IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.

NGHC CASE NO. 15320/09

In the application of

RYAN ALBUTT	Applicant

In re

CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION	First Respondent
KHULUMANI SUPPORT GROUP	Second Respondent
INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE	Third Respondent
INSTITUTE FOR JUSTICE AND RECONCILIATION	Fourth Respondent
SOUTH AFRICAN HISTORY ARCHIVES	Fifth Respondent
HUMAN RIGHTS MEDIA CENTRE	Sixth Respondent
FREEDOM OF EXPRESSION INSTITUTE	Seventh Respondent

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Eighth Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Ninth Respondent
GERHARDUS JOHANNES TALJAARD	Tenth Respondent
AREND CHRISTIAAN DE WAAL	Eleventh Respondent
WILLEM JACOBUS PETRUS JACOBS	Twelfth Respondent
HANS JACOBUS WESSELS	Thirteenth Respondent
RYNO ADRIAAN ROSSOUW	Fourteenth Respondent
JOHANNESS BENJAMIN VAN DER WESTHUIZEN	Fifteenth Respondent

FIRST TO SEVENTH RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned

LWAZI PUMELELA KUBUKELI

state under oath as follows:

1. I am an advocate practising as in-house counsel at the Legal Resources Centre, Cape Town with its offices at Third Floor, 54 Greenmarket Place,

Shortmarket Street, Cape Town. I am responsible for the management of this matter on behalf of the First to Seventh Respondents, who are the Applicants in the main application. For the sake of clarity and convenience I refer to them as "the Coalition".

2. I am fully conversant with the facts and legal contentions underpinning these proceedings. I am duly authorised to oppose this application for leave to appeal and to depose to this affidavit on behalf of the Coalition.

3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge. They are to the best of my knowledge and belief both true and correct.

THIS APPLICATION FOR LEAVE TO APPEAL

4. Before I respond in detail to the contents of the affidavit of Mr Snaid, I set out the approach of the Coalition to this application.

5. The Coalition applied to the North Gauteng High Court for relief in two parts:

5.1 Part A: An interim interdict restraining the President from granting any pardon in terms of the "Special Dispensation for Presidential pardons for political offences", pending the determination of the application in Part B.

5.2 Part B: A final interdict restraining the President from granting any pardon in terms of the Special Dispensation unless and until the victims of the offences concerned have been given access to the relevant application for a pardon and related information, and an opportunity to make representations to the President in that regard. (The Coalition initially also applied for an interdict preventing the granting of any pardon at all in terms of the Special Dispensation, but did not persist in seeking that relief.)

6. On 28 April 2009 Seriti J granted an interim interdict in terms of Part A. He specified the steps which were to be taken in order to bring the proceedings to the notice of other applicants for pardons in terms of the Special Dispensation, so that they could if they wished participate in the determination of Part B.

7. Mr Albutt was, according to his attorney, advised that there was no prospect of success in an appeal to a Full Bench of the High Court or the Supreme Court of Appeal against the order made by Seriti J, because the order was not final in effect and was therefore not appealable.

8. I respectfully submit that this advice was correct. The Supreme Court of Appeal has consistently held, most recently in *Van Niekerk and Another v Van Niekerk and Another 2008 (1) SA 76 (SCA)* at paragraph 9, that the granting of an interim interdict is not appealable.

9. Mr Albutt was thus content that the matter should proceed, in the ordinary

manner, to a decision by the High Court on the order sought in Part B.

10. The President and the Minister subsequently applied for leave to appeal to the Full Bench or the SCA. If the advice given to Mr Albutt is correct (and I submit that it is plainly correct), that application for leave to appeal will be dismissed. The main application will then proceed, in the ordinary way, to the determination by the High Court of the order sought in Part B.

11. However, Mr Albutt now seeks leave to appeal to this Court on the basis that the High Court may (wrongly) grant leave to appeal, and that decision may subsequently be found on appeal to be wrong, in which event there will be a "procedural morass" which will lead to delay.

12. I respectfully submit that this is no basis for an application for leave to appeal to this Court. There is no reason at all to think that the High Court will (wrongly) grant leave to appeal. Mr Albutt is free to submit, when the application for leave to appeal is heard in the High Court, that it should be dismissed on the ground that the order of Seriti J is not appealable. The Coalition will certainly make submissions to that effect.

13. The Coalition recognises that this Court may grant leave to appeal even though the order in question is not appealable under the Supreme Court Act. I submit that the Court will however not lightly do so.

14. I submit that this Court ought not to grant leave to appeal for no reason other than a fear expressed by one of the parties (without providing any grounds) that another court may decide a matter wrongly, which will result

in delay. If that were a valid basis for granting leave to appeal, this Court would be inundated by applications for leave to appeal predicated on no basis other than that it is speculated that another court may decide the matter wrongly.

