IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the application of:	CASE NO: 62/11
CENTRE FOR APPLIED LEGAL STUDIES	First Applicant
COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTIUTION	Second Applicant
and	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
CHIEF JUSTICE SANDILE NGCOBO	Third Respondent
and	
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	First Amicus Curiae
BLACK LAWYERS ASSOCIATION	Second Amicus Curiae
In the application of:	CASE NO: 53/11
JUSTICE ALLIANCE OF SOUTH AFRICA	Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

CHIEF JUSTICE SANDILE NGCOBO Third Respondent

and

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS First Amicus Curiae

BLACK LAWYERS ASSOCIATION Second Amicus Curiae

In the application of: CASE NO: 54/11

FREEDOM UNDER LAW Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE DIRECTOR-GENERAL: JUSTICE AND CONSTIUTIONAL DEVELOPMENT Second Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Third Respondent

CHIEF JUSTICE SANDILE NGCOBO Fourth Respondent

and

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS First Amicus Curiae

BLACK LAWYERS ASSOCIATION Second Amicus Curiae

FIRST RESPONDENT'S WRITTEN ARGUMENT

MODE OF REFERENCE:

1.

Constitution : Constitution of the Republic of South Africa, Act 108 of 1996.

Section 176(1) : Section 176(1) of the Constitution after amendment unless otherwise stated.

Section 8(a) : Section 8(a) of the Judges' Act.

Judges Act' : Judges' Remuneration and Conditions of Employment Act 47 of 2001.

The First Respondent and President are used interchangeably.

SALIENT FACTS:

2.

2.1 In early 2011, the Minister of Justice draws the President's attention to the issue of the incumbency of the office of Chief Justice which, absent Presidential action, would become vacant as at 15 August 2011 as a result of the present Chief Justice becoming eligible for retirement in terms of Section 3(a)(ii) of the Judges' Act read with Section 176(1) (as amended) of the Constitution.

2.2 The President is obliged to consider and implement one of two

courses of action; either to:

2.2.1 extend the term of office of the present Chief Justice for a specified period in terms of Section 8(a); or

2.2.2 appoint a Chief Justice in terms of Section 174(3) of the Constitution.

2.3 The President considered his options and due especially to the Chief Justice's involvement and contribution to certain projects relating to legal administration generally and the interest of continuity, decides on an extension.

2.4 The President, in writing, requests the Chief Justice to accept such extension for 5 years (the Chief Justice cannot be compelled to continue) and on 2 June 2011, the Chief Justice conveys such acceptance in writing.

2.5 On 3 June 2011, the President, by legal act in writing (and co-signed by the Minister), extends the tenure of the Chief Justice for another 5 years.

2.6 On 17 May 2011, the Centre for Applied Legal Studies ("CALS") made written enquiries as to the First Respondent's intentions regarding the extension of the term of office of the current Chief Justice. Receipt was acknowledged and on 3 June 2011, the Presidency informed CALS of the extension of that date having conveyed his decision in this regard to the opposition parties and the JSC. The present applications were thereafter launched.

DIRECT ACCESS:

3.

This is no doubt a matter in which this Court could have benefitted from the considered views of High Court and Supreme Court of Appeal Judges. Such *desidirandum* has frequently been expressed by this

Court. This is so particularly because the composition and tenure of members of this Court constitute the subject matter of the decision herein.

4.

On the other hand the parties are before this Court, it is a matter destined to be finalised in this Court and the First Respondent also wishes there to be clarity on the issues raised. Whilst the issues herein could and should have been raised at a much earlier stage, the fact remains that the issues have now been raised, are squarely before this Court and the practical implications thereof imminent. A decision one way or the other, may be attended to so as to avoid unnecessary future disputes about the composition of this Court.

5.

Whilst the First Respondent contends that the issues raised herein are not Direct Access issues within the meaning of Section 167(6) of the Constitution, this Court clearly has a discretion to hear and decide the

matter in the interests of justice on a direct access basis. The First Respondent thus abides the decision of this Court.

THE ISSUES ARISING:

6.

