iv. **Conclusions**

(1) An incisive investigation of the mandate and objectives of Section Terrorism is required. Other official instructions to individuals (such as an alleged assignment to Col At Nel to render intelligence support for discrediting actions), as well as their activities in this regard also require incisive investigation.

(2) All allegations of corruption and criminal activities by members of DCC must be referred to the SAP or Directorate Provoos for investigation.

c. **Army Intelligence (GS2)**

i. Allegations mainly pertains to BEVKOM's involvement in discrediting campaigns against the ANC and a possible misrepresentation by the Bevkom component of the nature and extent of the threat in reports compiled by Brig Van Wyk. Should this be the case (which an evaluation of his reports might prove), it would indicate that Brig Van Wyk has his own agenda and that he uses Bevkom's existing mandate (whatever it is), for that purpose.

ii. Once again it would appear that authorised and official matters have been integrated with self-initiated objectives that high-hierarchy decision-makers had lost track of the initial objectives and real mandate. However, an investigation is required to confirm or refute these conclusions.

iii. Other alleged GS2 activities focuses on the allegation of intelligence support to VR's pseudo-capability in actions against the internal structures of the ANC and the PAC. These operations, whether they have been authorised or not, are also not in line with the Government's current political policy.

iv. It is also being alleged that Lt-Genl Miring gave instruction that Directorate Reconnaissance should not collect information on the right wing or on right-wing organisations, and that he wants to be informed of who stands where in Directorate Reconnaissance. In this regard Lt-Gen Miring's instruction would probably be in line with particular contingency planning. Directorate Reconnaissance plays an important role in this matter, and the conclusion arrived at is that Lt-Gen Miring wanted to make sure what the position was with regard to the authority (mandate) for the utilisation of power. This conclusion also corresponds with other information that Lt-Gen Miring is an avowed realist concerning reform initiatives in the RSA, as well as a supporter of these initiatives. Furthermore, one should guard against the wrong interpretation of his remark concerning the execution of a possible coup, should it be necessary. The remark was probably intended to refer to

official emergency action in case of an attempted coup d'etat from either the left or the right wing.

v. **Conclusion**

(1) All aspects of Bevkom's mandate and instruction must be subjected to incisive investigation, and their desirability or not must be deliberated in view of the Government's political policy.

(2) Monthly reports and motivations for Bevkom's activities must be investigated to determine whether they do not serve as basis to obtain official approval for a self-initiated programme.

d. **7 Med Bn Gp**

i. The core aspects in respect of alleged activities of 7 Med Bn Gp centre on the privatisation of the chemical and biological warfare programme. The fact that the programme is still in the process of privatisation allegedly involves great risks for the SADF and the Government.

ii. Furthermore, information pertaining to activities of Brig (Dr) Wouter Basson in respect of an alleged chemical attack on Frelimo soldiers in Mozambique, an alleged poison disrepute action against the ANC, alleged execution of SADF elimination instructions and that he lives beyond the means linked to his rank.

iii. If these allegations are true, it is unlikely that these actions have been authorised because they are against the spirit of the current political process. Had these allegations been false, they would have the potential to cause unprecedented damage to the SADF and the Government because:

(1) Brig (Dr) Basson is indeed involved in chemical research: (And what is more, he is said to be related to Gen Lothar Neethling).

(2) The public would find it hard to accept the opposite in the light of previous official denials of other events (such as Ferdi Barnard's attachment to the SADF), linked to Brig (Dr) Basson's and the SADF's real involvement in chemical and biological research.

iv. Without considering other facts, on the surface it would appear that Brig (Dr) Basson had adapted and developed an initial Project with pure objectives to a stage that self-initiated actions are the order of the day, which could only lead to embarrassment of a serious nature.

v. **Conclusions**

(1) Although aspects of Brig (Dr) Basson's project is being investigated by the Auditor-General, an incisive investigation regarding the desirability of the Programme in its totality, including cover firms, is required if it had not been done by this time.

(2) Instructions and mandates to Brig (Dr) Basson must be investigated and evaluated against alleged activities as to identify double agendas.

9. **General Conclusion.** The assignments, mandates, objectives, projects and submissions for activities of Directorate DCC (mainly Section Terrorism), Directorate Reconnaissance, Bevkom and 7 Med Bn Gp (which must include Brig (Dr) Basson), must be subjected to incisive investigation.

EVALUATION/SUMMARY/COMMENT OF/ON INFORMATION REGARDING INDIVIDUALS

10. Annexure A, which is a summary of allegations concerning risk activities of SADF components, contains names of various SADF members that require further explanation. Annexure C contains the explanation. Summarised, these individuals can be divided in three categories, i.e.

a. Individuals in positions of command who wear an albatross of the past round the neck as an inescapable burden.
   i. Gen Kat Liebenberg
   ii. Lt-Gen C.P. Van der Westhuizen
   iii. Individuals who can be discredited for activities by subordinates by virtue of their command positions. Individuals in this regard are:
   iv. Lt-Gen G. Meiring
   v. Gen-Maj H.J. Roux

vi. Brig J.C. Swart
vii. Brig Tolletjie Botha

b. Individuals involved in apparent self-initiated activities against the interests of the state (not necessarily consciously). Individuals in this regard are:

i. Brig Ferdi Van Wyk
ii. Brig (Dr) Wouter Basson
iii. Brig Oos Van der Merwe
iv. Col At Nel
v. Col H.A.P. Potgieter
vi. Col Mielie Prinsloo
vii. Col Bert Sachse
viii. Col Hannes Venter
ix. Comdt Anton Nieuwoudt
x. Comdt Henry Van der Westhuizen

11. If the allegations (mainly unsubstantiated information) of SADF components' activities (Annexure B) are judged in general, the impression (no substance) is gained that:

a. there is a possibility that certain general staff and senior officers had lost sight of the initial mandate and approved objectives of projects, and that they approve/accept/initiate actions that in actual fact involve additional unauthorised objectives and do not necessarily serve the interests of the State;

b. projects afford members the opportunity to follow a self-initiated agenda under an official cover.

12. Significantly, the individuals involved in the alleged activities are the same persons who have been mentioned in most of the alleged risk activities described in Annexure A and B.

13. **General Conclusion**

a. SADF components that must be subjected to incisive investigation (as indicated in the previous conclusion), must be investigated by an independent SADF working group to attain true refinement of mandate, assignments, objectives and to re-establish credibility.

b. It is unlikely that mandate refining itself would bring about credibility in "the SADF and future continuous "clean" SADF actions". A ridding of incumbents from SADF components may also be required. In this regard, those individuals referred to in the three categories mentioned in Par 10, would be affected. The three categories are :

i. Individuals in positions of command who wear an albatross of the past round the neck as an inescapable burden.

ii. Individuals who could be discredited by virtue of their positions of command, for actions by their subordinates.

iii. Individuals involved in apparent self-initiated activities against the interests of the state (not necessarily consciously).

c. In addition to the cleansing of posts, further investigation into the alleged activities/possible double agendas of individuals whose names appear in Annexure B, is required.