15. In addition, the High Court has not yet definitively decided the merits of the substantive application made by the Coalition. What it has done is grant an interim order preserving the status quo while the substantive application is decided.

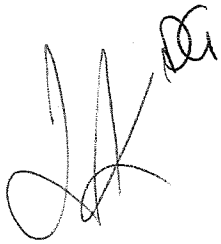
16. What Mr Albutt now wants is that this Court should definitively decide the merits of the substantive application (Part B), without the benefit of either

16.1 a definitive judgment of the High Court on the merits; or

16.2 any judgment at all by either a Full Bench or the SCA.

17. Although the form of this application is an application for leave to appeal, in substance it is therefore akin to an application for direct access in respect of Part B. Mr Albutt does not, I submit, make out any case for direct access or what in effect amounts to direct access.

18. The Coalition respectfully submits that for all of these reasons, the interests of justice do not require that leave to appeal to this Court be granted.



THE BACKGROUND FACTS

19. At a Joint Sitting of Parliament on 21 November 2007, President Mbeki announced a special process for the handling of pardon requests made by "people convicted for offences they claim were politically motivated, and who were not denied amnesty by the TRC". President Mbeki stated that the aim was to assist the nation in resolving the "unfinished business" of the TRC. He said inter alia:

19.1 It was important that pardon requests were dealt with "in an open and transparent manner, uniformly and in strict compliance with pre-determined procedures and criteria".

19.2 The process would not undermine the work of the TRC but would instead build upon its legacy.

19.3 His pardon decisions would be guided by the values and principles enshrined in the Constitution, and the "principles, criteria and spirit" of the TRC.

20. An Explanatory Memorandum was issued, dealing with the Special Dispensation. It stated that the President would:

20.1 be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation; and

20.2 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.

21. The participation of victims was a bedrock element of the TRC Amnesty process – both as a requirement of justice and reconciliation, and to ensure that the facts alleged by amnesty applicants were properly scrutinised and tested.

22. The initial role in the Special Dispensation process was performed by the Reference Group (RG). The RG consisted only of politicians. At the first full meeting of the Reference Group on 6 February 2008, it confirmed its commitment to pursue its task in terms of *inter alia*, the following objective: "... and whereas the Reference Group was constituted at the instance of the President to assist him in the evaluation of applications for presidential pardon, the group will utilize the opportunity to contribute to the ideal of reconciliation by advising the President in a spirit of even-handedness and justice on an equal basis for all."

23. The RG received and considered 2114 applications for pardons, and has made recommendations to the President. It operated under blanket secrecy. The RG refused to identify who had made application for a pardon. (A list was ultimately obtained two working days before the expiry of the RG's mandate, as a result of an application under the Promotion of Access to Information Act.)

24. The RG, the President and the Minister have declined to disclose the contents and motivations of the pardon applications, and to disclose to the applicant organisations what applications for pardon have been recommended.

25. The RG refused to give the victims or other persons affected by the offences in question an opportunity to make representations as to whether a pardon should be granted.

26. The RG gave victims no opportunity to challenge the facts alleged by the applicants for pardons as the basis of their assertion that they should be granted pardons.

27. According to the incomplete list in Annexure "I" to Mr Snaid's affidavit – which is the first list the Coalition have seen, despite their repeated requests to this effect - the RG has recommended 121 pardon applicants for pardon.

28. At the request of the Coalition, the President gave an undertaking not to grant any pardons in terms of the Special Dispensation while he was considering the request of the Coalition that victims be given an opportunity to make representations to him as to whether a pardon should be granted, and if so, on what terms.

29. The President then decided not to grant victims such an opportunity, and

withdrew his undertaking. He did not disclose which applications had been recommended to him, and which he was considering.

30. The Coalition then made the application to the Gauteng High Court to which I have referred above. The President stated in his affidavit in those proceedings that he would already have made his decisions but for this application.

31. It is not possible for individual victims to make application for relief, as they do not know who has made application for pardon and who has been recommended by the RG.

32. On 28 April 2009, the North Gauteng High Court granted judgment in this matter and made an interim Order that:

32.1 The President is interdicted from granting any pardon in terms of the "Special dispensation for Presidential pardon for political offences" until such time as the proceedings described in Part B of the Notice of Motion are finalised.

32.2 The President and/or the Minister are provide the applicants with the list of prisoners recommended for release by the Pardon Reference Group;

32.3 The Applicants are to serve the papers in this matter on the applicants for pardon referred to in the preceding paragraph.

