CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 91/08
2009 ZACC 22

WYBRAND ANDREAS LODEWICUS DU TOIT — Applicant

versus

MINISTER FOR SAFETY AND SECURITY OF THE REPUBLIC OF SOUTH AFRICA — First Respondent

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — Second Respondent

Heard on : 24 February 2009

Decided on : 18 August 2009

JUDGMENT

LANGA CJ:

Introduction

[1] This matter concerns the reach of amnesty granted under the provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995 (Reconciliation Act). The issue raised is the effect of amnesty on consequences flowing from a criminal conviction and sentence. In the particular circumstances of this case, the question is how

the amnesty provisions relate to other legislation governing the employment of members of the South African Police Service (SAPS).

[2] The Court is required to consider one of the initial and most profound challenges to our democracy, namely, the granting of amnesty to the perpetrators of crime committed with a political purpose during the dark days of apartheid. As it has done once before,[1] the Court has to grapple with the question of how to balance the varying interests involved in this difficult area of the law.

Parties

[3] The applicant is Mr Wybrand Andreas Lodewicus du Toit, formerly employed as the National Commanding Officer, Technical Support Services in the SAPS with the rank of Director. The first respondent is the Minister for Safety and Security, cited in his capacity as the minister in charge of the SAPS. The second respondent is the National Commissioner of the SAPS (National Commissioner), appointed in terms of section 207 of the Constitution, and charged with the control and management of the SAPS.

Background

[4] The applicant, while in the employ of the SAPS, was convicted on four counts of murder in the Eastern Cape High Court, Port Elizabeth and was sentenced to 15 years'

[1] *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).

imprisonment on 27 June 1996. The murder of the four deceased, otherwise collectively known as the "Motherwell Four", was politically motivated. A consequence of the conviction and the sentence on the four counts was that in terms of the provisions of section 36(1) of the South African Police Service Act 68 of 1995 (SAPS Act), Mr du Toit was deemed to have been discharged from his employment with the SAPS, effective from the date following the date of sentence. Section 36 reads as follows:

> "(1) A member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine, shall be deemed to have been discharged from the Service with effect from the date following the date of such sentence: Provided that, if such term of imprisonment is wholly suspended, the member concerned shall not be deemed to have been so discharged.
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> (2) A person referred to in subsection (1), whose—
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> *(a)* conviction is set aside following an appeal or review and is not replaced by a conviction for another offence;
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> *(b)* conviction is set aside on appeal or review, but is replaced by a conviction for another offence, whether by the court of appeal or review or the court of first instance, and a sentence to a term of imprisonment without the option of a fine is not imposed upon him or her following on the conviction for such other offence; or
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> *(c)* sentence to a term of imprisonment without the option of a fine is set aside following an appeal or review and is replaced with a sentence other than a sentence to a term of imprisonment without the option of a fine,
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> may, within a period of 30 days after his or her conviction has been set aside or his or her sentence has been replaced by a sentence other than a sentence to a term of imprisonment without the option of a fine, apply to the National Commissioner to be reinstated as a member.
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> (3) In the event of an application by a person whose conviction has been set aside as contemplated in subsection (2)(*a*), the National Commissioner shall reinstate

such person as a member with effect from the date upon which he or she is deemed to have been so discharged.

(4) In the event of any application by a person whose conviction has been set aside or whose sentence has been replaced as contemplated in subsection (2)*(b)* and *(c)*, the National Commissioner may—

(a) reinstate such person as a member with effect from the date upon which he or she is deemed to have been so discharged; or

(b) cause an inquiry to be instituted in accordance with section 34 into the suitability of reinstating such person as a member.

(5) For the purposes of this section, a sentence to imprisonment until the rising of the court shall not be deemed to be a sentence to imprisonment without the option of a fine.

(6) This section shall not be construed as precluding any administrative action, investigation or inquiry in terms of any other provision of this Act with respect to the member concerned, and any lawful decision or action taken in consequence thereof."

[5] The applicant appealed against his conviction to the Supreme Court of Appeal. The matter was postponed pending finalisation of his application for amnesty, which he had lodged in the interim with the Committee on Amnesty, a body established under section 16 of the Reconciliation Act. The application for amnesty was refused, but the decision of the Committee on Amnesty was subsequently set aside on review by the Western Cape High Court, Cape Town. The applicant was later granted amnesty in respect of all four counts of murder. Mr du Toit was informed of the success of his application on 23 December 2005.

[6] Before amnesty was granted, the applicant wrote to the National Commissioner of the SAPS to ask whether, if his application was successful, he would be reinstated to his

position in the SAPS. This enquiry, to which the National Commissioner responded in the affirmative on 29 December 1999, was based on the applicant's interpretation of section 20(10) of the Reconciliation Act, which provides as follows:

> "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."