6.1 That Section 8(a) is not legislation such as contemplated by Section 176(1), the only constitutional license for extending the basic 12 year non-renewable term of office of a Constitutional Court Judge. In short, Section 8(a) cannot be sourced back to Section 176(1).

6.2 That Section 8(a) offends the constitutional principle of separation of powers and the concomitant necessary independence of the Judiciary. It is submitted that save for the issue whether processes seemingly promoting such principle are to be read in Section 8(a) or are required to be expressed in Section 8(a), the answer to this is either made irrelevant by the

answer to 6.1, or is subsumed into a finding that Section 8(a) is covered by Section 176(1). This follows from the obvious axiom that a provision of the Constitution, cannot be unconstitutional.

MATTERS NOT IN ISSUE:

7.

7.1 The President extended the term of office of the incumbent Chief Justice in terms of Section 8(a) of the Judges' Act, for a period of 5 years (with effect from 15 August 2011), on 3 June 2011 and save for the broad attack on the Constitutionality of Section 8(a), this was validly done.

7.2 That such an extension was done for legitimate and rational reasons and for the purposes contemplated in Section 8.

7.3 In terms of Section 8(a) no formal or prescribed prerequisites such as consultation etc are expressly stipulated for an extension

of office of the Chief Justice (and in Section 8(b) for the President of the Supreme Court of Appeal). No such processes such as those contemplated by Section 174 of the Constitution were as a matter of fact implemented, or followed in respect of the 3 June extension.

7.4 That the President's duty as Head of the Executive requires him to implement legislation and as a general rule it is not for him to query the Constitutionality of such legislation especially where the issues are moot.[1]

7.5 The competence and integrity of the Third Respondent and propriety of extending his office for 5 years save for the constitutional objection as a matter of principle, are accepted.

---

[1] See: PHILLIPS AND ANOTHER v DIRECTOR OF PUBLIC PROSECUTIONS, WITWATERSRAND LOCAL DIVISION, AND OTHERS 2003 3 SA 345 (CC) [11].

7.6 The extension of the Chief Justice's term of office will not as a matter of objective fact, detract from the independence of the judiciary (as opposed to the perceptions as to this which are in dispute).

THE LEGALITY DISPUTE SECTION 8(a):

8.

The attack on Section 8(a) on this leg, in submission boils down to:

8.1 Section 8(a) does not itself extend the term of office of the Chief Justice; it delegates this to the President who extends it or not by his decision – the qualification to Section 176(1) requires Parliament itself to do so.

8.2 Section 8(a) allows the extension of a specific Constitutional Court Judge's term; that of the Chief Justice. The qualification in Section 176(1) contemplates only an *en masse* extension – i.e.

all extensions must apply to all Constitutional Court Judges equally.

THE INTERPRETATION OF SECTION 176(1):

9.

The interpretation of Section 176(1) as it now reads is not an incremental exercise – this is what it meant originally, this is what the amendment intended and hence this is what the section means. It is an exercise designed to establish the meaning of the Section as it now reads, not mired in the past. The rationale of the present Section 176(1) may thus be very different to that which inspired the original Section and to hearken back to that may distort the present meaning.[2]

10.

The Applicants contend that an Act of Parliament which extends the

[2] Compare: BEKKER NO v TOTAL SOUTH AFRICA (PTY) LTD 1990 3 SA 159 (T) 170H.

term of office of the Chief Justice subject to determinants requiring the President's request for this to happen in a specific instance for a specified period and the assent of the incumbent Chief Justice, conflicts with Section 176(1).

11.

Section 176(1) renders the term of office of a Judge of the Constitutional Court to be 12 years but subject to such extension of term as Parliament wills in an Act of Parliament. That is its basic structure. Hence, if Parliament tomorrow changes the term of office of the Constitutional Court Judges as Constitutional Court Judges, to 15 or 18 years that clearly is covered and permitted by Section 176(1).

12.

If the will of Parliament is an Act of Parliament that the term of office of the Chief Justice is extended by a period determined by the President and accepted by the Chief Justice, it is not clear why this is not covered by Section 176(1). The wording of Section 176(1)

stresses that such legislation can only serve to extend the 12 year term, not reduce it.

