

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No:

In the matter between:

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| KHULUMANI SUPPORT GROUP, WESTERN CAPE REGION | First Applicant |
| SHIRLEY RENEE GUNN | Second Applicant |
| BRIAN MKULULI MPAHLELE | Third Applicant |
| MAUREEN THANDI MAZIBUKO | Fourth Applicant |
| JOHANNES PETRUS HENDRY TITUS | Fifth Applicant |

and

| | |
|--|-------------------|
| DESMOND MPILO TUTU N.O. | First Respondent |
| THE TRUTH AND RECONCILIATION COMMISSION | Second Respondent |
| THE MINISTER OF JUSTICE | Third Respondent |
| THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA | Fourth Respondent |

AFFIDAVIT OF THE FIRST APPLICANT

I, the undersigned,

SHIRLEY RENEE GUNN,

do hereby make oath and say that:

1. Unless the context indicates to the contrary, the facts to which I depose fall within my personal knowledge. To the extent that legal submissions are advanced, they are made on the basis of advice received from the Applicants' legal representatives, which advice I believe to be correct.

The parties

2. I am an adult female, a community social worker of 30 Koring Road, Crawford, Cape Town. I am the Chairperson of the Khulumani Support Group, Western Cape Region (the First Applicant). I am also the Second Applicant in this matter. I have been identified as a victim of gross violations of human rights in Volume 5, Chapter 2 of the five volume report filed by the Second Respondent during October 1998 (*"the TRC report"*). A copy of the relevant page is annexed hereto marked "SG1".
3. I bring this application acting in my own interest and in the public interest. I am also duly authorised by the First Applicant to do so on its behalf and on behalf of its members, and to depose to this affidavit.

4. The members of the First Applicant on whose behalf this application is brought, are listed in annexure "A" hereto.

5. The First Applicant is the Khulumani Support Group, Western Cape Region (referred to herein as such or as "*Khulumani*"). Khulumani is a voluntary association founded in January 1998 in Cape Town, at which time it was called "*the Ex-political Prisoners and Torture Survivors Support Group*".

6. It was founded by victims of gross violations of human rights as a support group for survivors and families of victims of the political conflict of apartheid South Africa, and was set up in response to the process of the Truth and Reconciliation Commission (referred to herein as the Second Respondent or "*the TRC*"). The name was changed to Khulumani during September 1999 in order for the organisation to be able to identify with other support groups, similarly named, which existed across the country. The aim of Khulumani is to contribute to the empowerment of all victims, survivors and relatives of victims and survivors of gross violations of human rights during the apartheid years in South Africa. In order to achieve this objective, the activities of Khulumani include, *inter alia* –
 - 6.1 providing a forum for survivors and victims to share experiences and to offer mutual support;

- 6.2 empowering victims to rebuild sustainable lives;
 - 6.3 providing access for victims to psychological, legal, social and other support services which can assist in alleviating their problems;
 - 6.4 working for a just reparation policy from the TRC;
 - 6.5 ensuring that victims requiring reparations are being assisted and that the recommended policy on reparations is being fairly and timeously implemented; and
 - 6.6 educating and mobilising survivors and all victims and the community in general about the plight of victims.
7. One of the fundamental tasks undertaken by Khulumani has been to assist victims of gross violations of human rights in obtaining special pensions and urgent interim reparations from the TRC.
 8. The Third, Fourth and Fifth Applicants are members of the First Applicant and have been identified as victims of gross human rights violations by the Second Respondent. The plight of the Third to Fifth Applicants as described in their

affidavits reflect the circumstances and living conditions of the vast majority of the members of Khulumani.

9. The First Respondent is Desmond Mpilo Tutu, the Chairperson of the Second Respondent, of c/o the State Attorney, Liberty Life Centre, 22 Long Street, Cape Town, who is cited herein in his official capacity.
10. The Second Respondent is the TRC, a juristic person established in terms of section 2 of the Promotion of National Unity and Reconciliation Act, No 34 of 1995 (*"the TRC Act"*), of which the President has determined Cape Town to be the seat, of c/o the State Attorney, Liberty Life Centre, 22 Long Street, Cape Town. The Second Respondent is an organ of state and in any event a public body which has performed and, as far as I am able to ascertain, seems still to do so through its Amnesty Committee, both administrative acts and public actions and have discharged quasi-judicial duties in relation to its findings.
11. The Third Respondent is the Minister of Justice of c/o the State Attorney, Liberty Life Centre, 22 Long Street, Cape Town, who in accordance with section 46(7) of the TRC Act becomes, upon the dissolution of the TRC in terms of section 43(3) of the TRC Act, the legal successor to the TRC.