[7] On 23 December 2005 the applicant informed the National Commissioner that he had been granted amnesty and that he was seeking to be reinstated. The Chief of Staff of the SAPS refused to reinstate the applicant, contending that his situation was not contemplated in section 36(2) of the SAPS Act and that section 20 of the Reconciliation Act did not provide for reinstatement of employees whose employment had been terminated in terms of section 36.

[8] The North Gauteng High Court, Pretoria, refused Mr du Toit's application to compel the SAPS to reinstate him, and his subsequent appeal to the Supreme Court of Appeal was dismissed with costs on 30 September 2008. The applicant now seeks the

leave of this Court to appeal against the judgment of the Supreme Court of Appeal.[2] The respondents jointly oppose the application.

Issues

[9] The applicant's case is based on three contentions which also formed the main thrust of his submissions before the North Gauteng High Court and the Supreme Court of Appeal. The contentions may be summarised as follows:

a) Section 20(10) of the Reconciliation Act is remedial in nature and should be given a wide and generous interpretation. It has a retrospective effect not only on the applicant's conviction and sentence, but also on their consequences. In the context of the Reconciliation Act and the constitutional provision for national unity, amnesty is all-encompassing, and has the effect of nullifying the applicant's discharge from the SAPS as a result of his conviction and sentence. The applicant relied on this Court's judgment in *AZAPO* in which Mahomed DP interpreted the meaning of amnesty to be necessarily wide and, in that case, to include indemnity from civil claims for damages.[3] He contended that section 20(9), which specifically excludes the undoing of civil judgments, is an indication of the purpose of the legislation to exclude retrospectivity only when this is specifically indicated. On that reasoning, the applicant argued that he is

[2] Reported as *Du Toit v Minister of Safety and Security and Another* 2009 (1) SA 176 (SCA).

[3] Above n 1 at para 35.

entitled to be reinstated with effect from the date of his discharge on 28 June 1996.

b) The applicant argued that reference to "appeal or review" in section 36(2) of the SAPS Act should be read to include a successful application for amnesty. He contended that there should be no difference between the consequences of the grant of amnesty and those that follow a successful appeal or review. In this case, the effect must be the reversal of the applicant's discharge from his position in the SAPS. He submitted that the failure to equate appeal or review with amnesty in this case would mean that the applicant is in a worse position than if he had elected to continue with his application for appeal, which result cannot be sanctioned by the Reconciliation Act.

c) The applicant's third and final contention concerned the agreement by the National Commissioner, by letter, that the applicant would be reinstated to his position in the SAPS should amnesty be granted. The Chief of Staff of the SAPS then refused to reinstate the applicant. The applicant contended that the agreement by the National Commissioner is binding on the SAPS.

[10] The respondents argued firstly that the appeal does not raise a constitutional matter because none of the questions before the Supreme Court of Appeal involved

constitutional issues. The appeal concerns common law principles of statutory interpretation, contract and the principle that remedial statutes be construed generously.[4]

[11] Second, the respondents supported the finding of the Supreme Court of Appeal that section 20(10) of the Reconciliation Act does not operate retrospectively, because of the effect of the common law presumption against retrospectivity. The purpose of the legislation is not to allow persons guilty of crimes and human rights abuses to escape the consequences of their conduct arising before amnesty was granted. The Reconciliation Act has a limited purpose which, in the case of Mr du Toit, has already been achieved. The civil consequences of the conviction and sentence, such as contractual termination under section 36 of the SAPS Act, are not affected.

[12] Third, the respondents challenged the contention whereby the applicant seeks to equate the consequences of amnesty with those of an appeal or review in section 36(2) of the SAPS Act since the granting of amnesty is an administrative process whereas appeal and review are judicial processes. Their requirements differ, as do their tests. Substantively, success on appeal or review presupposes innocence or an inability to prove guilt while the grant of amnesty presupposes guilt. Fourth, the respondents pointed to the significance of the failure of the legislature, when enacting the SAPS Act, to include the

[4] The respondents argued that the principle that remedial legislation be interpreted generously is pre-constitutional. For a discussion on the interpretation of remedial legislation in the pre-constitutional era, see *Euromarine International of Mauren v The Ship Berg and Others* 1984 (4) SA 647 (N) at 663C–664A and *Jooste v Compensation Commissioner* 1997 (1) SA 83 (C) at 88J–89A. The principle that remedial legislation ought to be interpreted generously finds favour in the constitutional framework in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at paras 51–2.

grant of amnesty when it made provision for appeal and review. They argued that this is an indication that amnesty was not meant to be treated in the same manner as an appeal or review.