MEANING OF SECTION 8(a):

13.

This Section simply means that if the term of office of a Chief Justice comes to an end by reason of the period of his service in the Constitutional Court (which is currently between 12 and 15 years) expiring or he reaching the age of 70, such term of office is extended for the period the President requests (if at all) and the Chief Justice agrees to.

14.

The fundamental question is whether Section 8 constitutes legislation as contemplated by Section 176(1) (as amended); namely is it (part of) an Act of Parliament extending the 12 year term of office of a Constitutional Court Judge?

15.

At face value, the answer is clearly in the affirmative. Section 8 seeks to extend the term of office of a Chief Justice subject to certain determinants. It is part of an Act of Parliament.

16.

This remains the essential issue irrespective of the perspective, nature and wording of the attack on Section 8. If not it leads to the result that the Constitution is unconstitutional. This is not a viable contention.

SECTION 8(a) NOT IN CONFLICT:

17.

Parliament has wide (but not unlimited) powers of delegating legislating powers. [3] In this case the President is given the power to implement an extension of the term of office of the Chief Justice clearly contemplated by Parliament, by determining the period of extension and seeking the Chief Justice's assent which is a *sine qua non* of such extension.

18.

In promulgating Section 176(1), the framers of this Section could not have been but firmly aware of the power of the President to appoint

---

[3] See: SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS v HEATH AND OTHERS 2001 1 SA 883 (CC) [25]; EXECUTIVE COUNCIL, WESTERN CAPE LEGISLATURE, AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 1995 4 SA 877 (CC) [64]; EXECUTIVE COUNCIL, WESTERN CAPE v MINISTER OF PROVINCIAL AFFAIRS AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER; EXECUTIVE COUNCIL, KWAZULU-NATAL v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2000 1 SA 661 (CC) [123].

the Chief Justice (and Deputy Chief Justice) and the President of the Supreme Court of Appeal.[4]

19.

This, save for the nomenclature of the office bearers of the Courts, was the position since 1996. Any legislation which purported to extend the term of office of a Chief Justice or other apex Judges could not have been intended to detract from this power of the President at pains of constitutional conflict and invalidity.

20.

It is clear that the close association and co-operation which is required between Executive and Judiciary which are in a working partnership to ensure maximising the effective functioning of each (which does not detract from the doctrine of separation of powers), requires the President (as Head of the Executive) and the Apex Judges in the

[4] See: Section 174(3) read with section 174(4) and section 174(6) of the Constitution.

highest Courts (the Constitutional Court and the Supreme Court of Appeal) to work together effectively and reposing confidence in one another. The Constitution itself recognizes the special interest that the President as head of the Executive has, in the appointment of these specific office bearers. In terms of the Constitution, he initiates their appointments – he has, in theory, an open field to choose from, subject to the minimum requirements in Section 174(1) and input requirements which follow. Other Constitutional Court Judges and Judges are presented for appointment through the Judicial Services Commission.

21.

It would, indeed, have been in conflict with this Constitutional framework and somewhat irrational if the President was wholly excluded by the Act from the effective re-appointment of the Chief Justice for a period potentially far in excess of what the President initially appointed him to. It would have drastically interfered with his power to appoint the Chief Justice in terms of Section 174(3).

22.

It follows that just as the Act of Parliament would have to accommodate in extending tenure for a specific office, the individual's decision, it had also to accommodate the decision of the President in some format in order to achieve constitutional harmony.

23.

It is also pointed out that individual *ad hominem* appointments to State offices are not usually effected by Acts of Parliament; there are any number of compelling reasons why not.

24.

An *ad hoc* extension of the term of office of an existing Chief Justice, would thus for the period of extension, frustrate the Section 174(3) power of the President. Not only was the Section 8(a) arrangement an obvious mechanism for the Parliament to revert to so as to accommodate pragmatic concerns, but indeed it could not but recognise this power in the legislative mechanism for extension.

25.

