

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)**

CASE NO: 2938/01

In the matter between:

SIMELANE, BEKUMDENI QEDUSIZI

Applicant

and

THE MINISTER OF JUSTICE

Respondent

AND CONSTITUTIONAL DEVELOPMENT

THIS JUDGEMENT DELIVERED ON THE 13TH DAY OF APRIL 2006

NDITA J:

Introduction

[1] This is an application for the review, setting aside and substitution of an in-chambers administrative decision of the Amnesty Committee of the Truth and Reconciliation Commission refusing to grant amnesty to the applicant. The

application is unopposed. The applicant, a former attorney and currently a colonel in the South African National Defence Force ("SANDF"), submitted an application for amnesty to the Amnesty Committee in terms of section 18(1) of the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act"). Section 18(1) of the Act provides as follows:

"Any person who wishes to apply for amnesty in respect of any act, omission or offence on the grounds that it is an act associated with a political objective, shall ... submit the application to the Commission on a prescribed form".

[2] The particular acts, omissions or offences in respect of which the applicant sought amnesty, were the following:

- a) Receipt of the amount of R50 000-00 from the Motor Vehicle Accident Fund ("MVA Fund") purportedly in settlement of a claim by a client, and the utilization of that money to further military and intelligence activities of the Azanian People's Liberation Army ("APLA").
- b) Any civil liability that might ensue as result of the aforementioned.

Factual Background

[3] The essential facts which underpin the applicant's submissions to the Amnesty Committee can be briefly summarized as follows: In support of his

application, the applicant stated that he joined the Pan Africanist Congress ("PAC"), which was one of the major liberation movements against apartheid in the 1960's. He thereafter joined the military wing of the PAC, commonly known as Azanian People's Liberation Army ("APLA"). After receiving military training in 1962, he progressed to the rank of Natal Regional Commander of APLA and held that post until he was exiled in 1984.

[4] In his capacity as regional commander of APLA, under orders from the APLA High Command in Exile, he was responsible for coordinating underground military intelligence operations against the apartheid government. The applicant provided logistical support to APLA operatives, which included money, transport and military intelligence operations. APLA was regarded as a "terrorist" organization and he was obliged to perform his military duties clandestinely. Membership of APLA was illegal under the apartheid laws and constituted an act of treason.

[5] To fulfill his role as Regional Commander of APLA, the applicant established financing operations that could not be easily infiltrated or discovered by the security police of the state. In this regard, he began an organization called the African World Foundation ("AWF"). The AWF had the trappings of a legitimate organization, but, in fact, was a financing vehicle for APLA and its activities against the government. This finance scheme, if discovered by the

security branch of the South African Police, was in itself an act of treason. Essentially, the applicant and his underground colleagues used the savings account to finance the military, political and intelligence operations of the PAC. The details of this “APLA account” were held with the Barclays National Bank at the corner of Smith and Field Streets in Durban.

[6] While providing this logistical support to APLA, he was admitted and legally enrolled as an attorney of the High Court of South Africa. In the 1980’s he conducted his business under a firm of attorneys called Simelane & Simelane Inc in Durban. It was in this capacity that he committed fraud involving R50 000-00 on behalf of the APLA wing of the PAC, consequently violating the rules of the Natal Law Society and the Attorneys Act.

[7] The applicant was publicly known as an attorney of the High Court but, secretly, as the Regional Commander of APLA. Stated differently, he was an attorney by day and an APLA operative who directed military, political and intelligence operations against the apartheid government by night. In those two capacities he started drawing a significant amount of attention from the security police.

[8] During May/June 1984 he received an amount of R50 000-00 in respect of his motor vehicle accident client, Martha Mandlovu Mkhize, from the former

attorneys C M Luthuli & Co. This money was accepted by his client's erstwhile attorneys as settlement for damages. Instead of handing over the money to the client, the applicant deposited it into the account of the AWF, also known as the APLA account. He was aware that this was fraudulent and in order to mislead the MVA Fund, he covered it up with an incorrect reference number. The fraud was committed to boost his underground activities and to provide APLA resources to avoid detection by the government of the day, and to pursue its activities. The applicant averred that, during the time of the fraudulent act, he had been informed by one of the state's informers that he was under close and increased surveillance from the security police.