[13] Finally, the respondents argued that the agreement by the National Commissioner that the applicant would be reinstated is not binding on the SAPS. When the undertaking was made, the National Commissioner was in no position to exercise the discretion conferred on him by section 36(4):[5] the trigger in section 36(2) had not been activated and thus none of the requisite jurisdictional facts existed.

Is a constitutional issue raised?

[14] Despite the respondents' contention to the contrary, I am of the view that the proper interpretation of the amnesty provisions does raise a constitutional issue. The Reconciliation Act gives effect to the epilogue to the interim Constitution, which is reproduced in Schedule 6 to the Constitution.[6] The concerns of amnesty, reconciliation

[5] Above at [4].

[6] The epilogue to the interim Constitution, under the title "National Unity and Reconciliation", provided that:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
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> 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.
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> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

and national unity were germane to the constitutional arrangements underlying the inception of the new constitutional order. The proper interpretation of the Reconciliation Act accordingly does give rise to a constitutional matter. The proper interpretation of section 36 is, at the very least, a matter connected with a decision on a constitutional matter and is therefore within the jurisdiction of this Court.

The interests of justice

[15] The period in which the Committee on Amnesty operated has now passed. The question arises then whether it is in the interests of justice to deal, years later, with the issues raised. The issues are not only complex but are very close to our constitutional project. The process of national reconciliation is ongoing and will be with us for many years to come. Accordingly, and in the light of the historical and constitutional context of amnesty set out below, I am convinced that the interests of justice dictate that this Court should resolve the dispute.

> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
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> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country."

Section 22(1) of Schedule 6 to the Constitution provides:

> "Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity."

Amnesty in its constitutional and historical context

[16] An assessment of the reach of amnesty requires the Court to consider the founding principles of our constitutional order, which include the rule of law.

[17] The South African nation was, for decades, a deeply divided society characterised by gross violations of fundamental human rights. Mohamed DP described the period as follows:

> "Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law."[7]

[7] Above n 1 at para 17.

[18] What followed was a negotiated transition premised on the need for the transformation of society and the building of bridges across racial, gender, class and ideological divides. The epilogue to the interim Constitution identifies it as an "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence". It goes on to state that, "[t]he 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." By adopting that Constitution, the nation signalled its commitment to reconciliation and national unity, and its realisation that many of the unjust consequences of the past can never be fully reversed but that it would nevertheless be necessary to "close the book" on the past.[8]

[19] The Reconciliation Act was enacted pursuant to these sentiments. The objective was to facilitate the establishment of as complete a picture as possible of the causes, nature and extent of the gross violations of human rights. In order to achieve this, the Reconciliation Act provides that amnesty would be granted to perpetrators who make full disclosure of the facts relating to acts committed with a political purpose during the period identified.

[20] The grant of amnesty was, to a certain extent, a means to an end. Truth-telling is central to the development of a collective memory and in order for that truth to be told,

[8] Id at para 2.

amnesty was granted to those making disclosures about offences that they had committed. The amnesty process was an important mechanism that allowed those who otherwise would have had to deal with their convictions or secret guilt to come clean and be allowed to start their lives anew. The process was a necessary tool in a larger scheme of things.

[21] Amnesty in terms of the Reconciliation Act requires broad consideration, for it is part of a restorative and prospective process of transitional justice, heralding the coming-of-age of the proper rule of law in a society emerging from conflict. Judicial action, truth-telling, reparations and institutional reform are each inadequate on their own to apprehend the past, and too narrow to advance the goals of the future. Used in intelligent unison, they may achieve the delicate balance needed to afford solace to those who have suffered, whilst simultaneously strengthening peace, democracy and justice for the future. Though the amnesty process may appear to be a device to facilitate forgiveness, closing the door on the past and moving on, it is also a pragmatic venture. It is often resorted to in the face of a political impasse that bears neither hope of certain resolution nor the avoidance of visceral strife. So it was with South Africa.

[22] The purpose of the amnesty proceedings was to bring closure and understanding. South Africans were to get together, listen and share interpretations of history, and then walk away to exorcise their inner demons. To each was afforded the possibility of solace, the knowledge of truth and the cleansing of conscience.

[23] While all this may be necessary for the reconciliation of a nation, the promise not to punish those who have flagrantly violated the law seems to be at odds with one of the basic features of the South African constitutional order: namely, the rule of law. Amnesty and its consequences are thus bound to be a source of contention.