Whether the term of office of a particular Chief Justice is to be extended, would often only be capable of sensible answer at the time of his otherwise retirement from the Constitutional Court. This is a decision which calls to be made when that exigency is imminent. Section 8 reads so as to accord with this process. It was hardly intended to be exercised by a President to take place in 10 years time. This is a very useful mechanism for Parliament to resort to given the exigencies of a decision to extend as opposed to *ad hoc ad hominen* legislation.[5]

26.

These considerations apply *a fortiori* given the President's power of Appointment in terms of Section 174(3) of the Constitution.

---

[5] Compare: the analogous mechanism in respect of the coming into operation of national legislation, of Presidential determination of date of inception. See: EX PARTE MINISTER OF SAFETY AND SECURITY AND OTHERS: IN RE S v WALTERS AND ANOTHER 2002 (4) SA 613 (CC) [71] – [73].

27.

Not only is there not a particularly rigid distribution between the Legislature and the Executive (certainly in the form of the President)[6] – but the legislative history of Section 176(1) and Section 8(a) confirm that Section 8(a) was contemplated and intended to be part of the very legislation envisaged and covered in the last part of Section 176(1).[7]

28.

The very Legislature (Parliament) which assented to the exception to Section 176(1) of the Constitution, assented to Section 8 of the Act. The enactments were read, debated together and passed on the same day in Parliament by unanimous vote with the support of two thirds of

---

[6] See: HEATH supra [23]-[24].

[7] The history is set out in the First Respondent's Answering Affidavit:
(a) in Case Number 62/11 (the CALS application) at paragraphs 44 - 46 pages 158 – 159;
(b) in Case Number 53/11 (the JASA application) at paragraphs 64 – 67 pages 109 – 110;
(c) in Case Number 54/11 (the FUL application) at paragraphs 72 – 75 pages 158 – 160.

Parliament (only the IFP although not opposing, did not actively support the package of Acts). There is no doubt that Section 4 and Section 8(a) were, *inter alia*, the very legislation Section 176(1) contemplated and covered as a matter of intention.[8] They and Section 4 of the Judges' Act were joined at the hip.

29.

The legislative history of the proviso to Section 176(1) and the Judges' Act demonstrates this clearly and the Court is entitled to consider and be informed by this given that it is un-contentious. Evidence of the history, context and mischief aimed against (which effectively relates to the purpose) of a Statutory provision even of the Constitution itself, is admissible to elucidate its meaning. This Court had itself recently seemed willing to expand use of this source of possible elucidation of meaning particularly where the factual aspects informing the purpose

[8] Compare: UNITED DEMOCRATIC MOVEMENT v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (AFRICAN CHRISTIAN DEMOCRATIC PARTY AND OTHERS INTERVENING; INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA AND ANOTHER AS AMICI CURIAE) (No 2) 2003 (1) SA 495 (CC) [113].

of the provision were undisputed.[9]

30.

This supports the view that Section 8 qualifies under the exception as an Extension by Act of Parliament as intended in Section 176.

31.

The power of Parliament to extend the term of office of a Constitutional Court Judge, clearly included the power to prescribe that such extension is to be determined by the President.[10]

32.

The Constitutional provisions regarding the duration of the holding of Judge's offices are set out in section 176. What is clear is that whilst

---

[9] Compare: S v MAKWANYANE AND ANOTHER 1995 (3) SA 391 (CC) [15] – [19] especially [19].

[10] Compare by analogy: EX PARTE MINISTER OF SAFETY AND SECURITY AND OTHERS: IN RE S v WALTERS AND ANOTHER 2002 4 SA 613 (CC) [71] [73].

the Constitution leaves this issue in respect of all other Judges to Parliament to determine by way of legislation, it deals specifically with the duration of office of Constitutional Court Judges:

32.1 a Constitutional Court Judge's office expires if he has served as such (in a permanent capacity) for 12 years;

32.2 if he turns 70 before completing 12 years, his term of office ends at such earlier date.

(This was how section 176(1) initially read).

33.

The rationale of the limitation on the length of service of Constitutional Court Judges was to prevent stagnation in judicial decision-making due to the permanence and lack of new blood in the collective group of Constitutional Court Judges. The continuation of service of one of the Constitutional Court Judges does not detract from this in any

significant measure. This immutable principle of 12 years and you are out, was jettisoned in the amended Section 176(1).

