CONFUSING GRACE WITH AMNESIA: REVIEWING ACTS OF THE HEAD OF STATE

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1 Introduction

In terms of section 83 of the South African Constitution the President is both head of state and head of the national executive. Section 85 vests the executive authority of the Republic in the President, who exercises it 'together with other members of the Cabinet'. In terms of section 86 the President is elected by the majority in the National Assembly, meaning in practice that the leader of the majority party becomes President. Section 91(2) provides that the President appoints the Deputy President and Ministers and assigns their powers and functions, and may dismiss them'. In law there are therefore no limitations on the leader of the majority party regarding the selection, dispatch and control of members of Cabinet. Limitations on the President that may exist in this regard therefore depend almost wholly upon the political culture of the governing party. As long as a president remains in command of the majority party, he or she may require Cabinet and Parliament to do his or her bidding, albeit — thankfully — within the bounds of the Constitution.[1]

Section 84(2)(j) of the Constitution provides that the 'President is responsible for ... pardoning or reprieving offenders and remitting any fines, penalties or forfeitures.' This 'responsibility' is entrusted to the

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1 This is a feature 'inherited' from pre-constitutional South Africa and may be described as the Constitution's Achilles heel: it harks back to an era in our constitutional history in the 1980's when the State President was in effect endowed with executive sovereignty. However, the current dispensation is different from that era in that our Constitution is supreme and justiciable. Nevertheless, the arrangement holds the danger of the destruction of constitutionalism should a president endowed with supremacy over not only the Executive, but also over a legislative majority capable of amending the Constitution, be so inclined.

President under the heading of 'Powers and Functions of the President.' This is far from unique in the world and the provision emerges, even in the South African context, from a long history. When it comes to the exercise of the pardon, it is possible for a President as guarantor of ministerial incumbency to ensure that any advice given would accord with his or her personal preference. If advice or recommendations received do not please the President, they may easily be circumvented without any constitutional or other legal consequences.

The discussion below begins with a sketch of the chronology and outcomes of the cases of *Chonco* and *Albutt*, followed by a brief exposition of the distinction between amnesty and pardon. In section 4 the political activities surrounding the cases are outlined and in section 5 some substantive constitutional and administrative law issues related to the circumstances of the cases, including the reviewability of discretionary presidential actions, are discussed before conclusions are drawn.

2 *Chonco* and *Albutt*

The presidential pardon received the attention of the Constitutional Court more than once in 2010. Behind the eventual judgments that were handed down lies a long trail of political, executive, administrative, parliamentary and judicial activity. An understanding of the chronology of all of these activities is necessary for an understanding of the jurisprudential issues involved. The cases of *Chonco*[2] and *Albutt*[3] came to the Court along different routes, but they were eventually woven into the same fabric through the manoeuvrings of politicians and litigants.

The Truth and Reconciliation Commission (TRC) commenced its work in December 1995, and was dissolved at the end of 2001. The Commission's Amnesty Committee considered more than 7000 applications for amnesty, and then granted or refused the applications. After the dissolution of the TRC 33 members of the ANC and PAC who were unsuccessful in their applications for amnesty were pardoned by President Mbeki. It is significant that the 33 were not granted amnesty, but received the presidential pardon.

2 *Chonco v Minister of Justice and Constitutional Development* 2008 4 SA 478 (T) ('*Chonco* High Court'); *Minister of Justice and Constitutional Development v Chonco* 2009 6 SA 1 (SCA) ('*Chonco* SCA'); *Minister of Justice and Constitutional Development v Chonco* 2010 4 SA 82 (CC) ('*Chonco* 1'); *Chonco v President of the Republic of South Africa* 2010 6 BCLR 511 (CC) ('*Chonco* 2').

3 *Centre for the Study of Violence and Reconciliation v President of the Republic of South Africa* North Gauteng High Court in Case No 15320/09; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC).

Moved by this, Mqabukeni Chonco, convicted and serving a sentence for various serious crimes for which he was sentenced to death in 1989,[4] applied in May 2002 for a presidential pardon on the grounds that his crimes were committed 'for political objectives'. Chonco was a member of the IFP, a political party that expressly refrained from participating in the activities or the TRC. Chonco was joined in his application by 383 prisoners in a similar situation, with the IFP assisting the applicants. The application was duly lodged with the Minister of Justice and Constitutional Development, but nothing came of it until questions regarding the matter were raised in Parliament. More than three years later, in September 2005, President Mbeki stated that he had not yet seen the applications and that the Minister was to process and submit them to him. When still nothing was done, the IFP — supported by the PAC — approached both the Human Rights Commission and the High Court for assistance.

On 21 November 2007 President Mbeki informed a joint sitting of Parliament that a special process was to be set in motion to deal with a large number of applications for presidential pardon for crimes allegedly committed with a political motive arising from the conflicts of the past. This 'special dispensation' included the establishment of a multi-party 'Presidential Reference Group' (PRG) which was to consider all the pending applications and make (non-binding) recommendations to the President. Although the Chonco-related applications would be included in this process, the subsequent litigation on behalf of that group did not centre upon the special dispensation, but rather on the executive prevarication over their original (2002) applications for pardon.

On 11 February 2008 the North Gauteng High Court ordered the Minister to do, within three months, whatever is necessary to make it possible for the President to exercise his responsibility to consider the pardoning applications of Chonco and others.[5] The Minister appealed against this order. The Supreme Court of Appeal dismissed the Minister's appeal in March 2009,[6] pointing out that the Minister was constitutionally bound to perform the executive functions concerned. The Court construed a right for prisoners to apply for a pardon, and placed an obligation on the Executive to respond to such an application. The Minister then applied for leave to appeal to the Constitutional Court.

