**IN THE HIGH COURT OF SOUTH AFRICA**

**NORTH GAUTENG HIGH COURT, PRETORIA**

Case Number:

In the matter between:

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| **CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION** | First Applicant |
| **KHULUMANI SUPPORT GROUP** | Second Applicant |
| **INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE** | Third Applicant |
| **INSTITUTE FOR JUSTICE AND RECONCILIATION** | Fourth Applicant |
| **SOUTH AFRICAN HISTORY ARCHIVES** | Fifth Applicant |
| **HUMAN RIGHTS MEDIA CENTRE** | Sixth Applicant |
| **FREEDOM OF EXPRESSION INSTITUTE** | Seventh Applicant |

and

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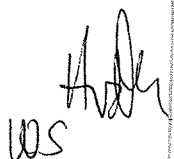
| **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** | First Respondent |
| **THE MINISTER OF JUSTICE** | Second Respondent |



## FOUNDING AFFIDAVIT

I, the undersigned

**HUGO VAN DER MERWE**

state under oath as follows:

1. I am the Programme Manager of the Transitional Justice Programme at the Centre for the Study of Violence (CSVR), the First Applicant. I currently manage the CSVR's Cape Town office. I am duly authorised to institute this application on behalf of First Applicant and to depose to this affidavit on behalf of the other applicants, whose confirmatory affidavits are attached to this application. In this regard I refer to the confirmatory affidavits of Marjorie Jobson, Olivier Kambala, Jaco Barnard Naude, Piers Pigou, Shirley Gunn and Melissa Moore on behalf of the Second, Third, Fourth, Fifth Sixth and Seventh Applicants (which are annexed hereto marked **HM1** – **HM6** respectively). I also refer to the affidavits of Naranden Jody Kollapen and Alexander Lionel Boraine which are filed in support of this application and annexed hereto marked **HM7 AND HM8** respectively.

2. Save where appears to the contrary from the context, the facts contained in this affidavit are within my own personal knowledge. To the best of my knowledge and belief they are both true and correct.

**THE ISSUE**

3. The President has established a "special dispensation" for the granting of pardons to persons who have been convicted of offences allegedly committed in pursuit of political objectives.

4. The initial role in this process was performed by the Reference Group, which is a group consisting solely of members of political parties.

5. The Reference Group has received and considered applications for pardons, and has made recommendations to the President. It has operated under blanket secrecy. It has refused to identify who has made application for a pardon, to disclose the contents and motivations of the pardon applications, and disclose what applications it has recommended. It has refused to give the victims of or other persons affected by the offences in question an opportunity to make representations as to whether a pardon should be granted, and if so, on what terms.

6. It appears that the President will very shortly make decisions on which



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offenders will be granted pardons. The President has not disclosed and will not disclose what applications he is considering. He has refused to give the victims of or other persons affected by the offences in question, an opportunity to make representations as to whether a pardon should be granted, and if so, on what terms.

7. It is not possible for any victim or person affected by the offences in question to make application for relief, none of them knows who has made application and is being considered for a pardon.

8. The Applicants seek a declaration that the President is not entitled to grant pardons under such circumstances, and an interdict preventing the President from doing so. They initially seek an interim interdict pending the final determination of the application.

The structure of this affidavit

9. In this affidavit, I advance certain legal submissions on the advice of my legal representatives. I address a range of factual matters and submissions as to the content of the special dispensation and the terms of reference, to provide the basis of this application.

10. I deal in turn with the following matters –

10.1 The parties;

10.2 The *locus standi* of the applicants;

10.3 The scope and impact of the special dispensation on pardons;

10.4 Objections to the respondents' actions, including that their actions in relation to the special dispensation have:

10.4.1 violated several fundamental rights and freedoms;

10.4.2 effectively created a re-run of the amnesty process of the Truth and Reconciliation Commission ("TRC");

10.4.3 violated the rule of law and fair process.

10.5 The grounds of review, which deal with the fact that the special dispensation on pardons, and its implementation by the President, are in conflict with sec 33 of the Constitution, the provisions of PAJA, the common law, and the constitutional principle of legality;

10.6 The grounds of unconstitutionality, which involves violations of the rule of law; infringements of the rights to dignity, life, freedom and security of the person, equal protection, freedom of expression, and access to information; and South Africa's international law obligations.



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## THE PARTIES

Applicants

11. The First Applicant is the Centre for the Study of Violence and Reconciliation ("the CSVR"). It is an association not for gain and incorporated under sec 21 of the Companies Act 61 of 1973 under registration number 1998/00544/08. The purpose of the CSVR is to work to prevent violence in all its forms, heal its effects and build sustainable peace and reconciliation in South Africa. The CSVR's main office is located on the 4th Floor of the Braamfontein Centre, 23 Jorissen Street, Braamfontein, Johannesburg, South Africa, 2017

12. The Second Applicant is the Khulumani Support Group ("Khulumani"). It is an unincorporated association and non profit organisation registered under the Non Profit Organisations Act 71 of 1997 under registration number 008-135. Khulumani's purpose is to bring survivors and families of victims together to create a collective presence within the community through the processes of the Truth and Reconciliation Commission and otherwise to advocate on behalf of victims and survivors of gross human rights violations. Khulumani's office is located on the 6th Floor of the Heerengracht Building, 87 De Korte Street, Braamfontein, Johannesburg, 2017, South Africa. .



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13. The Third Applicant is the International Center for Transitional Justice ("the ICTJ"). It is an association not for gain incorporated under sec 21 of the Companies Act 61 of 1973 under registration number 2006/012351/08. The South African office of the ICTJ is located at G6 Twickenham Brookside Office Park, 11 Lansdowne Road, Claremont, Cape Town. The ICTJ utilises the experience gained by its staff during the South African Truth and Reconciliation Commission process to assist countries pursuing accountability for past mass atrocity or human rights abuse.

14. The Fourth Applicant is the Institute for Justice and Reconciliation ("IJR"). It is an association not for gain and incorporated under sec 21 of the Companies Act 61 of 1973. It promotes nation-building within constitutional democracies and solutions to problems that continue to undermine peaceful transition both in South Africa and elsewhere. The IJR is situated at Wynberg Mews, Ground Floor, House Vincent, 10 Brodie Road, Wynberg, Cape Town

15. The Fifth Applicant is the South African History Archive ("SAHA"). SAHA is a registered non profit with registration number 031-807-NPO / PBO. It is an independent human rights archive dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. SAHA is situated at the William Cullen Library, University of Witwatersrand, Johannesburg.



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16. The Sixth Applicant is the Human Rights Media Centre ("HRMC") a duly registered non profit organisation and section 21 company. It is an organization dedicated to the compilation of oral history that enables organizations and individuals to tell their stories to the public in a variety of media forms through projects promoting human rights awareness. The HRMC is situated at 2 Mains Avenue, Haven House, Kenilworth, Cape Town.

17. The Seventh Applicant is the Freedom of Expression Institute ("FXI") a duly registered non-profit organisation. It was established in 1994 to protect and foster the rights of freedom of expression and access to information and to oppose censorship. FXI's address is 21st Floor Sable Centre, 41 De Korte Street, Braamfontein, Johannesburg, South Africa, 2017.

Respondents

18. The First Respondent is The President of the Republic of South Africa ("the President"), who is sued in his official capacity as such, and as head of state. The First Respondent's address for service is care of the State Attorney, Pretoria.

19. The Second Respondent is the Minister of Justice ("the Minister"), who is sued in his official capacity as such. The Minister is the cabinet member



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responsible for the administration of justice. His department (the Department of Justice and Constitutional Development) has administered the special dispensation established by the President, to which I refer below. The Second Respondent's address for service is care of the State Attorney, Pretoria.

**LEGAL INTEREST AND LOCUS STANDI**

20. The CSVR has *locus standi* in these proceedings through acting in its own interest in terms of sec 38(a) of the Constitution. I say this for the following reasons:

20.1 The objects of the CSVR include promoting sustainable peace and reconciliation. One of the primary elements in achieving sustainable peace and reconciliation is dealing with the human rights violations and crimes of the past by means, *inter alia*, of holding perpetrators to account.

20.2 The CSVR considers the TRC to have been a mechanism for holding perpetrators of apartheid-era crime accountable. During the TRC process, the CSVR provided support to victims of apartheid crimes, including psycho-social counseling. It continues to support the families of those who disappeared at the hands of apartheid security forces. The CSVR views the process established by the special dispensation on pardons as a significant departure



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from the principle of victim participation upheld by the TRC and enshrined in South Africa's constitutional order.

20.3 The CSVR seeks to promote democracy and human rights, including the rule of law. The exclusion of victims from the special dispensation and the restriction of submissions to perpetrators and political parties undermine the rule of law, with the consequent effect of undermining democracy and human rights.

21. Khulumani acts in terms of sec 38(c) of the Constitution, on behalf of all those who may be prejudiced by decisions of the Reference Group, including victims and all families of victims of criminal acts perpetrated by members and agents of the Apartheid regime and its security forces. Khulumani also brings this application under sec 38(e) of the Constitution as an association acting in the interests of its members. Khulumani has a further legal interest in these proceedings, namely a public interest under sec 38(d), which arises from the fact that the exclusion of victims from the special dispensation on pardons undermines its own work and the work of the TRC process from the perspective of victims and survivors. The special dispensation on pardons benefits and focuses exclusively on perpetrators and completely ignores the interests of victims and survivors.

22. The International Center for Transitional Justice has locus standi in terms of sec 38(a) as the special dispensation on pardons undermines



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victims' rights and is therefore in fundamental conflict with the ICTJ's institutional goals. Furthermore, in light of its activities as an international human rights organization concerned primarily with both judicial and non-judicial accountability, the ICTJ believes that the special dispensation on pardons, to the extent that it excludes victims, is contrary to international law and violates South Africa's international law obligations. Under similar circumstances, the ICTJ has appeared before the Constitutional Courts of both Colombia and Indonesia to enforce these countries' obligations under international law in relation to the prevention of impunity for human rights violators.

23. FXI has *locus standi* in terms of sec 38(a) in that its principal objective is the promotion of freedom of expression in South Africa and the opposing of censorship. FXI views the special dispensation process as a violation of the rights of the public, the media and victims to free speech and access to information contained in sec 16 and 32 of the Constitution.

24. SAHA, which documents past struggles against apartheid, also has *locus standi* in terms of sec 38(a). It worked extensively in recording and capture the individual stories of those involved in the TRC. SAHA is deeply concerned that the special dispensation on pardons will undermine the work of the TRC, compromise the rights of victims to a fair and just process; and will prevent the exposure of information disclosed in the process about South Africa's past.



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25. The HRMC, which is an oral history project that promotes an awareness and culture of human rights, adopts a people-centred and developmental approach in acknowledging the struggles of the past. The HRMC has *locus standi* in terms of sec 38(a) because the special dispensation on pardons, contrary to the objectives of the HRMC, denies the role of victims, refuses to hear their voices, and excludes them entirely from the process.

26. Copies of the articles of association and constitutions of the applicants will, if required, be made available at the hearing of this matter.

