CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 94/09
[2010] ZACC 7

In the matter between:

MQABUKENI CHONCO AND 383 OTHERS Applicants

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Respondent

Heard on : 4 February 2010

Decided on : 16 March 2010

JUDGMENT

KHAMPEPE J:

Introduction

This matter is a sequel to *Minister for Justice and Constitutional Development v Chonco and Others*[1] (*Chonco 1*) which was decided by this Court on 30 September 2009. The facts are essentially the same and appear from the judgment in *Chonco 1*.[2]

[1] *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25, CCT 42/09, 30 September 2009, as yet unreported.

[2] Id at paras 2-6. For the background to the litigation in that matter see paras 7-13.

The present is an application for direct access as contemplated in section 167(4)(e)[3] of the Constitution. The applicants, Mr Chonco and 383 other pardon applicants, seek an order declaring that the President had unreasonably delayed in considering and deciding their applications for presidential pardon under section 84(2)(j)[4] of the Constitution which had been filed with the Department of Justice and Constitutional Development in 2003. The applicants also seek an order directing the President to decide their applications within one month from the date of the order.

On the day of the hearing, counsel for the President handed in a supplementary affidavit in which the President stated that he had considered all 384 applications. He had decided to reject 230 out of the 384 applications. No decision had been made in respect of the 146 applicants who had elected to apply for pardon under the special dispensation process. This was because on 29 April 2009, the High Court granted an order interdicting the President from granting pardons under section 84(2)(j) pending the

[3] Section 167(4)(e) provides:

> "Only the Constitutional Court may—
>
> . . .
>
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation".

[4] The relevant part of section 84 provides:

> "(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
>
> (2) The President is responsible for—
>
> . . .
>
> (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures".

finalisation of the main application foreshadowed in Part B of the Notice of Motion.[5] The application for leave to appeal against the High Court order was heard in this Court in November 2009 in the matter of *Albutt v Centre for the Study of Violence and Reconciliation and Others* (*Albutt*).[6] Since no ruling had been made in respect of the application, the President considered it prudent to defer his decision in regard to the 146 applications until judgment had been given by this Court. The remaining eight applications where the applicants did not apply for pardon in terms of the special dispensation process, but whose circumstances were closely linked to the 146 applications, were also not finally decided pending the judgment of this Court in *Albutt*. In the light of this, the President submitted that it would not be just and equitable for this Court to grant the applicants the relief they sought as the matter had been rendered academic by the processing of their applications.

Counsel for the applicants informed the Court that he would no longer persist in seeking relief as it had been substantially obtained in the light of the President's decision articulated in the supplementary affidavit. The parties, however, indicated that they

[5] *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, unreported.

[6] The application in *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4, CCT 54/09, 23 February 2010, as yet unreported, was filed on 2 June 2009 and the matter was heard on 10 November 2009. The matter related to the issue of victim participation in the special dispensation process set up to deal with pardons for politically motivated crimes. Judgment was handed down on 23 February 2010.

Ngcobo CJ found that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by it. Given the history of our country, victim participation in accordance with the principles of the Truth and Reconciliation Commission was the only rational means to contribute towards the President's stated objectives in instituting the special dispensation process, namely to promote national reconciliation and national unity. Accordingly, Ngcobo CJ held that victims are entitled to an opportunity to be heard before the President makes a decision to grant a pardon under the special dispensation.

wished to argue the issue of costs. Therefore this judgment deals only with the question of costs.

The applicants originally sought costs on an attorney-and-own-client scale. During argument, counsel for the applicants indicated that the applicants were no longer seeking costs on a punitive scale but still sought costs against the President on the ordinary scale. Counsel for the President however contended that the facts of the case justified an order that the parties should bear their own costs.

It is trite that costs are a matter within the discretion of the Court[7] and that the discretion must be exercised judicially, having regard to all the relevant considerations depending on the circumstances of each case. Such considerations as discussed by this Court include: the conduct of the parties; the conduct of the legal representatives; whether a party has had only technical success; the nature of the litigants; the nature of the proceedings;[8] the nature and complexity of the issues[9] and whether litigation is considered vexatious or frivolous.[10] A further consideration in constitutional litigation must be the way in which a costs order will hinder or advance constitutional justice.[11]

[7] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) at paras 7-9; *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 138 and *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (No 2)* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 3.

