



CONSTITUTIONAL COURT OF SOUTH AFRICA

Ryan Albutt and the Centre for the Study of Violence and Reconciliation and Others

**CCT 54/09
[2010] ZACC 4**

Date of Judgment: 23 February 2010

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 23 February 2010, the Constitutional Court handed down judgment in a case concerning a special dispensation process established by former President Mbeki in November 2007 to deal with pardon applications from persons convicted for offences they claim were politically motivated, but who did not participate in the Truth and Reconciliation Commission (TRC). Having failed to secure the participation of victims in the pardons process through political channels, the Centre for the Study of Violence and Reconciliation and other non-governmental organisations brought an urgent application in the North Gauteng High Court, Pretoria (High Court) to prevent the President from issuing pardons under the special dispensation pending the final determination of the rights of victims in the main application. The High Court found that victims of offences in respect of which pardon was sought under the special dispensation are entitled to make representations prior to the President's decision to grant pardon. It reasoned that the exercise of the pardon power under section 84(2)(j) of the Constitution constitutes administrative action and is subject to the procedural fairness requirements set out in the Promotion of Administrative Justice Act, 2000 (PAJA). The High Court accordingly granted an interdict preventing the President from considering any application for pardon under the special dispensation pending finalisation of the main application.

Mr Ryan Albutt, who brought a pardon application under the special dispensation process, asked the Constitutional Court for leave to appeal against the order of the High Court. In addition, he brought an application for direct access challenging the constitutionality of section 1 of PAJA, should the Court conclude that PAJA defines the exercise of the power

to grant pardon as administrative action. The President and the Minister for Justice and Constitutional Development, who were the respondents in the High Court, supported Mr Albutt's applications. In this Court, they argued that the victims of the offences in respect of which pardon was sought are not entitled to make representations before a decision to grant pardon is made. They submitted that the decision whether to grant pardon constitutes executive action and is therefore not subject to the procedural requirements in PAJA. In the alternative, they argued that if PAJA defines administrative action to include the exercise of the power to grant pardon, it is unconstitutional.

The NGOs contended that the High Court was correct to find that the exercise of the pardon power constitutes administrative action, and that this power is therefore subject to the procedural safeguards in PAJA. In addition, they maintained that the very nature of the special dispensation process requires the President to give the victims an opportunity to make representations. They submitted that, like the amnesty process of the TRC, the objectives of the special dispensation are to promote national unity and national reconciliation, which cannot be achieved without the participation of victims. Accordingly, they contended that the failure to give victims an opportunity to make representations was not rationally related to the achievement of the objectives of the special dispensation.

In a unanimous judgment, Ngcobo CJ found that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by it. Ngcobo CJ observed that when former President Mbeki announced the special dispensation process, he outlined its objectives, which were national unity and national reconciliation, and stated that he would be guided by the criteria, principles and spirit that underpinned the TRC amnesty process. Ngcobo CJ held that, given our history, victim participation in accordance with the principles of the TRC was the only rational means to contribute towards national reconciliation and national unity. Ngcobo CJ found further that, based on the context-specific features of the special dispensation process, victims must be given the opportunity to be heard in order to determine the facts on which pardons are based, namely, whether the offence was committed with a political motive.

Accordingly, Ngcobo CJ held that victims are entitled to an opportunity to be heard before the President makes a decision to grant a pardon under the special dispensation. In making this finding, Ngcobo CJ emphasised that it applies only to applications for pardon that have been brought under the special dispensation, and not to other categories of applications for pardon.

Ngcobo CJ found it unnecessary to consider whether PAJA defines administrative action to include the exercise of the pardon power, and therefore declined to consider the direct access application.

In the result, Ngcobo CJ granted leave to appeal, and dismissed the appeal. He ordered the President and the Minister to pay the costs incurred by the NGOs, which include the costs of two counsel. Ngcobo CJ did not make an order with respect to the application for direct access, nor did he make an order as to costs in respect of this application.

A separate concurring judgment was written by Froneman J with Cameron J and Van der Westhuizen J concurring, which agreed with the findings of Ngcobo CJ in all respects but provided additional comments in support of the judgment. These comments situate the Court's findings on the rule of law within the context of South Africa's recent and pre-colonial history. The judgment emphasises the African legacy of participation of citizens in societal affairs and notes how this tradition further legitimises the interpretation of the rule of law in this matter. The comments were made with the caveat that they do not speak to pardon issues beyond the confines of the facts of this case.