34.

The provisions of Section 8(a) do not erode judicial independence, especially because:

34.1 decision making depends on a quorum of at least 8 Judges;

34.2 the continuation of office in terms of the Section 8(a) process can only occur once for a specific period; there can be no question of further extensions as an inducement of pro-government decisions;

34.3 the history of decision making in the Constitutional Court testifies to independent decision-making and split decisions;

34.4 it is a wholly unrealistic perception that Section 8(a) would

undermine the independence or stifle the renewal of the Constitutional Court jurisprudence by not having fresh minds on the bench.

35.

The difference in rationale between Section 176(1) of the Constitution and Section 3 and 4 of the Judges' Act on the one hand and the provisions of Section 8(a) is not to be conflated. Section 8(a) is not aimed at detracting from the "no old wood" basis of Section 176 which is directed at the judicial decision making in Constitutional litigation, the main Court function of the college of Constitutional Court Judges.

36.

Section 8(a) is inspired not by the need to salvage some old wood for decision making purposes, but to continue the term of office of the Chief Justice because he may only have just started in the post (like the present Chief Justice) which entails a number of important functions other than judicial decision making and in which continuity is

much required or desired (or where he may just have been seized with such other issues and functions). Section 8(a) and (b) indicate recognition that for those reasons a continuation of services in the respective offices is provided for. Save for the first Chief Justice seldom if ever is it likely to even approximate 12 years (the current situation indicates this) that the Chief Justice will be Chief Justice.

THE ONE FOR ALL ARGUMENT:

37.

The contention that any extension of terms of office to be valid must equate to an extension of all terms of office of all Constitutional Court Judges is untenable.

37.1 Literally interpreted that is not how Section 176(1) reads. It permits the extension of the term of office of a Constitutional Court Judge. There are clearly distinguishable posts on the Bench with different qualities required for each. In the

Constitutional Court there are as Constitutional Judges, the Chief Justice, the Deputy Chief Justice, the other Constitutional Court Judges. Each of these is **a Constitutional Court Judge** – if the purpose of Section 176(1) was to limit the effect of the extending litigation, to *en banc* provisions only, the wording to express such clear intention was easy and ready at hand. Why does the relevant sentence of Section 176(1) not simply read, "unless the term of office **of all Constitutional Court Judges** is increased".[11]

37.2 Interpreting the provisions of Section 176(1) in context, the one for all case is not reconcilable with its legislative history and context. It is simply unrealistic given the long and careful consideration which preceded the presentation of *inter alia* Section 176(1) and Section 8(a) as part of two bills joined at the hip and so treated by Parliament and read, debated and passed

[11] See: DESERT PALACE HOTEL RESORT (PTY) LTD v NORTHERN CAPE GAMBLING BOARD 2007 3 SA 187 (SCA) [7] – [8]; S v TOMS; S v BRUCE 1990 2 SA 802 (A) 807H – 808A; RAF v RAMPUKAR 2008 2 SA 534 (SCA) 541B-C.

on the same day, that Parliament would limit the extensions under Section 176(1) to *en masse* increases applicable equally (Section 176(1)) and in the same legislative breath pass Section 8(a) which is premised to subvert this principle by an increase of just one Judge's term of office being clearly sanctioned.

37.3 Whilst perhaps less obvious, the principle of *en masse* extensions did not appear central to the Judges' Act – indeed, it provided for some Judges to be Constitutional Court Judges for up to 15 years, others to 12 years, all dependent on the arbitrary (in this relative aspect) issue of how much previous service (if any) as a Judge outside the Constitutional Court the specific Judge had performed (see section 4 of the Judges Act). In context this does not demonstrate the dedication to the one for all approach one would have in context have expected, if that was the clear limiting factor guiding legislation contemplated under Section 176(1). It simply adds another individual factor determining different terms, to the list of such operative factors.

THE MANNER OF EXTENSION IN SECTION 8(a):

38.

