REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 76755/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

..... 3/6/2019.
SIGNATURE DATE

In the matter between

JOAO RODRIGUES	**Applicant**
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	**First Respondent**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**Second Respondent**
MINISTER OF POLICE	**Third Respondent**
IMTIAZ AHMED CAJEE	**Fourth Respondent**
YASMIN SOOKA	**First Amicus Curiae**
DUMISA BUHLE NTSEBEZA	**Second Amicus Curiae**

MARY BURTON	**Third Amicus Curiae**
WENDY ORR	**Fourth Amicus Curiae**
GLENDA WILDSCHUT	**Fifth Amicus Curiae**
FAZEL RANDERA	**Sixth Amicus Curiae**
SOUTHERN AFRICA LITIGATION CENTRE	**Seventh Amicus Curiae**
PAN AFRICAN BAR OF SOUTH AFRICA	**Eighth Amicus Curiae**
LAW SOCIETY OF SOUTH AFRICA	**Ninth Amicus Curiae**

JUDGMENT

Flynote

Criminal Procedure – Permanent stay of prosecution – Delay in prosecution – section 35 (3) of the Constitution, 1996 in relation to the delay in prosecution – Factors to consider include the length of the delay, reasons the government relies on to justify the delay, the accused's assertion of a right to a speedy trial, prejudice to the accused, nature of the offence and public consideration – new factor to add in is the interests of family and/or the victims of the crime – length of delay was unreasonable especially in light of political interference – age and infirmity are to be considered at sentencing - however, no trial prejudice and no exceptional circumstances present to justify radical and far reaching relief of a stay of prosecution – application for stay of prosecution dismissed.

Headnote

The Applicant seeks a permanent stay of prosecution with respect to a charge of murder and another charge. The Applicant alleges that he has suffered a delay in respect of the prosecution which results in an infringement of his right to fair trial in terms of section 35(3) of the Constitution, 1996. The charge of murder relates to the death of Mr Ahmed Timol, an anti-apartheid activist who died on or about 27 October 1971. This case comes before the courts after the reopening of an inquest in 2017 (2017 Inquest) conducted in 1972 following Mr Timol's death (First Inquest) which

found that Mr Timol had committed suicide and no one alive was responsible for Mr Timol's death. The 2017 Inquest however found that Mr Timol was murdered.

The court discussed the factors to consider for a permanent stay of prosecution namely the length of the delay, the reasons the government relies on to justify the delay, the accused's assertion of a right to a speedy trial, prejudice to the accused, nature of the offence and public consideration. The court also added a new factor, namely, the interest of the family or victims of the crime.

The applicant alleged that he suffers memory loss as a result of his age and therefore will be prejudiced. The court provided that age and infirmity are considered at sentencing or prior to the trial. The court held that there is no prejudice to the accused as there is no evidence to prove that poor memory will taint the fairness of the trial as the State carries the burden of proving guilt beyond reasonable doubt.

The court was faced with the issue of political interference in the National Prosecuting Authority in finalising the prosecution of the applicant. The period in question was considered to be the period between 2003 and 2017. The court directed that the conduct of the relevant officials and others at the time needed to be brought to the attention of the National Director of Public Prosecutions for her consideration so that she may take any necessary action. The court concluded that although there was political interference, investigating it further in this court was not necessary.

The court held that while the delay in prosecution has caused some measure of prejudice, it cannot be said to taint the fairness of the proposed trial which the Applicant is entitled to. The court held the interests of justice and the societal need to ensure accountability for the commission of serious offences and the nature of the crime located in its historical context all militate against the granting of a permanent stay of prosecution. The court dismissed the application grounded in section 35(3) of the Constitution.

KOLLAPEN J (MOSHIDI J and OPPERMAN J concurring)

Introduction

[1] In this application, the Applicant seeks a permanent stay of prosecution in respect of a charge of murder and one other charge. The application relates to events that span some 47 years and covers large periods of South Africa's painful and turbulent past as well as the steps taken to deal with and come to terms with that past in the building of a new future and society. In broad terms, it involves the death of the late Mr Ahmed Timol, attempts to uncover the truth of what happened to him, the State's decision to prosecute the Applicant for the death of Mr Timol and the Applicant's assertion that he is entitled to a permanent stay of prosecution.

The relief sought

[2] The relief the Applicant seeks is set out fully in the Notice of Motion and is described as follows:

1. "A declaratory [sic] order that the criminal proceedings instituted against the Applicant constitutes an unfair trial against the Applicant as is envisaged in section 35(5) of the Constitution of the Republic of South Africa, Act 108 of 1996.
2. A declaratory [sic] order that the criminal proceedings instituted against the Applicant constitute an infringement of his fundamental rights to a fair trial as is provided for in section 35(5) of the Constitution read with section 342A of the Criminal Procedure Act, Act 51 of 1977.
3. That the Applicant is granted a permanent stay on the charge of murder in the criminal proceedings against the Applicant relating to the death of the late Ahmed Essop Timol on or about the 27th of October 1971.
4. That the First and/or Second Respondents are prohibited from proceeding with the criminal prosecution against the Applicant on a charge of murder relating to the death of Ahmed Essop Timol.

5. That the First and/or Second Respondents are ordered to withdraw the criminal proceedings against the Applicant relating to the death of Ahmed Essop Timol.
6. That the Respondent(s) is/are ordered to pay the costs of this application only in the event of them and/or anyone of them opposing [sic] this application and in such instance only against the Respondent(s) who oppose /opposes this application.
7. Further and/or alternative relief."

[3] In *Sanderson v Attorney-General, Eastern Cape*[1] the Constitutional Court described the relief of a permanent stay of prosecution as being "radical, both philosophically and socio-politically"[2] and went on to observe that "[i]ndeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused."[3]

The Respondents

[4] The First to Third Respondents are State parties who all oppose the relief sought. The Fourth Respondent is the nephew of the late Mr Timol and was given leave by this Court to be joined as a party. Whilst he is a party in his personal capacity, he also speaks for the extended Timol family.