12. In terms of section 46(7)(b) of the TRC Act, the Minister of Justice shall have the authority to wind up the affairs of the TRC and for purposes of any legal relations, including legal proceedings involving the TRC, be the legal successor to the TRC.
13. Section 46(7)(a) of the TRC Act provides that upon the dissolution of the TRC, all assets, including intellectual property rights, monies and liabilities of the TRC, shall revert to the Department of Justice to be dealt with according to law.
14. Following the submission of the TRC report to the President of the Republic of South Africa on 29 October 1998, the activities of the TRC were suspended until such time as it is to be reconvened by the Third Respondent in accordance with section 43(3) of the TRC Act. Section 43(3) of the TRC Act contemplates that the President shall, by proclamation in the Government Gazette, reconvene the TRC for purposes of completing its final report once the Amnesty Committee had completed its work and determine a date for the dissolution of the TRC.
15. The President by proclamation determined 31 May 2001 as the date on which the Amnesty Committee would be resolved (Proclamation R.31, Government Gazette No. 22333, 28 May 2001). The President further determined 1 June

2001 as the date on which the TRC would reconvene for purposes of completing its final report and 31 December 2001 as the date for the dissolution of the TRC (Proclamation R.32, Government Gazette No. 22333, 28 May 2001).

16. For all intents and purposes this had the effect in law of the TRC no longer existing, notwithstanding that the TRC Report is incomplete or that the Amnesty Committee has not finalised all its work or that the final list of victims have not been finally concluded or published.
17. It is thus not clear whether the TRC had in fact been formally and finally dissolved. For that reason both the TRC and the Minister of Justice as the legal successor of the TRC have been cited as Respondents.
18. The Fourth Respondent is the President of the Republic of South Africa, whose address is Tuynhuys, Parliament Street, Cape Town. The Fourth Respondent is cited in his official capacity by reason only of his interest in the subject-matter of the application. Accordingly, no relief is sought against him. Should he however elect to oppose the application, a suitable order as to costs will be sought against him.

19. This is essentially an application seeking access to information pertaining to the Government's reparation policy and seeking an order directing that such reparation policy be provided to the Applicants. In the alternative, and in the event that it is the stance of the Respondents that there is no reparation policy in existence, the Applicants seek an order compelling the Government to provide such policy as soon as reasonably possible and compelling the Government to pay out urgent interim reparations until such time as the policy is prepared or until such time as there is a reparation policy.

20. The scheme of this affidavit necessitates me dealing with –
 - 20.1 the legislative framework which governs the work of the Second Respondent as well as the Promotion of Access to Information Act, No. 2 of 2000 (*"the PAI Act"*);

 - 20.2 the TRC report;

 - 20.3 reparations;

 - 20.4 the application for access to information; and

 - 20.5 fair administrative action.

The TRC Act

21. The preamble of the TRC Act states that its aims, *inter alia*, is to provide for the investigation and establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; to afford victims an opportunity to relate the violations they suffered; to take measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of victims of violations of human rights; reporting to the nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of the TRC, comprising a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation ("*the Reparation Committee*"); and to confer certain powers, assign certain functions to and impose certain duties upon the TRC and those committees.

22. The TRC Act came into force on 1 December 1995. Section 1 of the TRC Act defines reparation as including any form of compensation, *ex gratia payment*, restitution, rehabilitation or recognition. It defines victims as including –

22.1 persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights as a result of a gross violation of human rights; or as a result of an act associated with the political objective for which amnesty has been granted;

22.2 persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in the above subparagraph who were in distress or to prevent victimisation of such person; and

22.3 such relatives or dependants of victims as may be prescribed.

23. Section 3 of the TRC Act sets out the objectives of the TRC which includes *inter alia* the restoring of human and civil dignity to victims by granting them an opportunity to relate their own accounts of the violations of which they are the

victims, and by recommending reparation measures in respect thereof and to compile a report providing as comprehensive an account as possible of the activities and findings of the TRC as well as recommendations of measures to prevent the future violation of human rights.

24. In terms of section 3(3)(c) of the TRC Act, the Reparation Committee was established to deal with matters referred to it relating to reparations.

25. The TRC was obliged in terms of section 4(e) of the TRC to prepare a comprehensive report setting out its activities and findings based on factual and objective information and evidence collected or received by it or placed at its disposal. On 29 October 1998, and in compliance with section 4(e) of the TRC Act, a report styled as the Truth and Reconciliation Commission of South African Report was handed to President Nelson Mandela. The TRC report was subsequently tabled in Parliament in accordance with section 44 of the TRC Act. The TRC report comprises five volumes of approximately 2250 pages. A substantial portion of Volume 5 deals with victims of gross violations of human rights and the TRC's recommendations in respect of a reparation and rehabilitation policy in compliance with section 4(f). Section 4(f) provides that the TRC shall make recommendations to the President with regard to the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at

rehabilitating and restoring the human and civil dignity of victims as well as measures which should be taken to grant urgent or interim reparation to victims.

26. Section 11 of the TRC Act makes it quite clear that when dealing with victims the actions of the TRC must be guided by the following principles:

26.1 Victims shall be treated with compassion and respect for their dignity.

26.2 Victims shall be treated equally and without discrimination of any kind, including race, colour, gender, sex, sexual orientation, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin or disability.

