CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/09
[2009] ZACC 25

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT Applicant

versus

MQABUKENI CHONCO AND 383 OTHERS Respondents

Heard on : 25 August 2009

Decided on : 30 September 2009

JUDGMENT

LANGA CJ:

Introduction

[1] Mr Mqabukeni Chonco was convicted of robbery, the unlawful possession of a firearm and ammunition, attempted murder and murder in 1989. He was sentenced to death for murder. The carrying out of the death penalty was later suspended in 1990 and Mr Chonco's sentence was commuted to life imprisonment when the death penalty was removed as a judicial punishment in South Africa because of its inconsistency with the

Constitution.[1] He is still in prison and has now lodged an application for presidential pardon in terms of the powers vested in the President by virtue of section 84(2)(j) of the Constitution. The relevant part of section 84 provides—

> "(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
>
> (2) The President is responsible for—
>
> . . .
>
> (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures".

Background

[2] During the 1980s and in the early years of democracy, a maelstrom of political violence raged through our country between, amongst others, the supporters of the African National Congress (ANC) and the Inkatha Freedom Party (IFP). Mr Chonco, a member of the IFP, alleges that the murder for which he was convicted, a murder that occurred during that era, was a crime committed for a political objective.

[3] The Truth and Reconciliation Commission (TRC), established under the Promotion of National Unity and Reconciliation Act 34 of 1995 (Reconciliation Act), provided a mechanism for the granting of amnesty to perpetrators of gross human rights violations in return for disclosure of the horrors committed with a political objective. The

[1] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

Reconciliation Act also made provision for reparation to victims and the closing of the book on the past.[2] The process provided an opportunity for Mr Chonco, and others in his circumstances, to come forward, make a disclosure of what they knew regarding the gross violations of human rights that had taken place and, if they qualified, be granted amnesty and receive absolution for the crimes for which they had been convicted. Mr Chonco did not, however, apply for amnesty since, he says, the IFP chose not to participate in the TRC process and its members were likewise instructed not to take part. Only in early 2003, after the TRC process had ended, did Mr Chonco apply to the President to be pardoned for his crimes.

[4] Mr Chonco's application was joined by 383 other convicted prisoners. Their applications for pardon were assisted and supported by the IFP. They applied for pardon on the ground that the crimes for which they had been convicted and imprisoned had been committed for political objectives. From the answering affidavit filed on behalf of the Minister for Justice and Constitutional Development (the Minister) in the North Gauteng High Court (High Court), and Mr Chonco's reply to it, it appears that these applications were lodged in May 2002, after the President pardoned 33 members of the ANC and the Pan Africanist Congress (PAC), who had applied to the TRC, wholly or partly unsuccessfully, for amnesty.

[2] For a discussion on the TRC and the granting of amnesty, see *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC); and *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22, Case No. CCT 91/08, 18 August 2009, as yet unreported.

[5] All the applications were received by the Minister, who is the applicant for leave to appeal. A considerable time passed without a response from the President or the Minister. Various members of the IFP raised the matter in letters to the President, in parliamentary debates and in general speeches. In September 2005, in answering a question posed to him in Parliament, the President acknowledged that he had not yet seen these applications for pardon. He stated, however, that he had "urged" the Minister to expedite the processing of the applications.[3]

[3] The President is recorded in *Hansard,* 8 September 2005, pages 22–5, as stating:

> "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 . . . .
>
> However, I'd like to draw the attention of the hon member to some of the difficulties that attend the application for presidential pardons submitted by the IFP. I am informed that some of the people concerned are serving sentences for offences that include murder, robbery, housebreaking, theft and rape.
>
> The IFP says these offences were committed in the context of the terrible political violence that engulfed KwaZulu-Natal, Gauteng and Mpumalanga during the years of transition from apartheid to democracy. None of the applicants took advantage of the Truth and Reconciliation Commission process to apply for amnesty. The Ministry and Department of Justice must therefore go through the complex process of deciding the basis on which to make any recommendations to the President, whether for or against each individual application.
>
> For instance, it's difficult to understand how the IFP and the applicants concerned can explain that defenceless women were raped in order to advance a political purpose of the IFP. I am sure that the IFP wouldn't argue that. I am sure the IFP wouldn't argue that, and thus transform the heinous crime of rape into a pardonable political offence.
>
> . . .
>
> They must also ensure that their recommendations to the President are 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, 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.
>
> I'd also like to remind the hon member that when we tabled the report of the TRC in Parliament, we indicated that those who had committed political offences within the meaning of the TRC Act and had not taken advantage of the TRC process would have the option to engage the National Prosecuting Authority.

