

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

Case Number: 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
AND OTHERS** Respondents

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1. This application concerns the “Special Dispensation for Presidential Pardons for political offences” (“the Special Dispensation”).
2. Part A of this application is presently before the Court. In Part A, the Applicants seek an order interdicting the First Respondent from granting any pardon in terms of the Special Dispensation, until such time as the proceedings in Part B of the Notice of Motion have been finally determined.¹
3. In Part B,² the Applicants seek a final order interdicting the First Respondent from granting any pardon in terms of the Special Dispensation; alternatively, an order that the First Respondent is interdicted from granting any pardon in terms of the Special Dispensation unless and until the victims and other persons who were affected by the offence(s) in question:
 - 3.1. have been given access to the relevant application for a pardon and the proceedings and recommendation of the Pardons Reference Group in that regard; and
 - 3.2. have been given an opportunity to make representations in that regard to the First Respondent.
4. No relief is sought against the Minister of Justice (“the Minister”), who is cited only to the extent that he may have an interest in these proceedings.

¹ Record 2: Notice of Motion; Part A; par 2.

² Record 4: Notice of Motion; Part B; par 2 and 3.

5. The Applicants will not persist, in Part B, in seeking an interdict preventing the granting of any pardons under the Special Dispensation. In other words, at that stage they will seek only the alternative relief in Part B.
6. The Heads of Argument address the following:
 - 6.1. A summary of the issue in this matter.
 - 6.2. The factual background to the institution of these proceedings.
 - 6.3. Locus standi.
 - 6.4. Joinder.
 - 6.5. The Applicants have a prima facie right:
 - 6.5.1. The process is in breach of the right to fair administrative action.
 - 6.5.2. In any event, the process is in breach of the President's constitutional and common law duty to act fairly.
 - 6.5.3. The process is in breach of various other Constitutional rights.
 - 6.6. The other requirements for an interim interdict:
 - 6.6.1. Reasonable apprehension of harm.
 - 6.6.2. Balance of convenience
 - 6.6.3. No other remedy
 - 6.7. Urgency

THE ISSUE

7. The President has established a “Special Dispensation” for the granting of pardons to persons who have been convicted of offences allegedly committed in pursuit of political objectives.
8. The initial role in this process was performed by the Reference Group (RG). The RG consists of politicians.
9. The RG has received and considered 2114 applications for pardons, and has made recommendations to the President. It has operated under blanket secrecy. It refused to identify who had made application for a pardon, to disclose the contents and motivations of the pardon applications, and to disclose what applications it has recommended.
10. The RG refused to give the victims or other persons affected by the offences in question³ an opportunity to make representations as to whether a pardon should be granted.
11. 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.
12. The RG has made recommendations to the President. While the precise number of people recommended for pardon has not been disclosed, it is a

³ For the sake of convenience we refer to these persons jointly as “the victims”.

limited number.

13. The President would already have made his decisions in this regard but for this application. He has not disclosed and will not disclose which applications have been recommended to him, and which he is considering.
14. The President has refused to give the victims an opportunity to make representations as to whether a pardon should be granted, and if so, on what terms.
15. It is not possible for victims to make application for relief, as they do not know who has made application and who has been recommended by the RG.
16. The Applicants seek an interdict preventing the President from granting pardons under such circumstances. They initially seek an interim interdict pending the final determination of the application.

THE FACTUAL BACKGROUND

17. 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.” According to President Mbeki the aim was to assist the nation in resolving the “unfinished business” of the Truth and Reconciliation Commission (“the TRC”).⁴ We refer to this process established by President Mbeki as the “special dispensation”.⁵
18. The President stated that the special dispensation would be guided by the following:⁶
- 18.1. A window of opportunity for new pardon requests would open on 15 January 2008 and close on 15 April 2008. Requests would be considered from applicants convicted of offences “of the nature considered by the TRC during the period up to 16 June 1999”.⁷ (The deadline for applications was subsequently extended to 31 May 2008).⁸
- 18.2. Certain categories of persons were excluded from this process: persons convicted of sexual offences, domestic violence, the sale, possession or manufacturing of drugs, and applicants who had

⁴ Record 26: Founding Affidavit; par 34.

⁵ Record 10: Founding Affidavit; par 3.

⁶ Record 163: HM 13 to the Founding Affidavit.

⁷ Record 27: Founding Affidavit; par 36 and 37.

⁸ Record 28: Founding Affidavit; par 37; and 181: HM 18 to the Founding Affidavit

been denied amnesty by the TRC.⁹

19. A Reference Group consisting of politicians was set up as part of the special dispensation. In this regard, President Mbeki announced on 21 November 2007 that all political parties represented in Parliament would be invited to appoint a representative to serve on the Reference Group.¹⁰

20. President Mbeki stated that he would make his decision on whether to refuse or grant pardon on each application placed before him on an individual basis, and would, with regard to each application:¹¹

20.1. seriously consider the recommendations made to him by the RG;

20.2. form an independent opinion on the basis of the facts / information placed before him, to arrive at a decision whether to grant or refuse pardon.

21. He stated that in doing this he would:

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

21.2. uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the TRC, especially as

⁹ Record 28: Founding Affidavit; par 36.

¹⁰ Record 161: HM 12 to the Founding Affidavit.

¹¹ Record 160: HM 12 to the Founding Affidavit.

they relate to the Amnesty Process.¹²

22. The RG was formally constituted on 18 January 2008 at a meeting with former President Mbeki, during which the Terms of Reference for the RG were adopted.

22.1. Dr Tertius Delport was elected chairperson. Each political party represented in Parliament appointed a Reference Group member.¹³

22.2. Paragraph 2 of the preamble to the Terms of Reference states that if legal mechanisms created during the transition, such as the amnesty provisions of the Promotion of National Unity and Reconciliation Act, 1995 were available today, they would have been employed to deal with persons who have been convicted and sentenced for politically motivated offences. The preamble notes that since such mechanisms are not available, and given that the President enjoys the constitutional power to grant pardons, he accordingly intends to exercise such power in lieu of amnesty laws.

23. On 24 January 2008 the Department of Justice and Constitutional Development (“the Department”) announced that the twelve page pardon application forms were available to interested applicants at all courts,

¹² Record 160: HM 12 to the Founding Affidavit.

¹³ Record 10: Founding Affidavit; par 4.

correctional facilities, Department of Justice regional offices and websites.¹⁴

24. The names of the fourteen political parties and their individual nominees to the RG appear as HM24 to the founding affidavit.¹⁵ The Terms of Reference of the RG are attached to the same document¹⁶. The following aspects warrant emphasis:

24.1. The RG consists of representatives of political organizations;¹⁷

24.2. The RG must develop its own rules and procedures in considering each application for pardon for the purpose of making recommendations to the President based on each application;¹⁸

24.3. All recommendations made in respect of applications for pardon must be submitted to the President¹⁹ and such recommendations must be made in respect of each application for a pardon;²⁰

24.4. The President after considering the recommendations made by the RG, has the power to grant or refuse an application for pardon.²¹

25. The RG has received and considered applications for pardons and has

¹⁴ Record 29: Founding Affidavit; par 39; Record 164: HM14 to the Founding Affidavit.

¹⁵ Record 190: HM 24 to the Founding Affidavit.

¹⁶ The Terms of Reference are also attached separately as HM59 to the Founding Affidavit (page 343).

¹⁷ Record 192: HM 24 to the Founding Affidavit; par 1.1.

¹⁸ Record 193: HM 24 to the Founding Affidavit; par 2.4.

¹⁹ Record 196: HM 24 to the Founding Affidavit; par 10.1.

²⁰ Record 196: HM 24 to the Founding Affidavit; par 10.2.

²¹ Record 197: HM 24 to the Founding Affidavit; par 11.1.

made recommendations to the President.²²

26. Unless the relief sought in Part A of the Notice of Motion is granted, the President will very shortly decide which offenders will be granted pardons pursuant to this special dispensation.²³

Attempts to remedy the exclusion of victims

27. The coalition of non-governmental organizations comprising the Applicants (“the Coalition”),²⁴ and its individual members, made approaches first to the RG, and then to the President, to ensure that the victims of the offences in question were: (a) given access to the relevant information relating to the pardon application; and (b) given an opportunity to make representations in that regard.

Attempts to persuade the Reference Group

28. The attempts to persuade the RG included the following:
- 28.1. On 5 February 2008, the CSVR contacted Dr Delpont (chairperson of the RG) to offer the CSVR’s assistance and expressed the hope of a “constructive relationship” with the RG.²⁵
- 28.2. On 25 March 2008, the CSVR again contacted Dr Delpont

²² Record 10: Founding Affidavit; par 5.

²³ Record 10: Founding Affidavit; par 6.

²⁴ Record 33: Founding Affidavit; par 49.