26.3 Procedures for dealing with applications by victims shall be expeditious, fair, inexpensive and accessible.

26.4 Victims shall be informed through the press, and any other medium, of their rights in seeking redress through the TRC, including information of –

26.4.1 the role of the TRC and the scope of its activities;

26.4.2 the right of victims to have their views and submissions presented and considered at appropriate stages of enquiry.

26.5 Appropriate measures shall be taken in order to minimise inconvenience to victims and, where necessary, to protect their privacy to ensure their safety as well as that of their families and of witnesses testifying on their behalf, and to protect them from intimidation.

26.6 Appropriate measures shall be taken to allow victims to communicate in the language of their choice.

26.7 Informal mechanisms for the resolution of disputes, including mediation, arbitration and any procedure provided for by customary law and practice shall be applied, where appropriate, to facilitate reconciliation and redress to victims.

27. The Reparation Committee was established (section 23 of the TRC Act) and had additional powers, duties and functions allocated to it in terms of section 25 of the TRC Act, which *inter alia* included making recommendations which could include urgent interim measures as contemplated in section 4(f)(ii) as to appropriate measures of reparation to victims. It also had to make recommendations and

submit to the TRC a final comprehensive report on its activities, findings and recommendations. This report is contained in Volume 5 of the TRC report.

28. Any person referred to the Reparation Committee in terms of section 25(1)(a)(i) could apply to it for reparations in the prescribed form, which application had to be considered. If the Reparation Committee was of the opinion that the applicant was a victim it had to, having regard to the criteria as prescribed, make recommendations as contemplated in section 25(1)(b)(i) in an endeavour to restore the human and civil dignity of such victim.
29. The recommendations referred to in section 4(f)(i) must be considered by the President with a view to making recommendations to Parliament and making regulations (section 27(1) of the TRC Act).
30. The recommendations referred to in section 27(1) of the TRC Act shall be considered by the joint committee and the decisions of the joint committee shall, when approved by Parliament, be implemented by the President by making regulations. These regulations –
 - 30.1 shall determine the basis and conditions upon which reparations shall be granted;

- 30.2 shall determine the authority responsible for the application of the regulations;
- 30.3 may provide for the revision and, in appropriate cases, the discontinuance or reduction of any reparations;
- 30.4 may prohibit the cession, assignment or attachment of any reparation in terms of the regulations, or the right of any such reparation;
- 30.5 may determine that any reparation received in terms of the regulations shall not form part of the estate of the recipient should such estate be sequestrated; and
- 30.6 may provide for any other matter which the President may deem fit to prescribe in order to ensure an efficient application of the regulations (section 27(3) of the TRC Act).
31. Section 27(4) provides that the joint committee may also advise the President in respect of measures that should be taken to grant urgent interim reparation to victims. The joint committee is defined in section 1 as the joint committee of the Houses of Parliament appointed in accordance with the Standing Orders of

Parliament for the purpose of considering matters referred to in terms of the TRC Act.

32. In terms of section 15(1) of the TRC Act, when the Committee on Human Rights Violations finds that a gross violation of human rights had been committed and if it is of the opinion that the person is a victim of such a violation, it refers the matter to the Reparation Committee for its consideration in respect of reparations.
33. It shall then at the request of the Reparation Committee furnish it with all the evidence and other information relating to the victim concerned or conduct such further investigation or hearing as it may require.
34. Similarly, when the Amnesty Committee grants amnesty to any person in respect of any act, omission or offence and it is of the opinion that the person is a victim in relation to that act, omission or offence, it had to refer the matter to the Reparation Committee for its consideration in respect of reparations (section 22(1) of the TRC Act).
35. In addition, even where amnesty is refused, but the Amnesty Committee is of the opinion that the act, omission or offence concerned constituted a gross violation

of human rights and a person is a victim in that matter, it referred the matter to the Reparation Committee for consideration in respect of reparations.

36. In terms of section 42(1) of the TRC Act a President's Fund was established in consultation with the Minister of Justice and the Minister of Finance. It contained all money appropriated by Parliament for purposes of the fund and money donated or contributed to the fund or accrued to the fund from any source. In terms of section 42(2) there shall be paid from the President's Fund all amounts payable to victims by way of reparation in terms of regulations made by the President. Any money of the fund which is not required for immediate use could be invested with a financial institution approved by the Minister of Finance and could be withdrawn when required.

37. It is also quite clear that in terms of section 43(2)(b) of the TRC Act that the Amnesty Committee shall also exercise the powers and perform the duties and functions of the Committee on Human Rights Violations established by section 12 and of the Reparation Committee established by section 23 in respect of responses to matters which commenced before 14 December 1997 by the said Committees but was not yet finalised by 31 July 1998.

38. Section 47(1) of the TRC Act provides that notwithstanding the dissolution of the TRC in terms of section 43(3), the President's Fund shall continue to exist until a

date fixed by the President by proclamation in the Gazette, whereupon all the funds and property which vested in the President's Fund immediately prior to that date shall be transferred to the Disaster Relief Fund referred to in Chapter II of the Fundraising Act, No. 107 of 1978, whereafter all such funds shall vest in the Disaster Relief Fund.

