THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 159/08

THE MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT APPELLANT

and

MQABUKENI CHONCO AND 383 OTHERS RESPONDENTS

Neutral citation: *The Minister for Justice and Constitutional Development v Chonco* 159/08 [2009] ZASCA 31 (30 March 2009)

Coram: FARLAM, NUGENT, VAN HEERDEN, JAFTA et MLAMBO JJA

Heard: 16 FEBRUARY 2009

Delivered: 30 MARCH 2009

Summary: Constitutional law – applications for pardon under s 84(2)(j) of the Constitution – whether Minister for Justice and Constitutional Development under constitutional obligation to process applications before the President considers whether to exercise his power under the section.

ORDER

On appeal from: High Court Pretoria (Seriti J sitting as court of first instance)

The following order is made:

The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

JUDGMENT

FARLAM JA (Nugent, Van Heerden, Jafta et Mlambo JJA concurring)

[1] In this matter the appellant, the Minister for Justice and Constitutional Development, appeals against a judgment delivered by Seriti J in the Pretoria High Court in which he directed the appellant's predecessor 'to do all the necessary within a period of three months from [the date of the order] to enable the second respondent [the President], to exercise the powers conferred on him in terms of s 84(2)(j) of the Constitution in an informed way with regard to all 384 applications for Presidential pardon referred to in [the] application.' In the order appealed against the learned judge also declared that the appellant's predecessor had 'failed to exercise with due diligence and without delay, the constitutional obligation to process and do all the necessary to enable the second respondent to exercise the powers conferred on him in terms of s 84(2)(j) of the Constitution in an informed way, with regard to the applications for Presidential pardon by the applicant [the present first respondent] and the 383 other applicants for Presidential pardon in whose interest and on whose behalf the applicant brought this application.'

[2] As appears from the portion of the order which I have quoted, the application before the court was brought by the present first respondent, Mqabukeni Chonco, on behalf of himself and 383 other persons. All of them are currently in prison, so it was alleged, serving lengthy gaol sentences for

what they allege were criminal offences 'committed . . . in the course of the political struggle of the past.' None of them applied for amnesty to the Truth and Reconciliation Commission (to which I shall refer as 'the TRC') because, so they say, their political party, the Inkatha Freedom Party, 'did not support the TRC'. (In what follows I shall call this party the 'IFP'.) Their applications for pardon in terms of s 84(2)(j) of the Constitution were addressed to the second respondent, the President, but were forwarded by the IFP on their behalf to the then Minister for Justice, on the instructions of a senior official in the office of the Minister, during the period September to October 2003.

[3] It was common cause between the parties that, by the time the application was heard in the court *a quo* the applications submitted on behalf of the applicants had not been sent to the second respondent for consideration, nor have they been sent since. This is despite the fact that, by the time of the hearing, almost four and a half years had elapsed since they were sent to the then Minister.

[4] On 20 May 2005 Mr L K Joubert MP, a member of the IFP, raised the matter in the National Assembly. In the course of his speech he said the following:

'The first issue that I wish to deal with is applications for presidential pardon or reprieve that the IFP submitted and on which it is getting absolutely nowhere. We submitted a total of 384 applications for presidential pardons, in terms of section 84(2)(j) of the Constitution, as long ago as September and October 2003, and that is more than one and a half years ago.

Apart from acknowledging receipt of the applications, nothing has transpired since that. My colleague, Mr Mzizi, wrote to the Minister for Justice and Constitutional Development on 13 February 2004 enquiring when he could expect a reply. Our Chief Whip wrote to the President on 11 November 2004 asking what progress had been made. The President's Office replied on 23 November and assured us that the matter was receiving the President's attention.

Hearing nothing further from the President, our Chief Whip, once again, wrote to the Minister for Justice and Constitutional Development on 19 January 2005 requesting an appointment to see the Minister in this regard. Seeing that nothing happened, our Chief Whip once again wrote to the Minister on 8 March 2005 and insisted on an urgent interview to discuss this

matter. Nothing happened; there was complete silence. We are simply being ignored.

