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**Our ref. DJ Eloff/MAT4135**

**Your ref.**

23 August 2021

**THE RIGHT HONOURABLE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

Mr Cyril Ramaphosa  
Union Buildings  
Government Avenue, Pretoria

By email: president@presidency.gov.za & presidentrsa@presidency.gov.za  
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**THE RIGHT HONOURABLE MINISTER OF POLICE**

Mr Bheki Cele  
231 Pretorius Street  
7th floor Wachthuis Building  
Pretoria, 0002

By email: GaehlerSMK@saps.gov.za & PhokaneN@saps.gov.za

Dear President Ramaphosa and Minister Cele,

**RE: IMPLEMENTATION OF THE CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT  
ACT NO. 37 OF 2013 IN ORDER TO FACILITATE THE CREATION AND MAINTENANCE  
OF THE CONVICTED OFFENDER INDEX OF THE NATIONAL DNA DATABASE**

1. We write to you on behalf of Action Society, a registered non-profit company and civil rights organisation (hereafter “our client”). Our client acts in the interest of its supporters and the interest of the public through active advocacy for policy change and is driven by a purpose to provide a voice to the voiceless.

## **BACKGROUND TO THIS LETTER**

2. Action Society wholeheartedly supports your statements concerning the fight against crime and violence as part of your State of the Nation priorities. You have described the levels of crime in South Africa as undermining people’s sense of safety and security, and you have confirmed that tackling crime is central to the success of South Africa’s recovery from the Covid-19 pandemic. Our client especially supports your stated focus on ending Gender-Based Violence as a key priority<sup>1</sup> of the South African government.
3. Our client is equally concerned about the unacceptably high crime rate and the poor prosecution statistics in our country and has made it its mission to promote effective crime-fighting and the prosecution of criminals.
4. The extremely negative effects that these circumstances have on the citizens of our country raise important constitutional issues about the responsibilities of your office and of the South African Police Services, both of whom are constitutionally required to do everything in their collective power to combat crime and to protect the citizens of South Africa.
5. It is common cause among all right-minded people that the National Forensic DNA Database of South Africa (the “NFDD”) is an essential and effective weapon in the fight against crime. No one disputes that it has enhanced the ability of the South African Police Services to identify criminals and that it provides considerable assistance to the prosecuting authorities to achieve convictions of those who have been apprehended. There is a considerable body of literature about the effectiveness of a properly implemented and maintained National Forensic DNA Database in the fight against crime.

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<sup>1</sup> ATC210514: Report of the Portfolio Committee on Police on the 2021/22 Budget Vote 28, Annual Performance Plan (App) of the Department of Police (Saps), Dated 12 May 2021

6. Notwithstanding its obvious benefits, the implementation of the NFDD has been fraught with difficulties and delays since its inception in 2015. These challenges have had the result that the fight against crime and Gender-Based Violence has been deprived of the benefit of a fully operational National Forensic DNA Database of South Africa. Unfortunately, this situation persists even today.
7. A fundamental challenge to the implementation of the NFDD arises out of the failure of the government and the Police Ministry to implement all of the legislative provisions contained in the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 (the “Forensic Procedures Act”), enacted by Parliament and promulgated by the President some eight years ago.
8. The particular challenges which are addressed in this letter can be remedied swiftly and easily by your office and by the Police Ministry. It is for this reason that our client has instructed us to write to you.
9. There are two important aspects relating to the implementation of the Forensic Procedures Act that require urgent attention in order to facilitate the proper implementation and operation of the NFDD, so that it may take its rightful place as an important and effective crime-fighting tool in the hands of the South African Police Services and the National Prosecuting Authority.

## **THE LEGISLATIVE PICTURE**

10. As mentioned, this letter concerns the implementation of the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 which has amended the Criminal Procedure Act of 1977 and the South African Police Service Act of 1995. The Forensic Procedures Act was assented to by the President on 27 January 2014.

## **THE FIRST ISSUE REQUIRING REMEDIATION – IMPLEMENTATION OF SECTION 36D(1)**

11. On 1 December 2014 the President of the Republic of South Africa, by Proclamation 89 of 2014, fixed 31 January 2015 as the date on which the Forensic Procedures Act came into operation. The Presidential Proclamation, however, excluded Section 2, to the extent that it

inserts section 36D(1) into the Criminal Procedure Act, from operation. Section 36D(1) of the Criminal Procedure Act has never been implemented.