[6] Nothing happened, however, after this statement by the President. After a substantial lapse of time, during which the IFP lodged a complaint against the Minister with the South African Human Rights Commission on Mr Chonco and the other prisoners' behalf, Mr Chonco commenced proceedings against the Minister, as first respondent, and the President, as second respondent, in the High Court. The proceedings were supported by the PAC, whose Member of Parliament, Mr Pheko, lodged a supporting affidavit as part of the founding papers.

High Court

[7] The order sought by Mr Chonco before Seriti J in the High Court was one declaring that the Minister, as the assignee of the President or as a delegated member of the national executive, had failed to exercise her constitutional obligation to process, with diligence and without delay, the applications for pardon, and thus enable the President to consider and decide upon the applications in terms of section 84(2)(j). In the alternative, Mr Chonco argued that the failure by the Minister to take a decision regarding each of the applications constituted administrative action and was reviewable in terms of section

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> Government made the suggestion precisely to minimise the intervention of the President of the Republic in the manner requested by the IFP when it asked the President to pardon serving prisoners, basing himself on claims made by prisoners and political parties that rape, housebreaking and robbery have been committed to advance a legitimate political cause.
>
> Nevertheless, as I have already indicated, we will in due course respond to the applications lodged by the IFP. However, I would plead with the hon member to understand that what his party has asked the President of the Republic to do carries extremely serious implications for what our country has been striving to achieve over the last 11 years, relating to such important issues such as national reconciliation, respect for the rule of law and the promotion of safety and security for everybody within our borders . . . .
>
> Faced with the challenge to make decisions that bear on such grave matters, I believe that we must make haste slowly."

6(2)(*g*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[4] Consequently, Mr Chonco requested the High Court to direct the Minister to do everything necessary to enable the President to exercise the powers conferred upon him by section 84(2)(j). Although the President was joined in the High Court proceedings, no relief was sought against him and he did not participate in the proceedings.

[8] The High Court noted that although the power to pardon was vested solely in the President as Head of State, applications were in practice received, processed and commented upon within the Department of Justice and Constitutional Development and subsequently passed on to the President for decision. He ruled that this practice was in accordance with the law and therefore had legal consequences. The request for assistance by the President to the Minister created an obligation on the part of the Minister.

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[4] Section 6(2) of PAJA reads in relevant part:

> "A court or tribunal has the power to judicially review an administrative action if—
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> . . .
>
> *(g)* the action concerned consists of a failure to take a decision . . . ."

Section 1(i) of PAJA defines "administrative action" in part as—

> ". . . any decision taken, or any failure to take a decision, by—
>
> *(a)* an organ of state, when—
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation;
>
> . . .
>
> which adversely affects the rights of any person and which has a direct, external legal effect . . . ."

[9] He noted further that more than four years had passed and none of the applications had been processed and no recommendations had been made to the President. He held that the Minister had failed to perform her functions diligently and without delay as required by section 237 of the Constitution.[5]

[10] The Minister was consequently ordered to do everything necessary, within three months, to enable the President to act in terms of section 84(2)(j). The Minister thereupon sought leave to appeal to the Full Bench of the High Court, alternatively to the Supreme Court of Appeal, against the judgment of the High Court. Leave to appeal to the Supreme Court of Appeal was granted. The President did not join in the appeal.

Supreme Court of Appeal

[11] In the Supreme Court of Appeal, the Minister argued that there was no constitutional obligation on the part of the Minister to process applications for pardon, since that function vested exclusively in the President as Head of State in terms of section 84(2)(j).

[12] In a short, unanimous judgment delivered by Farlam JA, the Supreme Court of Appeal dismissed the appeal and ruled that the Minister bore obligations stemming from section 85(2)(e) of the Constitution. Section 85(2) provides in relevant part:

[5] Section 237 of the Constitution reads:

> "All constitutional obligations must be performed diligently and without delay."

"The President exercises the executive authority, together with the other members of the Cabinet, by—

. . .

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

[13] The definitive paragraph in that judgment reads as follows:

"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".[6]

Issues before this Court

[14] The Minister now seeks leave to appeal to this Court. The application is concerned with the Minister's failure to process applications, the consideration of which is an exclusive function of the President in terms of section 84(2)(j). The question is whether

[6] *Minister for Justice and Constitutional Development v Mqabukeni Chonco and 383 Others* Case No. 159/08 Supreme Court of Appeal, 30 March 2009, as yet unreported, at para 42.

this failure amounts to a breach of a constitutional obligation under section 85(2)(e) on the part of the Minister in her capacity as a member of the national executive. Whether the High Court and the Supreme Court of Appeal were correct in their characterisation of the functions and obligations under sections 84(2)(j) and 85(2)(e) thus arises for determination.

