

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO. 15320/09

In the matter between:

**CENTRE FOR THE STUDY OF VIOLENCE
AND RECONCILIATION**

First Applicant

KHULUMANI SUPPORT GROUP

Second Applicant

**INTERNATIONAL CENTER FOR
TRANSITIONAL JUSTICE**

Third Applicant

**INSTITUTE FOR JUSTICE AND
RECONCILIATION**

Fourth Applicant

SOUTH AFRICAN HISTORY ARCHIVES

Fifth Applicant

HUMAN RIGHTS MEDIA CENTRE

Sixth Applicant

FREEDOM OF EXPRESSION INSTITUTE

Seventh Applicant

and

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

First Respondent

THE MINISTER OF JUSTICE

Second Respondent

OPPOSING AFFIDAVIT OF FIRST RESPONDENT

I, the undersigned,

KGALEMA PETRUS MOTLANTHE

do hereby make oath and say the following:

1.

- 1.1. I am the President of the Republic of South Africa, and have been joined in these proceedings as the first respondent.
- 1.2. The facts I describe in this affidavit fall within my personal knowledge, unless I state otherwise or the context of this affidavit makes it obvious that they do not. I confirm that those facts are, to the best of my knowledge and belief, true and correct.
- 1.3. I shall, in due course, make submissions on legal matters. To the extent that I do so, I rely on the legal advice of my legal representatives, obtained in the course of the preparation of this affidavit, which advice I believe to be correct.

2. I have read the notice of motion and annexures thereto. I respond to the averments and contentions made on behalf of the applicants, in support of the relief sought in Part A of the notice of motion, which I oppose. I also intend to oppose the relief sought in Part B of the notice of motion. I will deliver my affidavit opposing Part B of the notice of motion, within the permissible time limits. I accordingly reserve my right to deal with the allegations of fact and the legal contentions made by the applicants in support of that relief.
3. This affidavit has been prepared in circumstances of extreme pressure, having regard to the time period which the applicants have afforded to the respondents to file their opposing affidavit. I have been afforded barely four working days within which to deliver my opposing affidavit, after the service of the application on the State Attorney. This is a wholly unsatisfactory state of affairs, having regard to the fact that the issues raised in this application have been ongoing for several years, and the applicants have known about them throughout.
4. In the concluding part of this affidavit, I deal with the applicants' contentions that the present application is urgent, and should be treated as such. I shall set out my reasons why I believe that the application is not urgent, and that any urgency is that of the applicants' own making. I shall therefore ask the Court to strike it off the roll for lack of urgency.

5. In what follows, I deal with,
- 5.1. first, the background to the current process for presidential pardon, that was initiated by my predecessor-in-title, pursuant to the address he made to the joint sitting of Parliament, on 21 November 2007. I do so, in order to show that the applicants have failed to show a *prima facie* right of the sort that merits protection by way of an interim interdict that is sought in Part A of the notice of motion.
- 5.2. secondly, the process that has been followed, thus far, in order to consider applications for pardon, which I have to consider and decide, pursuant to the responsibility conferred upon me in terms of section 84(2)(j) of the Constitution of the Republic of South Africa Act, 108 of 1996, as amended (“the Constitution”). I shall deal with these matters in order to show that the applicants have not demonstrated that they are likely to suffer irreparable harm, in the event the interim interdict is refused.
- 5.3. thirdly, the way I intend to discharge my responsibility, pursuant to section 84(2)(j) of the Constitution. I shall traverse the discretionary and personal nature of the section 84(2)(j) constitutional powers conferred on me as Head of State, the fundamental difference

between the pardon and amnesty, and indemnity processes, and highlight the fact that no legal right or legitimate interest of a victim (within the context of this application) can be affected by the granting of a pardon in terms of section 84(2)(j) of the Constitution. I shall show further that though the applicants have raised widespread criticism regarding the conduct of the Reference Group, they have not suggested that I would not be able to discharge my responsibility lawfully, and consistent with the Constitution.

