



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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 1 AUGUST 2025

SIGNATURE:..

Case No. 005245/2025

In the matter between:

THABO MVUYELWA MBEKI

1st Applicant

BRIGITTE SYLVIA MABANDLA

2nd Applicant

And

LUKHANYO BRUCE MATTHEWS CALATA

1st Respondent

ALEGRIA KUTSAKA NYOKA

2nd Respondent

BONAKELE JACOBS

3rd Respondent

FATIEMA HARON-MASOET

4th Respondent

TRYPHINA NOMANDLOVU MOKGATLE

5th Respondent

KARL ANDREW WEBER

6th Respondent

KIM TURNER	7 th Respondent
LYNDENE PAGE	8 th Respondent
MBUSO KHOZA	9 th Respondent
NEVILLE BELING	10 th Respondent
NOMBUYISELO MHLAULI	11 th Respondent
SARAH BIBI LALL	12 th Respondent
SIZAKELE ERNESTINA SIMELANE	13 th Respondent
SINDISWA ELIZABETH MKONTO	14 th Respondent
STEPHENS MBUTI MABELANE	15 th Respondent
THULI KUBHEKA	16 th Respondent
HLEKANI EDITH RIKHOTOSO	17 th Respondent
TSHIDISO MOTASI	18 th Respondent
NOMALI RITA GALELA	19 th Respondent
PHUMEZA MANDISA HASHE	20 th Respondent
MKHONTOWESIZWE GODOLOZI	21 st Respondent
MOGAPI SOLOMON TLHAPI	22 nd Respondent
FOUNDATION FOR HUMAN RIGHTS	23 rd Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	24 th Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	25 th Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	26 th Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	27 th Respondent
MINISTER OF POLICE	28 th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	29 th Respondent

In re:

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2 nd Applicant
BONAKELE JACOBS	3 rd Applicant
FATIEMA HARON-MASOET	4 th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5 th Applicant
KARL ANDREW WEBER	6 th Applicant
KIM TURNER	7 th Applicant
LYNDENE PAGE	8 th Applicant
MBUSO KHOZA	9 th Applicant
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THULI KUBHEKA	16 th Applicant
HLEKANI EDITH RIKHOTOSO	17 th Applicant
TSHIDISO MOTASI	18 th Applicant

NOMALI RITA GALELA

19th Applicant

PHUMEZA MANDISA HASHE

20th Applicant

MKHONTOWESIZWE GODOLOZI

21st Applicant

MOGAPI SOLOMON TLHAPI

22nd Applicant

FOUNDATION FOR HUMAN RIGHTS

23rd Applicant

And

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

1st Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

2nd Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

3rd Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

4th Respondent

MINISTER OF POLICE

5th Respondent

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE

6th Respondent

Coram: Millar J

Heard on: 28 July 2025

Delivered: 1 August 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The

date and time for hand-down is deemed to be 09H00 on 1 August 2025.

Summary: *Application to intervene – a declarator and constitutional damages sought in the main application – applicants named in founding papers – applicants not directly implicated – implication by inference through reference to books published in 2009 and 2019 – no specific finding sought against applicants – no direct and substantial legal interest in the declaratory order sought or in any award for damages that would be made – application dismissed – circumstances of the matter are such that the application while unsuccessful was understandable and for that reason no order as to costs.*

ORDER

It is Ordered:

- [1] The application is dismissed.
- [2] There is no order as to costs.

JUDGMENT

MILLAR J

- [1] This is an application in which the applicants, (Mr. Mbeki and Ms Mabandla), seek leave to intervene as respondents¹ in an application (main application) brought

¹ They seek leave to intervene as the 7th and 8th respondents in the main application.

by various applicants (the Calata applicants) against various respondents (the government respondents) for inter alia the establishment of a Commission of Enquiry and constitutional damages.

- [2] The main application is predicated upon the failure by the government respondents to either investigate or prosecute specific cases referred for this purpose by the Truth and Reconciliation Commission (TRC).

