IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO. 15320/09

In the matter between:

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Applicant

and

CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION	First Respondent
KHULUMANI SUPPORT GROUP	Second Respondent
INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE	Third Respondent
INSTITUTE FOR JUSTICE AND RECONCILIATION	Fourth Respondent
SOUTH AFRICAN HISTORY ARCHIVES	Fifth Respondent
HUMAN RIGHTS MEDIA CENTRE	Sixth Respondent
FREEDOM OF EXPRESSION INSTITUTE	Seventh Respondent
RYAN ALBUTT	Eighth Respondent
GERHARDUS JOHANNES TALJAARD	Ninth Respondent
ALEXANDER GEORGE WHITEHEAD	Tenth Respondent
AREND CHRISTIAAN DE WAAL	Eleventh Respondent

WILLEM JACOBUS PETRUS JACOBS Twelfth Respondent

HANS JACOB WESSELS Thirteenth Respondent

RYNO ADRIAAN ROSSOUW Fourteenth Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE that the above Applicants intend to apply to this Honourable Court for leave to appeal to a Full Bench of the North Gauteng High Court, alternatively the Supreme Court of Appeal, against the whole of the judgment and order of this Honourable Court in the above matter, delivered on the 28 April 2009.

BE PLEASED TO TAKE NOTICE FURTHER that the said application will be based on the following grounds:

1. The Court erred in making the orders in paragraph (a) read with paragraph (b) and (d) of the order made by the Court in that it anticipated the relief sought in Part B of the Application as the orders in paragraphs (a) and (b), read together, are not susceptible of alteration by a court of similar standing, are definitive of the

rights of the parties, and have the effect of disposing of a substantial portion of the relief sought in Part B of the application;

2. The Court erred in granting the orders made in that though paragraph (a) of the order in isolation does not dispose of all the issues between the parties, the inclusion of paragraph (b) and (d) of the order tilts the balance of convenience in favour of a consideration of the entire interim order on appeal, because addressing the interim order in its totality will lead to a just and reasonably prompt resolution of the real issue between the parties.

3. The Court has misdirected itself in the general trend and tone of its findings and conclusions, both on matters of law and issues of principle, giving a final effect to the judgment and orders made, by *inter alia*,

3.1 applying the "*unius inclusio est alterius exclusio*" rule of statutory construction in finding that the application of this rule would not "offend any of the values and principles enshrined in our Constitution" and by holding that it was appropriate to utilise the said rule. The Court ought to have found that the application of this rule was in conflict with not only the constitutional principle of separation of powers

but also with the constitutional design and framework contemplated in Chapter 5 of the Constitution, as well as the objects of the powers and functions conferred on the First Respondent by section 84(2)(j) of the Constitution;

3.2 finding that the Legislature did not intend to exclude the section 84(2)(j) power from the definition of "administrative action" as contemplated in section (1) of the Promotion of Administrative Justice Act 3 of 2000 in circumstances where the Court ought to have found that this constitutional power of the First Respondent to grant pardons, reprieve offenders and remit fines has been recognised by the courts as the discretionary exercise of a constitutional prerogative which is constrained only by section 1(c) of the Constitution;

3.3 finding that the practical effect of parole and pardon are the same, and holding that there is no justification for differentiating between the two in granting a hearing to victims of crime prior to a prisoner being released on parole yet denying the same right to a victim in the case of an application for a pardon. The Court ought to have found that the parole and pardon processes are fundamentally different in that the former is defined by statute whilst the

type of pardon that is the subject matter of this application (as opposed to statutory pardons) is consequent on the application of section 84(2)(j) of the Constitution, being an original constitutional discretionary power conferred on the First Respondent alone. The Court ought further to have found that the First Respondent is not constrained in his election of the process for considering and granting pardons as contemplated in section 84(2)(j) of the Constitution, provided that the process complies with section 1(c) of the Constitution;

3.4 prescribing the sort of information that the First Respondent was obliged to consider prior to granting a pardon to include the inputs of victims and/or families of the victims and information from an interested party. The Court ought to have found it could not prescribe the form and content of the powers conferred by section 84(2)(j), or any modality to be applied by the First Respondent in the exercise of the section 84(2)(j) power other than to ensure compliance with section 1(c) of the Constitution

3.5 justifying this intrusion into defining what constitutes relevant information for purposes of exercising a section

84(2)(j) power on the basis that this approach accorded "with the basis values and principles enshrined in section 195 of the Constitution and give effect to the right contemplated in section 33 of the Constitution". The Court ought to have found that the values and principles enshrined in Chapter 10 of the Constitution related specifically to the **public administration**, and that section 33 of the Constitution has no relevance to the exercise of an original discretionary constitutional power conferred in terms of section 84(2)(j) of the Constitution;

3.6 highlighting the transparency and participatory nature of the amnesty process. In so doing the Court selectively focussed on the portion of the address by the First Respondent in Parliament on 21 November 2007 which reads "...and uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process" to the exclusion of the other relevant criteria relied on by the former President in his address;

3.7 emphasising that the former President had made a "lawful public commitment". In so doing the Court misdirected itself

by ignoring the context of the full text of that address, thus distorting the nature of the undertaking by the then President.