²⁵ Record 30: Founding Affidavit; par 40 and HM15 (at page 177).

requesting the Terms of Reference for the RG.²⁶

28.3. On 5 May 2008, the CSVR again emailed Dr Delport requesting a list of applicants who had submitted pardon applications.²⁷

28.4. On 6 May 2008, Dr Delport responded advising that the RG had “not decided whether to make the list public or not” and indicated that he would raise the request at the RG meeting on 12 May 2008.²⁸

28.5. 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.²⁹ The CSVR received no response to that enquiry.³⁰

28.6. 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 2008.³¹

²⁶ Record 31: Founding Affidavit; par 42 and HM17 (at page 181).

²⁷ Record 31: Founding Affidavit; par 44 and HM19 (at page 183).

²⁸ Record 32: Founding Affidavit; par 44 and HM20 (at page 184).

²⁹ Record 33: Founding Affidavit; par 47 and HM23 (at page 189).

³⁰ Record 33: Founding Affidavit; par 47.

³¹ Record 33: Founding Affidavit; par 48 and HM24 (at page 190).

- 28.7. 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.³² The Coalition received no response to this letter.³³
- 28.8. On 30 June 2008, the CSVR sent an e-mail to the secretary of the RG requesting a meeting.³⁴
- 28.9. On 1 July 2008, the CSVR sent an e-mail to Dr Delpont requesting a meeting.³⁵
- 28.10. On 1 July 2008, Dr Delpont responded advising 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.³⁶
- 28.11. On 15 July 2008, a meeting was held between the Coalition members and Dr Delpont, the secretary and Mr Sibonyani.³⁷ The details of this are set out in the founding affidavit.³⁸
- 28.12. On 17 July 2008 and pursuant to a request from Dr Delpont, the Coalition addressed correspondence to the RG in which it

³² Record 33: Founding Affidavit; par 49 and HM25 (at page 198).

³³ Record 34: Founding Affidavit; par 50.

³⁴ Record 34: Founding Affidavit; par 50.

³⁵ Record 34: Founding Affidavit; par 50.

³⁶ Record 34: Founding Affidavit; par 50 and HM26 (at page 200).

³⁷ Record 34: Founding Affidavit; par 51.

³⁸ Record 34: Founding Affidavit; par 51.

articulated its requests and recommendations.³⁹

28.13. On 7 August 2008, Dr Delpont 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.⁴⁰

28.14. On 12 August 2008 the Applicants 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.⁴¹

28.15. On 12 August 2008 the NGO 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;⁴² the Coalition urged him to intervene and direct the RG to comply with the Constitution.

28.16. On 19 August 2008, the South African Human Rights Commission wrote to President Mbeki and echoed many of the concerns raised by the NGO coalition.⁴³

28.17. On 20 August 2008, the Coalition sent letters to all political parties

³⁹ Record 36: Founding Affidavit; par 52 and HM27 (at page 201).

⁴⁰ Record 38: Founding Affidavit; par 53 and HM28 (at page 204).

⁴¹ Record 38: Founding Affidavit; par 54 and HM29 (at page 206).

⁴² Record 38: Founding Affidavit; par 55 and HM30 (at page 207).

⁴³ Record 39: Founding Affidavit; par 57 and HM33 (at page 212).

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.⁴⁴ 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.⁴⁵

28.18. On 8 September 2008, the FXI received a response to its letter to the Democratic Alliance dated 3 September 2008. Dr Delpont 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.⁴⁶

Approaches to the President

29. The approaches to the RG having come to nothing, the Applicants approached the President in an attempt to ensure that the rights of victims were complied with before the decision was made:

29.1. On 3 October 2008, the Coalition wrote to President Motlanthe *inter alia* to make him aware of the Coalition's concerns regarding the

⁴⁴ Record 40: Founding Affidavit; par 58 and HM34(a) to 34(d) (at page 214).

⁴⁵ Record 40: Founding Affidavit; par 59.

⁴⁶ Record 40: Founding Affidavit; par 59.

RG process,⁴⁷ and urged him to intervene and direct the RG to comply with the Constitution.

29.2. On 17 November 2008, the NGO 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.⁴⁸

29.3. On 9 December 2008, the Applicants' attorney wrote to the President reiterating the Applicants' objections to the RG process, and asserting that the process established by the Special Dispensation is "inconsistent with the Constitution, the Service Charter for Victims of Crime in South Africa, and the principles and values underpinning the Truth and Reconciliation Commission". He repeated that the Applicants' chief concern is that pardons may be granted to persons without first ensuring that victims are given an opportunity to be heard. He sought the President's assurance that he would not grant pardons without first considering submissions from the relevant victims. Failing that, the Applicants would institute urgent legal proceedings.⁴⁹

29.4. On 18 December 2008 the Presidency advised that the Applicants' letter had been referred to the Minister for his consideration and

⁴⁷ Record 43: Founding Affidavit; par 60 and HM37 (at page 242).

⁴⁸ Record 44: Founding Affidavit; par 55 and HM38 (at page 246).

⁴⁹ Record 54: Founding Affidavit; par 64 and HM48 (at page 309).

advice. The President undertook not to consider any political pardons received from the RG until the Minister had made a recommendation.⁵⁰

29.5. The Applicants' attorneys received two letters in January 2009 in which it was advised that the Department of Justice and Constitutional Development would seek legal opinion before making any recommendations.⁵¹

29.6. On 10 March 2009 the Minister advised the Applicants that he had obtained Counsel's opinion and had made recommendations to the President regarding the Applicant's submissions.⁵²

29.7. On 11 March 2009 the Applicants' attorneys wrote to the Presidency noting it seemed that the Applicants' request for the views of victims and other interested parties to be heard during the recommendations process had fallen on deaf ears.⁵³

29.8. On 13 March 2009, the Presidency wrote to the Applicants' attorneys stating that the President considered the process to have been "regular" and would not furnish and (further) undertaking.⁵⁴

29.9. On 16 March 2008, the Applicants wrote to the President expressing disappointment at the President's view and stating that

⁵⁰ Record 55: Founding Affidavit; par 66 and HM50 (at page 313).

⁵¹ Record 55: Founding Affidavit; par 67 and HM51 and HM 52 (at pages 313 and 314).

⁵² Record 56: Founding Affidavit; par 69 and HM54 (at page 317).

⁵³ Record 57: Founding Affidavit; par 70 and HM55 (at page 318).

⁵⁴ Record 58: Founding Affidavit; par 71 and HM56 (at page 320).

the Applicants were left with no choice but to bring an urgent interdict application to Court.⁵⁵ This was done on 19 March 2009.

30. The process before the RG operated under a veil of blanket secrecy to such an extent that:

30.1. The RG refused to identify who had made application for pardon;⁵⁶

30.2. The RG refused to disclose the contents and motivations of the pardon applications;⁵⁷

30.3. The RG refused to disclose what applications it has recommended to the President;⁵⁸

30.4. The RG refused to give victims affected by the offences in question an opportunity to make representations as to whether a pardon should be granted and, if so, on what terms.⁵⁹

31. This veil of secrecy is now being perpetuated by the President, who is the decision-maker, in that:

31.1. The President will not disclose what applications have been recommended to him, and which he is considering.⁶⁰

31.2. The President has refused to give victims an opportunity to make

⁵⁵ Record 60: Founding Affidavit; par 72 and HM57 (at page 322).

⁵⁶ Record 10: Founding Affidavit; par 5. See also para 31 below.

⁵⁷ Record 10: Founding Affidavit; par 5.

⁵⁸ Record 10: Founding Affidavit; par 5.

⁵⁹ Record 10: Founding Affidavit; par 5.

⁶⁰ Record 10: Founding Affidavit; par 6.

representations as to whether a pardon should be granted, and if so, on what terms.⁶¹

32. The President asserts that he has not refused to consider any representations which are made to him by the victims. That statement is, with due respect, entirely empty: Unless a victim knows:

32.1. that the President is considering granting a pardon to the offender in question,

32.2. the basis on which application has been made for a pardon, and

32.3. that the President will consider representations in that regard,

a victim plainly does not have the opportunity to make representations.

33. None of those conditions exists. This is the direct result of the refusal of first the RG and then the President to make the relevant information known to victims.

34. The only information which the Coalition ever managed to extract – after a lengthy process under the Promotion of Access to Information Act – came from the Department of Justice two working days before the end of the extended mandate period of the Reference Group. This was a 300-page list referred to as the “Political Pardons Application Form Received Register”. It:

⁶¹ Record 10: Founding Affidavit; par 6.

- 34.1. listed everyone who had applied for a pardon.
 - 34.2. stated the name, prison or identity number, offence, and whether the person was in or out of prison.
 - 34.3. did not disclose where the person concerned was imprisoned.
 - 34.4. did not disclose the status of the application, and whether it had been recommended or rejected.
 - 34.5. did not identify the victims of the offence in question.⁶²
35. The Applicants' case is that the President is obliged to ensure that victims have the opportunity to be make representations before he makes a decision as to whether to grant a pardon. They accept that he could choose to give this hearing through a body created by him for that purpose (such as the RG) or though another mechanism determined by him.
36. The facts show that
- 36.1. the RG has refused to create such an opportunity;
 - 36.2. the President declined to intervene to ensure that the RG provided such an opportunity; and
 - 36.3. the President has failed and refused to create any other such opportunity.