The *Amici*

[5] The applications by the *amici* were not opposed by any of the parties. An order was made at the hearing of the matter admitting them as *amici.* The Court was satisfied that it was in the interests of justice to do so and that they would

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[1] 1998 (2) SA 38 (CC). *Sanderson* deals with the delay after a person has become an accused but the four factors distilled were accepted, with qualification, and applied in respect of a pre-trial delay. See *Bothma v Els and Ohers* 2010 (2) SA 622 (CC) at para [37].

[2] Id at para 38.

[3] Id.

advance submissions that would be of assistance to the Court in adjudicating the matter.

[6] The first to sixth *amicus curiae* are former TRC commissioners who sought to offer their expertise and unique experience in matters related to reconciliation, amnesty, and the appropriate treatment of crimes committed under apartheid.

[7] The seventh *amicus curiae*, the Southern African Litigation Centre (SALC), has developed expertise in the area of human rights and international law and sought to offer its expertise in the area of the best international law practice in dealing with crimes against humanity.

[8] The eighth *amicus curiae*, the Pan African Bar Association of South Africa (PABASA) is a voluntary organisation of advocates committed to the values of the Constitution such as equality, freedom and dignity.

[9] The ninth *amicus curiae*, the Law Society of South Africa, is an association of attorneys who are committed to the rule of law and accountability for criminal conduct and was admitted on the basis of its experience in that area.

Background facts

The late Ahmed Timol: the man and the political activist

[10] The late Mr Ahmed Timol (Timol), a teacher by profession, was a passionate and courageous advocate for freedom and justice who became actively

involved in the political struggles in South Africa as a member of the South African Communist Party (SACP).

[11] On the night of 22 October 1971, at around 23h00, Timol and his colleague Salim Essop (Essop) were arrested at a roadblock when documents and pamphlets of the banned SACP were found in the boot of the vehicle they were travelling in. Both Essop and Timol were arrested and initially taken to Newlands Police Station from where they were transferred to John Vorster Square by members of the Security Branch.

[12] Essop testified during the Inquest opened in 1972 (1972 inquest) that the last glimpse he had of Timol was when he saw Timol with a black hood placed over his head, being dragged along by two Security Branch officers. Timol, according to Essop, seemed unable to walk normally and the two Security Branch officers were holding him up. Essop testified about the torture he suffered at the hands of the Security Branch officers, such as electrocution, and thought that Timol suffered the same fate, if not worse.

[13] On 27 October 1971 Timol died and the police, in whose custody he was at the time, said he had committed suicide by jumping from Room 1026 on the 10th floor of John Vorster Square. An inquest held in Johannesburg in 1972 came to the same conclusion and found that no person was responsible for his death. It also found that the Applicant was the only other person with Timol when the latter was said to have moved towards the window in Room 1026, opened it,

and jumped out despite unsuccessful efforts by the Applicant to reach Timol before he jumped.

[14] The Timol family were not satisfied with the finding of the 1972 Inquest Court and, determined to uncover the truth and seek justice, began a long process in which they undertook further investigations; obtained new evidence that was not placed before the 1972 Inquest Court; and prevailed upon the authorities and others to seek the reopening of the inquest into Timol's death. Those efforts spanned a long period of time and ultimately resulted in a decision by the Second Respondent to reopen the inquest.

[15] The second inquest was held in the Gauteng Division of the High Court of South Africa in 2017 (the 2017 inquest) before Mothle J. The Court heard evidence from a number of witnesses who knew Timol and who were in detention at the time he was. These witnesses were able to testify with regard to the methods of interrogation and torture that many detainees experienced at the hands of the Security Branch. The Applicant also testified in this inquest, as did members of the Timol family. The court also heard expert evidence from pathologists who concluded that the injuries suffered by Timol prior to the fall were so serious that Timol would not have been able to walk, eat, or drink unaided. The 2017 Inquest Court found that Timol's death was brought about by him having been pushed from the 10th floor or the roof of John Vorster Square with the necessary intent to kill in the form of *dolus eventualis*. The Court also found that the Applicant, on his own version, participated in the cover up to conceal the crime

of murder and that he be investigated with a view to being prosecuted for being an accessory after the fact in respect of the crime of Timol's murder.

[16] The findings of the 2017 inquest were in stark contrast to those of the 1972 inquest with the conclusion being that Timol had been murdered and that the Applicant had participated in the cover up to conceal the murder of Timol and committed perjury.

[17] Of relevance in this application are the events that led to the first democratic elections in 1994 and the agreements reached between the National Party and the liberation movements in dealing with the past which ultimately resulted in the promulgation of the Promotion of National Unity and Reconciliation Act (the "TRC Act").[4] The Truth and Reconciliation Commission (TRC), which was established in terms of the TRC Act was tasked with establishing "as complete a picture as possible of the nature, causes and extent of the gross violations of human rights"[5]. It was also required to facilitate the granting of amnesty for those who had committed crimes with a political objective and who had made full disclosure of all relevant facts.

[18] The mother of Timol participated in the TRC process at a victims hearing seeking to know who killed her son and the circumstances under which he died. The Applicant did not participate in that hearing and in its final report, the Truth and Reconciliation Commission concluded that:

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[4] 34 of 1995.

[5] The preamble of the TRC Act.

"[T]the commission finds that the SAP and in particular Colonol Greyling, Captain Bean, Sergeant Rodrigues, Warrant Officer Cloete, Sergeants FJ Ferreira, MC Pelser and DL Carter were directly responsible for the death of Mr Ahmed Timol. The commission finds further that the inquest magistrate's failure to hold the police responsible for Ahmed Timol's death contributed to a culture of impunity that led to further gross human rights violations".[6]

[19] The Applicant did not apply for amnesty in terms of the TRC process and it was not disputed in these proceedings that the State retained the right to prosecute those who had committed crimes in the past if either they did not apply for amnesty or were unsuccessful in their application for amnesty.

[20] The finalisation of the work of the TRC as well as the amnesty process was concluded in approximately March 2002 when the TRC was dissolved by Presidential Proclamation. What should have followed, according to the submissions of the first to sixth *amici*, was what they describe as a 'bold prosecutions policy' which would require the State to prosecute those who had not applied for amnesty in order to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law. There was however no bold prosecutions policy rather what can only be described as a timid retreat.