In the meanwhile, we have been very patient and did not kick up dust when Dr Boesak received a pardon. We were hoping that attention would also, in due course, be given to our 384 applicants but, until today, nothing has happened.

I, therefore, have to tell this House that 384 applications for pardons are simply lying somewhere and nobody seems to be interested in doing anything about them. This is nothing less than a violation of human rights. Those 384 applicants and their families have been waiting for a very long time but all they have received is silence.

I bring this matter to the attention of Parliament and the public, and I today publicly request the hon Minister to kindly and urgently inform us what the status of these applications is so that we can immediately inform the applicants about where they stand.'

[5] It appears from the papers that the Minister then promised to give her immediate attention to the matter.

[6] On 8 September 2005, Mr J H van der Merwe MP, the IFP Chief Whip (and incidentally the respondents' attorney in this matter), directed a question in Parliament to the President with regard to the progress that had been made. This question elicited a reply which contained the following:

'[T]he applications referred to by the hon member have not yet been sent to the President, and are still with the Department of Justice. The matter has unfortunately been delayed in the Department of Justice, which has received more than 1 000 applications for pardons for crimes allegedly committed for political reasons.

We've urged the Minister of Justice to ensure that the processing of these and other applications is expedited. We will consider the appropriateness of a presidential pardon for each case once the Ministry and the Department of Justice have completed the processing of the applications, and verified the facts of each case, understanding very well the prerogatives granted to the President of the Republic by section 84(2)(j) of the Constitution, to which the hon member referred.'

[7] The President in the course of his reply explained some of the difficulties which had been encountered in dealing with the applications. Amongst other things he said that the Ministry and the Department of Justice

had to ensure that their recommendations to the President were 'based on the application of a set of criteria that are consistent with the spirit that inspired the establishment of the TRC. Apart from anything else', he continued, 'such criteria would help us to avoid *ad hoc* and arbitrary presidential decisions that would undermine the important principle of equality of treatment of all our citizens and the necessary transparency in this regard.'

[8] The President also said that the applications were being processed by the Ministry and the department and added that 'at the appropriate moment we shall come back to the people who have applied for these pardons to indicate what decision should have been taken.'

[9] Later the same day, in the discussion in the National Assembly, the President said that he would speak to the Minister and her deputy so that they could interact with Mr van der Merwe and with Dr S E M Pheko MP, of the Pan Africanist Congress (who had also raised the matter), and could indicate what was being done and the particular problems they were experiencing with regard to the processing of the applications.

[10] Eight months later, on 19 May 2006, Mr van der Merwe raised the matter again in the National Assembly. He spoke of what he called the 'unbelievable lack of action by the hon Minister'. After referring to the 384 applications for pardon which the IFP had submitted towards the end of 2003, which he said had fallen on deaf ears, he continued:

'I wish to give hon members an idea of the unbelievable and almost impossible uphill battles we have fought to seek justice and to ensure that the Constitution is respected and that these applications are processed.

For almost three years now, we have written letters to the hon Minister and the hon President pleading with them to attend to these applications. Where did it get us? Nowhere. Absolutely nowhere! The hon Minister ignored us. Twice in this very House we called this neglect a violation of human rights. Our very serious accusation and the plight of 400 prisoners were simply ignored . . .'

[11] In her reply to Mr van der Merwe's speech, the Minister pointed out that

there were no guidelines for dealing with these applications and said that the President had decided 'to take the issue to all the parties.'

[12] She continued:

'As the Department of Justice and Constitutional Development, we are trying to get proposals, which we will table before the cabinet; an undertaking which is not easy but rather difficult. We acknowledge that there are problems with regard to the existing guidelines as they state that when an individual applies for a presidential amnesty, the issue will be treated separately. The President actually said that people seeking political amnesty should appear before the TRC. And since they did not appear before the TRC, they are now faced with this issue. Hence it is important to ensure that the guidelines are correct.

It should be noted that this undertaking is not an easy one and it did not even start in 2003. Honestly speaking, this matter forms part of the outstanding issues. It was indicated during CODESA that there were still problems that needed our attention. We should put our heads together, apply our minds and throw some ideas around as to how we are going to move forward. We will bring the President's response to Parliament soon. It will be taken to the cabinet, as I will not be the first person to receive it.'

