CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/09
[2010] ZACC 4

RYAN ALBUTT	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 TRUST	Fifth Respondent
HUMAN RIGHTS MEDIA CENTRE	Sixth Respondent
FREEDOM OF EXPRESSION INSTITUTE	Seventh Respondent
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Eighth Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Ninth Respondent

GERHARDUS JOHANNES TALJAARD — Tenth Respondent

AREND CHRISTIAAN DE WAAL — Eleventh Respondent

WILLEM JACOBUS PETRUS JACOBS — Twelfth Respondent

HANS JACOB WESSELS — Thirteenth Respondent

RYNO ADRIAAN ROSSOUW — Fourteenth Respondent

JOHANNESS BENJAMIN VAN DER WESTHUIZEN — Fifteenth Respondent

Heard on : 10 November 2009

Decided on : 23 February 2010

JUDGMENT

NGCOBO CJ:

Introduction

This case concerns the power of the President to grant pardon under section 84(2)(j) of the Constitution to people who claim that they were convicted of offences which they committed with a political motive. Section 84(2)(j) provides that the President is

responsible for "pardoning or reprieving offenders . . .". The question we are asked to decide is whether the President is required, prior to the exercise of the power to grant pardon to this group of convicted prisoners, to afford the victims of these offences a hearing. This case arises out of an application for leave to appeal directly to this Court and an application for direct access brought to this Court by the applicant, Mr Albutt.

The application for leave to appeal is directed at an order of the North Gauteng High Court, Pretoria (High Court)[1] granting an interim interdict. That interdict prevented the President from granting any pardon under section 84(2)(j) pursuant to a special dispensation process for presidential pardon for political offences, pending the finalisation of the main application foreshadowed in Part B of the Notice of Motion.[2] The application for direct access is for an order declaring invalid section 1 of the Promotion of Administrative Justice Act, 2000 (PAJA).[3] This relief is sought in the event this Court

[1] *Centre for the Study of Violence and Reconciliation and Others v President of the Republic of South Africa and Others* Case No 15320/09, North Gauteng High Court, Pretoria, 29 April 2009, as yet unreported.

[2] In Part B of the Notice of Motion the first to seventh respondents in this application sought the following:

> "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
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> 2.2 have been given an opportunity to make representations in that regard to the first respondent.
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> 3. The first respondent is ordered (and the second respondent is ordered, only in the event of his opposing this application, jointly and severally) to pay the costs of this application.
>
> 4. Further or alternative relief."

[3] 3 of 2000.

finds that, upon its proper construction, section 1 of PAJA[4] defines administrative action to include the exercise of the power to grant pardon under section 84(2)(j).

The President and the Minister for Justice and Constitutional Development (the Minister) support both applications. For convenience I shall refer to the President and the Minister as "the state". A coalition of non-governmental organisations (the NGOs) resists both applications. In these proceedings they are the first to the seventh respondents.[5]

Factual background

On 21 November 2007, former President Mbeki announced a special dispensation for applicants for pardon who claimed that they were convicted of offences that were politically motivated. This dispensation was aimed at dealing with the "unfinished

[4] Section 1 of PAJA provides:

> "In this Act, unless the context indicates otherwise—
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> 'administrative action' means any decision taken, or any failure to take a decision, by—
>
> (a) an organ of state, when—
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> (i) exercising a power in terms of the Constitution or a provincial constitution; or
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> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, 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), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution".

[5] In order of appearance they are: the Centre for the Study of Violence and Reconciliation, the Khulumani Support Group, the International Centre for Transitional Justice, the Institute for Justice and Reconciliation, the South African History Archives Trust, the Human Rights Media Centre and the Freedom of Expression Institute.

business" of the Truth and Reconciliation Commission (the TRC).[6] This "unfinished business" included "the question of amnesty for many South Africans who had not participated in the TRC process for a number of reasons".[7] As the former President explained:

> "As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this 'unfinished business'."[8]

The former President also announced the establishment of a multiparty Pardon Reference Group (the PRG) which would assist him in the discharge of his constitutional responsibility to consider requests made for pardons by offenders who fall within the special dispensation process. Persons who qualified for pardon under this process were "[p]ersons who were convicted and sentenced solely on account of allegedly having committed politically motivated offences before June 16, 1999" and who had not applied for amnesty by the TRC.[9] Originally, requests for pardons pursuant to this process had to

[6] Address by President of South Africa, Thabo Mbeki to the Joint Sitting of Parliament to Report on the Processing of some Presidential Pardons, Cape Town, 21 November 2007 available at http://www.thepresidency.gov.za/president/sp/2007/sp11211540.htm (accessed on 15 December 2009).

[7] Id.

[8] Id.

[9] Item 7 of the Terms of Reference for a Special Dispensation on Presidential Pardoning Process Relating to Certain Offenders sets out who qualified for pardons:

> "7.1 Persons who were convicted and sentenced solely on account of allegedly having committed politically motivated offences before June 16, 1999; and
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> 7.2 Comply with the pre-determined criteria and procedures as set out in the application form, may apply to the President for pardon in the prescribed manner.
>
> 7.3 A person will only qualify for consideration for pardon if—
>
> (a) he or she

be made between 15 January and 15 April 2008, but this period was later extended to 31 May 2008. The PRG was formally constituted on 18 January 2008. Pursuant to its Terms of Reference, one of its responsibilities was to "[c]onsider each application for pardon and make recommendations to the President."[10] And the PRG had the power to develop its own rules and procedures.[11] The PRG had a limited lifespan which did not extend beyond 30 November 2008.

(i) is presently serving a sentence of imprisonment;

(ii) was sentenced to a term of imprisonment or a fine for an offence which arose from or is related to, an act or omission associated with a political objective committed in the course of the conflicts of the past;

(b) the offence referred to in paragraph (a) was committed on or before the date of the inauguration of the President on 16 June 1999; and

(c) his or her application for pardon is accompanied by a prescribed affidavit or affirmation deposed to or affirmed by a person authorized by a political party or organization, institution, liberation movement or body, in which it is confirmed that the act or omission which constituted the offence in question, occurred under the instruction of, or in the execution of an order, instruction, command, direction, advice, plan or project of, or on behalf of, or with the approval of, or in furtherance, promotion or achievement of the policies, objectives or interests of, the said party, organization, institution, liberation movement or body of which the applicant was a member, agent or a supporter."

[10] Item 2.3 of the Terms of Reference for the PRG.

