

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
KHULAMANI SUPPORT GROUP	SECOND APPLICANT
INTERNATIONAL CENTRE 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
RYAN ALBUTT	THIRD RESPONDENT
GERHARDUS JOHANNES TALJAARD	FOURTH RESPONDENT
ALEXANDER GEORGE WHITEHEAD	FIFTH RESPONDENT
AREND CHRISTIAAN DE WAAL	SIXTH RESPONDENT
WILLEM JACOBUS PETRUS JACOBS	SEVENTH RESPONDENT
HANS JACOB WESSELS	EIGHTH RESPONDENT
RYNO ADRIAAN ROSSOUW	NINTH RESPONDENT

FILING NOTICE

ON THE ROLL:

14 APRIL 2009

DOCUMENT:

**FOURTH TO NINTH RESPONDENTS' HEADS
OF ARGUMENT**

FILED BY:

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ATTORNEYS FOR APPLICANTS
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TO:

**THE REGISTRAR
NORTH GAUTENG HIGH COURT
PRETORIA**

AND TO:

**THE FIRST TO SEVENTH APPLICANTS
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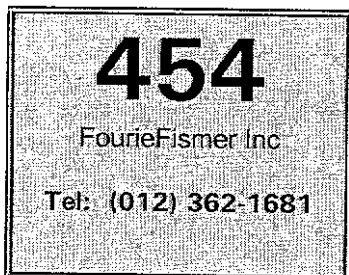
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AND TO:

**THE FIRST AND SECOND RESPONDENTS
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AND TO:

**THE THIRD RESPONDENT
C/O SNAID & EDWORTHY
C/O HACK, STUPEL & ROSS
STANDARD BANK CHAMBERS
CHURCH SQUARE
PRETORIA
REF: MR SNAID**



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**FOURTH TO NINTH RESPONDENTS'
HEADS OF ARGUMENT**

1.

The Application for an Interdict brought on an urgent basis fatally flawed for a number of reasons:

- i. Lack of urgency.
- ii. Flawed on account of non-joinder and lack of *locus standi*.
- iii. The executive powers vested in the State President in terms of Section 84(2)(j) of the Constitution are executive powers and as such also the President's prerogative.

URGENCY:

2.

The application is not urgent. Any urgency was created by the Applicants.

3.

As early as August the 7th 2008, the Applicants were aware of the RG's attitude as set out in a letter by the Chairman, Dr Delpont (page 203).

4.

At that early age the Applicants were aware of the fact that victims and/or the plight or wishes of the victims were not going to be considered by the RG. Instead of bringing an Application, if nothing else, against the RG, they chose to carry on writing letters to the State President and engaging other parties in their endeavour to be heard.

5.

It is unheard of that the Applicants now bring an Urgent Application at this late stage, after all the proceedings done by the RG have been completed, the Applicants' names have been forwarded to the State President to consider pardon and all that still has to be done, is for the State President to exercise his powers in terms of Section 84(2)(j) of the Constitution.

6.

The effect thereof will be that the entire process which has been running since in 2007 will be nullified and almost every step taken by the RG will have to be repeated, reconsidered and re-evaluated.

FLAWED ON ACCOUNT OF NON-JOINDER

7.

The Application is likewise fatally flawed on account of non-joinder. It is submitted that all the Applicants for pardon should have been joined by the Applicants. The names of each and every Applicant have been known since November 26, 2008 (paragraph 45, page 32).

8.

It is submitted that it is inconceivable that the Court will make an order that will have a devastating impact on convicted prisoners (the Fourth to the Ninth Respondents) if the relief sought by the Applicants is granted.

9.

On the 4th of April 2008 the Fourth to the Ninth Respondents duly submitted their Applications for Presidential Pardon to the Department of Justice and Constitutional Development.

10.

The Fourth to the Ninth Respondents therefore have a *bona fide* belief their Applications have been forwarded to the State President and are being considered by the State President for pardon.

11.

The Fourth to the Ninth Respondents were found guilty in the Circuit Court at Kathu, Northern Cape, on the 12th of January 2005 of the offences of culpable homicide and public violence. They were each sentenced to four years imprisonment on each of the charges.