In what eventually became the *Albutt* case, the North Gauteng High Court was approached in April 2009 by seven non-governmental organisations for an interdict against the President on an urgent basis

4 The death sentence was later commuted to life imprisonment.
5 *Chonco* High Court (n 2 above).
6 *Chonco* SCA (n 2 above).

to prevent him from granting any pardon in terms of the Mbeki special dispensation of 2007. The NGO's wished the victims of the crimes for which the applicants had been convicted to be given access to the applications and to the proceedings and recommendations of the PRG and to be given the opportunity to make representations to the President in that regard. The application was based on the fact that the PRG did not function transparently since it had refused to reveal any information about the applications for pardon submitted to it or about the recommendations it had made and had also refused to entertain representations to it on whether or not a pardon should be granted. Furthermore the President had also refused to disclose which applications for pardon he was considering and would not allow victims or other persons affected by the offences concerned to make representations to him.[7] This was the precursor to the *Albutt* judgment delivered by the Constitutional Court on 23 February 2010 in which it was held that the victims of the crimes concerned were indeed entitled to be given the opportunity to be heard before the President decided to grant pardon under the special dispensation.[8]

In the mean time the Constitutional Court had been seized with the Minister's application for leave to appeal against the judgment of the SCA in favour of Chonco and his co-applicants. In its judgment of 30 September 2009, later referred to by the Court as '*Chonco 1*'[9] the Constitutional Court granted the Minister leave to appeal, upheld the appeal and overturned the judgments of both the High Court and the Supreme Court of Appeal. Essentially this finding was based on the Court's view that Chonco had wrongly sued the Minister while the action should have been brought against the President. The applicants promptly applied to the Constitutional Court for direct access and sought an order declaring that the President had unreasonably delayed in considering and deciding their applications for presidential pardon, and directing the President to decide their applications within a month. Judgment was delivered in what might be referred to as '*Chonco 2*' on 16 March 2010.

3 Amnesty and the presidential pardon

The TRC process emanated from the 'postamble' of the transitional Constitution of 1993,[10] the fifth paragraph of which provided as follows:

7 Paras 44-46 of *Albutt* (n 3 above). At the time Kgalema Motlanthe was the President. His term of office was between September 2008 and May 2009.
8 *Albutt* (n 3 above).
9 *Chonco 1* (n 2 above).
10 Constitution of the Republic of South Africa, Act 200 of 1993.

> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.

A very clear exposition of the nature of amnesty is provided by O'Brien.[11] Amnesty, he says, 'is an expression of the sovereign power of the lawmaker to provide immunity from the usual operation of the law', which can take various forms and which has an age-old history as a means of settling civil and military conflicts. Its purpose is essentially to bring about a formal forgetting (the root of the word 'amnesty' is the same as that of 'amnesia') of past occurrences by means of awarding immunity from liability in law for deeds done in the course of war or civil strife.

In line with the nature of amnesty, section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 provided that a person who was granted amnesty by the TRC's Amnesty Committee for particular acts, omissions or offences associated with a political objective, would no longer bear any liability for such acts, omissions or offences. In terms of subsection (8), sentences imposed upon persons convicted for crimes for which amnesty was granted would lapse.

The constitutional 'responsibility' of the President in terms of Section 84(2)(j) to pardon or reprieve offenders and to remit any fines, penalties or forfeitures has its historical roots in the royal prerogative of the British sovereign since at least the 17th Century.[12] In the 18th Century Blackstone described the prerogative of mercy as one of the great advantages of monarchy, but added:[13]

> In democracies, however, this point of pardon can never subsist, for there nothing higher is acknowledged than the magistrate who administers the laws; and it would be impolitic for the power of judging and of pardoning to centre in one and the same person.

The notion of the pardon should be understood to be a mechanism for correcting judicial errors when effecting such corrections is beyond the jurisdiction of a court. Originally it was deemed to be a royal act of grace, the Crown being the fountain of justice for the whole realm. Where it was originally a matter of pure regal discretion performed in the absence of the opportunity to appeal a judicial conviction and sentence, since the early 20th Century the consideration and granting

11 R O'Brien 'Amnesty and international law' (2005) 74 *Nordic Journal of International Law* 261, especially section 2 at 262-265.
12 Se eg DEC Yale (ed) *Sir Matthew Hale's The prerogatives of the King* (1976) ix-xi.
13 Blackstone's *Commentaries on the laws of England in four books* Vol 2 (1753) Chapter XXXI 398.

of the pardon in England has been located in Cabinet and therefore became a function of the Executive.[14]

Before South Africa became a Republic, English colonial constitutional law caused a similar pattern to be followed, leading Hahlo and Kahn to state in 1960 that the Executive (Cabinet) had 'secured control over the prerogative' in that it could be exercised without reference to the sovereign.[15]

When the Union of South Africa was converted into a Republic, section 7(4) of the Republic of South Africa Constitution Act 32 of 1961 conferred such powers and functions as were immediately prior to the commencement of this Act possessed by the Queen by way of prerogative upon the newly established head of state, the State President, and section 7(3)(f) provided that he had the power 'to pardon or reprieve offenders, either unconditionally or subject to such conditions as he may deem fit, and to remit any fines, penalties or forfeitures'. Under section 16(1) of the 1961 Constitution Act, the State President was bound to act on the advice of the executive.