⁶² Record 45: Founding Affidavit, par 62.3

LOCUS STANDI

37. The First Respondent has disputed the Applicants' *locus standi* to institute these proceedings.⁶³
38. It is regrettable that the President of the Republic of South Africa has adopted such a technical approach to a group of seven NGOs who have instituted these proceedings in an attempt to vindicate the rights of a particularly vulnerable group of people in post-apartheid South Africa. This is, as the Constitutional Court has recognised, a country where few have the means to enforce their rights through the courts.⁶⁴
39. In any event, we now address each of the bases upon which *locus standi* is challenged.

The allegation that none of the Applicants have adduced evidence to show that they are victims of conflicts of the past, in their own right

40. The threshold proposed by the President, namely that the Applicants must show that they are victims of conflicts of the past in their own right, is not borne out by the Constitution. It is flatly inconsistent with the prescripts of the Constitution and various dicta of the Constitutional Court.
41. Where there is an allegation that a right in the Bill of Rights has been

⁶³ Record: First Respondent's Answering Affidavit at par 6.

⁶⁴ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (1997 (7) BCLR 851) at para [69].

infringed or threatened, the persons who may approach the Court are:⁶⁵

41.1. Anyone acting in their own interest;

41.2. Anyone acting on behalf of another person who cannot act in their own name;

41.3. Anyone acting as a member of, or in the interest of, a group or class of persons;

41.4. Anyone acting in the public interest; and

41.5. An association acting in the interest of its members.

42. According to the Constitutional Court, this provision introduces a radical departure from the common law in relation to standing.⁶⁶

43. In **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)**, O'Regan J explained why a generous and expanded approach to standing is necessary in constitutional litigation.

She said:

“Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In

⁶⁵ Section 38 of the Constitution.

⁶⁶ *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) (2004 (7) BCLR 775; [2004] ZACC 12) at para 14. See also para 17.

such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation.⁶⁷ (Emphasis added)

44. In line with these principles, organisations similar to the Applicants in this matter have been found have the necessary *locus standi*. Examples are: (a) **Centre for Child Law and Others v MEC for Education, Gauteng, and Others 2008 (1) SA 223 (T)** where an advocacy and public-interest body was found to have had standing to institute proceedings; (b) **Campus Law Clinic, University of KZN v Standard Bank of SA Ltd 2006 (6) SA 103 (CC)**, where a university campus law clinic which provides legal aid to indigent clients was found to have standing; (c) **Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC)**, where a non-profit non-governmental organisation had standing to challenge provisions of the Immigration Act 13 of 2002, dealing

⁶⁷ Par 229.

with the deportation of illegal foreigners.

45. In accordance with these well-established principles, the Applicant NGOs in this matter have alleged that by virtue of the work that they do, they act: (a) in their own interests;⁶⁸ (b) on behalf of victims and families of victims of criminal acts perpetrated by members and agents of the apartheid regime and its security forces;⁶⁹ (c) as associations acting in the interests of their members;⁷⁰ and (d) in the public interest.⁷¹

Acting in their own interest

46. The Applicants contend that each of them has standing to institute these proceedings in its own interest (i.e. in terms of s 38(a) of the Constitution).⁷² In particular, the Applicants rely on s 38(a) on the following bases:

46.1. The Centre for the Study of Violence and Reconciliation (CSV), whose objects include promoting sustainable peace and reconciliation, avers that one of the primary ways of achieving its object is dealing with human rights violations and crimes of the past by means of, *inter alia*, holding perpetrators to account. It asserts that it has provided support to victims of apartheid crimes during the

⁶⁸ The CSV, the International Centre for Transitional Justice, the FXI, SAHA and the HRMC.

⁶⁹ Khulumani Support Group.

⁷⁰ Khulumani Support Group.

⁷¹ Record 19: Founding Affidavit at par 27.2.

⁷² Record 19: Founding Affidavit at par 27.1.

TRC process and continues to support families of those who disappeared at the hands of the apartheid security forces. The CSVR explains that it seeks to promote democracy and human rights, including the rule of law which is undermined by the exclusion of victims from the special dispensation process.⁷³

46.2. The International Center for Transitional Justice (ICTJ), which describes itself as an organisation concerned primarily with both judicial and non-judicial accountability, contends that the special dispensation process violates South Africa's international law obligations. The ICTJ has appeared before the Constitutional Courts of both Colombia and Indonesia to enforce these countries' obligations under international law.⁷⁴

46.3. The Freedom of Expression Institute (FXI), whose principal objective is the promotion of freedom of expression in South Africa and the opposing of censorship, contends that the special dispensation process violates these rights.⁷⁵

46.4. The South African History Archives (SAHA), which documents past struggles against apartheid and has worked extensively in recording and capturing the individual stories of those involved in the TRC, asserts its standing on the basis of its concerns that the special

⁷³ Record 16: Founding Affidavit at par 20.

⁷⁴ Record 17: Founding Affidavit at par 22.

⁷⁵ Record 18: Founding Affidavit at par 23.

dispensation will undermine the work of the TRC, compromise the rights of victims to a fair and just process, and prevent the exposure of information disclosed in the process about South Africa's past.⁷⁶

46.5. The Human Rights Media Centre (HRMC) which is an oral history project that promotes an awareness and culture of human rights, and adopts a people-centred and developmental approach in acknowledging the struggles of the past, contends that the special dispensation is contrary to its objectives, denies the role of victims, refuses to hear their voices and excludes them entirely from the process.⁷⁷

47. We submit that these Applicants plainly have standing in their own interest, in order to achieve their own objects.

Acting on behalf of victims and families of victims

48. Khulumani Support Group asserts its standing in terms of s 38(c) of the Constitution. It contends that it acts in the interests of the group comprising victims, or family members of victims, of apartheid violence and repression associated or purportedly associated with a political objective committed

⁷⁶ Record 18: Founding Affidavit at par 24.

⁷⁷ Record 19: Founding Affidavit at par 25.

prior to 16 June 1999 (as envisaged in the terms of reference).⁷⁸

Acting as an association on behalf of its members

49. Khulumani also brings this application under s 38(e) of the Constitution as an association acting in the interests of its members.⁷⁹

Acting in the public interest

50. The Applicants all assert standing under s 38(d) of the Constitution, on the grounds that they act in the public interest.⁸⁰

51. They contend that the First Respondent's actions related to the special dispensation were not authorised by the Constitution or by law, violate the rule of law and fair process, violate several fundamental rights and freedoms and amount to an effective re-run of the TRC amnesty process.⁸¹

The Applicants act in the public interest on the basis that there are no parties which can effectively challenge what has been done and will be done.

52. The Applicants are civil society organisations which seek to vindicate the

⁷⁸ Record 20: Founding Affidavit at par 27.3.

⁷⁹ Record 17: Founding Affidavit at par 21.

⁸⁰ Record 19: Founding Affidavit at par 27.2.

⁸¹ Record 19: Founding Affidavit at par 27.2.

public interest in ensuring that the Constitution and the law are complied with.⁸²

53. The Constitutional Court held in **Campus Law Clinic** that even where there was no live dispute, it could be in the public interest for a body such as the Campus Law Clinic to bring proceedings. Factors that would be relevant would be: whether there is another reasonable and effective manner in which the challenge may be brought; the nature of the relief sought and the extent to which it is of general and prospective application; the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court; the degree of vulnerability of the people affected; the nature of the rights said to be infringed; as well as the consequences of the infringement. In the circumstances of that case, the possibility that the people affected by the provisions concerned would challenge their constitutionality was remote. Accordingly, the Constitutional Court held, objectively speaking, that it was in the public interest for the proceedings to be brought.⁸³

54. In **Lawyers for Human Rights**, Madala J observed that s 38 introduces far-reaching changes to our approach to standing which take account of, among other things, the vulnerability of the people previously

⁸² Record 19: Founding Affidavit at par 27.2.

⁸³ **Campus Law Clinic, University of KZN v Standard Bank of SA Ltd 2006 (6) SA 103 (CC) at par 20 and 21.**

disadvantaged by apartheid, their socio-economic plight and a concomitant desire to correct the wrongs perpetrated against them over a long period of time.⁸⁴

55. In **Ferreira v Levin**, O'Regan J held

[234] This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v)⁸⁵ and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.

56. We submit that on this basis, the Applicants are justified in bringing this application in the public interest. There is no other reasonable and effective manner in which this challenge can be brought. Individual victims who may be affected by the granting of a pardon can not bring proceedings, because they do not know that they may be affected. The blanket of silence drawn by the RG and President has precluded them from knowing who has applied for a pardon, and who has been recommended for a pardon.