The Promotion of Access to Information Act, No. 2 of 2000 ("the PAI Act")

39. The PAI Act was promulgated to give effect to the constitutional right of access to any information held by the State that is required for the exercise or protection of any rights and to provide for matters connected therewith.
40. Its objectives are *inter alia* to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information and to actively promote a society in which the people of South Africa would have effective access to information to enable them to more fully exercise and protect all their rights.
41. One way of achieving this is by empowering and educating everyone to understand their rights in terms of the PAI Act in order to exercise their rights in relation to public and private bodies, to understand the functions and operation of

public bodies and to effectively scrutinise and participate in decision-making by public bodies that affects their rights (section 9(e) of the PAI Act). The Respondents are all public bodies.

42. In terms of section 11(1) of the PAI Act a requester must be given access to the records of a public body if that requester complies with all the procedural requirements of the PAI Act relating to a request for access to a record and access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of the PAI Act. A record is defined as any recorded information regardless of form or medium in the possession or under the control of a private or public body respectively, irrespective of whether it was created by that body.
43. In terms of section 18(1) of the PAI Act a request for access to information must be made in the prescribed form to the information officer of the public body concerned at his or her address or telefax number or electronic mail address. Such a request must comply with the requirements set out in section 18(2) of the PAI Act.
44. In terms of section 25(1) of the PAI Act the information officer to whom the request for access is made or transferred must, as soon as reasonably possible but in any event within 30 days after the request is received, decide in

accordance with the PAI Act whether to grant the request and notify the requester of the decision and, if the requester stated that he or she wished to be informed of the decision in any other manner, inform him or her in that manner if it is reasonably possible.

45. In the event that the request for access to information is refused, the notice must –

45.1 state adequate reasons for the refusal, including the provisions of the PAI Act relied upon;

45.2 exclude from such reasons any reference to the content of the record; and

45.3 state that the requester may lodge an internal appeal or an application with the Court, as the case may be, against the refusal of the request and the procedure (including the period) for lodging the internal appeal or application, as the case may be.

46. Section 27 of the PAI Act specifically provides:

"If an information officer fails to give a decision on a request for access to the requester concerned within the period contemplated in section 25(1),

the information officer is, for purposes of this Act, regarded as having refused the request."

47. A requester may lodge an internal appeal against a decision of the information officer of a public body to refuse a request for access (section 74(1) of the PAI Act). I am advised that this would include a failure to give a decision as contemplated in section 27 of the PAI Act.
48. In terms of section 77(3) of the PAI Act the relevant authority must decide on the internal appeal as soon as reasonably possible, but in any event within 30 days after the internal appeal is received by the information officer of the body.
49. Section 77(7) of the PAI Act provides that if the relevant authority fails to give notice of a decision on an internal appeal to the appellant within the period contemplated in subsection (3), namely 30 days after the internal appeal is received by the information officer, that authority is, for the purposes of the PAI Act, regarded as having dismissed the internal appeal.
50. Section 87(1) of the PAI Act extends periods for dealing with requests during the first two years to allow a public body to provide the information in terms of a request within a period of 90 days, as opposed to a period of 30 days.

51. It is only after the expiry of the periods contemplated in the PAI Act that an aggrieved litigant may then proceed to Court by way of an application for the appropriate relief as contemplated in section 82 of the PAI Act. A Court hearing an application may grant any order that is just and equitable, including orders –

51.1 confirming, amending or setting aside the decision which is the subject of the application concerned;

51.2 requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the Court considers necessary within a period mentioned in the order;

51.3 granting an interdict, interim or specific relief, a declaratory order or compensation; or

51.4 as to costs.

The TRC Report

52. The TRC report identifies those persons who suffered gross violations of human rights, which are defined as killing, abduction, torture and severe ill-treatment as

well as associated violations. These have been defined in the final report. A copy of the relevant definitions are annexed hereto marked "SG2".

53. Volume 5, Chapter 2 of the TRC report contains a list of victims taken from the database of the TRC on 30 August 1998. The TRC report acknowledges that there are thousands more names to be included in this list, but because the process of making a finding and of dealing with queries, reviews and appeals continued beyond 30 August 1998, those names have not been included. Moreover, it was also accepted in the TRC report that further victims of human rights violations would be identified through the continuing applications for amnesty. The TRC report foreshadows that a complete list would be published at a later date as an addendum to that report.

54. The TRC report also recognises that victims of human rights abuses have suffered a multiplicity of losses and enjoy a right to reparation. It further recognised that without adequate reparation and rehabilitation measures, there could be no healing or reconciliation. Moreover, that reparation was essential to counterbalance amnesty in that the granting of amnesty denied victims the right to institute civil claims against perpetrators. Accordingly, the Government had a responsibility to provide reparation (Volume 5, Chapter 5, paras 2-3 at p.170).

55. As already stated, the TRC Act mandated the Reparation Committee of the TRC to provide, among other things, measures to be taken in order to grant reparation to victims of gross human rights violations.

56. The TRC report acknowledges that the amount of reparation awarded must be sufficient to make a meaningful and substantial impact on the lives of the victims (Volume 5, para 11 at p.172).