[21] What occurred in the period from about 2003 until 2017 was that all investigations into TRC cases and other crimes of the past were stopped as a result of an executive decision taken at a high level that purported to interfere with the National Prosecuting Authority's prosecutorial decision making.

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[6] TRC Final Report, Volume 3, Chapter 6, page 542 at para 61.

[22] The First Respondent describes this interference as follows:

> "The only conclusion to arrive at is that the delay in prosecuting the Applicant was not as a result of the First Respondent's own doing or its malice- it was as a result of the political interference and the 'severe political constraints' to which the First Respondent was subjected".[7]

[23] There was thus what can only be described as high level executive interference on investigating and prosecuting TRC crimes and other crimes of the past in the period from 2003 until about 2017. In an affidavit filed in other proceedings before this Court (*Thembisile Phumelele Nkadimeng v National Director of Public Prosecutions and 8* others[8]) the former National Director of Public Prosecutions, Advocate Vusi Pikoli describes what he regarded as an assumption on the part of the then Minister of Justice that TRC matters will not be prosecuted. He says that he -

> "found this to be a disturbing development as it appeared that at a political level there was an expectation that I would not prosecute TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear favour or prejudice".[9]

[24] In the same affidavit he then deals with a Memorandum he prepared arising out of this improper interference and concluded:

> I complained that such interference impinged upon my conscience and oath of office. I indicated that I was unable to deal with these cases in terms of the normal legal process and sought guidance on the way forward."[10]

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[7] See First Respondent's Supplementary Affidavit at para 2.12.

[8] Gauteng Division, case no 35554/2015.

[9] See Fourth Respondent's Answering Affidavit, Annexure IC6 at para 49.

[10] Id at para 52.

This Memorandum is dated 15 February 2007 and in September that year, Advocate Pikoli was suspended from office.

[25] The Applicant was arrested and charged with murder on 30 July 2018. He was brought to Court and released on bail. His case has been transferred to this Court where it is currently pending - awaiting the outcome of this application.

The legal basis upon which the relief is founded

[26] The application is advanced on the basis that the Applicant's rights in terms of Section 35(3) of the Constitution - to have his trial begin and conclude without delay - has been violated by the delay of some 47 years. This delay, he contends, has redounded to his prejudice and has undermined his right to a fair trial. He accordingly seeks relief on that basis.

[27] In addition, he argues that his prosecution is premised upon an improper motive as the 2017 Inquest Court did not recommend that he be investigated for murder, but rather as an accessory after the fact to murder and that the charge sheet which charges him with premeditated murder is accordingly advanced for an improper motive given the 2017 Inquest Court's findings.

Preliminary issues for determination

[28] Whilst the Applicant has sought to argue that he has advanced a proper case for the main relief he seeks, he has also raised a point *in limine* which may be conveniently dealt with at this stage.

In Limine

[29] It is argued by the Applicant that in the face of the undisputed political interference that was brought to bear on the prosecutorial machinery - and which I have described above - there is insufficient information before this Court that explains in detail how and why such political interference occurred. The Applicant contends that it is unclear whether the nature of the political decisions arrived at constituted an amnesty and/or a pardon and that this Court is accordingly hamstrung by the lack of such information in determining the relief.

[30] The Applicant therefore takes the position that the Court should not finalise the application before it but rather use its powers to make an order directing that all relevant information relating to the genesis and the detail of the political interference be placed before it before deciding the application.

[31] While the issue of the political interference is a matter of great seriousness, and is one I will deal with in greater detail, including the manner in which the evidence about the interference was revealed, I do not agree that the matter cannot be finalised in the absence of the details the Applicant contends for.

[32] While these details will no doubt be relevant in the writing of the history of this episode in our democracy - and no doubt more will emerge around it - the absence of such detail would not stand as an obstacle to this Court determining the issues before it. In particular, all of the parties are in agreement that there was political interference and that such interference may well have delayed the investigation and prosecution of the Applicant. It does

not take the matter any further to seek the finer detail of how the political interference materialised.

[33] In so far as there was a possible amnesty or pardon, I am of the view, for the reasons that will emerge, that whilst it is extremely unlikely that there was an amnesty or pardon, even if there was, its legal basis and legal validity would be highly questionable. I deal fully with those issues later in this judgment but for now, I am not persuaded that there is any merit in acceding to the request by the Applicant in respect of the point *in limine.*

[34] For these reasons the point *in limine* is not sustainable and is dismissed.

The merits

[35] A few preliminary observations may be necessary in locating the relief sought within its proper legal and factual context.

Pre-trial delay versus prosecution delay

[36] The legal basis for this application is founded upon the right contained in Section 35 (3)(d) of the Constitution which provides that:

"Every accused person has a right to a fair trial, which includes the right –

...

(d) to have their trial begin and conclude without unreasonable delay".

It is not the case for the Applicant that there has been an unreasonable delay following the commencement of the prosecution in July 2018 and accordingly, this is not an application that activates the provisions of Section 342A of the

Criminal Procedure Act which deals with what was termed as "intra-curial delay" by the High Court in *State v Naidoo*[11]. This application relates to the alleged delay in the investigation of the matter and the commencement of the prosecution.

The factors necessary to consider when determining relief for a permanent stay of execution

[37] In *Bothma v Els*[12] the Constitutional Court referred with approval to the approach taken in *Sanderson*,[13] that in determining relief for a permanent stay of prosecution, the Court was required to engage in a balancing exercise in which the conduct of both the prosecution and the accused were weighed and the following considerations examined:

a. The length of the delay;
b. The reasons the government assigns to justify the delay;
c. The accused's assertion of a right to a speedy trial; and
d. Prejudice to the accused.

[38] The Court however, went on to caution that the above factors did not constitute a definitive check list and added a fifth factor - the nature of the offence and the public policy considerations that may be attached to it.[14] This, in my view, also has relevance in these proceedings as the offence in question is the crime of murder allegedly committed during the apartheid era and, in respect of which,

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[11] 2012(2) SACR 126 (WCC).

[12] 2010 (2) SA 622 (CC) at para 36.

[13] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC).

[14] *Bothma* above n 9 at para 37.

there has been considerable legal and policy considerations that sought to guide the new democratic society in its approach to such crimes.