- 5.4. then, proceed to deal with the applicants' contentions on the balance of convenience. I will show that those contentions are wholly unfounded, and that on the contrary, the balance of convenience favours the discharge of my constitutional responsibility to consider and decide upon those applications, having regard to the provisions of section 2 of the Constitution, which requires that that constitutional responsibility should be fulfilled. In this context I will further make clear to this Court the tight time frames within which I must dispose of the current applications as a result of the impending elections and change in administration. Having regard to the provisions of section 237 of the Constitution, which requires that that constitutional responsibility should be performed diligently and without delay, as I now have the information and capacity to finalise these applications,

I should not be prevented from discharging my constitutional duty to consider and decide on these applications.

5.5. Lastly, the applicants' contentions that the application is urgent.

No locus standi

6. I am advised and I verily believe that, contrary to their claim in paragraph 27 of the founding affidavit, the Applicants do not have the legal standing to bring this application. I say so for the following reasons:

6.1 None of the applicants have adduced evidence to show that they are victims of conflicts of the past, in their own right. The special dispensation for pardons is a process set up specifically to deal with convictions for offences arising from conflicts of the past. Also, despite having accessed the list of applicants for special dispensation pardons in November 2008, the applicants have not demonstrated they have made contact with and are therefore aware of and represent any victim of an offence committed by one of the applicants for pardon, and that, were I to consider the applications before me without hearing him or her, that victim's constitutional rights would be violated. Furthermore,

there is no indication that the applicants for pardon wish to be bound by an order interdicting me from considering their applications. On the contrary, if the attitude of Mr Albutt, the person who seeks to intervene in these proceedings is anything to go by, the applicants herein are acting against the wishes and interests of the applicants for pardon.

6.2 Applicants premise their legal standing on sec 38(a), (c) and (d) of the Constitution. The applicants allege that the Reference Group violated certain rights of “victims”. However, the applicants have not identified a constitutional right or rights that would be violated by me were I to grant or refuse a pardon after considering the recommendations of the Reference Group and taking into account all relevant information placed before me. The applicants’ claim to legal standing is predicated on the violation of broad constitutional principles. I am advised that such a perceived violation cannot be the subject of an interdict sought by asserting section 38 rights, especially if the conduct complained of is the exercise by me of a constitutional power and/or involves the execution of a constitutional obligation. Argument in this regard shall be made at the hearing of the application.

6.3 As far as reliance on section 38(a) is concerned, it is clear from the applicants’ early correspondence with the Reference Group that their interest in the special process has been to “contribute to the pardon

process through providing information, expert input, assisting to improve participation by civil society and engaging in public education regarding the process”, and to “...play an information dissemination and education role.” This much is clear from annexure “HM15” and, I submit, is in line with the stated objects of each of the applicants.

No prima facie right

- 7 The foundation of the application is that the special dispensation process is designed to deal with the “unfinished business” of the Truth and Reconciliation Commission (“the TRC”) in that the effect and outcome of the special dispensation process is the same as that of the TRC’S Amnesty process. Relying upon that fundamental predicate, the applicants claim that the implementation of the special process must comply with the safeguards that were provided for in the assessment of applications for amnesty, in terms of the Promotion of National Unity and Reconciliation Act, 34 of 1995, as amended, (“the TRC Act”) in order to be lawful and constitutional. One of the safeguards heavily relied upon by the applicants is that victims of criminal conduct for which pardons are applied for in terms of the current process ought to have been given an opportunity to make representations to the Reference Group, and a failure to afford them such an opportunity renders the whole process unlawful and unconstitutional. The applicants make these

contentions in paragraphs 87, 88.1.4.2, 88.4.9, 88.5, 89, 101 and 107 of the founding affidavit.

7. I respectfully submit that the factual foundation of the application is seriously flawed. I wish to categorically state that there are no legal rights that require interim protection pending the final determination of Part B of this application. The applicants have misconstrued the nature, function and ambit of the powers conferred on me as President by section 84(2)(j) of the Constitution. They have furthermore misunderstood the role of the political party representatives who have been requested to deal with the applications for pardon as envisaged by my predecessor when these matters were raised in Parliament.
8. The powers conferred by section 84(2)(j) of the Constitution are discretionary, original constitutional powers. When I act in terms of section 84(2)(j) of the Constitution, I exercise executive powers. The section 84(2)(j) powers are expressed in wide and unqualified terms. The discretion that is inherent in the power to pardon in terms of section 84(2)(j) of the Constitution is constrained by section 1(c) of the Constitution. At the core of section 1(c) of the Constitution is the premise that I, as President, must take cognisance of the principle of legality and the supremacy of the Constitution. In so doing I must, by way of example, take account of the fundamental constitutional

imperative that the exercise of public power must fall within the threshold test of rationality.