[9] An investigation against his practice was instituted by the Natal Law Society, which included, amongst other things, the R50 000-00 that he had deposited into the APLA account. When questioned by Messrs Farleigh and Chetwyn-Palmer of the Natal Law Society, who had been tasked with investigating his practice, the applicant did not disclose where the money was deposited. He claims that, had he disclosed what he had done with the money, he would have compromised the entire financing operations of the PAC and APLA's underground military and political work. Subsequent to the investigation, he was struck off the attorneys' roll.

Standard of review

[10] The South African courts have long accepted that a review envisaged in these proceedings under this Act is the “third type review”, identified more than a hundred years ago in **Johannesburg Consolidated Investment Co v Johannesburg City Council** 1903 (TS) 111, i.e. where Parliament confers statutory powers of review. Innes CJ, with reference to this kind of review, stated that a court could:

“... enter upon and decide the matter de novo. It possesses not only the powers of a court of review in the legal sense, but it has the functions of a Court of appeal with additional privileges of being able, after setting aside the decision arrived at..., to deal with the matter upon fresh evidence.”

The test to be employed in reviewing the substance of a decision of the committee is an enquiry into the presence of rational connection between the decision taken and the facts on which the decision is based, as well as the reasoning for the decision. (See **Niewoudt v Chairman, Amnesty Committee, Truth and Reconciliation Commission** 2002(3) SA 143 (C).)

[11] Section 6(2)(f) of the Promotion of Administrative Justice Act recognizes an absence of rationality as one of a number of bases upon which administrative action may be assailed by means of judicial review. The applicant’s main grounds for attacking the decision of the Amnesty Committee appear to be the following:

- a) That the Committee erred in refusing the applicant amnesty

if due regard is given to the relevant facts of the applicant's submissions in support of his application for amnesty.

- b) That the Committee did not apply its mind to the application, and had it applied its mind to the application, it would have granted him amnesty.
- c) That the Committee failed to exercise a proper discretion and as such violated the applicant's constitutional right to a fair decision.

The Application for Amnesty

[12] The salient and relevant facts in the amnesty application are central to this review application and to the grounds on which it is submitted that the Committee did not apply its mind to the issues before it, and therefore acted unlawfully, unreasonably and unfairly. One of the pillars of the applicant's submissions is that the decision of the Committee fails the test of rationality if due regard is given to the relevant facts of the applicant's submissions. Before examining the decision of the Committee, one needs to determine what it is that the applicant made the amnesty application for.

[13] In an affidavit dated 27th April 1997, the applicant set out the background to the fraud and prayed for the following relief:

“ I was cleared by the Republic of South Africa according to a letter dated

the 6th of April 1992 addressed to me by the UNHCR as per item [B] 30 above and that I could return to South Africa. Notwithstanding this letter the lawyers I instructed in Durban confirmed that there was a warrant for my arrest at the offices of the Attorney-General in Pietermaritzburg.

I was also indemnified in 1994 by the Department of Justice, Office for Indemnity, Immunity and Release. Notwithstanding this indemnity the Director-General for Justice declined to appoint me as an official in his department as more fully set out in item [B] 40 above. Consequently I kindly request that this matter be considered and to grant me amnesty in all liabilities that my conduct as herein outlined could have resulted in. I also request for amnesty that may be necessary as a result of the judgment by Mr Justice Howard herein. I submit that my conduct throughout was politically motivated. I was a soldier in the non-statutory forces since 1962 as more fully set out in my certificate of service in the non-statutory forces as per item [B] 44 above”.

[14] Given the factual background earlier referred to, this statement leaves no doubt in my mind that the applicant was in fact seeking amnesty for the criminal offence of fraud and any civil liability he might have incurred as a result thereof.