[39] A sixth factor may also become important. This relates to the interests of the family and/or the victims of the crime. The role and participation of victims has been a central feature in the approach to dealing with crimes committed in the past. A victim's interests and voice, whilst not dispositive, is an important part of the balancing exercise that *Sanderson* contemplates.[15]

Main issues for determination

[40] The following issues accordingly arise for determination and are not to be dealt with in an insulated fashion, but rather as part of a weighted balancing exercise.

The length of the delay

[41] While it remains the assertion of the Applicant that there was a delay of some 47 years from 1971 - when the crime was allegedly committed - to 2018 - when he was charged - the timeline of 47 years is more nuanced and complex than that and may be broadly divided into 3 periods.

I. The period from 1971 to 1994

[15] *Sanderson* above n 10 at para 36.

[42] The relevance of this period and the 1994 cut-off date is that the approximately 23 years it spanned, covered the pre-democratic era. It was a time when a minority government was in power and one that was, in law, responsible for a system of arrest and detention without trial and under whose watch some of the most serious and systemic violations of human rights took place. The Applicant was in the employ of that government and in particular, in its security machinery. It hardly could have been expected from that government that the will to investigate such crimes as the murder of Mr Timol would have emerged and persisted, resulting in a proper investigation and charges being proffered.

[43] On the contrary, the 2017 Inquest found a cover up that was engineered, and of which, the Applicant was a part of and in respect of which he committed perjury. The conclusion of the TRC in this regard - that the First Inquest failed to properly hold the police accountable, thereby contributing to a culture of impunity - is also relevant in this context.

[44] It can therefore hardly be open to the Applicant to suggest that the 23 years from 1971 to 1994 could be characterised as constituting a delay when, objectively speaking, all of the legal and factual considerations to which I have referred, would have militated against any action on the part of the authorities by way of an investigation or a prosecution. The Applicant had elected to make himself a part of that system, had participated in its oppressive machinery, and allegedly sought to cover up his wrong-doing. Surely he cannot now be seen to reap a benefit from such a state of affairs and locating part of the culpability in the delay over those 23 years to that system. To allow him to do so would

seriously offend notions of fair play and the interests of victims that have become a central feature of our criminal justice system.

[45] Accordingly, whilst this period does chronologically fall into the timeline of 47 years, it should not, for the reasons given, be reckoned as constituting part of the delay.

II. The period from 1994 to 2002

[46] This period was characterised by the formation of a newly elected and democratic government. It included policy and legal initiatives to deal with the crimes of the past. An important aspect of these initiatives was the establishment of the TRC which created a process that allowed for victims to be heard as well as for perpetrators of crimes that were politically motivated to apply for and receive amnesty.

[47] During this time it would have been open to all who had committed crimes in the past with a political motive to come forward and apply for amnesty. Provided that full disclosure was made and the crime was committed with a political motive, a perpetrator would have been entitled to obtain amnesty.[16]

[48] The amnesty provisions in the TRC Act were not universally accepted, particularly by families of loved ones who were murdered during the pre-apartheid period. This difficulty was eloquently captured by the

[16] Above n 4 at section 20(1) (a)-(c).

Constitutional Court in *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa*:

"Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured,

maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconciliation and reconstruction" which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue." [17]

[49] The cut-off date for amnesty applications was initially 14 December 1996 but was extended to 10 May 1997. The TRC was dissolved on 31 March 2002. On 15 April 2003, the President placed the final TRC Report before Parliament and directed that the National Director of Public Prosecutions institute prosecutions where appropriate.[18]

[50] This period in the 47 year timeline largely encompassed dealing with the past. During this time the process of victims and perpetrators coming forward was encouraged and it was certainly the view of the former TRC Commissioners that upon the conclusion of the Commission there would be a bold prosecutions policy to deal with perpetrators of crimes who never came forward to seek amnesty.

[51] The TRC report captures this desire in the following terms:

"... the need for an accountable amnesty provision which did not encourage impunity, while at the same time taking account of the rights of victims. Furthermore, it has always been understood that, where amnesty has not been applied for, it is incumbent

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[17] 1996 (4) SA 672 at para 17.

[18] Government Gazette (Notice 1539 of 2008) (12 December 2008), 31723. See also the Fourth Respondent's answering affidavit, annexure IC7, the affidavit of Adv Anton Ackermann at para 13.

on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law."[19]

[52] Accordingly, this part of the timeline, to the extent that it constituted a delay, was a delay of the kind that was regarded as necessary and important to allow a new society to come to terms with its past, to allow victims and perpetrators to take advantage of the opportunities created by the TRC Act, and to provide a mechanism – flawed, but the product of a historical compromise - to seek and find closure.

[53] It could not, in my view, be said to be a part of the delay when, by operation of the law, it was a period of hiatus that was contemplated by the TRC Act. Even if it could be regarded as a period of delay, then there are meritorious reasons why it was the kind of delay that could hardly be regarded as culpable. It was a historic and unique time in the history of South Africa. A difficult political compromise was being given effect to. The nation was collectively prevailed upon to give the process an opportunity to succeed in the hope that it would advance the twin objectives of reconciliation and reconstruction. It was imperative that South Africa embrace this process if it were to have any chance of growing as a new nation and overcoming the deep distrust and suspicion that characterised the relationship between its people for so long.

[54] That being the case, one then moves to deal with the third period. It is the delay during this period in which the Applicant locates his case.

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[19] TRC Final Report above n 6, Volume 6, Section 5, Chapter 1, page 595 at para 24.

III. The period from 2003 to 2017

[55] This is the period characterised by the political interference to which reference has already been made. There can be little argument that the political interference resulted in TRC cases (and one must assume the Timol case) not receiving the necessary attention by virtue of investigation that could have led to a decision to prosecute.

[56] There are, however, a number of issues that span this period – this includes the issues deemed necessary to consider by *Bothma* i.e. the reasons the government assigns to justify the delay; the accused's assertion of a right to a speedy trial; and the prejudice to the accused – which require special attention.

i. The nature of the interference and its impact on the Prosecuting Authority

[57] Whilst it is manifestly clear that the political interference materially affected the ability of the NPA to properly deal with the TRC cases in that the resources that were necessary to conduct proper investigations were not forthcoming, the NPA cannot, as it seeks to do, portray itself purely as a victim of the political machinations of the time. Whatever form the political interference took, the NPA was enjoined in terms of both its constitutional and legal responsibilities to act on behalf of society and protect the public interest.[20]

[20] See First Respondent's Supplementary Affidavit, page 766 at para 2.30.