- [3] All these cases are serious in nature and the Calata applicants are all either victims or family of victims who, besides having an interest in specific cases, were themselves victims of apartheid - a crime against humanity.²

- [4] In the main application, the Calata applicants allege that between 1998 and 2017, the government respondents,³ suppressed and prevented the investigation and prosecution of apartheid-era cases that were referred to the National Prosecuting Authority (NPA) by the TRC for prosecution.

- [5] In the main application, there were initially two categories of orders sought. The first was for a declaratory order as to the unlawfulness and wrongfulness of the failure to prosecute apartheid era TRC cases and for the payment of constitutional damages and the establishment of a trust to administer those damages. The second was for an order setting aside the failure to establish a commission of enquiry into the failure to investigate and prosecute the TRC cases.

² International Convention on the Suppression and Punishment of the Crime of Apartheid G.A.res 3068 (XXVIII), 28 U.N GAOR Supp. (No. 30) at 75, U.N.Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976. In article 1 it is stated "*The State's Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of this Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.*" [My underlining].

³ They are the 1st to 6th respondents in the main application and the 24th to 29th respondents in the present application.

- [6] Before this application was heard, the government respondents, and particularly the current President of the Republic, acquiesced to the order for the establishment of a commission of enquiry. Accordingly, all that remains for determination and decision by the court in the main application, is the declaratory order and the claim for damages.
- [7] The nub of the main application against the government respondents is that: *"In fact, the TRC cases were deliberately suppressed following a plan or arrangement hatched at the highest levels of government and across multiple departments. This is the real explanation for the delay."* It is this conduct and its consequences which the Calata applicants contend militate in favour of an award of constitutional damages.
- [8] It was common cause between the parties in argument that both Mr. Mbeki and Ms. Mabandla are likely to make themselves available to testify before the commission. However, they seek leave to intervene in the main application ostensibly on the basis that they face the spectre of findings being made against them and their conduct (while in office) being declared wrongful as a precursor to the award of damages.
- [9] The course of the main application is not without peculiarity. Initially the government respondents opposed the application but after the decision to establish a commission of enquiry, the government respondents (except for the NPA) withdrew their notices of opposition. This is still the position at the time that the application to intervene was heard. It was also the position when this application was launched.
- [10] After the launch of this application, those government respondents that withdrew their notices of intention to oppose have since apparently indicated that they intend to apply to have them re-instated. There is also an extant application for a stay of the residue of the relief sought in the main application pending the outcome of the Commission of Enquiry. These issues will all be decided by another Court.

- [11] It suffices to state that for Mr. Mbeki and Ms Mabandla, they “stand alone” in these motion proceedings in that the only way that they would be able to assert any legal interest or vindicate any right arising from any order that would be granted is for them to intervene.
- [12] So, what is the basis for intervention?
- [13] Mr. Mbeki and Ms Mabandla are named in the founding affidavit. It is their case that serious allegations are preferred against them.
- [14] The main application consists of some 1077 pages. Of this, the founding affidavit makes up 259 pages together with 677 pages of annexures and 241 pages of supporting affidavits.
- [15] In the founding affidavit, there are 21 references to Mr. Mbeki. Of these 21 references:
- [15.1] ten relate to matters that are simply recordals of statements made or official acts performed by him while he was the Deputy President and President.
- [15.2] four relate to the possible prosecution of Mr. Mbeki and other ANC leaders for acts alleged to have been committed by them.
- [15.3] seven refer to –
- [15.3.1] The first of the seven references is in the index to the founding affidavit and records pertinently *“Former President Mbeki denies involvement in political interference.”*
- [15.3.2] The remaining six are all quotes from two books, extracts of which form part of the annexures. The two books concerned

are “Post - TRC Prosecutions in South Africa” authored by O Bubenzer and published in 2009⁴ and “Death Flight” authored by Michael Schmidt and published in 2019.⁵

[16] There are six references to Ms. Mabandla. Of these six references:

[16.1] five relate to official acts performed by her or references to her in a professional capacity.

[16.2] one reference in which her failure to respond to a memorandum sent to her was called into question.

