IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between:

CASE NO: CCT 62/11

CENTRE FOR APPLIED LEGAL STUDIES First Applicant

COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION 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

and

In the matter between:

CASE NO: CCT 54/11

FREEDOM UNDER LAW Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

THE DIRECTOR-GENERAL: JUSTICE AND CONSTITUTIONAL 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

and

In the matter between

CASE NO: CCT53/11

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

MINISTER'S SUBMISSIONS

A. Introduction

1. The applicants in this case:

1.1. Centre for Applied Legal Studies and Council for the Adancement of the South Africa (“CALS”)

1.2. Justice Alliance of South Africa (“JASA”) and

1.3. Freedom Under the Law (“FUL”)

collectively referred to hereinafter as the applicants have launched these applications, on an urgent basis, seeking similar substantive relief.

2. In the main, the aplicants seek an order:

2.1. declaring section 8(a) of the Judges’ Remuneration and Conditions of Employment Act 47 of 2001 (“the Act”) to be unconstitutional and invalid;

2.2. declaring the decision of the President taken in terms of section 8(a) of the Act, to request the Chief Justice to continue performing active as Chief Justice of the Republic of South Africa, to be unconstitutional and invalid.

3. FUL and JASA had premised their application for direct access, *inter alia,*:

3.1. in terms of section 167(4)(e) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) for the alleged failure of the President to fulfil a constitutional obligation; and

3.2. In the FUL application, in terms of section 165(4) of the Constitution; and

4. The President and the Minister refute the stated grounds for direct access on the basis that:

4.1. Section 167(4) of the Constitution does not impose a constitutional obligation on the President when exercising a power in terms of section 8(a) of the Act;

4.2. Section 165(4) of the Constitution is of no application to these proceedings;

4.3. The relief sought does not involve a matter that is within the exclusive jurisdiction of this Court.

B. Common cause issues

5. There is no dispute as to any matter of fact. The following facts are common cause -

5.1. Chief Justice Ngcobo would reach the limit of 15 years' active service as a judge on 15 August 2011.

5.2. On 11 April 2011, the President acting in terms of section 8(a) of the Act requested the Chief Justice Ngcobo to continue performing active as Chief Justice of the Republic for a period of 5 years from 16 August 2011 to 15 August 2016;

5.3. On 2 June 2011 the Chief Justice assented to the request;

5.4. On 3 June 2011 the President met with leaders of political parties represented in the National Assembly and advised them of his request to the Chief Justice and his assent thereto.

5.5. On 3 June 2011 the President similarly advised the Judicial Service Commission of his request to the Chief Justice and his assent thereto.

C. Structure of these submissions

6. In these submissions we will address the following issues:

6.1. Whether the applicant should be granted direct access;

6.2. Whether the application concerns matters which are exclusively within the Court's jurisdiction;

6.3. Whether there is a constitutional obligation with which the President must comply prior to exercising his powers in terms of section 8(a);

6.4. The provisions of section 8(a) of the Act and the exercise of the power by the President in terms of the section;

6.5. A brief analysis of comparative jurisprudence;

6.6. The issue of separation of powers

and lastly

6.7. Applicability of section 172(1)(b) in the event the Court declares section 8(a) of the Act unconstitutional.

D. Direct Access

7. The applicants have launched these proceedings in terms of Rule 18 of the Rules of the Constitutional Court, read with section 167(6)(a) of the Constitution. JASA has further relied on the provisions of section 167(4)(e) of the Constitution, whilst FUL in addition thereto relies on the provisions of section 165 of the Constitution. We will consider these grounds in turn.

8. In ***Gundwana V Steko Development And Others*** **2011 (3) SA 608 (CC)** this Court reiterated that it is undoubtedly so that the general rule is that direct access will be granted only in exceptional circumstances[1].

9. In support for direct access, the applicants rely on the fact that the issues concern the constitutional validity of an Act of Parliament; the importance of the matter; the fact that no oral evidence will be required and that the constitutional issues raised are of high importance to the administration of justice, the separation of powers and the rule of law and have already attracted significant public attention.