[11] The NGOs attached to their founding affidavit an undated document, which is apparently part of a larger document. The part that is attached deals with criteria, rules and procedures for making recommendations to the President. According to this document the only means of verifying the version of an applicant for pardon is "a copy of the judgment" which "is . . . discussed as a verification tool in order to compare and contrast the version submitted by the applicant." See para 4.1 no. 6 Criteria, Rules and Procedure Used for Purposes of Making Recommendation in each Application for a Pardon. This document does not make any provision for the victims to be heard. In addition, this document sets out the main criteria for making recommendations to the President, namely, whether the applicant is indeed a political offender and whether the release of the applicant would not endanger society. In addition, it lists the Norgaard Principles that would be taken into account in determining the two main criteria. C(i)–(v) of the Norgaard Principles are as follows:

"i. The motive of the offender – i.e. was it a political motive (e.g. to change the established order) or a personal motive (e.g. to settle a private grudge).

ii. The context in which the offence was committed, especially whether the offence was committed in the course of or as part of a political uprising or disturbance.

iii. The nature of the political objective (e.g. whether to force a change in policy or to overthrow the Government).

iv. The legal and factual nature of the offence, including its gravity (e.g. rape could never be regarded as a political offence).

v. The object of the offence (e.g. whether it was committed against Government property or personnel or directed primarily against private property or individuals)."

In announcing the special dispensation, the President also explained how he would deal with applications for pardon, stating that he would "seriously consider the recommendations made to him by the Reference Group".[12] However, he emphasised that he would "form an independent opinion on the basis of the facts/information placed before him" to decide whether to grant or refuse a pardon.[13] He stated that in so doing he would—

> "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".[14]

The Explanatory Memorandum, which the Department of Justice and Constitutional Development issued to explain the special dispensation process, reiterated that the President would be guided by these principles, values, criteria and objectives in considering applications for pardon. Neither the statement by the former President, nor the Terms of Reference for the PRG and the Explanatory Memorandum, dealt with the question whether the victims of offences in respect of which a pardon was sought under the special dispensation were entitled to make representations.

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[12] President Mbeki's Address above n 6.

[13] Id.

[14] Id.

Beginning in February 2008, the NGOs made numerous attempts to secure the participation of the victims in the special dispensation process. These attempts were finally rejected by the PRG during August 2008 when it told the NGOs that neither its Terms of Reference nor any law compelled it to call for input from the public, in particular, from the victims. The PRG referred the NGOs to the President as the "custodian of the [pardon] process" who could take such considerations into account.[15] Subsequent approaches to the Minister and the President were also unsuccessful. During March 2009, the Office of the President in effect declined the request for victim participation in the special dispensation and refused to furnish any undertaking in this regard. Litigation ensued.

The NGOs launched an urgent application in the High Court for an interdict preventing the President from granting any pardons in terms of the special dispensation process until the finalisation of the main application. The NGOs challenged the exclusion of victims from participating in the special dispensation process mainly on the grounds that it was inconsistent with section 33 of the Constitution,[16] the provisions of PAJA and the common law duty to act fairly. The application was resisted by the state on various grounds, including that the NGOs lacked standing and that the victims had no right to be

[15] Letter from Dr JT Delport, Chairperson of the PRG to Dr Hugo van der Merwe, Transitional Justice Programme Manager, Centre for the Study of Violence and Reconciliation, 7 August 2008.

[16] Section 33 of the Constitution of the Republic of South Africa, 1996 provides in relevant part:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

heard when the President exercises the power to grant pardon under section 84(2)(j). The applicant and six other convicted prisoners[17] sought, and were granted, leave to intervene. They resisted the application on the same grounds as the state, but included non-joinder of other applicants for pardon as an additional ground.

High Court

The High Court found that the NGOs had standing because they were acting on behalf of victims who could not act in their own name, in the interests of victims, and also in the public interest. On the non-joinder issue, the High Court held that non-joinder was not fatal to the application. It reasoned that it was not necessary to serve the papers on all applicants who had applied for pardon prior to the hearing of the matter. Only those applicants for pardon who had been recommended for pardon had to be served. As the NGOs did not know the identity of those applicants, it was not possible to serve the papers on them. The High Court accordingly ordered the government to provide the NGOs with a list of applicants who had been recommended for pardon; that the NGOs serve the papers on those applicants for pardon; and that the Minister make the other applicants for pardon aware of the proceedings.[18]

[17] The applicant and the interveners were co-accused in a trial arising from certain events that took place in Kuruman in the Northern Cape in 1995. Municipal workers who were on a peaceful strike were severely assaulted with lethal weapons. The applicant and the interveners indiscriminately smashed cars of innocent bystanders and pursued and assaulted other black persons who had nothing to do with the striking workers. Among those assaulted were women and elderly persons. See *S v Whitehead and Others* 2008 (1) SACR 431 (SCA) at para 12. They were sentenced to various terms of imprisonment. Another intervener was Mr JB van der Westhuizen who had been convicted in connection with a bomb blast in a Worcester supermarket on Christmas Eve in 1996 that killed four people and injured 67. All the interveners had applied for political pardon. The interveners did not take part in the proceedings in this Court.

[18] *Centre for the Study of Violence and Reconciliation* above n 1 at 33.

On the central issue of whether the victims had the right to participate in the special dispensation process, the High Court answered this question in the affirmative. Its conclusion rests on at least three legs: (a) upon a proper construction, section 1 of PAJA defines administrative action to include the exercise of the power to grant pardon under section 84(2)(j),[19] and hence the President is subject to the procedural requirements imposed by PAJA; (b) the effect of parole and pardon is the same and there is no justification for allowing victims of crime to be heard prior to a prisoner being released on parole but to deny victims a hearing when a prisoner is being considered for pardon;[20] and (c) the President was bound by his commitment to be guided by the principles of the TRC.[21] The Court reasoned:

> "[T]he 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 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 [pardon] application form."[22]

The High Court concluded that the victims of crime have a right to be heard prior to the exercise of the power to grant pardon under section 84(2)(j).

[19] Id at 25-6.

[20] Id at 27.

[21] Id at 30.

[22] Id at 27-8 with the substitution of "pardon" for "parole".

The High Court accordingly granted an order interdicting the President from granting any pardons in terms of the special dispensation pending the finalisation of the main application. The state sought leave from the High Court to appeal to the Full Court of the High Court, alternatively, to the Supreme Court of Appeal. This application, which is apparently still pending in the High Court, prompted the applicant to seek leave from this Court to appeal directly to it. As indicated earlier, the applicant has also launched an application for direct access to this Court.[23]

These proceedings are a sequel.

It is convenient to consider first the application for leave to appeal.