[17] Regarding Mr. Mbeki, besides the books, the contents of which are both hearsay, and which set out a narrative indicative of a conspiracy to defeat the investigation and prosecution of TRC cases, there are no direct allegations made by the Calata applicants against him. There are also no direct allegations made against Ms. Mabandla.

[18] It is important to note that besides the fact that there are no direct allegations, the founding affidavit references the fact that the allegations of political interference, the subject of the aforesaid books, are denied by Mr. Mbeki.

[19] Neither Mr. Mbeki nor Ms. Mabandla are specifically named as having directly acted in any way to subvert or prevent the TRC investigations or prosecutions. References to them are by virtue of the offices that they held and by way of inference. In this regard, for example, it is stated:

“174. It is not known who authorised the halting of investigations, but since it involved suspending work on a large number of serious crimes, mostly involving murder, it is highly likely that the authority must have come from the very top. In addition, the heads of the NPA, DSO and SAPS must all

⁴ ISBN: 978-90-47-43047-6 published on 31 October 2009.

⁵ ISBN: 978-06-24-08860-8 published in 2019.

have acquiesced in this decision, together with the cabinet ministers overseeing those departments.”

- [20] No matter how compelling the narrative may be, any direct references that appear from the extracts from the two books, are hearsay. It was argued for the Calata applicants that any Court before which the main application would serve for decision, would be astute to this, particularly regarding the declaratory order sought. The submission in this regard was that:

“As far as the families are concerned, for purposes of their declaratory relief and claim for constitutional damages, while they allege that their cases were subject to interference, they are not concerned with individual culpability in this application. They do not seek relief pertaining to personal culpability.

For purposes of their families’ claim for constitutional damages, it does not matter which personalities were involved and what roles they played. What matters is whether their cases were stopped through political or other pressure brought to bear on the NPA, and if so, whether this entitles them to an award of constitutional damages”.

- [21] The Calata applicants oppose this intervention application, contending that the relief sought in the main application is only against the government parties who are the current state functionaries in their official capacities and not against either Mr. Mbeki or Ms Mabandla personally. They make the point that no order is sought against either of them and for that reason, the application for intervention ought to be refused.

- [22] Applications for intervention such as in the present instance, are brought, in terms of rule 12 of the Uniform Rules of Court:

“Any person entitled to join as a plaintiff [an applicant] or liable to be joined as a defendant [respondent] in any action [application] may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff [an applicant] or a defendant [respondent]. The court may, upon such application, make such

order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet."

[23] In deciding whether an order is to be granted in terms of rule 12, the Court must determine whether:

[23.1] the applicant has a direct and substantial interest in the right that is the subject matter of the main application.

[23.2] the allegations made by the intervening applicant constitute a *prima facie* case or defence and

[23.3] the application is made seriously and is not frivolous.⁶

[24] Mr. Mbeki and Ms Mabandla submit that they have a direct and substantial interest sufficient to justify intervention. They argue that the damaging allegations against them "*would necessarily be in issue between the parties to the litigation*". This argument is predicated on the basis that the allegations, such as they are, would be admissible to the extent that a finding could be made against them. Such a finding, so it was argued, is necessary for the award of damages and that if such a finding were not made, this would have, even if the finding sought was made on another basis, an impact on the damages to be awarded. It was argued that because of this, even though the declaratory order is not sought against them, a finding against them would implicate them in that order.

[25] The Calata applicants contend that the main application will not be decided specifically on whether Mr. Mbeki or Ms. Mabandla themselves interfered in TRC cases. That question, they say, will be resolved by the Commission of Inquiry that has been established. There, Mr. Mbeki and Ms Mabandla will have an

⁶ *Peermont Global (KZN) (Pty) Ltd v Afrisun KZN (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom* [2020] 4 All SA 226 (KZP).

opportunity to address the allegations that the Calata applicants make against them, including those that are of a hearsay nature.

[26] In their view, the application to intervene is made solely to address reputational concerns and “set the record straight” regarding allegations which if established, would tarnish their reputation but not because there is any legal interest in the relief sought.