10. The President and the Minister have contended that the impugned section has been on the statute books for almost ten years and the applicants have failed since their existence to challenge its constitutionality. Since March 2011 the possibility that the President could invoke section 8(a) of the Act started receiving widespread attention in legal publications and the general printed media. The applicants at that juncture should have taken the necessary steps to institute proceedings in the normal course.

---

[1] At Para [27]

11. The applicants challenge is to the constitutionality of section 8(a) of the Act and the President's exercise of his power in terms thereof.

12. In ***Transvaal Agricultural Union V Minister Of Land Affairs And Another*** **1997 (2) SA 621 (CC)** this Court dealt with an application brought by way of direct access on not dissimilar grounds and held that *"[T]he Act deals with issues of considerable public importance. But so do many Acts of Parliament and, in itself, this is no justification for seeking relief by way of direct access to this Court. Section 102 of the Constitution prescribes, and jurisprudential policy dictates, that this Court should ordinarily not deal with matters as both a Court of first instance and as one of last resort. What Rule 17* (the antecedent of the present Rule 18) *requires is, therefore, that in addition to the importance of the matter, there be proof that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government'. Clearly those are stringent requirements".* Further, that "*[U]rgency may afford grounds for engaging this Court directly. But it must be clear that the urgency is such that the delay in securing a definitive ruling would prejudice the public interest or the ends of justice and good government"*[2].

[2] At paras [16] to [19]

13. It is submitted that the applicants could have approached the High Court and obtained judgment on an urgent basis. The judgment would serve before this Court and the matter could still have been disposed of before 15 August 2011, thus securing a definitive ruling before the Chief Justice's retirement date.

14. In the premises, we submit that the grounds raised by the applicants to justify direct access fall short of the requirements prescribed by this Court in ***Transvaal Agricultural Union*** and other cases***.***

15. The applicants have failed to establish that this was a case in which the ordinary procedures ought not to have been followed. Although this matter involves important issues, these are within the jurisdiction of the High Court and needed to be resolved by it before this Court was approached for relief.

E. Exclusive Jurisdiction

16. We submit that the matters raised in this application do not fall within the exclusive jurisdiction of this Court. The very fact that FUL and JASA premise their applications for direct access, in part, on the provisions of section Rule 18 supports this contention.

17. In ***Glenister V President Of The Republic Of South Africa And Others*** **2011 (3) SA 347 (CC)** this Court pointed out that in matters contemplated in, *inter alia,* section 167(4) of the Constitution where the Constitutional Court has exclusive jurisdiction, litigants are obliged to come to this Court. The Court concluded that:

> "*[25] An application for leave to obtain direct access is therefore not the appropriate vehicle for bringing to this court matters in which it has original jurisdiction. Unless another rule specifically applies, those applications must be brought to this court on notice of motion pursuant to CC rule 11."*

18. The launch of an application for direct access other than in terms of Rule 11 points to a tacit concession on the part of the applicant that in addition to this Court, other Courts also have jurisdiction in the matters involved in the litigation.

F. Applicability of sections 167(4) and 165 of the Constitution

19. Section 167(4)(e) of the Constitution provides that *"Only the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation".*

20. The applicants invoke this section and contend that:

20.1. The President failed to comply with his constitutional obligations in terms of section 174(3); and

21. FUL further contends that Parliament's conduct was contrary to its constitutional obligation under section 165(4).

22. The challenge in respect of section 165(4) is directed at Parliament. FUL has not joined Parliament in these proceedings. In ***Glenister*** this Court held that the failure to join the Speaker of the National Assembly and the Chairperson of the National Council of Provinces should be fatal to an application brought on this ground.[3]

23. FUL does not elaborate in its founding papers on this challenge. It is not canvassed in its submissions and we assume that it has abandoned this ground for direct access.