[24] Our constitutional democracy is founded on the supremacy of the Constitution and the rule of law.[9] The rule of law requires, among other things, that the law should punish those guilty in terms of the law and absolve those who are not. This principle not only protects against the arbitrary exercise of public power, but also points to the correct way to treat those who act contrary to the law.[10] The rule of law requires accessibility, precision and general application of the law.[11] As this Court held in *De Lange v Smuts NO and Others*,[12] "citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights . . . ."[13] The effect of the underlying

[9] Sections 1(c) and 2 of the Constitution.

[10] Dicey *Introduction to the Study of the Law of the Constitution* 10th ed (Macmillan, London 1959) at 188, referred to by this Court in *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 16.

[11] *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 102.

[12] *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

[13] Id at para 31. (Footnotes omitted.)

principle on the right of access to court, as provided in section 34 of the Constitution, is that any constraint on these rights must be interpreted restrictively.[14]

[25] An amnesty process naturally runs contrary to the usual approach to crime in general, and human rights violations in particular. Ordinarily, when good order is achieved after an intense period of national turmoil, punishment of the worst offenders offers catharsis for those whose rights have been grossly violated. It has rightly been observed that what makes amnesty controversial is the fact that it operates at odds with what has been referred to as the "standard justice script", in terms of which a call to account, a recognition of wrongdoing, and a retributive response are required.[15] This sentiment understandably enjoys substantial support in democratic settings. But amnesty is different.

[26] Indeed, in *AZAPO*, this Court held that amnesty impacts upon fundamental rights. Every person is entitled to protection from unlawful invasions of his or her rights to life, security of the person and dignity, and, when those rights are infringed, to be able to approach a court for relief. The granting of amnesty takes away this entitlement.[16]

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[14] As this Court held in *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 11, "[t]his section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law." (Footnote omitted.)

[15] See Du Bois-Pedain *Transitional Amnesty in South Africa* (Cambridge University Press, United Kingdom 2007) at 258-9.

[16] Above n 1 at para 9.

[27] This limitation is permitted by the Constitution itself, and to that extent there is an adjustment to what in fact constitutes "the rule of law". In *AZAPO*, the Court found that the ultimate aim of the truth and reconciliation process justifies the severe limitation on rights that it causes.[17] This was an extraordinary time and extraordinary measures had to be taken.

[28] The process of reconciliation is an agonising one which requires give and take from all sides. The victim or family of the victim is able to hear the truth about the motives of the act and circumstances surrounding their suffering, and in return must accept that no criminal sanction will be forthcoming. At the same time, the perpetrator comes face to face with his or her conscience, and with the victim, and has to make a full disclosure. In return, the weight of the commission of the offence is lifted from the perpetrator's shoulders with a guarantee of immunity from prosecution, a clean criminal record, and the assurance that never again can the conviction be counted against him or her.[18]

[29] This interplay of benefit and disadvantage is essential to the process and to the desired result, namely, the emergence of objectives fundamental to the ethos of the constitutional order. Both at the level of the individuals involved, and of the nation as a

[17] Id at para 21.

[18] Id at para 7.

whole, it is this interplay that lends acceptability to the amnesty process, despite the tensions and strains it imposes on the rule of law.

[30] What is important is the delicate, constitutionally required balance that is implicit in the legislation and that must be achieved by its implementation. This is, after all, a project directed at national unity and reconciliation and to grant disproportionate benefit to one party at the expense of the other would be unjust and would strike at the equilibrium envisaged by the Constitution. The realisation of a balanced and equitable final result must lie at the core of a constitutionally appropriate interpretation of the relevant section of the Reconciliation Act. This then is the context in which the appropriate reach of amnesty in the statute must be determined.

The interpretation of section 20(10)

[31] The interpretation of section 20(10) of the Reconciliation Act[19] is the central issue in this case. The section is couched in very broad terms and appears capable of the widest possible interpretation. A purely literal and de-contextualised reading might suggest that the grant of amnesty has the effect of expunging not only the record of the conviction and sentence imposed on the perpetrator, but also all consequences that follow that conviction and sentence, past, present and future. There are, however, serious difficulties with that interpretation.

[19] Above at [6].

[32] Read in its context, it is inconceivable that the purpose of section 20(10) of the Reconciliation Act could be the undoing of the past to a limitless degree. Not even the applicant contends for unrestricted retrospectivity. For, indeed, factual events that occurred in the past cannot be undone. It is accordingly necessary to determine the limits of the reach of section 20(10).