4. The Court erred in relying on the above findings and conclusions in that it ought to have realised that, based on this order, further dilatory interlocutory applications could be launched seeking:

4.1 inclusion in the list of persons referred to in paragraph (b) and (c) of the order;

4.2 clarity on which category of persons the Court had in mind with respect to paragraph (d) of the order, and reasons why the Court considers them to be parties with a direct and substantial interest in this matter;

4.3 clarity on the Court's finding that the Promotion of Administrative Justice Act 3 of 2000 applies to applications made in terms of section 84(2)(j) of the Constitution;

4.4 clarity on whether the parole or amnesty processes have relevance only to the applications for pardon that have been recommended by the Special Reference Group or whether

these processes are relevant to all pardons, or whether they have relevance only to pardons that include a political motive as justification for the offence committed;

4.5 clarity on whether, as argued by the Applicants, the President is compelled to disclose the contents and motivations of the pardon applications.

5. The Court erred in that it ought to have realised that compliance with its judgment and order required that immediate, prejudicial and irreversible steps, having final effect, would have to be taken by the First Respondent, in that the First Respondent has been prevented from discharging his constitutional obligations to consider these and possibly other applications for pardon indefinitely.

6. The Court erred in granting this order in that it ought to have declined to interfere with the powers conferred on the First Respondent in terms of section 84(2)(j) of the Constitution on the basis that these are original constitutional powers that only the First Respondent may exercise at his discretion, provided he complies with section 1(c) of the Constitution which binds the First Respondent to *inter alia* comply with the requirements of the rule

of law and apply the principle of legality as he discharges his functions.

7. The Court erred in failing to confine its order to paragraph (a) of the order made, and having done so, to prescribe time frames within which Part B of the application ought to be finalised. This would clearly have indicated that the interests of justice and the public interest required that the President expeditiously finalise the applications for pardon that are before him. Instead, the order granted compromises the expeditious finalisation of the applications for pardon that have been recommended by the Special Reference Group in circumstances where the applicants themselves had not sought the orders made in (b) and (d).

BE PLEASED TO TAKE NOTICE FURTHER that this application will be made on a date determined by the Registrar of this Honourable Court.

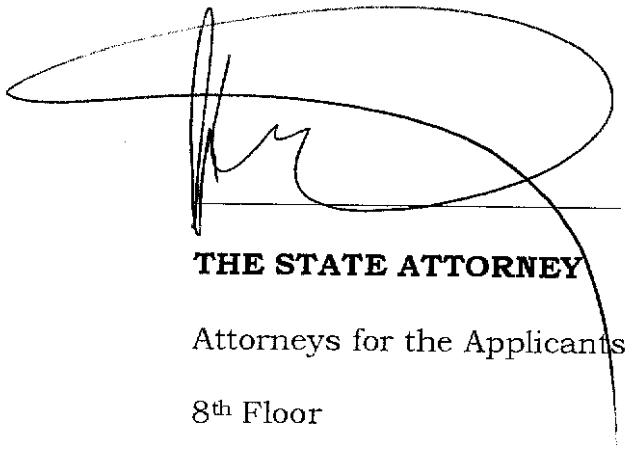
DATED AT PRETORIA ON THIS 20th DAY OF MAY 2009.

of law and apply the principle of legality as he discharges his functions.

7. The Court erred in failing to confine its order to paragraph (a) of the order made, and having done so, to prescribe time frames within which Part B of the application ought to be finalised. This would clearly have indicated that the interests of justice and the public interest required that the President expeditiously finalise the applications for pardon that are before him. Instead, the order granted compromises the expeditious finalisation of the applications for pardon that have been recommended by the Special Reference Group in circumstances where the applicants themselves had not sought the orders made in (b) and (d).

BE PLEASED TO TAKE NOTICE FURTHER that this application will be made on a date determined by the Registrar of this Honourable Court.

DATED AT PRETORIA ON THIS 20th DAY OF MAY 2009.



THE STATE ATTORNEY

Attorneys for the Applicants

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Ref: 1779/2009/Z8/PM

Tel: 012 – 309 1564

TO:

THE REGISTRAR

NORTH GAUTENG HIGH COURT

PRETORIA

Received a copy hereof on

this the day of May 2009

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AND TO:

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CAPE TOWN

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Received a copy hereof on

this the 20th day of May 2009

AND TO:

SNAID & EDWORTHY ATTORNEYS

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Received a copy hereof on

this the day of May 2009

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AND TO:

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Received a copy hereof on

this the day of May 2009

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IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT. PRETORIA)

CASE NO: 15320/09

DATE:

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

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

(3) REVISED.