24. In respect of the President, at issue is whether there is a constitutional obligation with which he must comply prior to exercising his powers in terms of section 8(a). The applicants contend that the constitutional obligation in terms of section 174(3) to consult the JSC and leaders of political parties in the National Assembly would apply to any decision to extend the original term of

---

[3] At [29]

office of the Chief Justice. We submit that the applicants' contention is erroneous on two bases:

24.1. The President did not extend the term of office of the Chief Justice. Such extension was effected by Parliament with the enactment of section 8(a);

24.2. The obligation in section 174(3) relates strictly to the appointment of the Chief Justice (and the other persons specifically mentioned therein). Once complied with, neither the Constitution nor the Act envisage its further application.

25. In ***President of The Republic Of South Africa and Others v South African Rugby Football Union And Others*** **1999 (2) SA 14 (CC)** this Court held that "*If the section* [section 167(4)] *were to be construed as applying to all questions concerning the constitutional validity of conduct of the President it would be in conflict with s 172(2)(a), which empowers the High Court and the Supreme Court of Appeal to make orders concerning the constitutional validity of any conduct of the President. It seems to be correct that when the two sections are read together a narrow meaning should be given to the words 'fulfil a constitutional obligation' in s 167(4)(e).*"[4] The

[4] At [25]

view that the phrase 'a constitutional obligation' in section 167(4)(e) should be given a narrow meaning was reiterated in ***Doctors For Life International v Speaker of The National Assembly and Others* 2006 (6) SA 416 (CC)**[5]

26. This Court in ***Von Abo v President of The Republic of South Africa* 2009 (5) SA 345 (CC)**, extending the principle espoused in ***Doctors For Life*** to the presidential obligation stated that *"[I]n Doctors for Life Ngcobo J, writing for the court, observed that the word 'obligation' connotes a duty specifically imposed by the Constitution on Parliament to perform specified conduct. It seems to me that by parity of reasoning the same consideration applies to an 'obligation' relating to the President. The main thrust of these decisions seems to be that s 167(4)(e) which provides for the exclusive jurisdiction of the Constitutional Court should be construed restrictively in order to give full recognition to the power of the Supreme Court of Appeal and the High Court to determine whether conduct of the President is constitutionally valid.*

27. The extension of the obligation in section 174(3) that the applicants postulate in respect of section 8(a) of the Act flies in the face of the narrow interpretation placed by this Court.

---

[5] At [19]

28. The obligation contended for does not derive from section 174(3) of the Constitution; neither from any other constitutional provision, nor section 8(a) of the Act.

29. The applicants contend that the word *"appoint"* in section 174(3) must be understood to include an extension of the term of office of the Chief Justice as contemplated in section 8(a). The applicants, however, do not provide a cogent basis why the word should be interpreted so broadly. We submit that to do so would be to do violence to the word.

G. Section 8(a) of the Act

30. The Act was promulgated in terms of section 176(1) of the Constitution which provides that:

> *"A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge"*

31. In promulgating the Act, Parliament extended the terms of office of the different Constitutional Court judges.

32. The Act defines a 'Constitutional Court judge' as:

any person holding the office of-

(a) Chief Justice of South Africa;

(b) Deputy Chief Justice; or

(c) judge of the Constitutional Court,

and includes any person who, since 7 June 1994, held, the office of-

President of the Constitutional Court;

(i) Deputy President of the Constitutional Court; or

(ii) judge of the Constitutional Court;

33. Sections 8(a), 4(1) and (2) are consistent with the wording of section 176(1) which permits an Act of Parliament to extend the term of office of a Constitutional Court judge.

34. These sections provide for the continuation of active service by Constitutional Court judges. The terms of continuation are different, regard being had to the age of the respective judge or the length of service or whether or not he is Chief Justice. As a direct consequence of this, it is conceivable that not all the judges of the Constitutional Court will necessarily serve a uniform period. This result militates against the proposition that the Act contemplated in section 176(1) must extend the terms of all judges such that they serve the same period.