27. Further to what I have said above, I submit that the applicants have standing in terms of the following constitutional provisions:

27.1 Each of the applicants has standing in terms of sec 38(a) because it is acting in its own interest.

27.2 Each of the applicants has standing under sec 38(d) because it acts in the public interest. I am advised that where constitutional rights are infringed, the consequences, by definition, affect the general public. As set forth below, respondents' actions related to the special dispensation were not authorized by Constitution or by law, violate the rule of law and fair process, violate several fundamental rights and freedoms, and amount to an effective re-run of the TRC's amnesty process. There are no other parties which



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can effectively challenge what has been and will be done. The applicants are civil society organisations which seek to vindicate the public interest in ensuring that the Constitution and the law are complied with.

27.3 The Second Applicant has standing in terms of sec 38(c), as it acts in the interests of the group comprising victims or victims or family members of victims of apartheid violence and repression associated, or purportedly associated with a political objective committed prior to 16 June 1999 (as envisaged in the terms of reference).

27.4 People who were the victims of, or affected by, the offences committed by the applicants for pardon do not know that those offenders are being considered for a pardon. This is so because the special dispensation creates a secret process. The Reference Group and the President have (save as is set out below) refused to make known who has applied for pardon. The victims and people affected have not been informed of such applications, and can therefore not act in their own names. The applicants all act in terms of sec 38(b) on behalf of such persons.

**FACTUAL BACKGROUND**

28. In 1994, prior to the election of Nelson Mandela as South Africa's first



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democratically elected President, an interim Constitution had been adopted for the purpose, as set out in the preamble, of "the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution". The postscript to the interim Constitution authorised a limited amnesty with "a firm cut-off date" for politically motivated offences "[i]n order to advance [...] reconciliation and reconstruction..." To this end the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act" or "the TRC Act") was enacted. It incorporated the granting of amnesty for such offences committed within a specified period when full disclosure was made and certain other criteria met ("the amnesty criteria"). In total, the Amnesty Committee received 7112 applications for amnesty, of which 849 were granted, 5,392 were rejected, and 871 were withdrawn. The Amnesty Committee of the TRC wound up its work and published its report in 2003.

29. In 2002, 33 prisoners were granted a presidential pardon for acts of political violence committed on behalf of the African National Congress and Pan Africanist Congress. According to the Department of Justice and Constitutional Development, these prisoners had applied for amnesty under the TRC system but their applications had been rejected. The former chairperson of the TRC, Archbishop Desmond Tutu, labelled the pardons as 'the thin edge of a general amnesty wedge'. A copy of the newspaper article in which these developments are reported is annexed hereto marked "**HM 9**".



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30. In 2003 some 384 prisoners made applications for Presidential pardons in terms of sec 84(2)(j) of the Constitution. They were all assisted in the processing of their applications for Presidential pardons by the Inkatha Freedom Party ("IFP"). They claimed in the case of *Chonco and Others v Minister of Justice and Constitutional Development and Another* (TPD case no 21224/2007) that the Minister of Justice & Constitutional Development had failed to process their applications for pardons with due diligence. I am advised that one of the defences raised by the Minister was that there was no policy in place to deal with requests for "politically motivated" motivated offences. The Minister of Justice filed an affidavit in which she stated that the Department was "desirous of obtaining a defensible departmental framework for the evaluation of [apartheid era] applications," The Court ordered the Minister of Justice to take all necessary steps to enable the President to carry out his obligations in terms of sec 84(2)(j) of the Constitution.

Report of the Amnesty Task Team

31. An undated report, titled "Report: Amnesty Task Team", a copy of which is annexed hereto marked **"HM10"**, and which was disclosed during the proceedings in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07) revealed that:



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31.1 The government Director-General's Forum, under the chairpersonship of the Director-General: Justice and Constitutional Development on 23 February 2004, appointed an "Amnesty Task Team" to consider and report on, amongst other things, a "consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past".

31.2 In order to give effect to the "arrangements" contemplated by then President Mbeki in his statement to the National Houses of Parliament on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003, the Amnesty Task Team recommended the creation of a Departmental Task Team comprising members of the Department of Justice and Constitutional Development, the Intelligence Agencies, the South African National Defence Force, the South African Police Service, Correctional Services, the National Prosecuting Authority and the Office of the President.

31.3 The functions of the proposed Task Team would be to:

31.3.1 consider the advisability of the institution of criminal proceedings for an offence committed during the conflicts of the past and make recommendations to the National Director of Public Prosecutions;

31.3.2 consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to:

31.3.2.1 the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of sec 84(1)(k) of the Constitution;

31.3.2.2 the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.

31.4 Significantly, the proposed task team was required to receive "information or representations from victims, perpetrators, legal representatives or any other person or institution regarding any specific matter".

32. In 2005, the National Director of Public Prosecutions (NDPP) with the concurrence of the Minister effected changes to the Prosecutions Policy under sec 179 of the Constitution (the special dispensation or amended policy). The amended policy permitted the NDPP to employ the same amnesty criteria as those used by the TRC when deciding whether or not to prosecute offenders involved in the conflicts of the past. Victims and civil society groups viewed the amended policy as an extension of the



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TRC's amnesty regime under the guise of prosecutorial discretion. These groups, which included First to Third Applicants, successfully challenged the constitutional validity of the special dispensation amendments in the Pretoria High Court. Even that amended policy, however, had required the NDPP to take reasonable steps to obtain the views of victims before taking a decision.

33. The then Minister Brigitte Mabandla disclosed in a press statement dated **5** January 2007 the need for the development of a policy on presidential pardons for prisoners who allege that their offences were politically motivated. A copy of this press statement is annexed hereto marked **"HM11** According to the Minister the matter was complex and, since there was no legal precedent, "a political solution" was required. The Minister noted that:

33.1 Some of the applicants for pardons had failed to utilise the TRC processes that were available to them because their political parties did not support the TRC;

33.2 Some of the applicants pleaded ignorance of the TRC processes;

33.3 Offences that some of the applicants are alleged to have committed took place after the cut off date for TRC amnesty applications.

President Mbeki and the unfinished business of the past



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34. At a joint sitting of Parliament on 21 November 2007, then President Mbeki announced a special process for the handling of pardon requests made by "people convicted for offences they claim were politically motivated, and who were not denied amnesty by the TRC." According to President Mbeki the aim was to assist the nation in resolving the "unfinished business" of the Truth and Reconciliation Commission (TRC). He said:

> "As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this 'unfinished business.'"

34.1 President Mbeki assured members of Parliament that the new process would be consistent with "what the nation sought to achieve through the TRC," and would support the discharge of the President's "constitutional obligation to consider the requests for pardon from people who have already been convicted for offences they claim belong among the category of offences that were considered by the TRC Amnesty Committee."

34.2 In order to "entrench the practice the nation has sought to cultivate,



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of acting in unity as it addresses the crimes of the past," President Mbeki asked each political party represented in Parliament to appoint a representative, not necessarily an MP, to serve on a Pardons Reference Group (RG) charged with considering pardon requests and submitting recommendations to the President. President Mbeki indicated that he would not be bound by the advice of the RG, but would give serious consideration to its recommendations.

35. President Mbeki noted that, while the President is constitutionally obligated to consider pardon requests, she or he is under no obligation to grant pardons, "provided that she or he proceeds in a rational manner." In addition to observing the rationality obligation, Mbeki stressed the importance of dealing with pardon requests "in an open and transparent manner, uniformly and in strict compliance with predetermined procedures and criteria." President Mbeki stressed that the process would not undermine the work of the TRC, but would instead build upon its legacy. He pledged that his ultimate pardoning decisions would be guided by the values and principles enshrined in the Constitution, as well as the "principles, criteria, and spirit" of the Truth and Reconciliation Commission.

36. President Mbeki announced a window of opportunity for new pardon requests that would open on 15 January 2008 and close on 15 April 2008. Requests would be considered from applicants convicted of



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offences "of the nature considered by the TRC during the period up to 16 June 1999." Applicants convicted of sexual offences, domestic violence, or the sale, possession, or manufacturing of drugs would not be considered for pardon, nor would applicants denied amnesty by the TRC. President Mbeki's professed hope was that the RG would enable him to complete the "unfinished business" of the TRC. A copy of the relevant Hansard extracts is annexed marked "**HM12**".

37. On 16 January 2008, the Office of the President released a press statement announcing the beginning of the period of applications for Presidential pardons for alleged political offences in accordance with President Mbeki's announcement in Parliament on 21 November 2007. A copy of this press statement is annexed marked "**HM13**". Prospective applicants were given a three-month period, from 15 January to 15 April 2008, to apply for pardons. The President also announced the establishment of a multi-party Reference Group to consider applications for pardons and make recommendations to the President. The deadline was subsequently extended to the end of May.

37.1 The President confined the ambit of the pardons to those who were convicted for political offences committed before 16 June 1999. The press statement states that such persons will be considered for "amnesty". The reference to "amnesty" rather than "pardons" confuses the purpose of the process and, intentionally or unintentionally, implies a re-run of the TRC.

37.2 The press statement disclosed that those who have been convicted for sexual offences, domestic violence and any offence referred to in sec 13 of the Drugs and Drug Trafficking Act, 1992, or those whose applications for amnesty were refused by the Truth and Reconciliation Commission's Amnesty Committee, do not qualify for "amnesty". This second reference to "amnesty" further confuses the purpose of the special dispensation.

Creation of the Reference Group

38. The multi-party Reference Group was formally constituted on 18 January 2008 at its first meeting with President Mbeki, during which the Terms of Reference for the RG were adopted. Dr Tertius Delport was elected Chairperson. Though participation in the RG was not mandatory, each political party represented in Parliament appointed an RG member.

39. On 24 January 2008, the Department of Justice and Constitutional Development announced that the twelve page pardon application forms were available to interested applicants at all courts, correctional facilities, Department of Justice regional offices, and websites. A copy of the application form is annexed marked **"HM14".** I have no personal knowledge of the availability of these forms at those locations. The application form was never published in the *Government Gazette*.



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Approaches to the RG

40. Immediately thereafter, concerned NGOs, including the CSVR, made efforts to engage with the RG to address issues of victim participation, transparency, and public disclosure. On 5 February 2008, I contacted the Chairperson Dr Delport via email to offer the Centre's assistance to the Reference Group. I indicated that the CSVR could provide "information, expert input, [and] . . . [help] improve participation by civil society and engag[e] in public education regarding the process." I further explained that the Centre "would like to contribute to a process that can help those in jail re-integrate and constructively contribute to the healing of victims and communities where appropriate," and expressed hope for a "constructive relationship with the Parliamentary Reference Group." A copy of this email is annexed marked **"HM15".** Chairman Delport responded by phone to acknowledge receipt of the email. He stated that the RG would not be willing to meet with civil society representatives, but would consider written submissions.

41. On 27 February 2008, the Department of Justice & Constitutional Development published a full page advertisement in the *Star*, the *Pretoria News*, the *Daily News*, the *Diamond Fields Advertiser*, *Isolezwe* and the *Cape Argus* titled "Presidential Pardons: DO YOU QUALIFY?" The advertisement stated "If you are in prison for a politically motivated

offence committed before June 16, 1999, or released from prison after having committed offences of a political nature, you could qualify for a pardon from our State President" (underline added). In addition to describing the basic aspects of the special dispensation, the advertisement informed potential applicants: "If you need help filling in your application, your political party has a duty to assist you to complete the application form." This provision suggests that political parties are under an obligation to support all pardon applicants claiming membership of their parties. The advertisement is annexed marked **"HM16".**

42. On 25 March 2008, less than a month before the period for pardon applications was due to close, I contacted Dr Delport via email to request the RG Terms of Reference. While the Terms of Reference are now available on the website of Department of Justice and Constitutional Development, at that time they had not yet been publicly released. A copy of this email is annexed marked **"HM17".** I received no response from Dr Delport.