32.4 The Minister must make other applicants for parole [other than those referred to above] aware of these proceedings.

33. The President and the Minister have not yet provided the Applicants in the main application (the Coalition) with the list of prisoners recommended for release by the Pardon Reference Group.

34. On 20 May 2009 the President and the Minister gave notice of an application to the North Gauteng High Court for leave to appeal to a Full Bench, *alternatively* the Supreme Court of Appeal, against the whole of the judgment and order of Seriti J.

35. Mr Albutt initially did not apply for leave to appeal to the Full Bench, the SCA or this Court. According to his attorney Mr Snaid, the original decision was taken because Mr Albutt believed that he had no prospect of success in the High Court and the SCA because the orders made might be found not to be final in effect, and because an appeal to this Court might be held to be premature. He has now changed his position with regard to an appeal to this Court.

36. Accordingly, the present state of affairs is as follows:

36.1 There is a pending application for leave to appeal to a Full Bench of the North Gauteng High Court, *alternatively* the SCA, by the President and Minister of Justice.

36.2 Mr Albutt has now brought a separate application for leave to appeal directly to this Court.

FURTHER REASONS WHY THIS APPLICATION FALLS TO BE DISMISSED

37. I referred in the introductory section of this affidavit to reasons why, I respectfully submit, this application for leave to appeal to this Court falls to be dismissed. In addition, I wish to refer to the following reasons.

38. The appeal to this Court relates to an interim order, the effect of which is to preserve the status quo while the relief in Part B is sought. The Part B relief is simply to require that a particular procedure is followed before pardons are granted in terms of the Special Dispensation. I respectfully submit that there is no good reason, in the interests of justice, for this Court to deviate in this case from the ordinary rule that the granting of an interim interdict is not appealable.

39. It is not in the interests of justice for the parties to be deprived of a determination of the Part B application by the Full Bench or the SCA; and indeed for this Court (if the matter properly comes before it in due course) not to have before it the benefit of the views of the Full Bench or the SCA.

40. Mr Albutt's real remedy to address his concerns is not to appeal to this Court, but to oppose the application by the President and the Minister for leave to appeal to the Full Bench or the SCA. He can then oppose the Coalition's application in the High Court for the relief sought in Part B. This is apparently what he intended to do until the President and the

Minister applied for leave to appeal.

41. I now respond to the detail of the affidavit by Mr Snaid.

ANSWER TO THE FOUNDING AFFIDAVIT

Re "Purposes of this application"

Ad paragraph 3

42. Save to state that I do not accept that leave to appeal to this Court should be granted, or indeed that condonation should be granted, the contents of this paragraph are noted.

Re "Proceedings in the court a quo and parties thereto"

Ad paragraph 7

43. I do not accept that the oral argument by counsel or "particularly" counsel for Mr Albutt was "significantly" curtailed.

44. The Judge stated, before the hearing commenced, that argument had to be completed in one day. This was accepted by all counsel save for Mr Albutt's counsel.

45. I do not know whether Mr Snaid seeks to imply (for he refrains from saying so in terms) that Mr Albutt did not have a fair hearing in the Court *a quo*. If this is indeed his contention, then I state that it is simply not

correct. I highlight the following in this regard:

45.1 The parties were given the opportunity to file heads of argument. Counsel for all of the parties did so. Most of them (including Mr Albutt's counsel) filed comprehensive heads of argument.

45.2 All counsel were given an opportunity to present their oral argument within time limits which were determined by the Judge before the hearing commenced.

45.3 The Judge afforded Mr Albutt's counsel additional time at the end of the proceedings, to enable him to respond to matters raised by counsel for the Coalition.

45.4 The Court *a quo* sat until approximately 6 p.m. so as to ensure that the parties were given a proper opportunity to present argument.

Re "background facts"

Ad paragraph 10

46. I have dealt above with President Mbeki's announcement at a Joint Sitting of Parliament on 21 November 2007 that a special process would be created for the handling of pardon requests made by people convicted for offences they claim were politically motivated, and who were not denied amnesty by the TRC. President Mbeki stated that the aim was to assist the nation in resolving the "unfinished business" of the Truth and Reconciliation Commission, and that requests would be considered from

applicants convicted of offences "of the nature considered by the TRC during the period up to 16 June 1999".

47. The initial deadline for the submission of applications was ultimately extended to 31 May 2008.

Ad paragraph 14

48. Save to state that I have no knowledge of whether the Reference Group received applications "mainly" from persons serving prison sentences, the remaining content of this paragraph is not disputed.