12.

They appealed against the sentences and the convictions to the High Court of the Northern Cape in Kimberley, but the appeals were turned down. They appealed further to the Supreme Court of Appeal in Bloemfontein, but the appeals were turned down.

13.

They applied to the Constitutional Court for Leave to Appeal to the Constitutional Court, but the application was turned down.

14.

They all started serving their sentences during January 2008.

15.

Taking into account the time they spent in custody while awaiting trial, as well as awaiting the outcome of their appeals, they all have approximately five years of their sentences outstanding to be served.

16.

The Fourth to the Ninth Respondents believe they qualify for the Presidential Pardon and that they have good prospects of success with their applications in this regard. Up to date hereof they had not received any indication to the contrary from the Reference Group.

17.

If their applications for Presidential Pardoning are found to be successful, it will have the result that they will be exonerated from serving the rest of their sentences.

18.

It is therefore of paramount importance that the Presidential Pardon process, that has now been running for more than a year, be finalised and that the President be allowed to grant or refuse the pardons in terms of the process as far as the Fourth to the Ninth Respondents are concerned.

19.

Any interference in that process obviously will negatively impact on the rights of the Fourth to the Ninth Respondents and the other Applicants who are waiting for a possible Presidential Pardon in this regard.

20.

One would have expected the Applicants in this application to have joined the Fourth to the Ninth Respondents as well as the other Applicants for Presidential Pardon in as far the relief claimed by the Applicants will have a devastating impact on the Respondents' legitimate expectations.

21.

At the least there was a duty on the Applicants to notify the Respondents and other Applicants for Presidential Pardon that they intended to apply for an interdict that will effectively destroy their rights created for them in the Presidential Pardoning process.

22.

The Third to the Ninth Respondents were totally unaware of the application brought for this interim interdict and were, as the papers show, not originally joined as Respondents in this application.

23.

They became aware of the application via their Attorneys who informed them of a possibility that if the relief sought by the Applicants is granted, it may destroy their chances to ever be considered for pardon.

24.

It is submitted that there are probably hundreds of other Applicants for pardon in the same position as the Fourth to the Ninth Respondents who have not been notified and/or joined in the Application by the Applicants.

25.

It is submitted that it is inconceivable that the Court will make an order that will have such a final and devastating impact on the Fourth to the Ninth Respondents as well as all the other Applicants for pardon, should the relief sought by the Applicants be granted.

26.

There is a further fatal flaw in the application regarding non-joinder and that is that the Applicants have failed to name one victim or identify one victim who supports their application.

27.

It is clear from the Applicants' Founding Affidavits that they knew as late as November 2008 who all the Applicants were and secondly, it would have been a simple matter to determine who the Applicants are (and therefore the victims) who were forwarded to the State President.

28.

The position now is that there may not be one victim who is prepared to support this application and who wishes to take part in such a process as envisaged by the Applicants. This submission is not farfetched on account of the Applicants simply failing to identify any such victim and/or provide this Honourable Court with any such victims' wishes and/or particulars.

PREMATURE:

29.

A further criticism is that the application was brought prematurely for the simple reason that it may well be that the State President decides not to issue any pardons to any of the Applicants at all. If some Presidential pardons are granted, the circumstances of those grants can be investigated by the Applicants in due course.

30.

It is further submitted that in the case of the Fourth to the Ninth Respondents the victim of the culpable homicide (the widow) had been consulted in the Respondents' Application for Presidential Pardon and have apparently elected not to oppose or become part of such process.

31.

There is therefore no basis to apply for the setting aside of the pardons for reason of exclusion of victim participation as far as the Fourth to the Ninth Respondents are concerned.

32.

It is further submitted that the State President should be allowed to finalise the process. The Applicants will then know exactly who all the parties concerned with this dispute should be. They will then be in a position to join all parties' whose rights are affected or maybe affected by the ultimate decision of the Court.

33.

That will enable them to joint such parties in any application against the decision of the State President to grant the specific Presidential Pardons.

34.

The victims could be accurately identified and be allowed the opportunity to decide whether they want to become part of the process to oppose such pardons or not as set out above, or many of the victims may choose not to. At the moment the Applicants simply assume on behalf of unknown victims that they indeed want to exercise rights without any factual basis for such assumption.