Is a constitutional issue raised and should leave to appeal be granted?

[15] The first issue which needs to be addressed is whether the appeal raises a constitutional issue. If it does, I must consider whether it is in the interests of justice that leave to appeal be granted. In my view, both questions must be answered in the affirmative. In the first place, the matter is principally concerned with the interpretation and application of two sections of the Constitution, namely, sections 84(2)(j) and 85(2)(e). The interpretation of the Constitution is always a constitutional issue.[7]

[16] The issues raised deal with the relationship between the powers and functions of the President as Head of State, on the one hand, and those that are entrusted to the national executive, on the other, as well as the obligations that accrue to each. Clarification of these respective, powers, functions and obligations is a matter of the greatest importance. It is, in my view, clearly in the interests of justice that leave to appeal be granted.

[7] Section 167(7) of the Constitution reads:

> "A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

[17] It is necessary at this stage to draw attention to the further directions that were issued. This was after certain documents had been lodged, namely the founding affidavit by the Minister, a confirmatory affidavit by the President and, later, the opposing affidavit of Mr Chonco. In relevant part, the directions read as follows:

> "The parties and the President, if so advised, are required to make written submissions in light of sections 84(2)(j) and 167(4)(e) of the Constitution on whether:
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> (a) the High Court and the Supreme Court of Appeal were competent to hear the matter;
>
> (b) only this Court is competent to hear the matter; and
>
> (c) is it permissible to determine these issues which arise without joining the President as a party to these proceedings."

Written responses and submissions were received from the parties and from the President. Mr Chonco then sought leave to seek relief against the President. Initially he brought a notice of amendment to his original notice of motion in the High Court. When the Minister protested, he brought an application for direct access to this Court. At the hearing, he abandoned this expansion of the matter and it was subsequently struck from the roll. This renders it unnecessary to consider the direct access application.

Submissions of the Minister and the President

[18] The Minister and the President filed written submissions jointly. They contend that the process of verification, assessment and evaluation of applications for pardon is

not a national executive function. Although the procedure for the processing of pardon applications is not prescribed, it is a matter that falls exclusively within the parameters of section 84(2)(j). Four reasons are advanced in defence of this proposition.

[19] The first reason is that it cannot be correct to divide the exercise of the constitutional power to pardon into two, that being the preparatory preliminary stage and the making of the decision which is entrusted to the President. This would have the effect of shifting elements of the President's exclusive Head of State power to the Minister, in her capacity as a member of the national executive. Moreover, it would result in uncertainty as to what constitutional obligation is imposed upon whom and when it is so imposed.

[20] Second, the power conferred on the Head of State by section 84(2)(j), although an executive power,[8] is unrelated – both textually[9] and in its application – to the executive power given to the national executive authority in terms of section 85(2)(e). The former is exercised by the President alone whereas the latter is a collaborative, collective venture between the President and Cabinet. The entitlement of the President to consult does not

[8] See *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 11; and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 117.

[9] See *President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* [2009] ZACC 1, Case No. CCT 24/08 (*Quagliani*) and CCT 52/08 (*Goodwin*), 21 January 2009, as yet unreported, at paras 21-2; and *Hugo* above n 8 at para 12.

diminish this responsibility nor parcel it out to those with whom he consults. This is particularly important given that such consultation may in fact be desirable.[10]

[21] Third, each Minister has a separate and specialist function,[11] and takes responsibility for that function.[12] Functions – and the legal obligations attendant – can, however, be transferred by the President.[13] If a transfer is to be of legal effect, the Constitution prescribes that it must be in writing,[14] otherwise the decision is of no effect. The Minister contends that the lack of a written request from the President means that no responsibility with legal consequences passed to a member of the national executive.

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[10] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*) at para 41.

[11] Section 91(2) of the Constitution reads:

> "The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them."

[12] Section 92 of the Constitution reads:

> "(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".

[13] Section 97 of the Constitution reads:

> "The President by proclamation may transfer to a member of the Cabinet—
>
> (a) the administration of any legislation entrusted to another member; or
>
> (b) any power or function entrusted by legislation to another member."

Section 98 of the Constitution reads:

> "The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function."