⁸⁴ At paragraph 73 to 76.

⁸⁵ The equivalent provision of the interim Constitution of 1993.

The allegation that the Applicants have not made contact with and do not represent the victims of an offence committed by one of the applicants for pardon

57. The Applicants have explained that victims of the offences committed by pardon applicants do not know that those offenders are being considered for pardon. For that reason, those victims are not able to make application for relief.

58. The Applicants have further explained that the list of applicants for special dispensation provided to SAHA on 26 November 2008 does not resolve this, for the following reasons:

58.1. Most fundamentally, the First Respondent has not notified persons affected that the offenders in question have applied for pardons, and invited them to make representations. It is the duty of the First Respondent to do so. That is not a duty which rests on bodies such as the Applicants.

58.2. The Applicants (unlike the state) do not have the records which make it possible to identify who were victims in each case. The list did not contain that information.

58.3. The Applicants (unlike the state) do not have the records which make it possible to establish where the victims live, so that they may be contacted.

58.4. The list does not indicate which of the 2114 individuals have been recommended for pardon, and are being considered by the President.

59. In any event, a victim who is not a party to these proceedings has deposed to an affidavit aligning herself with the relief sought in these proceedings and the basis upon which this is sought. This is Ms Maggie Friedman, who is the widow of the late Dr David Webster who was assassinated on 1st May 1989 by security force operative, Mr Ferdi Barnard. Barnard was convicted of the murder of Dr David Webster and in 1999 he was sentenced to life imprisonment. He has applied for a pardon under the Special Dispensation.

The allegation that no constitutional right has been violated

60. We submit that the First Respondent is not correct in his contention that the Applicants' claim to standing is predicated on the "violation of broad constitutional principles". The Applicants have averred that many rights in the Bill of Rights have been infringed or threatened, including (but not limited to) the following:

60.1. A right to require that the First Respondent should act fairly and consistently with his undertakings, because of the right to just and fair administrative action, and because of the duties placed on government under the Constitution and by the common law.

60.2. A right to human dignity and equality for victims in respect of processes followed and outcomes achieved.

60.3. A right to free expression.

61. In any event, a failure to predicate standing on a constitutional right is by no means a bar to asserting standing where the applicant's own rights are not directly affected. **Kruger v President of Republic of South Africa and Others 2009 (1) SA 417 (CC)** was a case brought by an attorney who challenged the validity of a Proclamation issued by the President, in order to protect the rights of road accident victims. Section 38 of the Constitution did not find direct application, as the case did not concern a challenge based on a right in the Bill of Rights. The Constitutional Court held that it should nonetheless adopt a generous approach to standing. In so doing, it was "mindful of the fact that constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights."⁸⁶ According to the Constitutional Court, such an approach to standing would facilitate the protection of the Constitution.⁸⁷

62. In the circumstances, we submit that there is no merit to this challenge by the First Respondent.

⁸⁶ At paragraph 23.

⁸⁷ At paragraph 23.

The allegation that there is no basis for reliance on section 38(a) of the Constitution

63. The First Respondent appears to suggest that because, in early correspondence with the RG, the Applicants described their interest in the special dispensation process as being “to contribute to the 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”, they are now prevented from asserting standing to institute these proceedings.
64. In their founding papers the Applicants have asserted and, we submit, established their standing.

JOINDER

65. The complaint is raised that the application is defective because the Applicants have not joined the 2114 persons who applied to the RG for pardons.

66. We submit that this is without any substance.

66.1. Until the end of November 2008, the RG and the First Respondent refused to disclose the identity of the 2114 pardon applicants.

66.2. The state has still not disclosed the current whereabouts of those 2114 individuals, some of whom are apparently no longer in prison. It is therefore not possible for the Applicants to serve the application on them.

66.3. 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.

66.4. The RG and the First Respondent have refused to disclose who are the pardon applicants whose applications have been recommended by the President, and which the President is considering. It is therefore not possible for the Applicants to join these individuals.

67. The President has stated 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

68. The Applicants at this stage seek interim relief. In other words, they seek to “freeze” the situation pending a determination of the rights and obligations of the parties.
69. In order to address the problem of notice, the Court could make an order that either:
- 69.1. The First Respondent is to disclose to the Applicants the names and present whereabouts of the pardon applicants whose applications are currently before him, in order that the Applicants may give them notice of the proceedings for a final order;
- 69.2. The President or the Minister is to give notice to the pardon applicants whose applications are currently before him, of the proceedings for a final order.

A PRIMA FACIE RIGHT

70. It is well established that the *prima facie* right which needs to be shown by the Applicant is one which is in less stringent terms than where an applicant claims a final interdict. The Applicants bear the onus to place sufficient evidence before the Court to show the existence of a right, even though, by reason of denials by the Respondent, some doubt might be thrown on the existence of that right.
71. The point of departure is that the President, in exercising his powers to grant pardon, is constrained by the precepts of the Constitution.
72. In **Chairperson of Constitutional Assembly, Ex p: In re Certification of Constitution of the RSA 1996 1996 (4) SA 744 (CC)**, the Constitutional Court held that the power of the South African Head of State to pardon was originally derived from royal prerogatives. However, the Court held, regardless of the historical origins of the concept, the President derives this power not from antiquity but from the Constitution itself. Accordingly, should the exercise of the power in any particular instance be such as to undermine any provision of the Constitution, that conduct would be reviewable.⁸⁸
73. In **President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)**⁸⁹ the Constitutional Court considered the nature of the pardon powers

⁸⁸ At par 116.

⁸⁹ See too: *Chonco and Others v Minister of Justice and Constitutional Development and Another*

granted to the President by section 82(1)(k) of the interim Constitution.⁹⁰ Section 82(1)(k) gave the President the power “to pardon or reprieve offender, either unconditionally or subject to such conditions as he or she may deem fit, and to remit any fines, penalties or forfeitures.”

74. The Constitutional Court held⁹¹

74.1. The powers of the President contained in s 82(1) of the interim Constitution have their origin in the prerogative powers exercised under former Constitutions by South African heads of State;

74.2. There are no powers derived from the royal prerogative which are conferred upon the President. The presidential power to pardon is a constitutional power as enumerated in s 82(1)(j).

75. Against this background, the Constitutional Court found:

75.1. Whether the President is exercising constitutional powers as head of the executive (i.e. the Cabinet) or as head of State, he is acting as an executive organ of government.⁹²

75.2. Originating as they do from an executive organ of State, acts of the President, under section 82(1), are subject to the provisions of chapter 3 of the interim Constitution. As a result the exercise by the President of his powers under section 82(1) is subject to review by

2008 (4) SA 478 (T).

⁹⁰ At par 5.

⁹¹ At par 8.

⁹² At par 11.

Courts of appropriate jurisdiction in the same way as the exercise by him of other constitutional powers would be subject to review.⁹³

75.3. In the exercise of his or her constitutional power to grant pardons, the President is obliged to adhere to all of the terms of the Constitution including the provisions of the Bill of Rights.⁹⁴

75.4. No prisoner has the right to be pardoned, to be reprieved or to have a sentence remitted. The Constitution places such matters within the power of the President. This does not mean that, if a president were to abuse this power vested in him or her under s 82(1)(k), a Court would be powerless, for it is implicit in the interim Constitution that the President will exercise that power in good faith. If, for instance, a president were to abuse his or her powers by acting in bad faith, there is no reason why a Court should not intervene to correct such action and to declare it to be unconstitutional.⁹⁵

76. It is thus clear that in exercising his powers regarding the granting of pardons in terms of the special dispensation, the President is constrained by the prescripts of the Constitution.

⁹³ At par 13. See too: First Constitutional Certification judgment at par 116.

⁹⁴ At par 49.

⁹⁵ At par 29.

77. We submit that the Applicants have demonstrated a clear right, and in any event at the very least a strong *prima facie* right, on the following bases:
- 77.1. The right to fair administrative action.
 - 77.2. A right to insist that the President would act fairly, under the Constitution and the common law.
 - 77.3. A right that there be compliance with the Government's own commitments to fair process and victim participation;
 - 77.4. A right to human dignity and equality for victims in respect of processes followed and outcomes achieved
 - 77.5. A right to fair process and adherence to the Rule of Law;
 - 77.6. A right to free expression.
78. We should clarify at the outset that the question is whether the President may grant a pardon in a manner which is in breach of those rights. The President may choose how interested parties are to participate in the process – for example through a reference group process (as long as it is fair), through another process established by him, or through making representations directly to him. What he may not do, we submit, is grant a pardon under the special dispensation without giving interested parties a fair opportunity to be heard. We say this for the following reasons.

The process is in breach of the right to fair administrative action.