INFORMATION/INTELLIGENCE MADE AVAILABLE TO LT-GEN STEYN

14. For the sake of completeness, documents concerning OP CRUSEN and OP WIDOW, which have been made available to Lt-Gen Steyn, are attached as Annexure D and E (Crusen) and F (Widow). The purpose of their inclusion is

a. to have a consolidated document at command;

b. to utilise it as reference when necessary.

15. To sum up, the following information is contained in the documents:

a. **Annexure D** (Op Crusen) : Individuals allegedly employed by or having contact with Division Intelligence and who act suspiciously, whether in connection with violence or criminal actions. (The documents contain recommendations regarding action.)

b. **Annexure E.** Individuals not in direct contact with the SADF with potential concealed agendas and/or possibly involved in activities that can relate to acts of violence. (Recommendations for action have been proposed.)

c. **Annexure F.** Former BSB and SADF members (of whom some serve in the DCC), who might be involved directly or indirectly in activities that could have a bearing on acts of violence. (Recommendations for action have not been made.)

LIST OF CONCLUSIONS

16. Project Pastoor and all other related projects/operations must be investigated in detail in terms of:

    a. Desirability to continue with the project in the present dispensation.

    b. Possible deviations from the initial objective, with specific reference to possible self-initiated actions under official cover.

17. The mandate and objectives of Section Terrorism must be investigated incisively. Other official instructions to individuals (such as an alleged instruction to Col At Nel to render intelligence support for discrediting actions), and their activities in this respect, must also be investigated incisively.

18. All allegations of corruption and criminal activities by DCC members must be referred to the SAP and / or D Provoos for investigation.

19. All aspects of Bevkom's mandate and instruction must be investigated incisively, and its desirability, whether or not, must be deliberated in the light of the Government's political policy.

20. Monthly reports and motivations for Bevkom actions must be investigated to determine whether official approval for a self-initiated programme had not been sought.

21. Although aspects of Brig (Dr) Basson's Project has already been investigated, an incisive investigation is also required if it has not been done as yet, concerning the desirability for the continuation of the Programme in its entirety, including cover firms.

22. Instructions and mandates to Brig (Dr) Basson must be investigated and matched against alleged activities to identify double agendas.

23. **General conclusions**

a. SADF components to be subjected to incisive investigation must be investigated by an independent SADF working group to attain a true refinement of mandate, assignments, objectives and re-establishment of credibility.

b. It is unlikely that mandate refining by itself would bring about credibility "in the SADF and future "clean" SADF actions". A ridding of incumbents form SADF components might also be required. In this regard, those individuals referred to in the three categories mentioned in Par. 10, would be affected. The three categories are:

i. Individuals in positions of command who wear an albatross of the past round the neck as an inescapable burden.

ii. Individuals who could be discredited by virtue of their positions of command, for actions by their subordinates.

iii. Individuals involved in apparent self-initiated activities against the interests of the State (not necessarily consciously).

c. In addition to the cleansing of posts, further investigation into the alleged activities / possible double agendas of individuals whose names appear in Annexure B, is required.

REACTION ON POSSIBLE DRASTIC ACTION

24. It is unlikely that a few adjustments would clean the record, in the light of the current credibility crisis of the Defence Force and the balance of allegations (albeit unconfirmed), regarding SADF components who apparently act outside their mandate, individuals attached to components who apparently exceed their mandate and / or pursue own agendas under official pretext, along with individuals in positions of command who have lost pace with true objectives. The only alternative would be drastic intervention.

25. It is expected that the reaction of various groups with regard to drastic intervention in the SADF, would be experienced differently. Intervention may include refining of mandate, objectives and role; curtailment / cancellation of assignments; rationalisation of functions; large scale post transformations and retrenchments.

26. **General.** The timing for such measures and the manner the issue is to be approached, are regarded as crucial factors in determining the eventual reaction. Factors such as the general security situation, the Government's position with regard to moral high ground, the progress of the process of transition and the economic prospects will have to be considered in the timing. It is anticipated therefore, that the general reaction would coincide with the positive and / or negative general mood in the country.

27. **Anticipated reactions**

a. **Individuals who would be affected as a result of albatrosses of the past or possible discrediting due to activities of subordinates.** The most important factors that would affect their reaction are anticipated to be the manner in which it is to be performed and the acceptability of the motivation for the action. Individuals in these categories are regarded as realists who probably would accept the situation if it is handled correctly.

b. **Individuals involved in double agendas.** Among these individuals are two categories who would react differently:

i. **Those involved in alleged criminal activities.** No matter the circumstances, they would probably find fault with the dispensation, and would probably join particularly opposing right-wing groups.

ii. **Those who pursue self-initiated objectives under official pretext.** They probably believe that they act within their mandate and would feel aggrieved. The majority would probably join opposing right-wing groups.

Remark: Both categories would probably threaten to expose actions of the past, and might even proceed to expose them. However, that would be counterproductive because that would not only incriminate them, but would prompt the need for intervention for that very reason.

c. **SADF components affected (including Division Intelligence).** Members of SADF components who might be affected by intervention, could react according to their political affiliation. The reaction would probably be less intense than that of members whose components might be closed down or drastically scaled down or be accommodated elsewhere in the SADF. Since the majority of SADF members are being regarded as apolitical and are professional soldiers, a realism prevails that the SADF should regain its credibility one way or the other. Should a drastic intervention be motivated as a solution, it would probably be accepted.

d. **The broad population.** The three respective categories that might react differently.

i. **Leftist grouping.** There will definitely be a propagandistic exploitation of the situation. The degree would be determined by the level of the transitional process. It can be expected that the more intense the reaction, the more negative the general reaction would be.

ii. **Right-wing grouping.** Intense reaction is expected, which would increase the right-wing threat potential for future violent actions. This will reinforce their ranks.

iii. **Central grouping.** It is expected that although the reaction would be negative, the intervention may be accepted with the correct motivation and the manner in which it to be executed and the timing.

28. **Procedure.** It is anticipated that :

a. In the light of the current negative mood, a sudden drastic intervention would harm stability.

b. An appropriate peg, such as the results of the Steyn investigation, would be the most acceptable action within a positive climate.

RECOMMENDATIONS

29. In the light of the above, it is recommended that :

a. Para. 16 to 22, which serve as conclusions, be implemented as recommendations.

b. A drastic intervention, as recommended by the Counterintelligence Community and supported in the conclusions contained in the document, be considered. (Vide par. 24).

c. Should the proposed intervention be accepted as desirable, that it be performed in such a manner that it would have the least effect on stability. Individuals who would be affected for the time being are mentioned in Annexure C.

d. Actions as indicated in Annexure B be performed. Included are the allegations that require further internal investigation and / or committal to the Goldstone Commission, the SAP and D Provoos.