[33] The Supreme Court of Appeal relied on the presumption against retrospectivity to reject the applicant's broad reading of section 20(10) that would result in the retrospective application of that section to the consequences of the conviction and sentence. It held that, because of the presumption, the consequences of the conviction and sentence were not affected by the grant of amnesty. This seems to me to afford too much weight to the presumption against retrospectivity in a matter like the present. In particular, it fails to give sufficient weight to the fine distinction between the broad concept of retrospectivity and the distinctive notion of retroactivity. A retrospective provision operates for the future only but imposes new results in respect of past events. A retroactive provision operates as of a time prior to the enactment of the provision itself and changes the law applicable with effect from a past date.[20]

[34] The effect of section 20(10) is, in my view, unavoidably retrospective. The legislation reaches into the past in that it refers to acts committed before the enactment of the statute and seeks to expunge the record of such acts. The purpose of the legislation is

[20] Juratowitch *Retroactivity and the Common Law* (Hart Publishing, Oxford 2008) at chapter 1.

to provide for retrospective application. The question is where the boundaries of such retrospective application lie. The presumption does not fully answer this question.

[35] A provision that has retrospective operation must, in terms of the general approach to retrospectivity, be interpreted restrictively,[21] so that the extent of retrospective operation is limited. Retrospectivity is a concept that includes a range of time-related effects, the result being that there are degrees of retrospectivity.[22] Retroactivity is the interpretation advocated for by the applicant.

[36] In this case, therefore, and in accordance with the general rule that a statute does not strike at acts and transactions that have already been completed before the statute was enacted,[23] the effect of the granting of amnesty does not necessarily, by virtue of the sweeping language used, extend to all of the consequences of the conviction and sentence and alter these consequences from a time prior to the granting of amnesty, or from the granting of amnesty itself. An indication of retrospectivity, without more, is not

[21] Du Plessis *Re-Interpretation of Statutes* (Butterworths, Durban 2002) at 183.

[22] Id at 182.

[23] The principle against interference with vested rights is a component of the presumption against retrospectivity. No statute is to be construed as having retrospective operation which would have the effect of altering rights acquired and transactions completed under existing laws, unless the legislature clearly intended the statute to have that effect. This stems from the belief that at some point the state, the parties and third parties are entitled to rely on a common understanding of the nature of the rights acquired or transactions completed. Compare *Wijesuriya v Amit* [1965] All E.R 701 at 703, where the Privy Council held that–

> "[i]t must be shown that the enacting words clearly cover the case to which it is sought to apply them. The court will no doubt prefer an interpretation which gives effect to the [provision], rather than one which denies it any efficacy, but it will not strain the language used, nor will it rewrite or adapt it to cover cases other than those to which it clearly applies."

A similar approach has been adopted in *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA); and *Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 683E-F.

sufficient to determine its scope and it is necessary to ascertain the meaning of the section in question, and the extent of its retrospective effect, by considering its context and purpose.

Context, purpose and object

[37] As far back as 1950, Schreiner JA in his minority judgment in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* [24] set out the relationship between 'text' and 'context' thus:

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning. . . The second line of approach appears from what was said by Lord Greene, then Master of the Rolls in *Re Bidie* . . .
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> > 'Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context.'" (Footnotes omitted.)[25]

[24] *Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another* 1950 (4) SA 613 (A).

[38] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[26] this Court, per Ngcobo J, held that, "[t]he emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous."[27] This has been the consistent approach of this Court when interpreting statutes. The move away from the "plain words" of the statute is necessitated by the fact that the text of the Constitution and the legislation giving effect to its provisions is value-laden and "value can hardly be expressed in clear and unambiguous language."[28]

[39] Two contexts are relevant here. First there is the historical context: the purpose of the legislation and the social and historical need it was designed to address. This is the

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[25] Id at 662-3. See also 664E-F, where Schreiner JA went on to declare what amounted to an endorsement of the role of the contextual approach:

> "Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over context, and *vice versa*, the less clear it is the greater the part that is likely to be played by the context."

This was perhaps the clearest and most coherent pre-constitutional expression of the importance of context in interpretation, and is supported later in *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914D-E, in which the court held that despite being clear and unambiguous, words in a statute should be read in the light of the subject matter with which they are concerned and that it is only when that is done that the true meaning of the legislation can be discerned.

[26] [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[27] Id at para 90.

[28] 25 LAWSA (reissue) at para 319. Most recently, in *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11, Case No CCT 77/08, 7 May 2009, as yet unreported, at para 21, the purpose and context of legislation were held to play an important role in clarifying the scope and extent of that legislation. In *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC) at paras 19–20 this Court, per Sachs J, considered the importance of interpretation in the context of a constitutional democracy. This importance stems from the fact that the Constitution must be understood as responding to the country's painful past and laying the foundations for a democratic and open society. Legislation must then be read with a mind to the role that such legislation should play in the value system articulated by the Constitution.

broad context in which the Reconciliation Act operates and is discussed above in the section entitled "*Amnesty in its constitutional and historical context*".[29] But there is also the narrow statutory context of section 20(10) provided by the rest of the Reconciliation Act and, in particular, the other sections of the Act that deal with the consequences of amnesty. The meaning of a particular section within an Act may be ascertained by examining the scheme established by the Act. That scheme emerges from the provisions of section 20(7) to (9).