However, the State President of the Republic of South Africa Constitution Act 110 of 1983 was not merely head of state, but also head of government. The effect of this arrangement was that it was possible for the State President to exercise the prerogative of pardon without the advice — although 'in consultation' — with the Cabinet.[16] The State President was in an extremely powerful position in that cabinet ministers were fully dependent upon him for their appointment or dismissal resulting in the advice rendered by ministers to be likely not to challenge his opinions. This poor example of modern constitutionalism was unfortunately replicated in both the 1993 and 1996 Constitutions.[17]

Presumably Chonco and his co-applicants approached the Minister of Justice and Constitutional Development for presidential pardons in 2002 in terms of the provisions of section 327 of the Criminal Procedure Act 51 of 1977. In effect section 327 allows a person who has been convicted of an offence regarding which new evidence becomes available after all avenues of recourse to the courts have been exhausted, to petition the Minister of Justice and Constitutional Development, who may refer it back to court for consideration and

14 Cf eg ECS Wade & AW Bradley *Constitutional and administrative law* 10th ed (1985) 360 and C Turpin & A Tomkins *British government and the Constitution* 6th ed (2007) 464-465.

15 HR Hahlo & E Kahn *South Africa — The development of its laws and Constitution* (1960) 128.

16 Cf eg D Basson & H Viljoen *Suid-Afrikaanse staatsreg* 2nd ed (1988) 60, the relevant provisions of Act 110 of 1983 being secs 6(4) and 19(1)(b).

17 Cf note 1 above.

may make a recommendation to the President regarding the granting of a 'free pardon'. Ministerial and presidential actions in this regard are in terms of section 327(7) not subject to appeal or review. Given the pre-constitutional origin of Act 51 of 1977 it may be that this provision will, if challenged, be found to be unconstitutional or in need of being read down in some respects, for example regarding the exclusion of judicial review of the Minister's actions, and also because section 84(2)(j) of the Constitution requires the petition to be directed at the President and not the Minister, the latter not having to be involved at all in terms of the Constitution.

Obviously amnesty as it was conceived in the 1993 Constitution is different from pardon as provided for in Section 84(2)(j) of the 1996 Constitution. It would however appear that neither the Office of the Presidency nor the courts recognised this distinction properly while dealing with the *Chonco* and *Albutt* matters.

When the Constitutional Court was called upon to certify the text of the draft Constitution of 1996, Section 84(2)(j) was objected to on the grounds that the presidential pardon would undermine the supremacy of the Constitution and violate the separation of powers. To these objections the Court responded,[18] with reference to the historical roots of the pardon, that the President did not derive this 'power' to pardon from antiquity, but from the Constitution itself. Responding to the concerns about the separation of powers, the Court pointed out that it had never been part of the functions of the judiciary to 'pardon and reprieve offenders after justice has run its course,' but that that was a function 'ordinarily entrusted to the head of state in many national constitutions' where the supremacy of the constitution and the separation of powers are not considered to be threatened thereby. The Court reconfirmed this view in the *Hugo* case.[19] There the Court (referring to the provision in the 1993 Constitution's equivalent of the current Section 84(2)(j)) expressly stated that:[20]

> ... the exercise by the President of his powers under s 82(1) may be subject to review by Courts of appropriate jurisdiction in the same way as the exercise by him of other constitutional powers would be subject to review.

Section 2 of the 1996 Constitution declaring the Constitution to be 'supreme' and rendering 'law or conduct inconsistent with it' invalid, as well as section 7(2) requiring the state to 'respect, protect,

18 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 116 & 117.

19 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) paras 5, 7 & 8.

20 Para 13 of the *Hugo* judgment (n 19 above).

promote and fulfil' the rights in the Bill of Rights and section 8(1) binding 'the legislature, executive, the judiciary and all organs of state' to the Bill of Rights, read together, should, in line with the *dictum* from the Hugo judgment cited above, render decisions by the President to grant or withhold the pardon subject to judicial review. Add to this that section 167(4)(e) grants the Constitutional Court the jurisdiction to 'decide that Parliament or the President has failed to fulfil a constitutional obligation'. To these considerations we return in section 5 below.

4 The travails of political litigation

Given the fact that President Mbeki pardoned 33 unsuccessful amnesty applicants before, it is difficult to fathom why, when he announced his special dispensation for the more than a thousand applicants for pardon who did not take part in the TRC amnesty proceedings but alleged that they were convicted for offences committed while moved by political considerations, chose in effect to infuse amnesty into the pardon. Also given the inordinate delay in dealing with the applications up to that point and its eventual outcome (albeit under a new presidency) one can reasonably only infer that the President himself was driven by political motives as opposed to considerations of legality or constitutionality. The administrative equivocation by three presidents and their ministers over eight years and the argumentative stances of the Executive in the concomitant litigation strengthen this inference.

In Mr Mbeki's announcement of the special dispensation on 21 November 2007[21] there was a deliberate conflation of amnesty and the presidential pardon. On the one hand he stated that:

> the President has an obligation to consider all requests made to him or her to pardon or reprieve offenders and remit any fines, penalties or forfeitures. At the same time, having thus applied his or her mind, the President is under no obligation to accede to the requests made to him or her, provided that she or he proceeds in a rational manner.

On the other hand he said that he would, in deciding on the applications:

> be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation; and, uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and

[21] The text of the speech can *inter alia* be found on the ANC's website at http://www.anc.org.za/show.php?id=4240 (accessed 21 March 2012).