[15] However, in response to the above submissions, the Committee advised the applicant on 30 June 1997, by facsimile transmission, that his application was not in the prescribed format and forwarded the appropriate forms to him for completion. By the time he completed and submitted the forms, the Committee had already given its decision on 07 April 1998, declining the applicant amnesty. Therefore, it is clear that the decision could not have been based on the second affidavit, which was then in the prescribed format. I, however, deem it necessary to refer to the second affidavit which re-iterates what the applicant sought amnesty for. It states as follows:

“As Regional Commander of APLA in Kwa-Zulu Natal and an Attorney of the law firm Simelane & Simelane I transferred R50 000, 00 (fifty thousand) from the law firm books into an Apla account in the name of the African World Foundation without the authority of the Natal Law Society or the MVA Fund and for which I was charged with theft and struck of the roll by the Natal Law Society during March/April 1994”.

[16] In my view, it seems that the only reasonable inference that could be drawn is that the applicant sought amnesty for fraud and any subsequent civil litigation arising from that. This much should have been clear to the Committee from the reading of the first submission. It is regrettable that the application was considered in this fashion, because the next step would have been to consider whether the act was associated with a political objective and whether a full

disclosure was made.

The Decision of the Amnesty Committee

[17] The Amnesty Committee refused the applicant's application for amnesty in a decision dated 7 April 1998, which reads as follows:

"Having read the submission made by the applicant and having perused the documents referred to in the submission, the committee finds that:

- a) *The application does not relate to any act, omission or offence committed by the applicant as envisaged in section 20 of the Act; instead it relates to the application by the Natal Law Society and the subsequent decision of the Natal Provincial Division of the High Court of South Africa in terms of which the applicant's name was struck off the roll of practising attorneys. The applicant submits that the said application was and decision was politically motivated and in fraudem legis as he was a member of the PAC and subsequently ANC and that he was not properly served with the application to remove his name from the roll of practising attorneys.*
- b) *The applicant submits that he conducted a lucrative attorneys practice and he suffered damages as a result of the striking of his name off the*

roll of practising attorneys; Thus incapacitating him from practising his legal profession.

After considering the application for amnesty, the committee decides that:

- i) The application for amnesty is refused;*
- ii) The application for reparation is hereby referred to the Human Rights Violations Committee for its consideration and decision.”*

[18] After the Committee had informed him of their decision, the applicant continued to submit further papers in support of his application to it. The Committee advised him that it could not revisit his application, because it had become *functus officio*.

[19] In order to ascertain whether the decision of the Committee meets the rationality test, it is important to look at what informed the decision and whether the Act was interpreted in a manner that advanced its objectives.

[20] Mr. Ntsebeza, who represented the applicant, submitted that the grounds on which the decision of the Amnesty Committee was made are divorced from the relevant facts of the application for amnesty. Furthermore, the Committee's decision that the application did not relate to an act, omission or offence associated with a political objective, gives a reasonable impression that the

Committee did not in fact apply its mind to the application. I agree. It is abundantly clear from the applicant's first submission that he sought amnesty for fraud involving R50 000-00 tendered by the MVA Fund as settlement against a claim for damages, an amount which applicant used to finance APLA operations. Again, it is patently clear that the application for amnesty does not relate to the application for striking off the applicant's name from the roll of attorneys. In my view, the applicant demonstrated facts and evidence of an act, omission or offence, which might have been associated with a political objective. Whether that entitles him to amnesty is another question altogether.

[21] The decision of the Committee shows no analysis, whatsoever, of how it came to the conclusion that the applicant's application does not relate to an act, omission or offence associated with a political objective. It is on this basis, the applicant contends, that the Committee did not consider the merits of the application before deciding it. It seems the decision to refuse amnesty was made on the recommendations of Tania Hoskin and Robin Brink in accordance with a hand-written memorandum dated 7 October 1997 addressed to Martin Coetzee. In this memorandum, the subject matter is "*Correspondence in respect of amnesty applicant: Bhekumndeni Qedusizi Penuell Simelane AM 6291/97*". It is necessary to quote the full memorandum. It stated:

"Upon perusal of the file the following information has come to light

- the applicant was an attorney, who was struck off the roll for*

*misconduct unbecoming of a member of this profession-
misappropriation of funds*