[8] *Ferreira v Levin NO and Others* above n 7 at para 3.

[9] *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others* [1999] ZACC 13; 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) at para 138.

[10] *Affordable Medicines Trust* above n 7 at para 138.

[11] *Biowatch* above n 7 at para 16.

Ultimately, the Court has to decide what is a just and equitable order to grant in the circumstances of this case.[12]

The inquiry into what would be a just and equitable order of costs in this case includes a determination of the reasonableness of the conduct of the parties in relation to the proceedings. It is therefore useful to analyse the conduct of the parties in the present proceedings. I do so in two parts.

Was it reasonable to institute litigation at the time and to persist after the President's answering affidavit?

In urging this Court to grant them costs, the applicants submitted that they were entitled to approach this Court for the relief sought and that they would have succeeded in their application for direct access. The applicants filed their application on 28 October 2009, less than a month after the judgment in *Chonco 1* was handed down. The applicants conceded during argument that the facts and cause of action in this matter and in *Chonco 1* were "basically the same". The only difference, they submitted, is that it is now the President who stands as respondent, and that there has been an additional period of delay in processing the pardons.

[12] In *Affordable Medicines Trust* above n 7 at para 138 it was held:

> "The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. . . . The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."

They further conceded that during that period, they made no attempt to communicate with the President in order to inquire, given the decision in *Chonco 1*, when he would be in a position to complete the process. The applicants however argued that in the light of the history of the litigation and the unresponsiveness on the part of the government to their numerous inquiries, they did not see any benefit in writing to the President to determine when the applications would be considered. They therefore contended that they had taken a "reasonable course" in the circumstances and that one could not speculate as to whether the President would have been inclined to process the applications following the decision in *Chonco 1*. They stated that the impending litigation was the only real "bargaining chip" available to them in order to exert pressure on the President to move forward with the applications.

The past conduct of the Presidency gives some credence to this argument. Throughout the history of this matter, it would seem that the Presidency has taken action only in response to the litigation. The President also conceded that prior to the lodging of his affidavit, he had not communicated with the applicants or given them an indication of when he would be in a position to make a decision regarding the applications. Neither the papers nor the judgment in *Chonco 1* shed any light on the status of the applications.

Counsel contended that it was unreasonable for the applicants to institute the present proceedings without affording the President an opportunity to indicate how he intended to respond to the judgment. In this regard he emphasised the fact that the founding papers

were signed only nine days after the decision in *Chonco 1*. When it was suggested that the President should have, shortly after the decision in *Chonco 1*, informed the applicants how he intended to proceed with their applications, counsel pointed out that the President had to obtain legal advice on the outcome of the decision in *Chonco 1*, an exercise that was time consuming.

On a consideration of the facts, the applicants, in my view, acted unreasonably in engaging this Court without making any inquiries from the President on how he intended to attend to the processing of the applications. This is so because first, the President was not a party, strictly speaking, to the previous litigation and needed sufficient time to be briefed on the matter including the legal implications of the judgment as it related to the further processing of the applications. Of course, this does not suggest that he was not aware of that litigation but justifies the need to have sought sufficient time to obtain legal advice considering that this Court had recently clarified the nature and scope of the President's powers, functions and duties in relation to applications for pardon in terms of section 84(2)(j). Second, the decision in *Chonco 1* was delivered only on 30 September 2009. The fact that the applicants' founding affidavit was deposed to on 9 October 2009, merely nine days after the Court's decision, and that the application was lodged on 28 October 2009, suggest that the applicants had little intention of investigating viable alternatives for the settlement of the dispute but were minded to rush to this Court.

I am mindful that the applicants, in the context of this case, would wish to vindicate their rights with greater urgency and use these proceedings as a "bargaining chip". This Court would not wish to deprive the litigants of a necessary weapon to use in order to vindicate their rights. But in the circumstances it is difficult not to conclude that the institution of these proceedings was hasty. At the very least, it behoved the applicants to put the Presidency on terms before resorting to litigation. A simple letter to the President putting him on terms or making inquiries in regard to the processing of their applications for pardon, given the decision in *Chonco 1*, would have sufficed. The facts of this case simply illustrate that had the applicants written such a letter to the President, he would probably have given the same response that is contained in his answering papers. The conduct of the applicants in the circumstances was therefore plainly precipitate.