Ad paragraph 15

49. Mr Snaid's statement (confirmed by Mr Albutt) that the attacks by Mr Albutt and the other members and supporters of the AWB were on *"a group of black strikers"* is inconsistent with the judgment of the Supreme Court of Appeal in the appeal by Mr Albutt and his co-accused.

50. The appeal is reported as *S v Whitehead and Others* [2007] ZASCA 171; [2007] SCA 171 (RSA); [2008] 2 All SA 257 (SCA) ; 2008 (1) SACR 431 (SCA). The Court described the actions carried out by Mr Albutt and his co-accused as

> *"an unashamed racist attack perpetrated more than a year after the introduction of a constitutional order. It was arrogant in the extreme and incited terror amongst the black citizens of Kuruman."* (at par 23)

51. The Court found that

"the attacks were indiscriminate" and *"certainly not limited to members of the group of striking workers, and with women and elderly people also being victims".* (at para 19)

52. Combrinck JA made the following findings with regard to Mr Albutt:

"The assault of which he was convicted took place at two o'clock in the afternoon of the day in question, long after the main attack had taken place. According to the state witnesses an unknown black man came into a local doctor's waiting-room and hid behind the door. Five to six white men, one of whom was appellant 7 [Mr Albutt], entered, struck the man repeatedly with pickhandles and sticks to such an extent that extensive bleeding from his head was observed. A tear-gas canister was activated and the witnesses fled. When they returned the attackers and the unknown black man had disappeared. The brutal assault on an unarmed man, outnumbered six to one, by men armed with lethal weapons is deserving of an additional period of direct imprisonment." (at para 12)

Ad paragraph 16

53. I have no personal knowledge of the contents of this paragraph but emphasise the following:

53.1 Only four persons from Kuruman chose to attend the meeting, even

though it was publicised in Kuruman and a bus was provided.

53.2 There were many more than four victims of Mr Albutt and the other members and supporters of the AWB. The extensive and widespread nature of the assaults on the black citizens of Kuruman appears from the judgments in the SCA.

53.3 The names of the four persons who attended the meeting have been identified, but their role in the events in question was not been explained.

53.4 There is no evidence at all that any one of those four persons:

53.4.1 supported the granting of a pardon to Mr Albutt; or even

53.4.2 was asked his or her opinion as to whether Mr Albutt should be granted a pardon.

54. Mr Albutt sought this meeting only

54.1 almost thirteen years after the events in question;

54.2 after the President had announced the Special Dispensation; and

54.3 after he had consulted with his attorney and counsel in that regard.

55. I submit that under the circumstances, it is difficult to avoid drawing the

inference that Mr Albutt set up this meeting solely for the purpose of strengthening his application for a pardon.

56. I submit that an affidavit from the then secretary of the ANC in the Northern Cape can not be a substitute for the views of the victims themselves, or be considered to be a response on behalf of the victims. Mr Albutt certainly did not communicate with the victims "through the African National Congress", as he and Mr Snaid assert.

Ad paragraph 17

57. The Coalition made extensive attempts to ensure that the principles of victim participation, transparency and public disclosure were infused into the process. In summary, those attempts and the responses included the following:

57.1 On 5 February 2008 the CSVR contacted Dr Delport (chairperson of the RG) to offer the CSVR's assistance and expressed the hope of a "constructive relationship" with the RG.

57.2 On 25 March 2008 the CSVR again contacted Dr Delport requesting the Terms of Reference for the RG.

57.3 On 5 May 2008 the CSVR again emailed Dr Delport requesting a list of applicants who had submitted pardon applications.

57.4 On 3 June 2008 the CSVR addressed an e-mail to Mr Sibanyoni (the Deputy Chairperson) enquiring about a statement made by Dr

Delport that only a limited number of the 2000 cases received were appropriate for the RG to consider, in that the rest were not political. The CSVR enquired whether the assessment came from the Department of Justice and what, exactly it was based on. The CSVR received no response to that enquiry.

57.5 In response to a request from the CSVR on 12 June 2008 for the Rules and Procedure governing the RG, its Terms of Reference and list of members were provided by the secretary of the RG on 17 June 2008.

57.6 On 20 June 2008 the Coalition delivered letters to all of the RG members expressing concerns over the difficulty of discovering and engaging with the procedures of the RG, and requesting a meeting of NGOs and the RG. The Coalition received no response to this letter.

57.7 On 30 June 2008 the CSVR sent an e-mail to the secretary of the RG requesting a meeting.

57.8 On 1 July 2008 the CSVR sent an e-mail to Dr Delport requesting a meeting.

57.9 On 1 July 2008 Dr Delport responded that a "comprehensive response" to the Coalition's request had been drafted and that he, the secretary and Mr Sibonyani were prepared to meet with the Coalition.