[58] Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the State,[21] whilst Section 179(4) requires the NPA to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement.[22]

[59] That legislation is the National Prosecuting Authority Act[23] and provides as follows:

> "**32 Impartiality of, and oath or affirmation by members of prosecuting authority**
>
> *(a)* A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law.
>
> (b) Subject to the *Constitution* and *this Act* , no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the *prosecuting authority* or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.
>
> ...
>
> **41 Offences and penalties**
>
> (1) Any person who contravenes the provisions of section 32 (1) *(b)* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment."

[60] In these circumstances it must follow that the NPA had a duty to assert its authority and independence and resist the political interference. It cannot be

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[21] Section 179(2) of the Constitution provides:

> "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".

[22] Section 179(4) of the Constitution provides:

> "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice".

[23] 32 of 1998.

acceptable for it to simply have allowed, as it did, the manipulation of the criminal justice system in the serious manner in which it occurred.

[61] The constitutional design that is evidenced in South Africa's Constitution can only be advanced if the institutions of State accept and discharge their responsibilities in the manner contemplated. Unwavering fidelity to the Constitution and the law must, at all times, be displayed. It is therefore not open to the NPA to seek to absolve itself of its constitutional duty in failing to pursue the TRC cases.

[62] In *S v Basson*[24] the Constitutional Court described the importance of this duty in the following terms:

> "... In our constitutional state the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The state must protect these rights through, amongst other things, the policing and prosecution of crime.
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> ...
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> ... By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective. Where, therefore, a court quashes charges on the ground that they do not disclose an offence with the result that the state cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the state, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the state is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter."[25]

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[24] 2005 (1) SA 171 (CC).

[25] Id at paras 31 and 33.

[63] The necessity of an independent prosecuting authority was highlighted by the Constitutional Court in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others*:

> "At the centre of any functioning constitutional democracy is a well-functioning criminal justice system. In *Democratic Alliance* Yacoob ADCJ observed that the office of the NDPP "is located at the core of delivering criminal justice". If you subvert the criminal justice system, you subvert the rule of law and constitutional democracy itself. Unsurprisingly, the NPA Act proscribes improper interference with the performance of prosecutorial duties.
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> ...
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> Improper interference may take any number of forms. Without purporting to be exhaustive, it may come as downright intimidation. It may consist in improper promises or inducements. It may take the form of corruptly influencing the decision-making or functioning of the NPA. All these forms and others are proscribed by an Act that gets its authority to guarantee prosecutorial independence directly from the Constitution."[26]

[64] Of course it may well be asked, what was the NPA required to do in the face of high level political interference? Rather than simply succumb to it, it was open and incumbent upon the NPA to have brought this interference into the open. Victims of those crimes where investigation and prosecution was being suppressed certainly had the right to know what was happening and why such cases were not being prosecuted. Society as a whole had an ongoing interest in the work of the TRC and the follow up that the government had committed itself to. Parliament, which ultimately represents the legislative authority of the State, had a right to know when the letter and spirit of legislation that it had

[26] 2018 (2) SACR 442 (CC) at paras 20-21.

passed was being deliberately undermined. None of this occurred and the NPA must accordingly accept the moral and legal consequences of this most serious omission and dereliction of duty on its part.

[65] It is also for these reasons that the conduct of the relevant officials and others outside of the NPA at the time should be brought to the attention of the National Director of Public Prosecutions for her consideration and in particular, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted.

Finally, there must be a public assurance from both the Executive and the NPA that the kind of political interference that occurred in the TRC cases will never occur again. In this regard they should indicate the measures, including checks and balances, which will be put in place to prevent a recurrence of these unacceptable breaches of the Constitution.

ii. The manner in which the Respondents have introduced the issue of political interference into evidence

[66] Very much related to the above, is the manner in which the NPA dealt with the disclosure of the acts of political interference in these proceedings. The main answering affidavit of the NPA was signed on 3 December 2018 and filed shortly thereafter. There was no mention made of the political interference that was brought to bear on the NPA. The Fourth Respondent then filed an answering affidavit in January 2018 wherein he set out, in considerable detail, the political interference. This included the affidavit deposed to by Adv Pikoli in the *Nkadimeng* matter as well as the Memorandum prepared by him in

February 2007 expressing his grave misgivings about such interference and his reluctance to go along with it.

[67] It was only after this affidavit was filed that the NPA then revealed the existence of the political interference and then also filed the affidavit of Adv Macadam which further detailed the extent of the political interference the NPA was subjected to. MacAdam's affidavit was signed on 1 November 2018, well before the NPA's answering affidavit was signed and filed. It begs the question as to why such an important affidavit was not filed as part of the answering affidavit when it was ready and presumably available to being filed.

[68] The suggestion that it was deliberately withheld from this Court is difficult to refute especially given its seriousness and the detailed allegations contained therein of political interference.

[69] This is not how an organ of State, that is meant to act without fear, favour or prejudice and in the public interest, should conduct litigation.

[70] In *Grootboom v NPA*[27] the Constititonal Court, in dealing with the manner in which state organs are expected to litigate and be of assistance to Courts, remarked as follows:

"There is another important dimension to be considered. The respondents are not ordinary litigants. They constitute an essential part of government. In fact, together with the office of the State Attorney, the respondents sit at the heart of the administration of justice. As organs of state, the Constitution obliges them to "assist

[27] 2014 (2) SA 68 (CC).

and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."[28]

iii. The question of whether an amnesty or pardon may have been granted and if so, the consequences thereof

[71] The Applicant, in dealing with what may have prompted the political interference, suggested that an amnesty or a pardon may have been given by the President in respect of TRC cases - including his. He contends that he may well have been the beneficiary of such an amnesty or pardon. At best, this assertion amounts to nothing more than speculation on the part of the Applicant as there is nothing on the papers to suggest that either an amnesty or a pardon was granted to the Applicant.