28/4/2009

DATE SIGNATURE

IN THE MATTER BETWEEN

CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION	1ST APPLICANT
KHULUMANI SUPPORT GROUP	2ND APPLICANT
INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE	3RD APPLICANT
INSTITUTE FOR JUSTICE AND RECONCILIATION	4TH APPLICANT
SOUTH AFRICAN HISTORY ARCHIVES	5TH APPLICANT
HUMAN RIGHTS MEDIA CENTRE	6TH APPLICANT
FREEDOM OF EXPRESSION INSTITUTE	7TH APPLICANT
AND	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS	RESPONDENTS

JUDGMENT

SERITI, J

1. INTRODUCTION

This matter came to Court by way of urgency.

In the notice of motion, the Applicants in terms of Part A thereof, are seeking an order in the following terms:

"(2) The first respondent is interdicted from granting any pardon in terms of the 'Special dispensation for Presidential pardons for political offences' until such time as the proceedings described in Part B below have been finally determined."

In Part B, the Applicants are seeking for an order in the following terms:

"1. The first respondent is interdicted from granting any pardon in terms of the 'Special dispensation for Presidential pardons for political offences'.

2. (Alternatively to paragraph 1) The first respondent is interdicted from granting any pardon in terms of the 'Special dispensation for Presidential pardons for political offences' unless and until the victims of the offence(s) in question and other persons who were affected by such offence(s):

2.1 have been given access to the relevant application for a pardon and the proceedings and recommendations of the Pardons Reference Group in that regard; and

2.2 have been given an opportunity to make representations in that regard to the first respondent."

Initially, there were only two Respondents, but during the last hearing Messrs Ryan Albutt, Gerhardus Johannes Taljaard, Alexander George Whitehead, Arend Christiaal de Waal, Willem Jacobus Petrus Jacobs, Hans Jacob Wessels Reyno Adriaan Rossouw and Benjamin Johannes van der Westhuizen, made an application to be joined as Respondents and their applications were granted and there was no opposition to their applications.

2. FOUNDING AFFIDAVIT

It was attested to by Mr Hugo van der Merwe, the Programme Manager of the First Applicant.

He alleges that he has authority to depose to the affidavit on behalf of all the Applicants and the necessary confirmatory affidavits are attached.

The First Applicant ("CSVR") is an association not for gain and incorporated under section 21 of the Companies Act 61 of 1973. Its purpose is to prevent violence in all its forms, heal its effects and build sustainable peace and reconciliation in South Africa.

The Second Applicant is an unincorporated association and non profit organisation registered under the Non Profit Organisations Act 71 of 1997 – its purpose is to bring survivors and families of victims together to create a collective presence within

the community through the processes of the Truth and Reconciliation Commission, and also to advocate on behalf of victims and survivors of gross human rights violations.

The Third Applicant is an association not for gain incorporated under section 21 of the Companies Act *supra*. It utilises the experience gained by its staff during the South African Truth and Reconciliation Commission process to assist countries pursuing accountability for past mass atrocity or human rights abuse.

The Fourth Applicant is also an association not for gain incorporated under section 21 of the Companies Act *supra*. It promotes nation building within constitutional democracies and provide solutions to problems that continue to undermine peaceful transition both in South Africa and elsewhere.

The Fifth Applicant is a registered non profit organisation. It is an independent human rights archive dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa.

The Sixth Applicant is a registered organisation dedicated to the compilation of oral history that enables organisations and individuals to tell their stories to the public in a variety of media forms through projects promoting human rights awareness.

The Seventh Applicant was established in 1994 to protect and foster the rights of freedom of expression and access to information and to oppose censorship.

He further alleges that the President has established a "special dispensation" for the granting of pardons to persons who have been convicted of offences allegedly committed in pursuit of political objectives.

The initial role in this process was performed by the Reference Group which is a group consisting solely of members of political parties.

The Reference Group has received and considered applications for pardons, and has made recommendations to the President. It has operated in secret and it has refused to identify who has made application for a pardon, to disclose the contents and motivations of the pardon applications and to disclose which applications it has recommended. It has refused to give the victims of or other persons affected by the offences in question an opportunity to make representations as to whether or not a pardon should be granted, and if so on what conditions.

The President has not disclosed and is refusing to disclose which applications for pardon he is considering. He has refused to give the victims or other persons affected by the offences in question an opportunity to make representations as to whether or not a pardon should be granted in the said applications.

The decision of the President regarding the applications for pardon is imminent.

The victims or persons affected by the offences in question cannot approach the Court for relief as it is not known who the Applicants for pardon are.

It is further stated that the Applicants seek a declaration that the President is not entitled to grant pardons under such circumstances, and an interdict preventing the President from doing so.

It is further alleged that at a joint sitting of Parliament on 21 November 2007, then President Mbeki announced a special process for the handling of pardon requests made by "people convicted for offences they claim were politically motivated and who were not denied amnesty by the TRC".

The President then asked each political party represented in Parliament to appoint a representative to serve on a Pardons Reference Group ("RG") charged with considering pardon requests and submitting recommendations to the President – President indicated that he would not be bound by the advice of the Pardons Reference Group but would give serious consideration to its recommendations.