[14] Section 101(1) of the Constitution reads:

> "A decision by the President must be in writing if it—
>
> (a) is taken in terms of legislation; or
>
> (b) has legal consequences."

[22] Last, in response to the directions of this Court, the Minister and President assert that the High Court and the Supreme Court of Appeal lacked jurisdiction to hear the matter. This is so because only the Constitutional Court may decide that the President has failed to fulfil a constitutional obligation. Additionally, the President has a direct and substantial interest in the matter and should thus be a necessary party to the proceedings.

[23] The Minister and the President accordingly contend that the former cannot be held accountable under section 92(3)(a)[15] of the Constitution for failure to act in terms of the powers conferred by section 85(2)(e). Therefore, relief against the Minister is inappropriate. It is the President that must be pursued.

Submissions of Mr Chonco

[24] Mr Chonco accepts that executive powers and functions bestowed on the President under section 84(2)(j) may be exercised only by the President. However, he argues that it follows from this that, if the Minister undertook to process his application, she did not do so pursuant to section 84(2)(j), since this Head of State power is reserved for the President. Mr Chonco contends that the Minister, in providing assistance to the President's exercise of this Head of State power, was acting in terms of section 85(2)(e). This is because the principle of legality requires that a minister act pursuant to a constitutional or statutory grant of power.

[15] Section 92(3) of the Constitution reads in relevant part—

"Members of the Cabinet must—

(a) act in accordance with the Constitution . . . ."

[25] Mr Chonco contends that the Minister's obligation and responsibility arose from a source of power that is distinct from the section 84 power accorded to the President. Once the request had been made by the President to process the applications, a legal obligation upon the Minister was generated.

[26] In the alternative, Mr Chonco argues that the Minister's failure to act constituted a failure to take a decision and is reviewable in terms of section 6(2)(*g*) of PAJA.[16]

Sections 84 and 85 as sources of public power

[27] This Court has repeatedly held that the definite and proper sourcing of public power in law – either in the Constitution or in national legislation – is fundamental to the principle of legality. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*,[17] it was held that–

> "[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law."[18]

This Court expanded on this well-established principle in *Affordable Medicines Trust and Others v Minister of Health and Others*:[19]

[16] Given their conclusion that the Minister was to be accountable under section 85, neither the High Court nor the Supreme Court of Appeal found it necessary to decide whether this contention was sound.

[17] [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

[18] Id at para 20.

> "The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'."[20] (Footnotes omitted.)

This was affirmed in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*,[21] in which it was held that—

> "[t]he doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law."[22]

[28] It is therefore necessary, first, to identify the source of the power to carry out the preliminary process, prior to the Head of State decision and, second, to determine to whom that power accrues.

[29] Sections 84 and 85 are sources of public power. They assign executive functions to particular functionaries – the President and the national executive, respectively. A function is a tasked duty to act in terms of the Constitution or legislation. A functionary

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[19] [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[20] Id at para 49.

[21] [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC).

[22] Id at para 68.

will have the power necessary to fulfil a function that is assigned and, naturally, the corresponding obligation for its performance.[23]

[30] In *SARFU*,[24] this Court, affirming *Hugo*,[25] held that the powers section 84(2) confers on the President as Head of State originate historically from the royal prerogative and were exercised by the Head of State rather than the head of the national executive. The powers granted by section 84(2) are now clearly original constitutional powers. Section 84(2)(j) is the source of the power, function and obligation to decide upon applications for pardon. Though there is no right to be pardoned, the function conferred on the President to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality,[26] diligently and without delay. That decision rests solely with the President.

[31] However, the power to decide, though the principal focus of the section, is not the only power it accords to the President. Section 84(1) gives the President the powers 'necessary' to fulfil the functions accorded to him or her. This indicates that the President bears powers that go beyond the principal decision-making power, and include

[23] Currie and De Waal *The New Constitutional and Administrative Law* Volume 1: Constitutional Law (Juta, Cape Town, 2002) at 235.

[24] Above n 10 at para 144.

[25] Above n 8 at paras 6–8.

[26] *SARFU* above n 10 at para 148.

what may be described as 'auxiliary powers'. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,[27] it was stated:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[28]

[32] Later, the following appears:

> "Amongst the powers vested in local governments . . . are powers which are necessary for performing certain specific functional competences vested in councils. Where appropriate, these powers can be relied upon . . . to justify legislative and executive action necessary for the implementation of the functional competences . . . ."[29]

[33] Accordingly, the scope of these auxiliary powers is narrow – only those powers reasonably necessary to properly fulfil the functions in section 84(2) are endowed. These would include the power to request advice[30] as well as the power to initiate the processes needed to generate that advice, such as receiving and examining applications for pardon.