[72] While there were political attempts made to consider pardons and amnesties post the TRC process, none of them materialised. The Courts took the firm view, particularly in matters relating to pardons, that when such power was exercised, it triggered the duty to hear persons affected and that the exclusion of victims from such a process was irrational.[29]

[73] Therefore, on this aspect there is simply no evidence of an amnesty or pardon being granted to the Applicant. Even if one was granted, it would, at best, have been a private process to the exclusion of victims and would not survive legal

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[28] Id at para 30.

[29] See *Albutt v CSVR* 2010 (3) SA 293 (CC) at para 69 where the Constitutional Court held:

> "In my view, the address of former President Mbeki to Parliament itself evidenced and indeed recognised that, given our history, victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity. It follows therefore that the subsequent disregard of these principles and values without any explanation was irrational. On this basis alone, the decision to exclude the victims from participating in the special dispensation process was irrational."

or constitutional scrutiny in the light of the observations of the Constitutional Court in *Albutt*.[30]

iv. The effects of the delay and the Applicant's assertion to a speedy trial.

[74] Reverting then to the timeline of 47 years that the Applicant advances as being the period of the delay. It must follow that certainly the period from 1971 until 2003 must be excluded for the reasons already given. What remains, and what the Applicant has focussed on in a substantial manner, is the delay from 2003 until 2017. There can be little doubt that this constitutes a substantial period of time and the reasons advanced by the State - namely that of political interference - cannot serve to justify the delay. It is arguable that, excluding the process of the Second Inquest, had the necessary resources been made available to investigate the case and the evidence been placed before the NPA without any political interference, it may have been possible for a decision to prosecute to have been taken somewhere earlier within that 14 year period. That it did not happen, must be largely attributable to the political interference and the willingness of the NPA to yield to such interference.

[75] Whilst it must therefore follow that there was a delay of a lengthy period in bringing the Applicant to trial, this cannot be the end of the enquiry. In *Bothma* the Court, in dealing with a lengthy pre-trial delay which it described as "the extreme belatedness of the prosecution", located the enquiry in the following terms:

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[30] Id at para 74.

"In this context, then, the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence."[31]

[76] Further, in *Sanderson* the Court, in dealing with time, observed that:

The amount of elapsed time is obviously central to the enquiry. The right, after all, is to a public trial "within a reasonable time after having been charged". Understanding how this factor should be incorporated into the enquiry is not straightforward. In the United States and Canada, time is considered to be a "triggering mechanism" which initiates the enquiry and it also functions subsequently as an independent factor in the enquiry. In my respectful view, time has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation.

Time does not only condition the relevant considerations, such as prejudice, it is also conditioned by them. The factors generally relied upon by the state - waiver of time periods, the time requirements inherent in the case, and systemic reasons for delay - all seek to diminish the impact of elapsed time."[32]

[77] Even though the delay would have resulted in some prejudice to the Applicant - the trial he is now required to face could have occurred much earlier - the question this Court is required to consider in the balancing exercise is not prejudice in isolation, but rather, as posited in *Bothma,* whether the delay would "inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence".[33]

v. Prejudice to the Accused

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[31] *Bothma* above n 9 at para 35.

[32] *Sanderson* above n 10 at paras 28-29.

[33] Above n 26.

[78] The Applicant argues that the lengthy delay will materially prejudice his right to a fair trial. In support thereof he states, "[a]s mentioned at this stage basically all the material witnesses passed away and/or disappeared and the memory of available witnesses, including my own memory, faded significantly because of the passage of time".[34]

[79] In *Bothma*, the Court in dealing with what would constitute irreparable trial prejudice said the following:

> "These findings call for interrogation of what is meant by irreparable or insurmountable trial prejudice. Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus, irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability. Clearly, potential witnesses who have died cannot be revived. Documents that have gone permanently astray may not be capable of recreation. Irreparability in this context must therefore relate to insurmountable damage caused not to sources of testimony as such, but to the fairness and integrity of a possible trial. Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained."[35]

[80] Also in *Wild and Another v Hoffert NO and Others* the Constitutional Court, having found that there was an unreasonable delay, nevertheless concluded that there was no trial related prejudice or exceptional circumstances to justify a permanent stay of prosecution.

> "Those interests, so it was held, had to be taken into consideration in assessing the fundamental question whether there had been an infringement of the protection afforded by the constitutional imperative of a speedy trial. Although the starting point is to establish whether the time lapse between charge and trial is reasonable, time is

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[34] See Applicant's Founding Affidavit at para 63.

[35] *Bothma* above n 9 at para 68.

not merely a trigger to an enquiry as to prejudice. It remains the most important consideration throughout the enquiry, bearing on the other considerations and, in turn, being coloured by them. Furthermore, other than is the case in some comparable jurisdictions, no formal line is drawn in our law between particular time spans regarded as acceptable and those that do not pass muster. Our approach, rather, is to make a flexible evaluation of the time elapsed in the context of and in conjunction with all other relevant features of the case, starting with the nature, gravity and extent of the prejudice suffered, or likely to be suffered, by the accused. The most invasive prejudice suffered by a person pending trial is obviously pre-trial incarceration, which entails not only loss of personal liberty but often loss of livelihood and the ability to maintain dependents. Ordinarily, therefore, this form of prejudice will weigh heavily in deciding how long a wait is reasonable."[36]

[81] In examining the trial prejudice that the Applicant contends he will face, it is not in dispute that the Applicant has access to the full docket in the criminal trial the State seeks to pursue. The Applicant is at liberty to engage experts, if he regards that as necessary, in supporting his defence and importantly, the trial Court, in such proceedings, is constitutionally bound to ensure that the trial is conducted in a fair manner.

[82] The Applicant is currently on bail and his legal fees are being paid for by the State – these exclude the risk of pre-trial incarceration and the financial burden of funding his defence.

[83] The applicant alleges he suffers from memory loss due to old age. Notably, age and infirmity are generally considered at the stage of sentencing. In the case of *S v Hewitt*,[37] a 75 year old man convicted of the rape of two girls during the

[36] 1998 (2) SACR 1 (CC) at para 6.

[37] 2017 (1) SACR 309 (SCA).