43. On 13 April 2008, in light of the delayed establishment of the RG, President Mbeki extended the deadline for submitting pardon applications from 15 April 2008 to 31 May 2008. The official media statement by the Office of the Presidency is annexed marked **"HM18".**

44. I emailed Dr Delport on 5 May 2008 to request a list of the applicants



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who had submitted pardon applications. A copy of this email is annexed marked **"HM 19"**. Dr Delport responded on 6 May 2008 that the RG had "not decided whether to make the list public or not," and indicated that he would raise the request at the RG meeting on 12 May 2008. While my request was formally refused, the list of pardon applicants was only disclosed after an application under the Promotion of Access to Information Act (PAIA) had been launched by the Fifth Applicant (the South African History Archives). I refer further to this below. Dr Delport's email of 6 May 2008 is annexed marked **"HM20"**.

45. Media reports published in 2008 indicated that the political pardon applicants included: Ferdi Barnard (former Civil Co-operation Bureau operative who murdered David Webster), former apartheid police chief General Johann van der Merwe and his four co-accused in the attempted murder of Rev Frank Chikane, Adriaan Vlok (former law and order minister), Chris Smit (former police major general), and Gert Otto and Manie van Staden (former police colonels). An example of such a media reports is annexed marked **"HM21 & "HM21(a)"**. Following the release of the names of the applicants under the PAIA application on 26 November 2008 I was able to confirm that these persons had indeed applied for pardons.

46. On 26 May 2008, the CSVY held a Workshop on Prosecutions and Restorative Justice at which the RG's Deputy Chairperson Mr Jonas Ben Sibanyoni spoke. Mr Sibanyoni quoted President Mbeki's November

2007 remarks at length, and described the administrative support for the RG provided by the Department of Justice & Constitutional Development. He indicated that RG meetings were taking place in Parliament (Cape Town) and Pretoria.

47. At some point shortly thereafter, Dr Delport released a statement revealing that only 1300 of the applications received by the RG involved acts of political violence. A copy of this statement is annexed marked **"HM22".** I sent an electronic query to Mr Sibanyoni to inquire as to the basis for this estimate, but never received a response to that question. A copy of this email is annexed marked **"HM23".**

48. I contacted the secretary of the RG on 12 June 2008 to request the rules and procedures governing the RG. On 17 June 2008 the RG Secretary, Neville Gawula, provided the CSVR with a copy of the RG Terms of Reference and a list of RG members, a copy of which is annexed marked **"HM24"**. The rules and procedures have never been disclosed. The development of RG rules and procedures is vested in the RG and mandated by Section 2.4 of the Terms of Reference.

49. On 20 June 2008 a coalition of non-governmental organisations, including the applicants ("the coalition"), delivered letters to all the RG members to express concerns over the difficulty of discovering and engaging with the procedures of the RG, and to request a meeting of NGOs and the RG. The letter identified five principal concerns: (1) the



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failure to disclose RG Rules and Procedures; (2) the failure to clearly define the category of "politically motivated offences" that may result in pardon recommendations; (3) the importance of full disclosure by pardon applicants; (4) the RG's obligation to improve public disclosure and procedural transparency; and (5) the glaring lack of victim consultation. A copy of this letter is annexed marked **"HM25".**

50. Having received no response to the coalition's letters, I sent an email to Mr Gawula on June 30, requesting a meeting. On 1 July 2008, I sent a similar letter to Dr Delport. On the same day, Dr Delport responded by email to inform that a "comprehensive response" to the coalition's request had been drafted, and that he, Mr. Galuwa, and Mr. Sibonyani were prepared to meet with the coalition. A copy of Dr Delport's email is annexed hereto marked **"HM26"**.

51. The NGO coalition met with Dr Delport, Mr Sibonyani and Mr Gawula on 15 July 2008. Representatives from several NGOs and civil society organizations voiced concerns over the exclusion of victims from the RG process, the refusal to disclose the names of pardon applicants, and the general opacity of the RG process. During the course of the meeting:

51.1 The RG representatives expressed willingness to consider the concerns raised by the coalition of NGOs, but generally defended the process as compliant with international norms and past practice. Dr Delport distinguished between the amnesty available



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through the TRC process and the President's discretionary authority to exercise his pardon power pursuant to sec 84(2)(j) of the Constitution.

51.2 Dr Delport reported that the RG had requested that the President consider applications from persons who had been denied amnesty in the past, but that the President had not responded to that request.

51.3 Dr Delport stated that the RG utilized criteria from the Groote Schuur Minute, the TRC legislation, and the Norgaard Principles when considering pardon applications, but did not provide a definitive list of criteria. Dr Delport did not clarify whether the group had developed written rules and procedures pursuant to Terms of Reference Section 2.4.

51.4 At the time of the meeting between NGOs and the RG, Dr Delport advised that the RG had considered 171 applications for pardons, of which 16 had been recommended to the President for pardon. The coalition suggested that, given the relatively small number of applications recommended to the President for pardon, victim consultation in cases considered for recommendation to the President would not be unduly cumbersome. Dr Delport asked the coalition to reduce its requests to writing and informed the coalition that the RG would consider the coalition's requests at a meeting to



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be held on 28 July 2008.

52. The coalition complied with Dr Delport's request and delivered its written requests and recommendations to the RG on **17** July 2008. A copy of this letter is annexed marked **"HM27".** In this letter it was pointed out that:

52.1 the coalition was very concerned that the RG had not sought the representations of victims;

52.2 since the RG had to consider the applications and make recommendations to the President; and since the President was likely to act upon such recommendations in issuing pardons, the interests of victims were manifestly implicated. Victims, and organisations representing victims, should accordingly have been given an opportunity to make representations to the RG in those cases where the RG contemplated the recommending of pardons. The RG's Terms of Reference (TOR) did not exclude such representations;

52.3 it was not just adherence to basic principles of fairness and the respect for the rights of victims that demanded that victims be heard; since the subject matter of the special dispensation had its roots deep within South Africa's negotiated transition and constitutional order, the special dispensation was obliged to respect



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and uphold the same rights that had been accorded to victims in the truth and reconciliation process;

52.4 there might be certain cases before the RG which were of national significance. In such cases there might be other interested entities who wished to place their submissions before the RG;

52.5 the fact that the chosen legal mechanism to reach "closure" on the conflicts of the past happened to be the pardon process did not denude victims of the constitutional rights they had enjoyed during the transitional period;

52.6 the chosen mechanism of closure could never immunize the RG of its constitutional obligation to seek the views of those who have a material interest in the outcome of the process;

52.7 victims and victim groups could only make meaningful representations if they were aware of the cases before the RG, and the motivations and endorsements put forward for pardon;

52.8 the coalition offered to assist the RG to create a process that respected South Africa's negotiated transition and upheld the constitutional rights of victims;

52.9 Dr Delport should approach the President to request him not to



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issue any pardons, pending the outcome of this process, in respect of the 16 cases already referred to him.

Rejection of victim participation by the Reference Group

53. By letter dated 7 August 2008, Dr Delport informed the coalition of NGOs of the RG's conclusion that neither the Terms of Reference nor any law compelled the RG to "call for inputs by the public (in particular the victims)," and the RG accordingly would not accede to requests to incorporate victim input into the process. He noted that, as the "custodian of the [pardons] process," the President could take such considerations into account, and advised the coalition to direct its concerns to the Office of the President. The letter did not include a response to the other concerns raised by the NGO coalition. A copy of this letter is annexed marked **"HM28".**

54. The applicants in a letter dated 12 August 2008 expressed disappointment with the RG's unwillingness to consider victim input and improve transparency in the RG processes, and reiterated its requests for a list of pardon applicants and the RG rules and procedures. In the same letter, the coalition informed the RG that failing such disclosure by 20 August 2008, the NGOs would be forced to take further steps. A copy of this letter is annexed marked **"HM29".**

55. Also on 12 August 2008, the NGO coalition wrote to President Mbeki



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expressing its concerns and urging him not to issue pardons in terms of the special dispensation until such time as the dispute over the process was resolved. A copy of this letter is annexed marked **"HM30".** The President's Office responded on 19 August 2008, confirming receipt of the letter and indicating that a response would be forthcoming. A copy of this letter is annexed hereto marked **"HM31".** The President did not however respond further.

Approach to the SA Human Rights Commission

56. On 11 August 2008, I wrote to the South African Human Rights Commission to relay the history of engagement with the RG, provide a summary of the coalition's concerns and invite the Commission's engagement with the RG process. A copy of this letter is annexed hereto marked **"HM32".**

57. On 19 August 2008, the South African Human Rights Commission (the Commission) wrote to President Mbeki and echoed many of the concerns raised by the NGO coalition. The Commission stated that the "process that generates a recommendation is sufficiently important ... [that] victims of serious human rights violations should at the very least have the opportunity to engage with the pardons process." The Commission further concluded that the silence in the Terms of Reference on the issue of victim participation "does not exclude victim participation," and urged the RG to "interpret the Terms of Reference



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broadly to include victim participation." The Commission encouraged the President to provide clarity to the PRG on the issue of victim participation, and strongly recommended that the PRG include such participation in making its recommendations. A copy of this letter is annexed marked **"HM33".** In this regard I refer to the supporting affidavit of Mr. **Jody Kollapen**, Chairperson of the South African Human Rights Commission annexed marked **"HM7"**.

Approaches to political parties

58. The next day, applicants sent letters to all political parties with representatives serving on the PRG in an attempt to amplify their concerns over the lack of transparency and victim involvement in the RG process, gauge each party's support for the process, and lodge urgent requests for meetings with party leaders and RG representatives. Copies of these letters are annexed marked **"34(a) to 34(d)".**

59. The coalition received a range of responses to their 20 August 2008 letters.

59.1 On 22 August 2008, United Christian Democratic Party MP Isaac Mfundisi responded by email to express familiarity with both the coalition's concerns and the referral of such concerns to the Presidency. He suggested that the RG would discuss any response from the President at its next meeting scheduled for 25-27 August



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2008. As the matter "borders on the extension of their Terms of Reference," Mr Mfundisi was content to let the process take its course. A copy of this email is annexed marked **"HM35"**

59.2 On 28 August 2008, the CSVR met Independent Democrats (ID) MP Lance Greyling to discuss the ID's position on the processes employed by the RG. Shortly thereafter, I spoke with ID RG representative Solani Gudlhuza, who stated that, as a PRG member, he no longer reports to the ID, and further that he supports the collective decision of the RG to exclude victims from the progress.

59.3 During a phone call on 29 August 2008, African Christian Democratic Party PRG representative Hendry Cupido informed Natalie Jaynes of the Institute for Justice and Reconciliation that he was bound by the Terms of Reference and would make no further comment.

59.4 Azanian Peoples' Organization (AZAPO) RG representative Sam Tloubatla made a similar statement to Natalie Jaynes on 29 August 2008 phone call.

59.5 On 8 September 2008, FXI received a response to its letter to the Democratic Alliance (DA) dated 3 September 2008. The response was from Dr Delport, who indicated that he was responding on



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behalf of the RG and not on behalf of the DA. The RG indicated that:

59.5.1 in their view the powers vested in the President by virtue of sec 84 (2) (j) of the Constitution are executive and not administrative powers and that it does not consider that this process was intended to further or supplement the hearings in terms of the TRC process.