35. Section 176(1) properly interpreted therefore means that, except where the contemplated statute provides for the extension thereof, the term of a Constitutional Court Judge shall be 12 years, or until he or she attains the age of 70, whichever occurs first. The proviso therefore clearly intended that the Legislature, should it so elect, could alter the stipulations set out in section 176(1). By virtue of sections 3, 4 and 8(a) of the Act, the terms set out in the Constitution for Constitutional Court judges are now to be found in the said sections.

36. This language is consistent with the language employed in the Constitution as a whole. Thus, section 85(2)(a) of the Constitution, which deals with the executive authority of the Republic provides: "*the President exercises the executive authority, together with the other members of the Cabinet, by implementing national legislation except where the Constitution or an Act of Parliament provides otherwise"*.

37. The common definition of except is as follows

"(1) except for - other than; apart from;

(2)except that – but for the fact that; were it not true that

(3) an archaic word for unless"[6]

"a grammatical word indicating the only person or thing that does not apply to a statement just made, or a fact that modifies the truth of the statement"[7]

38. As the Constitution has vested full authority in the Legislature to extend the term of a Constitutional Court judge, with the promulgation of the Act, the provisions of section 176(1) limiting the terms of Constitutional Court judges are no longer applicable. The terms of Constitutional Court Judges are now regulated in terms of the Act.

39. We submit that by providing different terms for different Constitutional Court judges the Act does not offend any provision of the Constitution. In fact, the Legislature has been empowered to do so by the Constitution.

Do the provisions of section 8(a) constitute delegation?

40. The applicants contend that section 8(a) purports to abdicate, in its entirety, the power granted Parliament under section 176(1) of the Constitution.

---

[6] Collins Concise Dictionary, 2003 edition
[7] Internet thesaurus

41. We deny that in enacting section 8 Parliament abdicated its legislative power. Parliament has exercised its legislative powers in full. The President is neither required to pass other legislation nor subordinate legislation.

42. The applicants place much reliance on the case of ***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)** (hereinafter referred to as *Executive Council, Western Cape 2000)*. We submit that such reliance is misplaced.

43. This case is distinguishable from the current matter, both in terms of the empowering constitutional provisions and the wording of the legislation enacted in terms thereof.

44. In ***Executive Council, Western Cape 2000*** the Court was concerned with the provisions of section 24 of the Local Government: Municipal Structures Act 117 of 1998.

45. Section 159(1) of the Constitution provides that *"[T]he term of a municipal council may be no more than five years, as <u>determined by national legislation</u>*". Section 24(1), on the other hand, provided that

"[T]he term of municipal councils is no more than five years as determined by the Minister by notice in the Government Gazette, calculated from the day following the date or dates set for the previous election of all municipal councils in terms of ss (2)". [Emphasis added].

46. The Court held that section 24(1) constituted impermissible delegation of legislative authority. We are, with respect, in agreement with the decision of the Court in this regard. The determination of the term of Municipal Councils was clearly the preserve of Parliament, a provision that Parliament ignored in delegating the power to the Minister as it purported to do.

47. Sections 8(a) on the other hand does not purport to delegate the power to determine the term of the Chief Justice to the President. The section itself determines the term to be until the Chief Justice attains the age of 75 years. The limitations of length of service in sections 3, 4(1) and (2) were made inapplicable to the Chief Justice by Parliament. There is nothing in section 176(1) of the Constitution that suggests that the Legislature acted beyond its powers in removing this restriction. On the contrary, we contend, the section permitted Parliament to extend the terms in the manner it found fit.

48. Section 8(a) has determined the term of the Chief Justice to be until he or she reached the age of 75. The Chief Justice is neither an ordinary judge nor an ordinary Constitutional Court judge. This is constitutionally recognised. Section 174(3) of the Constitution prescribes a process of appointment of a Chief Justice and Deputy Chief Justice different from that of other Constitutional Court judges.

49. The choice of the Chief Justice and Deputy Chief Justice is a constitutional power that vests exclusively in the President (after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly).