ANNEXURE A
STAFF PAPER
DD DECEMBER 1992

RISK ACTIVITIES OF SADF COMPONENTS

This document represents source information and conclusions that have been made available to Lt-Gen Steyn. In addition to other information available, the intelligence picture has been used as basis for the Staff Paper.

1. An analysis of information available indicate that some members, contractual members and co-workers of the SADF were involved, and in some instances are still involved in illegal and unauthorised activities that harm the security, interests and welfare of the State. The spectrum of these activities includes murders, deeds of terrorism, disruption and influencing activities, destabilisation activities abroad, corruption, promotion of factional party political objectives and blatant disregard of Government policy.

2. The motives of individuals involved are diverse and vary from personal gain, reprisal, personal political agendas and pursuit of strategic and tactical objectives in conflict with Government policy. However, some role players are caught up in activities of the past that are unacceptable in this era.

3. Evidence at the disposal of the Counterintelligence Community on which the above statements rest, are based on facts, both confirmed and unconfirmed information from reliable sources, and indications are that these are true. The information is also based on evidence submitted in court and at other investigation forums.

4. A cursory examination of the information indicates that the above activities were mainly centralised at certain Defence components, i.e. the Directorate Covert Collection (DCC) of Division Intelligence, Army Foundation (GS2), and certain components of Special Forces and 7 Medical Battalion.

5. Summarised the intelligence picture pertaining to the above Defence components is as follows:

a. **Directorate Covert Collection (DCC)**

i. Destabilisation of the internal political situation by means of planning and executing coups in self-governing territories and manipulation of important political role players.

ii. The instigation of unrest through murder, providing political factions with arms and executing intimidation activities.

iii. Members' involvement in planning to ruin the Government's reform initiatives through the escalation of violence.

iv. Corruption among members by means of illegal trading in weapons.

v. Involvement in planning and committing murders with major political consequences (e.g. FLORES case).

b. **Army Intelligence (GS2)**

i. Discrediting activities against the ANC and other political opponents.

ii. Influencing activities and perception creation in the mass media as well as in the SADF.

iii. Intelligence support for destabilisation operations.

iv. Members' participation in coup-related planning.

v. The dissemination of disinformation.

c. **Special Forces**

i. Participation in destabilisation operations in black townships.

ii. Creation of arms caches and the development of operational launching positions in neighbouring countries.

iii. Training of military wings of internal political groups (e.g. Inkatha), as well as training to resistance movements in other African countries, including RENAMO.

d. **7 Medical Battalion**

i. Involvement in the SADF's chemical and biological warfare programmes.

ii. Involvemnt in the so-called "Poison murders".

iii. Involvement of some members in corruption vir personal gain.

iv. Involvement in Chemical attack on Frelimo.

v. Handling of drugs for operational utilisation.

6. When analysing the intelligence picture, it would appear that the senior command structure of the above Defence Force components are controlled by Lts-Genl G Meiring and C.P. Van der Westhuizen, who in turn are under the command of the Head of the SADF, Gen Kat Liebenberg. To a high degree, Generals Liebenberg and Van der Westhuizen are caught up in the momentum of activities of the past, which at present, receive prominent negative publicity, whilst Gen Meiring promotes a personal agenda against the interests of the State.

7. At executive level and in varying degrees, the following senior officers are linked to the above activities as a result of their positions of command or their personal involvement in the said activities.

a. Brig Jake Swart
b. Gen H Roux

c. Gen Chris Thirion
d. Brig Ferdi Van Wyk (GS2)
e. Brig Tolletjie Botha (DCC) - Directorate Covert Collection
f. Col At Nel (DCC)
g. Brig Wouter Basson (7 Med) - 7 Medical Batallion
h. Col H.A.P. Potgieter (Special Forces)
i. Brig Oos Van der Merwe
j. Col Mielie Prinsloo (GS2)
k. Col Anton Nieuwoudt (DCC)
l. Col Bert Sachse (5VR) - 5 Reconnaissance Regiment/Commando
m. Col Hannes Venter (4VR) - 4 Reconnaissance Regiment/Commando
n. Comdt Henry Van der Westhuizen (DCC)

8. Strong interaction exist between the above four Defence Force components, which results in the major role players being relatively restricted.

9. The availability of secret funds, virtually unchecked delegated authority and the Total Onslaught Syndrome has led to a situation where these Defence Force components has become self-generating and self-perpetuating. New entry into the ranks of these components have soon declined in the pattern that have been brought about by their predecessors. The leadership and the unique milieu has afforded individuals of one mind the opportunity to move upward in the hierarchy order. This in turn, has resulted in these components having been caught up in particular value systems and ways of thinking.

10. With analysis of the information it has become apparent that an informal structure has been created, of which the major role players pursue the same agenda, which harm the State's interests.

11. It has also become evident that controlling officers of the said SADF components were either involved in malpractices at executive level or were aware of these practices. On the other hand, if they had performed their duty, they had to be aware of these malpractices.

12. It will not be feasible to mould this information into a suitable product that can be utilised in court-related actions, other legal proceedings or disciplinary hearings because

a. Evidence has already been destroyed and is still being destroyed on large-scale.

b. Existing evidence has been acquired in an extremely sensitive manner and would expose agents to retaliation.

c. The powers of the members and groups involved are such that the life of a witness would have no value.

d. The role players protect eac other.

13. The security situation and the delicate stage negotiations for a new constitutional dispensation has reached, compel a revolutionary intervention to eradicate the malpractices that have been identified forthwith. This will not exclude court-directed or other administrative proceedings.

ANNEXURE B
of Staff Paper
dd December 1992

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	a	b	c	d	e	f	g	h	i
1	Special Forces: 1. Establishment of arms caches and development of operational launching positions in neighbouring countries	Serving members: Gen Kat Liebenberg Lt-Gen G Meiring Brig JC Swart Col Mielie Prinsloo Brig (Dr) W Basson Brig Tolletjie Botha *(Documentary)*	DCC maintains close ties with Project Pastoor. There are joint projects, such as arms caching in Portugal that are being linked to arms caches for internal uprisings when required (so-called Palmeira Project). DCC and Pastoor share cover offices in Malawi *(Documentary as well as sources)*	Apparently Brig JC Swart is in command of Operation Pastoor (previously Operation Phantom), under the control of the SADF and Army. The operation is being staffed by members of Special Forces and old BSB members. Objectives are: i. Conducting warfare on an irregular basis ii. Establishing bases in Africa as launching positions for future operations. iii. Establishing arms caches abroad. iv. Development of Malawi as support country into the rest of Africa *(Documentary)*			X		Internal investigation into desirability of Project
			Arms caching is managed from and into the RSA. One of Pastoor's aircraft has been modified to stow weapons *(Reliable sources)*.	It would be a deviation from its imitial objective if arms caching into the RSA takes place under Operation Pastoor			X		Internal investigation