The President, in addition to observing the rationality obligation, stressed the importance of dealing with pardon requests "in an open and transparent manner, uniformly and in strict compliance with predetermined procedures and criteria".

It was determined that applications for pardons will be received from 15 January 2008 up to 15 April 2008. The latter date was later extended. Certain categories of prisoners were excluded from the process. The President confined the ambit of the pardons to those prisoners who were convicted for political offences committed before 16 June 1999.

The multi-party Pardons Reference Group was formally constituted on 18 January 2008 and the Terms of Reference were adopted. Dr Tertius Delport was elected Chairperson.

Immediately after the formation of the Pardons Reference Group, the First Applicant together with other Non Governmental Organisations made efforts to engage with the Pardons Reference Group to address issues of victim participation, transparency and public disclosure.

During February 2008 he contacted Dr Delport via e-mail offering the assistance of the First Applicant to the Pardons Reference Group and also requested a meeting with the Group. Dr Delport advised him that the Group is not willing to meet with civil society representatives but would consider written submissions.

On 5 May 2008 he sent an e-mail to Dr Delport requesting a list of the applicants who had submitted pardon applications. On 6 May 2008 Dr Delport responded and stated that the Pardons Reference Group has not decided whether to make the list public or not,

and he indicated that he would raise the request at their meeting on 12 May 2008. His request was formally refused. The list of pardon applicants was only disclosed after an application under the Promotion of Access to Information Act had been launched by the Fifth Applicant.

The list of the applicants for pardon include Ferdi Barnard (former Civil Co-operation Bureau operative who murdered David Webster), former apartheid police chief General Johann van der Merwe and his four co-accused in the attempted murder of Rev Frank Chikane, Adriaan Vlok (former law and order minister), Chris Smit (former police major general) and Gert 0tto and Manie van Staden (former police colonels).

0n 20 June 2008 a coalition of non-governmental organisations, including the Applicants, delivered letters to all the Pardons Reference Group members to express concerns over the difficulty of discovering and engaging with the procedures of the Pardons Reference Group and they requested a meeting with them. The letter identified five principal concerns, namely:

1. the failure to disclose the Pardons Reference Group Rules and Procedures;
2. the failure to clearly define the category of "politically motivated offences" that may result in pardon recommendations;
3. the importance of full disclosure by pardon applicants;
4. the Pardon Reference Group's obligation to improve public disclosure and procedural transparency; and
5. the glaring lack of victim consultation.

No response was received to the coalition letters – on 30 June and 1 July 2008 he sent letters to Mr Gawula, a member of the Pardons Reference Group, and to Dr Delport requesting a meeting.

0n 15 July 2008 the NGO coalition met with Dr Delport and Messrs Gawula and Sibanyoni. Representatives from several NGO's and civil society organisations voiced concerns over the exclusion of victims from the Pardons Reference Group's process, the refusal to disclose the names of pardon applicants and the general opacity of the whole process.

During the meeting mentioned above Dr Delport stated that they utilised criteria from the Groote Schuur Minute, the TRC legislation and the Norgaard Principles when considering pardon applications, but did not provide a definitive list of criteria. He further advised them that the Pardons Reference Group have considered 171 applications for pardons of which 16 have been recommended to the President for pardon.

The coalition suggested that given the relatively small number of applications recommended to the President for pardon, victim consultation in cases considered for recommendation to the President would not be unduly cumbersome. Dr Delport requested the coalition to reduce in writing its request and informed them that the Pardons Reference Group would consider the coalition's requests at a meeting to be held on 28 July 2008.

On 17 July 2008 the coalition addressed and delivered its written requests and recommendations to the Pardons Reference Group. In the letter it was mentioned, *inter alia*:

(a) that the coalition was concerned that the Pardons Reference Group did not seek the representations of victims;

(b) that the Pardons Reference Group has considered the applications for pardons, and since the President is likely to act on such recommendations when considering pardons, the interests of the victims were manifestly implicated. Victims and organisations representing victims should have been given an opportunity to make representations in those cases where pardons are to be recommended;

(c) there might be certain cases before the Group which were of national significance. In such cases there might be other interested entities who wish to place their submissions before the Group;

(d) victims and victim groups could only make meaningful representations if they were aware of the cases before the group and the motivations and endorsements put forward for pardon;

(e) Dr Delport should approach the President and request him not to issue any pardons in respect of the sixteen cases already referred to him pending the outcome of this process.

In a letter dated 7 August 2008 Dr Delport informed the coalition of NGDs of the Group's conclusion that neither the Terms of Reference nor any law compels the Group to "call for inputs by the public (in particular the victims)", and the Group would not accede to requests to incorporate victim input into the process. The coalition was advised to direct its concerns to the Office of the President.

In a letter dated 12 August 2008 addressed to Dr Delport, he, on behalf of the coalition, expressed disappointment with the Group's unwillingness to consider victims' inputs and reiterated the coalition's request for a list of pardon applicants and the Group's rules and procedures.

On the same date the coalition wrote a letter to the President expressing its concerns and urging him not to issue pardons in terms of the special dispensation until such time that the dispute over the process was resolved. On 19 August 2008 the President's office confirmed receipt of the letter and indicated that a response would follow. No further response from the President was received.