[27] In *SA Riding for the Disabled Association v Regional Land Claims Commissioner*,⁷ the Constitutional Court stated the position with regards to intervention applications as follows:

“[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

⁷ 2017 (5) SA 1 (CC). *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at 89B-C. See also *Snyders and Others v De Jager (Joinder)* 2017 (5) BCLR 604 (CC).

'In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.' (footnotes omitted.)

[28] In *Lebea v Menye*,⁸ the Constitutional Court held that:

"direct and substantial interest is a direct and substantial interest in the order that a court is asked to make in a matter. It is not enough if a person has an interest in a finding or in certain reasons for an order. The interest must be in the order or the outcome of the litigation."

[29] The Supreme Court of Appeal (SCA) took a similar approach in *National Director of Public Prosecutions v Zuma*,⁹ where the first applicant in this case similarly brought an application to intervene. The SCA refused his intervention and stated that:

"[84] It ought to be apparent by now that Mr Mbeki and other members of Government had ample reason to be upset by the reasons in the judgment which cast aspersions on them without regard to their basic rights to be treated fairly. It is not necessary to revisit those issues since they have been dealt with in sufficient detail. However, they make the applicants' desire to intervene at the appeal stage understandable."

[85] Nevertheless, to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal. The basic problem with the application is that the applicants have no interest in the order but only in the reasoning. They are in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. Such a person has no ready remedy, especially not by means of intervention. To be able to intervene in an appeal, which is by its nature

⁸ 2023 (3) BCLR 257 (CC) at para [30].

⁹ 2009 (2) SA 277 (SCA).

directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal.”

[30] In *Wynne v Divisional Commissioner of Police and Others*,¹⁰ it was held that:

“Assuming, without deciding, that the above decisions are correct, it seems obvious that in each case the reason for granting leave to intervene was that the damaging allegations against the third party would necessarily be in issue between the parties to the litigation. It would have been impossible for the Court to give judgment in those cases without deciding whether the third party had or had not committed adultery and the effect of the judgment would therefore have been to decide the correctness or otherwise of the attack on the third party's reputation. The same position arose in *Vawda v Budrea* (1908) 29 NLR 539, where the defendant alleged fraud and collusion on the part of a third person who was not a party to the action. In principle the Full Court accepted the proposition that, ‘a man's character being beyond all price’, the third party should be entitled to intervene, but this again was a case where the allegations made against the third party were directly in issue between the litigating parties and would necessarily have to be decided in the course of the judgment on the merits.” [My underlining].

[31] It was argued for Mr. Mbeki and Ms Mabandla that for the granting of the orders sought, a finding as to their personal conduct would have to be made. It was this possible finding that that they asserted grounded their “direct and substantial” and “legal interest”.

[32] However, in *Rodrigues v National Director of Public Prosecutions and Others*,¹¹ the Full Court of this Division held:

“(III) The period 2003 – 2017.

¹⁰ 1973 (2) SA 770 (E) at 774F-H. See also *SA Commercial Catering and Allied Workers Union v Lehapa NO (Mostert NO intervening)* 2005 (6) SA 354 (W).

¹¹ 2019 (2) SACR 251 (GJ).

[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] . . .

(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 National Prosecuting Authority (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 to protect the public interest.”

[33] Thereafter, in *Rodrigues v National Director of Public Prosecutions and Others*,¹² the Supreme Court of Appeal in dealing with the same issue, held:

“The period 2003 to 2017

[26] It was during this 14- year period that the executive adopted a policy position conceded by the state parties that TRC cases would not be prosecuted. It is perplexing and inexplicable why such a stance was taken both in the light of the work and report of the TRC advocating a bold prosecutions policy, the guarantee of the prosecutorial independence of the NPA, its constitutional obligation to prosecute crimes, and the interests of the victims and survivors of those crimes.

[27] All these considerations, either viewed individually or collectively, should have stood in the way of any such moratorium on the prosecution of TRC

¹² 2021 (2) SACR 333 (SCA).