- *He was a member- of the ANC-*
- *He alleges his being struck off the roll (sic) was politically motivated- according to applicant Mr Farleigh and Mr Chetwynd-Palmer (investigating his practice) were acting on orders of the security police.*
- *He seeks reparation for the loss of his attorney's license.*
- *He alleges that he was assaulted and disgraced and humiliated by the security police.*
- *I asked Robin Brink to have a look at the file. He did so. We can therefore conclude that the application has no merit for the granting of Amnesty. It is only on the basis of his membership with the ANC and his fabulous allegations of people being co-conspirators in the apartheid regime that he alleges his being struck of roll was politically motivated. We do not agree. We can find no evidence that the act was conducted with a political objective. Furthermore, he was struck off the roll, not charged with fraud. We therefore recommend a refusal of amnesty code N." _*

[22] I have perused the record of the amnesty application and it is not clear

how the Committee was constituted or what deliberations were held, either by a committee or a subcommittee. It is also unclear in what capacity Tania Hoskin and Robin Brink considered the application and made the recommendations contained in the internal memorandum. The result is that I remain unsure of what informed the decision to refuse amnesty. The only inference I can draw is that the source of the Committee's decision is not an independent analysis of the facts in the applicant's submissions, but rather the submissions by Tania Hoskin and Robin Brink.

[23] When an administrative authority has not applied its mind in making a particular decision, it is hard to imagine how that decision can pass the rationality test. The outcome of not applying one's mind is irrationality of the subsequent decision. Even if one were to assume that the submissions by the applicant were unclear or drafted in a manner that required the Committee to read carefully on what basis the amnesty was being sought, that still would not justify the decision. Section 19 provided the Committee with a discretionary mechanism to achieve the objectives of granting amnesty to credible applicants. It states as follows:

"Upon receipt of any application from amnesty, the committee may return the application to the applicant and give such directions in respect of the completion and submission of the application as may be necessary or request the applicant to provide such further particulars as it may deem necessary."

[24] Similarly, even if the application had been incomplete, defective, unintelligible or incoherent, the Committee could have invoked this section and given directions necessary for the proper hearing of the application. All that the Committee had to do in order to achieve the objectives of the Act was to return the application to the applicant and request further particulars or clarification on exactly what basis the applicant was seeking amnesty. Consequently, in my view, there is no rational objective basis on which the Committee's refusal to grant amnesty could be justified. The Committee's decision should have been premised on the material facts before it, mainly that the applicant's application for amnesty related to the offence of fraud allegedly committed to further political activities against the apartheid government. It is my view that the Committee did not apply its mind to the merits of the application. Had it applied its mind, it would not have come to the conclusion that the application for amnesty related to the applicant's striking off the attorney's roll.

Did the Amnesty Committee comply with the provisions of the Act?

[25] Mr. Ntsebeza submitted that the failure by the Committee to investigate was unlawful and accordingly a violation of the principle of legality. In order to adjudicate this review, it is necessary to examine whether the Committee committed an illegality by refusing amnesty to the applicant. I have already pointed out that the Committee, in refusing the applicant amnesty, stated that the

application did not relate to any act, omission or offence envisaged in section 20 without any enquiry or investigation. It is trite that procedural requirements and formalities laid down in an enabling statute have to be complied with. Section 19 regulates the manner in which applications for amnesty should have been dealt with and section 19(1) provides as follows:

“Upon receipt of any application for amnesty, the Committee may return the application to the applicant and give such directions in respect of the completion and submission of the application as may be necessary or request the applicant to provide such further particulars as it may deem necessary.”

[26] Section 19(2) on the other hand provides that the Committee shall investigate the application and make enquiries as it may deem necessary, provided that the provisions of section 30(2) shall, with the necessary changes, apply in respect of the investigations.

[27] Section 19(3) states that:

“After making investigation, the committee may-

(a) (i) inform the applicant that the application judged on the particulars or further particulars contained in the application or provided by the applicant or revealed as a result of enquiries made by the committee, if any, does not relate to an act associated with a

political objective.

(ii) Afford the applicant the opportunity to make further submissions; and decide whether the application judged on the particulars referred to in subparagraph (i), and in such further submission, relates to such an act associated with a political objective, and if satisfied that the application does not relate to an act, in the absence of the applicant and without holding a hearing, grant amnesty and inform applicant accordingly.”