On 19 August 2008 the South African Human Rights Commission wrote to the President and raised almost similar concerns raised by the coalition. It stated, *inter alia*,

"The main thrust of the concerns raised has been the lack of any participation of victims in the process of considering the numerous applications received by the Reference Group. Our understanding is that notwithstanding that the final decision on any pardon application is ultimately taken by the President, the process that generates a recommendation is sufficiently important that victims of serious human right violations should at the very least have the opportunity to engage with the pardons process."

On 20 August 2008 the Applicants sent letters to all political parties with representatives serving on the Pardons Reference Group raising their concerns over the lack of transparency of the process and lack of request of victims' inputs, and requesting meetings with the party leaders.

Some of the parties' representatives responded and stated that they support the Pardons Reference Group's stance and none of them were sympathetic to the concerns of the coalition.

On 8 September one of the Applicants received a response to its letter addressed to the Democratic Alliance. The response was from Dr Delport who indicated that he was responding on behalf of the Pardons Reference Group and he indicated amongst others that:

(i) the Group is of the opinion that the present process was not designed to be a judicial or *quasi*-judicial enquiry and unlike the TRC, the Group is not empowered to gather information, receive evidence and call witnesses;

(ii) the Group, by its nature, is clearly called upon to advise the President from a political perspective, and particularly in terms of a quest for national reconciliation;

(iii) the President does not, in the normal course of dealing with applications in terms of section 84(2)(j) receive inputs from the victims and is under no obligation to do so and therefore also not obliged to do so in the present instance;

(iv) the Group is similarly under no obligation to hear the evidence of victims, but if the President from a policy point of view decides that the Group ought to hear such evidence and instructs the Group accordingly, the position will naturally change.

On 3 October 2008 and 17 November 2008, the NGO coalition addressed letters to the President and the Minister of Justice and Constitutional Development respectively. In the said letter, the concerns of the coalition regarding the Group's process were raised. In the letter to the President, the latter was urged to refrain from any action on the pardon applications until the concerns of the coalition were resolved.

On 9 December 2008 the Applicants' attorney addressed a letter to the President wherein the President was urged not to pardon any of the perpetrators who had applied for pardon prior to considering submissions from relevant victims.

After several exchange of correspondence between their attorney and the office of the President and the Minister of Justice and Constitutional Development, the latter, on 10 March 2009 advised their attorney that he has made certain recommendations to the President. The Minister further advised them that the remaining applications and recommendations of the Pardon Reference Group were expected to be submitted to the President by Friday 13 March 2009.

On the same Friday, a letter from the President's office was received by their attorney. In the said letter, it was stated, *inter alia*, that the victim's submissions were not nccessary.

3. ANSWERING AFFIDAVIT

It was attested to by Mr K M Motlanthe, President of the Republic of South Africa.

He alleged that he now has the information and capacity to finalise the pardon application referred to herein.

None of the applicants have adduced evidence to show that they are victims of conflicts of the past in their own rights.

When he exercises his powers in terms of section 84(2)(j) of the Constitution, the victims and/or third parties have no right to a hearing.

His predecessor, when establishing the Pardons Reference Group, contemplated *inter alia* that he had to deal with each application for pardon individually, taking into account recommendations made to him by the Pardons Reference Group. The Pardons Reference Group was established to assist the President in the consideration of applications for a pardon. Its primary function was to consider applications for pardon that were submitted to the Department of Justice and Constitutional Development. Thereafter, it was required to make recommendations in regard to each of the applications.

He intends to deal with applications for pardon which have been placed before him. He also intends to consider recommendations made to him by the Pardons Reference Group.

The rights and interests of victims of offences for which pardon is sought have already been taken into account in the process which led to the trial, conviction and sentencing.

He further stated that-

"It is worth mentioning that the fact that the Reference Group did not take into account any representations from victims of crimes or their families which they may have wished to place before them, does not necessarily mean that I am precluded from taking these representations into account."

4. ANSWERING AFFIDAVIT OF FIRST INTERVENING PARTY

The affidavit was attested to by Mr Paul Snaid, an attorney for Mr Ryan Albutt, the first intervening party.

The first intervening party is an applicant for a presidential pardon pursuant to the special dispensation process which the Applicants are challenging.

He described in some detail the offence for which Mr Albutt was convicted and sentenced. The latter was alleged to have been a member of AWB, when he, together with other people, attacked and assaulted people who were on strike in their area.

He further alleges that he assisted Mr Albutt to complete the pardon application and to meet and discuss with some of the people who were affected by the events for which Mr Albutt was sentenced.

The meeting between Mr Albutt and the victims was facilitated with the assistance of the local ANC officials.

An affidavit attested to by Mr Neville Mompathi, Secretary of the African National Congress, Northern Cape was attached.

In the said affidavit, Mr Mompathi, *inter alia*, confirms a meeting that took place between Mr Albutt and some of the victims at prison. He also supports that Mr Albutt's application for pardon be granted.