79. Section 33 of the Constitution recognizes the right to administrative action that is lawful, reasonable and procedurally fair. The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) was enacted to give effect to s 33(3) of the Constitution.
80. We submit that the presidential power under section 84(2)(j), *viz*, to grant pardon or reprieve, including any process the President may put in place to facilitate such decisions, constitutes “administrative action” and is subject to review in terms of PAJA.
81. The definition of “administrative action” in s 1(b)(aa) of PAJA addresses the question of whether the exercise of the presidential powers contained in s 84(2) constitutes “administrative action”.
82. 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).
83. 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.
84. 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

85. Dealing with the President's executive authority under s 85 of the Constitution, the Chief Justice pointed out following:

[124] Section 85 deals with the President and Cabinet. If it had stood alone there would have been greater force in the finding that the making of regulations by a minister is excluded from the definition of 'administrative action'. But it does not stand alone. Subparagraph (aa) of the definition goes on to refer to specific subparagraphs of s 85(2), including s 85(2)(b), (c), (d) and (e), but excludes from the list s 85(2)(a). The provisions of s 85(2)(a) - (e) are as follows:

'(2) The President exercises the executive authority, together with the other members of the Cabinet, 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 administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation.'

[125] The omission of subpara (2)(a) from the specified list of exclusions is significant. [Underline added]

86. By the same reasoning, the omission of the granting of pardons from the list of exclusions is significant. It can hardly have been by accident: the

The process is in breach of the duty to act fairly

87. This is a constitutional state in which the principles of fairness and accountability are fundamental.⁹⁶ Fairness is, as O'Regan J has pointed out, is one of the core values of our constitutional order.⁹⁷
88. The requirements of fairness and accountability are to be determined by the context. This was held in **Minister of Health NO v New Clicks SA (Pty) Ltd (TAC as Amici Curiae) 2006 (2) SA 311 (CC)**:

[145] Reasonableness and procedural fairness are context specific. What is reasonable and procedurally fair in one context is not necessarily reasonable or procedurally fair in a different context. 128 In *R v Secretary of State for the Home Department, Ex parte Daly* 129 ([2001] 3 All ER 433 (HL) at 447a.) Steyn LJ referred to an observation by Laws LJ emphasising that 'the intensity of review in a public law case will depend on the subject-matter in hand'. Steyn LJ went on to say '(t)hat is so even in cases involving convention rights. In law context is everything.'

89. In this case, the context includes:

89.1. The self-imposed benchmark created by the President;

⁹⁶ See in this regard, for example, section 195 of the Constitution.

⁹⁷ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* Constitutional Court case no CCT 97/07, judgment handed down on 20 March 2009, para [221].

89.2. The related fact that the purpose of the Special Dispensation is to complete the “unfinished business” of the TRC; and

89.3. The commitment of the state, in many contexts, to victim participation.

The self-imposed benchmark

90. We submit that the Applicants have a right to the relief sought on account of the fact that the process ultimately adopted and followed by the Reference Group and President is fundamentally at odds with the pre-determined benchmark to which the President had already committed. This is apparent from the following:

90.1. At the Presidential announcement on 21 November 2007 to a joint sitting of Parliament, President Mbeki stated as follows:

90.1.1. While the President is constitutionally obligated to consider pardon requests, she or he is under no obligation to grant pardons, “provided that she or he proceeds in a rational manner.”⁹⁸;

90.1.2. That 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”⁹⁹;

⁹⁸ Record 27: Founding Affidavit; par 35.

⁹⁹ Record 27: Founding Affidavit; par 35.

90.1.3. That the process would not undermine the work of the TRC but would instead build upon its legacy;

90.1.4. That ultimately his pardon decisions would be guided by the values and principles enshrined in the Constitution, as well as the “principles, criteria and spirit” of the TRC.¹⁰⁰
(Emphasis added)

90.2. As is reiterated in the Explanatory Memorandum dealing with the special dispensation,¹⁰¹ in considering each application placed before him, the President would:

90.2.1. Be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation¹⁰²; and

90.2.2. 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 process¹⁰³;

90.3. 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

¹⁰⁰ Record 27: Founding Affidavit; par 35.

¹⁰¹ Record 249: HM 39 to the Founding Affidavit.

¹⁰² Record 252: HM 39 to the Founding Affidavit; par 12.3.1.

¹⁰³ Record 252: HM 39 to the Founding Affidavit; par 12.3.2.

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.”¹⁰⁴

91. This commitment by the President was publicly made, to Parliament and the nation. However, 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:

91.1. Inconsistent with the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation;

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

91.3. Inconsistent with the President’s self-imposed benchmark in this regard.

¹⁰⁴ Record 51: Founding Affidavit; par 62.4.5. and HM46 (at page 302).

92. As was held in the **Johannesburg Municipal Pension Fund** case:¹⁰⁵

“Public administrators must be accountable; act lawfully and fairly and not arbitrarily; act honestly and ethically and be bound by their lawful undertakings.”¹⁰⁶

93. The development of the English law with regard to undertakings and commitments made by government is explained in the leading work by Wade and Forsyth.¹⁰⁷ They analyse the decisions of the courts, and conclude as follows:

“These are revealing decisions. They show that the courts now expect government departments to honour their statements of policy or intention, and that there is a clear link between unreasonableness and unfairness. Lord Scarman made an emphatic statement that unfairness in the purported exercise of power can amount to an abuse or excess of power. Fairness is a powerful ally for the litigant and the unexpressed basis of many rules”.¹⁰⁸

94. It would run counter to these principles of fairness and accountability for the authorities to make a commitment of this kind, and then simply abandon them.

¹⁰⁵ *Johannesburg Municipal Pension Fund and others v City of Johannesburg and others* 2005 (6) SA 273 (W)

¹⁰⁶ At [17], relying on *Reuters Group plc* 2001 (12) BCLR 1265 (C) at [2], [33] - [35], [46] and [47]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2002 (2) SA 674 (CC) at [133] and [148]; *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T); *York Timbers Ltd v Minister of Water Affairs and Forestry and Another* 2003 (4) SA 477 (T) ([2003] 2 All SA 710) at 506 - 7 (SA); *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) (1999 (4) BCLR 382) at [45] - [46].

¹⁰⁷ Wade and Forsyth *Administrative Law* (9th ed) 372 to 376.

¹⁰⁸ At 374.

Compliance with the Government's own commitments to fair process and victim participation

95. The Government of the Republic of South Africa has formally adopted a Service Charter for Victims of Crime in South Africa (“the Victims’ Charter”).

The Victims’ Charter was adopted by Government in order to:

95.1. Eliminate secondary victimisation in the criminal justice process;

95.2. Ensure that victims remain central to the criminal justice process;
and;

95.3. Clarify the service standards that can be expected by and are to be accorded to victims whenever they come into contact with the criminal justice system.”¹⁰⁹

96. The Charter does not define “victim”, but the Oxford English Dictionary defines the word to mean (among other possible meanings), “one who suffers some injury, hardship or loss” (emphasis added).¹¹⁰

97. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (“the UN Declaration”) provides, *inter alia*:¹¹¹

¹⁰⁹ Victims Charter, p 7.

¹¹⁰ Shorter Oxford English Dictionary (3ed, Oxford, 1973).

¹¹¹ Adopted by General Assembly resolution 40/34 of 29 November 1985.

“Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
 - (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
 - (c) Providing proper assistance to victims throughout the legal process;
 - (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.”

(Emphasis added)

98. Articles 4, 5 & 6 of the Declaration imply a right of a family member of a deceased victim of crime to make submissions in relation to the possible

99. Victim participation and the right of victims to know the truth were accepted as an indispensable requirement of the TRC Amnesty process. This was recognised by the Constitutional Court in **Azanian Peoples Organisation (AZAPO) v President of the RSA 1996 (4) SA 671 (CC) (“AZAPO”)**:

“[20] Is s 20(7), to the extent to which it immunises wrongdoers from criminal prosecution, nevertheless objectionable on the grounds that amnesty might be provided in circumstances where the victims, or the dependants of the victims, have not had the compensatory benefit of discovering the truth at last or in circumstances where those whose misdeeds are so obscenely excessive as to justify punishment, even if they were perpetrated with a political objective during the course of conflict in the past? Some answers to such difficulties are provided in the subsections of s 20. The Amnesty Committee may grant amnesty in respect of the relevant offence only if the perpetrator of the misdeed makes a full disclosure of all relevant facts. If the offender does not, and in consequence thereof the victim or his or her family is not able to discover the truth, the application for amnesty will fail. Moreover, it will not suffice for the offender merely to say that his or her act was associated with a political objective. That issue must independently be determined by the Amnesty Committee pursuant to the criteria set out in s 20(3), including the relationship between the offence committed and the political objective pursued and the directness and proximity of the relationship and the proportionality of the offence to the objective pursued.”