The separation of powers doctrine is an inherent part of the Constitution and national legislation in conflict with that is invalid. It and its concomitant structure of our independent judiciary, are important principles of South African Constitutional law. That said, for reasons that follow it is submitted that the manner of extension in section 8(a) does not offend the principle of separation of powers.

39.

The South African doctrine of separation of the three powers, is not a rigid one. Especially the lines between the Legislature and the President as Head of the Executive are fluid at least in so far as the one arm influencing and assisting the other, are concerned.[12]

[12] See: HEATH supra [25].

40.

This means that the practical application of the doctrine is very much one which does not stand on no "interference" or no role of the one arm in the other field of operation as a rigid measure of the invalidity of such action. It is clear that the Constitutional Court has adopted the principle that whether a Statute or the implementation thereof falls foul of the principle of separation of powers is a matter of degree to be decided in the factual and legal context of the specific legislation and / or conduct.[13]

41.

A similar argument of invalidity was raised before the Constitutional Court in respect of the power of the Minister to extend the terms of office of Magistrates in **VAN ROOYEN AND OTHERS v THE STATE AND OTHERS (GENERAL COUNCIL OF THE BAR OF SOUTH**

[13] See: VAN ROOYEN AND OTHERS v THE STATE AND OTHERS (GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA INTERVENING) 2002 5 SA 246 (CC) [19] [105] – [109].

AFRICA INTERVENING)[14] given the provisions of Section 174(7) of the Constitution.

42.

The Constitutional Court dealt with it as follows:

> **"A related argument, relevant not only to this issue but also to other provisions of the Magistrates Act, is directed to the provisions of s 174(7) of the Constitution. The section states:**
>
> > **'Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.'**
>
> **The question is whether this precludes delegation and requires all material provisions dealing with such matters to be contained in the Act of Parliament itself. That seems to have**

[14] 2002 5 SA 246 (CC).

been the view of the High Court, and if it is correct, it would be relevant to this issue."[15]

43.

The Court earlier held that an appointment by the Minister did not offend against the separation of powers doctrine:

"In particular, the judgment of the High Court seems to assume that the involvement of members of the Executive and the Legislature in the appointment of judicial officers contravenes the separation of powers required by the Constitution. The mere fact, however, that the Executive and the Legislature make or participate in the appointment of Judges is not inconsistent with the separation of powers or the judicial independence that the Constitution requires."[16]

---

[15] VAN ROOYEN supra [120].

[16] VAN ROOYEN supra [106].

44.

The Court held that what Section 176(7) requires is that:

> **"What the Constitution requires is that the Act of Parliament must ensure that these important matters take place without favour or prejudice. The Magistrates Act does not contain detailed provisions dealing with all such matters. However, it makes provision for the Magistrates Commission whose principal object is to ensure that this is done. The vesting of this power in the Magistrates Commission was in fact the means specifically chosen in the interim Constitution for ensuring the absence of favour and prejudice in relation to such matters."[17]**

Hence the Constitutional demands were satisfied in that case.

45.

The involvement of especially the Executive in appointing members of

[17] VAN ROOYEN supra [121].

the Judiciary, and their appointment etc by the Executive, does not as this Court has frequently held, violate the doctrine so as to trigger invalidity.[18]

46.

It also follows from the above that an extension of tenure on the basis of a Presidential request to that effect, does not interfere with the South African model of separation of powers in such a manner that it is rendered unconstitutional. The Chief Justice involved has already been appointed as a Judge of the Constitutional Court and as Chief Justice in a manner allowed by the Constitution and not offensive to the doctrine. In principle, the **period** *per se* a person serves as a Judge, cannot be offensive to that doctrine especially as this is dependent on

[18] See: HEATH supra [25] [26]; VAN ROOYEN supra [152] – [155]; IN RE CERTIFICATION OF THE CONSTITUTION OF THE RSA, 1996 1996 (4) SA 744 (CC) [123] – [128] especially 128. Compare: DE KOCK AND OTHERS V VAN ROOYEN 2005 1 SA 1 (SCA).

age, a factor which has no rational connection to performance of the judicial function without fear, favour or prejudice.[19]

47.