[40] Section 20(7)[30] provides that a person who has been granted amnesty shall not be *civilly or criminally* liable in respect of acts for which he or she was granted amnesty. This means that once amnesty is granted, no civil or criminal liability can be imposed for the past acts. Section 20(7) thus changes the legal consequences of the acts for which amnesty was granted, for the future, from the date on which amnesty was granted. It is retrospective but not retroactive in effect and applies both in respect of civil and criminal liability.

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[29] Above at [16]–[30].

[30] Section 20(7) provides:

> "(a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.
>
> (b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first-mentioned person.
>
> (c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offence."

[41] Section 20(8)[31] provides that if a person is standing trial for the relevant offences at the time amnesty is granted, or has been convicted and is waiting for the passing of sentence, the *criminal proceedings* shall forthwith become void. If a person has been sentenced and is serving a period of imprisonment when amnesty is granted, the sentence so imposed, upon publication of the notice granting amnesty, shall lapse and the person shall forthwith be released. What is clear from this provision is that the consequences of amnesty in this respect affect the future only, that is, the period that follows *after* the grant of amnesty, and affect only criminal proceedings. The proceedings "forthwith" become void and the sentence "forthwith" lapses. Again, the effect is retrospective but not retroactive. Thus, any sentence served will not have been rendered unlawful, but the rest of an uncompleted sentence lapses.

[31] 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."

[42] Section 20(9)[32] continues this theme by making clear that where a *civil* judgment has been granted in respect of the relevant act *before* the grant of amnesty, the operation of the judgment shall not be affected by the grant of amnesty. It is clear that this provision too does not seek to affect the past but preserves the legal consequences that have happened before the grant of amnesty. If a judgment has been satisfied, section 20(9) has no effect. If the judgment is outstanding, section 20(9) preserves the effectiveness of that judgment. This section has no retrospective effect.

[43] Thus from the date on which amnesty is granted, the direct legal consequences of the criminal conduct for which amnesty was granted will no longer obtain. The provisions do not render steps lawfully taken before amnesty was granted unlawful. Nor do they undo certain legal consequences which were already complete by the time amnesty was granted. So, if a civil judgment has been granted, it will remain in force. If a portion of a sentence has been served, the sentence will lapse from the date of amnesty and will not be set aside from the date upon which the sentence was imposed.

[44] The provisions also draw a distinction, in relation to pending proceedings and past liability, between criminal liability on the one hand, and civil liability on the other. The effect of amnesty on criminal liability is both prospective and retrospective: criminal

[32] Section 20(9) provides:

> "If any person has been granted amnesty in respect of any act or omission which formed the ground of a civil judgment which was delivered at any time before the granting of the amnesty, the publication of the proclamation in terms of subsection (6) shall not affect the operation of the judgment in so far as it applies to that person."

liability in respect of the acts for which amnesty is granted is extinguished and where there has been a conviction it is deemed not to have taken place. By contrast, the effect of granting amnesty on civil liability that has already been determined is prospective only. This shows that the granting of amnesty does not obliterate all the direct legal consequences of conduct in respect of which amnesty is granted.

[45] There is good reason for this. The consequences of a prior conviction are primarily limited to an entry in official documents or records and the sentence that the person is serving. Undoing the conviction and sentence principally affects these records and the sentence to be served in the future: it does not and cannot undo the time already served. Expunging the conviction means that a person no longer has a previous conviction: he or she is eligible, for instance, to become a member of the National Assembly.[33]

[46] On the other hand, undoing a civil judgment or an administrative decision taken pursuant to conduct that later gives rise to amnesty may have far-reaching consequences for private individuals and bodies. Decisions taken may have been acted upon and decision-makers may have organised their affairs in accordance with the decision already taken. In the case of discharge or dismissal, someone may have been employed in the position of the dismissed or discharged employee. Undoing civil judgments or

[33] In terms of section 47(1)(e) of the Constitution.

administrative decisions already lawfully taken would therefore have disruptive consequences and result in uncertainty for individuals outside of the amnesty procedure.

[47] In determining whether section 20(10) has the effect of cancelling the discharge of Mr du Toit as a past consequence of the conviction and sentence, it is important to note that the provisions of section 20(7), (8) and (9) do not seek to undo direct legal consequences that flowed from the commission of the offence which were complete before the date on which amnesty was granted. Nor do they seek to affect the civil and administrative consequences of conviction and sentence.