100. In **Derby-Lewis v the Minister of Correctional Services and Four Others Case No. 54507/08 [unreported]**, in the context of parole, this Court once more recognized the right of a relative of a victim to make representations and attend board meetings.¹¹² The Court further observed that before a prisoner can be placed on parole all possible relevant information should be considered and the Parole Board has a duty to weigh and consider such information and to exclude information that may be irrelevant.¹¹³

101. We submit that this context, too, points to the conclusion that:

101.1. victims and their families have a right to participate in the special dispensation process;

101.2. there is no conceivable reason or basis why this right, which was infused into the TRC Amnesty proceedings as well as parole proceedings (and which is consistent with the government's obligations under the Victims' Charter and the UN Declaration), should be sacrificed in the special dispensation process;

101.3. victims and their families and other interested parties have a right to know the disclosures made by perpetrators for purposes of securing a political pardon.

¹¹² At page 24 of the unreported judgment.

¹¹³ At page 24 of the unreported judgment.

Conclusion on the duty to act fairly

102. The duty to act fairly arises from the context which we have described.

That duty will, in an appropriate context, arise under the Constitution and the common law even where the proceedings in question do not constitute administrative action.

103. *Du Preez and Another v Truth and Reconciliation Commission*¹¹⁴ concerned the activities of the Committee on Human Rights Violations (“the Committee”) of the TRC. The function of the Committee was to engage in a fact-finding inquiry, and ultimately submit a comprehensive report to the TRC on its activities and findings. This report was to contain recommendations on measures to prevent the future violation of human rights.

104. The applicants in *Du Preez* were allegedly implicated in the poisoning and disappearance of a person in Port Elizabeth. They were notified two days in advance that a hearing was to take place in which allegations would be made against them. The Promotion of National Unity and Reconciliation Act, 1995, provides that if during any investigation or hearing before the TRC, any person is implicated to their detriment, the TRC must afford him or her an opportunity to submit representations to the TRC with regard to that matter.

¹¹⁴ 1997 (3) SA 204 (A).

105. The Appellate Division (per Corbett CJ) however went further than this. It held that because of the potential prejudice flowing from the allegations which could be made at the hearing and from the findings and recommendations of the Committee, the Committee had a duty to treat the applicants fairly. Corbett CJ concluded as follows:

“The Committee’s findings in this regard and its report to the [TRC] may accuse or condemn persons in the position of the applicants. Subject to the ultimate grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights to personality. They must be treated fairly.”¹¹⁵

106. The applicants thus had the right to timeous notice of the hearing in which they were to be implicated as well as the right to be informed of the substance of the allegations against them.¹¹⁶ Corbett CJ noted:

“In my view, the solution to the problems raised by the issues in this case may be found in the common law, and more particularly the rules of the common law which require persons and bodies, statutory and other, in certain instances to observe the rules of natural justice by acting in a fair manner.”¹¹⁷

107. The decision of the Court of Appeal in **R v Lord Saville of Newdigate and Others, Ex parte A and Others** is also enlightening.¹¹⁸ This was a fact-finding enquiry which was required to hear evidence and produce a report

¹¹⁵ At 233, emphasis added.

¹¹⁶ At 234.

¹¹⁷ At 230.

¹¹⁸ [1999] 4 All ER 860 (CA).

on the “Bloody Sunday” massacre. The Court held that the tribunal was under a duty to act fairly. Lord Woolf MR held as follows:

“Although we are here concerned with a very different type of inquiry from that being considered in the Pergamon Press case, it can equally be said of this tribunal that while it is master of its own procedure and has considerable discretion as to what procedure it wishes to adopt, it must still be fair.... This is because there is an implied obligation on the tribunal to provide procedural fairness.”¹¹⁹

108. Prof de Ville concludes as follows:

“It is now accepted that the advice, findings or recommendations of an investigatory body can adversely affect the rights or legitimate expectations of a person. The audi rule is therefore applicable to the proceedings of such an enquiry where a person or body can suffer prejudicial consequences because of the report or recommendation of the statutory body concerned.”¹²⁰

109. There is thus overwhelming authority that under the common law, and at least in the present context,¹²¹ the President is obliged to follow the rules of procedural fairness in conducting his enquiry and making his decision. It is not only the offenders who are entitled to fairness: it is also the victims and other affected parties.

110. The fact that the decision involves the exercise by the President of a

¹¹⁹ At para 38.

¹²⁰ Judicial Review of Administrative Action in South Africa (LexisNexis Butterworths) at 242.

¹²¹ It is not necessary to enter upon the question whether this duty arises in all applications for a pardon. For present purposes, the Applicants limit themselves to the duty which exists in the particular context of the Special Dispensation.

- 110.1. Traditionally, the exercise of the prerogative powers of a monarch has not been subject to judicial scrutiny. However, over the past two or three decades there has been a movement, in certain circumstances, in favour of the recognition of such a review jurisdiction - and even in countries without a written constitution containing a bill of rights¹²²;
- 110.2. In **Sachs v Dönges NO**¹²³, Schreiner JA anticipated those developments and stated as follows: “Although in describing the category of prerogative powers the word "discretionary" is sometimes used, this only means that the exercise of the powers is not restricted within the limits of any statute. It does not mean that the powers falling within the category form an almost mystical field in which the executive is free not only to do whatever it wills, but also to undo whatever it has done.
- 110.3. In Baxter’s view: “The traditional view now shows signs of change. As the courts have developed more fully the principles by which discretionary powers may be reviewed, some Judges have begun to regard some prerogative powers as an historical anachronism, as

¹²² At par 16.

¹²³ 1950 (2) SA 265 (AD)

powers which might as easily have originated from statute, and as powers to which the normal principles of review should be applied by analogy. If this approach is accepted - and since the scope of review will always be affected by the question of justiciability - it is possible that the prerogative will gradually lose all its significance in administrative law.”¹²⁴;

110.4. Certain English authorities have concluded that, in contemporary English law, the exercise of a prerogative power may be reviewed if, and to the extent that, the subject-matter thereof is amenable to judicial process¹²⁵;

110.5. Other Commonwealth jurisdictions have adopted this English approach¹²⁶;

110.6. There has been a distinct movement in modern constitutional states (including England) in favour of recognising at least some power of review of what are or were prerogative powers of the head of State.¹²⁷

¹²⁴ At par 17.

¹²⁵ At par 19.

¹²⁶ At par 20.

¹²⁷ At par 27.

The right to human dignity and equality

111. The Applicants contend that the special dispensation:

111.1. serves to benefit the perpetrators of gross human rights at the expense of the victims and the victims' families¹²⁸;

111.2. causes suffering to victims and victims' families by denying them full justice¹²⁹;

111.3. dishonours the respect, dignity, value and acceptance of victims and victims' families in the wider community¹³⁰;

111.4. demeans South African society as a whole by betraying the constitutional compact as enshrined in the epilogue to the Constitution of the Republic of South African Act 200 of 1993 and undermines the purpose and spirit behind the TRC.¹³¹

112. These submissions are consistent with the *dicta* of the Constitutional Court in **AZAPO**, where it held as follows:

[9] The effect of an amnesty undoubtedly impacts upon very fundamental rights. All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts

¹²⁸ Record 96: Founding Affidavit; par 132.1.1.

¹²⁹ Record 96: Founding Affidavit; par 132.1.2.

¹³⁰ Record 96: Founding Affidavit; par 132.1.3.

¹³¹ Record 96: Founding Affidavit; par 132.1.4.

of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights.

....

[17] Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The [TRC] Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the

wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.”

(Emphasis added)

113. The epilogue to the Interim Constitution reads as follows:

“National Unity and Reconciliation

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-

existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.”

114. Pursuant to the provisions of the epilogue, during 1995 Parliament enacted the Truth and Reconciliation Act.

115. The Truth and Reconciliation Act has expired and could not be used to deal

¹³², states as follows:

“AND WHEREAS prior to the commencement of the new Constitutional dispensation and thereafter, amnesty and indemnity laws were enacted and utilized to extinguish criminal (and in some instances civil) liability and/or expunge criminal convictions of persons who committed offences before 1994 arising from the conflicts of the past, [with a political objective] from their criminal records, such pieces of legislation, namely the Indemnity Act (Act 35 of 1990), the Further Indemnity Act (Act 15 of 1992) and the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995) (“the TRC Act”), has expired and can no longer be utilized to deal with the existing matter at hand.

AND WHEREAS the President considered all other relevant statutory provisions, did not find any existing measures suitable to deal with the specific matter at hand” ¹³³

116. As a result of this context and rationale, the key criteria for recommendation of a pardon under the special dispensation (as set out in the application form) mirror the amnesty criteria contained in section 20 of the TRC Act. The founding affidavit¹³⁴ highlighted the following:

116.1. Paragraph 3.4(c) dealing with a political objective replicates section 20(1)(b) of the TRC Act;

¹³² Record 62: Founding Affidavit; par 77.

¹³³ Record 343: HM 59 to the Founding Affidavit; par 2 and 3

¹³⁴ Record 68: Founding Affidavit; par 85.