9. Applications for pardon are individual, personal applications, and they are considered on that basis. There is no such thing as a group pardon, even in circumstances where applicants approach a President as a group because they happen to share the same characteristics. I am constitutionally obliged to consider each one of those applications on its own merits. There is no right to a pardon, despite perceived similarities between or amongst applicants. Similarly, there is no right to a hearing on the part of a third party, including a victim. In the past, in the exercise of the power to pardon in terms of section 84(2)(j) of the Constitution, the President has granted pardon where he has determined that the public welfare will be better served by the granting of a pardon to an individual. I, therefore, reiterate that it is only in circumstances where a complainant is able to prove that I have acted arbitrarily, inconsistently, or irrationally, that a Court may review the exercise of an executive power such as the power to pardon in terms of section 84(2)(j) of the Constitution.
10. A pardon granted in terms of section 84(2)(j) of the Constitution removes the record of the criminal offence of an offender, and therewith, removes all the consequences that attached solely by reason of the applicant's commission of the offence. It does not mean that the applicant never committed the

offence. This is one of the fundamental differences between a pardon and amnesty.

11. The TRC Act, on the other hand, specifically dealt with applications for amnesty which were considered and decided upon by the Committee on Amnesty of the TRC, established pursuant to Chapter 4 of the TRC Act. Section 20 of the TRC Act makes it clear that any person who qualified was entitled to make application for amnesty. That would include, and in fact, in the majority of applications considered by the Committee on Amnesty, included persons who were neither charged nor convicted of offences for which they sought amnesty. The concept of amnesty cannot be limited to the absolution of criminal liability, as with pardons. The objective of the TRC Act in granting amnesty was to protect an applicant who made full disclosure from both the criminal and civil consequences of his or her disclosures, including acts, omissions and offences. There was no requirement that only convicted offenders would be considered for amnesty. Even those whose offences remained undetected could apply for amnesty.

12. The origins of the establishment of the Reference Group that has made recommendations to me regarding the requests for pardon by individuals who allege that they committed offences with a political objective during the conflicts of the past, can be found in various references to the plight of these applicants by leaders of the political parties of which the applicants were

members. This matter was also raised in the application of the 384 Inkatha Freedom Party members who approached the High Court in 2007 for relief. That matter was referred to the Supreme Court of Appeal and the decision of that Court was delivered this morning.

13. In an address to a joint sitting of Parliament on the 21 November 2007 my predecessor, recognising that the power to pardon could only be exercised by the President, stated that he as President was under no obligation to accede to the requests made for pardon, provided that in his decision, the threshold of rationality was met. I annex hereto marked "KPM 1" the full text of that address for ease of reference. In that address he advised Parliament that he had decided to institute a special process to assist him as President in the discharge of the obligation to consider the requests for pardon "from people who have already been convicted for offences they claim belong among the category of offences that were considered by the Committee on Amnesty". In his view, this special process was a measure that was suitable to deal with these particular applications in a flexible, decisive and speedy manner and thereby assist in promoting the critical objectives of national reconciliation and nation-building.
14. In summary, the material distinctive feature of the special process initiated on 21 November 2007 is that it deals with applications for pardon, and not amnesty. A person who qualified to make such an application must, amongst

others, have been convicted of an offence and is presently serving a sentence of imprisonment, or was sentenced to a term of imprisonment or fine, for an offence which arose from, or is related to, an act or omission associated with a political objective committed in the course of the conflicts of the past. In other words, an applicant for a pardon, must have been convicted of an offence of the sort described in paragraph 7.3 of the terms of reference of the special process, and must have been sentenced to a term of imprisonment or a fine, or is presently serving a sentence of imprisonment.

15. It stands to reason that a qualifying person who applied for a pardon, and whose application had to be considered for recommendation by the Reference Group would have been tried and convicted by a court in open proceedings, where a victim and his or her family would possibly have been entitled to be present and participate in those proceedings.