57.10 On 15 July 2008 a meeting was held between the Coalition

members and Dr Delport, the secretary and Mr Sibonyani.

57.11 On 17 July 2008 and pursuant to a request from Dr Delport, the Coalition addressed correspondence to the RG in which it articulated its requests and recommendations.

57.12 On 7 August 2008 Dr Delport wrote to the Coalition stating that neither the Terms of Reference nor any law compelled the RG to "call for inputs by the public (in particular the victims)" and that the RG would accordingly not accede to requests to incorporate victim input into the process.

57.13 On 12 August 2008 the Coalition expressed disappointment with the RG's unwillingness to consider victim input and improve transparency in its processes, and reiterated its request for a list of pardon applicants.

57.14 On 12 August 2008 the Coalition wrote to President Mbeki expressing its concerns, and urging him not to issue pardons in terms of the special dispensation until such time as the dispute over the process had been resolved; the Coalition urged him to intervene and direct the RG to comply with the Constitution.

57.15 On 19 August 2008 the South African Human Rights Commission wrote to President Mbeki and echoed many of the concerns raised by the Coalition.

57.16 On 20 August 2008 the Coalition sent letters to all political parties with representatives on the RG, to amplify their concerns over the

lack of transparency and victim involvement in the RG process, and gauge each party's support for the process. It urgently requested meetings with party leaders and RG representatives. The Coalition received responses to these letters from: (a) the United Christian Democratic Party; (b) the Independent Democrats; (c) the African Christian Democratic Party; (d) the Azanian Peoples' Organisation. These responses indicated support for the decision of the RG to exclude victims from the process.

57.17 On 8 September 2008 the FXI received a response to its letter to the Democratic Alliance dated 3 September 2008. Dr Delport indicated that he was responding on behalf of the RG. In that letter, he sought to justify the approach of the RG not to hear the views of victims and their families.

57.18 On 3 October 2008 the Coalition wrote to President Motlanthe *inter alia* to make him aware of the Coalition's concerns regarding the RG process, and urged him to intervene and direct the RG to comply with the Constitution.

57.19 On 17 November 2008 the Coalition wrote to the new Minister of Justice in order to inform him of the Coalition's objections to the RG process, and requested an urgent meeting with him.

57.20 On 9 December 2008 the Coalition's attorney wrote to the President reiterating the Coalition's objections to the RG process.

57.21 On 18 December 2008 the Presidency advised that the Coalition's letter had been referred to the Minister for his consideration and

advice. The President undertook not to consider any political pardons received from the RG until the Minister had made a recommendation.

57.22 On 13 March 2009 the Presidency wrote to the Coalition's attorneys stating that the President considered the process to have been "regular" and would not furnish any (further) undertaking.

57.23 On 16 March 2009 the Coalition wrote to the President expressing disappointment at the President's view, and stating that they were left with no choice but to make an urgent application for an interdict.

Ad paragraph 18

58. The contents of this paragraph are correct. I should however emphasise the following:

58.1 The RG refused to disclose who had applied for pardons; in respect of what crimes pardons had been applied for; the motivations for the pardon applications; and who the RG had recommended for pardon.

58.2 The list to which Mr Snaid refers was obtained through a time-consuming application under the Promotion of Access to Information Act. It was provided some two working days before the expiry of the RG's mandate. It was a 300-page list referred to as the "Political Pardons Application Form Received Register". It

58.2.1 listed everyone who had applied for a pardon.

58.2.2 stated the name, prison or identity number, offence, and whether the person was in or out of prison.

58.2.3 did not disclose where the person concerned was imprisoned.

58.2.4 did not disclose the status of the application, and whether it had been recommended or rejected.

58.2.5 did not identify the victims of the offence in question.

Ad paragraph 20

59. The undertaking requested from the President was that he would not grant pardons <u>without giving victims and other interested parties and effective opportunity to make representations</u>.

<u>Re "Interested parties not before court a quo, urgency and non-joinder"</u>

Ad paragraph 21

60. I deny that there is any merit to these submissions. In amplification, I submit as follows:

60.1 Until the end of November 2008, the RG and the President refused to disclose the identity of the 2114 pardon applicants.

60.2 The state has never disclosed the current whereabouts of those

individuals, some of whom are no longer in prison. It was therefore not possible for the Coalition to serve the application on them.

60.3 It would in any event be extraordinarily wasteful to serve on all 2114 original applicants, when only a limited number of them have been recommended for pardon.

60.4 The RG and the President have consistently refused to disclose the identity of the (smaller) group of applicants who have been recommended for pardons. It was therefore impossible for the Coalition to serve the application on those persons.