35.

No factual basis is provided for the assumption by the Applicants in the main application that it would be exceedingly difficult if not impossible, to reverse the decision of the State President once the affected prisoners (interalia the Fourth to the Ninth Respondents) had been released from incarceration.

36.

The Fourth to the Ninth Respondents are all well known businessmen in the Kuruman area who own immovable property (see paragraph 52 of the Answering Affidavit). There is no basis to allege that if the pardons were to be granted and eventually for whatever reason be overturned by a competent Court of Law, that they will not abide by such decision. They did so in the past when their appeals failed.

37.

There is no factual basis for the assumption made in paragraph 136 by the Applicants that the victims will suffer considerable stress and trauma if pardons were to be issued.

38.

It is therefore clear from the above that the balance of convenience favours the Fourth to the Ninth Respondents and all the other Applicants for pardon who applied in terms of a valid process initiated by the then State President.

39.

To interdict the State President at this stage, not to finalise the process, will negatively impact on the Fourth to the Ninth Respondents' right to freedom to be heard while the possible stress or trauma that the victims may or may not suffer, for which there is no factual basis, will only arise if and when some of the pardons applied for are granted.

40.

It was never considered by the Applicants that the real difference between this process initiated by the then State President and the TRC is simply that in this case all the victims will probably have been consulted during the sentencing process.

41.

The Presidential Pardon in this case is something completely different from the process followed during the TRC, during which people who had never been convicted, could apply for amnesty.

THE PREROGATIVE OF THE STATE PRESIDENT:

42.

"Being a branch of Government, the Courts have to avoid the appearance of encroaching upon the territory of the Executive.

This is a principal reason for the restricted ambit of judicial review."

ADMINISTRATIVE LAW – LAWRENCE BACKSTER – FIRST EDITION.

43.

Before the present constitution the President derived his powers concerning the exercise of the prerogative from our Common Law that had been inherited from the British Crown and had been left unaffected by legislation.

44.

See **MINISTER OF INTERIOR AND OTHERS v BEIER 1948 (3) AD 409** where it was held at page 442:

"...the Government had the power, in the exercise of the prerogative, to deport enemy aliens without giving them an opportunity of making representations against the deportation."

45.

And further, at page 445:

"...The commission was merely an advisory body to the executive Government. In appointing of the commission Government cannot be held to have undertaken or represented that the commission would observe that procedure."

46.

Presently Section 84(2) deals with the powers and the function of the President and reads as follows:

"%...

j. The President is responsible for pardoning or reprieving offenders and remitting any fines, penalties or forfeitures ..."

47.

Section 85 reads as follows:

"1.

The executive authority of the Republic is vested in the President.

2.

The President exercises the executive authority, together with the other members of the Government, by:

- a. implementing national legislation except where the constitution or an act of parliament provides otherwise;*
- b. developing and implementing national policy;*
- c. co-ordinating the functions of State Departments and administration;*
- d. preparing and initiating legislation; and*
- e. performing any other executive function provided for in the constitution or in national legislation."*

48.

The only limitation on the executive powers of the President is found in Section 101 that reads as follows:

"A decision by the President must be in writing if it:

- a. is taken in terms of legislation; or*
- b. has legal consequences."*

49.

There is no other provision that curtails or limits the powers of the President. There is therefore no need for the President to consult anybody before granting a pardon. The Applicants in this regard had not made out a case to be heard.

50.

Section 237 of the constitution reads as follows:

"All constitutional obligations must be performed diligently and without delay."

51.

The Applicants have not shown that they have any right to restrict the President when he attempts to act in terms of the constitution as set out above.

52.

It was held in **MASETLHA v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & ANOTHER 2008 VOLUME 1 SA 566 (CC)** at paragraph 76 as follows:

"Section 85(2)(e) of the constitution, in particular, stipulates that the President exercises executive authority by performing any other executive function provided for in the constitution or in national legislation."

53.

The clear distinction was drawn between executive and administrative action in **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION 2000 VOLUME 1 SA 1 (CC)**, paragraphs 141 to 143:

"In Section 33 the administrative, not executive, is used to qualify action."