16. It also stands to reason that qualifying persons who apply for a pardon would have been sentenced by a court taking into account all relevant circumstances, including the interests of a victim of the crime. In that event too, a victim of crime would have been entitled to participate in the proceedings which resulted in the sentence imposed by a court. Furthermore, such victim would not have been prohibited from instituting a civil claim against that offender if such legal recourse would have been available to such person in terms of the law.

17. It follows, therefore, that with regard to the penalty imposed, the rights and interests of victims of crimes for which a pardon is sought would have already been taken into account at the time when an applicant for a pardon was tried, convicted and sentenced.

18. In contrast, applications for amnesty in terms of the TRC Act dealt, by and large, with cases of persons who were neither tried, convicted nor sentenced in respect of offences for which amnesty was sought. There was, therefore, no prior public process involving the participation of the victims of offences for which amnesty was sought. It was precisely for that reason that the application process for amnesty required the involvement of victims of offences and their families, during the application process. Such an involvement was understandable, having regard to the fact that the majority of cases for which amnesty was sought had not been preceded by a prior open public process which involved participation by victims of offences and their families, so as to take into account their interests.

19. The marked distinction between the process for applications for amnesty, in terms of the TRC Act, and the current process for application for pardon, demonstrates that the applicants are mistaken in two respects; first, when they contend that the latter is designed to deal with the unfinished business of the TRC and second, when they equate the effect and outcome of my consideration of the current applications, using the mechanism of the

Reference Group, as being the same as that of the TRC's amnesty process. I draw attention to the following background, in order to illustrate that the contentions of the applicants are unfounded.

20. In responding to the issues of pardons that was raised in the National Assembly on 22 May 2002, the then Minister of Justice, Dr P Maduna referred to the basis on which the section 84(2)(j) constitutional power is exercised by the President, on the recommendation of the Minister of Justice and Constitutional Development. I annex hereto marked "KPM 2" a copy of the Hansard Record of that particular debate in Parliament. The members debating the matter at that forum clearly understood the difference between pardon in terms of section 84(2)(j) of the Constitution, and the grant of amnesty in terms of the TRC Act.
21. I further annex hereto marked "KPM 3" and "KPM 4" the Hansard Records of similar debates in Parliament on 8 September 2005 and 29 May 2007 where my predecessor and Minister Bridgette Mabandla, respectively, responded to concerns raised by members.
22. Again, in his address to the joint sitting of Parliament on 21 November 2007, my predecessor indicated that he had regularly received requests for pardon from various political parties, organisations and individuals, in respect of

individuals who have been sentenced by our courts for serious offences before and after the cut-off date of 10 May 1994 established pursuant to the TRC Act. I draw attention to the following portion of his address –

“From as early as the year 2000, after the mechanisms put in place by the TRC Act had fulfilled their statutory mandates, we have with ever-increasing regularity received requests for pardon from various political parties, organisations and individuals, in respect of individuals who have been sentenced by our courts for serious offences, both before and after the 10 May 1994 TRC cut-off date, allegedly in furtherance of political objectives or aims, arising out of conflicts of the past.”

23. The then President made it clear, in his address, that he had an obligation to consider all of those requests made to him for pardon. He also made it clear that he had decided to institute a special process to assist him in the discharge of his constitutional obligations to consider and deal with requests for pardon from persons who had already been convicted of offences that they claim fall within category of offences that were considered by the Amnesty Committee of the TRC. As indicated by the then Director-General in the Presidency in annexure “HM 42” of the applicant’s founding affidavit, what guided the establishment of the special process was the President’s speech, and that affected parties who wished to have the President consider

reopening TRC cases should make separate submissions to him. The basic feature of the special process that my predecessor contemplated was clearly outlined in the address of 21 November 2007.

24. What is quite clear from the address by the then President is that he emphasised, and was aware, at all times, that:

24.1. The requests made to him and his obligations to deal with them related to his powers and obligations to grant or refuse pardon, in terms of section 84(2)(j) of the Constitution.

24.2. He had to deal with each application for pardon individually, taking into account recommendations made to him by the Reference Group.

24.3. When he deals with each of the applications individually, he would be required to and would formulate “an independent opinion” on the basis of the facts and information placed before him. Thus, he would arrive at a decision whether or not to grant or refuse a pardon, in respect of each application.