As mentioned previously, counsel for the President argued that after the decision in *Chonco 1*, the President needed time to be briefed and to obtain legal advice on how best to deal with the 384 applications. There is some substance in this argument, particularly bearing in mind that at the time of the institution of these proceedings, there was a pending interdict which prevented the President from finalising the applications for pardon. As already stated, this Court was then seized with the application for leave to appeal against the order granted by the High Court and had not ruled on the matter.[13] The applicants must have been aware of this development when instituting these proceedings. It is therefore not inconceivable that the President would have required consultation with

[13] Above n 6. Judgment was handed down on 23 February 2010.

regard to how to further process the applications in the light of the interim interdict granted in *Albutt* and the appeal proceedings directed at the interdict before this Court. It was therefore not reasonable to proceed without putting the President on terms.

Nor was it reasonable for the applicants to proceed after the President lodged his answering affidavit on 13 December 2009 with an undertaking that he was considering the applications and that he intended to finalise them by the end of January 2010. Notwithstanding that undertaking, the applicants contended that having regard to the protracted non-responsiveness on the part of the President to their inquiries, they were justified in waiting for a firm assurance from the President that the applications had in fact been processed. They submitted that the firm assurance arrived only in the form of the supplementary affidavit filed on the morning of the hearing and that it would be unreasonable to have expected the applicants to abandon the litigation before that point.

Counsel for the President argued that after the President had made an undertaking under oath, the applicants should not have pursued the matter. Even in the written submissions, the President submitted that it was evident that he was doing exactly what the applicants sought in the notice of motion and that there was, therefore, no real issue on the merits.

In my view, the Presidency's previous tardiness cannot justify the applicants' stance. They ought to have exercised caution and put the President on terms with regard to the further processing of their applications after *Chonco 1* before litigating. In the

circumstances, the proper administration of justice demands that such precaution be taken by litigants before embarking upon litigation in this Court. The applicants' stance may well have been justified if it would have been reasonable to expect the Office of the Presidency to continue with its dilatory conduct notwithstanding the judgment of this Court in *Chonco 1*. There was no evidence that the President had in the past failed to comply with orders granted by this Court or undertakings so given. Therefore, they had no reason to believe that the President would not take heed of this Court's finding in *Chonco 1*. This fortifies my view that the applicants' conduct was precipitate when they chose litigation as their first and last resort. Counsel for the President submitted that at the very least, after the President's answering affidavit was filed, the applicants could have sought a postponement *sine die* in order to assess if the President would follow through on his undertaking, a view I am inclined to accept.

The relevance of the costs order in Chonco 1

The applicants' counsel further conceded that despite being unsuccessful in *Chonco 1*, a costs order was granted against the government in the applicants' favour. This order was granted to express this Court's displeasure at the conduct of the Presidency and the Minister in having unreasonably delayed the processing of the 384 applications for pardon. In *Chonco 1*, Langa CJ intrepidly found that the conduct of the Presidency and the Minister was unacceptable:

> "Six years have passed since Mr Chonco posted his application for pardon to the Minister. Yet, despite public undertakings made by the President and the Minister to expedite a response to the applications, the respondents have waited in vain. This is unacceptable. The Constitution requires that all constitutional obligations, wherever they lie, 'must be performed diligently and without delay.'"[14] (Footnote omitted.)

From the above it is plain that, although the costs order was made against the government, the reason for the order was the dilatory conduct of the President. Notably, the costs order the applicants obtained in *Chonco 1* not only indemnified them from the expense of that litigation, it also constituted a public censure against those responsible for the long delay in processing their applications.

That same delay is the subject matter of the present application. In my view it would not be just and equitable to grant further costs in favour of the applicants in respect of the same delay.

Conclusion

Having regard to all these considerations, I am of the view that it would not be just and equitable for this Court to award the applicants costs.

Costs in relation to the application for condonation

[14] *Chonco 1* above n 1 at para 45.

Although the applicants have tendered costs in respect of the application for condonation for the late preparation of the record, the President has declined them. In the result no costs order will be made in that regard.

Order

The following order is made:

(a) No order is made on the application.

(b) There is no order as to costs.

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

Counsel for the Applicants:	Advocate TJ Kruger SC and Advocate C Van Jaarsveld instructed by JH van der Merwe Inc.
t:	Advocate MTK Moerane SC and Advocate NH Maenetje instructed by the State Attorney, Pretoria.