Procedural and preliminary issues

The central issue presented in the application for leave to appeal is whether the victims of the offences for which pardon is sought under the special dispensation process are entitled to be heard prior to the exercise of the power to grant pardon. However, to reach this issue we must first decide whether—

a) condonation should be granted to the applicant for the late filing of his application for leave to appeal and to the NGOs for the late filing of their answering affidavit;

[23] Above at [1].

b) leave to appeal directly to this Court should be granted;

c) the NGOs have standing; and

d) the High Court should have non-suited the NGOs for failure to join the applicants for pardon under the special dispensation.

I propose to deal with the procedural and preliminary issues first.

Should condonation be granted?

The application for leave to appeal was late by some nine days. The explanation for this delay is that initially the applicant was content to proceed with the main application. However, when the President sought leave to appeal to the Full Court of the High Court or the Supreme Court of Appeal, he became concerned about the delay this might entail and decided to appeal directly to this Court. The NGOs do not persist with their objection to the granting of condonation to the applicant. The NGOs were late by one day in filing their answering affidavit to the application for leave to appeal, and their application for condonation is not opposed by the applicant and the state.

In the case of the applicant, the period of delay is minimal, there is a satisfactory explanation for the delay and there is no suggestion of prejudice. In the case of the NGOs, the delay is minimal. In these circumstances, condonation should be granted to both the applicant and the NGOs. An order to this effect will therefore be made.

Should leave to appeal be granted?

The question whether leave to appeal should be granted depends upon whether (a) the application raises a constitutional matter and (b) it is in the interests of justice to grant leave. The application raises questions of considerable constitutional importance concerning the powers of the President to grant pardon under section 84(2)(j). Indeed, the NGOs do not contest that the application raises a constitutional matter. However, the NGOs contend that it is not in the interests of justice to grant leave to appeal.

The NGOs made much of the non-appealability of the High Court order, since it took the form of an interim interdict. They submit that it lacked the three attributes of an appealable order, that (a) it must be final in effect, and not susceptible to alteration by the court of first instance; (b) it must be definitive of the rights of the parties; and (c) it must have the effect of disposing of at least a substantial portion of the relief sought in the main application.[24] The NGOs submit that it is well-established that the granting of an interim interdict is not appealable under the Supreme Court Act, 1959.[25] While acknowledging that the test for leave to appeal to this Court does not require the satisfaction of these criteria, they submit that this Court should not entertain appeals against orders which have no final effect on the dispute between the parties. They submit that the order sought to be appealed against is such an order.

[24] See *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 6 and *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J.

[25] 59 of 1959.

What must be emphasised at the outset is that the interim nature of the order is not in itself determinative of whether it is in the interests of justice to grant leave to appeal. It is a factor that is relevant to the overall enquiry into the interests of justice. This is so because section 167(6)(b) of the Constitution prescribes the interests of justice as the standard for granting leave to appeal directly to this Court.[26] The question for determination, therefore, is whether it is in the interests of justice to grant leave to the applicant to appeal against the order of the interim interdict pending the finalisation of the main application.

What is in the interests of justice must be determined in the light of the facts of each case.[27] The policy considerations that inform the non-appealability of interlocutory orders under the common law and section 20 of the Supreme Court Act are relevant, but not decisive, in this enquiry.[28] However, it will not generally be in the interests of justice

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[26] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
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> . . .
>
> (b) to appeal directly to the Constitutional Court from any other court."

See also section 16(2) of the Constitutional Court Complementary Act Amendment Act 79 of 1997, which provides:

> "The rules shall, when it is in the interests of justice and with leave of the Court, allow a person—
>
> (a) to bring a matter directly to the Court; or
>
> (b) to appeal directly to the Court from any other court."

See also *Khumalo* above n 24 at para 7 and *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC) at para 6.

[27] *TAC (No 1)* above n 26 at para 8 and *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

[28] See *Khumalo* above n 24 at para 8; and *TAC (No 1)* above n 26 at para 8.

for this Court to entertain appeals against interlocutory rulings which have no final effect on the dispute between the parties.[29] There are sound policy considerations for this. It is indeed "undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance."[30] This consideration must of course be balanced against the fact that a final determination of the main dispute between the parties, which decisively contributes to its final resolution, might be more expeditious and cost-effective.

Ultimately, when determining whether it is in the interests of justice to grant leave to appeal against an interim interdict, the following considerations, while not exhaustive, are relevant:

a) the facts of the case;

b) the nature of the interim order and, in particular, the effect of upholding the interim order on the main application;

c) the desirability of having the views of an appellate court on the matter;

d) whether the matter is appealable;

e) the importance of a determination of the constitutional issues raised in the interim order;

f) whether the issues raised by the interim order require urgent resolution; and

g) the prospects of success.[31]

[29] *Khumalo* above n 24 at para 8.

[30] See *TAC No 1* above n 26 at para 9 and *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59.

[31] See *Khumalo* above n 24 at para 10.

The NGOs submit that the order of the High Court is clearly interlocutory and has no final effect on the dispute between the parties. Our courts have held that, in determining whether an order is final in effect, what matters is not only the form of the order "but also, and predominantly[,] its effect".[32] An interim interdict has a final effect if it disposes of any issue or portion of an issue in the main application; put differently, if it "anticipates or precludes some of the relief which would or might be given at the hearing".[33] An examination of the issues raised in the interim interdict proceedings and the manner in which they were dealt with may help to determine whether the court meant to express a final decision on those issues, that is, whether it intended to dispose finally of those issues or any part thereof.[34]

The order made by the High Court rests mainly on two findings of law: (a) the exercise of the power to grant pardon constitutes administrative action; and (b) the victims of crime have a right to be heard prior to the President's decision to grant pardon under section 84(2)(j). These definitive findings of law by the High Court dispose of the issue whether victims have a right to be heard prior to the exercise of the power to grant pardon, an issue foreshadowed in the alternative relief sought by the NGOs in the main application.

[32] *Metlika Trading Ltd and Others v Commissioner for SARS* [2004] 4 All SA 410 (SCA) at para 23; *Zweni* above n 24 at 532H-I and *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H.

[33] *Metlika Trading* above n 32 at para 21 citing *Pretoria Garrison Institutes v Danish Variety Products (Pty.), Limited* 1948 (1) SA 839 (A) at 870. See also *Zweni* above n 24 at 532J-533A with the substitution of "any" for "substantial".

[34] *African Wanderers Football Club (Pty.) Ltd. v Wanderers Football Club* 1977 (2) SA 38 (A) at 46C.