- 24.4. In arriving at his decision, and after considering whether to grant or refuse the application for pardon, he would be guided by several principles and values that underpin the Constitution, including the principles and objectives of nation-building and national reconciliation, and would also uphold and be guided by the principles, criteria and spirit that inspired and underpinned the processes of the TRC, especially as they related to the amnesty process. He stressed that the TRC process was not to be undermined.
- 24.5. He would not be bound to accept any recommendation made to him by the Reference Group. He would also not be bound to grant a pardon, either.
25. Following upon the address to the joint sitting of Parliament, the terms of reference for the special dispensation were made. I emphasise that the terms of reference make it clear that the obligations sought to be discharged by the President in terms thereof are those set out in section 84(2)(j) of the Constitution, namely, the power and obligation to grant or refuse pardon, or relieve offenders or remit any fines, penalties or forfeitures imposed upon them.

26. There are clear indications in the terms of reference that the special process is not and was never intended to be a continuation of the process for the grant or refusal of amnesty by the TRC's Committee on Amnesty. I draw attention, in this regard, to the following features of the special process:

26.1. The President is at liberty to choose the process he or she wishes to adopt in considering applications for pardon. The Constitution simply requires that the decision taken must comply with the principle of legality. In this process, as with all the other applications for pardon that have been considered in the past, neither my predecessor nor I have elected to hear victims.

26.2. Paragraph 2 of the preamble to the terms of reference makes it clear, beyond doubt, that the mechanisms provided for in a number of statutory provisions, including the TRC Act, have expired, and can no longer be utilised to deal with the ever-increasing requests for pardon addressed to the President by various political parties, organisations and individuals on behalf of those who claim that they were convicted of offences or omissions involving political objectives arising from conflicts of the past;

- 26.3. Paragraph 4 of the preamble to the terms of reference also makes it clear that the means available to the President to deal with the ever-increasing requests addressed to him was the power and obligation invested upon him in terms of section 84(2)(j) of the Constitution to consider and decide on applications for pardon;
- 26.4. The entire process contemplated in the terms of reference related solely to applications for a pardon, and not amnesty, as was previously the case in respect of the TRC processes;
- 26.5. One of the qualifying requirements for application was that an applicant had already been convicted and sentenced to imprisonment or fine, or was presently serving a sentence following upon his or her conviction.
27. The Reference Group was established to assist the President in the consideration of applications for a pardon, in terms of the special process. Its primary function was to consider applications for pardon that were submitted to the Department of Justice and Constitutional Development. Thereafter, it was required to make a recommendation in regard to each of the applications. Recommendations so made would then be placed before the President for his consideration.

28. I have already pointed out that the President, although obliged to consider recommendations on each application, is not bound thereby. He is free to reject any recommendation made to him. Nevertheless, he is required to take account of all relevant information and facts placed before him in order to arrive at a decision to grant or refuse a pardon. In doing so, he is required to observe the requirements of the Constitution.
29. I intend to deal with applications for pardon which have now been placed before me in line with the approach outlined by the then President. I also intend to consider recommendations made to me by the Reference Group, in regard to each of the applications placed before me. My decision on the applications for pardons is not only necessary, but also desirable, having regard to the fact that the process had already been initiated from 21 November 2007 and some applicants had made application for a pardon as far back as the year 2002. It is in the interests of the public that this process be brought to a conclusion expeditiously.
30. The applicants claim that the special process has, thus far, been implemented unlawfully and unconstitutionally because the terms of reference do not take into account several requirements for which they contend. For instance, the applicants have, in a letter dated 3 October 2008 and addressed to me (annexure "HM37" of the founding affidavit) sought to graft into the terms of reference "legislative" requirements which, in their

view, will render the process constitutional and lawful. Relying on those “legislative” requirements, the applicants then issued an ultimatum that I should not make any decision on the applications for pardon, which would prejudice the broader public interest. In another letter, dated 17 November 2008 addressed to the second respondent (annexure “HM38” of the founding affidavit), the applicants make it clear that they were considering instituting legal proceedings to challenge the process for the grant or refusal of pardons in terms of the current process.