1980's and the indecent assault of another girl in 1994 appealed his sentence of eight years imprisonment. The court expressed the view that "[r]egarding his age, whilst courts have considered oldness as a mitigating factor, it is certainly not a bar to a sentence of imprisonment".[38] Our courts have, prior to this case, also taken the position that old age is not a bar to imprisonment.[39]

[84] More so, it is accepted that old age is not a bar to prosecution and imprisonment internationally. In *Papon v France*[40] the European Court of Human Rights dealt with the case of Maurice Papon who had been convicted of aiding and abetting crimes against humanity during World War II. He appealed his sentence on the basis of his age and ill-health. The court concluded that although Papon was 90 years of age and was ill, he would be under constant medical supervision and therefore there was no bar to his imprisonment.

[85] Similarly in the United States, the case of *Killen v State of Mississippi*[41] which concerned the deaths of 3 persons by members of the Ku Klux Klan on 21 June 1964 is illustrative. In January 2005, Edgar Ray Killen, at the age of 80, was indicted for the deaths. He was found guilty of three counts of murder and was sentenced to serve 20 years for each count.

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[38] *Hewitt* para 15.

[39] *S v Zinn* 1969 (2) SA 537 (A) at 542B-C.

[40] (No. 1) Application 64666/01.

[41] 958 So. 2d 172 (2007) Mississippi Supreme Court.

[86] Furthermore, there is also no evidence that the alleged poor memory of the Applicant and other witnesses is likely to taint the fairness of the trial. If anything, that remains a neutral factor as it applies equally to the State and ultimately, it is the State that carries the burden of proving guilt beyond reasonable doubt.

[87] Indeed in *Wild* the Court made reference to the continuing remedy that an accused person enjoys during a trial to obviate any possible infringement of rights during trial in the following remarks:

> "The conclusion that a permanent stay of prosecution is not appropriate relief to be granted to the appellants here, by no means puts paid to their rights under s 25(3)*(a)*. Those rights and the duty to devise appropriate remedial relief for their infringement will continue throughout the trial. For example, it is trite that a judicial officer, when structuring sentence, is obliged to have regard to pre-trial detention and any other significant prejudice suffered as a result of the case hanging over the accused's head for a protracted period. Similarly, should it transpire that there had indeed been trial-related prejudice, this judgment would constitute no impediment to appropriate relief then being granted."[42]

[88] Hence age and infirmity are not grounds upon which the applicant can singularly rely as a form of prejudice. These are grounds which, generally, a trial court must consider at sentencing.

[89] In conclusion, while the delay has caused some measure of prejudice, it cannot be said that it will taint the fairness of the proposed trial or that such a trial, if it proceeds, will not of necessity incorporate the safeguards of fairness that the

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[42] *Wild* above n 30 at para 36.

Applicant is entitled to. In any event, the right to a fair trial is subject to the limitations envisaged in section 36(1) of the Constitution.

Nature of the Crime

[90] The charge the Applicant faces is one of murder and in *Zanner v Director of Public Prosecutions, Johannesburg*, the Supreme Court of Appeal observed that:

"The nature of the crime involved is another relevant factor in the enquiry. This is particularly so in the present case, considering its seriousness. The sanctity of life is guaranteed under the Constitution as the most fundamental right. The right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime. It is also not an insignificant fact that the right to institute prosecution in respect of murder does not prescribe. Clearly, in a case involving a serious offence such as the present one, the societal demand to bring the accused to trial is that much greater and the Court should be that much slower to grant a permanent stay."[43]

[91] Similar sentiments were expressed in *Bothma* where the Court alluded to, what it termed, the "profound societal interest in bringing a person charged with a criminal offence to trial."

"The judgment in *Sanderson* points out that in determining reasonableness it is not only the interests of the accused that must be borne in mind. In making a value judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. When a permanent stay of prosecution is sought this societal interest will loom very large. "The entire enquiry must be conditioned by the recognition that we are not atomised individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with a structural legal system; a system which

[43] 2006 (2) SACR 45 (SCA) at para 21.

requires the prosecution to prove its case in a public forum." The judgment notes that "[w]e also have to be prepared to pay a price for our membership of such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused.

...

The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial. As the popular saying tells us, 'Molato ga o bole' (Setswana) or 'ical'aliboli' (isiZulu) there are some crimes that do not go away."[44]

[92] The seventh *amicus curiae* also urged the Court to seriously consider the nature of the crime in determining the relief sought. They contended that the facts advanced in support of the crime of murder, which is reflected in the indictment, would also sustain a conclusion that the alleged crime in question would constitute a crime against humanity of apartheid. Alternatively, it would constitute a crime against humanity of persecution on racial or political grounds; further alternatively, a crime against humanity of murder. They, together with the eighth *amicus curiae*, argued that each of these offences triggers an obligation in terms of customary international law on the part of the South African government to investigate and prosecute such offences.

On that basis, the seventh *amicus curiae* contend that the application for a stay of prosecution should be refused as to grant it would undermine South Africa's ability to discharge its obligations in terms of international law.

In addition it has urged the Court to construe the charge sheet as constituting the elements necessary to found a crime against humanity, alternatively to use its inherent power to correct the charge sheet to reflect the legal

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[44] *Bothma* above n 9 at paras 41 and 77.

characterisation of the offence as a crime against humanity, further alternatively, to refer the charge sheet back to the First Respondent for reconsideration.

[93] The charge sheet read with the summary of substantial facts locate the alleged crime within the apartheid system which is described in the summary of substantial facts as "a system of institutionalised racial segregation and discrimination that was in existence from 1948". The State, however, has not elected to charge the Applicant with committing a crime against humanity. I have doubts whether under such circumstances it is open to the Court to amend the charge sheet or to direct that the State reconsiders the charge sheet.

Section 86 of the Criminal Procedure Act, upon which the *amicus* relies on for this submission, provides for the amendment of the charge sheet in very limited circumstances and in the main deals with charge sheets that are defective for want of any essential averments therein and instances where there is a variance between an averment in the charge sheet and the evidence led in Court.[45] Clearly section 86 is not of application here.