The order of the High Court is therefore final in effect; it is definitive of the rights of the victims to be heard prior to the decision whether to grant pardon; and it has the effect of disposing of the alternative relief claimed by the NGOs in the main application, although in theory it remains susceptible to alteration by the High Court.[35]

There are further considerations which weigh in favour of the granting of leave to appeal. There is significant public interest in determining whether the President should hear victims of political offences prior to granting pardon in relation to those offences. This is so because of the close relationship between the TRC process and the special dispensation process. There are some 2 114 applications for pardon in respect of political offences that are pending. There are, no doubt, other applications for pardon in relation to other offences that are pending. The record indicates that some of the applications for pardon in respect of political offences have been pending since 2002. While there is no right to a pardon, the applicants for pardon are at least entitled to have their applications considered without delay.[36]

In addition, the decision of the High Court has cast grave doubt over the power of the President to decide applications for pardon without calling for the views of victims. It is clear from the judgment of the High Court that its conclusion on section 84(2)(j) goes beyond the special dispensation process and relates to the exercise of the power under

[35] See *Zweni* above n 24 at 532I-533A and *Pretoria Garrison Institutes* above n 33 at 870.

[36] Section 237 of the Constitution. See *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25 (30 September 2009), as yet unreported, at para 30.

section 84(2)(j) in general. It is desirable and in the public interest that this issue be resolved as soon as possible to enable the President to carry out his constitutional obligations without delay. While the views of the Supreme Court of Appeal or the Full Court of the High Court would no doubt have been of benefit to this Court, delays caused by the appeal process would be prejudicial to the public interest.

Moreover, this is not a case where the prospects of success are necessarily determinative of the interests of justice.[37] The issue raised in the application for leave to appeal is of considerable constitutional importance concerning the powers of the President to grant political pardon under section 84(2)(j). It is an issue which goes to the "unfinished business" of nation-building and national reconciliation. It is an issue which calls for an early and definitive decision of this Court.

For all these reasons, I am satisfied that it is in the interests of justice that leave to appeal be granted to the applicant to appeal directly to this Court. An order to this effect will therefore be made.

There are two additional preliminary issues to address before considering the main issue in the appeal. The one relates to standing, and the other relates to the non-joinder of other applicants for political pardon.

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[37] See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12 and *Fraser v Naude and Others* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 10.

Standing

The applicant makes a qualified concession in relation to standing. While accepting that the NGOs have standing, he nevertheless contends that they were only entitled to seek declaratory relief and were not entitled to seek an order preventing the President from granting pardons. In support of this contention, the applicant submits that each application for pardon must be considered individually to determine whether it should be allowed to proceed. This is necessary, so the argument goes, because certain victims and perpetrators may well have become reconciled and victims might want their perpetrators to be pardoned. The applicant submits that in these circumstances it would be unfair to prevent all special dispensation pardons from being granted.

The concession that the NGOs have standing was properly made. Our Constitution adopts a broad approach to standing,[38] in particular, when it comes to the violation of rights in the Bill of Rights.[39] This is apparent from the standing accorded to persons who

[38] See, for example, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 229.

[39] Section 38 of the Constitution provides:

> "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."

act in the public interest. This ground is much broader than the other grounds of standing contained in section 38.[40] The NGOs have standing on at least two grounds.[41]

First, they are litigating in the public interest under section 38(d) of the Constitution. The NGOs contend that the exclusion of victims from participation in the special dispensation process violates the Constitution, in particular, the rule of law. They submit that, as civic organisations concerned with victims of political violence, they have an interest in ensuring compliance with the Constitution and the rule of law. Second, they are litigating in the interest of the victims under section 38(c). The victims whose interests the NGOs represent were unable to seek relief themselves because they were unaware that applications for pardons affecting them were being considered. The process followed by the President made no provision for the victims to be made aware of the applications for pardons, nor to be given the opportunity to make representations.

The primary purpose of the litigation is to safeguard and vindicate the asserted right of the victims of the offences in respect of which pardons are sought to have an opportunity to be heard. A declaratory order without an interdict would not have been effective in protecting the rights of victims, in particular, those who might want to oppose the

[40] See *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at para 15.

[41] Organisations similar to the NGOs have been found to have standing before this Court. See, for example, *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at paras 20-2 and *Lawyers for Human Rights* above n 40 at paras 14-8.

granting of a pardon. Having regard to the interests which the NGOs seek to protect, and the basis for their standing, there is simply no reason for limiting the relief they could seek to a declaratory order. I conclude that the NGOs have standing to seek the interim order interdicting the granting of pardons.

Non-joinder

The applicant does not pursue the issue of non-joinder. He properly conceded that the interests of other applicants seeking pardon, who are not before this Court, were adequately looked after. Indeed, the interest that the applicant has in this case is identical to that of other applicants for pardon who are not before this Court.

With these preliminary issues out of the way, I now turn to consider the central question presented in this appeal, namely, whether the victims of political offences in respect of which pardons may be granted under the special dispensation are entitled to a hearing prior to the exercise of the power to grant pardon.

The contentions of the parties

The NGOs contend that the victims of the offences in respect of which pardons are sought under the special dispensation process are entitled to be heard. They challenge the decision to exclude the victims from participating in the special dispensation process on three main grounds. First, they contend that the decision to exclude the victims from participating in the special dispensation process is irrational. They submit that it is not

rationally related to the objectives which the dispensation seeks to achieve, namely, national unity and national reconciliation. Second, they contend that the context-specific nature of the special dispensation process requires the President to give the victims an opportunity to be heard prior to making a decision to grant a pardon. Third, they contend that the exercise of the power to grant pardon constitutes administrative action under section 1 of PAJA and that this attracts the duty to afford the victims a hearing.

The applicant and the state challenge the right of victims to be heard when the President exercises the power to grant pardon. First, they deny the charge of irrationality pointing out the differences between the amnesty process and pardon. Second, they contend that the exercise of the power under section 84(2)(j) is executive action and does not constitute administrative action. They submit that, properly construed, the definition of administrative action in section 1 of PAJA excludes the power to grant pardon. Third, confronted by what was described as incoherence in section 1 of PAJA, and, in the event of this Court finding that, upon a proper construction, section 1 of PAJA defines administrative action to include the exercise of the power to grant pardon, counsel for the applicant submit that PAJA is unconstitutional. This submission forms the basis of the application for direct access. The argument advanced by the state was substantially the same.

In the course of oral argument the applicant also advanced two contentions which it will be convenient to dispose of before addressing the main questions presented in the case.

The first concerned compliance with section 101(1)(b) of the Constitution,[42] and the other raised the question whether the President had in fact taken a decision to refuse to afford the victims a hearing.