12. Section 36D(1) provides for the mandatory taking of a buccal samples from arrested, charged or convicted persons in respect of certain offences listed in Schedule 8.
13. Our client appreciates that the logistical difficulties which prevailed in 2015, namely the lack of trained personnel and the unavailability of sufficient quantities of the consumables required for the taking and processing of buccal samples, occasioned the exception contained in the Presidential Proclamation of 1 December 2014.
14. Our client, however, is very concerned that in the seven years that have passed since then, the exception has not been removed and that Section 36D(1) still remains inoperable. In other words, it is still not mandatory for the South African Police Services take buccal samples in the appropriate circumstances, notwithstanding that this is a legislated procedural requirement.
15. Our client considers this to be a serious impediment to the proper implementation and population of the NFDD and it calls upon you to implement section 36D(1) of the Criminal Procedure Act forthwith by proclaiming that it should come into operation immediately.
16. Our client's call is, furthermore, in accordance with the recommendations of the National Forensic Oversight and Ethics Board's Handover Report of April 2020 which recommended that section 36D(1) be brought into operation.
17. Without a mandatory requirement that buccal samples be taken in the defined circumstances, the NFDD will never achieve its full potential in the fight against crime and the citizens of South Africa will continue to suffer the consequences.

## THE SECOND ISSUE REQUIRING REMEDIATION – EXTENSION OF THE OPERATION OF SECTION 7(7)

18. Section 7(7) of the Forensic Procedures Act requires the taking of buccal samples from Convicted Offenders in prison. It provides that *“the National Commissioner of the South African police service must, with the assistance of the National Commissioner of Correctional Services, from the date of commencement of this section, ensure that a buccal sample is taken within two years of any person serving a sentence of imprisonment in respect of any offence listed in Schedule 8 to the Criminal Procedure Act – (a) before the release of the person, if the buccal sample has not already been taken upon his or her arrest; or (b) who is released before their sentence is completed either on parole or under correctional supervision by a court”*.
19. This section forms part of the *“transitional arrangements”* which provided for the transfer of existing forensic databases to the NFDD. It also required cooperation between the National Commissioner of the South African Police Service and the National Commissioner of Correctional Services to ensure that buccal samples would be taken from any person already serving a sentence of imprisonment in respect of Schedule 8 offences. The Commissioners were required to ensure that the buccal samples were taken within two years.
20. Our client understands that the prescribed period of two years was imposed to prevent delays in the implementation of the section. Unfortunately, the requirements of the section were not fulfilled during the specified period and buccal samples were not taken from all persons serving sentences of imprisonment in respect of the scheduled offences. The Convicted Offender Index was therefore never fully populated within the prescribed period.
21. The failure to take the buccal samples within the original two-year period has now given rise to a situation where certain convicted offenders are refusing to provide buccal samples. They justify their refusal by relying on the expiry of the two-year period referred to above. This means that Convicted Offenders, who constitute the most important contributors to an effective NFDD, have not been properly sampled. To make matters worse, members of this essential category of individuals, are being released from prison without buccal samples having been provided and they are therefore not being included in the NFDD.

22. This has the effect that many thousands of samples that would be invaluable in the fight against crime are not being included in the NFDD. With each passing day the situation is compounded.
23. It is well known that Convicted Offenders are more likely to be involved in crime than the general population and that their inclusion in the DNA data base is of paramount importance. As a consequence, the opportunity to include these critical samples in the DNA database is being lost, to the detriment of the crime-fighting capabilities of the South African Police Services and of the National Prosecuting Authority.
24. With the intention of resolving this difficulty in mind, the Police Ministry produced a Draft Bill entitled the Criminal Law (Forensic Procedures) Amendment Bill of 2018 (the "Amendment Bill"). We point out, in order to emphasise the extent of the delay that has occurred already, that the Draft Bill was prepared in 2018 and that it has yet to be placed before Parliament.
25. The Amendment Bill is aimed at amending section 7 of the Forensic Procedures Act so as to avoid the opportunistic reliance by Convicted Offenders on the apparent limit of the two-year period for the taking of buccal samples from the prison population to refuse to cooperate. The Amendment Bill also provides an important mechanism for the relevant authorities to obtain buccal samples where cooperation is refused.
26. We do not agree that there is in fact such a time limitation on the powers of the state to take buccal samples from Convicted Offenders, when the Forensic Procedures Act is considered as a whole, but this is unfortunately how the Act is being implemented on the ground. The result is that Convicted Offenders are being released without being required to provide buccal samples for the NFDD.
27. Our client supports the Draft Bill, but notwithstanding numerous attempts by the Standing Committee, the National Forensic Oversight and Ethics Board and others, the Minister of Police has for the past three years failed and/or refused to place the Draft Bill before Parliament.

