IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:

NGHC CASE NO: 15320/09

In the Matter between:

RYAN ALBUTT Applicant

and

CENTRE FOR THE STUDY OF VIOLENCE
AND RECONCILIATION First Respondent
KHULUMANI SUPPORT GROUP Second Respondent
INTERNATIONAL CENTRE FOR
TRANSITIONAL JUSTICE Third Respondent
INSTITUTE FOR JUSTICE AND
RECONCILIATION Fourth Respondent
SA **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
MINISTER OF JUSTICE Ninth Respondent

and

GERHARDUS JOHANNES TALJAARD	Tenth Respondent
AREND CHRISTIAAN DE WAAL	Eleventh Respondent
WILLEM JACOBUS PETRUS JACOBS	Twelfth Respondent
HANS JACOB WESSELS	Thirteenth Respondent
RYNO ADRIAAN ROSSOUW	Fourteenth Respondent
JOHANNES BENJAMIN VAN DER WESTHUIZEN	Fifteenth Respondent

APPLICANT'S FOUNDING AFFIDAVIT: LEAVE TO APPEAL

I, the undersigned,

PAUL SNAID

do hereby make oath and say:

1 I am an attorney of this court. I practise in partnership under the style of Snaid & Edworthy. The facts to which I depose are, except where specifically so stated or the context clearly so indicates, within my personal knowledge.

2 I am the attorney for Ryan Albutt ("the applicant for leave"), an adult male businessman born 20 April 1970, identity number 700420 0507 2080, presently serving a sentence of imprisonment in the Upington Prison, in the Northern Cape Province.

Purposes of this application

3 The purposes of this application are:

3.1 to seek leave to appeal against the whole of the judgment and order of Seriti J, made in North Gauteng High Court case no. 15320/09 on 28 April 2009;

3.2 to seek condonation for the lateness of this application; and

3.3 to obtain directions for service on a large class of persons whose rights are affected by these proceedings and who were not brought before the court *a quo.*

Proceedings in the court *a quo* and parties thereto

4 The first to seventh respondents ("the applicant bodies") brought an application against the eighth and ninth respondents ("the President") and "the Minister" respectively in two parts:

4.1 Part A, for urgent relief, in which an interdict was sought pending the determination of the main application to prevent the President from granting any pardon in terms of the "special dispensation for presidential pardons for political offences";

4.2 Part B, for final relief, interdicting the President from granting any pardon in terms of the "special dispensation for presidential pardons for political offences" in any circumstances or, in the alternative, until certain conditions had been met relating to access by the "persons who were affected by such offence(s)" were given access to certain relevant records and an opportunity to make representations.

On 2 April 2009, the applicant for leave and the tenth to fourteenth respondents and on 14 Aril 2009 the fifteenth respondent (collectively "the pardon litigants") were joined as respondents.

6 The urgent application foreshadowed in Part A of the notice of motion was then adjourned to 14 April 2009, when it was argued as an urgent interim application before Seriti J. Heads of argument were filed by all parties before the court.

7 The interim application in Part A of the notice of motion was argued on 14 April 2009. The judge *a quo* made it clear that he only had that day available for argument and the opportunity for oral argument by counsel, particularly counsel for the applicant for leave, was significantly curtailed.

8 Seriti J handed down a written judgment on 28 April 2009.

9 A copy of the judgment against which leave to appeal is sought, which includes the orders made by Seriti J, is attached marked "A". The relevant terms

of the notice of motion appear on typed page 2 of the judgment. The reference to the matter's having been heard on 6 April 2009 is wrong.

Background facts

10 At a joint sitting of Parliament on 21 November 2007, President Mbeki announced that he was putting in place a process for the handling of pardon requests by people convicted of offences they claimed were politically motivated and who were not denied amnesty by the TRC.

11 As part of this process, President Mbeki invited all the political parties represented in Parliament to appoint a representative to serve on a Pardons Reference Group ("PRG") to evaluate pardon requests and submit recommendations to him. President Mbeki made it clear that he would give serious consideration to such recommendations but would not be bound by them.

12 A copy of President Mbeki's address to Parliament is attached marked "B". The address was put before the court *a quo* by both the applicant bodies and the President.

13 President Mbeki's statement to Parliament was translated into action when the Presidency announced the commencement of the "political pardons period in a public statement dated 16 January 2008, a copy of which is attached marked "C".