[48] There are three possible interpretations of section 20(10), each of which was raised at the hearing. The first, advanced by the applicant, suggests that amnesty extinguishes the conviction and sentence, as well as the consequence of that conviction, being discharge, as from the date of the conviction itself, thus retroactively. The second, raised by the respondents, is that amnesty serves to extinguish the conviction but does not affect the direct legal consequences that flowed from that conviction. The third, which during argument was accepted by the applicant as alternative relief, is that while the Reconciliation Act cannot retroactively reinstate the applicant, it may be that as at the date of the granting of amnesty, the applicant was entitled to reinstatement.

[49] These three interpretations arise out of the lack of clarity in the section itself. In essence, each requires some degree of “reading-in” to make the intended meaning clear.

The applicant would read the section, " . . . the conviction shall for all purposes, before and after the granting of amnesty, including the application, before and after the granting of amnesty, of any Act of Parliament or any other law, be deemed not to have taken place." According to the respondents, the provision would read, " . . . the conviction shall for all purposes, with effect from the granting of amnesty, including the application of any Act of Parliament or any other law, be deemed not to have taken place." Finally, under the third interpretation, the section would read, " . . . the conviction shall for all purposes, with effect from the granting of amnesty, including the application, before or after the granting of amnesty, of any Act of Parliament or any other law, be deemed not to have taken place." No single reading emerges without anomaly.

[50] In ascertaining which of these constitutes the correct interpretation of section 20(10), the Court has to determine which of them is properly in line with the scheme laid out in the Reconciliation Act, and which best achieves the goal of reconciliation and national unity. That would be the interpretation that achieves the most appropriate balance between the parties, that fits most comfortably into the constitutional and statutory framework, and that requires the least intrusive addition to the text.

[51] While the Reconciliation Act seeks to advance reconciliation and national unity, it cannot undo what has happened in the past. Just as the aim of the legislation is not to restore to the victims what they have lost – an impossible task – it is not (as we have seen from the analysis of the provisions above) to restore the perpetrator, in every respect, to

his or her position prior to the commission of the offence. To seek to undo all the consequences of the conviction would be an endless task and would place an undue burden on the state and third parties.

[52] Section 20(7) to (10) of the Reconciliation Act demonstrates that the legislature was alive to this concern when the Act was passed. It does not undo the direct legal consequences of the conviction and sentence beyond the public consequences such as the removal of the record of conviction and sentence from official documents and the voiding of sentences still to be served. Even in respect of public consequences, it is not sought to undo ordinary legal consequences already complete by the time amnesty was granted. In this manner, section 20(7) to (10) pays due regard to the interplay of benefit and disadvantage so important to the process of national reconciliation.

[53] The textual clues afforded by the provisions in the Reconciliation Act concerning the reach of amnesty therefore bolster this understanding of the historical context in which the Act was passed. It was important at the time that those coming forward to the Truth and Reconciliation Commission and admitting to wrongs they had committed did not receive the lion's share of benefits from the process. The Reconciliation Act carefully ensures this.

[54] The applicant invoked the fact that the statute is remedial legislation, the purpose of which is to "express the values of the Constitution and to remedy the failure to respect

such values in the past".[34] He relied on *Goedgelegen Tropical Fruits*, where this Court held that the Constitution and remedial legislation "umbilically linked to the Constitution" ought to be interpreted in context and by offering a "generous construction over a merely technical or linguistic one".[35]

[55] The Reconciliation Act was, to a certain extent, enacted in order to remedy the failures of the past, but the primary aim of the Act was to use the closure acquired as a stepping stone to reconciliation for the future. Amnesty was an important tool in this process and one without which the process would not have been agreed to by all parties, and could not have taken place. However, it cannot be correct to say that the Reconciliation Act was enacted in order to ameliorate hardship for the perpetrators of human rights abuses and to provide these perpetrators with remedies. The applicant cannot, for this reason, rely on the usual rule of the generous interpretation of remedial statutes to persuade this Court that he ought to be reinstated. To interpret the Reconciliation Act in this way would not be to ensure that it achieves its aims but would, in fact, be flouting those aims by extending too far the already delicate and difficult issue of amnesty.

[56] The conscious decision by the legislature was that amnesty would allow people not to be trapped in the painful past, but to be given a pardoned freedom to go forth and

[34] *Goedgelegen* above n 4 at para 55.

[35] Id at para 53.

contribute to society. Amnesty may forgive the past, but in South Africa it is intended to have the inherently prospective effect of national reconciliation and nation-building, for the past can never be undone. Only the future may be forged as desired.