- 116.2. Paragraph 3.1.2. dealing with motive replicates section 20(3)(a) of the TRC Act;
- 116.3. Paragraph 3.4(a) dealing with whether an act was committed on behalf of an organization replicates section 20(3)(e) of the TRC Act;
- 116.4. Paragraph 3.3(a) dealing with personal gain replicates section 20(3)(f)(i) of the TRC Act.
117. The effect of the TRC amnesty process and the Presidential issue of pardons in terms of the special dispensation is the same¹³⁵; viz, record of the conviction shall be deemed to be expunged and any person already serving a sentence is released.
118. Notwithstanding this similarity in respect of the criteria employed (for the granting of pardon under the special dispensation as compared with the granting of amnesty) and the effect thereof (i.e. of Presidential Pardon and amnesty), there are two critical differences: the participation of victims and their families in the process, and the element of full disclosure of the truth. Unlike the present process, in the TRC process:
- 118.1. A bedrock principle of the conditional amnesty was full disclosure by perpetrators. Victim participation was a crucial means of testing the version of perpetrators in order to ensure full disclosure¹³⁶;

¹³⁵ Record 69: Founding Affidavit; par 86.

¹³⁶ Record 69: Founding Affidavit; par 87.

- 118.2. Victims had the right to participate in hearings¹³⁷;
- 118.3. Victims were involved at most levels of the amnesty process¹³⁸;
- 118.4. Victim participation, including the amnesty procedures, was per s 3(1) of the TRC Act considered necessary not only for reconciliation and nation-building, but also for reasons of truth seeking and establishing “as complete a picture as possible of the cause, nature and extent of gross human rights”¹³⁹;
- 118.5. The TRC was required to ascertain the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations.^{140 141 142}
- 118.6. The process facilitated the recognition and acknowledgment of the wrongs suffered by victims.

119. In its Recommendations, the TRC expressed the view that “any amnesty and pardon must make provision for the rights of victims and maintain the constitutionality of our new state based on disclosure and a respect for the human rights of all.”¹⁴³

¹³⁷ Record 70: Founding Affidavit; par 88.

¹³⁸ Record 73: Founding Affidavit; par 88.4.

¹³⁹ Record 79: Founding Affidavit; par 97.

¹⁴⁰ Record 79: Founding Affidavit; par 97.

¹⁴¹ See too: section 4(b) of the TRC Act.

¹⁴² Record 81: Founding Affidavit; par 101.

¹⁴³ Record 76: Founding Affidavit; par 92.

The right to human dignity

120. We submit that the special dispensation (in the absence of participation by victims and their families) is an affront not only to the human dignity of each individual victim, but also to members of their families, the communities in which they live and South Africa society as a whole:

120.1. In affording perpetrators of the most serious crimes an opportunity to escape the full consequences of their crimes at the expense of their victims, the intrinsic worth of the victims is degraded¹⁴⁴;

120.2. Since the communities in which the victims live stand by them in solidarity and compassion, the intrinsic worth of those communities is similarly disrespected;

120.3. Since South Africa as a nation made a compact with victims in order to cross the divide from the past to the future, we contend that all South Africans are implicated in the breaking of this constitutional compact. The humanity of South African society as a whole is accordingly demeaned. In this regard we refer to the concept of “ubuntu” as invoked by several Constitutional Court judges in *S v Makwanyane*. Mokgoro J conceptualised human dignity as part of *ubuntu* or humaneness, in which the community or group plays an indispensable role:

¹⁴⁴ *S v Makwanyane* 1995 (3) SA 391 (CC) per O Regan J at par 44.

“While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality”.¹⁴⁵

The right to equality

121. The Applicants allege that victims of the criminal activity which is the subject of the special dispensation, are:

121.1. treated less favourably than perpetrators of such criminal activity, whose rights and freedoms are promoted at the expense of the rights of and freedoms of victims;

121.2. treated less favourably than the victims of other criminal activity such as: (a) that which was the subject-matter of the TRC process; (b) that which is the subject of parole. In both the latter instances, the victims were and are given the right to be heard.

122. For this reason, we submit that the right to equality (both s 9(1) and 9(3) of the Constitution) is violated by the special dispensation.¹⁴⁶

123. In the first place, we submit that these differentiations are irrational because they are not rationally related to any legitimate government purpose. For this reason, there is a violation of s 9(1) (“the first leg of the equality test”).

¹⁴⁵ *Makwanyane (supra)* per Mokgoro J para 308; see also the judgments of Langa J (paras 223 *et seq*), Madala J (paras 241 & 260), Mahomed J (para 263) and Sachs J (para 374).

¹⁴⁶ Record 98: Founding Affidavit; par 132.4.

124. The first leg of the equality test has been described by the Constitutional Court as follows in **Prinsloo v Van der Linde and Another**^{147 148}:

"[25] It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.

[26] Accordingly, before it can be said that mere differentiation infringes s 8 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8. But while the existence of such a rational relationship is a necessary condition for the differentiation not to infringe s 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element, referred to above, is present." (Emphasis added)

¹⁴⁷ 1997 (3) SA 1012 (CC).

¹⁴⁸ See too: **Zondi v MEC for Traditional and Local Government Affairs and Others** 2005 (3) SA 589 (CC) (2005 (4) BCLR 347) at para [90]; **Bel Porto School Governing Body and Others v Premier, Western Cape, and Another** 2002 (3) SA 265 (CC) (2002 (9) BCLR 891) at paras [41] and [45]; **Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) at paras [84] - [86] and [90].

125. In **Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)**¹⁴⁹ the Constitutional Court held:

"[49] It is so that laws rarely prescribe the same treatment for everyone. Yet it bears repetition that when a law elects to make differentiation between people or classes of people it will fall foul of the constitutional standard of **equality** if it is shown that the differentiation does not have a legitimate purpose or a rational relationship to the purpose advanced to validate it. Absent the pre-condition of a rational connection the impugned law infringes, at the outset, the right to equal protection and benefit of the law under s 9(1) of the Constitution. This is so because the legislative scheme confers benefits or imposes burdens unevenly and without a rational criterion or basis. That would be an arbitrary differentiation which neither promotes public good nor advances a legitimate public object. In this sense, the impugned law would be inconsistent with the equality norm that the Constitution imposes, inasmuch as it breaches the 'rational differentiation' standard set by s 9(1) thereof." (Emphasis added)

126. In addition, we submit that s 9(3) of the Constitution is infringed given that such victims are (precisely as a result of being victims of human rights violations) members of a historically vulnerable group, such differentiation constitutes discrimination and must be presumed, in the absence of evidence to the contrary from the respondents, to be unfair.

127. The relevance of the victims' right to equality in relation to the issue of prosecution of the perpetrators of human rights violations is specifically affirmed in a 2005 United Nations report in the following terms:

¹⁴⁹ 2006 (4) SA 230 (CC).

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law.”¹⁵⁰ [emphasis supplied]

Adherence to the Rule of Law

128. The applicants submit that the special dispensation violates the rule of law, which is a foundational value of the Constitution embodied in s 1, by facilitating the cessation of all further criminal penalties and the expunging of criminal records of perpetrators through a process which was entirely secret and which prevented victims and other affected persons from being heard.

129. The operations of the special dispensation constituted arbitrary conduct since it involved the recommending of pardons solely on the basis of perpetrator applications and political party endorsements, which were then considered by a group comprising only of political party representatives. We submit that such conduct is arbitrary since:

129.1. it was not rationally related to the purpose of the special dispensation, which was to recommend appropriate cases for pardon based on criteria that included disclosure and the showing of a political motivation;

129.2. there was never any prospect of compliance with such criteria being

¹⁵⁰ United Nations Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law: Human Rights Resolution 2005/35, items 3 and 12

properly assessed through a process which only sought to hear the versions of the perpetrators;

129.3. the Terms of Reference allowed political parties themselves to submit applications on behalf of pardon applicants¹⁵¹;

129.4. the process before the Reference Group has not been open and transparent¹⁵²;

129.5. the Reference Group did not publicize the applications made by perpetrators¹⁵³;

129.6. the Reference Group consisted of representatives of political parties and those applying for pardons were offenders who are either members or supporters of the same political parties.¹⁵⁴ The RG was accordingly hopelessly tainted by structural or institutional bias.¹⁵⁵

129.7. there were no independent or neutral experts on the RG who could have provided the President with considered and measured advice.¹⁵⁶

130. We submit that the special dispensation has given rise to one or more of the following perceptions on the part of the public:

¹⁵¹ Record 79: Founding Affidavit; par 98.

¹⁵² Record 82: Founding Affidavit; par 103 and 107.

¹⁵³ Record 90: Founding Affidavit; par 123.2.

¹⁵⁴ Record 85: Founding Affidavit; par 112.

¹⁵⁵ Record 86: Founding Affidavit; par 115.

¹⁵⁶ Record 85: Founding Affidavit; par 111.