57. The TRC report pertinently states (Volume 5, Chapter 5, pp.174-175):

"20. The present government has accepted that it is morally obliged to carry the debts of its predecessors and is thus equally responsible for reparation. Implementation of reparation will afford all South Africans an opportunity to contribute to healing and reconciliation.

21. Without adequate reparation and rehabilitation measures, there can be no healing and reconciliation, either at an individual or a community level. Comprehensive forms of reparation should also be implemented to restore the physical and mental well being of victims."

58. Accordingly, the TRC set out policy proposals and recommendations in respect of both urgent interim reparation and reparation itself. These were submitted to the President for his consideration in terms of sections 27 and 40(1)(d) of the TRC Act. These recommendations are contained in the TRC report and the relevant section is annexed hereto marked "SG3".
59. As can be noted from the TRC report, a distinction is drawn between urgent interim reparation, individual reparation grants, symbolic/legal administrative measures, community rehabilitation programmes and institutional reform. The Reparation Committee recommended that a well structured monetary grant taking into account reasonable access to essential basic services and generating opportunities to achieve a dignified standard of living within the South African socio-economic context should be worked out (Volume 5, Chapter 5, para 42 at p.179).
60. It also recommended the provision of urgent interim reparations and individual reparation grants in the form of money (Volume 5, Chapter 5, para 45 at p.179).

Reparation

61. The TRC Act contemplates two stages in the process of reparation and rehabilitation, namely urgent interim reparation and final reparation measures. It

defines reparation as including any form of compensation, *ex gratia* payment of restitution, rehabilitation or recognition (section 1).

62. The TRC report recommended that all applicants be considered for the grant of urgent interim reparation pending the payment of final reparations (Volume 5, Chapter 5, para 54 at p.181). Moreover, that victims or their relatives and dependants who have urgent medical, emotional, educational, material and/or symbolic needs, be entitled to urgent interim reparation.

63. The grant of urgent interim reparation was made using a detailed set of criteria available to the Reparation Committee and promulgated by Government. The first urgent interim reparation payment was made during July 1998, at which time there was ongoing discussion about the constitution of the implementing body that would eventually take over from the Reparation Committee. At the time the final report was published, this matter had not yet been resolved. Despite efforts, I have been unable to ascertain what progress has been made to establish this body.

64. The TRC outlined the delivery of urgent interim reparations as involving the following steps:
 - 64.1 Receiving decisions from the Reparation Committee.

64.2 Referring victims to appropriate service(s).

64.3 Making payments according to the approved sliding scale and/or the type of need.

(Volume 5, Chapter 5, para 65 at p.183)

65. It further recommended that all those found to be victims would be eligible for final reparation, regardless of urgency of need (Volume 5, Chapter 5, para 66 at p.184).

66. It further recommended that the final reparations involve an amount of money called an individual reparation grant to be made available to each victim or equally divided among relatives and/or all dependants who have applied for reparation if the victim is dead. Furthermore, that the amount be determined by way of a formula based on three criteria, namely –

66.1 an amount to acknowledge the suffering caused by the gross violations that took place;

66.2 an amount to enable access to services and facilities; and

66.3 an amount to subsidise daily living costs, based on socio-economic circumstances.

(Volume 5, Chapter 5, para 67 at p.184)

67. The TRC report further stated (Volume 5, Chapter 5, para 68 at p.184) that:

"The individual reparation grant is an acknowledgement of a person's suffering due to his/her experience of a gross human rights violation. It is based on the fact that survivors of human rights violations have a right to reparation and rehabilitation. The individual reparation grant provides resources to victims in an effort to restore their dignity. It will be accompanied by information and advice in order to allow the recipient to make the best possible use of these resources. 38% of the Commission's deponents requested financial assistance to improve the quality of their lives. In addition, over 90% of deponents asked for a range of services which can be purchased if money is made available – for example, education, medical care, housing and so on."

68. It further recommends that a monetary package based on a benchmark amount of R21 700,00 be made available (Volume 5, Chapter 5, para 69 at p.184).

69. It envisaged that the grant would be funded and administered by the President's Fund which would accrue resources through allocations from the national fiscus,

international and local donations and earned interest on the fund. Further recommendations were made about symbolic reparation measures (Volume 5, Chapter 5, paras 78-93 at pp.188-190) and in respect of community rehabilitation (Volume 5, Chapter 5, paras 94-115 at pp.192-194).

70. The TRC acknowledges (Volume 5, Chapter 5, para 116 at p.194) that the nature and structure of the body which implements final reparations will need to be debated and would depend on the decisions taken by Parliament about the form the final reparation will take. It indicates that the Reparation Committee recommended that the following issues be considered:

70.1 That implementation must take place at national, provincial and local levels.

70.2 That the national implementing body be located in the office of the President or Deputy President.

70.3 That it be headed by a National Director of Reparation and Rehabilitation who should be advised by a panel or board of trustees composed of appropriately qualified members from the relevant ministries and human rights organisations.