28. Our client considers this to be a serious dereliction of duty by the Minister of Police as it runs counter to his obligation to implement the provisions of the Criminal Law (Forensic Procedures) Amendment Act of 2013 and to act in accordance with the best interests of the citizens of this country. Our client requires this dereliction of duty to be remedied forthwith. It is simply unacceptable that this important aspect of the NFDD is being neglected to the detriment of the citizens of South Africa.
29. We have been instructed to point out that our client is not alone in expressing its concerns about this failure by the Minister of Police.
30. In its April 2020 report, signed by Justice Yvonne Makgoro, the National Forensic Oversight and Ethics Board confirmed that it had proposed an amendment during 2017 to the Forensic Procedures Act to remedy the shortcoming in the legislation following the expiry of the two-year transitional period to allow for the continuation of the convicted offender sampling programme. The Board, in its report, confirmed that the Amendment Bill was also recommended for approval by the Justice, Crime Prevention and Security (JCPS) Cluster Directors-General forum during 2017/18.
31. The National Forensic Oversight and Ethics Board reported, furthermore, that its primary focus, stated as a priority, *“remains the extension of the two-year period to allow for all outstanding convicted offenders to be sampled”*. It also emphasised that the *“Convicted Offender Index of the NFDD is [a] vital component of the NFDD as it provides potential links to cold cases and other crimes. If this crucial index is not populated, the NFDD the loses its efficacy as a criminal intelligence tool”*.
32. It has been reported that the Amendment Bill could not be tabled with the JCPS Cluster Cabinet Committee due to the decision of the Minister of Police to place its further processing in abeyance, pending the finalisation of discussions with the Minister of Home Affairs to establish a population DNA database of all citizens of South Africa<sup>2</sup>.

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<sup>2</sup> National Forensic Oversight And Ethics Board Hand Over Report April 2020

33. Needless to say, nothing has come of the national database, which in all likelihood is unconstitutional, but this idea has inexplicably permitted the Amendment Bill to languish since 2018. The direct and extremely negative effect of the delay is that the taking of buccal samples from Convicted Offenders has not been continued.
34. On 2 March 2021 Mr Rapea from the CSPA informed the Portfolio Committee that the Chief State Law Advisors had provided pre-certification for the Amendment Bill, that the Department for Performance Planning, Monitoring and Evaluation had provided its Socio-Economic Impact Assessment and that the Cabinet had been asked to allow the Bill to be processed directly through Parliament. The Amendment Bill, however, has yet to see the light of day and has not yet been presented to Parliament.
35. It is apparent that there is unanimous support for the Amendment Bill, but that this notwithstanding, the Amendment Bill, inexplicably, has not yet been introduced to Parliament.
36. Our client is, quite frankly, extremely concerned that in these circumstances the Amendment Bill, which is so crucial to the successful operation of the NFDD, remains in limbo. Our client is also of the view that the failure to extend the two-year period is contrary to the intention behind the Forensic Procedures Act, and is furthermore both irrational and unconstitutional.
37. In addition, the failure to take all necessary steps to ensure that Convicted Offenders' DNA is collected and recorded in the NFDD is contributing materially to your government's failure to address in a meaningful way the scourge of Gender-Based Violence in South Africa.
38. As mentioned, the Amendment Bill also caters for an additional issue which relates to the enforceability of the requirement to provide buccal samples. Certain Convicted Offenders have refused to provide their samples and the Amendment Bill contains provisions which are aimed at overcoming this problem. This also undermines the effectiveness of the DNA data base project.