[13] In October 2006, in reply to a question on the matter in the National Council of Provinces, the Minister said:

'There are 1107 applications for pardons which were received by the Department from prisoners who allege that their offences are politically motivated. These include the submission by the IFP in respect of 385 of their members. These applications are complex in nature:

> The sentences that the applicants are serving vary from 12 years to death. With respect to the latter, a separate process was completed to convert all death sentences to alternative sentences, in most cases, life sentences. The applicants also indicate in their applications that they did not apply for amnesty with the TRC because they either did not know that they could do so and when they did find out, it was too late as they were out of time, or that the TRC process was not supported by their political parties. In some cases the offences were allegedly committed after the cut-off date of the TRC process itself.

Due to the complexity of the applications I have deemed it necessary to approach Cabinet to give guidance on the matter.'

[14] Thereafter up to the date when the first respondent deposed to the founding affidavit, viz 28 May 2007, no indication of whatsoever nature had

been given by either the Minister or the President as to whether any progress had been made regarding the applications for presidential pardon brought by the respondents, and, if so, what that progress was.

[15] The main answering affidavit filed on behalf of the Minister was deposed to by Mr Menzi Simelane, the director general of the department.

[16] In his affidavit Mr Simelane set out the legal framework informing the subject matter of these proceedings, and emphasised the need for a new approach. He stated that the Minister was currently engaged in a process involving what he called the construction of an appropriate framework for considering applications for pardon in respect of politically motivated offences.

[17] Mr Simelane listed the following questions which were included, as he put it, in the matters that the Minister 'would like to infuse into the current debate concerning politically motivated pardons':

'1. Post 1994 and given the TRC process, who can be regarded as an offender incarcerated because of having committed a politically motivated offence or one associated with a political objective?

2. What would be considered to be the most appropriate cut off date for a definition of an offence that was politically motivated or associated with a political objective?

3. What is a politically motivated offence, given the advent of democracy in 1994?

4. Are there circumstances under which an offence committed in 2000 or 2007 could be considered to be politically motivated or associated with a political objective?

5. Was the post 1994 violent conflict that occurred in KwaZulu Natal and the East Rand political in nature? All of it?

6. Should rape be considered as an offence committed with a political motive or associated with a political objective? If so, under what circumstances?

7. Would offences committed by former members of the security forces be considered alongside those committed with a political objective?

8. Who is to verify the particulars furnished in the applications and how is that verification to be done?

9. Should victims of the crimes committed be accommodated and if so in what manner?

10. What would be the most appropriate and effective manner of dealing with a large number of applications?'

[18] He then provided a précis of the individual applications, set out the department's stance and responded to the averments in the founding affidavit.

[19] In the section dealing with the construction of an appropriate framework, Mr Simelane said the following:

'[O]ther than internal operational procedures that assist the *Department* in the assessment and evaluation of applications for the pardon of minor offences, dealt with below, there is no established process for assessing and evaluating applications for the pardon of more serious offences, and in particular those motivated by way of a political objective.'

[20] He proceeded to refer to pardons granted by President Mbeki on 6 May 2002 to 33 African National Congress and Pan Africanist Congress members in the Eastern Cape who had all, wholly or in part unsuccessfully, gone through the amnesty process of the TRC. Although it appears that Dr Maduna, the then Minister, had, as it was put in a later explanatory note to the President, 'argued the cases of some [of the 33 and contended] . . . that pardon should not be granted to them', he later (after some of those covered by his original letter had been released from prison) reconsidered the matter and recommended that the 33 should be granted pardons. He motivated this advice as follows:

'He [ie, Dr Maduna] is of the view that public opinion, inside as well as outside politics, requires the 33 to be pardoned in terms of s84(2)(j) of the Constitution of the Republic of South Africa, 1996. Accordingly he recommends that the 33 persons on the list be pardoned in respect of the convictions for which they are currently serving or for which they have already served a term of imprisonment. All the information regarding their conviction and sentences, however, [is] not available at this stage. Every effort will be made to submit [it] to the President as soon as possible.'