– era cases. That it happened, despite the constitutional, legal and other considerations, suggests disdain for those important considerations and interests”.

- [34] Accordingly, it cannot be in issue that there was political interference in the prosecution of the TRC cases. Our Courts have found this to be so, and those findings stand and are binding. For this reason, the argument advanced for the Calata applicants that there would be no need for a specific finding against either Mr. Mbeki or Ms Mabandla, is to my mind entirely sound. The issue has been decided.
- [35] The finding that has already been made is a general finding. The Calata applicants have recorded in their papers that Mr. Mbeki places in issue any imputation of wrongdoing on his part. Intervention by Mr. Mbeki in these proceedings is not “*where the allegations made against the third party were directly in issue between the litigating parties and would necessarily have to be decided in the judgment of the merits.*”¹³ That issue has already been decided insofar as the government respondents, the very parties against whom the main application has been instituted, are concerned.
- [36] Since a specific finding is not required in the main application, the argument that consequent upon the necessity for such a finding that leave to intervene ought to be granted, is unsustainable. That this is so, is further demonstrated by the absence of any direct evidence presented against Mr. Mbeki and Ms Mabandla.
- [37] The evidence such as it is, arising out of extracts from the two books has been overtaken by the findings of firstly the Full Court and then the Supreme Court of Appeal in *Rodrigues v National Director of Public Prosecutions and Others*.

¹³ *Ibid* Wynne v Divisional Commissioner of Police and Others at 774E-H.

- [38] It is not insignificant that the book of O. Bubenzer has been within the public domain since 2009 and that of M Schmidt since 2019. Insofar as Mr. Mbeki and Ms Mabandla may take issue with anything contained in those books, they have other remedies available to challenge the veracity of what is contained therein.
- [39] While it is alleged in general terms in the main application by the Calata applicants, that the government respondents are responsible for the failure to prosecute TRC cases, the proverbial ship to challenge that has sailed.
- [40] Mr. Mbeki and Ms Mabandla have no direct and substantial interest in the granting of any declaratory order against the government respondents and would have no obligation in respect of the granting of that order or any damages awarded in consequence thereof.¹⁴ The appropriate forum for them to “tell their side of the story” is at the Commission of Enquiry.
- [41] For the reasons I have set out above, the application for intervention fails.
- [42] This brings me to the question of costs. It was argued for the Calata respondents that a punitive costs order was merited, should the Court refuse the application to intervene. The argument was predicated on the fact that Mr. Mbeki had previously tried to intervene in legal proceedings for substantially similar reasons but had been unsuccessful. He had done so in the Supreme Court of Appeal no less some 16 years ago. Knowing this, he had, even though there had already been a decision to establish a Commission of Enquiry, persisted.
- [43] While a party may embark upon a particular course of action, even on more than one occasion, and it proves to be unsuccessful, this does not to my mind (on its

¹⁴ See *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at para [17].

own) establish any basis for the award of a punitive costs order. It is trite that each case must be decided on its own facts and that the award of costs is a discretionary matter.

[44] The facts in the present matter, make it unique. The subject matter concerns a failure to address the fundamental right to justice and closure. Every person implicated, no matter how remotely, is acutely aware of its importance to our society at large. While Mr. Mbeki and Ms Mabandla are unsuccessful, given the importance of the matter, it cannot be said that the application was brought for an improper motive.

[45] In *National Director of Public Prosecutions v Zuma*,¹⁵ the Court found that the desire to intervene was "understandable" and even though the application to intervene was dismissed, there was no order made in respect of costs.

[46] Mr. Mbeki and Ms Mabandla sought leave to intervene in their personal capacities and although unsuccessful, given the fact that the main application is constitutional in nature, I am of the view that no order of costs should be made.

[47] Accordingly, it is ordered –

[48.1] The application is dismissed.

[48.2] There is no order as to costs.



A MILLAR

JUDGE OF THE HIGH COURT

¹⁵ *Ibid.*

HEARD ON:

28 JULY 2025

JUDGMENT DELIVERED ON:

1 AUGUST 2025

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