5. ANSWERING AFFIDAVIT BY MR GERHARDUS JOHANNES TALJAARD MADE ON HIS BEHALF AND ON BEHALF OF MESSRS ALENDER GEORGE WHITEHEAD, AREND CHRISTIAAL DE WAAL, WILLEM JACOBUS PETRUS JACOBS, HANS JACOB WESSELS AND REYNO ADRIAAN ROSSOUW. THE SECOND TO SIXTH INTERVENING PARTIES

It was attested to by Mr Gerhardus Johannes Taljaard.

He alleges that on 4 April 2008 he, together with the other intervening parties, duly submitted their applications for Presidential pardon to the Department of Justice and Constitutional Development. They believe that their applications are in the process of being considered by the Pardons Reference Group.

They expect the Reference Group to make recommendations to the State President shortly.

Together with the other intervening parties they were found guilty on 12 January 2005 on charges of culpable homicide and public violence and they were each sentenced to eight years imprisonment. They appealed their convictions and sentences and their appeals were dismissed. As they were out on bail, they started serving their sentences during January 2008.

Victim participation is not a prerequisite in a Presidential pardon process. They have notified the widow and family members of the deceased in the culpable homicide charge that they have applied for the Presidential pardon. There are no valid reasons for interdicting the President from finalising the Presidential pardon process.

He further alleged that-

"The remedy now being relied on is premature as, at this stage, it is not clear that there was indeed no victim participation in the pardons that are considered and about to be finalised. That will only become clear once specific pardons had been granted and it appears that the victims concerned had not been informed."

There is a further respondent who joined the proceedings, but his answering affidavit is basically the same as the ones of Respondents three to nine and I will not deal specifically with his affidavit.

6. REPLYING AFFIDAVIT : RE FIRST TO NINETH INTERVENING PARTIES

It was attested to by Mr Hugo Van der Merwe, the Programme Manager of the First Applicant.

He pointed out that Mr Ryan Albutt is a supporter of the Afrikaner Weerstandsbeweging who has applied for Presidential Pardon.

In his application for pardon, he did not disclose in full his participation in the offences for which he, together with other intervening parties, were convicted for.

He referred to the remarks of the Supreme Court of Appeal in the matter of *S v Whitehead and Others* 2008(2) All SA 257 (SCA), in which remarks the activities of the intervening parties are set out.

He further alleges that since the Special Dispensation was shrouded in secrecy and since the Pardons Reference Group, with the approval of the President, refused to disclose the contents of political pardon applications or seek out the views of victims or other interested persons, nobody was able to highlight the aspects of the crimes committed by Mr Albutt and the other intervening parties for the benefit of the Pardons Reference Group.

In reply to the other intervening parties' allegations, he stated, *inter alia*, that there were some 2 300 applicants for political pardons. The Pardons Reference Group refused to disclose who had applied for pardons, in respect of what crimes pardon had been

applied for, the motivations for the pardon applications and who the Group had recommended for pardon.

After the Fifth Applicant had launched an application under the Promotion of Access to Information Act, a list containing names of the political pardon applicants was supplied some two working days before the expiry of the mandate of the Pardons Reference Group. The Applicants do not know who the Group have recommended for pardon, and consequently Applicants do not know which victims will potentially be affected by the Special Dispensation on Political Pardons.

The framework for the Special Dispensation outlined by President Mbeki in a joint sitting of Parliament on 21 November 2007, specifically called for openness and transparency. The President further stated that the process will be guided by values and principles enshrined in the Constitution as well as the "principles, criteria and spirit" of the Truth and Reconciliation Commission ("TRC").

7. FINDINGS

7.1 *Locus standi*

Section 1(a) of the Constitution of the Republic of South Africa, 1996 ("The Constitution") reads as follows:

> "1. The Republic of South Africa is one sovereign, democratic state founded on the following values:

(a) human dignity, the achievement of equality and the advancement of human rights and freedoms."

Section 84(2) reads as follows:

"The President is responsible for ...

(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures."

Section 38 provides that

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

The Respondents' Counsel in their written submissions and during oral argument submitted that the Applicants have no *locus standi* to bring this application.

In *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) at 135E-F (paragraph 15) YACOOB, J when dealing with the question of standing said:

> "Subsection (d) expressly allows court proceedings by individuals or organisations acting in the public interest. Public interest standing is given in addition to those provisions that allow for actions to be instituted on behalf of other persons and on behalf of a class. Subsection (d) therefore connotes an action on behalf of people on a basis wider than the class actions contemplated in the section."

See also *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) at 225B-C and *Campus Law Clinic, University of KZN v Standard Bank of SA* 2006 6 SA 103 (CC) at 112C-E para 20.

All the Applicants in the founding affidavit allege that they are acting in the public interest. Their founding documents allow them to act in the public interest.

Section 38(c) allows a person or organisation to approach a Court if the latter is, *inter alia*, acting on behalf of a group or class of persons.