[21] As has been said, the President accepted this advice and pardoned the 33 offenders concerned.

[22] Mr Simelane stated that there had been 'much debate and a divergence of views, both within and outside of Parliament, with regard to how best to deal with these applications, given the termination of the indemnity and then the TRC processes [ie, the processes under the Indemnity Act of 1990 and the Promotion of National Unity and Reconciliation Act 34 of 1995].' According to Mr Simelane, the Minister had directed her department to look into ways in which a framework for the evaluation of the applications could be formulated. He expressed the considered view 'that the draft framework would be finalised inside a period of approximately six months [ie, from 27 July 2007, the date he deposed to his affidavit].'

[23] In dealing with the averments in the founding affidavit he enjoined the first respondent 'to furnish full and further particulars of the circumstances of each of the offences that were committed in respect of the 383 applicants for whom he purports to act'. He urged the respondents 'to exercise greater tolerance, patience and deference to the process necessary to formulate an appropriate framework'. He continued:

The question of pardon is a discretionary exercise of mercy and does not come as a right. None of the applicants can claim prejudice arising out of their incarceration. The incarcerations were a consequence of due process.'

[24] He admitted that the practice was to have the applications processed by the department but denied that that conduct constitutes 'administrative action' within the meaning of the Promotion of Administrative Justice Act 3 of 2000 (commonly known as 'PAJA').

[25] In his replying affidavit the first respondent states that the department must have been aware as long ago as 2000 of the deficiencies in its own internal processes and internal criteria as regards the assessment of applications with a 'political element'. He also stated that, if there is no room within the current parameters used by the department to make a positive

recommendation regarding any of the applications, this position is due to the lack of action on the part of the department itself. He contended further that the Minister gave no acceptable reason for the delay in doing what he called the 'necessary' since 2000.

[26] He also stated that all that he called for was that the precedent set in 2000 by Dr Maduna (and subsequently by President Mbeki) in the case of the 33 persons who were granted presidential pardon, be followed. No reasonable explanation, he submitted, was forthcoming from the M
inister as to why this precedent should not be followed.

[27] Before the judgment of the court *a quo* is summarised, it is appropriate to set out the relevant provisions of the Constitution.

[28] Section 84, which deals with the powers and functions of the President, reads as follows:

'84 (1) . . .

(2) The President is responsible for –

. . .

(j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures . . . '

[29] Section 85 deals with the executive authority of the Republic. It provides:

'85 (1) The executive authority of the Republic is vested in the President.

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

[30] Section 92 deals with accountability and responsibilities. It reads:

'92. (1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

(3) Members of the Cabinet must –

(a) act in accordance with the Constitution; and

(b) provide Parliament with full and regular reports concerning matters under their control.'

[31] Section 101 deals with executive decisions. Sub-section (1) reads as follows:

'101. A decision by the President must be in writing if it –

(a) is taken in terms of legislation; or

(b) has legal consequences.'

[32] Section 237 of the Constitution provides:

'237. All constitutional obligations must be performed diligently and without delay.'

[33] In his judgment Seriti J referred to the fact that, in the answering affidavit filed on behalf of the Minister, it was stated that the department was processing the applications for pardon as a matter of practice. The judge considered a submission which had been advanced before him by counsel for the appellant to the effect that there was no legal duty on the Minister to process the applications for presidential pardon as the first respondent had failed to demonstrate that s 101(1) of the Constitution has been complied with.

[34] He held that the President's request to the Minister to process the applications for pardon was in accordance with the law and had legal consequences. If the request of the President did not comply with the law, he pointed out, Mr Simelane 'could have said so in no uncertain terms.'

His failure to do so and the fact that the department was in the process of carrying out the request of the State President justify

'the conclusion that the President's request to the Minister has legal consequences. Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. When processing the applications under consideration, the Minister is

exercising a public function and she is bound to perform the said function diligently and without delay.'