In addition, and given the principle of the separation of powers, the independence of the prosecutorial authority, and its role as set out in Section

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[45] Section 86 (1) provides:

> *(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is and in any other part thereof which it may become necessary to amend.*

179 of the Constitution, it may be inappropriate and outside the boundaries of judicial authority for a Court to direct that the charge sheet be amended as the amicus suggests. This especially in a matter where the State has already decided to prosecute. It may well be different if one was dealing with a refusal to prosecute which is not the case here.

[94] In argument, counsel for the seventh *amicus*, in response to a question from the Court, accepted that if the prosecution of the Applicant were to continue, that would be a proper discharge of the international obligations South Africa has in terms of international customary law. Under such circumstances it becomes unnecessary to make a determination on whether this Court is dealing with conduct which goes beyond laying the basis for a murder charge but also constitutes a crime against humanity. That argument may well be possible and indeed a compelling one, but given the relief I intend proposing, there would be no need to deal with it and make a determination thereon. Of course it would be open to the State, if they so desire, to reconsider the charge sheet, alternatively, to leave it as it is but upon conviction (if that was to follow) to argue in mitigation that the conduct of the Applicant would also have constituted a crime against humanity. Those are matters for the future and for the Trial Court.

The interest of the victims and the family

[95] While the interests of the victims and family can never be dispositive in an application of this nature, in the context of this application, those interests

warrant mention. The Timol family have, for many years, simply sought to establish what had happened to the late Ahmed Timol and the circumstances that led to his death. They persisted in seeking the truth and finding a measure of justice and, for a long time, their efforts seemed to come to nothing. They were not in search of revenge, but rather the truth and participated in the victims hearing of the TRC. They also implored the Applicant to come forward and reveal all. They accepted that the prospect of amnesty being granted to those responsible for the murder of Timol, was one that was real and a prospect that was contemplated by the TRC Act.

[96] It was largely through their efforts that a decision was taken to reopen the Inquest and the Second Inquest was ultimately held. Now that a decision to prosecute has been taken, and someone is at least indicted for the death of Timol, they too are entitled to the justice that has eluded them for so long. Whatever the outcome of the criminal trial may be, they have an interest in ensuring that there is a proper process to ventilate the truth of what occurred and for the Applicant's guilt or innocence to be determined in a court of law. It will no doubt bring a measure of closure after almost 50 years.

Conclusion on the unreasonable delay challenge

[97] In conclusion, whilst it is accepted that there was a delay that would correctly be characterised as unreasonable in its duration and in respect of the justification advanced for it, there is no evidence that the delay will result in trial prejudice nor are there any exceptional circumstances present that would justify granting the radical and far reaching relief the Applicant seeks.

[98] If anything, the interests of justice; the societal need to ensure accountability for the commission of serious crimes; and the nature of the crime located in its historical context all militate against the grant of the relief sought.

[99] The application grounded in section 35(3) of the Constitution accordingly falls to be dismissed.

Improper Motive

[100] The second thrust of the Applicant's challenge is that the prosecution has been advanced for an improper motive. In this regard, he contends that the Inquest Court concluded that he be investigated for his role as an accessory after the fact to murder and not in respect of the crime of murder.

[101] He therefore concludes that the State, in charging him with the offence of murder, acted on an improper motive as it was a decision not supported by the findings of the Inquest Court.

[102] The Respondents' stance is that the Inquest Court never excluded the possibility that the Applicant be charged with murder and that its conclusions are, nevertheless, not definitive of the charge the State may elect to bring. In addition, they point out that the evidence led at the Inquest Court may well sustain a charge of murder on the basis of *dolus eventualis*.

[103] One has to guard against the temptation to utilise this hearing to determine the strength of the case the Applicant is to meet in the criminal proceedings the

State has initiated. This is not the forum for the ventilation of such issues and, as the ninth *amicus curiae* has pointed out, the Applicant has remedies to deal with those issues, including the utilisation of section 22(c) of the NPA Act and Section 174 of the Criminal Procedure Act. Motive and, reasonable and probable cause, should not be conflated. We are satisfied that the evidence intended to be presented at trial, meets a basic threshold and that the applicant has sufficient remedies available to him to deal with the nature and quality of the evidence intended to be presented against him.

[104] In any event, the First Respondent, without admitting in any manner that the prosecution was brought with an improper motive, argues that the motive will, in any event, be irrelevant. It relies on the dicta in *NDPP v Zuma* to the following effect:

> "The court dealt at length with the non-contentious principle that the NPA must not be led by political considerations and that ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute. This, however, does need some contextualisation. A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr. Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.
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> This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality. The facts in *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order* illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on confiscating further machines. The object was not to use them as exhibits – they had enough exhibits already – but to put Highstead out of business. In other words, the confiscation had

nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what 'ulterior purpose' in this context means. That is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction the reliance on this line of authority is misplaced as was the focus on motive."[46]

[105] There is, in my view, nothing to suggest that the prosecution was advanced for an improper motive.

Costs

[106] None of the parties seek an order as to costs and have cited the *Biowatch* principle in support thereof.[47]

Concluding remarks

[107] This, in many respects, is a difficult case. Not necessarily on account of the legal issues it raises, but rather to the extent that it compels us to revisit our troubled past; examine what occurred there; recognise the need for reconciliation; and the consequences that invariably went with it. Importantly, this case reaffirms that justice and the truth were never meant to be compromised during all that our young society sought to do in dealing with its troubled, turbulent and shameful past.

[108] The refusal of a permanent stay of prosecution is not a signalling that we are required to be vengeful to those who are alleged to have committed serious crimes in the past but rather, an affirmation that the principles of accountability

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[46] 2009 (2) SA 277 (SCA) at paras 37-38.

[47] Biowatch *Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) at para 21.

and responsibility for breaching the rules of society stand at the doorway of our new constitutional order.

Order

[1] The application is dismissed

[2] No order is made as to costs

NJ Kollapen
Judge of the High Court of South Africa
Gauteng Division, Pretoria

I concur

DSS Moshidi
Judge of the high court of South Africa
Gauteng, Local Division, Johannesburg

I concur

I Opperman
Judge of the High Court of South Africa
Gauteng, Local Division, Johannesburg

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Date of hearing: 28th and 29th March 2019

Date of Judgment: 3 June 2019