59.5.2 the RG is furthermore of the opinion that the present process was not designed to be a judicial or quasi-judicial enquiry: unlike the TRC, the RG is not empowered to gather information, receive evidence and call witnesses.

59.5.3 that the RG, by the very nature of its composition, is clearly called upon to advise the President from a political perspective, and particularly in terms of a quest for national reconciliation.

59.5.4 that the Terms of Reference prescribed by the President define the mandate of the RG, and the RG cannot take it upon itself to institute a judicial enquiry.

59.5.5 that the President does not, in the normal course of dealing with applications in terms of sec 84 (2) (j) of the Constitution,



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solicit the views of victims and is under no legal obligation to do so and therefore also not obliged to do so in the present instance.

59.5.6 that the RG is similarly under no legal obligation to hear the evidence of victims, but that if the President from a policy point of view decides that the RG ought to hear such evidence and consequently instructs the RG to do so, the position will naturally change.

59.6 On 30 September 2008, President Kgalema Motlanthe issued a press statement in which he granted a request by the RG for an extension of the deadline for completing its work. A copy of this statement is annexed marked **"HM36"**

Communications to President Motlanthe and the new Minister of Justice

60. On 3 October 2008, the NGO coalition wrote to President Motlanthe to welcome his promise to build upon South Africa's constitutional democracy and make him aware of the coalition's concerns regarding the RG process. The coalition informed President Motlanthe of its intent to explore all legal avenues, and urged the President to refrain from any action on the pardon applications until the concerns of the coalition were resolved. A copy of this letter is annexed marked **"HM37".**



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61. On 17 November 2008, the NGO Coalition sent a letter to the new Minister, Mr Surty, to inform him of the coalition's objections to the RG, its attempts to influence the pardon application review process, and its intent to take legal action failing resolution of these objections. The coalition made an urgent request for a meeting with the Minister to discuss these concerns. A copy of this letter is annexed marked **"HM38".** The Minister only responded to this letter on 8 January 2009. The requested meeting has never taken place.

PAIA documentation

62. On 26 November 2008, a mere 2 weekdays before the expiry of the RG's mandate, the PAIA Unit of the Department of Justice & Constitutional Development (DOJ) released certain of the records requested by SAHA, the fifth applicant. Amongst the documents released were:

62.1 An undated "Explanatory Memorandum" released by the Office of the Chief Litigation Officer of the DOJ. The memorandum states that the special dispensation was created because the indemnity and amnesty provisions of earlier laws such as the Promotion of National Unity and Reconciliation Act 34 of 1995 have "expired and can no longer be utilized". A copy of this document is annexed marked **"HM39"**



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62.2 An undated document titled "Criteria, Rules and Procedures Used for Purposes of Making Recommendation in each Application for a Pardon". This document appears to be part of a larger document and appears to have been authored by the RG for the purpose of making recommendations to the President in terms of paragraph 2.4 of the Terms of Reference. A copy of this document is annexed hereto marked **"HM40"** This document confirms that:

62.2.1 Only political party representatives were involved in the making of decisions to recommend or not to recommend pardons.

62.2.2 No verification or testing of the perpetrators' version took place apart from contrasting such version with the judgment in the case. It appears that even this limited and inadequate means of verification did not take place in all cases.

62.2.3 The same principles as those used by the TRC, namely the Norgaard Principles, were employed to determine whether the perpetrator qualified as a "political offender".

62.3 An approximate 300 page list referred to as the "Political Pardons Application Form Received Register" which included the following headings: name and surname, identity or prison number, offences, in or out of prison, and application status. With the exception of the



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first page the application status column was not completed.

62.3.1 The types of offences for which perpetrators have applied for pardon include: murder, attempted murder, assault, robbery, housebreaking, possession of stolen goods, kidnapping, car hijacking, possession of firearms and ammunition, high treason and rape.

62.3.2 Political affiliations identified include the Inkatha Freedom Party, African National Congress, Pan Africanist Congress, Afrikanerweerstandsbeweging, Azanian People's Organisation and Parents against Gangsterism and Drugs.

62.3.3 There are also applications from security force members including the South African Police, the Civil Cooperation Bureau and Special Forces of the South African Defence Force.

62.3.4 It appears that amongst the applicants are those responsible for taxi violence, farm killings, racist attacks and industrial unrest.

62.3.5 Perhaps the highest profile applicants are Johannes Velde van der Merwe, the former Commissioner of the South African Police, and Adriaan Vlok, the former Minister of Law and



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Order who had authorised the elimination of an anti-apartheid activist, Rev Frank Chikane.

62.3.5.1 I am advised that Messrs Vlok and van der Merwe applied to the National Director of Public Prosecutions (NDPP) for indemnity in terms of the amended Prosecution Policy referred to above. I am advised that the amended Prosecution Policy employed similar criteria (essentially the TRC amnesty criteria) as the special dispensation in making determinations whether to grant an effective indemnity from prosecution.

62.3.5.2 The NDPP, Adv Vusi Pikoli, stated in an affidavit before the Ginwala Commission of Inquiry that since they "*had declined to disclose in full*" he declined to give them "*immunity from prosecution*". An extract from this affidavit is annexed marked **"HM41"**

62.3.5.3 I am advised that the Chairperson of the RG, Dr J T Delport, served as a Deputy Minister of Provincial Affairs during the Apartheid regime. Dr Delport in a report to the President dated 21 April 2008 (dealt with below) states that *""the full disclosure" requirement (the requirement which was the cause of the failure in most instances), is surely not a critical element any more"*.



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62.4 Various correspondence and minutes, including:

62.4.1 Undated minutes titled "Establishment of the Reference Group". A copy of these minutes is annexed marked **"HM42"** Certain political party representatives alleged that the TRC was an unsatisfactory process. The Director General of Justice was recorded as saying that it was "*not necessary to identify applicant who gave command. Party can simply confirm*".

62.4.2 The African People's Convention (APC) saw the RG as an "Amnesty Committee". In a letter dated 10 December 2007 addressed to the Office of the Director General in the Office of the President, the Secretary General of the APC confirmed its representative to serve on "the Amnesty Committee as outlined by the President of the Republic. A copy of this letter is annexed hereto marked **"HM43"**

62.4.3 In a report titled "Representations to the President" dated 21 April 2008, Dr Delport stated that the RG "*will indeed be able to make a contribution towards 'finishing the unfinished business of the past'"*. He claimed as the chairman that he could "*testify to the fairness and objectivity with which members take decisions".* Dr Delport urged the President to



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broaden the Terms of Reference so that the RG could consider applications from perpetrators who were denied amnesty and from perpetrators who had not been criminally charged. He wrote that perpetrators who were denied amnesty should be considered for pardon because:

> *"the fact that not all perpetrators were even-handedly treated cast a shadow over the whole process of closure; the perception is that justice was not meted out equally for all. Consequently the process lacks legitimacy in the eyes of many South Africans and particularly those who were incarcerated and their families".*

> *"If indeed the object of the* [RG] *is to obtain closure…applicants who failed to get amnesty in the TRC ought to be included. Such inclusion will not undermine the process: years have gone by and the 'full disclosure' requirement (the requirement which was the cause of the failure in most instances), is surely not a critical element any more. In most of these cases where amnesty was denied on the grounds that 'full disclosure' was not made, it was disputed that the crime was indeed 'political'".*



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62.4.4 A letter from Dr Delport dated 29 August 2008 was addressed to the Head of Legal and Executive Services at the Presidency. A copy of this letter is annexed marked **"HM44"** In this letter Dr Delport-

62.4.4.1 claims that the special dispensation "*was never intended to further or supplement the TRC process objectives*". This claim is made even though the preamble to the Terms of Reference of the RG states that the special dispensation was created because laws such as the TRC Act had expired and could no longer be utilized.

62.4.4.2 appears to accept that since victims' rights will be infringed "*the principles of legality and the rule of law must be complied with*"; and added that *"soliciting the views of the victims and or allowing victims to make representation on applicants who are recommended for pardons, will not only create insurmountable challenges or unintended consequences, but will have an effect of delaying the process in toto*".

62.4.4.3 urges the Presidency to decline the request from the CSVR for victim participation because it "*is not material to the outcome of the process but rather a quest for national reconciliation and thus ... should accordingly*



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*not be considered*".

62.4.5 While Dr Delport explicitly urged the President to reject victim participation because it was aimed at "national reconciliation", paragraph 4.1 of the minutes of the RG meeting held on 6 February 2008 described the RG's mandate as that of achieving its objectives "*within the spirit of national reconciliation*". A copy of this report is annexed hereto marked **"HM45"** Moreover, in an undated "Progress Report" which was presumably transmitted to the President's office, Dr Delport stated that the objective of the RG was to promote reconciliation. A copy of this report is annexed hereto marked **"HM46"** In this report Dr Delport "*confirmed* [the RG's] *commitment to pursue its task in terms of the following objectives...*

> *...and whereas amnesty for crimes committed in the course of these conflicts was regarded as an instrument to achieve reconciliation and reconstruction...*
>
> *..and whereas the Reference Group was constituted at the instance of the President to assist him in the evaluation of applications for presidential pardon, the group will utilize this opportunity to contribute to the ideal of reconciliation by advising the President in a spirit of*



WS [signature]

*even handedness and justice on an equal basis for all.*

62.4.6 In a letter dated 9 October 2008 addressed to President Motlanthe, a copy of which is annexed marked **"HM47",** Dr Delport revealed that:

62.4.6.1 the RG would not be able to finalise recommendations on all the 2300 applications and that only 600 applications had been finalised so far. This was because the applicants provided "*scant information*";

62.4.6.2 although the RG had considered requesting an extension it decided not to do so as most members will be "*electioneering for the General Election*".

62.4.6.3 the only verification conducted by the RG was the obtaining of court judgments and that qualified legal assistants were needed to "summarise court judgments for members";

62.4.6.4 on 30 November the RG would deliver its report, which would include a list of unfinished applications and the reason why each application could not be finalized. If the President required, the RG would make recommendations on how to deal with the unfinished



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applications.

62.4.6.5 The RG was under a moral and legal duty to deal with applications expeditiously to reduce anxiety amongst the perpetrators, and therefore recommended that the President inform the perpetrators of his decision as soon as he received the RG recommendations and inform those perpetrators whose applications were not completed how their applications would be dealt with.

62.4.6.6 The RG was persisting with its efforts to broaden its mandate to include those perpetrators denied amnesty, those facing prosecution and those who had not been charged as yet. The RG recommended that the President initiate a new process to deal with these categories.

62.4.6.7 The RG was persisting with its efforts to persuade the President to arrange payment for its members.

63. Significantly, the following requested information was not provided by the PAIA Unit of the DOJ:

63.1 Applications of the perpetrators together with their motivations for pardons;



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63.2 Endorsements for pardons by political parties;

63.3 Names of applicants recommended for pardon.

63.4 Reasons for the decisions to recommend pardons.

Further communications with President Motlanthe and the Minister

64. On 9 December 2008, the attorney for the applicants, Mr. S P Kahanovitz of the Legal Resources Centre (LRC), addressed a letter to President Motlanthe. A copy of this letter is annexed hereto marked **"HM48"** Mr. Kahanovitz:

64.1 referred the President to the NGO coalition letter of 3 October 2008 and reiterated that the special dispensation was inconsistent with the Constitution, the Service Charter for Victims of Crime in South Africa, and the principles and values underpinning the Truth and Reconciliation Commission.