50. In conformity with the constitutionally recognised position the Chief Justice and Deputy Chief Justice occupy, the Act preserves the President's discretion to implement the extension of the term of office of the Chief Justice. This, we submit, is a pragmatic approach and that section 8(a) does no more than enable the duly authorised person, the President, to meet contingencies and deal with various circumstances that may in future arise.

51. The applicants contend that the power granted the President in terms of section 8(a) is legislative in nature. To the extent that this Court finds that Parliament, in enacting section 8(a) delegated any of its powers, we submit that such a power is not of a legislative nature.

52. In the event the delegation is established, what must first be considered is whether such delegation is inconsistent with the Constitution.

53. In ***Catholic Bishops Publishing Co v State President and Another*** **1990 (1) SA 849 (A)** at 864I - 865A Corbett CJ stated that:

> *"It is true that in general the repository of a delegated power of legislation - and here we are dealing with such a case, viz the power of the State President to legislate by making regulations - may not, in the absence of authorisation in the empowering statute, subdelegate his power to someone else. This principle is expressed by the maxim* delegatus delegare non potest*. Such an incompetent subdelegation may occur where the repository of the legislative power, the delegatus, in the purported exercise of that power (say, by regulation) confers upon another an unlimited discretion to deal with the matter which is the subject of the regulation".*
>
> *……..*
>
> *"If the power in question is a power to legislate, then this principle would apply to a purported delegation of legislative power, but not prima facie to the conferment of executive or administrative*

powers to deal ad hoc with particular cases……...Much would depend, however, on the nature and ambit of the powers conferred and the statutory authority under which this was done. Relevant in this connection is whether or not what is conferred on the subdelegee amounts to an arbitrary discretion to be exercised in each case without any guidelines being laid down".

54. When regard is had to the provisions of section 8(a), it is clear that the Legislature has exercised its statutory authority. It has merely extended to the President an administrative power to deal *ad hoc* with particular cases. This power does not constitute unbridled discretion. Its exercise is subject to guidelines set out in the section, to wit:

54.1. The power may only be exercised in relation to a Chief Justice who becomes eligible for discharge from active service in terms of section 3(1) or 4(1) or (2). Implicit in this requirement is that the power may be exercised only once, as a Chief Justice in respect of whom the provisions of section 8(a) have been previously applied is no longer a *Chief Justice who becomes eligible for discharge from active service in terms of section 3(1) or 4(1) or (2)*;

54.2. The President must, at the time of the request, specify the actual period of continuation of active service; and

54.3. Any period of continuation of active service may not extend beyond the date on which such Chief Justice attains the age of 75.

55. It is submitted therefore that the section contain express constraints on the exercise of the power conferred on the President. Any exercise of this power by him in contravention of the constraints set out would be *ultra vires* and invalid.

The history of the legislation

56. Section 176(1) was amended by the Constitution Sixth Amendment Act of 2001 ("Constitution Sixth Amendment Act") promulgated on 21 November 2001. The objective of the Constitution Sixth Amendment Act is set out thus in the preamble of the Act "*To amend the Constitution of the Republic of South Africa, 1996, so as to change the title of the President of the Constitutional Court to that of Chief Justice; to provide for the offices of Deputy Chief Justice, President of the Supreme Court of Appeal and Deputy President of the Supreme Court of Appeal; to provide for the extension of the term of*

office of a Constitutional Court judge ……;[emphasis added]

57. The Constitution of the Republic of South Africa Amendment Bill thus made provision for the President of the Constitutional Court to become the Chief Justice of South Africa. Hitherto, the Chief Justice had been the Head of the Supreme Court of Appeal of the Republic. It furthermore sought to make provision for the extension of tenure of Constitutional Court judges.

58. Prior to this amendment, the extension of the tenure of the Chief Justice was governed by section 7A of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 ("the 1989 Act"). It read as follows:

> *"A Chief Justice who has been discharged from active service, except a Chief Justice who has been discharged from active service in terms of section 3(1)(b),(c) or (d), may, at the request of the President, from the date on which he has been discharged from active service, perform services of as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years".*

59. In terms of section 3 read with section 4 of the 1989 Act a judge held office for a period of 15 years active service or on attaining the age of 75 years. On the occurrence of either event, the judge was discharged from active service.