[28] The use of the word “*shall*” in section 19(2), in my view, means that the requirement to investigate before making a decision to refuse amnesty is peremptory not permissive. Stated differently, because the structure of section 19 creates a condition precedent for any decision that the Committee may take in the words “*after investigating...*”, the requirement to investigate is a procedural jurisdictional fact for the Committee’s decision making process. It is trite law that mandatory provisions are usually signaled by the use of peremptory language such as “*shall*”, “*must*”, and the use of negative language such as “*no person shall*” and the presence of a sanction for non-compliance.

[29] My view is that it is only after the Committee had investigated, could it decide to grant or reject the application or afford any sort of hearing. Clearly, the textual force of section 19(2) and (3) reinforces the submission that the mere

receipt of the application for amnesty triggers an obligation on the Committee to investigate. In respect of the former, the Committee is obliged to conduct an investigation as soon as it receives an application for amnesty. In respect of the latter the Committee has a discretion whether to conduct enquiries where it is deemed necessary. How the Committee is to conduct the investigation is purely discretionary. The Concise Oxford Dictionary defines investigate as

“carry out a systematic or formal inquiry into (an incident or allegation) so as to establish the truth, carry out a search into (a subject), make a search or systematic enquiry”.

[30] Earlier on, in this judgment, I indicated that the Committee acted unfairly by not asking for more information from the applicant when it was unclear about the purpose of the application. Now I am looking at the legality of the failure of the Committee to act in accordance with the enabling provisions. The investigative procedural requirement serves not only as a formality, but is a necessary substantive requirement for fair procedure in accordance with the principle of administrative justice. Ultimately, the Committee, as an administrative body, was bound by the considerations of fairness, equity and the objectives of the Act. (See **Du Preez & Another v Truth and Reconciliation Commission** 1997 (3) SA 204 (SCA).)

[31] The applicant was entitled to expect, as a matter of right, that the

Committee conducts an investigation before coming to a decision. In my view, therefore, the Committee acted not only unlawfully by not conducting an investigation, but also unreasonably in failing to exercise a discretion where the circumstances of the application called for one. The result is that non-compliance with mandatory provisions leads to the invalidity of the decision of the Committee. In **Minister of Public Works and Others v Kylami Ridge Environmental Association and Other** 2001 (3) SA 1151 (CC) Chaskalson P stated that:

“The doctrine of legality applies to the exercise of all public power”.

Did the Application comply with section 20 of the Act?

[32] It has been submitted, on behalf of the applicant, that the Committee completely misinterpreted its mandate and failed to apply its mind to the requirements of the Act for the granting amnesty in the light of the facts before it. More specifically, the Committee erred in holding that the application for amnesty does not comply with section 20 of the Act. Section 20 provides as follows:

“(1) If the committee, after considering an application for amnesty, is satisfied that-

- a) the application complies with the requirements of this Act;*
- b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsection (2)*

and (3); and

c) the applicant has made a full disclosure of relevant facts, it shall grant amnesty in respect of that act, omission or offence.

(2) In this Act , unless the context otherwise indicates, ‘act associated with a political objective’ means any act or omission which constitutes an offence or delict which, according to the criteria in subsection (3), is associated with a political objective, and which was advised, planned, directed, commanded, ordered, or committed within or outside the Republic during the period 1 March 1960 to the cut-off date, by-

(a) any member or supporter of a publicly known political organizations or liberation movement on behalf of or in support of such organization or movement, bona fidei in furtherance of a political struggle waged by such organization or movement against the State or any former state or another publicly known political organization or movement; ...”

[33] The Committee found in its decision that the amnesty application does not relate to any act, omission, or offence committed by the applicant, as envisaged

in section 20. In this judgment, I have already indicated that the decision has no rational connection with facts on which it was based. I therefore do not intend to deal with the question whether the act, omission or offence was committed with political objectives within the ordinary meaning of that expression. To do so in the circumstances of this case would be to pre-empt or influence the decision of a Committee that might need to be established, as this court has already made a finding on the legality of the decision of the Committee.