64.2 sought the President's urgent assurance that he would not pardon any of the perpetrators who had applied for pardons through the special dispensation without first considering submissions from relevant victims.



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64.3 requested that in the event that the President was not prepared to consider the submissions of victims before pardoning political offenders, he should provide full reasons for his refusal to do so.

64.4 stated that if such an assurance (or reasons) were not received by the close of business on 12 December 2008, his clients would have no alternative but to institute urgent legal proceedings.

65. A copy of that letter was both served on the President's Cape Town office and faxed to him in Pretoria. Adv Sigodi of the Legal & Executive Services Unit of the Presidency acknowledged receipt of it on 11 December 2008 and undertook to revert to our attorneys of record by 19 December 2008. A copy of Adv Sigodi's letter is annexed marked **"HM49"**

66. On 18 December 2008 Adv Sigodi advised in a letter that the "President has instructed that your letter be referred to the Minister of Justice & Constitutional Development for his consideration and advice". Further in the letter the President undertook not to consider "any of the political pardons received from the Reference Group" until such time as the Minister had made a recommendation. A copy of the letter is annexed marked **"HM50"**

67. Following this exchange our attorney received the following two letters in January 2009:



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67.1 a letter from the Director General of the Department of Justice & Constitutional Development, dated 6 January 2009 and received on 13 January 2009, where the Director General stated that the department would be seeking a legal opinion on this matter before making any recommendations. A copy of that letter is attached marked **"HM51"**

67.2 a further letter dated 8 January 2009 was received from the Minister acknowledging that the matter had been sent to him for his consideration, and stating that he intended in due course to advise the President on the issue and would reply to our attorney's letter to him of 17 November 2008. A copy of this letter is annexed marked **"HM52"**

68. On our instructions our attorney, by way of a letter dated 16 January 2009, acknowledged the letters received from the Minister and his Director General and suggested that the legal opinion should be made available to us so that we could attempt to resolve this matter without resort to litigation. A copy of this letter is annexed marked **"HM53"**

69. We did not hear further from the Minister until 10 March 2009, when a letter was faxed to the LRC. The Minister stated that he was now in possession of counsel's opinion and that he had made recommendations to the President. The Minister also stated that the



WS [signature]

remaining applications and recommendations of the Reference Group were expected to be submitted to the President by Friday 13 March 2009. A copy of this letter is annexed marked **"HM54"**

70. On 11 March 2009, Adv Lwazi Kubukeli of the LRC (in the absence of Mr Kahanovitz, who is now away on sabbatical leave) faxed a letter to the Minister, which was copied to Adv S Sigodi, the Head of Legal & Executive Services in the Presidency). In that letter, a copy of which is annexed marked **"HM55"**, Adv Kubukeli

70.1 requested the Minister to make available to us his counsel's opinion, together with his recommendations to the President, so that we may make submissions to the President;

70.2 noted with some alarm, that political pardon recommendations appeared to have been submitted to the President exclusively on the basis of representations made by perpetrators and political parties;

70.3 noted that it appeared that our request for the views of victims and other interested parties to be heard during the recommendations process has fallen on deaf ears;

70.4 enquired whether political pardon "applications and recommendations" had been considered by the Minister and

whether his own recommendations would accompany those of the Reference Group;

70.5 enquired whether the Minister had specifically applied his mind to the question of whether victims should be excluded from the recommendations process;

70.6 assumed that the written undertaking provided by the President's office on 18 December 2008, namely that the President would not consider any of the political pardons received from the RG pending his decision on our request to him contained in our letter dated 9 December 2008, still stood;

70.7 stated that the applicants did not wish to be taken by surprise, and proposed that if the President intended to make decisions on the recommendations of the RG, without the submissions of victims, the parties urgently agree on a process that would allow the applicants sufficient time to institute urgent legal proceedings.

71. On Friday afternoon, 13 March 2009, a letter from Adv Sigodi, the Head of Legal & Executive Services in the Presidency, was faxed to the LRC. Adv Sigodi stated that he acted on the instructions of the President and that he was responding to LRC's letters dated 3 October and 9 December 2008. The letter is annexed hereto marked **"HM56".** In the letter he advised that:



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71.1 the power of the President to grant pardons was "constitutionally authorised";

71.2 former President Mbeki had outlined in a joint sitting of Parliament a "dispensation of pardoning certain individuals who have been convicted of crimes in furtherance of political objectives…";

71.3 a Reference Group comprising members of political parties processed each application for political pardon and made representations to the President;

71.4 the terms of reference of the Reference Group stated that those who had been refused amnesty under the TRC Act did not qualify for pardon;

71.5 the "complaint" raised in the LRC letters relates only to the "process" behind the special dispensation for political parties; namely that victims of crime are not afforded an opportunity to make representations;

71.6 "it is not necessary to comment on the correct exposition of the law except to state that it is the President's considered view that the process .... is regular"

71.7 the President will not be furnishing any undertakings referred to in your letters."

72. On 16 March 2008 the LRC responded by way of a letter faxed to the President, a copy of which is annexed marked **"HM57"**. In this letter the LRC on behalf of the applicants:

72.1 expressed disappointment that the President appeared to take the view that since the Constitution empowered him to grant pardons it did not matter what process he put in place for the purpose of processing and recommending pardons; even if such a process was manifestly unfair and constitutionally unsound;

72.2 stated that such an approach was inconsistent with the spirit and purpose of South Africa's new constitutional order; and that it specifically flew in the face of the requirement laid down by the author of the Special Dispensation on Political Pardons, former President Mbeki, who stated in a joint sitting of Parliament, that the process would comply with the "principles, criteria, and spirit" of the Truth and Reconciliation Commission.

72.3 assumed that the President had decided to consider the recommendations on political pardons exclusively on the basis of representations made by perpetrators and political parties.

72.4 further assumed that the President had decided specifically to exclude and prevent the views of victims from being heard in the



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recommendations process; and moreover that the President had condoned an entirely secret recommendations process for political pardons.

72.5 advised that the applicants were left with no choice but to bring an urgent application to court to interdict the President from issuing political pardons and requested him not to issue any political pardons pending the final determination of the rights of victims by a court.

The Judgment in the Prosecution Policy challenge case

73. Meanwhile, on 12 December 2008 judgment was handed down by the Pretoria High Court in te matter of *Thembisile Nkadimeng and Others vs. The National Director of Public Prosecutions and Another* (TPD case no 32709/07)). In this matter the policy amendments to the Prosecution Policy were challenged on the basis that they constituted an impermissible rerun of the TRC's amnesty process. The policy amendments had introduced new criteria, essentially the same as the TRC amnesty criteria, upon which the NDPP could decline to prosecute cases arising from the conflicts of the past.

74. Legodi J agreed with counsel for the applicants that the policy amendments were "*a copy or duplication*" and a "*copy cat"* of the TRC's amnesty criteria and guidelines. He declared the policy amendments to be inconsistent with the Constitution and accordingly unlawful and

invalid. A copy of the judgment by Judge M F Legodi is annexed hereto marked **"HM58"**.

75. The respondents in that case lodged an application for leave to appeal, but have not prosecuted this appeal.

76. I am advised that the core policy amendment criteria are similar to the criteria employed by the RG.

**THE SCOPE OF THE SPECIAL DISPENSATION ON PARDONS**

77. The preamble to the terms of reference sets out the context and rationale for the President's special dispensation on pardons. A copy of the terms of reference is annexed hereto marked **"HM59"**,

77.1 The preamble makes it clear that the special dispensation is meant to bring closure for those persons convicted of political crimes arising out of the conflicts of the past.

77.2 Since the earlier laws providing for amnesty and indemnity, namely the Indemnity Act (Act 35 of 1990), the Further Indemnity Act (Act 15 of 1992) and the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995) (the TRC Act), have lapsed and "can no longer be utilized to deal with the existing matter at hand," and since "the President considered all other relevant statutory



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provisions, [and] did not find any existing measures suitable to deal with the specific matter at hand," the President decided to use his constitutional power of pardon to establish a special dispensation for processing such pardons.

77.3 The President accordingly established a Reference Group consisting of representatives of political organizations in terms of section 1 of the terms of reference. The responsibilities of the RG are set out in section 2 and include:

77.3.1 receiving all screened applications for pardon from the Department of Justice and Constitution Development (DOJ);

77.3.2 ensuring that each application for pardon is completed in a prescribed manner;

77.3.3 considering each application for pardon and make recommendations to the President.

77.4 Under section 2 the RG was required to develop its own rules and procedures in considering each application for pardon for purpose of making recommendations to the President. The RG was obliged to communicate its rules and procedures to the DOJ within fourteen (14) days of its first sitting.

77.5 The DOJ was required to provide administrative support to the RG. The seat of the RG was to be in Cape Town or any other location as might be determined by the RG in consultation with the DOJ.

77.6 Section 6 of the terms of reference stipulated that the RG should exist for the period as from the date of its first meeting to the 30th September 2008, although this date was later extended to the end of November 2008.

77.7 Section 7 sets out who qualifies for pardon under the special dispensation. These are persons who:

77.7.1 were convicted and sentenced solely on account of allegedly having committed politically motivated offences before June 16, 1999, the date of the inauguration of President Mbeki;

77.7.2 comply with the pre-determined criteria and procedures as set out in the application form;

77.7.3 attach an affidavit deposed by a person authorized by a political party, liberation movement or body, in which it is confirmed that the act or omission which constituted the offence occurred under the instruction of, or in the execution of an order, plan or project, or on behalf of, or with the approval of, or in furtherance, promotion or achievement of

the policies, objectives or interests of, the organisation of which the applicant was a member, agent or a supporter.

77.8 Section 8 disqualifies offenders who have committed sexual crimes, crimes involving domestic violence, drug related crimes; or offenders whose earlier applications for amnesty to the Committee on Amnesty established under the TRC Act were refused.

77.9 Section 9 permitted applications to be made by individuals and it allowed for political parties to submit applications to the DOJ on behalf of individuals.

77.10 Section 10 required that all recommendations made in respect of applications for pardon be submitted to the President and that each recommendation made by the RG reflect the majority as well as the minority views of members, if any.

77.11 According to section 11 the granting of a pardon to any person will lead to the expungement of the conviction and the criminal record of the offence in respect of which he or she is granted pardon.

**OBJECTIONS TO THE SPECIAL DISPENSATION**

78. The subject matter of the special dispensation, namely the "unfinished business" of the TRC, has its roots deep within South Africa's negotiated



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transition and the creation of South Africa's new constitutional order. The exclusion of victims and interested parties, together with the secrecy attached to the special dispensation, stands as a deep affront to the suffering of victims and to the compromises they made to ensure the success of the transition.

79. Paragraph 2 of the preamble to the Terms of Reference states that if the amnesty provisions of the Promotion of National Unity and Reconciliation Act, 1995 ("the TRC Act") were available today they would have been used to deal with persons who have been convicted and sentenced for politically motivated offences and who did not apply to the TRC for amnesty. The preamble to the Terms of Reference notes that since the TRC amnesty law is no longer applicable and given that the President enjoys the constitutional power to grant pardons, he accordingly intends to exercise such power to deal with the outstanding cases.