31. The applicants now contend that they have demonstrated a *prima facie* right to the interim relief sought in Part A of the notice of motion. The terse allegations made by the applicants in support of this contention are to be found in paragraphs 133 and 134 of the founding affidavit. In the event, the applicants claim that the *prima facie* right they contend for is supported by other parts of the founding affidavit, I invite them to expressly indicate those paragraphs to this honourable Court, in their replying affidavit.

32. I respectfully submit that the applicants have failed to show a *prima facie* right to the interim relief they seek. I say so for the following reasons:

32.1. The applicants singularly rely on the rights of victims in support of their contention that they have demonstrated a *prima facie* right to

interim relief. I respectfully submit that that contention simply fails to take into account the obvious distinction between the process of amnesty applications in terms of the TRC Act, and the applications for pardon following upon the recommendation of the Reference Group, that I am required to consider pursuant to the responsibility imposed on me in terms of section 84(2)(j) of the Constitution. Had they considered this obvious difference, they would inevitably have concluded that the rights and interests of victims of offences for which pardon is sought, such as there may be, have already been taken into account in the process which led to the trial and conviction, as well as the sentencing of the applicants. In any event, a right of hearing is not prescribed in section 84(2)(j) of the Constitution, nor is it a mechanism that my predecessor or I have elected to adopt.

- 32.2. Further, the Applicants have not identified specific victims they claim will be affected adversely by my consideration of the applications currently before me. Moreover, they have not demonstrated the specific right or rights of the alleged victims that will be infringed.

- 32.3. Thirdly, the applicants have failed to appreciate that applications for pardon and my consideration and decision thereon require individual consideration. In other words, each application will be considered on its own merits or demerits, and I will form an opinion on each application, and arrive at a decision whether to grant or refuse a pardon.
- 32.4. Fourthly, the applicants ignore the crucial feature of the address of the then President to the joint sitting of Parliament, when he announced the special process, namely, that the President will take into account all relevant information and facts that are placed before him or her, in order to arrive at a decision whether to grant or refuse a pardon. I have been following that approach in my consideration of applications for pardons that are pending before me.
- 32.5. It is worth mentioning that the fact that the Reference Group did not take into account any representations from victims of crimes or their families which they may have wished to place before them, does not necessarily mean that I am precluded from taking those representations into account. It should be borne in mind that the functions and duties of the Reference Group was to make a recommendation to me, and, although I will carefully consider it, I am not bound by such recommendation.

- 32.6. What is particularly and manifestly absent in the founding affidavit is the allegation that a particular victim of an offence for which a pardon has been applied, or his or her family, have sought to make representations to me and I have refused to afford them that opportunity. The high watermark of the applicants' case on this score, appears in paragraph 90 in which they claim that "*It appears that the President intends to make his decision without giving anyone, including those whose rights and interests are affected by his decision , any chance to be heard in them or in the process which has led up to them*".
- 32.7. The above allegations are wholly unfounded, and are based on hearsay evidence. The applicants have not produced any corroborative evidence which indicate that I have taken a view of the sort alleged by them, or that I have refused to receive any representations from a particular victim of an offence for which pardon is applied, or those of his or her family.
- 32.8. Moreover, the applicants themselves make it clear that the number of applications recommended by the Reference Group for approval by me is limited.

33. I therefore submit that the applicants have failed to show any *prima facie* right to the relief they seek. Their failure is exacerbated by the fact that my consideration and decision on the applications for pardon that are pending before me relate to a constitutional duty which I have and which I must fulfil diligently and without delay. In these circumstances, I respectfully submit that this honourable Court would be reluctant to grant an order which would effectively prevent me from fulfilling that constitutional duty.
34. One of the peculiar features of the present application which is relevant for the purposes of assessing the question of a *prima facie* right, is that the interim relief is sought pending the final determination of Part B of the notice of motion, which in itself is relief in the form of final interdict. One of the bases of the final interdict sought is that the special process was never authorised by the Constitution. In other words, the applicants attack the very existence of the special process. They do so in paragraphs 83, 120 and 121, as well as 130 and 131 of the founding affidavit.
35. Given the fact that the applicants now attack the entire process of the special dispensation, the grant of interim relief would be inappropriate, simply because, on their version, the whole process is unconstitutional. It would therefore be of no consequence to halt the process by way of an interim relief.