> Reconciliation Commission, especially as they relate to the amnesty process.

The Department of Justice and Constitutional Development subsequently published the PRG's Terms of Reference,[22] according to which its work had to be completed by no later than 30 November 2008. It is noteworthy that the establishment of the PRG and its terms of reference were not based on any statutory or constitutional foundation: it was a unique mechanism created administratively to assist the President in his consideration of the specific set of applications for pardon in a manner not binding him in his decision-making. Despite the unusual nature of this mechanism, it can hardly be argued that the establishment of the PRG lay beyond the lawful authority of the President. What was extraordinary was the decision to half-revive the TRC amnesty process presumably as unfinished business, and to have this process cast in a new format whereby applications for amnesty (as pardon) were ostensibly to be weighed objectively, though not transparently.

The PRG had not been established long when it was approached in February 2008 by the NGO's acting on behalf of the victims of the crimes for which the applicants for amnesty/pardon were convicted, requesting access to the process. The PRG rejected these requests in August 2008 stating that it was not obliged to allow such participation, and that the President was the 'custodian' of the process, to whom the applicants were therefore referred.[23]

After Mbeki was ousted by the ANC in September 2008, his temporary successor for almost eight months, Kgalema Motlanthe, stated in an affidavit that he 'intend[ed] to deal with applications for pardon ... in line with the approach outlined by the then President'.[24] However, as has been mentioned above, Motlanthe refused to allow victim participation. Later, in the *Albutt* case before the Constitutional Court the President averred that he never actually refused victim participation, but the Court had no doubt on this account and described the President's statement as 'argumentative in tone'.[25]

When President Zuma took office in May 2009 the situation was that the PRG was *functus officio*. Also, there were the *Chonco* judgments of the High Court and the Supreme Court of Appeal requiring the Executive to expedite consideration of the pardon applications as well as an interim interdict granted by the High Court

22 To be found on the internet at http://www.info.gov.za/events/2008/tor_pres_pardon.pdf (accessed 26 March 2012).
23 *Albutt* (n 3 above) para 8.
24 *Albutt* (n 3 above) para 42.
25 *Albutt* (n 3 above) para 44, also paras 45 & 46.

prohibiting the President from pardoning any of the applicants before allowing victims of the crimes concerned to be heard. The application to the Constitutional Court by Ryan Albutt (a member of the Afrikaner Weerstandsbeweging (AWB)) for leave to appeal against the interim interdict of the High Court was (ironically) supported by the President and the Minister. At that time Zuma therefore was, as was Motlanthe, opposed to the notion that the victims should be allowed a hearing. This was an indication that none of the three presidents involved were really serious with the revival of the TRC amnesty process in which the public evidence of victims had played a key role.

In September 2009 the Minister's appeal against the *Chonco* judgments succeeded in the Constitutional Court (*Chonco 1*). However, the Court did open the possibility for subsequent action by the applicants against the President, which they promptly took in the hope of getting a response from President Zuma regarding their applications pending since 2002. The judgment in *Chonco 1* ended with the *obiter* remark that the six years of delay in dealing with the applications was 'unacceptable' in view of section 237 of the Constitution[26] and because '[g]ood governance and social trust are premised at least partly on reasonable and responsive decision making' and 'this kind of delay is out of kilter with the vision of democratic and accountable governance'.[27]

The manner in which the President responded to being sued by Chonco and others crowned the irony of the course of events in which political moves were alternated with the exhaustion of all means offered by litigious appeal using public resources. The Constitutional Court was stopped in its tracks during the proceedings in *Chonco 2* by an announcement of the President on 4 February 2010 under the heading 'President Zuma has completed processing of Inkatha Freedom Party (IFP) pardon applications'.[28] The statement made it generally known that the President had filed an affidavit in the *Chonco* matter in which the Constitutional Court was asked that the relief sought should not be granted in view of the fact that all 384 applications for pardon had been processed by him, rendering the matter 'academic.' It was announced that the President had rejected 230 of the applications. 146 of the remaining applications, in which application was also made in terms of President Mbeki's 'special dispensation', could not be decided upon because of the order granted in the North Gauteng High Court on 6 April 2009 prohibiting the President from making a final decision in applications under the

26 Sec 237 provides: 'All constitutional obligations must be performed diligently and without delay.'
27 *Chonco 1* (n 3 above) para 45.
28 Available at http://www.thepresidency.gov.za/pebble.asp?relid=1267 (accessed 27 March 2012).

special dispensation without victims having had an opportunity to make representations regarding the applications.[29] The remaining eight applications, not affected by the court order, were said to be so closely linked to the others, that they could, in fairness to all concerned, also not be considered. The statement ended with an expression of the Presidency's hope that the announcement would 'bring the matter currently before the Constitutional Court to an end,' which it did.

5 Presidential discretion and administrative justice

Despite the absence of satisfactory distinctions between amnesty and pardon in the *Chonco* and *Albutt* judgments, various strands of analysis of profound doctrinal interest were touched upon in these cases by the various courts, such as the distinction between head-of-state and executive actions performed by a president (including the question whether head-of-state actions are judicially reviewable), the nature of the pardon in relation to amnesty and whether executive conduct might be administrative action. Conclusive guidance on none of these issues was provided in the judgments, but it is instructive to follow the reasoning employed by the various judges.