The argument based on section 101(1)(b)

The applicant submits that we should not pay any attention to what the former President said in Parliament because it was not in writing and, accordingly, has no legal consequence under section 101(1)(b). For purposes of disposing of this argument, it is not necessary to explore the meaning and scope of section 101(1)(b). Suffice it to say that, after announcing the special dispensation process, the President took concrete steps to give effect to this process.

He established the PRG; its terms of reference were adopted in writing; the PRG adopted its criteria and procedures for making recommendations to the President; an Explanatory Memorandum was issued to inform the public of the special dispensation process, its objectives and the criteria, principles and the values that would guide the President in considering the applications; and the PRG has indeed made recommendations to the President. Apart from this, neither the President nor the Minister has taken up this point. On the contrary, former President Motlanthe, who deposed to an affidavit in these

[42] Section 101(1) of the Constitution provides:

> "A decision by the President must be in writing if it—
>
> . . .
>
> (b) has legal consequences."

proceedings, declared under oath that he "intend[ed] to deal with applications for pardon . . . in line with the approach outlined by the then President [Mbeki]."

In these circumstances, it can hardly be suggested that this Court should ignore what the President not only said, but also did to give effect to his speech. Whatever the meaning and scope of section 101(1)(b), I am satisfied that this Court can rely on what the President said in order to determine the issues raised in this case. The argument of the applicant based on section 101(1)(b) must therefore be rejected.

Did the President take a decision to deny the victims a hearing?

In the course of oral argument, there was some assertion by the applicant, albeit in a faint tone, that the President had not taken a decision to deny the victims a hearing. As I understand the argument, it was based on a statement in the affidavit of former President Motlanthe to the effect that although the PRG had refused to receive representations from the victims, this did not mean that the President would not allow representations from the victims. This statement, which was argumentative in tone, was not accompanied by an offer to afford the victims the opportunity to make representations.

This argument faces two insurmountable hurdles. The first is that it ignores the tenor of the letter dated 13 March 2009 from the Office of the President. That letter was in response to a request to allow victims to participate in the special dispensation process. It is clear from this letter that the victims were not going to be allowed to make

representations. Were it to be otherwise, it would have been an easy matter for the Office of the President to inform the victims that they would be allowed to make representations. This did not happen. On the contrary, and this is the second hurdle, both in the High Court and in this Court, the state took the stance that the victims were not entitled to make representations.

The matter must thus be approached on the footing that the Office of the President took the decision that the victims would not be allowed to make representations. It is this decision which the NGOs are challenging.

Questions presented

This decision is challenged on three main grounds, namely that—

(a) the decision to exclude the victims from participating in the special dispensation process is irrational;

(b) the context-specific features of the special dispensation process requires the President to give the victims a hearing; and

(c) the exercise of the power to grant pardon constitutes administrative action and therefore triggers the duty to hear people affected.

I will consider each of these issues in turn.

Is the decision to exclude the victims from participating in the special dispensation process irrational?

It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law.[43] More recently, and in the context of section 84(2)(j), we held that although there is no right to be pardoned, an applicant seeking pardon has a right to have his application "considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality".[44] It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.

All this flows from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants.[45] To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the

[43] See *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 38 and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 32.

[44] *Chonco* above n 36 at para 30 (footnote omitted). See also *SARFU* above n 43 at para 148 and *Fedsure* above n 43 at paras 56-8.

[45] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 116 and *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 12.

objectives of the process.[46] If it is not, it falls short of the standard that is demanded by the Constitution.

The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under section 84(2)(j).

The applicant very properly concedes that this Court has the constitutional authority to examine whether the means adopted by the President are rationally related to the objective sought to be achieved by granting pardons to those convicted prisoners who claim to have committed offences with a political motive. I did not understand the state to contend otherwise. Nor is there any issue about the constitutional authority of the President to exercise his power to grant pardon as contemplated in the special

[46] *Fedsure* above n 43 at para 58 and *Affordable Medicines* above n 43 at para 49.

dispensation process. Indeed under section 83(c) of the Constitution, the President has a duty to promote "the unity of the nation and that which will advance the Republic." The question for determination is reduced to whether the decision to exclude victims from participating in the special dispensation process is rationally related to the objectives that the President set out when he announced the process.

When former President Mbeki announced the special dispensation process, he outlined its objectives and the criteria and the principles that would guide the decision-making process. The objectives that the special dispensation sought to achieve were national unity and national reconciliation. These objectives were to be achieved through the application of the "principles and values which underpin the Constitution", including 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".[47] But what are the principles, criteria and spirit that inspired and underpinned the amnesty process?

These emerge from the fundamental philosophy of our negotiated transition to a new democratic order. It was recognised early on, during the negotiation process, that the task of building a new democratic society would be very difficult because of our history, and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. The epilogue to the interim Constitution expresses this philosophy:

[47] President Mbeki's Address above n 6.

> "The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. . . . In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives".[48]

It is apparent from both the address by former President Mbeki and the Explanatory Memorandum that the special dispensation process had the same objectives as the TRC, namely, nation-building and national reconciliation. While the TRC process sought to achieve this through amnesty, the special dispensation seeks to achieve these objectives through pardons. As former President Mbeki explained when he announced the special dispensation process: "consideration has therefore been given to the use of the Presidential pardon to deal with [the] 'unfinished business' [of the TRC]."[49] The submission on behalf of the state that the NGOs are mistaken when they contend that the special dispensation was designed to deal with the "unfinished business" of the TRC cannot, therefore, be sustained.

The participation of victims was fundamental to the amnesty process. The process encouraged victims and their dependants "to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones".[50] But the truth of what really happened could only be known if those who were responsible for gross violations

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[48] Constitution of the Republic of South Africa Act 200 of 1993, under the title "National Unity and Reconciliation".

[49] President Mbeki's Address above n 6.

[50] *Azanian Peoples Organisation (Azapo) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 17.

of human rights were encouraged to disclose it with the incentive that they would not be punished. Thus, the participation of both the victims and the perpetrators was crucial to the achievement of the twin objectives of rebuilding a nation torn apart by an evil system and promoting reconciliation between the people of South Africa.

Indeed, as this Court observed in *Azanian Peoples Organisation (Azapo) and Others v President of the Republic of South Africa and Others*:

> "With [the] incentive [that the perpetrator will not receive punishment] what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue."[51]

In its report, the TRC emphasised the importance of the participation of victims and perpetrators in the achievement of national reconciliation:

> "By telling their stories, both victims and perpetrators gave meaning to the multilayered experiences of the South African story. These personal truths were communicated to the broader public by the media. In the (South) African context, where value continues to be attached to oral tradition, the process of story telling was particularly important. Indeed, this aspect is a distinctive and unique feature of the legislation governing the

[51] Id.