14 The PRG then proceeded to invite applications for political pardons. It received in all 2 114 such applications **[President's affidavit p571 para 36, extract attached marked "D"],** mainly but not exclusively from persons serving prison sentences. Those who submitted such applications include the applicant for leave and are called in this affidavit collectively "the political pardon applicants".

15 The pardon litigants were among those who sought pardons pursuant to this process. The pardon litigants (other than the fifteenth respondent) were all convicted of offences and sentenced to periods

of imprisonment arising from an attack in Kuruman mounted by members and supporters of the Afrikaanse Weerstandsbeweging, all of whom were white, on a group of black strikers in Kuruman in August 1995.

16 As appears from the judgment of the court *a quo,* before making application for a pardon, the applicant for leave undertook his own process of communicating with the victims through the African National Congress and his legal team, as a result of which four victims interviewed the applicant for leave and his wife at Upington Prison on 9 June 2008. Arising from this meeting, the secretary of the ANC in the Northern Cape, on behalf of the ANC, deposed to an affidavit, which was before the court *a quo* supporting the application for pardon of the applicant for leave. I attach the relevant extract from the answering affidavit of the applicant for leave and the affidavit of the secretary of the ANC in the Northern Cape (which was before the court *a quo)* marked "E" and "F" respectively.

17 From February 2008 onwards, representatives of the applicant bodies began lobbying the PRG and various government officials to address issues of victim participation, transparency and public disclosure.

18 On 26 November 2008, a list of those who had applied for such pardons was supplied to the applicant bodies **[Applicant bodies' founding affidavit p44-47 paras 62-62.3, extract attached marked "G"].** The applicant bodies founding affidavit discloses that the political pardon applicants were drawn from many political affiliations, including IFP, ANC, PAC, AZAPO, AWB and PAGAD.

19 The applicant bodies' founding affidavit also disclosed that:

19.1 one of the victims involved in the process was Rev Frank Chikane, the director-general in the Presidency;

19.2 the persons who had committed a serious crime in relation to Rev Chikane were seeking amnesty;

19.3 Rev Chikane had been intimately involved in, and manifestly approved of, the process put in place by President Mbeki.

20 The requests by the applicant bodies for victim participation in the process were refused and the PRG made its recommendations to President Motlanthe. The applicant bodies called upon the Minister, and then the President, to give an undertaking that he would not consider applications from the political pardon applicants. No such undertaking was forthcoming. The applicant bodies then launched the application in the court *a quo* on 19 March 2009.

Interested parties not before court *a quo,* urgency and non-joinder

21 The political pardon litigants submitted to the court *a quo* that:

21.1 no substantive order of any kind could be granted until all the political pardon applicants had been joined in the proceedings;

21.2 the applicant bodies had been in possession of the list of political pardon applicants since 26 November 2008 and that the alleged urgency was self-created because the applicants for pardon were prejudiced by the protracted negotiations and lobbying undertaken by he applicant bodies without reference to the applicants for pardon; and

21.3 the applicant bodies could not justify their failure to proceed in court by reference to requests for undertakings made to the Minister and the President because they had ignored those most vitally affected by their proposed litigation, ie the political pardon applicants whose opportunities to regain their freedom the applicant bodies were trying to frustrate or at least retard on procedural grounds.

22 Seriti J rejected these submissions and held **[typed p24 of the judgment]** that:

22.1 it was not necessary to serve on all the political pardon applicants but merely those who had been recommended for pardons by the PRG;

22.2 as the list given to the applicant bodies had not specified who had been recommended for "release on pardon", it was "not possible" to serve on such persons.

23 Seriti *J* did not deal specifically with the issue of urgency.

24 It is submitted that Seriti J erred and that he ought to have struck the matter off the roll or dismissed the urgent application for want of urgency and non-joinder.

25 As part of the order made, Seriti J directed:

25.1 the President and/or the Minister to provide the applicant bodies with a list of persons

recommended for release by the PRG;

25.2 the applicant bodies to serve the "papers in this matter" on the applicants for pardon whose names appear on such list.

26 No dates for compliance with his direction were prescribed by Seriti J.

27 I do not know whether anything has been done in relation to these directions. I was about to take this matter further and take steps to obtain a date for the hearing of the application in Part B of the notice of motion when the President's notice of application for leave to appeal was served on me.