5.1 Head-of-state and executive acts of the President

Chonco's case was made on the basis that the delay in the President's dealing with the applications for pardon was caused by a constitutionally reproachable failure on the part of the Minister. The Constitutional Court even speculated that this was a 'litigation strategy ... in order to break the seeming logjam in the process of ministerial consideration'.[30] Chonco's argument was based on the fact that the President's decision on granting a pardon had to be preceded by the exercise of normal executive functions performed in terms of section 85(2)(e) of the Constitution, which provides:

> 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.

[29] The statement was not very accurate regarding dates: Mbeki's announcement was made in 2007 (the statement said it was in 2008) and the court order concerned was issued in the High Court not on 6 April 2009 but on 29 April 2009 (n 3 above).

[30] *Chonco 1* (n 3 above) para 40.

This argument convinced both the High Court and the Supreme Court of Appeal[31] in view of section 92(3)(a) of the Constitution, which requires ministers to 'act in accordance with the Constitution' and section 237, which requires all constitutional obligations to be performed 'diligently and without delay.'

The Constitutional Court now had good reason to explore the distinction between the constitutional functions of the President as head of state and head of the national executive. In affirmation of its judgments in *Hugo*[32] and *SARFU*[33] that the presidential powers listed in section 84(2) of the Constitution[34] 'originate historically from the royal prerogative and were exercised by the Head of State rather than the head of the national executive,' but that they 'are now clearly original constitutional powers,'[35] the Court defined a function as 'a tasked duty to act in terms of the Constitution or legislation'.[36] Again with reference to its previous judgments, the Court confirmed that fundamental to the 'principle of legality' was the 'sourcing of public power' in the Constitution or national legislation.[37] Neatly putting together *dicta* from three previous judgments of the Court,[38] the 'doctrine of legality' was authoritatively described to be understood as follows:

- the exercise of all public power must comply with the Constitution;
- legality is 'an incident of the rule of law';
- legality is a constitutional control regulating the exercise of public power;
- neither the Legislature nor the Executive may exercise a power or perform a function not conferred upon them by law, and

31 Cf *Chonco 1* (n 3 above) para 13.
32 *Hugo* (n 19 above).
33 *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC).
34 Assenting to and signing Bills; referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality; referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality; summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business; making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive; appointing commissions of inquiry; calling a national referendum in terms of an Act of Parliament; receiving and recognising foreign diplomatic and consular representatives; appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives; *pardoning or reprieving offenders and remitting any fines, penalties or forfeitures*, and conferring honours.
35 *Chonco 1* (n 3 above) para 30.
36 *Chonco 1* (n 3 above) para 29.
37 *Chonco 1* (n 3 above) para 27.
38 As above. The previous dicta were drawn *seriatim* from *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC), *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC).

- the validity of the exercise of a public power must be 'clearly sourced in law.'

However, the Court held that a power being 'sourced in law' did not necessarily require express legislative listing of such powers. In view of section 84(1) of the Constitution which provides that '(t)he 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,' the Court stated that the President bore more than mere decision-making powers, but was also endowed with 'auxiliary powers,' which 'would include the power to request advice as well as the power to initiate the processes needed to generate that advice, such as receiving and examining applications for pardon'.[39]

The exploration of the head-of-state and head-of-the-national-executive powers of the President, involving the determination of the difference between sections 84 and 85 of the Constitution respectively, produced the Court's conclusion in this regard that the President as head of state acts alone, while as head of the national executive his actions are performed collectively by him and the Cabinet.[40]

The purpose of the Court's analysis was firstly 'to identify the source of the power to carry out the preliminary process, prior to the head-of-state decision and, secondly, to determine to whom that power accrues'.[41] The conclusion reached was that the 'preliminary process,' that is, the instruction to the Minister to receive and process the applications for pardon, fell within the ambit of the President's *auxiliary* powers.[42] In effect, therefore, the President was found not to have been hampered in the exercise of his sole authority to consider the requests for pardon, since the instruction to the Minister to do the preparatory work could have been withdrawn by the President, transferred somewhere else, or he might even have bypassed the procedure completely or might have ignored any advice on the matter.[43] Because there was no collective executive action in the sense of the section 85 functions, the Minister was accountable to the President alone — who also has the power to discipline or dismiss the Minister and therefore there was no individual or collective accountability to Parliament due to the laxity of the Minister.[44]

39 *Chonco 1* (n 3 above) paras 31 & 32.
40 *Chonco 1* (n 3 above) para 37.
41 *Chonco 1* (n 3 above) para 2.
42 *Chonco 1* (n 3 above) para 34.
43 *Chonco 1* (n 3 above) paras 38 & 39.
44 *Chonco 1* (n 3 above) paras 36, 38 and 40.

While this interpretation is strictly speaking correct, it is under the circumstances inconceivable that the President(s) were not aware of, and by implication condoned, the failure of the Minister(s) to perform their function diligently.

5.2 Judicial reviewability of presidential actions

The findings of the Court in *Chonco 1* also brought up the question whether the presidential powers entrusted by the Constitution exclusively to the President were reviewable. The Court explicitly stated that they were, in the sense that the Constitutional Court (alone) was empowered by the Constitution to determine whether the President 'has failed to fulfil a constitutional obligation'.[45] However, at this juncture the Court did not expand upon the criteria within which such a review might be conducted since it was not the President's conduct, but the Minister's that was the target of Chonco's application. But soon afterwards the Court was called upon in *Albutt* to consider this question.