TOP SECRET

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				
					Vague allegation	Strong allegation	Probably true	Confirmed	
		Brig (Dr) W Basson	Two Portuguese operators of Pastoor have recently been exposed and arrested. Brig (Dr) W Basson instructed that the persons detained were to be mrudered if they could not be relieved. *(Reliable source, confirmed by another source.)* Fronts of Operation Pastoor are in Kenia, Zambia and Mauritius, mainly in the nature reservearea. Strong contact with the British SAS exists. *(Documentary)*	Allegedly Brig Basson travelled overseas for this purpose. If this was the case, actions probably were self-initiated beyond Project Pastoor's domain and mandate.			X X		Internal investigation Internal investigation into Pastoor
	ii. Training of military wings of internal political groups (e.g. Inkatha), as well as training to resistance movements in other African countries, inter alia Renamo.	Col Bert Sachse Shaun Gullen Rod Rodrigues Roelie Roelofse Sergeant Americo	Members of 1 Recoon Reg and 5 Reconn Reg (RR) present training to resistance movements in 8 countries. *(Various agents).* Individuals involved in training are Gavin Christie, Col Bert Sachse, Shaun Gullen, Rod Rodrigues, Roelie Roelofse & Serg America of 4RR & 5RR *(Various sources)*	Probably true. The question is whether this was or was not an authorised project. Further investigation is required.			X		Internal investigation
	iii. Participation in destabilisation operations in black townships		Operation Pastoor is involved in violence on the East Rand. *(Technical collection).* Concrete facts not available, but concluded from teleph conversations, evacuations & transfers	If this was the case, actions are beyond Operation Pastoor's domain. Further investigation is required.		X			Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
			A discredition action was directed at the ANC to link the ANC to the use of poison. The young interrogators who had questioned the ANC member, were transferred to Pastoor to maintain control over them. This is a clear indication of the mutual relation between GS2, DCC and Pastoor *(Allegations by agent)*	Reporting of this case is obscure. However, if this was the case, actions are beyond Operation Pastoor's domain.		X			Internal investigation
		Serving member: Col Mielie Prinsloo Former members: Brig Archie Moore Col Daan Kershoff Nick Liebenberg Nick Basson Maj Buks Buys	Spoornet's intelligence network comprised former members of special Forces, i.e. Buks Buys, Nick Liebenberg, Nick Basson or Bosman, Archie Moore and Daan Kershoff, with the object to instigste violence by means of train murders. Buys, Liebenberg, Bosman resigned and established their own business. Nick Liebenberg often (the last time in March 1992) reported beforehand to Col Mielie Prinsloo where and when train murders were to take place, and implied that Special Forces are involved. *(Source reports and another Intelligence Service.)*	If the allegation was the truth, it probably was self-initiated. This is definitely not part of the Government's political policy. According to other information, it would appear that the ANC is in possession of similar information, but for one or otehr reason does not utilise it.. However, the allegations have the potential of serious embarrassment for the SADF and the State.			X		Goldstone

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
2.	DCC i. Destabilisation of the internal political situation through planning and execution of coups in self-governong territories, and manipulation of major political tole players.	Planners are: Brig F van Wyk Col At Nel Col Mielie Prisloo Tinus Hamman Comdt Henry van der Westhuizen *(Reliable source)* Possibly also Capt Pamela du Randt *(Reliable source)* **Executive at operational level are:** Comdt Anton Nieuwoudt Col Eugene de Kock (SAP) Comdt Henry van der Westhuizen *(Reliable source)* **Probable co-workers at operational level:** Brian Davis (London) Van Greunen Verne Lange Jimmy Nieuwoudt *(Various sources)*	Individuals involved in suspicious activities are members of Section Terrorism. The agenda of this group of individuals is: i. Discrediting of the ANC. ii. Instigation of public violence. iii. The failure of talks with the Government. iv. Increase in violence. v. De facto coup by the SADF to restore order. vi. Establishment/development and armament of Inkatha , and the creation of alternative right-wing political alliances. *(Allegations and reliable source)* The planning group meet clandestinely at a lodge (West stadium) at Loftus. Pamela du Randt is present often. *(Source reports and technical collection)*	Should this be the case, these allegations would be an indication of an own agenda that may have the potential of serious implications. This matter requires further urgent investigation. Further collection is essential.			X X		Internal investigation thereupon Goldstone Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
		Col At Nel Comdt Anton Nieuwoudt AO2 Clive Brink	The Ciskei Intelligence Service, controlled by Comdt Anton Nieuwoudt and AO2 Clive Brink. The coup and murder of Sebe was a planned action by Col At Nel and Comdt Anton Nieuwoudt *(Reliable source)*	Although Nieuwoudt controlled the Ciskei Intelligence Service, it has not been confirmed that he had planned Sebe's murder. However, according to a recent report, he is concerned about the fact that a judicial commission in the Ciskei is attmpting to "hang" the murder on Sebe round his neck (implicate him?)			X		Goldstone
			DCC is involved in Mozambique through agents Craig Williamson, Sakkie van Zyl and Celeste who are strongly linked to Renamo armament *(Various sources)*	A number of DCC members maintain contact with Craig Williamson, who, according to some reports, is involved in smuggling activities.			X		Goldstone
			DCC continues with planning to overthrow Holomisa and to substitute him with pawns. (Various agents and technical collection.) Individuals involved allegedly are Col At Nel and Comdt Anton Nieuwoudt.	According to another report, Nieuwoudt handles Col Duli of the TDF, and he along with Eugene De Kock and Chris Nel (alias Derek Louw) had planned to carry out a coup d'etat. Thus, the allegations have been confirmed and clearly point to self-initiated efforts to work against the policy of the Government.				X	Goldstone

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	ii. Participation of members in planning to ruin the Government's reform initiatives through the escalation of violence.	JC Prinsloo (DCC in Durban)	DCC agents are involved in the training of IFP members, whereupon they are placed at security firms (ubder IFP and SADF control), fully armed. Ex-Rhodesians wit Right-wing radical viewpoints control the security firms COIN, Shield and Hullets. *(Allegations by independent sources.)*	Allegedly, JP Prinsloo of the DCC's Durban office may be responsible for liaison wrt the training. If this proves to be true, it would probably be in pursuance of a self-initiated agenda.		X			Goldstone
			DCC has full control over the Zulu faction's participation in talks with the Government. Allegedly the infrastructure is such that 24 000 Zulus can be armed in the PWV area within 24 hours. *Various independent sources.)*	Further collection is essential for meaningful evaluation.		X			Goldstone
		Col De Kock Leon Flores Steve Bosch Col At Nel	The former 8-member "hit squad" of Vlakplaas was under the command of Col Eugene de Kock, Leon Flores and Steve Bosch, of whom the latter two became DCC members. Col de Kock maintains close ties with Col At Nel. *(Source reports and Technical collection)*	There were various accounts of contact between Col de Kock (SAP) and certain DCC members. From the veiled use of words, it could be concluded that the combination was involved in activities that harmed the interests of the State.				X	Goldstone