In this case the Applicants brought this application on behalf of a group of victims who might have a right to be heard (as alleged by the Applicants) by President prior to President considering pardons.

Applicants might also act on behalf of other persons as provided for in section 38(b) mentioned above.

I am of the view that the Applicants have standing in this matter as provided for in one or more of the subparagraphs of section 38.

7.2 Non-joinder

The Respondents' Counsel submitted that the application is flawed on account of non-joinder. It was further submitted that all the applicants for pardon should have been joined by the Applicants in this action.

Apparently over two thousand prisoners, who are serving their sentences at different prisons, have applied for pardon.

A list of the said prisoners was made available to the Applicants, but not a list of those that the Pardon Reference Group has recommended that they should be released on pardon was not given to the Applicants in this matter.

I do not believe that it was necessary to serve these papers on all the pardon applicants prior to the hearing of this application.

It was, in my view, necessary to serve these papers on the pardon applicants who have been recommended for release on pardon, but that was not possible as the Reference Group failed to provide the Applicants with such a list.

Failure to serve these papers on the prisoners recommended for release cannot be fatal to this application.

7.3 Powers of the President

The next question I would like to consider is the power conferred on the President by section 84(2)(j) of the Constitution mentioned above.

The Respondent's Counsel submitted that the President has unfettered discretion to carry out his constitutional obligations as he deems fit. President's discretion is not limited.

On the other hand, the Applicants' counsel submitted that the granting of a pardon constitutes an "administrative action" and is subject to review in terms of Promotion of Administrative Justice Act 3 of 2000.

Section 1 of the latter Act contains a definition of an "administrative action", and also mentions powers or functions which are excluded from the definition of an administrative, and in that regard it reads as follows:

"... but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e) ..."

Section 84(2)(j) is not mentioned as one of the powers excluded from the definition of "administrative action".

There is a rule of construction in our common law called *unius inclusio est alterius exclusio*, which loosely translated means the express mention of the one is the exclusion of the other. The said rule can be of assistance in interpreting contents of a document or provision in a statute. In *Consolidated Diamond Mines v Administrator SWA* 1958 4 SA 572 (AD) at 648H, STEYN, JA when discussing the said rule said-

"It affords, I think, no more than a *prima facie* indication of the legislature's intention."

In *Makholiso and 0thers v Makholiso and 0thers* 1997 4 SA 509 (TkSC) at 517D-E PICKERING, J said:

"Furthermore, although I am mindful of the fact that the maxim *inclusio unius est alterius exclusio* is not a rigid rule of statutory construction and that it must at all times be applied with great caution. [See *Administrator, Transvaal and 0thers v Zenzile and 0thers* 1991 1 SA 21 (A) at 37H." See

also *Minister of Health NO v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) at p373A-H (paras 124, 125 and 126).]

My view is that the application of the above-mentioned rule of statutory construction in this case will not offend any of the values and principles enshrined in our Constitution, and it is appropriate to utilize the said rule of construction.

To me it appears that the legislature did not intend to exclude the President's power of Pardon from the definition of an "administrative action". 0therwise, the legislature would have included section 84(2)(j) in section 1(a)(a) of the Promotion of Administrative Justice Act, *supra*.

7.4 Does victims of crime have a right to be heard prior to President exercising powers in terms of section 84(2)(j)

7.4.1 The Respondents' Counsel submitted that the victims of crime are not entitled to be heard prior to the President exercising his powers in terms of section 84(2)(j). 0n the other hand, the Applicants' Counsel submitted that the victims of crime, their families and other interested parties have a right to participate in the pardon process and make inputs.

7.4.2 In South Africa, the Service Charter for Victims of Crime makes provision for the victim's inputs when a prisoner is to be considered to be released

on parole. This accord with the United Nations' Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985.

In *Derby-Lewis v Minister of Correctional Services and 4 Others* case no 54507/08 Northern Gauteng High Court, (unreported full bench decision) it was held that in parole hearings, the victim or relatives of the victim have a right to be heard before a prisoner is released on parole. On p25 the Court said:

> "Before a prisoner can be placed on parole all possible relevant information should be considered. One cannot argue, as the applicant now does, that the fifth respondent's representations will be of a political nature and nothing else. Any person, including the applicant, may put relevant information before a Board. It is the duty of that Board to weigh and consider all information placed before it and to exclude information that may be irrelevant."

The practical effect of a parole and pardon are the same. I cannot find any justification for allowing victims of crime to be heard prior to a prisoner being released on parole, but to deny the same right to a victim in the case of a pardon.

In my view, the President prior to releasing a prisoner on pardon, must have considered all the relevant information relating to the said prisoner.

The said information should include, *inter alia*, the prisoner's application, the inputs of victims and/or families of the victims of that particular crime and any other relevant information which might come from any interested party. The inputs from the other interested parties will enable the President to verify the facts stated by the applicant in the parole application form. This view accords with the basic values and principles enshrined in section 195 of the Constitution and give effect to the right contemplated in section 33 of the Constitution.