No irreparable harm

36. There were 2114 applicants who applied for pardon in the current special dispensation. All of these applications for pardon have been processed by the RG and sent for my consideration. I have already considered some of those applications, but for the present application, I would have disposed of the remaining applications.
37. The applicants claim that they will suffer irreparable harm; in the event the interim relief sought in Part A of the notice of motion is not granted. The only two paragraphs in which allegations are made in support of this contention are paragraphs 135 and 136 of the founding affidavit. Again, in the event that the applicants contend that support for this contention is also to be found elsewhere in the founding affidavit, I invite them to indicate to this honourable Court, in their replying affidavit, where those allegations are made.
38. I submit that the applicants have failed to show irreparable harm, for the following reasons:
- 38.1. In paragraph 135, the applicants claim that it will be exceedingly difficult, if not impossible, to reverse the consequences of a grant of

a pardon. But the applicants are mistaken in this regard. It is always open to the applicants or any other person with a legally cognisable interest, to review a decision to grant or refuse a pardon in terms of section 84(2)(j) of the Constitution.

38.2. Moreover, the applicants themselves contend that the decision to grant or refuse a pardon constitutes administrative action, which is open to review by this Court in terms of the Promotion of Administrative Justice Act, 3 of 2000, as amended, (“PAJA”). Although I do not accept the correctness of this contention, I point out that, on their own approach, the applicants make it clear that they will not suffer any irreparable harm. After all, the claim asserted by them is for a lawful or constitutional process. They have an opportunity to remedy whatever harm which might arise from a process they conceive to be unlawful or unconstitutional.

38.3. I should, however, not be understood as suggesting that a decision to grant or refuse a pardon, although not administrative action, is not open to review by this Court. I have been advised, and respectfully submit, that this Court, as do other appeal courts, has made it clear that the exercise of presidential powers in terms of section 84(2) of the Constitution, even if it constitutes executive action, is subject to control by this honourable Court, including by way of review.

- 38.4. I do not accept that it will be exceedingly difficult or impossible to reverse the consequence of a decision to grant or refuse a pardon, in the event that decision is declared to be unlawful or unconstitutional. I have been advised, and respectfully submit, that no person will be entitled to claim a benefit from a decision which this honourable Court declared or found to be unlawful or unconstitutional. I have also been advised that this honourable Court has the power to grant an order which is just and equitable in the event that it is found that a decision to grant or refuse pardon, in regard to applications pending before me, is held to be unlawful or unconstitutional.
39. In paragraph 136 of the founding affidavit, the applicants claim that victims (presumably of offences for which applications for pardons have been made in terms of the current process) will suffer considerable stress and trauma in the event any of those applications succeed. I submit that the applicants' contentions are unfounded, for the following reasons:
- 39.1. First, the applicants fail to appreciate that the consequences which flow from the decision to grant or refuse a pardon flow from the authorised exercise of a constitutional responsibility in terms of section 84(2)(j) of the Constitution. Those consequences would therefore not be unlawful, as they are authorised by the exercise of a responsibility in terms of the Constitution.

39.2. There has been no allegation by the applicants that I have failed to comply with the principle of legality.

40. I therefore submit that the applicants have failed to show that they will suffer irreparable harm, in the event the interim relief sought is refused.

Adequate or alternative remedy

41. In the founding affidavit, the applicants make a bald allegation that they have no other viable or alternative remedy. They do so in paragraph 138 of the founding affidavit. In the same paragraph, the applicants claim that they had no means of knowing which cases were referred to the Reference Group, and what motivations were put up, and what cases were recommended for pardon to the President. In considering applications for pardon in terms of section 84(2)(j) of the Constitution, I am not legally obliged to consider the views of third parties. Granting a pardon in these circumstances is a discretionary measure authorised by the Constitution. The applicants also seek to support their bald allegation that they have no viable or alternative remedy by relying on the fact that it would be extra-ordinarily difficult to overturn such pardons as may have been granted, or to return perpetrators to prison. But that is not necessarily so. The consequences of a decision which is found to be unlawful or unconstitutional may be reversed by this

Court, having regard to its power to make an order which is just and equitable.