[34] The preliminary process at issue here is within the ambit of the President's auxiliary powers, implicit in section 84.

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[27] [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

[28] Id at para 58 in the judgment by Chaskalson P together with Goldstone and O'Regan JJ, with Ackermann and Madala JJ concurring.

[29] Id at para 138 in the judgment by Kriegler J with Langa DP, Sachs, Yacoob and Mokgoro JJ concurring.

[30] *SARFU* above n 10 at para 41.

Relationship between the preliminary process and the final decision

[35] The final decision on a pardon application, and the constitutional responsibility for that decision, rests with the President as Head of State. On that there is no contest. Because in this case, however, the preliminary process involves the Minister as well, we must determine where responsibility for this preliminary process lies. The answer lies in the scope of the President's power to request assistance.

[36] The President assigns powers and functions to members of the national executive in terms of section 91(2) of the Constitution. The members act collectively with the President in fulfilling the national executive functions set out in section 85(2) for which they are collectively and individually accountable to Parliament under section 92(2) of the Constitution. No such complex matrix attaches to the Head of State powers and functions under section 84 – they are assigned to the President alone.

[37] What separates the exercise of powers and functions under section 84 from those under section 85 is that the former are performed exclusively by the President, while the latter are performed collectively by the President and members of the Cabinet.

[38] In the present matter, collective action has not occurred, nor can it be presumed that it will occur. As with his or her unrestricted power to initiate the preliminary process, the President has the power to make a final decision that need not bear any reference to the recommendation made during the preliminary process. Were the

preliminary process to be considered a collective action, the result would be that a failure to take preliminary action would prevent the President from exercising a function and power accorded solely to him or her, so frustrating his or her powers as Head of State. The President must accordingly retain the sole ability to remove his or her instructions, bypass the process initiated by him or her or transfer the preliminary consideration elsewhere.

[39] Advice rendered, be it by request or standing practice, does not transform the solo character of Head of State powers and functions into national executive powers characterised by their collective exercise. The preparatory steps to be taken by the Minister and her department fall within the auxiliary powers of the President in the decision-making process. They are neither separate from, nor external to, that process.

[40] The President retains full powers and functions – and is therefore the bearer of all obligations –in the greater pardons process under section 84(2)(j). In short, Mr Chonco has pursued the incorrect party to obtain the legal relief that he seeks. That this pursuit may have been part of a litigation strategy crafted by Mr Chonco and his advisors, in order to break the seeming logjam in the process of ministerial consideration, does not detract from this conclusion. On the other hand, nothing in this judgment must be read to suggest that there could be no adverse consequences for a minister's inactivity or failure to fulfil a discrete function legitimately allocated by the President. After all, it is the President who has the power to appoint, dismiss or demote ministers or to allocate them

to particular portfolios. Ministers are, furthermore, accountable to Parliament for the performance of their functions, [31] even though, in this case, concerted attempts by the applicants and their advisors to engage this sphere proved unavailing.

[41] I am alert to the fact that the Supreme Court of Appeal, in finding that the Minister was performing "preliminary executive functions" here ,was concerned that there should not be a field of conduct by the administration for which there is no legal accountability. But the approach adopted in this judgment does not entail that there is no accountability in relation to pardons. It merely locates it in the President alone. In fulfilling this and other constitutional obligations the President is accountable to Parliament. In addition, the Constitution empowers this Court to determine whether the President "has failed to fulfil a constitutional obligation".[32]

The alternative argument raised by Mr Chonco – administrative action

[42] In the alternative, Mr Chonco argued that the flaws in the preliminary process constituted a failure to take a decision for which the Minister should be held accountable under PAJA. However, I have already found that the relevant powers, functions and obligations rest with the President alone. Hence the requirement within subsections

[31] See section 92(2) of the Constitution, above n 12.

[32] Section 167(e) of the Constitution reads in relevant part:

"Only the Constitutional Court may—

. . .

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation".

1(*a*)(i) and (ii) of PAJA that there be an exercise of public power in order to create administrative action is not met. The Minister did not fail to exercise a public power. There was a public power, but it was the President's, not the Minister's, to exercise. The Minister therefore cannot be held accountable for any unjust administrative action that may have occurred. Whether or not the preliminary process may be deemed administrative action for which the President could be held directly accountable, was not argued, and need not be decided upon in these proceedings.