7.4.3 President's address to the joint sitting of Parliament

On 21 November 2007 the President addressed the joint sitting of Parliament. He dealt with the need to deal with political prisoners who are still in detention and did not apply for amnesty through the TRC process. He further said that consideration has been given to the use of Presidential pardon to deal with the "unfinished business".

He requested political parties represented in Parliament to appoint representatives who would serve on a Pardon Reference Group that would consider each of the requests for pardon which the President would refer to the Group, and make recommendations to the President. In the said speech the following are also stated:

> "Further, the President will, with regard to each application placed before him-

seriously consider the recommendations made to him by the Reference Group-

- form an independent opinion on the basis of the facts/information placed before him, to arrive at a decision whether to grant or refuse pardon; and
  in so doing, the President will be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation building and national reconciliation; and
- uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process."

It is common cause between the parties that the Amnesty Process of the TRC was transparent and allowed full participation by the victims and their families.

The President made a public commitment about the process that he would follow in order to consider the pardon applications.

In the Heads of Argument the Applicant's Counsel referred the Court to the case of *Johannesburg Municipal Pension Fund and 0thers v City of Johannesburg and 0thers* 2005 6 SA 273 (W), at 290B-C MALAN J said:

> "Public administrators must be accountable; act lawfully and fairly and not arbitrarily; act honestly and ethically and be bound by their lawful undertakings."

I agree with the sentiments expressed above.

The President made a lawful public commitment. The said commitment accords with the basic values and principles enshrined in our Constitution.

In order to act in accordance with his public commitment, my view is that the President should allow the victims, and/or their families and interested parties to be heard prior to releasing any prisoner on parole.

8. IMPACT OF DECISION OF SUPREME COURT OF APPEAL IN *MINISTER OF CONSTITUTIONAL DEVELOPMENT v CHONGO* 159/08 (2009) ZASCA 31 (30 MARCH 2009).

In the above-mentioned case, the Supreme Court of Appeal confirmed an order of this Court which required the Second Respondent to do what is necessary within a period of three months from date of order to enable the President to exercise

powers conferred upon him in terms of section 84(2)(j) of the Constitution in an informed manner with regard to certain pardon applications.

The Respondents' Counsel submitted that there is an urgent need on the part of the President to make relevant decisions on applications for pardon that have now been submitted to him.

The Respondents' Counsel further submitted that the effect of the orders sought by the Applicants in these proceedings will be to delay and also deprive the President of his constitutional responsibility.

In my view, the effect of the above-mentioned judgment has no effect on the question of how does the President should go about in exercising his powers to decide on granting a pardon or not.

The question of victim participation was not raised in the said case. The decision did not suggest that victim participation should be excluded nor did it imply that.

If victim participation is allowed that does not mean that the President is deprived of his constitutional responsibility.

The Applicant's Counsel has submitted, correctly so, that the Applicants have made out a case for the relief contained in Part A of the notice of motion.

9. CONCLUSION

The other Respondents, namely third to tenth Respondents, have had some contact with some of the victims.

I do not intend to deal with the said contact because that does not mean that the victims of the offences they committed had an opportunity to make proper representation to the President nor the Pardon Reference Group. Other interested parties, like the Applicants in this case, might want to make inputs if given an opportunity to do so.

I do not believe that there are any bases for exempting them from the interim relief I intend granting. I intend granting the interim relief because I am of the view that the Applicants have made out a case for the relief sought in Part A of the notice of motion.

I believe that it is necessary that prisoners who might be affected by orders sought in these proceedings, should be made aware of these proceedings.

At the same time, the Court should recognise that it might be difficult for the Applicants to serve papers on all the pardon applicants, but I believe that they might be able to serve the papers on those applicants for pardon who have been recommended for release by the Pardon Reference Group

The Court therefore makes the following interim order:

(a) The First Respondent is interdicted from granting any pardon in terms of the "Special dispensation for Presidential pardons for political offences" until such time as the proceedings described in Part B is finalised.

(b) The First and/or the Second Respondent are to provide the Applicants with the list of prisoners recommended for release by the Pardon Reference Group.

(c) Applicants must serve the papers in this matter on the applicants for pardon mentioned in (b) above.

(d) The Second Respondent must make other applicants for parole [except those mentioned in (b) above], aware of these proceedings.

(e) Costs of this application to be costs in the proceedings mentioned in Part B of the notice of motion.

W L SERITI
JUDGE OF THE NORTH GAUTENG HIGH COURT

15320/2009

HEARD ON: 6 April 2009

FOR THE APPLICANTS: G Budlender SC, K Pillay, H Varney and L Kubukeli
INSTRUCTED BY: Legal Resources Centre

FOR THE 1ST & 2ND RESPONDENTS: M Moerane SC, V Maleka SC and L Gcabashe
INSTRUCTED BY: State Attorney
FOR THE 3RD RESPONDENT: N B Tuchtem SC and N Riley
INSTRUCTED BY: Shaid & Edworthy Attorneys

FOR THE 4TH -10TH RESPONDENTS: B C Bredenkamp SC
INSTRUCTED BY: Fourie Fismer Inc.