60.5 The President stated in his affidavit that if it had not been for this application, he would have considered and decided upon the applications which were recommended to him by the RG. It was therefore necessary for the Coalition to move urgently in order to prevent the unlawful granting of pardons under the special dispensation. It was plainly not possible, in any event, to give notice either to the 2114 pardon applicants, or to the (unidentified) pardon applicants who have been recommended to the President.

60.6 The relief sought and granted was interim relief. Its purpose and effect was to preserve the status quo pending a determination of the rights and obligations of the parties.

60.7 The interim order granted by the court *a quo* has now provided a means for bringing the application for final relief (Part B) to the attention of the other pardon applicants.

61. For the reasons already stated, I deny that the urgency was self-created. The President initially gave an undertaking not to grant any pardons, while he was considering the request of the Coalition that he give victims an opportunity to make representations. When he rejected that request and withdrew his undertaking, the Coalition immediately made application to the High Court.

Ad paragraph 22

62. I respectfully submit that the approach of the High Court was correct.

Ad paragraph 23

63. It is correct that Seriti J did not deal specifically with the issue of urgency. The matter was ultimately heard on 14 April 2009, to which date it had been postponed by agreement between the parties.

Ad paragraph 24

64. For the reasons which I have given above, I deny that there is any merit to this contention. I submit that the matter was manifestly urgent.

Ad paragraphs 25 and 26

65. Seriti J also directed the President and/or the Minister to bring the application to the attention of the other applicants for a pardon.

Ad paragraph 27

66. The President and the Minister have not yet provided the Coalition with

the list of prisoners recommended for release by the Pardons Reference Group.

67. Quite remarkably, however, Mr Albutt is in possession of such a list (Annexure I to Mr Snaid's affidavit), although his copy is incomplete. The position is thus that while consistently refusing to make the list available to the Coalition, the authorities have made it available to prisoners such as Mr Albutt.

Re "Constitutional question decided by the court a quo"

Ad paragraph 29

68. I do not accept that any of the judgments of the Constitutional Court which were cited to the Court *a quo* "held quite unequivocally that the pardon power of the President under s 84(2)(j) of the Constitution is an executive power and not an administrative power".

69. On the contrary, I respectfully submit that it is precisely the definition of "administrative action" in s 1(b)(aa) of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA") that addresses the question of whether the exercise of the presidential powers contained in s 84(2) constitutes "administrative action".

70. That definition lists the presidential powers which are excluded from administrative action. They are the powers listed in s 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k) of the Constitution.

71. The exercise of the power to grant pardons in subsection 84(2)(j) is specifically not excluded . This is the clearest possible indication that the legislature intended that the granting of pardons constitutes administrative action subject to PAJA. I submit that the judgment of Chaskalson CJ in *Minister of Health NO v New Clicks SA (Pty) Ltd 2006 (2) SA 311 (CC)* demonstrates that this is an appropriate way to determine the meaning of "administrative action". There, the Chief Justice considered whether the making of regulations constitutes administrative action. In order to answer this question, the Chief Justice had regard to the exclusions from the definition of "administrative action" in s 1 of PAJA.

Ad paragraph 30

72. I do not accept that there is any conceivable reason or basis why the right of victims and their families to be heard, which was fundamental to the TRC Amnesty proceedings and is also infused into parole proceedings, should be sacrificed in the Special Dispensation process. Whatever the differences between parole and pardon may be, the principle that victims and their families should be heard, should, I respectfully submit, apply in both instances. I submit further that whether or not this is correct as a general proposition, it is certainly correct in relation to the Special Dispensation.

Ad paragraphs 32 to 34

73. It was submitted in the Court *a quo* that the Coalition had a right to the

relief sought because the process followed by the RG and President is fundamentally inconsistent with the public undertaking which the President gave, and at odds with the pre-determined benchmark to which the President had committed himself.

74. The commitment by the President was publicly made, at a joint Sitting of Parliament, to Parliament and the nation. The process which was ultimately followed was inconsistent with this public undertaking. It did not allow for any consultation with victims or their families or other interested parties. It was, for that reason:

74.1 Inconsistent with the principles and values which underpin the Constitution, including:

74.1.1 the principles and objectives of nation-building and national reconciliation;

74.1.2 the right to a fair procedure, either because of the right to just and fair administrative action, or under the common law;

74.1.3 the right to compliance with the Government's own commitments to fair process and victim participation;

74.1.4 the right to human dignity and equality for victims in respect of processes followed and outcomes achieved;

74.1.5 the requirement of adherence to the rule of law under sec 1(c) of the Constitution;

74.1.6 the right to free expression;

74.2 Inconsistent with the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission;

74.3 Inconsistent with the President's self-imposed benchmark in this regard.

75. I submit that it would run counter to the principles of fairness and accountability, which underlie our Constitution, for the authorities to make a commitment of this kind, and then simply abandon it.