In this respect, the **VAN ROOYEN** judgment provides an instructive analogy regarding the power of the Minister to extend the tenure of Magistrate's beyond the retirement age of 65 years of age.[20] It considered that it is unreasonable to apprehend that the desire for continued tenure would influence the decision of the affected Judges (Magistrates in that case).

---

[19] Compare on the South African model of separation of powers in context: VAN ROOYEN supra [17]; HEATH supra [21] [25]. See also generally: DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, AND OTHERS 2009 4 SA 222 (CC) [181] [183] [184]; [220] – [221]; S v DODO 2001 3 SA 382 (CC) [17].

[20] VAN ROOYEN supra [150] – [152]; [155].

48.

In the case of the extension of the Chief Justice's term of office any arguments that the separation of powers precludes the President from deciding on this, is untenable. The provisions of Section 174(3) and Section 176(1) and indeed the structure of the Constitutional provisions dealing with the appointment etc of Judges, precludes such a blunt answer. In addition, the mechanism of an extension of office of judicial officers by the Executive is a well known one in our law and has been on the statute book and implemented for years: compare the similar type of provision to Section 8(a) in the form of s 7A of the Judges' Remuneration and Conditions of Employment Act 88 of 1989.

49.

The acceptance of Executive appointment of members of the Judiciary does not, it is accepted, insulate the manner of implementation of such executive power against the demands of the separation of powers doctrine – as an extreme example a week to week series of extensions would be invalid on any approach.

SECTION 8(a) – IMPLEMENTATION OF THE POWER OF EXTENSION:

50.

Section 8(a) contains important safeguards minimizing the impact thereof on the *trias politica* doctrine.

51.

The power of extension therein is:

51.1 to be utilized only once in respect of a particular Chief Justice;

51.2 the period of the once off extended tenure must be specified at the outset;

51.3 the power to extend the term for a specific period must be lawfully exercised for the purpose the Section 8(a) power is granted to the President. Albeit on narrower grounds (perhaps

limited to rationality), his decision would be open to a Court challenge (unlike say a direct Parliamentary extension).

52.

In support of the above, the following is submitted.

52.1 Section 8 deals with the situation where the Chief Justice becomes eligible for discharge in terms of Section 3 or Section 4 of the Act, that is, worked as a Constitutional Court Judge for 12 years or became 70 years of age (qualified by the 15 year minimum active service). "Eligible" here means satisfied the conditions for discharge (retirement is also a right not only an obligation).

52.2 A Judge does so, when one of the time related and certain conditions of Section 3 eventuates, as it must. That point of time is only reached once. It is at that stage that he can continue as Chief Justice if he wants, for the period requested by the

President. A Judge accordingly only becomes eligible once in terms of Section 3. The President at that stage may request him to continue for a period; the Judge does not ever again become eligible in terms of Section 3.

52.3 In short, the wording of Section 8 suggests a once off extension on an ordinary literal reading thereof and save if sound reason to depart therefrom exists, this must be given effect to.

52.4 That the extension is for a specific period is clear from the words "for a period determined by the President". This does not seem to be disputed by the Applicants.

53.

The President's request and determination of period will be subject to judicial review. Whilst such will offer only a restricted and narrow scope for a Court to set aside a request for continuation of office, the possibility of such scrutiny reduces any offence to Section 176(1) as a

result of the continuation of office not being entirely dependent on self-contained criteria in the Act.[21]

54.

The alternative to a Section 8(a) mechanism which is a pragmatic device to achieve continuity of office on a once off basis, seems in order to achieve its flexibility in that once off situation, to be *ad hominem* legislation. This would be a very awkward and unusual way of dealing with this – it would limit judicial challenge, it would constitute a direct link between office and the ruling party in Parliament and it may lead to parliamentary debates about the merits and demerits of various candidates.

55.

Section 8(a) does not expressly require the consultative steps set out in Section 174(3) as prerequisites for the appointment of a Chief

---

[21] Compare: VAN ROOYEN supra [154] [155].

Justice, for an extension under Section 8(a). These are input requirements under Section 174(3) – the President is to heed and consider the feedback. He does not have to follow it – it remains his decision.