54.

"This suggests that the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the executive arm of Government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not."

And further on:

55.

"The focus of the enquiry as to whether conduct is administrative action, is not on the arm of Government to which the relevant factor belongs, but on the nature of the power he or she is exercising." And then later on, paragraph 143:

56.

"Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls."

57.

And then later in the same decision the Court held as follows concerning the nature of the powers conferred by Section 84(2) of the constitution. Paragraph 146:

"The remaining Section 84(2) powers are discretionary powers conferred upon the President which are not constrained in any express manner by the provisions of the Constitution. The scope is narrow : The conferral of honours; the appointment of ambassadors; the reception of recognition of foreign diplomatic representatives; the calling of referenda; the appointment of commissions of enquiry and pardoning of offenders. They are closely related to policy; none of them is concerned with the implementation of legislation. Several of them are decisions which result in little or no further action by the Government."

And further on:

"... it is well established that the functions of the commission of enquiry are to determine facts and to advise the President through the making of recommendations. The President is bound neither to accept the commissions factual findings nor is he or she bound to follow its recommendations."

58.

And then lastly the President's executive power to pardon was considered in **PRESIDENT OF REPUBLIC OF SOUTH AFRICA & ANOTHER v HUGO 1997 (4)**

SA 1 (CC), paragraph 44 and further:

"The power to pardon duly convicted prisoners in terms of which the President acted is conferred upon him by the interim Constitution. The power of pardon is one which is recognised in many democratic countries. In terms of the interim constitution, the power is not subject to cabinet concurrence or to legislative control, but is conferred upon the President directly by the interim Constitution. Although the historical roots of the pardon power may lie in the royal prerogative, it is clearly a power which the drafters of the interim constitution considered appropriate within the constitutional democracy." And further in the same decision:

"To repeat the words of Holmes J : When 'a pardon is' granted it is a determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgement fixed." And further:

"It is not a private act of grace in the sense that the pardoning power in the monarchy may be. It is a recognition in the interim constitution that the power should be granted to the President to determine when, in his view, the public welfare will be better served by granting a remission of sentence or some other form of pardon."

59.

Consequently the Applicants have shown no clear right to be heard. Nor as is set out above have they showed irreversible or any harm based on facts at all.

60.

As set out above the so called harm that would befall victims, who were not identified, is simply an allegation without substance.

61.

It is further submitted that in the light of the non-joinder as set out above, the Applicants have no *locus standi* to have brought this application.

62.

It is submitted the true implication of what the Applicants seek to achieve (to protect the right of unnamed victims) is simply that the Fourth to the Ninth Respondent and all other Applicants for pardon, will become the victims of the Applicant's lack of diligence as set out herein.

63.

Lastly the President is compelled to act in terms of Section 237 as set out above and must perform his obligations diligently and without delay. No good cause has been shown for the President not to act in terms of Section 237 of the constitution.

COSTS:

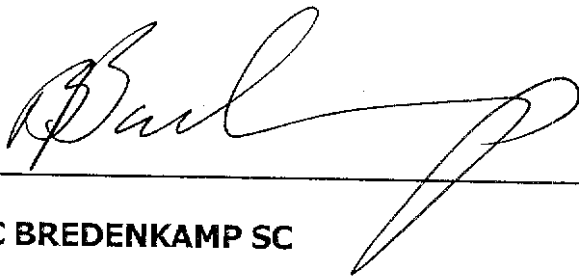
64.

The Applicants have chosen to approach this Honourable Court without joining the Applicants for pardon nor identifying the so called victims. The Applicants should and would have known what the inherent risks are in bringing such a flawed application to be heard by this Honourable Court.

65.

The Fourth to Ninth Respondents therefore ask that the application for an interim interdict be dismissed with costs, costs to be awarded against the Applicants jointly and severally.

SIGNED AT PRETORIA ON THIS THE 7TH DAY OF APRIL 2009.



A handwritten signature in black ink, appearing to read 'Paul', written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right and then loops back down.

BC BREDENKAMP SC

COUNSEL FOR FOURTH TO NINTH RESPONDENTS