76. In the circumstances, I respectfully submit that there is no merit to the submission advanced on behalf of Mr Albutt in this regard.

Re "balance of convenience"

Ad paragraphs 35 to 41

77. I submit that the Coalition demonstrated a clear right, alternatively a strong *prima facie* right, and that for that reason the remaining requirements for the grant of an interim interdict are of less significance. In any event, I do not accept that the balance of convenience favoured the respondents in the court *a quo* for the following reasons:

77.1 Victims and society will suffer considerable prejudice if the pardons are now granted:

77.1.1 If prisoners are released from incarceration, it will be exceedingly difficult if not impossible to reverse. One can only begin to imagine the outcry which would be generated if people who had been released from prison following a decision of the President, were then re-arrested if a Court decided that the President had not followed the correct procedure.

77.1.2 The fact that the people concerned were, on their account, politically motivated, gives further reason to be concerned about the political disturbance which might be generated if this were to happen.

77.1.3 It is not difficult to predict that those affected would contend, when the matter came to final determination, that even if the President acted wrongly, they should not be re-imprisoned.

77.1.4 Victims will suffer considerable stress and trauma where pardons in relation to particularly serious crimes are issued.

77.2 The pardon applicants do not have a right to a pardon, or a right to have their applications decided immediately. They have a right to have their applications properly considered, without undue delay,

and in accordance with the law. They have no right to have the matter decided in a manner which is inconsistent with the Constitution and the common law.

77.3 If the President now gives victims an opportunity to make representations, this will not result in a breach of any right of the pardon applicants.

78. I accordingly deny that there is any merit to this ground of appeal.

79. I submit that the allegations in paragraphs 37.1 and 37.2, with regard to Rev Chikane, are entirely irrelevant. Even if one well-placed victim had already been consulted, and did not wish to be heard further or at all, it would be absurd to suggest that this would justify denying all victims an opportunity to be heard.

80. As I have pointed out above, there is no basis for Mr Snaid's contention that Mr Albutt has consulted with his victims. He has in fact not done so.

Re "President seeks leave to appeal to full bench or SCA"

Ad paragraphs 42 to 47

81. I deny that the President's application for leave to appeal has left the applicants for pardon in a "procedural morass". It was always open to any respondent in the Court *a quo* to seek leave to appeal. Mr Albutt has explained why he chose not to avail himself of that option – in my submission, correctly. The President has made a different choice. His

application must now be heard and decided. The fact that this process may take longer than Mr Albutt would have liked cannot be a reason to justify an appeal to this Court.

Re "Submissions"

Ad paragraphs 48 and 49

82. I deny that Mr Albutt has good prospects of success on appeal or that section 101 of the Constitution has any application to situations such as the present. I submit that section 101 applies to formal acts of the President.

83. If Mr Snaid and Mr Albutt are correct in their approach, then there could never be any legitimate expectation arising from an undertaking by the President, however solemnly it was given, unless it was given in writing. The President (unlike every other member of the executive) could act in an entirely unaccountable fashion, as long as he did not commit himself in writing.

84. This would be fundamentally inconsistent with the well-recognised Constitutional principle of accountability. I submit that it is not contemplated by section 101.

Re "interests of justice"

Ad paragraphs 50 to 54

85. I do not accept that the effect of the findings of the court *a quo* has been "to throw the law into confusion". What has happened, as is often the case, is that a court has made findings in an application for an urgent interdict. The High Court will decide at the hearing of the application for a final interdict (Part B) whether those findings are correct. Any party which is dissatisfied by that decision will have the right of appeal.

86. The law has no more been thrown into confusion than it is any time a High Court makes a finding of law which may subsequently be challenged. If the interests of justice required that such cases be immediately brought before this Court on appeal – and even when the decision was made only in granting an interim interdict - this Court would be flooded with appeals.

87. The appeal process will take some time. That is in the nature of legal process. Again, if litigants were entitled to bring appeals directly to this Court simply because they desire an early decision - and even when the order made was the granting of an interim interdict – this Court would similarly be flooded with appeals.

88. In response to paragraph 54, I respectfully submit that the applications for pardon under the special dispensation process are self-evidently different from applications for pardon "in the normal course". This much was evident from the President's very first announcement in Parliament on 21 November 2007. It is for this very reason that it was always envisaged that a different process would apply, as is evident from the setting up of the RG, the establishment of specific criteria, and the stated relevance of the TRC process.