In the *Albutt* case before the North Gauteng High Court it was argued for the President that he had unfettered discretion regarding the granting of pardon, while the applicants' position was that the granting of pardon was reviewable administrative action for purposes of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). On the basis of the *inclusio unius* rule of interpretation the Court accepted the argument that the constitutional pardon was administrative action since it was not excluded from the definition in the PAJA. The Court considered the application of the common law rule of interpretation not to offend any of the values and principles of the Constitution and — in a distressing reliance on pre-constitutional hermeneutics — held 'that the legislature did not intend to exclude the President's power of Pardon from the definition of an "administrative action"'.[46]

Referring to the fact that the *Service charter for victims of crime*[47] required that input was to be obtained from victims when a prisoner was being considered for parole, the High Court deemed the practical effect of parole and pardon to be the same and that it was therefore unjustified to deal with applicants for pardon in a manner

45 *Chonco 1* (n 3 above) paras 41 and 43, referring to sec 167(4)(e) of the 1996 Constitution.

46 *Centre for the Study of Violence and Reconciliation* (n 2 above) section 7.3 of the judgment.

47 Available at http://www.npa.gov.za/files/Victims%20charter.pdf (accessed 24 March 2012). The Charter is a document published by the Department of Justice and Constitutional Development *inter alia* 'To provide for the consolidation of the present legal framework in South Africa relating to the rights of and services provided to victims of crime' informing victims of crime of their rights.

different to other prisoners. The President was therefore required in law to consider all relevant information, including input from victims and other interested persons before granting pardon. This, the Court said, would be consonant with the basic values and principles governing public administration set out in section 195, and the right to administrative action protected by section 33 of the Constitution.[48] Finally the Court considered it relevant that the TRC process was transparent and allowed participation by victims[49] and granted the interim interdict applied for against the President preventing him granting any pardon in terms of the 'special dispensation' before victims had been provided with the relevant information and had been given the opportunity to make representations.

Albutt approached the Constitutional Court for leave to appeal directly against the decision of the North Gauteng High Court to grant the interim interdict against the President. In the event of the Court finding, like the High Court did, that the exercise of the constitutional pardon was indeed administrative action, an order was sought for declaring section 1 of the PAJA invalid. Even though it was against an interim interdict, leave to appeal directly to the Constitutional Court was granted in view of the fact that, in the words of the Chief Justice the application raised 'questions of considerable constitutional importance concerning the powers of the President to grant pardon under section 84(2)(j)'.[50] With reference to *Chonco 1* the Court reiterated that '[w]hile there is no right to a pardon, the applicants for pardon are at least entitled to have their applications considered without delay'.[51] Furthermore the Court found it necessary to deal with the High Court's conclusion that the President's constitutional function regarding the pardon 'goes beyond the special dispensation process'.[52]

The Court conceded the respondents' (the coalition of NGO's) position that the President's refusal to allow representations to be made to him by victims was irrational and that the context of the special dispensation required the victims being given a hearing, but preferred to leave the question whether the pardon constituted administrative action open.[53] The reasoning in the judgment is significant.

48 *Centre for the Study of Violence and Reconciliation* (n 2 above) section 7.4.2 of the judgment.
49 *Centre for the Study of Violence and Reconciliation* (n 2 above) section 7.4.3 of the judgment.
50 *Albutt* (n 3 above) para 20.
51 *Albutt* (n 3 above) para 27.
52 *Albutt* (n 3 above) para 28.
53 *Albutt* (n 3 above) para 47.

Taking the supremacy of the Constitution as point of departure, the Court again professed the 'doctrine of legality, which is part of the rule of law'. From this it follows that 'the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it'.[54] Since the President's power to pardon is derived from the Constitution, the manner in which it is exercised must pass constitutional muster. To do so, the decision not to allow victims to make representations in the special dispensation process 'must be rationally related to the achievement of the objectives of the process'.[55] Whereas the courts may not interfere in the Executive's choice of the methods by which it performs its functions, they must, when called upon to do so, objectively determine 'whether the means selected are rationally related to the objective sought to be achieved'. The jurisdiction to do so equally applies to the presidential pardon. [56]

This finding opens, consistent with previous judgments,[57] the question whether the non-applicability of the PAJA (were that to be decided) would have made a substantial difference.

5.3 The nature of the presidential pardon

In dealing with facts related to the 'special dispensation' announced in 2007, the Court sought guidance from the history and underlying sentiments of the TRC process and the objectives of 'nation-building and national reconciliation'[58] and concluded that victim participation was, as for the TRC process 'fundamental to the special dispensation process'.[59]

The Court rejected the suggestion, ironically made by the President and the Minister's counsel, that there was a fundamental difference between the pardon process and the TRC amnesty process.[60] In the seeming absence of arguments before the Court on the acceptability of the President's tailoring of the pardon

54 *Albutt* (n 3 above) para 49.
55 *Albutt* (n 3 above) para 50.
56 *Albutt* (n 3 above) para 51.
57 Eg the *Pharmaceutical* judgment (n 37 above) where the Court held (para 79) that the President's function to determine the date of the coming into effect of and Act of Parliament in terms of the Act itself, was not administrative action but that it lay 'between the law making process and the administrative process' but that the exercise of the function was nevertheless reviewable in terms of the rationality of the President's decision (paras 89 and 90).
58 *Albutt* (n 3 above) paras 53-61. In para 52 the Court also pointed out that the President, in terms of section 83(c) has a duty to promote 'the unity of the nation and that which will advance the Republic.'
59 *Albutt* (n 3 above) para 61.
60 *Albutt* (n 3 above) paras 62, 63,& 65-67.

temporarily to fit the dimensions of amnesty,[61] one must suppose that the Court's underlying assumption here was that it was acceptable. By implication the Court endorsed the temporary construction of pardon as amnesty and struck down the High Court's approach that there was no fundamental difference between the normal form of pardon and the specially created amnesty-pardon.[62] Fortunately, in his judgment the Chief Justice specifically pointed out that he wished to deal only with pardons under the 'special dispensation':[63]

> What distinguishes this category from others not before us is that the crimes in respect of which pardons are sought are alleged to have been committed with a political motive; the objective of these pardons is to promote national unity and reconciliation; and the crimes concerned were committed in a particular historical context. Different considerations may very well apply to other categories of applications for pardon. This judgment does not therefore decide the question whether victims of other categories of applications for pardon are entitled to be heard. That question is left open.