[35] Later in his judgment he stated that, in his view, 'the processing of the applications of the [respondents] has taken an unduly long time and the Minister has failed to perform her function as required by section 237 of the Constitution.'

[36] He accordingly held that the respondents had made out a case for relief and made the order summarised in para 1 above.

[37] Counsel for the appellant submitted that the court *a quo* had erred in holding that the Minister had a constitutional obligation to process the applications for pardons. It was contended that, as the power to grant pardons vests exclusively in the President as Head of State, he has the sole discretion to determine how he exercises that power.

[38] According to counsel, the practice which had developed in the department, even before the current constitutional dispensation, of the department assessing and evaluating applications for pardon and thereafter making recommendations to the President, did not create a legally enforceable obligation on the Minister to process the applications. It was submitted further that though the practice was permissible and desirable it did not, in the absence of a provision in the Constitution or in a statute, impose an obligation on the Minister.

[39] Counsel for the appellant also argued that Seriti J had erred in finding that the President had requested the Minister to process the applications as there was no evidence to that effect. If there had been such a request, the argument proceeded, it would have had to have been in writing if it were to have any legal consequences in terms of s 101 of the Constitution. Even if there had been such a request, no rights or interests of the respondents would have been affected thereby. Moreover, such a request and the

resultant compliance therewith would not amount to administrative action which is actionable in terms of PAJA.

[40] In counsel's submission, Seriti J had also erred in finding that, in processing the applications for pardons, the appellant's department was acting in terms of s 85(2) or s 92(3) of the Constitution. It was submitted that the executive powers or functions of the National Executive referred to in s 85(2)(e) of the Constitution are excluded from the definition of 'administrative action' in PAJA and that what the Minister or her department was doing was not the exercise of an executive function provided for in the Constitution or in national legislation as set out in s 85(2)(e) of the Constitution. Furthermore, so it was argued, s 92(3) of the Constitution is of no application.

[41] In my opinion, counsel for the appellant's submissions cannot be accepted. I think that Seriti J was clearly correct in coming to the conclusion that the President's request to the Minister to process the applications was in accordance with the law and has legal consequences.

[42] In my view the Minister had a constitutional obligation to process and to do what was necessary to enable the President to exercise the powers conferred upon him by s 84(2)(j) of the Constitution. A prisoner clearly has the right to apply for a pardon and someone has the obligation to give an answer. The fact that the President performs Head of State functions in terms of s 84(2) of the Constitution in pardoning offenders does not mean that executive functions are not performed beforehand. It is not implied in the Constitution that the President himself or through the office of the Presidency must perform all preparatory steps before the power to decide whether to grant a pardon or not is exercised. These steps (which may be called preliminary executive functions because they are steps required for laying the foundation for the ultimate decision to be made by the President) by clear implication fall within the ambit of the normal executive functions conferred by the Constitution on the executive and are therefore covered by s 85(2)(e) of the Constitution. In cases involving applications for pardon the appropriate department to perform these functions is the department. The Minister's

failure to perform these functions is a breach of s 92(3)(a) of the Constitution. (It follows from this conclusion that the respondents were not obliged to make out a case under PAJA in order to succeed and, accordingly, arguments based on PAJA do not have to be considered.)

[43] I am accordingly satisfied that Seriti J was right in holding that the Minister was obliged to process the applications and to do what was required to enable the President to exercise the powers conferred on him by s 84(2)(j) of the Constitution in an informed way and that that obligation was a constitutional one.

[44] It was not contended before us – nor could it have been so contended with any cogency – that the Minister, if she was so obliged, had performed her duties in this regard with due diligence and without delay. Nor was it argued that the period for compliance contained in para 1 of the order of the court *a quo* could be faulted.

The following order is made:

[45] The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

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IG FARLAM
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	M T K MOERANE SC L GCABASHE
Instructed by	STATE ATTORNEY PRETORIA STATE ATTORENY BLOEMFONTEIN
FOR RESPONDENT:	T J KRUGER SC C VAN JAARSVELD
Instructed by	JH VAN DER MERWE INCORPORATED PRETORIA BEN VAN DER MERWE ATTORNEYS BLOEMFONTEIN