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iii. Instigation of unrest through murder, armament of political factions and execution of intimidation activities. iv. Involvement in planning and committing of murders with serious political consequences (eg the Flores incident)	Col Eugene de Kock Leon Flores Col At Nel Steve Bosch HenryvdWesthuizen Rich Verster	12 former Vlakplaas askaris of Col Eugene de Kock (SAP) are still involved in operations and are handled by De Kock. All of them are fully equipped with weapons and supplied with arms caches, ammunition and supplies. Some of the askaris are hidden on DCC's holding (Olymus 73). *(Confirmed by various agents.)* Until recently Flores assisted the handling of askaris. His own weapons are cached on the holding of Tryon alias Trix alias Leonard. *(Reliable source)*	As mentioned above, the contact between Col De Kock (SAP) and DCC members is disturbing, and it would appear that a combination of individuals are pursuing an own self-initiated agenda.			X		Goldstone
		Brig (Dr) Basson Brig F van Wyk & probably Col At Nel	DCC in conjunction with Brig Ferdi vanWyk turned an ANC member to give evidence that the ANC uses chemical weapons ni Mozambique. (This was just after the chemical attack on the Frelimo group in Mozambique, vide section on 7 Med Bt Gp) *(Allegations by reliable source)*	Although the reporting is not clear, it would appear that an operation involving chemical weapons was launched in Mozambique, and that Col At Nel, Brig F Van Wyk & Brig (Dr) Basson were involved. The British organisation Chemical & Biological Defence Establishments investigated the area, and found that chemical weapons had definitely been used. It would appear that there were attempts to lay the blame on the ANC.		X			Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
			The caching of terrorist weapons in Swaziland are being planned by Cols Eugene de Kock and At Nel, and pointed out to the Swazi police, whereupon discredition takes place. *(Technical collection & reliable source)*	Apparently this is being done in pursuance of a self-initiated agenda or an existing assignment is conducted on own initiative but beyond limits.				X	Internal investigation
		Col At Nel & probably also Comdt Anton Nieuwoudt	DCC members handle elements of the PAC leadership in Transkei. Col At Nel instructed that the PAC had to proceed with murders on ANC members in the Transkei. *(Technical collection)*	These allegations, linked to the allegations mentioned elsewhere in this document, which maintain that DCC members continue to plan a coup d'etat in Transkei, once again are indicative of a self-initiated agenda conducted by certain DCC members.			X		Goldstone

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	v. Corruption among DCC members by means of illegal weapons trade.	Col At Nel Comdt Anton Nieuwoudt Comdt Henry wdWesthuizen Rich Verster Jeff Price Col Eugene de Kock (SAP) Piet Botha (SAP) Willie Nortje (SAP) Chappies Klopper (SAP)	The delivery of arms to the SAP located by so-called sources. Funds go to fictitious sources. *(Allegations)* The GS2 remuneration fund of the Army that handles arms located abroad, pays without asking questions, and a great number of fictitious sources are remunerated. *(Allegations.)* Anton Nieuwoudt keeps weapons at Plot 73, Olympus and in a container at a rented farm at Irene.	According to additional reporting, Col At Nel does not register internal sources anymore, and rpesumably they are remunerated from funds obtained form the delivery of weapons. It has also been alleged that munition depots are declared only partially. Allegedly, the remainder is hidden elswhere. Consequently, there is a possibility that other activities too might be funded. This is also an example of how as official responsibility, such as covert collection could be misused for own profit or for pursuance of a self-initiated agenda under official banner.				X	Investigation by D Provoos, whereupon investigation by Goldstone
3	GS2 Discrediting actions against ANC and other political opponents	Brig F Van Wyk Col At Nel	Disclosure concerning Winnie Mandela's disappearance of funds was a Ferdi Van Wyk/Col At Nel project. *(Allegations by source)*	If it was an official project in line with the State's political programme, it would be bona fide different. However, if it was self-initiated, then it would have a high-risk potential for embarrassment.			X		Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
		Brig F Van Wyk	The discrediting of the ANC and other political opponents against the Government is managed from the office of the Command. *(Various sources)*	On the basis of various reports, it would appear that official authorisation did exist. However, it would appear that Brig Van Wyk pursues more objectives that are self-initiated or that he attempts to convince his superiors to approve activities that are not always in the interest of the State. This will have to be investigated though.			X		Internal investigation
	ii. Influencing activities and creation of perceptions at the mass media and the SADF	BrigFvWyk	The emphasis on violence in BrigvWyk's report in a certain manner may establish misperceptions. *(Reliable source)*	It would appear that motivations for actions might be intensified to guarantee action. However, this is only a conclusion and needs to be investigated further.			X		Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iii. Intelligence support to destabilisation operations		The pseudo capability of 5Reconnaissance Regiment receives intelligence support from GS2 to be applied to the ANC's and PAC's internal structures. *(Source reports and Technical collection).* According to report received on 14Dec1992, an ANC member was to give evidence at the Goldstone Commission to the effect that members of 5ReconReg 1ReconnReg were to perform operations in KwaZulu. The vehicle registrations to be used for this purpose were checked by OATI. These can be trailed to 5ReconnReg. *(SAP)*	If this was the case, activities would not be in line with Government policy, and this might lead to serious embarrassment. This matter requires urgent investigation.			X		Goldstone ?
		ColHerman van Niekerk (leader) TinusVStaden (OpsOffic) JimLaferty - ex-Rhodesian MikeKennedy - ex-Rhodesian MarkVDMerwe - ex-Rodesian	Rumours are that a pseudo group of 5ReconnReg are involved in train murders along with members of the Rhodesian Selous Scouts under HermanVNiekerk *(Allegations)*	This is probably the same group who were, ito the above allegation, involved in speudo operations in KwaZulu. The allegations require further urgent investigation.					Goldstone