This allows for the assumption that the presidential pardon is not in future again to be construed as a form of amnesty. In a footnote in the supporting judgment of three justices, reference is made to judgments of courts in Trinidad and Tobago, the United Kingdom, New Zealand and the United States apparently for the purpose of demonstrating the deviation of the TRC amnesty process and Mbeki's special dispensation from the normal conception of executive pardon.[64] This amounts to recognition that the post-TRC approach to political pardon as amnesty confused pardon with amnesty.

It is to be hoped that this confusion will end with these cases and that the presidential pardon will in future be distinguished from political amnesty. If this distinction does not prevail, the doors may be opened to political abuse of a constitutionally regulated presidential function.

5.4 Pardon as executive action

Despite finding it to be unnecessary to decide the question whether the exercise of the power to grant pardon constitutes administrative action involving the PAJA, the Court remarked that:[65]

61 Proffering the argument would probably not have been considered by any of the litigants to serve their interests in the case.
62 The Court decided (para 76) that the High Court had erred in this regard.
63 *Albutt* (n 3 above) para 75.
64 *Albutt* (n 3 above) para 88 footnote 2.
65 *Albutt* (n 3 above) para 80. Also paras 76 and 82.

> [i]f one has regard to our jurisprudence, there is a substantial measure of doubt as to whether the exercise of the pardon power constitutes administrative action. Yet if this question is decided in the negative, a more difficult question arises, namely, whether PAJA, upon its proper construction, includes within its ambit the exercise of the power to grant pardon. And if the answer to this question is in the affirmative, more complex questions arise. Those questions are whether: (a) PAJA merely regulates the exercise of the power or whether in effect it reclassifies executive action as administrative action; and (b) whether it is constitutionally permissible for the legislature to do either of these.

Having already answered what it considered to be the essential questions in the case before it, the Court declined to say any more about the nature of the general pardon power, whether it was administrative action or whether the PAJA's constitutionality was in question on this score.

However,remarkably, in considering the question whether the President was justified in refusing victims to be heard in the process of considering the applications for pardon under the special dispensation, the Court utilised exactly such considerations as would have been relevant if section 6(2)(f)-(h) of the PAJA were to apply, namely *reasonableness* and *rationality*. However, for these considerations to apply to the review of a public function, the PAJA is not required: the constitutional imperative of legality suffices.

Whereas the term 'reasonable' is used in many provisions of the Constitution,[66] the word 'rational' is not to be found in its text. The phrase 'justifiable in an open and democratic society based on freedom and equality' in section 26(2) of the 1993 Constitution, famously replicated in the limitation clause, section 36(1) of the 1996 Constitution and enhanced with 'human dignity', gave the Constitutional Court cause for reading a rationality test into the Constitution.[67] Reasonableness and rationality — the latter being the opposite of arbitrariness — have thus become judicial standards by means of which the constitutionality of measures and actions of organs of state taken in terms of policy, often where discretion comes into play, is determined. This determination is required to be done objectively. The approach was further canonised later in 2010 in the judgment dealing with the amendment of the Road Accident Fund Act 56 of 1996 where paragraph 51 of the *Albutt* judgment was cited as

66 Sections 24-27, 29, 32, 33, 35-37, 41, 44, 59, 72, 80, 100, 103, 118, 122, 139, 146, 150, 160, 231 and 233 of the 1996 Constitution.

67 An early exposition of this test is to be found in *S v Lawrence* 1997 4 SA 1176 (CC) para 41: 'The requirement that the measures be justifiable in an open and democratic society based on freedom and equality means that there must be a rational connection between means and ends. Otherwise the measure is arbitrary and arbitrariness is incompatible with such a society.'

confirmation that it was now well settled law.[68] The constitutional demand for rationality in the performance of public functions, also those of the head of state, clearly does not apply only to administrative action but to all acts or omissions performed by those bearing authority, including the President.

Not allowing the victims of applicants for pardon under the special dispensation process to present the President with their views, was held to be irrational against the background of the TRC amnesty process where victims were given ample opportunity to testify and make their feelings known. In view of the values of accountability, responsiveness and openness enshrined in section 1(d) of the Constitution, deciding whether there was a political motive behind the commission of the crime concerned required more from the President than merely considering the applicant's statement. 'As a matter of rationality' the victims had to be heard.[69]

The considerations of reasonableness and rationality were however not applied by the Court only to the special dispensation situation. In the *Albutt* judgment the Court reconfirmed what was stated in *Chonco 1*[70] regarding all forms of the pardon, therefore also in the case of 'ordinary' pardons, namely that 'the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it'.[71] Thus the undue delay by the President to attend to the *Chonco* applications had to be considered to be unreasonable.[72]

Applied to the presidential power of pardon, the reasonable-and-rational test should mean that a refusal by the President to grant a pardon or reprieve in an unreasonable and irrational manner may be subjected to judicial review. If it is indeed true that the prerogative nature of this 'responsibility' — as it is characterised by section 84(2) of the Constitution — has been expunged and that it has become fully constitutionalised, it follows that an applicant for pardon should be provided with reasons when the application is refused in order to enable a court to determine the reasonableness and rationality of the refusal regardless of whether it is styled an 'administrative act' or whether section 1(d) of the Constitution, section 33 of the Constitution or the PAJA is applied.