39. A copy of the Criminal Law Forensic Procedures Amendment Bill and the Memorandum on the objects of the Criminal Law Forensic Procedures Bill 2018, which accompanies and motivates the reasons for the Amendment Bill, is annexed hereto as “A”. The memorandum, provided by the Police Ministry itself, sets out a comprehensive motivation for the necessity for the amendment.

## CONSTITUTIONAL RIGHTS

40. The failure to apply the existing legislation, which requires the establishment and proper implementation of a National Forensic DNA Database, constitutes a failure of the Presidency’s and the Police Ministry’s constitutional duties owed to the South African population in terms of the Constitution and the Criminal Law Forensic Procedures Amendment Act. It also constitutes a failure to act in accordance with the requirements of section 15J of the Criminal Procedure Act, which requires the proper implementation of the Convicted Offender Index.
41. In addition, and more generally, the failure to take all reasonable steps to act in accordance with the Constitution “*to secure the well-being of the people of the Republic*” and to “*enable the police service to discharge its responsibilities effectively*” directly infringes the provisions of sections 41 and 205 of the Constitution.
42. These failures, furthermore, infringe the rights of our client and of the population of South Africa in general as afforded to them under the Bill of Rights.
43. Should these failures of the constitutional obligations of the Presidency and of the Minister of Police not be remedied within 30 days of the date of this letter we hold instructions to approach the Courts, to seek the appropriate urgent relief, to compel the taking of the necessary steps to remedy the situation. Such relief may also include seeking a declaration of rights in terms of section 38 of the Constitution.
44. One example of the effectiveness of the national DNA data base is the case of *S v Mki*, Western Cape High Court Case No. 49/2016. It also illustrates the potentially fatal consequences of a failure to implement the Convicted Offenders Index of the database. Several rapes occurred in the Cape Peninsula area between 2011 and 2015 and a number of

innocent people were identified as suspects based on the incorrect identification by the victims. Five of these people were tortured and killed by the community on the basis of these incorrect identifications. During 2016, after matching reports on the DNA database, 26 cases of rape were linked to a single perpetrator.

45. In the meanwhile, Mki was convicted on a charge of common assault, for which he received a suspended sentence. His buccal sample was included in the Convicted Offenders Index, as a new entrant, and he was then linked to the DNA obtained as a consequence of these rapes. Mki was arrested and pleaded guilty to 12 counts of robbery with aggravating circumstances, 6 counts of attempted robbery with aggravating circumstances, 3 counts of attempted robbery, 2 counts of robbery, 4 counts of assault with intent to do grievous bodily harm, 27 counts of kidnapping and 30 counts of rape. He was sentenced to 15 terms of life imprisonment and to 12 terms of ten years' imprisonment. This predator has been removed from society because of the operation of the Convicted Offenders Index of the NFDD. His case serves as an extreme, but important example of the necessity for the implementation of all aspects of the NFDD and for the inclusion of existing Convicted Offenders' buccal samples into that Index.
46. It is plain that the resolution of this issue is urgent. Thousands of Convicted Offenders are being released from incarceration without their buccal samples having been taken, potentially leaving them unlinked to previous crimes and unlinkable to future crimes. It cannot be gainsaid that the failure to capture this data undermines an essential element of the entire project.
47. In the meantime, the women and children of South Africa are being subjected to what has been described as a "*veritable war on women and children*" and there is no sign that this is abating.
48. Both of you gentlemen, Mr President and Mr Minister, are able to do something meaningful to help to address this situation and all that is required to achieve this is that you urgently implement your government's own legislation to its full effect.

## DEMANDS

49. In summary, our client requires you as the President and/or the Police of Minister to take the following steps as a matter of urgency:
- 42.1 to issue a proclamation implementing section 36D(1) of the Criminal Procedure Act No. 51 of 1977 within 30 days of the date of this letter;
- 42.2 to ensure that the Draft Bill is placed before Parliament for consideration by that body within 30 days of the date of this letter.
50. We trust that it will not be necessary to approach the Courts in this regard and that we will receive your favourable responses by return of post or, preferably, by way of electronic mail.

Yours faithfully,



**HURTER SPIES INC.**

**Daniël Eloff**

**TO: THE COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES**

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