71. As this policy will have a fundamental impact on the lives of victims of gross human rights abuses and in particular members of the First Applicant, the Applicants by way of this application seek access to the very policy which will determine the course which final reparations will take, exactly because it wishes to have input in respect of the factors to be taken into account in the development of such policy, alternatively in the promulgation of regulations relating thereto.

The application for access to information

72. During 1997 and 1998 persons who had participated in the TRC process received letters from President Mandela. A copy of such a letter is annexed to the affidavit of the Third Applicant filed herewith. This letter foreshadowed the granting of reparations.

73. Subsequent to the conclusion of the TRC report, a number of the victims approached the relevant Government departments for assistance. However, these Departments were not advised as to the status of these victims and requests for assistance or services were not forthcoming nor prioritised by these Departments, leading to frustration and difficulties on the part of victims such as the members of the First Applicant.

74. As a result of such frustration, during or about March 1999 members of Khulumani handed a petition to a representative of the President at Tuynhuys. The petition requested the expediting of the giving of reparation and special pensions as victims were waiting in expectation for services which were not being provided.
75. During the second half of 2000 Khulumani met with Mr Frank Chikane, who at that stage was a Director-General in the President's office. This meeting was held by way of video-conferencing. Mr Chikane promised to revert to Khulumani in respect of future reparations. No further information was received from Mr Chikane.
76. In 2001 a reparations indaba was organised by Khulumani. Representatives from the Government participated in the indaba, including Prof Medhard Rwelamira of the Department of Justice. A number of TRC commissioners, including Dumisa Ntsebeza, were also present. A number of non-governmental organisations, including the South African Council of Churches, the Black Sash, the Institution for Justice and Reconciliation, the Trauma Centre, the Centre for the Study of Violence and Reconciliation, Khulumani as well as a number of academics attended the indaba.

77. At the indaba Prof Rwelamira advised that a Cabinet meeting was taking place at the same time as the reparations indaba and that the final policy on reparations would be made available to the group during the following month.
78. Despite several attempts to contact Prof Rwelamira or to obtain a copy of this policy, Khulumani has to date been unable to obtain the promised policy on reparation.
79. During or about July 2001 meetings were held with non-governmental organisations in an attempt to raise support for a process to obtain access to the policy documents pertaining to the Government's reparation policy. At these meetings the Open Democracy Advice Centre ("ODAC") advised Khulumani on the provisions of the PAI Act and how information held by Government departments could be accessed. Khulumani then resolved that it would be appropriate to use the provisions of the PAI Act to formally request a copy of the promised reparation policy from the Government.
80. Accordingly a request for access to information was duly completed in terms of the regulations of the PAI Act and addressed to Advocate Vusi Pikoli, the Director-General in the Department of Justice. The application was delivered by members of Khulumani to the Department of Justice's offices at 120 Plein Street,

Cape Town, on 14 August 2001. A copy of the application is annexed hereto marked "SG4".

81. It is evident from the request that I requested the information in my capacity as the Chairperson of Khulumani and requested that the records containing the reparation policy as written by the Department of Justice, which deals with reparations to be made in terms of the recommendations of the TRC, be provided.

82. By way of e-mail I received a letter dated 21 August 2001 (a copy of which is annexed marked "SG5") acknowledging receipt of the request to have access to documents held by the Department pertaining to the reparation policy. The e-mail also advised that in terms of section 22 of the PAI Act, a request fee of R35,00 was payable in the form of revenue stamps and should be forwarded to the office of Mr David Porogo, the Deputy Information Officer. The letter further advised that his office had received the request on 21 August 2001. Revenue stamps to the value of R35,00 was then forwarded under cover of a letter dated 5 September 2001 from ODAC for the attention of Mr Porogo. A copy of this letter is annexed hereto marked "SG6".

83. I was subsequently advised that this letter had not reached the offices of the Department of Justice and further revenue stamps to the value of R35,00 was then sent under cover of a letter dated 11 October 2001 by speed post.
84. No response was received to this request.
85. I am advised that should the information officer fail to give a decision on the request for access to the request concerned within a period contemplated in section 25 read with section 87 of the PIA Act (90 days), the information officer is for purposes of the Act regarded as having refused the request. After the 90 day period had expired, a notice of internal appeal in terms of section 75 of the PIA Act was filed under cover of a letter dated 15 November 2001.
86. The letter advised the Deputy Information Officer that no response had been received in respect of the request for information and that a Notice of Intended Appeal, together with the requisite R50,00 appeal fee in the form of revenue stamps, was sent to the Deputy Information Officer. I point out that in terms of section 77(3) of the PIA Act, the appeal had to be decided within 30 days after the internal appeal had been received by the Information Officer. Such appeal must be decided by the relevant authority, which the PIA Act defines as the Minister of Justice or the person designated in writing by the Minister. I annex

hereto copies of the letter, notice of appeal and courier slip marked "SG7", "SG8" and "SG9" respectively.

87. The notice of appeal was neither acknowledged, nor replied to by the Minister of Justice or the Department of Justice.

