



CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister for Justice and Constitutional Development versus Mqabukeni Chonco and 383 Others

**CCT 42/09
[2009] ZACC 25**

Date of Judgment: 30 September 2009

MEDIA SUMMARY

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

On the 25th of August the Constitutional Court heard an application for leave to appeal against a decision of the Supreme Court of Appeal, brought by Mr. Mqabukeni Chonco and 383 other incarcerated persons. All had applied to the President to be pardoned for the criminal offences for which they had been convicted, which they allege were politically motivated. As Head of State, the President is empowered by section 84(2)(j) of the Constitution to grant such pardons.

The Minister for Justice and Constitutional Development (the Minister) received all the applications, in accordance with the practice whereby pardon applications are received, processed and commented on by the Department of Justice and Constitutional Development, preliminary to the President's final decision. However, after the passage of some four years, despite attempts by the prisoners' political patron, the Inkatha Freedom Party, to see to it that the applications for pardon were considered, still no decision was forthcoming from the President.

Mr Chonco and the other incarcerated persons brought proceedings in the North Gauteng High Court, seeking to hold the Minister accountable for failing in her constitutional obligation to process, with due diligence and without delay, the pardon applications. The High Court ruled in favour of Mr Chonco, finding that the Minister had failed to exercise due diligence in processing the applications to enable the President to exercise his powers under section 84(2)(j). The Minister appealed, without success, to the Supreme Court of Appeal. The Court held that the steps taken by the Minister constituted a 'preliminary executive

function', under section 85(2)(e) of the Constitution, since it was an act required to lay the foundation for the ultimate decision of the President.

In this Court the principal issue raised was whether the processing of pardon applications, prior to the final pardon decision taken by the President, was an obligation vested in the President as Head of State under section 84(2)(j), or an obligation of the Minister under section 85(2)(e).

In a unanimous judgment, Langa CJ held that section 84(1) of the Constitution confers upon the President a set of auxiliary powers, in addition to the principal decision-making power, to assist him in fulfilling the powers, functions and obligations placed on the President by section 84(2). The power to request assistance in the preliminary processing of pardon applications was such a power, vested in the President in his capacity as Head of State.

The Court held further that the exercise of powers and functions under section 84 is distinct from those under section 85. The former are performed exclusively by the President and members of the Cabinet. Were the preliminary process to be considered a collective action, the result would be that a failure by the Minister to take preliminary action would prevent the President from exercising a function and power accorded solely to him, so frustrating his powers as Head of State. The President must accordingly retain the sole ability to remove his instructions, bypass the process initiated by him, or transfer the preliminary consideration elsewhere.

Consequently, the Court upheld the Minister's appeal. Mr Chonco ought to have sued the President, not the Minister, to obtain the relief he sought. However, the Court awarded costs against the Minister on the grounds that unacceptable delays had occurred in processing the pardon applications. The only available option to Mr Chonco had been to pursue litigation and the Minister appeared to be the correct party to sue, in light of public statements by the President that he would only consider the appropriateness of a presidential pardon once the preliminary process had been completed by the Minister.

The application for leave to appeal and the appeal accordingly succeeded.