60. Section 97 of the Interim Constitution which regulated the appointment of the Chief Justice did not preclude the extension of tenure of a Chief Justice and thus section 7A of the 1989 Act did not offend the Interim Constitution. That was the provision in terms of which former Chief Justice Corbett's service as Chief Justice was extended, firstly for one year by former President de Klerk in 1993 and later for two years by former President Mandela in 1994.

61. Section 7A neither fell foul of the provisions of section 176(1) prior to its amendment by the Constitution Sixth Amendment Act, as the Chief Justice was not a judge contemplated in the section. With the promulgation of the Constitution Sixth Amendment Act, the result was that the Chief Justice became part of the Constitutional Court.

62. When regard is had to the amendment of section 176(1) of the Constitution and the deliberate re-wording of section 8(a) it is clear that the Legislature intended that the extension of tenure of the Chief Justice continued to be permissible. This could only be attained by amending section 176(1) of the Constitution such that the term of a

Constitutional Judge is not limited to 12 years' active service or the attainment of the age of 70. The Constitution Sixth Amendment Act therefore granted Parliament the power to extend the term of office of a Constitutional Court judge.

63. The effect of the amendment brought about by the Constitution Sixth Amendment Act is that the Constitution permits Parliament, should it so elect, to further amend sections 4(1) and (2) and provide that a Constitutional Court Judge must complete active service of 20 years before being eligible for discharge. Such an amendment effected through a constitutional power of section 176(1) would be constitutional.

64. We submit that viewed in the context of the legislation as a whole and the legislative history, there is nothing to suggest that Parliament was trying to re-enact the provisions of section 7A of the 1989 Act.

H. Comparative jurisprudence

65. Comparative jurisprudence is extensively set out by Chaskalson P (as he then was) in the ***Executive Council, Western Cape Legislature, and Others v President of the Republic of South***

Africa and Others **1995(4) SA 877 (CC)**[8](hereinafter referred to as Executive Council, Western Cape***)***. The general tenor of the cases referred to therein is that a delegation by Parliament is permissible where assignment of a power is not in conflict with constitutional restrictions or does not constitute abdication of its legislative functions.

66. What is clearly not permissible is that Parliament purport to assign its plenary legislative powers to another body.[9]

67. The Supreme Court of India in ***Sarwarlal and Others v The State of Hyderabad*** **1960 AIR 862, 1960(3) SCR 311**[10] expressed this principle thus:

> *"The doctrine of invalidity of legislative provisions enacted in colourable exercise of authority applies to legislatures whose powers are subject to constitutional restrictions. When such a legislative body seeks, under the guise or pretence of complying with the restrictions, in enacting a statute, to evade or elude them, it is but a fraud on the Constitution, and the statute is liable to be declared invalid on the ground that the enactment is in colourable exercise of authority, the statute being in truth beyond the competence of the body. But a statute enacted by a legislative authority whose powers are*

---

[8] At [53] – [60]
[9] Executive Council, Western Cape 2000 at [51]
[10] This case can accessed on: http:/indiankanoon.org/doc/618203

not fettered by any constitutional or other limitations, cannot be declared invalid as enacted in colourable exercise of its powers".[11]

68. In ***The Consumer Action Group & Anr. v. State of Tamil Nadu & Ors***. **2000 AIR 3060, 2000(2) Suppl.SCR 523, 2000(7) SCC 425, 2000(6) SCALE1, 2000(9)JT 272**[12] the Supreme Court of India, having analysed the court's previous decisions, held that:

"the principle which emanates from the aforesaid decisions relied upon by the appellants is very clear, namely: that if there is abdication of legislative power or there is excessive delegation or if there is a total surrender or transfer by the legislature of its legislative functions to another body then that is not permissible. There is, however, no abdication, surrender of legislative functions or excessive delegation so long as the legislature has expressed its will on a particular subject-matter, indicated its policy and left the effectuation of the policy to subordinate or subsidiary or ancillary legislation"[13]

The Court went further to stated that

---

[11] At p 318
[12] Internet link – http://indiankanoon.org/doc/993633
[13] At page 4 of the internet version of the case

"*…..the legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law"*[14].