> Commission, setting it apart from the mandates of truth commissions elsewhere. . . . The stories told to the Commission were not presented as arguments or claims in a court of law. Rather, they provided unique insights into the pain of South Africa's past, often touching the hearts of all that heard them.
>
> By providing the environment in which victims could tell their own stories in their own languages, the Commission not only helped to uncover existing facts about past abuses, but also assisted in the creation of a 'narrative truth'. In so doing, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless."[52]

The participation of victims is not only crucial to establishing the truth of what happened, but is also crucial to the twin objectives of nation-building and national reconciliation. In this regard, the TRC makes the following comment in its report: "In some cases . . . the Commission assisted in laying the foundation for reconciliation. Although truth does not necessarily lead to healing, it is often a first step towards reconciliation."[53]

What is plain from what I have said above is that the victims of gross human rights violations were at the centre of the TRC process. As the TRC observed:

> "One of the unique features of the Act was that it provided guiding principles on how the Commission should deal with victims. These principles constituted the essence of the Commission's commitment to restorative justice. The Act required that the Commission help restore the human and civil dignity of victims 'by granting them an opportunity to relate their own accounts of the violations of which they are the victim'. Through the

[52] The Truth and Reconciliation Commission *Truth and Reconciliation Commission Report Volume 1* (Juta & Co Ltd, Cape Town 1998) 112.

[53] Id at 107.

> public unburdening of their grief – which would have been impossible within the context of an adversarial search for objective and corroborative evidence – those who were violated received public recognition that they had been wronged."[54] (Footnote omitted.)

Excluding victims from participation keeps victims and their dependants ignorant about what precisely happened to their loved ones; it leaves their yearning for the truth effectively unassuaged; and perpetuates their legitimate sense of resentment and grief. These results are not conducive to nation-building and national reconciliation. The principles and the spirit that inspired and underpinned the TRC amnesty process must inform the special dispensation process whose twin objectives are nation-building and national reconciliation. As with the TRC process, the participation of victims and their dependants is fundamental to the special dispensation process.

Counsel for the state sought to justify the exclusion of victim participation on the grounds that there are important differences between the amnesty process and the special dispensation process. Much effort and time was spent on this aspect. One of the differences that was drawn to our attention is that in the case of a pardon, victims already had the opportunity to participate in the criminal proceedings. By contrast, the TRC process by and large dealt with individuals who had neither been tried and convicted nor sentenced in respect of the offences for which amnesty was sought. The state argues that there was therefore no prior victim participation, and precisely for this reason, the amnesty process required the participation of victims.

[54] Id at 128.

There are difficulties with this submission. First, it is premised on the assumption that the amnesty process dealt only with perpetrators who had not been convicted. This premise is false. The amnesty process dealt with both persons who had not been tried and those who had been convicted and sentenced. One need only look at the provisions of the Promotion of National Unity and Reconciliation Act, 1995[55] (the Truth and Reconciliation Act) that deals with convicted persons.[56] Indeed, once it is accepted, as it must be, that the amnesty process also dealt with persons who had been convicted and sentenced, the submission loses its force.

Second, it does not pay sufficient attention to the fundamental difference between criminal proceedings and the pardon process. The question in a criminal trial is whether

[55] 34 of 1995.

[56] Section 20(8) provides:

> "If any person—
>
> (a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or
>
> (b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted,
>
> the criminal proceedings shall forthwith upon publication of the proclamation referred to in subsection (6) become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released."

Section 20(10) provides:

> "Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public."

the accused is guilty of the crime charged and, if so, what sentence should be imposed. By contrast, in the pardon process the question is whether, notwithstanding the conviction and sentence, the applicant should be granted a pardon. In particular, the question in the context of the special dispensation process is whether the offence in respect of which a pardon is sought was committed with a political motive.

Third, it misconceives the rationale for victim participation in the TRC amnesty process. Victims participated in the amnesty process not because they did not have a prior opportunity to participate in any criminal proceedings, but because their participation was fundamental to the objectives of the TRC process, namely, nation-building and national reconciliation. Indeed, it is difficult to fathom how these objectives could be achieved if the victims of gross violations of human rights were excluded from the amnesty process. The amnesty process encouraged victims to come forward to tell their stories and to help them to discover the truth by encouraging the perpetrators, in return for amnesty, to disclose the truth of what they did. This was crucial to "creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which inform[ed] the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue [to the interim Constitution]".[57]

Finally, the argument based on the differences between the amnesty process and the special dispensation process misconceives the argument advanced by the NGOs. The

[57] *Azapo* above n 50 at para 17.

NGOs do not contend that the amnesty process and the special dispensation are similar. They contend that the President made a commitment to apply the principles, criteria and spirit that inspired and underpinned the TRC process, especially as they relate to amnesty, including the principles and objectives of nation-building and national reconciliation. They submit that the President must be held to these principles which former President Mbeki said would guide him in deciding whether to grant or refuse pardons. The NGOs submit that it is these principles which require victim participation in the special dispensation process.

Apart from these difficulties with their argument, the differences identified by the applicant and the state do not explain why, having undertaken to apply the principles and values which underpinned the amnesty process, it was decided to disregard those principles and values. The differences between the amnesty and pardon processes were known at the time when the former President made his speech in Parliament. Despite these differences, the President decided that the principles and values that underpinned the amnesty process would be applied to the special dispensation process. These differences therefore provide no basis for disregarding the values and the principles that the former President had stated would be applied to the special dispensation process.

Once it is accepted, as it must be, that the twin objectives of the special dispensation process are nation-building and national reconciliation and that the participation of victims is crucial to the achievement of these objectives, it can hardly be suggested that

the exclusion of the victims from the special dispensation process is rationally related to the achievement of the objectives of the special dispensation process.

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

Do the special features of the special dispensation process require the President to hear the victims?

Before the President decides whether to grant pardon, he must establish the facts in accordance with the criteria set out in the special dispensation process, namely, whether the offence was committed with a political motive. To establish the facts the President must hear both the perpetrators and the victims of the crimes in respect of which a pardon is sought. It is difficult to fathom how the President can establish the truth about the motive with which a crime was committed without hearing the victim of that crime. Decisions based on the perpetrators' versions and their supporting political parties are more likely to be arbitrary, considering the President's objective of determining whether a pardon applicant qualifies for a pardon for an allegedly politically motivated crime. It

is not inconceivable that a victim may want to make representations to demonstrate that the crime committed was not of a political nature, but due to other motives.