56.

Are these input requirements so vital as to set up such a clash with the separation of powers doctrine that their omission renders Section 8(a) constitutionally invalid?

57.

It is submitted that the answer is no for, *inter alia*, the following reasons.

57.1 The Constitutional Structure is such that any Chief Justice would have to pass through the input process initially. It may well be that he may have gone through 3 selection processes – as Judge (Section 174(6)), Constitutional Court Judge (Section 174(4))

and Chief Justice (Section 174(3)) before he obtains such office. In the case of an extension, he continues in the same office for which he has been weighed and found adequate (in the other instances above a different office was involved in each case).

57.2 If Parliament should extend his term under Section 176(1) in *ad hominem* legislation (say with the approval of the President) no input from the Judicial Services Commission ("JSC") is as a matter of law required (opposition parties would then provide input).

57.3 If the President is precluded from extending the term of office of the Chief Justice, he can appoint another party essentially of his choice under Section 174(3). The benefits of demanding input in the case of an extension seem in some respect more apparent than real given the advisory nature of such input.

57.4 The inherent limitations on the power of extension under Section

8(a) set out above operate in conjunction with these aspects.

58.

The contentions that an extension by the President may and does harm the independence of the judiciary as a result of the perceptions this engenders that the Chief Justice may be beholden to him and like assertions, simply fall far short of the threshold of a realistic and rational perception required to impugn such process.[22]

59.

If the President is moved by qualities of pliancy on the part of an incumbent Chief Justice to extend his tenure, such ambitions can readily be realized by the appointment of a new Chief Justice who literally need not even be a Judge. The Constitution grants the President the sole discretionary power to make such appointment

[22] See: VAN ROOYEN supra [34]

(section 174(3)), consultation processes on the way provides input not vetoes.

60.

It may equally unrealistically be argued that some of the Judges of this Court may be beholden to the Ruling Party for the extension to 15 years service in the Judges' Act. Such theatrical and / or paranoid perceptions may arise but they are simply not realistic.[23]

---

[23] See also in respect of the test for recusal, the *dicta* of this Court that a realistic perception of the required sort must be demonstrated. S v BASSON 2004 1 SA 246 (SCA) [10] [11] [19]; PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS 1999 4 SA 147 (CC) [36] [38] [41] [46] [48].

APPROPRIATE RELIEF:

61.

It is submitted that should this Court find that Section 8(a) is unconstitutional for any of the reasons advanced or that the *de facto* process in question did not meet the read-in similar provisions of Section 174(3), that any declaration of invalidity pertaining to Section 8(a) or the factual manner of extension, be suspended for a period of a year. In particular this is appropriate given:

61.1 The offending Section has been on the statute book for just about 10 years (9¾). Its meaning at face value is clear and that is what is complained about. There was every reason to bring the applications herein, premised on principle and not *ad hominem* considerations, a long time ago which would have enabled corrective action long before practical implications of implementation threatened.

61.2 Section 8(a) was accepted with no opposing vote in Parliament.

61.3 It must have been apparent that Section 8(a) was meant to be implemented; it had at least to be considered by the President each time a Chief Justice retired. This is the third such occasion since Section 8(a) was placed on the statute book. It had a similar predecessor which had been implemented. Clearly the appropriate time for *de facto* implementation of Section 8(a) would leave little space for due debate in the Courts, if that was what was to trigger litigation.

61.4 The National Assembly has resolved to support the extension of tenure of the Chief Justice and the main political parties support his *ad hominem* continuation. Democratic considerations thus support a suspension.

61.5 The Projects regarding legal administration in which the Third Respondent is involved and which, *inter alia*, moved the

President to extend the term of office can continue apace.

61.6 It will take some time for the President to consider what the appropriate steps are and to implement these. Likewise Parliament, should remedial legislation be required, would need time to consider this and other implications of the Judgment.

ORDER SOUGHT:

62.

The applications are to be dismissed alternatively any declaration of invalidity should be suspended for a year.

KJ KEMP SC

LK OLSEN

Chambers Durban

14th July 2011.