Constitutional Question decided by the court *a quo*

28 Seriti J found **[judgment para 7.3 typed pages 24-26]** that the granting of a pardon constitutes administrative action.

29 In coming to this conclusion, the judge relied entirely on an analysis of the Promotion of Administrative Justice Act and did not deal with any of the judgments of the Constitutional Court which

were cited to the judge and all 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.

30 The judge then proceeded, wrongly in my submission, to equate pardon with parole **[judgment para 7.4 typed pages 26-28]** holding, *inter alia:*

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

31 The judge further held that in his address to parliament the President had made a "lawful public commitment". The judge said that in his view the President "should allow the victims, and/or their families and interested parties to be heard prior to releasing any prisoner on parole [sic; pardon?]". **[judgment para 7.4.3 typed page 30]**

32 If this were meant to be a statement of the law, it is submitted that it is wrong. If it were meant as an expression of the judge's personal view, then it *was* misplaced and a violation of the separation of powers principle.

33 The case for the applicant bodies was that if the President's conduct did not amount to administrative action, the President's address to parliament had created rights to be consulted where none had previously existed.

34 The case for the respondents in the court *a quo* was that such rights cannot be created by a presidential address to parliament and that a reading of the address showed that on the facts it was not the intention of the President to create any such rights.

Balance of convenience

35 All the respondents made submissions to the effect that the balance of convenience favoured the respondents.

36 The submission was that the balance of convenience favoured allowing the President to act in accordance with the Constitution because any person who maintained that in his or her specific case, the grant of a pardon was unlawful would still be entitled to approach the court.

37 In his submissions to the court *a quo,* counsel for the applicant for leave:

37.1 made specific mention of the case relating to Rev Chikane and pointed out that it would be absurd to grant an interdict "in favour of" a person in Rev Chikane's position who manifestly did not wish further to be heard on the fate of the persons who had acted criminally in relation to him;

37.2 pointed out that there was nothing to suggest that many of the persons affected by the 2 114 applications for pardons did not feel the same way as Rev Chikane;

37.3 made the point that the case of the applicant for leave was *a fortiori* because he had actually made contact with victims arising from his crimes and publicised in Kuruman his intention of so doing.

38 The case for the applicant bodies on this issue was that victims would be traumatised if offenders were released before they were heard and that releases might lead to public unrest.

39 Although the application was one for interim relief and much of the argument related to balance of convenience, the judge *a quo* did not address balance of convenience at all in his judgment.

40 The judge *a quo* found that the pardon litigants should not be exempted from the interim order because other interested parties, like the applicant bodies, *"might* want to make inputs if given an opportunity to do so" [own emphasis; **judgment para 9 typed page 32].** It is submitted that this is no basis for an interdict. It is a requirement for an interdict that there be a reasonable apprehension of

irreparable harm, not a mere speculative possibility that harm will be caused.

41 When this speculative possibility is weighed against the actual prejudice suffered by the pardon litigants in having to remain in jail while their entitlement to be considered for pardon is litigated, the balance of convenience is tilted overwhelmingly in favour of the pardon litigants.

President seeks leave to appeal to full bench or SCA

42 By notice dated 20 May 2009, a copy of which is attached marked "H", the President and the Minister gave notice of their intention to seek leave to appeal to the full bench of the division or the SCA.

43 No date has been fixed for the hearing of the President's application for leave but the judge *a quo* has asked the parties' counsel to supply him with dates.

44 The applicant for leave had decided in light of the judgment to push for an early hearing of the main application. My advice to the applicant for leave had been that the orders of the court *a quo* were couched as interim orders and thus not appealable to the High Court or the SCA and that it would be premature to approach the Constitutional Court.

45 However, the President's application for leave has left the applicants for pardon in a procedural morass. For example:

45.1 leave might be granted to the President to appeal and the appeal might be dismissed by the full bench for want of appealability; or

45.2 worse still, the President's appeal might be successful but then appealed to a higher court which might reverse an earlier finding on the basis of non-appealability.

46 The result, at best for the applicants for pardon is an appeal process which is likely to last some three years as the case makes its way through the courts.

And then the main application will still not have been heard.

47 The applicant for leave has therefore reversed his earlier decision to abide the judgment of the court *a quo* and instructed me to seek leave to appeal to this court on his behalf.