Ad paragraph 55

89. As I have pointed out above, it is remarkable that Mr Albutt has been given a copy of the list of pardon applicants who have been recommended by the RG, while the authorities have consistently refused to make this available to the Coalition.

90. Mr Albutt did not disclose to the High Court that he was in possession of this list. The list (Annexure I to Mr Snaid's affidavit) is new evidence which Mr Albutt now seeks to introduce in his application for leave to appeal, without explaining why it was not produced earlier. I submit that the list is however revealing: it shows that

90.1 there is "No record" of the whereabouts of certain of the applicants for pardon. This illuminates again that the Coalition could not have served the urgent application on all pardon Applicants;

90.2 a number of the applicants have already been placed on parole;

90.3 certain of the applicants have never been sentenced.

Ad paragraphs 56-57

91. I do not know whether any of the applicants in *Minister for Justice and Constitutional Development v Chonco* ("*Chonco*") are also applicants for pardon under the Special Dispensation. To the best of my knowledge, the applicants in *Chonco* made applications for pardon long before the establishment of the Special Dispensation. In any event:

91.1 In *Chonco* the SCA held that since the Minister of Justice was obliged to process applications for pardons, a failure to do so was a breach of sec 92(3)(a) of the Constitution. The issue to be decided in *Chonco* is the role of the Minister of Justice in the processing of pardon applications. The Minister was not required to process or recommend pardons under the Special Dispensation. *Chonco* therefore deals with very different issues from those which are raised in the present case.

91.2 If there are indeed *Chonco* applicants who are also applicants for pardon under the Special Dispensation the procedure to be followed in the determination of their pardon applications will be decided in the present matter. The outcome of *Chonco*, while important in determining the roles and responsibilities of public functionaries, has no bearing on this.

92. I submit that it is not practical to attempt to shorten time limits (which will include the preparation of a lengthy record and service on a large number of persons, and the filing of heads of argument by a substantial number of parties) in order to hold any hearing on this matter simultaneously with the hearing of the *Chonco* appeal on 25 August 2009. I submit that there is no good reason to do so.

Re "Service on interested parties"

Ad paragraphs 58 and 59

93. I deny that the applicant organisations made the "mistake" claimed by the applicant in paragraph 58.

94. For reasons addressed in this affidavit, I respectfully submit that this Court should refuse leave to appeal. However, if this Court were to grant leave, I submit that:

94.1 there is no good reason why the members of the Coalition, which are voluntary bodies with limited funds, should be obliged to bear the considerable costs which are likely to be involved in complying with the notice procedure proposed by Mr Albutt; and

94.2 a procedure should also be devised for giving notice to victims of the crimes committed by the pardon applicants. Mr Albutt seems to take the view, notwithstanding his professed eagerness to consult with the victims of his crimes, that the victims can and should simply be ignored in this litigation. I submit that he is mistaken in this regard.

Re "Condonation"

Ad paragraphs 60 to 62

95. The Coalition does not accept that condonation should be granted.

96. The only basis suggested for condonation is Mr Albutt's change of mind following upon the application by the President and the Minister for leave

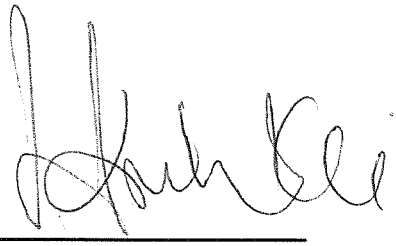
to appeal.

97. I have submitted above that this change of mind was fundamentally misconceived: it rests on the false foundation that an application for leave to appeal directly to this Court is justified on the basis that another Court may make the wrong decision. If I am correct that this is a false foundation, then I submit that there is no basis for granting condonation.

98. In the circumstances, unfortunate as the inevitable delays caused by legal process may be, the applicant has not shown any cause, let alone a good cause, why he is entitled to circumvent the due legal process.

99. In this regard I have pointed out that the applicant is not by right entitled to a presidential pardon. He is entitled to have his application properly considered, by a process which is in accordance with the law. I submit that it is not irrelevant that the applicant, whose sentence was described by appeal courts as one which was too "*light*" and which "*should have been increased*", has served less than two years of his ten-year sentence.

100. For the reasons set out above, the applicants in the main application respectfully ask that this application for leave to appeal be dismissed with costs.



LWAZI KUBUKELI

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit; and has no objection to taking the prescribed oath. Thus done, signed and sworn to before me, at Cape Town on this the 11th day of June 2009 in terms of the Regulations contained in Government Notice No. R.1258 dated 21 July 1972 (as amended) and Government Notice No. R.1648 dated 19 August 1977 (as amended), which have been complied with.

COMMISSIONER OF OATHS

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