88. On 20 March 2002, Khulumani organised a march to Parliament. This resulted in a meeting on the steps of Parliament between the Minister of Justice's representative, Mr Paul Setsetse, myself as well as other members of Khulumani. I was advised that –
 - 88.1 the reparation policy had been developed and was currently before the Cabinet;

 - 88.2 final interim reparations were being made and that anyone who had not received their money should submit their name to the Chairperson of the First Applicant;

 - 88.3 nothing would happen prior to the end of 2002; and that

 - 88.4 I should telephone Mr Setsetse on his mobile on Friday, 22 March 2002, to discuss a meeting between a delegation of Khulumani and the relevant

Ministers, Deputy Ministers and advisers in respect of the Government's response on where the process of reparation was currently at, and in order for us to obtain a hearing, in respect of the content of the policy and the process that would be followed.

89. On the morning of 22 March 2002 I telephoned Mr Setsetse who asked me whether the letter received from Advocate Johnny de Lange satisfied our concerns. (I had received an e-mail dated 20 March 2000 (4:27 pm) from one Chenille (C Jales) who forwarded to me a letter from Mr de Lange. This was a response to an email dated 7 March 2002 a copy of which is annexed hereto marked "SG 11a") I indicated to Mr Setsetse that we were not in possession of the policy and that Mr de Lange's letter did not address our concerns. I was advised that I should write a letter and e-mail it to Mr Setsetse stating exactly what it was that Khulumani wished to discuss in order that he could arrange a meeting with the appropriate persons. In an e-mail dated 25 March 2002 I recorded the contents of these conversations with Mr Setsetse. A copy is annexed hereto marked "SG10".

90. In the e-mail I also requested a meeting with the Minister of Justice and other Ministers, Deputies or advisers involved with the reparation policy in order to discuss our concerns relating to the disclosures and the time frame that had been made known to the public via the media and directly to Khulumani

regarding the policy and its implementation. I indicated that an example of this was the fact that we had been advised that the Ministry was considering a R40 000,00 once-off payment and that *"nothing will be done in this year"*.

91. I received no response to this e-mail.

92. Mr de Lange's e-mail, which is annexed hereto marked "SG11b", advised me that -
 - 92.1 given Khulumani's intention to initiate legal proceedings, it was advisable that he communicated with us in writing;

 - 92.2 he did not have a mandate to speak on behalf of the Department or the executives and that the views expressed should not be regarded as such (notwithstanding that he heads the Portfolio Committee on Justice and Constitutional Development);

 - 92.3 the TRC Act created a reparations process in two stages: final reparations and interim reparations;

 - 92.4 final reparations only legally arose once the TRC had adopted and handed over its final report to Government and became *functus officio*;

- 92.5 it was the intention of the TRC to hand its final report over to Government on 31 March 2002, which had not yet been arrived at;
- 92.6 until such time as final reparations had been finalised, the TRC Act provided for interim reparations which was the sole preserve of the TRC and had to be addressed to the TRC in accordance with the interim reparations provisions contained in the TRC Act (notwithstanding that the TRC was winding up and no longer formally existed);
- 92.7 the Department of Justice (and other departments) would only embark on a process of providing for a policy for final reparations once the TRC had finalised all its work and provided Government with its final report and recommendations;
- 92.8 in respect of the request for access to the Department of Justice's reparation policy, it was the sole preserve of the Executive to develop a policy on the issue of final reparations and the TRC Act;
- 92.9 Parliament and Mr de Lange in his capacity as Chairperson of the Portfolio Committee on Justice and Constitutional Development had no power to

decide whether Khulumani could have access to the information requested;

92.10 the views expressed in the letter were merely his personal opinion;

92.11 there could clearly be no Government policy on final reparations until the TRC had finalised its work and provided Government with a final report which was anticipated to happen on 31 March 2002;

92.12 thereafter, during the course of the development and finalisation of such a policy, access thereto will in all probability be guided by the TRC Act and section 44 of the PAI Act which provides an exemption to the disclosure of information when a policy is being developed by Government until such policy has been finalised; and

92.13 until the TRC had completed its work and adopted its final report, the Government was not able to commence with and finalise its work emanating from the TRC Act, particularly in respect of final reparations.

93. Accordingly, to date despite numerous telephone calls on behalf of Khulumani by Alison Tilley of ODAC as well as a number of efforts made by myself to various persons within the Department of Justice and Government, I have been unable to

obtain a copy of the reparation policy which officials within the Department of Justice have advised me is either lying on the desk of the Director-General, or in the office of the Ministry, or before Cabinet. In fact, Alison Tilley has been pertinently informed by Mr Setsetse that "*there is a policy*".

94. I have exhausted all the internal remedies available within the PAI Act. I have also reached the end of my tether in my attempts to engage members of Parliament and officials within the Department of Justice and members and officials of the TRC in attempting to find out about the reparation policy.
95. In the meantime, many of the victims of gross human rights violations whom the TRC process was meant to assist, are unable to sustain a dignified human existence and have been waiting a number of years for the "*promised*" reparations which they are to receive in exchange for not being able to institute civil action against perpetrators.