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iv. Paticipation of members in coup-related planning	Lt-Gen G Meiring	Gen Meiring instructed SpecialForces to determine which members of the present DefenceForce, the previous DefenceForce and the BSB are on "his" side, to enable him to know whom he could call up when it was necessary. He furthermore instructed that SpecForces was not allowed to collect information on right-wingers and rightwing organisations *(Reliable source)*	Since SpecForces would play an important role in countering a coup d'etat, it seems probable that GenMeiring would have wanted to know who were apolitical for utilisation. His behaviour is therefore evaluated as normal ito contingency planning.					None
		ColMiellePrinsloo	The selective leakage of information from ColMielie Prinsloo's group to Rightwing groups, especially early warnings against possible actions *(Confirmed by various independent sources)*	The evaluation was that Col Prinsloo is sympathetically disposed towards the Right Wing. This fact may endorse the other allegations contained in the document of his possible involvement in an own agenda directed against the ANC. This requires further investigation.				X	Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
4	7MED BN GP i. Involvement in the chemical and biological warfare programme of the SADF	BrigWouterBasson	There are several chemical firms that operate as private institutions in support of the chemical and biological warfare programme of the SADF. The privatisation of these firms is transparent, which might become serious risks for the SADF and the State in future. The firms are Roodeplaat Research Laboratory, Roodeplaat Tile firm, Delta-G, Protechnics, Ecotex. The activity is headed by Brig(Dr)WouterBasson. *(Documentary)*	The programme is performed under Project Jota. Privatisation does indeed take place. However, the allegation that the privatisation is transparent and might hold serious risks for the SADF and the State requires further investigation.			X		Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	ii. Involvement in chemical attack on Frelimo	Brig W Basson Brig Van Wyk Col At Nel	Allegedly the chemical attack on Frelimo soldiers in Mozambique (vide ser no 3.iv) was a practical training session. An small unmanned reconnaissance bomber was located shortly before the attack on Komatipoort. The toxic substance used in the attack was manufactured and stored by Petrotechnics. (Confirmed, and individuals involved are known)	Allegedly, the aircraft was tested shortly before the attack on Komatipoort. As stated, a British team of scientists established that chemical weapons were used in the attack on the Frelimo soldiers (finding - January 1992). Accor-ding to this and other information in this respect, DCC and GS2 members as well as Brig Basson directed a discrediting campaign against the ANC implicating the ANC as having a chemical warfare capability, is indicative of an attempted cover-up of either an own agenda or an authorised operation which had failed. However, this requires further investigation.				X	Internal investigation
	iii. Involvement in so-called poison murders	Brig W Basson Gen LotharNeethling	Members of Charl Naude's old group (SpesForces/BSB)formed a group under leadership of Brig W Basson responsible for all SADF elimination instruc-tions. Gen Lothar Neethling was intimately involved. (Evidence of members involved can be obtained) Johan Theron (4VR - Reconn. Regim.) And Johan Truter - financial manager (RN Lab), was also involved with the above. At Nel and Johan Theron have close	Vide all the info in the previous column. The allegation prompt-many questions that first need to be answered befor a meaningful evaluation can be made. Conside-ring the weight of allegations, it would appear that some of them might be true. According to reports received in Dec 1992, there was rummaging among certain DCC members at the time of Goldstone's visit to their offices because some beer tins had been "doctored" with poison. This has been confirmed.		X			

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
		GenKatLiebenberg	GenKatLiebenberg has been kept posted during the course of events. Allegedly, until 1989 he himself was also involved in the planning. (Evidence can be obtained from a person who was involved.)	Recently it has also been reported that D Verk/Recoinn??(Spec Forces)had received toxic substances from 7 Med BnGp, which might be utilised for operational purposes, inter alia a poisonous substance which is a "new product" that can be administered in nearly any manner. Allegedly, Brig Basson made it available. However, a meaningful evaluation is not possible before affidavits are obtained and further investigations are completed.		X			
		Name can be obtained	A BSB operator was involved in elimination activities, and disposes of information which directly implicates GenLieben-berg in the murders. (Member has already prepared an affidavit.)			X			
		Allegedly Col AtNel CmdtAntonNieuwou dt CmdtHenryvdWest-huizen are involved	Recently there was an attempt to bring the person under the control of the "generals" by offering a contract to supply poisoned beer to Zulus in Transkei. Wouter Basson furthermore offered him 100 000 tablets per month for one year. (Allegations)				X		

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
			The above person is a key figure and is part of the group BSB members who instituted legal proceedings against the SADF. (Sworn affidavit can be obtained)				X		
			The death of one Holtzhausen who was involved in the SADF's ivory/wood/diamond smuggling trade with Angola might point to this group.(Allegation)				X		
			It is known that Wouter Basson's direct supervisor had no control over him and that he pursued his own agenda. (Technical sources of conversation with subordinates who made arrangements.)				X		

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iv. Some members' involvement in corruption for personal gain		Corruption - Brig Wouter Basson has free access to the Lear Jet of Special Forces for private flights to rugby matches and buying sprees in foreign countries (Allegation - various sources)	Various reports have been received in respect of Brig Basson's misuse of official resources and the fact that that he lives exceptionally extravagant. Aspects are being investigated by the AG (Auditor-General/Attorney-General ??)				X	AG
			- Brig Basson invites others along and makes use of the most expensive accommodation. He has recently bought a house in France as well as corporate membership at a gholf club in France (Allegation by reliable source)					X	AG

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ANNEXURE C OF STAFF REPORT
DD DECEMBER 1992

INDIVIDUALS MENTIONED IN ANNEXURE A

Serial no	Individual	Allegations & circumstances wrt indivuals, supplied by individuals	Remarks	Conclusion
	a	b	c	d
1	Brig Jake Botha	- Supervises Reconn (Special Forces) - Entangled in the past & its momentum - Will not be able to detach himself from the past	It cannot be ruled out that he might be discredited in future due to alleged activities of subordinates	Ought to be included in the intervention
2	Gen-Maj HJ Roux	- Controls Project Pastoor - Supervises Reconnaiss Regiments - Ought to be aware of activities that might lead to embarrassment	Might be caught up in the momentum of activities that were acceptable in the past	Ought to be included in the intervention
3	Gen-Maj Chris Thirion	- In his current post he should be aware of DEC activities that might lead to embarrassment - Should be aware of possible misuse of Operation Pastoor for possible unauthorised activities	After having followed up allegations/ circumstances supplied by sources they were found to be based on wrong conclusions. It was concluded that he (Thirion) had taken over Gen Joubert's association with Project Pastoor when he had succeeded the latter.	NOT affected by possible intervention

4	Brig Ferdi V Wyk	- Commands Bev Com (?) - Was aware of Flores' assignment - Arranged clandestine visit of a foreign journalist via RSA to discredit ANC, but referred him to Gen-Maj Tienie Groenewald - Involved in discrediting activities iro political opponents	May be subjected to serious discrediting actions in future	Ought to be included in intervention
5	Brig Tolletje Botha	- Have direct command over DCC - Was aware of Flores' double agenda	Was discredited	Ought to be included in intervention
6	Col At Nel	- Took initiative in various activities that might have led to embarrassment, such as: i. Discrediting campaigns ii. Attacks by PAC members on ANC members in Transkei	Was discredited and allegedly involved in several other activitiess that may lead to embarrassment	Ought to be included in intervention
7	Brig Wouter Basson	- Involved on poison murders - Involved in chemical attack on Frelimo - A founder of the underground organisation "Binnekring" ("Inner Circle")	His alleged activities are of such a nature that they might lead to serious embarrassment. They also have the potential to seriously harm the State	Ought to be included in intervention
8	Col HAP Potgieter	- Involved in destabilisation activities (probably unauthorised)	May be discredited. Allegedly pursuing own agenda.	Ought to be included in intervention