68 *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) paras 34-37.
69 *Albutt* (n 3 above) paras 70-72 and 74.
70 *Chonco 1* (n 3 above) para 30.
71 *Albutt* (n 3 above) para 49 and 51. Cf the wording of sec 6(2)(f)(ii)(aa) of the PAJA.
72 Cf also the wording of sec 6(2)(g) of the PAJA.

The TRC and Mbeki's special dispensation processes were unique in that intangible considerations such as the political motivation of the perpetrators and the ideals of national unity and reconciliation were to be at the core of the decisions to grant or refuse amnesty and pardon. Were the granting of pardon to political supporters and refusal to others based on a president's political prejudices, or conversely on a view that political opponents should be appeased by granting pardons to their supporters, a court would have been able to determine that it was irrational and therefore unreasonable.

This raises the question whether the Presidency's statement of 4 February 2010, which effectively stopped the proceedings in *Chonco 2* merely by announcing that the applications for pardon had been processed, the majority had been rejected and others were delayed for reasons of similarity, should be considered to be reasonable. If so, the power to pardon retains the essence of its historical nature as 'royal prerogative', that is, an act of discretionary grace based on the subjective sentiment of mercy or clemency in the compassionate heart of a king. If not, it must be considered to be exposed to judicial review.

Furthermore, the granting or refusal of a pardon might even — also in view of the fact that section 82(2)(j) of the Constitution is pointedly not excluded from the definition of 'administrative action' in section 1 of the PAJA — be considered to be administrative action subject to the giving of reasons under section 5 of the PAJA.

An argument that refusal of pardon on application does not affect a right since a convicted person does not have a right to be pardoned, would not be persuasive: the granting or refusal of such an application at the very least affects the convicted person's — albeit justifiably limited, but not deprived — right to freedom of movement.

6 Have we lost our way between amnesty and pardon?

While it is to be hoped that future consideration of applications for presidential pardon will no longer be complicated by the notion of amnesty it might be asked what it takes to nudge an intractable President into performing a constitutional function affecting a right should he fail to do so expeditiously: pleading correspondence, political pressure, oppositional litigation, or a strategy combining all of these? As the facts of the *Chonco* case show, that may be the case at the present stage of the development of South African politics and constitutional development, but the real question should be: is the position in law that the President's constitutional function to grant or withhold the pardon an unqualified discretion in the nature of the

ancient royal prerogative and therefore beyond the reach of judicial review? A positive response to this question would be unconscionable in the constitutional state that the Republic of South Africa aspires to become in terms of its Constitution.

President Mbeki's 'special dispensation' announced in 2007 linked applications for pardon to the considerations underlying the unique process of amnesty contemplated in the 1993 postamble. This, it is submitted, confused the issue by imbuing the consideration of applications for pardon with the element of political motivation. With an attitude that reasons need not be given by the President for granting or not granting such applications, it follows that refusal of an application based on motives unpalatable to the President renders the decision subjective, arbitrary and therefore irrational. That political motives did influence the pardon of the 33 ANC and PAC members cannot in the absence of reasons given be proven, but it would under the circumstances *prima facie* appear to be the case. Similarly the granting of parole as soon as possible within the framework of the applicable legislation to convicted persons such as Shabir Shaik,[73] Alan Boesak[74] and Tony Yengeni[75] — albeit not by the President, but certainly within the reach of powerful presidential influence — can hardly be separated from political considerations. Can it be constitutionally acceptable to allow a president to pardon those with political motives which he approves of and not to pardon others with different political motives?

Historically and comparatively the pardon is intended merely to provide a corrective on the judicial process where judicial intervention has become impossible and good reasons exist for executive intervention. In addition to the complication of the matter by requiring political motivation behind the commission of the crimes concerned in the *Chonco* and *Albutt* cases, the constitutional nature of the pardon as being either a head-of-state, an executive or an administrative act, has not been settled by the Constitutional Court. For the purposes of determining whether the granting or not of an application for pardon is judicially reviewable, the categorisation thereof should however not make a difference.

If the consideration and grant of pardon is rooted solely in the Constitution — as the Constitutional Court has indeed held it to be —

73 Released on medical parole only two years and four months after commencing a 15 year sentence incurred on the basis of a fraudulent relationship with Jacob Zuma.

74 Who was found guilty of fraud and sentenced to three years' imprisonment, but was released after one year in prison and received a presidential pardon four years after his release, whereby his criminal record was expunged.

75 Also convicted of fraud but released on parole five months after commencing a four year sentence.

its prerogative origins of royal discretion and grace dependent upon the mercy of the monarch cannot still be a component thereof in any form: that such a result would be incompatible with democracy was already pointed out by Blackstone in 1753![76] In fact, the supremacy of the Constitution and the ubiquitous relevance of legality speak loudly for the need to reduce the presidential pardon to the level of an act which requires rational, reasonable and motivated action fully open to judicial review.

76 Blackstone *Commentaries* as quoted in n 13 above: see italicised phrase in the citation.