A process which permits political party representatives and their members, to the exclusion of the victims, to consider whether a pardon should be granted in an offence with a political motive is entirely inconsistent with the principles and values that underlie our Constitution. Some of the principles and values that underpin our Constitution are the principles of accountability, responsiveness and openness.[58] And one of the principles that underpinned the amnesty process was the participation of victims in seeking to achieve national unity and national reconciliation. It is these principles and values that must underpin the special dispensation process as former President Mbeki stated. To do otherwise is to undermine the TRC process and is contrary to the objective of promoting national unity and national reconciliation.

In these circumstances, the requirement to afford the victims a hearing is implicit, if not explicit, in the very specific features of the special dispensation process. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a matter of rationality, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.

[58] See section 1(d) of the Constitution.

The NGOs also advance an attractive argument for the proposition that, having regard to the objectives of the special dispensation process, the common law duty to act fairly requires the President to afford the victims of crimes in respect of which a pardon is sought a hearing before a decision to grant a pardon.[59] In the light of the conclusion that I have already reached, it is not necessary to deal with this argument.

For all these reasons, I conclude that the decision to exclude victims of the crimes in respect of which pardons were sought under the special dispensation process was irrational. The victims of these crimes are entitled to be given the opportunity to be heard before the President makes a decision to grant pardon under the special dispensation.

Lest there be a misunderstanding of the scope of this conclusion, I had better stress the obvious. This case is concerned with applications for pardon under the special dispensation. What I have said in this judgment therefore applies to this category of applications for pardon only. What distinguishes this category from others not before us is that the crimes in respect of which pardons are sought are alleged to have been committed with a political motive; the objective of these pardons is to promote national unity and reconciliation; and the crimes concerned were committed in a particular historical context. Different considerations may very well apply to other categories of applications for pardon. This judgment does not therefore decide the question whether

[59] See, for example, *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) (Ngcobo J dissenting) at paras 172-207.

victims of other categories of applications for pardon are entitled to be heard. That question is left open.

It is this category of pardons that was before the High Court. The High Court does not appear to have paid attention to the fundamental difference between the category of pardons in issue in this case and other categories of applications for pardon. Its conclusion, as I have pointed out above, went beyond this category and purported to deal with applications for pardon in general. In doing so, the High Court erred. So too, when it relied upon the provisions of PAJA to hold that the victims of the crimes in respect of which pardons are sought are entitled to a hearing before the decision whether to grant a pardon is made. These findings by the High Court were not necessary and cannot be allowed to stand.

Finally, the applicant contends that, if the NGOs obtained the relief they sought, the resulting procedural requirements would impractically encumber the special dispensation process. This is incorrect. This judgment does not imply or entail that, in affording a hearing to the victims of those applying for pardon under the special dispensation process; the President is bound to replicate the procedures, investigations and hearings of the TRC. The final relief the NGOs sought was merely "an opportunity to make representations".[60] Their counsel expressly concede that, after the names of those pardon applicants who had been recommended for approval were made known, a general notice

[60] Above n 2.

inviting submissions to the President from victims of the offences in question might suffice. It is abundantly established that what the opportunity to make representations requires depends on the context,[61] and it is not necessary to try to signify in advance what the opportunity for representations will require. It is enough to say that cumbersome impediments to the due despatch of the pardon process are not entailed.

The next question is whether, in the light of this conclusion, it is desirable that we should reach the question whether the exercise of the power under section 84(2)(j) constitutes administrative action.

Should we reach the argument based on PAJA?

One of the grounds upon which the NGOs urge us to find that the victims are entitled to a hearing is that the exercise of the power to pardon constitutes administrative action. This is one of the bases upon which the High Court made its order. The applicant and the state challenge this finding by the High Court, contending that upon its proper construction, section 1 of PAJA does not include the exercise of the power to pardon as administrative action. If it does, they maintain, then section 1 of PAJA is inconsistent with the Constitution. For their part, the NGOs submit that Parliament may extend a right granted by the Constitution and, in doing so, does not trespass into the province of the executive.

[61] See, for example, *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* [2004] ZACC 19*;* 2005 (3) SA 589 (CC)*;* 2005 (4) BCLR 347 (CC) at paras 113-4 and *SARFU* above n 43 at para 219 and cases cited therein.

We have had the benefit of the submissions of the parties on PAJA and its constitutionality.

If one has regard to our jurisprudence, there is a substantial measure of doubt as to whether the exercise of the pardon power constitutes administrative action.[62] Yet if this question is decided in the negative, a more difficult question arises, namely, whether PAJA, upon its proper construction, includes within its ambit the exercise of the power to grant pardon. And if the answer to this question is in the affirmative, more complex questions arise. Those questions are whether: (a) PAJA merely regulates the exercise of the power or whether in effect it reclassifies executive action as administrative action; and (b) whether it is constitutionally permissible for the legislature to do either of these. The question that must be answered on this score is whether having answered the central question presented in this case, we should now venture into all of these difficult questions.

What must be stressed here is the point that I have already made: this case concerns applications for pardon that are brought under the special dispensation, the question being whether the victims of the crimes that fall under this category of applications for pardon are entitled to a hearing. Once this question is answered in the affirmative in the light of the context-specific features of the special dispensation, it is not necessary to consider the question whether the exercise of the power to grant pardon under section 84(2)(j)

[62] *SARFU* above n 43 at paras 145-6.

constitutes administrative action. That broad general question was not before the High Court, which should not have posed and answered it, and we need not answer it in this case. Nor should we reach the question whether PAJA, upon its proper construction, includes within its ambit the exercise of the power to grant pardon under section 84(2)(j).

Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so. There may well be cases, and they are very rare, when it may be necessary to decide an ancillary issue in the public interest. This is not such a case. It may well be said that the President is anxious to know whether the exercise of the power to grant pardon constitutes administrative action and whether PAJA applies to applications for pardon. The anxiety of the President should adequately be addressed by what I have said above, namely, that the High Court erred in reaching these questions.

In the event, I conclude that it is not necessary for us to reach the question whether the exercise of the power under section 84(2)(j) constitutes administrative action and whether upon its proper construction, PAJA includes within its ambit the power to grant pardon

under section 84(2)(j). These questions must be left open for another day when a proper occasion to determine them is presented.

In the result no order should be made on the application for direct access which was conditional upon us reaching PAJA. In respect of that application, I consider it just and equitable that each party should bear its own costs.