Submissions

48 I submit that there are good prospects of success on appeal for the reasons set out in this affidavit and in the President's notice of application for leave to appeal.

49 In addition, I submit that under s 101 of the Constitution, only a written decision of the President can give rise to legally enforceable rights. As the "decision" to put the special process in place was not in writing, it is no more than a political promise which, if not adhered to, must be dealt with in the political rather than the judicial sphere.

Interests of justice

50 The effect of the findings of law in the judgment of the court *a quo* has been to throw the law into confusion. Although the order only relates to the applicants for political pardon, in its terms the judgment applies to all applications for pardon and would even preclude the President from granting a remission of sentence such as that in *Hugo* until a public process had been concluded.

51 The judgment therefore trenches substantially upon the President's powers under s 84(2)(j) of the Constitution. If the judgment is bad law, it ought to be corrected as soon as possible so that the President can do his constitutional duty.

52 Under s 167(5) of the Constitution, this court makes the final decision whether any conduct of the President is constitutional. I submit that in the circumstances of this case, such a decision should be made as soon as possible.

53 The applicants for political pardon are in a very difficult situation. Having participated in good faith in the process put in place by President Mbeki and although some of them have been recommended for pardon, they have to wait for the present matter to proceed through the courts before they can be considered for pardon, a process which will take several years unless this court comes to their relief as sought in the notice of motion.

54 If the true import of the judgment is that the rights of applicants for pardons other than political pardon applicants are not affected, then by participating in the presidential process, the political pardon applicants will be in a significantly worse position than applicants for pardon in the "normal course".

55 I received from the applicant for leave an incomplete list of the names of those who had been recommended for political pardon by the PRG. The list had been circulated by the authorities to the prisons. I attach a copy of such list marked "I".

The name of the applicant for leave is the first name on the list.

56 I have learnt that the matter of *Chonco and Others v Minister of Justice and Constitutional Development and Another* is on appeal to this court and will be heard on 25 August 2009. Many, if not all, the applicants for pardons in *Chonco's* case are applicants for political pardons. Unless the issue at the heart of the present case is adjudicated, many of the *Chonco* applicants will not achieve anything even if they are successful in this court because the judgment of Seriti J will preclude the President from adjudicating on the applications for pardons of very many, if not all, of the *Chonco* applicants.

57 I therefore submit that it would be in the interests of justice for the present matter to be heard together with *Chonco's* case on 25 August 2009. This will give all concerned adequate time to prepare.

Service on interested parties

58 I do not wish to make the same mistake as the applicant bodies. I therefore ask this court to issue directions for service on applicants for pardon.

59 I submit that justice will be done in relation to service if:

59.1 notice of any hearing ordered to take place in this court is directed to be given by publication by the President and/or the Minister, in a form to be determined by the Constitutional Court, in the prisons in which the applicants for pardon are being held and in a newspaper circulating throughout South Africa and by service on the attorney for the *Chonco* applicants;

59.2 the applicant bodies are directed to supply copies of all papers filed thus far in the court *a quo* and in this court to any applicant for pardon who requests them;

59.3 the applicant bodies and the President and/or the Minister are directed to report by affidavit to this court before any hearing of this matter that there has been proper compliance with this direction.

Condonation

60 The applicant for leave accepts that he has changed his position in regard to taking the judgment of the court *a quo* on appeal. However, his original decision was taken because he 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 in this case because his appeal might be held to be premature.

61 I submit that the President's application for leave the fact of the forthcoming appeal of the *Chonco* applicants have significantly changed the situation of the applicant for leave, the other pardon litigants and the applicants for pardons.

62 The applicant for leave did not delay after receiving the President's application for leave and the other parties to the dispute will not be prejudiced if this matter is heard by the Constitutional Court immediately rather than after making its slow way there through the courts.

Supporting affidavit

63 I attach a confirmatory affidavit by the applicant.

Order sought

64 I ask on behalf of the applicant for leave for orders in terms of the notice of motion.

(mwpw

Thus signed and sworn before me at JOhannesburg this 213 day of May 2009 by the deponent who has acknowledged that he knows and understands the contents of this affidavit, has sworn that its contents are true and considers the oath binding on his conscience.

COMMISSIONER OF OATHS
AlbuttPardonConCourt.afl

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