Alternative argument based on reinstatement from the date of the grant of amnesty

[57] As an alternative to the relief requested by the applicant, the possibility of reinstatement as from the proclamation of the granting of amnesty was suggested at the hearing and adopted by the applicant. This is based on the reasoning that while the consequence of the conviction cannot be deemed not to have occurred retrospectively, at the date of the proclamation, there is no reason for refusing to reinstate the applicant, given that his conviction is void.

[58] This argument too depends on the proper interpretation of section 20(10). Given the conclusion I have reached (that properly interpreted the provision does not seek to undo direct legal consequences that were completed by the time amnesty was granted), this argument too must fail. The discharge of the applicant under section 36 of the SAPS Act was lawfully effected by the time amnesty was granted and cannot be undone.

Section 36(2): should amnesty be equated to appeal or review?

[59] Both the High Court and the Supreme Court of Appeal rejected the argument that amnesty should be equated to "appeal or review" in section 36(2) of the SAPS Act.[36] I

[36] Above at [4].

am not persuaded that this Court should come to a different conclusion. Had the legislature intended to include in the ambit of section 36(2) the granting of amnesty it would have done so, given the time when the SAPS Act was enacted, and specifically the fact that this Act followed shortly after the Reconciliation Act. Further, appeal and review processes are judicial processes, whereas amnesty is an administrative process. The former are designed to determine guilt or innocence; the latter is premised on the guilt of the perpetrator and its purpose is to advance national reconciliation and reconstruction.

[60] The applicant contended that he was potentially worse off, having obtained amnesty, than he would have been had he continued with his appeal. This assumes that his appeal would have succeeded: a matter on which we need not speculate. The fact is that the applicant made a choice. The premise on which he applied for amnesty was that he had committed a gross human rights violation. It cannot be said that the consequences of his election to pursue amnesty are unjust or unfair.

[61] It was submitted that other members of the SAPS are still employed, having been granted amnesty before their conviction. This does not help the applicant. Section 36 clearly differentiates between those who have been convicted and sentenced and those who have not. This differentiation is reasonable and necessary for the functioning of the section and, while it is unfortunate for Mr du Toit, it is not the cause of any unjust result.

[62] While there may well be many who were granted amnesty for gross human rights violations who are still employed by the SAPS and other state entities, this cannot be a justification for restoring Mr du Toit to his position. His discharge occurred because he was convicted of committing a crime before being granted amnesty. The Reconciliation Act does not undo that consequence. His reinstatement is not being refused by this Court on the basis that he should not be allowed to serve as a member of the SAPS, but on an interpretation of the law in the light of its context.

Contract between the National Commissioner and the applicant

[63] The applicant contended that the letter he received from the National Commissioner constituted an agreement to reinstate him. However, as the Supreme Court of Appeal found, the letter was not intended to be and did not constitute a contract. First, it did not purport to be a binding contract. Second, the National Commissioner could not bind the SAPS to his interpretation of the relevant provisions. Accordingly, for the reasons set out in the judgment of the Supreme Court of Appeal,[37] this argument too must fail.

Conclusion and costs

[64] The application before this Court falls to be dismissed. It is appropriate that there be no order as to costs against the applicant. Mr du Toit is litigating against the state, based on legislation that needed clarification. He has raised important and complex

[37] Above n 2 at paras 20-2.

issues of statutory and constitutional interpretation. He should not be burdened with costs even though he has been unsuccessful.[38] The principle was not given adequate consideration in the High Court and the Supreme Court of Appeal and it is just to set aside the cost orders in those courts.

Order

[65] In the event, the following order is made:

1. The application for leave to appeal the judgment and order of the Supreme Court of Appeal in case number 467/2007, dated 30 September 2008, is granted.
2. The appeal is dismissed.
3. The orders for costs made by the North Gauteng High Court, Pretoria in case number 40687/2006, dated 21 June 2007, and by the Supreme Court of Appeal, are set aside.
4. In their place is substituted the following:

   There is no order for costs in the High Court and in the Supreme Court of Appeal.
5. There is no order for costs in this Court.

[38] See *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 139; and *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14, Case No CCT 80/08, 3 June 2009, as yet unreported, at paras 22-4.

Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, van der Westhuizen J and Yacoob J concur in the judgment of Langa CJ.

Counsel for the Applicant:	Advocate JG Cilliers SC and Advocate MD Du Preez instructed by Wagener Muller Vermaak Attorneys.
Counsel for the Respondents:	Advocate TJ Bruinders SC and Advocate BL Makola instructed by the State Attorney, Pretoria.