9	Brig Oos VD Merwe	- Laid down intelligence requirements regarding the guard system at the SP's residence. - Said that he might be prepared to launch a coup to restore order.	May be discredited. Is to retire. Works against Government policy.	Ought to be included in intervention.
10	Col Mielie Prinsloo	- Involved in destabilisation operations on own initiative - Provides intelligence support, of which the official nature is being queried - Involved in coup-related planning/statements	May be seriously discredited. Allegedly pursues personal agenda or twists existing mandate for self-initiated objectives	Ought to be included in intervention
11	Comdt Anton Nieuwoudt	- Was involved in Ciskei coup and Sebe murder - Controls Askaris (probably unauthorised) - Involved in destabilisation activities (probably own initiative) - Involved in coup planning/statements	Was discredited and may still be discredited. May involve the SADF in his own alleged double agenda, which may lead to serious embarrassment (whether true or not)	Ought to be included in intervention
12	Col Bert Sachse	- Involved in training of resistence movements in neighbouring countries - Allegations of smuggling of rhino horns	May be discredited. Probably pursuing a personal agenda	Ought to be included in intervention
13	Col Hannes Venter	- Involved in destabilisation operations (probably own initiative)	May be seriously discredited and may involve the SADF	Ought to be included in intervention

14	Comdt Henry VD Westhuizen	- Involved in destabilisation activities (probably own initiative) - Handles agents with questionable backgrounds	Allegedly pursues a personal agenda and allegedly entwined his official duties with his personal agenda	Ought to be included in intervention
15	Gen Kat Liebenberg	- In full command of SADF - Exposed to blackmail as result of previous involvement in unauthorised BSB activities - Allegedly involved in ivory smuggling (confirmed by independent sources) - Direct superior of Brig Wouter Basson, therefore he ought to know of the latter's probable unauthorised activities (Allegations by independent sources)	Probably caught up in albatrosses of the past that can result in him being discredited	Ought to be included in intervention

16	Lt-Gen G Meiring	- Full command of GS2 and Special Forces - Authorised Flores' visit and itinerary abroad - Gave instruction iro efforts to determine Rightwing support within Special Forces in order ro ensure selective summons when required - Forbade collection by Special Forces on rightwingers or rightwing organisations - Told an inner circle that he was prepared to launch a coup if necessary (Reliable source)	May be discredited due to the Flores case. Wrt the allegation iro Rightwing, his activities are evaluated as part of contingency planning. Since he has full command of the Army, he might not be able to escape the responsibility , should it be found that that the existing mandate/assignments were developed for other objectives	Ought to be included in intervention
17	Lt-Gen CP VD Westhuizen	- In view of his position as commander of the DI and DCC he had to be aware of malpractices at these offices. - He has albatrosses round his neck from which he cannot espcape, e.g. i. Goniwe ii. Hammer Forces iii. Train murders caused by members under his command	Probably caught up in albatrosses of the past that are inescapable	Ought to be included in intervention

Annexure D
of Staff report
dd December 1992

INDIVIDUALS ALLEGEDLY ATTACHED TO OR IN CONTACT WITH DIVISION INTELLIGENCE

Serial No	Individual	Affiliation	Activities	Status				Remarks
				Uncertain	Above suspision	Criminal activities	Goldstone Commission	
	a	b	c	d	e	f	g	h
1	JF Verster (Rich) i. ID no [redacted] ii. Alias iii. [redacted]	Member of Company	Allegedly individual is involved in : i. The smuggling of (1) drugs (2) ivory (3) gem stones (4) weapons (5) foreign currency (6) counterfeit money ii. Car and lorry theft			X X		Information regarding the smuggling & vehicle theft has been handed to the SAP (MID) for further investigation
2	JA Nieuwoudt (Comdt) i. J Nel; J Buitendag	SADF ex-Ciskeian Intelligence Service	i. Allegedly the individual is involved in cycad smuggling ii. Allegedly the individual is involved in organising an underground structure to serve as an alternative structure should the negotiation process fail	X X		X		The origin of the information is extremely sensitive and might compromise a total source network. Utilisation of the information must be cleared with the handler

3	H VD WESTHUIZEN i. [redacted]	Member of Company ex-SADF (DI)	i. Allegedly the individual is involved in the smuggling of (1) cycads (2) gem-stones (3) counterfeit money ii. Allegedly the individual is involved in activities probably related to violence			X X X	X	information to confirm the allegations could not be obtained. In view of the nature of his position he was concerned with collection on MK
4	G Janse Van Rensburg i. [redacted] ii. Alias: Steven van Lill iii. [redacted] Str	Member of Company ex-NI	Allegedly the person is involved in the smuggling of drugs and Red Mercury	X		X		To date confirmation for allegations could not be obtained

5	Tony Oosthuizen i. *Aliases (1) Tobie Esterhuizen (2) Michael O'Kelly (3) MJ Olivier ii. [redacted]	Member of Company ex-NI	Alleged agent for MI6			X		There were inve...ions in this regard. The allegations could not be confirmed.
6	AM VD Berg (Maj) i. [redacted] ii. [redacted]	SADF	Allegedly the said person misused official contacts for personal gain, and he is involved in an extramarital relationship	X				The allegations regarding the misuse of official contacts are being investigated by an RVO (??). Substantiation could not be obtained.
7	GD Price i. ID No [redacted] ii. Alias: A Wiltshire iii [redacted]	Member of Company ex-Rhodesian	Alleged agent for MI6			X		To date allegations have not been substantiated

8	RI Wishart	Member of Company ex-Rhodesian	Alleged agent for MI6	X		X		Allegation not sub...ntiated
9	HJM Widdowson (Cmdr) i. Force No [redacted] ii. Address [redacted]	SADF	Allegedly involved in theft of an R4 as well as espionage on behalf of a foreign intelligence service	X		X		Allegation not substantiated to date
10	HD Terblanche (Maj) i. Force No [redacted] ii. Address [redacted]	SADF	Allegedly involved in smuggling of gem-stones			X		There are good indications that the individual is indeed involved in smuggling of diamonds
11	Stefan Snyders (Comdt)	SADF	Allegedly involved in smuggling of diamonds and emeralds			X		Snyders maintains very close contact with Henry VD Westhuizen
12	Vernon Lange ii. Alias P Page	Member of Company ex-BSB	Allegedly involved in smuggling activities	X		X		Nature and extent of activities not known

13	JG Nieuwoudt i. Alias Neuman	ex-BSB Member of Company	Allegedly involved in extramaritsl relationship	X				No further negative information is known
14	JP Du Preez i. Alias J Du Plooy	ex-BSB Member of Company	Allegedly the said person has or had in his possession a number of unlicensed weapons of one Owen, ex-BSB member	X		X		No further negative information is known
15	LA MAREE (Chappies) i. ID No [redacted]	ex-BSB Member of Company	This person still has regular contact with former BSB members. No furhter information is known regarding his activities	X				The only negative information available about this person is speculation regarding the Webster murder
16	FL Smit (Maj)	SADF	Allegedly he is involved in i. the smuggling of weapons; and ii. the smuggling of Red Mercury	X		X	X	Not enough information available to substantiate the allegations. His involvement in arms transactions might be a result of his official duties

17	DH Fourie i. ID No [redacted] ii. Address [redacted]	Company member ex-BSB	Allegations regarding this person are the following: i. He was retrenched by the SADF, and he threatens to go to court. ii. He is involved in the training of people in Ciskei, inter alia in VIP protection. iii. He maintains regular contact with former BSB members. iv. He made contact with one Chris VD Merwe in Windhoek with a view to the possibility to establish a cover firm in Windhoek that can be utilised by Fourie to import arms and ammunition to the RSA.	X			X	Although there are indications, the information is inadequate to substantiate allegations wrt any BSB type of activities. It is possible that the cover firm can be used to evade existing sanctions against the RSA. Allegedly Fourie was the operational manager of the BSB and had to approve all tasks.