The TRC's amnesty process

80. I submit that the TRC, and particularly its amnesty process, was instrumental in paving the way for the creation of the democratic South Africa. It is widely acknowledged that the agreement on amnesty, as encapsulated in the epilogue to the interim Constitution, secured the participation of opposing factions in the negotiation process. Without the compromise of amnesty it is possible that the negotiated transition would not have been successful and the "historic bridge", as described in the



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interim constitution, never crossed.

81. It is therefore no exaggeration to say that, without agreement on the principles that underpinned the TRC, whose existence is based on the epilogue, South Africa's modern democracy might not have been born. I submit that a betrayal of those principles would constitute a betrayal of the foundation of the new South Africa.

82. A critical aspect of South Africa's transition was the "constitutional compact" struck with victims, in terms of which the interim Constitution specifically allowed for a once-off amnesty to be granted to those perpetrators who came forward and publicly told the whole truth about their crimes and who complied with certain other requirements. This required the victims to forego their rights in relation to justice in order to advance national unity and reconciliation. The state thereby entered into a compact with victims. This compact required the state to prosecute deserving cases in respect of offenders who did not receive amnesty. Another direct implication of the compact was that convicted perpetrators who were refused amnesty or who did not apply for amnesty would face the consequences thereof and would retain their criminal records and serve out their sentences in the normal course.

83. It is the applicants' contention that the special dispensation on pardons violates the Constitutional compact struck with victims in relation to the TRC by providing the possibility of the expunging of criminal records and



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release from criminal sentences to those who committed serious crimes during the apartheid era and beyond, who did not apply for amnesty. The special dispensation undermines the very fabric of the TRC process and design and in so doing disavows the very foundations of South Africa's democracy. The extension of the cut-off date of politically motivated cases to be considered from the TRC cut-off date in 1994 to 16 June 1999 also stands as a betrayal of the TRC process. The special dispensation is accordingly not only a betrayal of the constitutional compact made by South Africans but aspects thereof are also unlawful. In this regard I refer to the affidavit of **Alexander Lionel Boraine** annexed marked **"HM8"**.

An effective re-run of the TRC Amnesty process

84. In effect and outcome, the special dispensation on pardons differs only in form from the TRC's amnesty regime. A decision to pardon has the same practical effect as the erstwhile Amnesty Committee's decision to grant amnesty: a criminal record is expunged and the perpetrator in question is released from any penalty imposed upon him or her.

85. The key criteria for the recommendation of a pardon under the special dispensation as set out in the application form mirror the amnesty criteria contained in sec 20 of the TRC Act:

85.1 Paragraph 3.4(c) dealing with a political objective replicates sec



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20(1)(b) of the TRC Act;

85.2 Paragraph 3.1.2 dealing with motive replicates sec 20(3)(a) of the TRC Act;

85.3 Paragraph 3.4(a) dealing with whether the act was committed on behalf of an organisation replicates sec 20(3)(e) of the TRC Act;

85.4 Paragraph 3.3(a) dealing with personal gain replicates sec 20(3)(f)(i) of the TRC Act.

86. In applying the amnesty criteria, the President and the RG are little more than a replica of the erstwhile Amnesty Committee of the TRC. Instead of granting amnesty, the RG recommended pardons: the President may issue pardons on exactly the same criteria as the TRC's amnesty process. The effect is no different.

Rights of victims and the public in the TRC amnesty process

*Victims' rights*

87. While the effect and outcome of the special dispensation process is the same as that of the TRC's amnesty process, the special dispensation offers none of the openness and the safeguards provided by the TRC process. One of the bedrock principles behind the conditional amnesty



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of the TRC was full disclosure by perpetrators. Victim participation was a crucial aspect of testing the version of perpetrators in order to ensure full disclosure.

88. In compliance with the principles underlying South Africa's new constitutional order, the TRC process afforded certain rights and benefits to victims, such as the right to participate in hearings, receive counselling services and be awarded reparations.

88.1 Section 11 of the TRC Act makes it clear that when dealing with victims the actions of the TRC must be guided by the following principles:

88.1.1 Victims shall be treated with compassion and respect for their dignity.

88.1.2 Victims shall be treated equally and without discrimination of any kind.

88.1.3 Procedures for dealing with applications by victims shall be expeditious, fair, inexpensive and accessible.

88.1.4 Victims shall be informed through the press, and any other medium, of their rights in seeking redress through the TRC, including information of –



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88.1.4.1 the role of the TRC and the scope of its activities;

88.1.4.2 the right of victims to have their views and submissions presented and considered at appropriate stages of enquiry.

88.1.5 Appropriate measures shall be taken in order to minimise inconvenience to victims and, where necessary, to protect their privacy to ensure their safety as well as that of their families and of witnesses testifying on their behalf, and to protect them from intimidation.

88.2 The Commission reported extensively on its rigorous amnesty process and in particular its efforts to involve victims and to ensure that the process was public and transparent. In the chapter titled "Administrative Report" at Volume 6, Section 1, Chapter 2 at paragraphs 39 - 66 the seven stages of the amnesty process are set out.

88.2.1 The first stage involved the initial perusal of the applications to ensure that administrative requirements were met.

88.2.2 In the second stage, the evidence analysts perused the applications to, amongst other things, ascertain whether the



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act or omission in question was associated with a political objective or not.

88.2.3 The third stage entailed completing the required investigation before proceeding to finalise the application.

88.2.4 Upon completion of the required investigations and after final perusal by the evidence analyst in the fourth stage, an application was ready for submission to the Committee and would be dealt with either in chambers or at a public hearing.

88.2.5 In the fifth stage, the leader of evidence was responsible for putting before the Committee all the relevant evidence it might require in order to come to a decision as to whether or not amnesty should be granted.

88.2.6 The sixth stage involved the hearings, which not only took place in public, but were also extensively covered by the print and electronic media.

88.2.7 The final stage in dealing with an application was the delivery of a public decision by the Committee, with reasons, and the consequent notification of all parties concerned.

88.3 At paragraphs 57 - 59 in Volume 6, Section 1, Chapter 2 the



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Commission set out the detailed procedural rules for amnesty hearings. It described the safeguards to protect the interests of victims and the relatives of victims, which included the right to testify, call witnesses and address the Amnesty Committee.

88.4 The Commission involved victims at most levels of the amnesty process. The involvement of victims was set out in Volume 6, Section 1, Chapter 2 of the Report.

88.4.1 A senior staff member of the Amnesty Department was appointed as an amnesty victim coordinator, with a staff complement.

88.4.2 Witness protectors who were experienced members of the security forces were available for the protection of victims.

88.4.3 Investigators were required to obtain statements about the incidents in question from victims.

88.4.4 The scheduling of hearings had to take into account the location and availability of victims and their legal representatives, so that they could attend the hearing. Victims had to be notified of the date and venue of the hearing at least fourteen days before the hearing. As far as was practical and reasonable, the Committee was responsible for



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providing transport and accommodation for victims.

88.4.5 The hearing documentation containing the application(s) and relevant documentation was made available to victims and their legal representatives.

88.4.6 The Committee had to arrange for the services of a legal representative for victims who were not legally represented.

88.4.7 Logistics staff had to take care of travel, accommodation and catering arrangements for victims.

88.4.8 'Briefers', who were qualified mental health workers, were responsible for attending to the emotional well-being of victims for the duration of hearings. Briefers played an invaluable role in assisting grief-stricken victims and relatives.

88.4.9 Victims or the relatives of the victims and any witnesses they wished to call were permitted to give evidence at hearings. Victims who were unable to contribute towards the merits were allowed to make a statement rather than testify if they so preferred. These statements normally dealt with contextual or background factors and subjective views and experiences, often critical to issues of reconciliation and closure for victims.



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88.4.10 As soon as an amnesty decision was reached, it was handed to the executive secretary, who was required to promptly notify the victim and provide him or her with a copy of the decision as well as a copy of the proclamation that would be published in the Government Gazette. Known victims were notified through their legal representatives.

88.5 The Amnesty Committee of the TRC noted that because of its functions, which were specifically mandated by statute, it was seen as "perpetrator friendly". The Amnesty Committee, in its report at Volume 6, Section 1, Chapter 5 at paragraphs 5 to 8, stressed that notwithstanding this perception, the Committee made substantial resources available to assist victims, locating them, arranging for their legal representation and providing subsistence, transport and accommodation to enable them to attend and participate fully in amnesty hearings.

*Rights of the public and media*

89. The pardoning of convicted persons who committed crimes associated with the apartheid regime and South Africa's transition to democracy is of manifestly a matter of public interest. The public has an interest not only in the recommendations made by the RG and the decisions made by the President, but also in the manner in which those conclusions are reached.



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90. Given that this is a matter of public interest, the special dispensation on pardons ought to have been conducted as openly and transparently as possible. Despite the clear public interest and despite demand, the RG only disclosed its rules and procedures two weekdays before the end of its mandate. It never released the pardon applications submitted to it. All of the RG's meetings were held behind closed doors. The RG process has been for practical purpose a secret one. It appears that the President intends to make his decisions without giving anyone, including those whose rights and interests are affected by his decisions, any chance to be heard in them or in the process which has led up to them.

91. By contrast, the amnesty process of the TRC was a largely open process. The TRC found that the media played a very constructive and important role in covering amnesty hearings, and an excellent working relationship developed between the media and the Committee. The TRC noted in its Report at paragraph 55 of Volume 6, Section 1, Chapter 2 that the role of the media in communicating the essence of the amnesty process and involving the public in the proceedings "cannot be underestimated."

Principles and values that ought to have guided the Special Dispensation

92. The TRC expressed its reservations in connection with certain Presidential pardons that had been issued. In particular the Commission

stated that any further amnesty or pardons should not undermine the rationale of the TRC or its work. In the recommendations of the TRC at Volume 6, Section 5, Chapter 7 at paragraphs 32 - 33 the following is stated:

> **"32. The Commission therefore recommends that in the event that the President is considering a further amnesty provision, the following should be taken into account:**
>
> > **a that the rationale for establishing the Commission should not be undermined and that the value of its work should not be compromised through such a process;**
> >
> > **b that real reconciliation comes from facing the demons of the past honestly and demanding truth and accountability, and**
> >
> > **c that victims should not be 'revictimised' and that any amnesty should take into account their needs and their right to the truth and full disclosure and ultimately reparation .**
>
> **33. The Commission is thus of the view <u>that any amnesty and pardon must make provision for the rights of victims and maintain the constitutionality of our new state</u> based on disclosure and a respect for the human rights of all."**
> **(Underline added)**

93. In his address to the joint sitting of Parliament on 21 November 2007, President Mbeki stated that his consideration of applications for pardons "*will be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation,*" and that he would "*uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process.*" The principles and procedures in relation



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to victims and the wider public of the TRC process have been highlighted above. The RG expressly rejected such principles. The recommendations made by the RG to the President will accordingly not reflect the principles and spirit that inspired and underpinned the TRC process. The Presidential phase of the process is entirely closed to victims and others affected by the offences in question.

94. I have been advised and submit that the creation and implementation of this entirely closed and effectively secret process, and the failure to create any opportunity for participation by members of the public and by persons affected by the offences in question was unlawful.

95. According to paragraph 2.4 of the ToR *"[t]he RG must develop its own rules and procedures in considering each application for pardon for purpose of making recommendations to the President based on each application*." I submit that a reasonable interpretation of this clause read with the preamble and President Mbeki's statement to Parliament requires the RG to develop its own rules and procedures in accordance with the principles and values that underpinned the TRC and the new constitutional order. At the very minimum the RG was required to protect the rights of victims and South Africans generally.