Fair administrative action

96. I am advised that the Respondents' failure to develop and implement a reparation policy is an infringement of my right to administrative action that is lawful, reasonable and procedurally fair. I am further advised that in terms of section 237 of the Constitution of the Republic of South Africa, No. 108 of 1996, the

Respondents must perform all their constitutional obligations diligently and without delay. The *ipse dixit* of the Respondents both in a political capacity as well as officials within a number of Government departments have created a legitimate expectation on the part of the victims that a reparation policy is in existence within the Department and is imminent. I am also advised that the failure on the part of the Respondents to have developed and implemented a reparation policy is an infringement of the Promotion of Administrative Justice Act, No. 3 of 2000. Moreover, these actions have resulted in legitimate expectation on the part of victims:

96.1 In a statement by the President on the TRC report in Cape Town on 25 February 1999, he indicated that reparations would be offered to those who fought for freedom as visualised in the TRC Act and as recommended by the TRC. The matter of individual reparations, both in the form of cash and the provision of services, would be attended to. The President stated:

"There are many people who were harmed and their dignity denied during the course of the conflict which the TRC was mandated to investigate. We must respond to their plight as a central part of our quest for national unity and reconciliation."

A copy is annexed hereto marked "SG12".

- 96.2 In an address by the President at the International Summit of Unity and Reconciliation in Kigali, Rwanda on 18 October 2000 it was clearly indicated by the President that he could not grant amnesty without addressing the matter of reparations to the victims of the crimes of apartheid. The relevant extract from this speech is annexed hereto marked "SG13".
- 96.3 It is also clear from an extract of the South African Yearbook 2001/2002 annexed hereto marked "SG14" that the outstanding part of the TRC report deals with the work of the Amnesty Committee and is based on the amnesty hearings (and not reparations). Moreover, that a policy to deal with final reparation was already receiving Government's attention.
- 96.4 During a Parliamentary briefing on 13 September 2000 the Minister of Justice and Constitutional Development advised that the Department of Justice was in the process of preparing a set of proposals for consideration by Cabinet regarding the payment of reparations. Moreover, that this was being done in consultation with the relevant departments of Government and that it was hoped that an announcement could be made in the near future. A copy of the Parliamentary media briefing is annexed hereto marked "SG15".

96.5 In the response by the President to the debate on the state of the nation addressed in Cape Town on 15 February 2001, he indicated that it was expected that the Amnesty Committee would complete its work during March 2001, enabling the Reparation Committee and the TRC to prepare their final reports and to enable the Government to complete its work on the question of final reparations. He further indicated that the Government would meet its obligations with regard to interim reparations until such time as the final report emerged. A copy of this speech is annexed hereto marked "SG16".

96.6 During the 2001 budget speech on 21 February 2001, the Minister of Finance indicated that there was *"unfinished business"* in respect of the recommendations on reparations of the TRC. Moreover, that allocations to the President's Fund by the Department of Justice and Constitutional Development both in 2001/2002 and 2002/2003 would bring the amount available for final reparations to about R800 million. Moreover, that these would be paid in once-off settlements and that the budget would allow the programme to be concluded over the following two years. A copy of the relevant part of the speech is annexed hereto marked "SG17".

- 96.7 On 22 February 2001 the TRC responded to the Minister of Finance's budget speech about reparations acknowledging that the country had an obligation to pay reparations to those identified as victims by the TRC. A copy of the press release is annexed hereto marked "SG18".
- 96.8 During the budget vote 2001/2002 on 12 June 2001 the Minister of Justice and Constitutional Development advised that the TRC had concluded its work and that it was finalising its report. Moreover, that in anticipation of that report recommendations had already been placed before Cabinet regarding final reparations. The Minister further advised that the Government had committed slightly over R800 million for purposes of final reparations and that Cabinet was studying a document which set out proposals as to how to effect final reparations with a view to advising the President, who thereafter would table his proposals to a joint sitting of the House for debate by Parliament. He indicated that this would be done as soon as the President had received the final report of the TRC. A copy of the extracts from the speech is annexed hereto marked "SG19".
- 96.9 During the speech at the end of the consideration of the budget of the Presidency on 22 June 2001, the public was advised that the TRC was approaching the conclusion of its work and that the Government would return to Parliament with proposals on how to build upon the work done by

the TRC, including the critical and complex issues of what the law describes as final reparations. We were further advised that this was a residual part of our process of national reconciliation. A copy of the relevant part of the speech is annexed hereto marked "SG20".

97. The Applicants have exhausted their remedies in terms of the PAI Act. There is no other internal remedy available to the Applicants. This application has been necessitated by the failure on the part of the Respondents to fulfil their obligations toward the victims of gross human rights abuses who had participated in the TRC process.
98. The Honourable Court is therefore respectfully requested to grant the relief as set out in the Notice of Motion to which this affidavit is annexed.

SHIRLEY RENEE GUNN

I certify that the deponent acknowledged to me that she knows and understands the contents of this declaration and that she truly affirm that the contents of this declaration are true.

Thus signed and sworn to before me at CAPE TOWN on this day of JUNE 2002.

COMMISSIONER OF OATHS