69. **In *M.P. High Court Bar Association v. Union Of India and Others* 2005 AIR 4114, 2004(4) Suppl. SCR520, 2004(11) SCC766, 2004 (8) SCALE43, 2004(7) JT548**[15] the Supreme Court of India said:

"Under the Constitution of India, the power to legislate is with the Legislature. The said power of making laws, therefore, cannot be delegated by the Legislature to the Executive. In other words, a Legislature can neither create a parallel legislature nor destroy its legislative power. The essential legislative function must be retained by the Legislature itself. Such function consists of the determination of legislative policy and its formulation as a binding rule of conduct. But it is also equally well-settled that once the essential legislative function is performed by the Legislature and the policy has been laid down, it is always open to the Legislature to

[14] At page 5 of the internet version
[15] Internet link – http://indiankanoon.org/doc/226909

delegate to the Executive authority ancillary and subordinate powers necessary for carrying out the policy and purposes of the Act as may be necessary to make the legislation complete, effective and useful".[16]

70. The United States of America applies similar principles in determining whether delegation has been effected contrary to the provisions of the Constitution.

71. In ***Hampton JR & Co. v United States* 276 US 394, 72 L. ed** the Supreme Court of the United States considered the constitutionality of an Act that empowered the President to amend customs duties and levies, in circumstances where the Constitution vested in Congress the power to lay and collect taxes, duties, imports and excises. The court pointed out that whilst the Constitution clearly delineates the powers of the three branches of government, this did not mean "t*hat the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch*"[17].

---

[16] At pp 9 -10 of the internet version
[17] At p 629

72. In pointing out that there is a distinction to be drawn between delegation of power to make the law and conferring a discretion as to its execution, the court stated as follows:

> *"As Judge Ranney of the Ohio supreme court, in Cincinnati W. & Z.R. Co v. Clinton County, 1 Ohio St. 77, 88, said in such a case* "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.[18]"

73. Invoking this principle the court opined that *"[C]ongress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being*

[18] At p629 - 630

made dependent by the legislature on the expression of the voters of a certain district"[19]

74. The Court quoted with approval the decision of *Railroad & Warehouse Commission v Chicago, M. & St. P.R Co.* 38 Minn. 281, 298 to 302, 37 N.W. 782[20] in which the following was stated: *"If congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power".*

75. In ***William Graham v John Deere Co of Kansas City***, **388 US 1, 15 L ed 2d 545,86 S Ct 684** the Supreme Court stated that where a standard is expressed in the Constitution it may not be ignored, holding that it is in this light that validity 'requires reference ti a standard written into the Constitution.' The Court went further to state that:

> *"Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the*

---

[19] At p 629
[20] At p 630

constitutional aim. This is but a corollary to the grant to Congress of any Article 1 power".[21]

76. Australian jurisprudence also recognises and applies similar principles. In ***Baxter v AH Way*** **(1909) 8 C.L.R. 626; 15 A.L.R 603 (H.C)** the court expressed the principle in the following manner;

> *"It is of course obvious that every legislature does in one sense delegate some of its functions…….[Nor] is it to the purpose to say that the legislature could have done the thing itself. Of course it could. In one sense this is a delegation of authority because it authorises another body which it specifies to do something that it might have done itself. It is too late in the day to contend that such a delegation, if it is a delegation, is objectionable in any sense. The objection certainly cannot be supported by relying on the maxim* delegatus non delegare potest, *nor in my opinion, on any other ground".*

77. The above summary of comparative jurisprudence demonstrates that once the Legislature has executed the essential legislative power it is always open to it to delegate to the Executive authority ancillary

---

[21] At p 550 [5-7]

and subordinate powers necessary for carrying out the policy and purposes of the Act.