96. I submit further that if that is not the case, then the President acted unlawfully by not requiring the RG to develop rules and procedures in accordance with the principles and values that underpinned the TRC and



WS [signature]

the new constitutional order, and by not requiring the RG to protect the rights of victims and South Africans generally.

97. I point out that victim participation in the TRC, including its amnesty procedures, was, per section 3(1) of the TRC Act, considered necessary not only for reconciliation and nation-building but also for reasons of truth-seeking and establishing "as complete a picture as possible of the causes, nature and extent of the gross violations of human rights…". In particular, the TRC was required to ascertain *"the perspectives of the victims"* and the motives and perspectives of the persons responsible for the commission of the violations. Furthermore, subsection 3(1)(c) required the TRC to establish and make known the fate and whereabouts of victims, and to restore the *human and civil dignity* of such victims by granting them an opportunity to relate *their own account* of in respect of violations of which they were the victims.

98. The terms of reference of the special dispensation are silent on the need to establish the full truth about the violations that are the subject of the special dispensation process, and, significantly, there is no requirement to disclose this truth. Moreover, the Terms of Reference allow political parties themselves to submit applications on behalf of pardon applicants, further undermining any possibility of full disclosure. There are no doubt many cases where the political party in question would not wish to see full disclosure.



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99. The result was that-

99.1 the representative of the entity (the political party of the offender) which might have an interest in avoiding full disclosure, and might have an interest in the concealmeant of the truth, was given full access to the pardon application, and was given a role in determining both the process and the outcome; yet

99.2 the victims or other persons affected by the offence in question, who had an interest in full disclosure, and in establishing the truth of what happened – and also in ensuring that the President was informed of the truth of what happened – were entirely shut out of the process.

99.3 members of the public, who have an interest in disclosure and in the truth being established, were similarly entirely shut out of the process.

100. Indeed Dr Delport explicitly eschewed "full disclosure" as a factor to be considered in the deliberations of the RG. In a report titled "Representations to the President" dated 21 April 2008, Dr Delport stated that *"the 'full disclosure' requirement …is surely not a critical element any more."*

100.1 There is no evidence in the documents disclosed in response to the



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PAIA application, which suggests that his view in this regard was contradicted by the President.

101. Section 4(b) of the TRC Act required the Commission to "facilitate, and initiate or coordinate, the gathering of information and the receiving of evidence from any person, including persons claiming to be victims of such violations or the representatives of such victims, which establish the identity of victims of such violations, their fate or present whereabouts and the nature and extent of the harm suffered by such victims." If the RG were to make recommendations that are based on "full disclosure," as I submit they should be, the representations of victims and other interested parties would be crucial to such determinations, as such submissions would present the RG with evidence that would either refute or reinforce the claims of the applicants for pardons. Yet the RG asserted that it was under no obligation to hear the views of victims, and by implication that it was not required to verify the claims of the perpetrators or their associated political parties.

No transparency and no right to be heard under the special dispensation

102. The special dispensation on pardons, which excluded victims and the public from its processes and operated under blanket secrecy, betrayed the principles established in South Africa's negotiated transition and enshrined in our new constitutional order. The special dispensation on political pardons specifically rejected the TRC's recommendation to



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respect the rights of victims and not to undermine the rationale for the establishment of the TRC.

103. Unlike the TRC amnesty process, which was largely open and transparent, the procedures of the special dispensation are secret. Victims and interested members of the public are completely excluded from the special dispensation process. Not only are they denied participation in the process, but in most cases they were not even aware of the existence of applications for political pardon. Moreover, the only submissions that the President will receive will be the recommendations of the RG.

104. It might be argued that it is not practical for the President to invite representations from victims and other affected parties before deciding whether to grant pardons to the persons who have made application through the special dispensation.

105. I do not accept that this is so. The number of applications recommended by the RG for approval appears to be limited. I invite and request the Respondents to state what that number is. I submit that it would not be impractical for the President to invite and consider representations before making any decisions on those applications.

106. Even if that is not so, the RG phase of the process provided an obvious opportunity for participation by members of the public and by persons

affected by the offences in question. The President plainly had the power and the opportunity to require the RG to create such an opportunity.

107. The RG made recommendations for pardon without first obtaining, or attempting to obtain, the representations of victims or the representations of interested members of the public who may have wished to express their views to the RG on cases which are of national significance. Victims and members of the public were accordingly unable to:

107.1 make representations and rebut claims made by perpetrators that the crimes in question were of a political nature or motivated by a political objective;

107.2 comment on factual circumstances of the offence which are alleged by the perpetrators

107.3 comment on the circumstances in relation to egregious crimes and make representations on the appropriateness of issuing pardons in specific cases;

107.4 highlight the implications and impact of the issue of pardons on identified individuals and communities; and



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107.5 present a firsthand account of the harm caused by the crime.

108. In relation to the right of victims to be heard, I point out that the preamble to the Service Charter for Victims of Crime ("Victims' Charter"), approved by Cabinet on 1 December 2004 in accordance with Sec 234 of the Constitution, states that victims are entitled to *"...the equal enjoyment of all the rights and freedoms that are guaranteed in the Constitution [ ] and that an equitable criminal justice system can only be achieved if the rights of both victims and accused persons are recognized, protected and balanced*." A copy of the preamble to the Victims' Charter is annexed marked **"HM60"** Following the introduction of the Victims' Charter, victims are now permitted to make representation to the Parole Board and attend parole hearings.

*Violation of the principle of openness*

109. I respectfully submit that the values of openness, responsiveness and accountability that are articulated in sec 1(d) of the Constitution, and that permeate the Constitution, create a general presumption that the proceedings of public bodies and organs of state should be open, transparent and accountable to the public. More particularly I submit that the applicants, the public and the media were entitled to access and receive information concerning the pardons process by virtue of the rights to freedom of expression and access to information enshrined in sec 16(1) and 32 of the Constitution.



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110. I submit that the principle of openness applies to virtually all aspects of the Special Dispensation. I submit that the principle of openness would have enhanced the public's respect for the RG's process and its ultimate recommendations. I submit that open hearings:

110.1 act as security for testimonial trustworthiness in that they facilitate the enforcement of procedural fairness;

110.2 enable the public to verify that a public body, such as the RG, abides by constitutional standards;

110.3 have educational value in that they inform the public about matters of fundamental public interest and importance, not least of which are the atrocities committed during the apartheid era.

<u>The RG was not independent or objective and was tainted with bias</u>

111. The RG can hardly be described as an independent, neutral or expert body providing the President with considered and measured advice. The RG was comprised only of representatives of political parties. No victim or victim organisation representatives sat in the RG. The RG did not include any independent experts on matters relevant to pardons.

112. Those applying for pardons were all offenders who are either members



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or supporters of the political parties in question. The representatives of the political parties could not have been expected to act impartially and objectively in the circumstances. This was particularly the case since only one side of the story was presented to the RG, namely that of perpetrators.

113. I submit that where members or supporters of political parties represented on the RG applied for pardons, the representatives on the RG would inevitably be inclined to support their cause. The special dispensation provided for political party representatives to be part of the body making recommendations in matters in which they have a direct interest. They effectively made recommendations in their own cause. I submit that this direct interest is reflected in the request by the RG to the President to include those perpetrators denied amnesty by the TRC Amnesty Committee within the special dispensation.

114. I submit that under such circumstances it is intolerable in our constitutional order that victims should not even be permitted to make representations to the President, let alone be represented on an advisory body such as the RG.

115. I submit that given this structural or institutional bias there was never even a semblance or appearance of impartiality and objectivity in the RG process, which informs the decisions of the President. I submit that in the circumstances the special dispensation gives rise to more than a



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reasonable apprehension of bias.

116. I submit that not only is there more than a reasonable apprehension of bias but that the failure of the RG to accord basic procedural fairness to victims and interested members of the public gave rise to actual bias. In the light of these facts and given the nature and composition of the Board as described above, I submit that

116.1 the members of the RG were not sufficiently independent of the perpetrators making applications for political pardons to make objective recommendations;

116.2 The RG could not have been reasonably expected to approach such matters with an open mind to persuasion.

117. I submit further that, given the relationship between applicants for pardons, who are members and supporters of political parties, and members of the RG who are representatives of the same political parties, any informed victim or interested member of the public will harbour a reasonable apprehension of bias on the part of the RG.

118. I submit that:

118.1 the refusal of the RG to deal with the procedural concerns of the applicants,



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118.2 the refusal of the RG to hear the representations of victims and others, and

118.3 the cloaking of the process in secrecy,

reinforced the actual bias or alternatively the reasonable apprehension of bias that tainted the entire special dispensation on political pardons.

119. I submit that the special dispensation process is accordingly hopelessly tainted by illegality. I submit further that the public can have no faith in a process which is seen to be tainted by bias. Due to the inherent or structural bias that plagued this process there were no opportunities to minimise or reverse the prejudice that the applicants, victims and members of the public with an interest will suffer. I submit that the special dispensation on pardons is consequently invalid on this basis alone.

**GROUNDS OF REVIEW**

Introduction

120. I am advised and I submit that the special dispensation allowed the RG to conduct what is effectively a "re-run" of the TRC amnesty process in respect of those perpetrators who failed to apply to the TRC for amnesty.



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This "re-run" was not sanctioned by the Constitution or by any legislation and, moreover, conferred none of the safeguards contained in the TRC amnesty process.

121. For the reasons set out more fully below, I submit that the special dispensation and its implementation was unjust and unfair to the victims of perpetrators who failed to take advantage of the constitutionally mandated mechanisms offered by the TRC process.

121.1 The special dispensation accordingly betrayed the constitutional compact made with victims.

121.2 In the constitutionally mandated TRC process, victims were required to endure a severe limitation of their fundamental rights in order to secure the passage of South Africa's transition to democracy, national unity and reconciliation. However, the constitutional and statutory design stipulated that the amnesty afforded to perpetrators was a limited one, and that those perpetrators who spurned the process would face the consequences thereof.

122. I submit that the postscript to the Interim Constitution authorised an amnesty process through the establishment of mechanisms, criteria and procedures, all regulated by law, in order to achieve the objectives of national unity and reconciliation.



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122.1 The suspension of the rule of law and the rights of victims to justice as provided for in TRC Act was accordingly authorised by the Interim Constitution. The 1996 Constitution provides no authority for the suspension of the rule of law or the denial of the rights to justice of victims through any other similar programme.

123. The special dispensation contains none of the safeguards provided in the TRC amnesty process.

123.1 Unlike the amnesty regime under the TRC, which provided for open hearings, the special dispensation procedure operated secretly and behind closed doors.

123.2 The RG was not required to publicize an "application" made by perpetrators, which meant that interested parties were completely unaware that an application had been made.

123.3 The RG was under no obligation to make public any disclosure that was made by applicants or indeed any information about the conflicts of the past that were revealed in the process; and it made no such disclosures.

124. The operation of the special dispensation gives those responsible for human rights violations, who boycotted a negotiated and constitutional



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programme of truth and reconciliation, an opportunity of an effective amnesty without so much as a public appearance or public acknowledgment of their wrongful acts.