- 130.1. victims of a certain class of crimes, namely political crimes, are denied the full force of justice;
- 130.2. There are certain crimes, which include murder, forced disappearances, torture, assault, arson and public violence, which if committed for political purposes, will not be treated as seriously;
- 130.3. The commission of crimes is a legitimate political tool;
- 130.4. Those involved in politically motivated crimes in the future need not be as concerned about the consequences of their criminal actions.
131. An infringement of the principle of the rule of law cannot be saved by the application of the limitations clause, as it is not a right in the bill of rights, but instead arises as a result of the underlying constitutional principle of legality.

The rights to freedom of expression and access to information

132. It is submitted that the special dispensation has violated the right of victims to freedom of expression and their right of access to information in sections 16 and 32 of the Constitution by¹⁵⁷:

132.1. Denying the applicants, victims, interested members of the public and the media the freedom to receive pertinent information in relation to the special dispensation;

132.2. Denying the press and other media the freedom to report on the

¹⁵⁷ Record 98: Founding Affidavit; par 132.5.

special dispensation and to impart important information to the wider public.

133. The values of openness, responsiveness and accountability that are articulated in sec 1(d) of the Constitution, and that permeate the Constitution, create a general presumption that the proceedings of public bodies dealing with matters of great public importance should be open, transparent and accountable to the public.

134. Applying the principles of openness, responsiveness and accountability would have enhanced the public's respect for the special dispensation and its ultimate recommendations by:

134.1. permitting the wider public to act as a check on the accuracy of the substantive matters before the RG and as a check on procedural fairness;

134.2. enabling the public to be informed of matters of fundamental public interest and importance, not least of which are the atrocities committed during the apartheid and post apartheid eras.

THE REMAINING REQUIREMENTS FOR THE GRANT OF AN INTERIM INTERDICT

135. It is well established that the different requirements for an interim interdict interact with each other: where the applicant for such an interdict has established a strong *prima facie* right, the Court in the exercise of its discretion may place less emphasis on the other requirements.¹⁵⁸ On the basis of this principle we submit as follows:

135.1. First, that the Applicants have demonstrated a clear right; alternatively a strong *prima facie* right, and for that reason the remaining requirements for the grant of an interim interdict are of less significance;

135.2. Second and in any event, the Applicants have also complied with the remaining requirements.

A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted

136. We submit as follows in this regard:

136.1. Having demonstrated that the special dispensation process infringes a range of rights (constitutional or otherwise), with particular reference to its significantly prejudicial impact for victims,

¹⁵⁸ Erasmus and Others v Senwes Ltd and Others 2006 (3) SA 529 (T) at 540D

the Applicants have demonstrated a reasonable apprehension of injury;

136.2. The consequence of the final relief being granted and the interim relief being refused will accordingly mean that prisoners receiving pardon in terms of the special dispensation will do so pursuant to an unlawful and unconstitutional process, which will have operated to the detriment of victims and their families;

136.3. Accordingly, the final relief (even if granted) will ultimately constitute an *ex post facto* attempt at vindicating the rights of victims and their families that has already been violated by virtue of the interim relief having been refused; whereas if the interim relief were to be granted, such violation will have been prevented in the first place;

136.4. Based on the right established, we submit that the violation ought to be prevented in the first instance by this Court.

The balance of convenience in favour of the granting of an interim interdict

137. We submit that the balance of convenience favours the granting of an interim interdict for the following reasons.

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

138.1. If prisoners are released from incarceration, it will be exceedingly

¹⁵⁹. 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. This could (if the matter went on appeal) be some years after they had been released.

138.2. 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.

138.3. 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.

138.4. Victims will suffer considerable stress and trauma where pardons in relation to particularly serious crimes are issued.¹⁶⁰

139. 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, a right to have this done without undue delay, 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

¹⁵⁹ Record 102: Founding Affidavit; par 135.

¹⁶⁰ Record 102: Founding Affidavit; par 136.

common law.

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

The absence of any other satisfactory remedy.

141. It is submitted that the Applicants have no other alternative remedy. We emphasise the following in this regard:

141.1. The numerous attempts that the Applicants have made to engage with and persuade the Reference Group and the President were to no avail.

141.2. A range of rights will be violated (with attendant ramifications of a very serious nature for victims and their families) unless the interim relief sought is not granted.

141.3. The remedy of review after the fact will not be satisfactory, for two reasons:

141.3.1. There will already have been a breach of the rights of victims, and attendant prejudice and suffering, which will not be remedied by a subsequent reversal of the decision to grant pardons.

141.3.2. There can be no certainty that the pardons applicants will not succeed in a contention, when the matter comes to final determination, that even if the President acted wrongly, they should not be re-imprisoned.

URGENCY

142. The various Respondent opposed this application on the basis that there is no urgency, and contend that the application should be struck off the roll.¹⁶¹

143. We submit that the facts demonstrate quite the contrary.

144. It was not possible for the Applicants to review the proceedings of the Reference Group:

144.1. The RG had no formal legal existence;

144.2. Its decisions had no direct external legal effect;

144.3. It is not the RG, but the President, who is under a legal duty to act fairly and to give the victims an opportunity to make representations;

144.4. It was possible that after the RG had completed its work, the President would nevertheless give victims an opportunity to make representations through another mechanism (this is demonstrated that the President undertook not to make any decision until he had been advised whether he should give victims such an opportunity).

145. If the Applicants had brought proceedings before the President decided whether to give victims an opportunity to make representations, this would

¹⁶¹ Record: First Respondent's Answering Affidavit at par 49.

rightly have been met with the answer that the proceedings were premature.

146. It was only once the President refused to grant victims the opportunity to make representations, that the Applicants' cause of action arose.

147. This took place on 13 March 2009, when the First Respondent's office notified the Applicants' attorneys that he would not involve victims in the political pardons process, and withdrew his written undertaking not to consider recommendations for political pardons.

148. The President's subsequent affidavit demonstrated that the matter indeed became urgent at this point: he stated that if it had not been for this application, he would have proceeded to decide the applications for a pardon: "I have already considered some of those applications, but for the present application, I would have disposed of the remaining applications."

149. This application was served on the State Attorney on 19 March 2009 at approximately 13:10;

150. On 26 March 2009 the Applicants' attorney wrote to the First Respondent's attorney suggesting that the application be set down for hearing on a date to be agreed by the parties, on the basis that the First Respondent would undertake not to grant any pardons in the interim. This would have given the First Respondent more time to file his answering affidavit;

151. On Friday 27 March 2009, the First Respondent's attorney summarily

152. An unsigned answering affidavit (without all of the annexures) was sent by e-mail to the Applicants on the evening of 1 April 2009 after the close of business;
153. A signed version of the answering affidavit (with annexures) was made available at Court on the morning of 2 April 2009, when the matter was set down for hearing;
154. The matter was postponed by agreement between the parties to 14 April 2009;
155. Notwithstanding these proceedings, the First Respondent has not provided any assurance that he will not decide the applications for pardon pending the outcome of this application;
156. The First Respondent suffers no prejudice by an expedited hearing of this matter; he has now filed an answering affidavit and agreed to a timetable in respect of the further conduct of this matter;
157. The Third to Ninth Respondents are insistent on an early hearing and determination of the matter;

158. On the First Respondent's own version it is of utmost importance that the pardon applications are determined without further delay. An expedited hearing of this matter will facilitate that objective.

CONCLUSION

The Third to Ninth Respondents

159. The Third to Ninth Respondents contend that if an interim interdict is granted, they should be excluded from its ambit.

160. We submit that there is no basis for this contention:

160.1. If an interim interdict is granted, it will be because the Applicants have shown at least *prima facie* that the President may not grant pardons under the Special Dispensation unless and until victims have had an opportunity to make representations to him.

160.2. The Third to Ninth Respondents have not suggested that the victims of their crimes – a vicious, brutal and pre-planned racist attack by the AWB on the black citizens of Kuruman – have had an opportunity to make representations to the President.

160.3. The high-water mark of their case is the following:

160.3.1. Fifteen years after the attacks; after the Special Dispensation had been announced; and after he had consulted with

160.3.2. He met four victims of the attack, who expressed some confidence that a mutual accommodation would be reached.

160.3.3. Nothing came of this meeting.

160.3.4. Even those four individuals have not made representations on his application for a pardon, or expressed any support for it.

160.3.5. Even taking their tentative statement of goodwill at face value, there is no basis for any suggestion, let alone any conclusion, that they represent the victims of Kuruman.

161. We submit that if it is found that victims generally have the right to make representations to the President before he decides whether to grant a pardon, there is no reason at all to exempt the applications of the Third to Ninth Respondents from that requirement.

162. The Applicants accordingly seek an order in terms of prayers 2 and 3 of the notice of motion, including the costs of three counsel.

G BUDLENDER SC

KARRISHA PILLAY

H VARNEY

L KUBUKELI

8 April 2009

Chambers

Cape Town and Johannesburg