Costs

The issues that were raised in both the application for leave to appeal and the application for direct access are matters of considerable importance. As I have said, earlier, they concern the exercise of the power to grant pardon, in particular, the question whether the victims of the offences in respect of which the special dispensation process applies, are entitled to a hearing before a decision is made to grant pardon. The NGOs have succeeded in relation to the application for leave to appeal. They are entitled to their costs. The applicant entered the fray to safeguard his interest and those of other applicants seeking pardons who were not in court. In doing so, the applicant helped to put before the Court the perspective of the applicants for pardon. The applicant has, however, not succeeded. I think it would not be just and equitable to require him to pay the costs of the NGOs. That leaves the state to pay the costs of the NGOs.[63]

[63] See, for example, *Affordable Medicines* above n 43 at para 138 and *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 22-3.

I have already concluded that no order should be made on the application for direct access and that each party must pay its own costs.

Order

In the event the following order is made:

(a) Condonation is granted to the applicant for the late filing of the application for leave to appeal.

(b) Condonation is granted to the first to seventh respondents for the late filing of their answering affidavit.

(c) The application for leave to appeal is upheld.

(d) The appeal is dismissed.

(e) The President and the Minister for Justice and Constitutional Development are ordered to pay the costs of the first to seventh respondents. These costs will include costs consequent on the employment of two counsel.

(f) No order is made on the application for direct access.

(g) There will be no order as to costs on the application for direct access.

Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Van der Westhuizen J concur in the judgment of Ngcobo CJ.

FRONEMAN J:

I respectfully concur in the Chief Justice's judgment and only wish to add some comments in further support of his judgment. The judgment builds upon the fundamental understanding that under the Constitution, the President must always act in accordance with the rule of law, even when exercising executive functions.[64] It extends our understanding of what the rule of law requires of the President in the particular circumstances of this case. It does so, in the main, by determining the impact and meaning of the rule of law in the context of our recent history – the political strife that preceded and accompanied the birth of our democracy – and in particular the amnesty process put in place to assist in achieving national unity and reconciliation. The judgment draws its essence from the participatory process of the Truth and Reconciliation Committee (TRC). In so doing it gives content to the exercise of pardon in a manner which distinguishes it from notions of the nature and exercise of executive pardon powers elsewhere.[65]

[64] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC); *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) and *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 25; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

[65] See, for example, *de Freitas v Benny* [1976] AC 239 (PC); *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 (HL); *Burt v Governor-General* 1992 (3) NZLR 672 and *Biddle v Perovich* 274 US 480 (1927).

Some would find the broadened understanding of what the rule of law requires of us in these circumstances unpersuasive merely for the reason that it goes beyond the understanding of executive pardon powers elsewhere. Others might find those historical notions expedient in advancing a conception of executive power unconstrained by the rule of law. In my view it will contribute to a deeper understanding and acceptance of the rule of law if the content given to it in the main judgment also finds resonance, not only in our recent history, but also in pre-colonial history and in our own conception of democracy. And it does.

This Court has held that the democracy our Constitution demands is not merely a representative one, but is also, importantly, a participatory democracy.[66] That holds true even for the executive function at stake here. Promoting national unity is an ongoing process in terms of the Constitution.[67] While it may be necessary for this process of national unity "not to punish those who have flagrantly violated the law",[68] it needs to be remembered that this flies in the face of what is conventionally associated with the rule of law.[69] In this regard the presidential pardon power in relation to offences that may have an impact on national unity have characteristics similar to the amnesty process, where individual participation of victims was the only rational means of attempting to effect that purpose. Counsel for the applicant argued that the requirement of victim participation

[66] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 121 and *Matatiele Municipality and Others v President of the RSA and Others (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at para 40.
[67] See section 83(c) of the Constitution.

[68] *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC) at para 23.
[69] Id.

was met through the process set in place by the President which involved all the political parties represented in Parliament. Put differently, the argument was that representative democracy was sufficient in the circumstances. It is not. It would be irrational to treat similar processes relating to past violations of the law for a political motive – amnesty and "national unity" pardons – differently, by regarding individual victim participation as essential to the one process, but not to the other.

The notion of participatory democracy is also an African one. Victim participation was the norm in deciding the proper "punishment" for offenders in traditional African society. It was an expression of the participatory democracy practiced in those societies. That is my understanding of African tradition.[70] The main judgment therefore finds support in the African legacy of participation of citizens in affairs of the society, not as direct authority for its particular application to the facts of this case, but as further legitimisation that it accords with a tradition that runs deep in the lives of many people in this country. It is indeed difficult to escape the conclusion that this remarkable tradition of participation and capacity for forgiveness in African society also underlay, at a deeper level, the amnesty process. Without it the amnesty process would have been impossible, or at least it would have been immeasurably more difficult than it was. The same can be said for the ongoing duty to promote national unity.

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[70] There is much literature on the subject, but a personal expression on the matter can be found in Mandela *Long Walk to Freedom, The Autobiography of Nelson Mandela* (Macdonald Purnell (Pty) Ltd, Randburg 1994) 20. See also, for example, the description of the Gacaca courts of Rwanda in Amnesty International, *Rwanda Gacaca: A question of justice*, AI Index AFR 47/007/2002 and Villa-Vicencio "Transitional justice and human rights in Africa" in Bösl and Diescho (eds) *Human Rights in Africa* (Macmillan Education Namibia, Windhoek 2009) 41-3.

In the main judgment it is emphasised that the ruling does not in any way speak to pardon issues beyond the confines of the facts of this case. The same goes for these additional comments. I consider it important to demonstrate that the "pervasive demands for participatory living"[71] is one with deep roots in pre-colonial history, not that its past application should bind us in finding what is required for the present:

> "We do not have to be born in a country with a long democratic history to choose that path today. The significance of history in this respect lies rather in the more general understanding that established traditions continue to exert some influence on people's ideas, that they can inspire or deter, and they have to be taken into account whether we are moved by them, or wish to resist and transcend them, or . . . want to examine and scrutinize what we should take from the past and what we must reject, in the light of our contemporary concerns and priorities." [72]

Cameron J and Van der Westhuizen J concur in the judgment of Froneman J.

[71] Sen *The Idea of Justice* (Harvard University Press, Cambridge 2009) 322.

[72] Id at 332.

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For the Eighth and Ninth Respondents:	Advocate MTK Moerane SC, Advocate IV Maleka SC and Advocate L Gcabashe instructed by the State Attorney.
For the Fifteenth Respondent:	Advocate TJ Botha instructed by Lombards Attorneys.