125. While perpetrators were afforded considerable benefits under the special dispensation, victims were accorded none. These shortcomings are in my view a reflection of the failure of President Mbeki to consult with victims, including victims' families and organisations representing the interests of victims before issuing the special dispensation; alternatively it represents a failure of the RG properly to interpret its terms of reference in accordance with constitutional principles.

Conflict with sec 33 of the Constitution and PAJA and/ or the common law

126. In the light of what is set out above, the decision of the President to establish the special dispensation on political pardons in a manner that excluded victim participation, alternatively his failure to insist on the inclusion of victim inputs in the special dispensation, is challenged in these proceedings on the grounds that it is inconsistent with the provisions set out in sec 33 of the Constitution, in the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), and in the common law.

127. I have been advised and respectfully submit that the President's decision to grant a pardon constitutes administrative action, and is accordingly subject to the requirements of sec 33 of the Constitution and PAJA.



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Alternatively, if it does not constitute administrative action, then it is in any event subject to the common law duty to act fairly. The content of the duty to act fairly must be determined in the light of the constitutional and historical context to which I have referred.

128. The President's intention to grant political pardons on the basis of the special dispensation, in a manner that excluded victim participation, alternatively his failure to insist on the inclusion of victim inputs in the special dispensation, is inconsistent with:

128.1 sec 6 (2) (f) (ii) of PAJA in that the special dispensation and its process are not rationally related to its purpose, which was to recommend appropriate cases for pardon based on *inter alia* disclosure, establishing the true facts, and the showing of a political motivation;

128.2 sec 6 (2) (h) of PAJA in that the special dispensation and its process are unreasonable, alternatively, irrational. This is so because there was no prospect of determining the accuracy of disclosures and whether there was in fact a political objective when only one side of the story was told – and what is more, told to a body which was inherently and structurally biased.

128.3 sec 3 (2) (b) (ii) of PAJA and the *audi alteram partem* rule in that the special dispensation and its process permitted far reaching



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recommendations to be made without any representations from affected parties;

128.4 sec 3 (3) (b) of PAJA and the *audi alteram partem* rule in that the special dispensation and its process prevented victims and other interested persons from disputing information and arguments made by perpetrators and political parties;

128.5 sec 6 (2) (a) (iii) of PAJA in that the special dispensation and its process were tainted by actual bias or a reasonable suspicion of bias; while the composition of the RG gave rise to actual or structural bias or a reasonable suspicion of such bias in violation of sec 33 of the Constitution;

128.6 sec 6 (2) (d) of PAJA in that the refusal to include victim participation and to shroud the process in secrecy was materially influenced by errors of law.

128.7 the duty under the common law to act fairly.

129. Since the purpose of the special dispensation was to make recommendations for pardons based on determinations of whether accurate disclosure was made and whether the crime in connection was politically motivated, the decision to confine representations to perpetrators and political parties meant that the decision-maker had little



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or no way of verifying, assessing or testing the claims. This action was in violation of-

129.1 sec 6(2)(e)(vi) of PAJA in that it amounted to arbitrary or capricious conduct;

129.2 sec 6(2)(f)(ii) of PAJA in that it was not rationally connected to the purpose of the special dispensation;

129.3 sec 6(2)(h) in that it amounted to the performance of a function in pursuance of the special dispensation that was so unreasonable that no reasonable person could have so exercised the power or performed the function;

129.4 sec 6(2)(i) in that the conduct was otherwise unconstitutional or unlawful;

129.5 the common law duty to act fairly.

**GROUNDS OF UNCONSTITUTIONALITY**

130. The special dispensation on pardons as established by the President is substantively unconstitutional and invalid and is challenged in these proceedings on the following grounds:

Violation of the rule of law

131. I submit that the special dispensation on pardons is substantively unconstitutional and invalid in that it infringes the principle of the rule of law contained in sec 1 of the Constitution:

131.1 by facilitating the cessation of all further criminal penalties and the expunging of criminal records of perpetrators through:

131.1.1 an entirely secret process;

131.1.2 a process that eschews the carefully negotiated values, principles and safeguards for addressing politically motivated crime established during South Africa's transition.

131.2 by facilitating the cessation of all further criminal penalties and the expunging of criminal records of those perpetrators through a process that prevents victims, other affected and interested persons, and the public in general from registering any objections that they may have in relation to recommendations for pardons.

132. I submit that the special dispensation, insofar as it purports to recommend pardons solely on the basis of perpetrator applications as considered by political party representatives, without securing representations of those with a direct interest, constitutes arbitrary



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conduct. I submit that such conduct is arbitrary since it is not rationally related to the purpose of the special dispensation, which is to recommend appropriate cases for pardon based on criteria that include disclosure and the showing of a political motivation. I submit that there is no prospect of such criteria being properly tested through the special dispensation, which only seeks to hear the versions of the perpetrators.

Violation of the right to dignity

132.1 The creation of the special dispensation on political pardons by President Mbeki and the subsequent failure by President Mothlante to uphold victim participation has infringed upon the right to dignity of victims enshrined in sec 10 of the Constitution in that the special dispensation:

132.1.1 serves to benefit the perpetrators of gross human rights at the expense of victims and the victims' families;

132.1.2 causes suffering to victims and victims' families by denying them full justice;

132.1.3 dishonours the respect, dignity, value and acceptance of victims and victims' families in the wider community

132.1.4 demeans South African society as a whole by betraying the



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constitutional compact made with victims as enshrined in the epilogue to the *Constitution of the Republic of South Africa Act* 200 of 1993 and undermines the purpose and spirit behind the TRC;

Violation of the right to life

132.2 The creation of the special dispensation on political pardons by President Mbeki and the subsequent failure by President Mothlante to uphold victim participation violate the rights of victims to life enshrined in sec 11 by:

132.2.1 facilitating the cessation of all further criminal penalties and the expunging of criminal records of those perpetrators who infringed this right by committing acts of murder and enforced disappearances;

132.2.2 failing to give value to the lives of victims.

Violation of the right to freedom and security of the person

132.3 The creation of the special dispensation on political pardons by President Mbeki and the subsequent failure by President Mothlante to uphold victim participation violate the rights of victims to freedom and security of the person enshrined in sec 12 by facilitating the



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cessation of all further criminal penalties and the expunging of criminal records of those perpetrators who committed acts of torture, assault and other cruel and inhuman treatment;

Violation of the right to equal protection before the law

132.4 The special dispensation on political pardons has violated the rights of victims to equal protection and benefit of the law enshrined in sec 9 of the Constitution by

132.4.1 recognizing and promoting the rights of perpetrators but not the rights and freedoms of victims;

132.4.2 discriminating against victims who are the victims of crimes which happen to be the subject matter of the special dispensation on political pardons.

Violation of the right to freedom of expression

132.5 The special dispensation on political pardons has violated the rights of victims to freedom of expression as enshrined in Sec 16 of the Constitution by

132.5.1 denying the applicants, victims, interested members of the public and the media the freedom to receive pertinent



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information in relation to the special dispensation on pardons;

132.5.2 denying the press and other media the freedom to report on the special dispensation on pardons and to impart important information to the wider public.

The special dispensation is not a law of general application

132.6 The special dispensation on pardons is not a law. I am advised that it accordingly cannot constitute a law of general application for purposes of sec 36 of the Constitution, which may permissibly limit the rights enumerated in the Bill of Rights.

132.7 Since the provisions of the special dispensation infringe the rights referred to above, I submit that it is unconstitutional and moreover it cannot be saved by a consideration of the factors listed in sec 36 as it is not a law of general application.

The duty to respect, promote and fulfil rights

132.8 The President has a duty to respect, promote and fulfil the rights to dignity, life, freedom of security of person, freedom of expression and to equal protection and benefit of the law by virtue of sec 7(2) of the Constitution. The special dispensation on political pardons, as approved and condoned by the President, violated these rights.



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132.9 In terms of sec 8(1), the bill of rights binds all organs of state. I am advised that the President's exercise of power in terms of sec 84(2)(j) is accordingly reviewable for want of compliance with the bill of rights and the constitutional principles of legality and rule of law.

Violation of South Africa's international law obligations

132.10 The special dispensation on political pardons is substantively unconstitutional and invalid in that it constitutes an infringement of the international law obligations of the Republic of South Africa, as set out in sec 231 to 233 read with sec 39(b) of the Constitution, to uphold the right to justice and to punish violations of human rights.

132.11 The special dispensation on pardons violates the following international law instruments to which South Africa is a party, and by which it is bound:

132.11.1 Article 2(3), of the International Covenant for Civil and Political Rights ("ICCPR") by denying victims and their families an effective and full criminal justice remedy;

132.11.2 Article 6(1), of the ICCPR by permitting those who have violated the right to life to escape their full punishment and/ or



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to have their criminal records expunged;

132.11.3 Article 7 of the ICCPR by permitting the perpetrators of torture or cruel, inhuman or degrading treatment or punishment to escape their full punishment and/ or to have their criminal records expunged;

132.11.4 Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") by failing to give effect to the requirement that all acts of torture must be punishable by appropriate penalties.

**RESTRAINING THE FIRST RESPONDENT**

133. I submit that the applicants, in demonstrating the unlawfulness of the special dispensation process and the imminent granting of pardons pursuant to that process, have established a clear right that pardons should not and may not be granted under such circumstances.

134. I submit that the applicants, in demonstrating that the special dispensation process infringes constitutional rights; and in showing that the issuing of political pardons without victim inputs will seriously prejudice the rights of victims, have established a reasonable apprehension of injury.



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135. I submit that once pardons under the special dispensation are made by the President, and prisoners are released from incarceration, it will be exceedingly difficult, if not impossible, to reverse.

136. Victims will suffer considerable stress and trauma where pardons in relation to particularly serious crimes are issued.

137. In the circumstances, I submit that the applicants have amply demonstrated that the balance of convenience favours them and that they and associated victims will suffer irreversible harm if pardons are issued before the final resolution of these proceedings.

138. I submit that that the applicants have no other viable or alternative remedy. During the special dispensation the applicants, victims and interested parties had no way of knowing what cases were before the RG and what motivations for pardons were put up, let alone what cases were recommended to the President. They were accordingly unable to take any meaningful action. As mentioned above, once the President has issued pardons, it will be extraordinarily difficult to overturn such pardons and return released perpetrators to prison.

139. I submit that the applicants have amply demonstrated that they have exhausted all other remedies before seeking redress in the courts through extensive lobbying and engagement in an attempt to persuade

the President and the RG to act lawfully.

140. Notwithstanding these extensive efforts the RG persisted with its refusal to engage with victims and in so doing displayed a consistent disregard for the law. The President, rather than requiring the RG to act lawfully, has approved, condoned and justified the exclusion of victims as well as the blanket secrecy of the special dispensation on political pardons.

141. The applicants tender to co-operate with the respondents, if the latter so wish, to achieve a shortening of the time limits for the filing of papers and in an approach to the Deputy Judge President for an expedited hearing of the application for final relief in Part B of the Notice of Motion.

Wherefore I pray that this Honourable Court grants the relief set out in the Notice of Motion.

**HUGO VAN DER MERWE**

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Cape Town on this the 17th day of MARCH 2009, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended,



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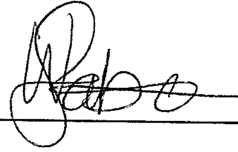
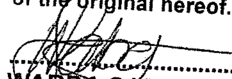
having been complied with.



**COMMISSIONER OF OATHS**

CERTIFICATE

I certify this to be a true and correct copy of the original hereof.



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