The Impact of the Indemnity granted in terms of the Indemnity Act

[34] One of the arguments raised by the applicant is that he has been granted indemnity from prosecution in terms of the Indemnity Act. Therefore, this court should declare that the applicant is to be granted amnesty by virtue of the indemnity granted to him. I deem this submission unpersuasive. The purpose of the indemnity issued under the Indemnity Act was to indemnify anyone from prosecution for offences committed during the years of conflict against the apartheid regime. The effect of indemnity could never amount to amnesty. The Act specifically sets out what should be considered by the Committee when dealing with amnesty applications. Had the legislature intended that persons who had been indemnified from prosecution in respect of any offences be automatically considered as having been granted amnesty, then it would have inserted a provision to that effect. That the applicant applied for amnesty whilst having been granted indemnity from prosecution, is clearly recognition of that

fact. Furthermore, the applicant, in his own words, states in his second submission that he is seeking amnesty from civil liability that might ensue from his criminal conduct. In any event, my view is that this court would not be competent to make such an order.

Substitution of the decision of the amnesty committee

[35] Various further submissions in support of the application for amnesty were forwarded to the Committee after it had already made its decision on 7 April 1998. These submissions were not considered by the Committee, as it considered itself to be *functus officio*. Having held that the decision of the Committee is not rationally connected to the facts on which the decision is based, it follows that the next question to consider is whether this court should step into the shoes of the Amnesty Committee and consider whether, on the facts and evidence before it, the applicant is entitled to amnesty.

[36] The guidelines on how this court should deal with a successful review application are set out by O'Regan J in **Premier Mpumalanga v Association of Estate Agents School** 1999 (2) (CC) 113 at para 50. The general principle under common law is that a court is reluctant to substitute its decision for that of the original decision-maker, but there are circumstances where it would be appropriate for a court to do so. Quoting from Lord Hailsham in **Chief Constable of the North of Wales Police v Evans** [1982] 3 ALL ER 141 (HL) at 143 H-J,

she elaborated upon the grounds on which it would be appropriate for a court to step in the shoes of the decision maker. The general principle is that a review court, when setting aside the decision of an administrative authority, will not substitute its own decision for that of the administrative authority unless exceptional circumstances exist. This is clearly set out in **Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others** 2001 (12) (BCLR) (C) at 1259 E:

“The purpose of judicial review is to scrutinize the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant function themselves. As a general principle, a Review Court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision...”

[37] But, Malan J went further to determine the exceptional circumstances under which a court is competent to substitute the decision of an administrative body under review. The test is ultimately one of fairness. On these facts, and applying the legal principle, should this court substitute the decision of the Committee and grant amnesty to the applicant?

[38] Commenting on the power to substitute its own decision for that of a functionary under an Act in **University of the Western Cape and Others v Member of the Executive Committee for Health and Social Services and Others** 1998 (3) SA 124 (C) Hlophe J (as he then was) stated:

“Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the courts have not hesitated to substitute their own decision for that of the functionary... The courts have also not hesitated to substitute their own decision for that of the functionary where undue delay would cause unjustifiable prejudice to the applicant... our courts have further recognized that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again... It would also seem that our courts are willing to interfere, thereby substituting their own decision for that of a functionary where the court is in a good position to make the decision itself as qualified should take the decision of the administrator’s powers or functions. In some cases however, fairness to the applicant may demand the court should take such a view”. (at 131 D-H)

[39] Mr. Ntsebeza submitted that, given the fact that this court has all the

relevant facts and evidence to make a decision to grant amnesty, there is no reason why the court should not substitute the decision of the Committee and grant amnesty to the applicant. Admittedly, there has been considerable delay which may have caused undue prejudice to the applicant, but whether this court should intervene depends on the particular statutory provisions concerned and the nature and extent of the functions entrusted to the body making the decision under review. Recently, in the Supreme Court of Appeal, in **Nel and Another NNO v The Master (ABSA Bank Ltd and Others intervening)** 2005 (1) SA 276 (SCA) at 286 para 23 Van Heerden JA, in approving the above dictum of Innes CJ (as he then was) held that:

“Thus when engaged in this third kind of review, the Court has powers of both appeal and review, with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred. However, while it is sometimes stated that the Court’s powers under this kind of review are ‘unlimited’ or ‘unrestricted’, this is not entirely correct. The precise extent of any ‘statutory review type power’ must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review. A statutory power of review may be wider than the ‘ordinary’ judicial review of administrative action (the ‘second type of review’ identified by Innes CJ in the

Johannesburg Consolidated Investment Co case), so that it combines aspects of both review and appeal, but it may also be narrower, with the court being confined to particular grounds of review or particular remedies”.