42. I also draw the attention of this Court to the allegations made in paragraph 139 of the founding affidavit, wherein the applicants claim that they have exhausted all remedies before approaching this Court for interim relief. The fact of the matter is that the applicants are well aware that the pardon process is a constitutional “prerogative” of the President. They cannot impose obligations or stipulations that the Constitution has not done on the President as he discharges this duty.

Balance of convenience

43. The applicants claim that they have demonstrated that the balance of convenience favours the grant of interim relief. They do so in paragraph 137 of the founding affidavit. The only consideration relied upon by them in this regard is that victims will suffer irreversible harm, in the event pardons are granted before the final determination of these proceedings. I submit that these claims are unfounded, for the following reasons:

- 43.1. The applicants have not demonstrated the type of irreversible harm which victims will suffer, in the event pardons are granted. It is simply not enough for them to make bald statements unsupported by facts.
- 43.2. Victims have always had a constitutional option to approach this honourable Court for relief, in the event they consider that a pardon has been granted or refused unlawfully or unconstitutionally.
44. There are other considerations which show that the balance of convenience does not favour the grant of the interim relief. I refer, in this regard, to the following:
- 44.1. First, the process has been ongoing for a considerable period of time. I have already indicated that it started already from 21 November 2007.
- 44.2. There have been 1118 persons who had applied for pardons prior to the commencement of the special dispensation, and for whom the special dispensation was intended. Some of these persons have now applied for pardons in terms of the current process. Those who

applied have a legitimate interest in the consideration of their applications and are entitled to a decision.

44.3. Thirdly, the decisions that I am called upon to make, in regard to the pending applications, require the fulfilment of a constitutional responsibility. I have already indicated that I intend to fulfil that constitutional obligation diligently and without further delay.

44.4. On the applicants' version, I will never be able to fulfil the constitutional duty concerned, in the light of the fact that the interim relief is sought pending the outcome of final relief, in the form of a final interdict that is based on, amongst others, the claim that the current process is in itself unconstitutional.

45. I therefore submit that the balance of convenience does not favour the grant of the interim relief.

Lack of urgency

46. The application was instituted on 19 March 2009. It was served at the office of the State Attorney on the same date, at approximately 13:10. The

respondents have been given barely four days to formulate answering affidavits in response to Part A of the notice of motion. The application has been set down for hearing on Part A on 2 April 2009. The applicants have nominated these tight time periods without explaining why they did so. They have not explained or justified the deviation from the normal time periods, and the degree of the deviation sought by them.

47. I respectfully submit that there is no urgency in the present application, and that any urgency is of the applicants' own making. I say so, for the following reasons:

47.1. In the first instance, the applicants have throughout been aware of the special process initiated by my predecessor. By 3 October 2008, they had already formulated their complaints regarding the process. They did so in terms of annexure "HM37" of the founding affidavit, which was addressed to me.

47.2. There is no reason why the applicants did not proceed to institute legal proceedings within a reasonable period thereafter. They have not explained why it was difficult or inadvisable for them to do so.

- 47.3. Secondly, the applicants have not sought to place before me information that they consider to be relevant, in the consideration of the pardons. Instead, they chose to rush to Court, in circumstances of urgency, which have not been justified.
48. I have been advised that this honourable Court has issued a practice direction on 12 February 2007 which deals with how urgent applications should be brought before the Court. The application has been instituted by way of semi-urgency, and involves bulky affidavits and annexures. The applicants should have complied with paragraph 11 of the Practice Direction. Instead, they have nominated a date for the hearing of the application, without approaching the Deputy Judge President for the allocation of the date for the hearing.
49. In the above circumstances, I submit that the applicants have failed to demonstrate urgency in the application. In any event, they have failed to comply with the Practice Directions of this honourable Court. On either or both bases, the application should be struck off the roll.

Relief sought by the first respondent

50. I request that the application for relief sought in Part A of the notice of motion should be dismissed, for the reasons set out above. In the event the Court is not inclined to dismiss the relief sought in Part A, I nevertheless submit that the application should be struck off the roll for lack of urgency, or want of compliance with the practice directions of this honourable Court.
51. In either event, the respondents request the costs of the application, including the cost of three counsel.

DEPONENT

I CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit; has no objection to taking the prescribed oath. Thus done, signed and sworn to before me, at _____ on this the _____ day of _____ **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