Jurisdiction and joinder

[43] The finding that the powers, functions and obligations vest solely in the President, leads to the conclusion that this matter should properly have come directly before this Court. Section 167(4)(e) provides that presidential obligations, as functions exclusively of the Head of State, are reviewable by this Court only.[33]

[44] It follows that the joinder of the President as a party was the proper course to follow. Clearly, he had a direct and substantial interest in the matter. Mr Chonco has pointed out that the President was kept abreast of all developments in the matter. He has indeed gone so far as to join the Minister in preparing and submitting written submissions on both the procedural questions asked by this Court and on the merits. By this, Mr Chonco suggested that the President had been effectively joined. Given my conclusion,

[33] This develops the observations made in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2009] ZACC 20, Case No. CCT 13/09, 22 July 2009, as yet unreported, at paras 16 and 20.

however, that only the President could be held accountable for the consideration of Mr Chonco's application for pardon, this suggestion has no merit. It was the President who should have been the sole target of the litigation, and since that was not done, Mr Chonco's litigation cannot be successful. In my view, the respondents were quite correct in deciding not to persist with this approach and the belated attempt to rectify the non-joinder of the President was, accordingly, abandoned and consequently struck off the roll.

The conduct of the Minister and the President

[45] One more matter deserves mention. Six years have passed since Mr Chonco posted his application for pardon to the Minister. Yet, despite public undertakings made by the President and the Minister to expedite a response to the applications, the respondents have waited in vain. This is unacceptable. The Constitution requires that all constitutional obligations, wherever they lie, "must be performed diligently and without delay."[34] Good governance and social trust are premised at least partly on reasonable and responsive decision making. It is however not clear from the papers who precisely is to blame for the delay. It may well have been the President's failure to authorise or expedite the drawing up of a framework to facilitate consideration of applications for pardon. One thing is certain, though – this kind of delay is out of kilter with the vision of democratic and accountable governance.

Costs

[34] Section 237 of the Constitution, above n 5.

[46] No costs order was sought by the Minister. This follows the practice in this Court whereby no costs awards are made against private litigants who have unsuccessfully raised a substantial constitutional issue against the state.[35] However, as I have pointed out already, Mr Chonco targeted the Minister in this litigation because of the President's indication in Parliament, in September 2005, that he would "consider the appropriateness of a presidential pardon for each case" only once the Ministry and the Department of Justice had "completed the processing of the applications". On the same day, Mr Chonco's attorney wrote to the Minister requesting an urgent appointment to discuss the President's signification that "[the Minister] and the Deputy Minister will give attention to these applications". No response to this urgent request is recorded in the papers. Indeed, in response to a further parliamentary question from Mr Chonco's attorney, who is also a Member of Parliament, in October 2006, the Minister indicated that the applications had still not been processed and that, at that stage, there were no reasonable prospects of finalising the process. And, as indicated earlier, more months of further seeming inaction followed before Mr Chonco initiated these proceedings at the end of May 2007.

[47] In these circumstances, it was understandable that Mr Chonco and his legal advisors would seek to hold the Minister accountable through litigation. Although we reverse the finding in law of the High Court and the Supreme Court of Appeal, the

[35] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14, Case No. CCT 80/08, 3 June 2009, as yet unreported, at paras 21–5; *Affordable Medicines* above n 18 at para 138; and *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3; 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at para 30.

circumstances in which the application was brought, together with the unacceptable delay in dealing with Mr Chonco's and the other applications for pardon, justify a singular approach to the costs of the case. In my view, justice requires that Mr Chonco, the 383 other applicants for pardon and their legal advisors should not be out of pocket because of their recourse to legal proceedings. The successful applicant for leave to appeal, the Minister, should pay the costs of Mr Chonco and the 383 other applicants for pardon.

Conclusion

[48] The appeal succeeds. Mr Chonco, though litigating for reasons to which the Court is sympathetic, has sued the wrong party to obtain the legal relief he seeks. I express no view as to the prospects of a future challenge that may be brought directly against the President.

Order

[49] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced by the following order:

"(a) The appeal is upheld.

(b) The application in the High Court is dismissed

(c) The appellant is ordered to pay the costs of the appeal."

4. The applicant is ordered to pay the respondents' costs in this Court.

Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Langa CJ.

For the Applicants:	Advocate MTK Moerane SC and Advocate L Gcabashe instructed by the State Attorney, Pretoria.
For the Respondents:	Advocate TJ Kruger SC and Advocate C van Jaarsveld instructed by JH van der Merwe Inc.