[40] Mr. Ntsebeza urged this court to exercise its judicial authority in the interest of justice and substitute the decision of the Committee by granting amnesty. To this end, section 8(1)(c) of PAJA provides the courts with powers in exceptional cases to substitute, vary or correct a defect resulting from administrative action. But the court’s power to impose its own decision should be guided by the dictates of justice, fairness and whether a substitution would be constitutionally defensible. Firstly, in the present matter, I cannot say with certainty that it is a foregone conclusion that amnesty should be granted. It must be remembered that the basis for the setting aside of the decision of the Committee is that it was incorrectly based on the perception that the application related to the decision of the Natal Provincial Division striking the applicant off the roll of attorneys.

[41] Secondly, even though there has been a delay, I believe an appropriate order addressing the defect could be made.

[42] Thirdly, the question which must be squarely put and answered is whether

it is fair and reasonable to require the applicant to submit its case *de novo* to the Ministry of Justice even though the Committee of the Truth and Reconciliation Commission has long disbanded. Before I answer this question, I propose to first deal with the nature and extent of the functions entrusted on the Amnesty Committee. The preamble to the Act provides as follows:

“And since the Constitution provides that Parliament shall under the Constitution adopt a law which determines a cut-off date, which shall be a date after October 1990 and before the cut-off date envisaged in the Constitution, and providing for mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with...”

[43] This provision, in my view, makes it very clear that Parliament intended that the granting of amnesty should vest solely in the hands of the Committee, and not with the courts. Moreover, if one looks at how the Committee is constituted, this becomes self-evident. Section 17(1) provides that the Committee shall consist of a Chairperson, a Vice-Chairperson and three other members who are fit and proper persons, appropriately qualified South African citizens and broadly representative of the South African community. In terms of section 17(3), only a judge can be appointed as Chairperson. This constitution implies that the granting or refusal of amnesty lies in the hands of one judge with three other members who need only be fit and proper persons. It seems to me that the

legislature did not intend that questions of amnesty should lie exclusively in the hands of a judge.

[44] Applying the dictum of Van Heerden JA in **Nel and Another NNO** *supra*, it is my view that the very manner in which the Committee is constituted on its own is an indication that this court should give a considerable measure of deference and be slow to substitute the decision of it. It has long been recognized that the court's reluctance to substitute its own decision for that of an administrative authority (but rather to remit it to the authority concerned) is in accordance with the court's understanding of the principle of separation of powers and the distinction between appeal and review. (See **Niewoudt v Chairman Amnesty Sub-Committee, Truth and Reconciliation Commission** 2002 (3) SA 149; JR De Ville, **Judicial Review of Administrative Action in South Africa** Lexis-Nexis, 2003 at page 335; and Lawrence Baxter, **Administrative Law**, Juta & Co Ltd 1984 page 681).

[45] In answer to the third question referred to earlier, in my view, it is fair and reasonable to refer the matter back to the Committee because in terms of the Act, it is the forum with powers to grant or refuse amnesty.

[46] In the circumstances of this case, an attempt by this court to substitute the decision of the Committee "*would constitute an unwarranted usurpation of*

powers entrusted to the public authority by the legislature”. (See **Baxter** supra.)

[47] In the result, I propose the following order:

- i) The decision of the Amnesty Committee of the Truth and Reconciliation Commission refusing amnesty to the applicant is hereby set aside.
- ii) The Minister of Justice is directed to establish an Amnesty Committee to consider the application of the applicant for amnesty.
- iii) There is no order as to costs.

NDITA, J

I agree and it is so ordered.

DESAI, J

I agree.

HJ ERASMUS, J