18	DF du T. Burger (Staal)	Member of Company ex-BSB	Allegations regarding Burger are as follows: i. He was dismissed by the DCC but he refuses to accept his dismissal and threatens with a court case. ii. He is involved in an extramarital relationship. iii. Involved in the smuggling of drugs, red Mercury, gold and diamonds. iv. Involved in suspicious special projects. However, the nature and extent are unknown. v. Maintains regular contact with former BSB members.	X		X	X	Existing information is inadequate to substantiate allegations
19	WJ Basson i. ID No [redacted] ii. Aliases (1) WJ Bester (2) M Barnard (3) M Reyneke (4) Christo Brits	Member of Company ex-BSB	No negative information wrt Basson has been obtained through monitoring actions. However, it clearly appears that he maintains contact with former BSB members and that he closely follows the investigations concerning the Webster murder	X				

20	Mrs S De Beer ii. ID No [redacted]	Member of Company ex-BSB		X				No negative information is known regarding the activities of this person
21	Calla Botha	ex-BSB	He had contact with Rich Verster (a DCC member)	X				Nature and extent of activities not known at present
22	Ferdi Barnard i. Alias Lanco Heins	ex-BSB	i. He was utilised as a source by the DCC, but was dismissed in December 1991. However, he still maintains contact with members of the DCC, including Rich Verster, Wally Wilsenach, Frans Smit and Geoff Price ii. Allegedly he is involved in the smuggling of diamonds, Red Mercury and ivory			X		It is not known if the contact is official or not. However, it would appear that the contact might pertain to criminal activities

23	Leon Flores	Former company member	i. Flores has regular contact with BSB members, inter alia with Col Eugene de Kock (Vlakplaas) ii Reports indicate that Flores might be involved in smuggling activities, possibly drugs (an amount of R120 000 for 60 gm was mentioned) iii. Allegedly he still operates from Vlakplaas offices iv. Flores maintains good contact with Henry VD Westhuizen v. Flores allegedly made available information to the press			X X	X	As a result of an i...ident in Britain, Flores was dismissed from the SADF. His continued contact with Eugene De Kock is suspicious

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ANNEXURE E
OF STAFF REPORT
DD DECEMBER 1992

Ser No	Individual	Affiliation	Activities	Status				Remarks
				Uncertain	Above suspision	Criminal activities	Goldstone Commission	
	a	b	c	d	e	f	g	h
1	**Anthony James Christopher White (Ant)** **i. ID No** [redacted] **ii. Aliases** (1)Anthony Greenstone (2) Anthony Greenwood (3) Anthony Greenway (4) James White (5) Abe White	Alleged ex-BSB	i. Allegedly, White, in cooperation with Mac Calloway and George Mitchell, smuggled arms (AK47s and AKMs) from Mozambique to Kwazulu where they were sold. Allegedly, SAO members were also involved in the matter ii. White also had contact with Craig Williamson iii. Allegedly White was also involved in ivory and rhenoceris-horn smuggling				X	

2	**Mike Drummond**	Alleged ex-BSB	i. Drummond allegedly assists Ant White and Mac Calloway in the smuggling of weapons. Amongst other things he delivered weapons to Naas Van Zyl (Mossgas) ii. Drummond was also involved in insurance fraud by reporting a vehicle as stolen to have the insurance amount paid out iii. Allegedly Drummond is also involved in the smuggling of gold and shrimps			X X	X	Drummond owns an aircraft that is used for special assignments
3	**Joe Verster** i. **Address** [redacted]	ex-BSB ex-SADF	i. During July 1992, Verster allegedly recruited individuals in the Johannesburg area. *Remark:* It is not known for what purpose recruiting was done ii. Verster maintains contact with Eugene De Kock iii. Verster has access to large sums of money and is orgaanising an unknown action. There is talk of an amount of R100 million iv. Verster allegedly maintains contact with "Terror" Lekota of the ANC v. Verster has established a business which is concerned with a security firm as well as a firm which transports goods to the so-called Frontline States	X			X	Although the information that is available does not point to Verster being involved in incongruities, there are clear indications that he is busy with a type of "BSB" action. He was managing director of the former BSB

4	Glen Gorman	Alleged ex-BSB	Statements by Gorman indicate that he is involved in an organisation that may be involved in violence. Gorman maintains contact with inter alia Pieter Van Zyl, Rocky Van Blerk and Dr Vernon Joynt. The said individuals all have BSB connections				X	Gorman has not been positively identified to date
5	**Eugene De Kock**	SAP	i. Allegedly, De Kock was to leave the SAP at the end of 1992 to join an organisation of Joe Verster. (*Remark:* The nature of the organisation is not known.) Allegedly, various former SAP colleagues of De Kock and Leon Flores were to join the organisation. It was alleged that De Kock would have brought with him to the organisation a large number of weapons cached in and outside the RSA. According to Ferdi Barnard, De Kock did not leave the SAP but was to take over underground structures of the SAP's D Section. ii. Allegedly De Kock is involved in smuggling trade, including Ferdi Barnard's alleged smuggling activities iii. De Kock has close contact with Henry VD Westhuizen, Ferdi Barnard and Leon Flores				X	
6	**Col Jan Breytenbach**	ex-SADF	Allegedly Breytenbach is engaged in recruitment for/creation of a resistence structure. Current as well as former members of the Security Forces allegedly are involved in the organisation	X			X	No further information regarding the resistence structure is available

7	**AB Stander (Riaan)** i. Employed at Intercol Pty Ltd. Directors of this company are Craig Williamson, Stander And Ant White	Alleged ex-BSB	i. Stander maintains contact with Staal Burger. The nature of the contact is unknown. ii. Allegedly, Stander is involved in discrediting activities directed against the RSA Government iii. Allegedly, Stander is involved in currency fraud iv. During a recent search at his house/business concern (Kastech - Eastech ??), a large number of arms and ammunition was found. v. His business concern, Kastech - Eastech??? may have connections with the CIA			X X X		Stander's activities are investigated by the SAP