78. In the circumstances, it is our contention that section 8(a) of the Act does not purport to delegate Parliament's legislative functions to the President. Parliament has already exercised its power in terms of section 176(1) of the Constitution. Section 8(a) merely authorises the President to effectuate Parliament's decision.

I. Separation of powers

79. The applicants contend that section 8(a) allows political interference with the independence of the judiciary by allowing *ad hoc,* individual extensions of the term of office of the Chief Justice. The applicants interpret the provisions of section 8(a) to permit a renewal of term of office of the Chief Justice.

80. Firstly, a renewal of term of office of the Chief Justice is not permitted by section 8(a). Whereas the sections predecessor[22] permitted such renewal, the wording of section 8(a) points towards a deliberate departure form such renewal, consistent with the provisions of section 176(1). An extension in terms of section 8(a) is possible only <u>before</u> the term expires. Should the term expire before

[22] Section 7A of the 1989 Act

the provisions of the section are invoked, it would no longer be permissible for the President to seek to exercise his discretionary powers in terms of the section.

81. Although the Constitution determines the tenure of office of judges, including the Constitutional Court judges, it grants Parliament the power to extend the terms of tenure. Previously, only the term of the tenure of Constitutional Court judges was constitutionally prescribed. All other judges hold office until they are discharged from active service in terms of an Act of Parliament[23]. This was however amended by Constitution Sixth Amendment Act in 2001, which permitted Parliament to extend the tenure of Constitutional Court judges.

82. In enacting the Act, Parliament has exercised its constitutional prerogative. An amendment of the term of office of a Constitutional Court judge can therefore not be construed as unconstitutional. Both section 176(1) and 176(2) of the Constitution grant Parliament the power to determine these terms.

83. A determination therefore in the exercise of those powers bestowed by section 176(1) is not unconstitutional. Section 176(1) does not place any constraints on the Legislature. Therefore, Parliament was

[23] Section 176(2) of the Constitution

at liberty to exercise these powers to their utmost extent, subject only to the limitations found in the Constitution. The extensions of the terms of Constitutional Court judges in terms of sections 4(1) and (2) and 8(a) do not offend any constitutional limitation or the principle of separation of powers.

84. Section 165(2) of the Constitution guarantees the independence of at the courts. In ***Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening*) 2002 (5) SA 246 (CC)** this Court pointed out that the mere fact 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[24]. We submit that by parity of reasoning an extension, by Act of Parliament, of the terms of office of a Constitutional Court judge, pursuant upon section 176(1) of the Constitution is not inconsistent with the judicial independence that the Constitution requires. Equally so, neither does the exercise of a discretionary power by the President in terms of section 8(a).

85. Accordingly, we submit that the granting of powers to the Legislature to extend the terms of judicial officers does not undermine the

[24] At [106]

principles of separation of powers or judicial independence as the extension is granted by the Constitution itself. It, therefore, would be absurd to argue, as FUL appears to be doing that a provision in the Constitution is unconstitutional.

J. Appropriate relief

86. We submit that it is just and equitable that this Court invoke the provisions of section 172(1)(b) of the Constitution in the event the Court declares section 8(a) unconstitutional.

87. In *Executive Council, Western Cape* Chaskalson J (as he then was) pointed out that:

> *"The powers conferred on the Courts by s 98(5) and (60)* [of the interim Constitution] *are necessary powers. ……. There may also be situations in which it is necessary for the Court to act to avoid or control the consequences of a declaration of invalidity of post-constitutional legislation where the result of invalidating everything done under such legislation is disproportional to the harm which would result from giving the legislation temporary validity".*

88. We submit that the issue *in hoc casu* is one contemplated by Chaskalson J. The retrospective declaration of invalidity of section 8(a) and its concomitant result would impugn the integrity not only of the Chief Justice but the office of the Chief Justice in general. The harm resulting thereby is disproportional to giving the section temporary validity to allow Parliament time to take remedial action, should it so choose. The President's request to the Chief Justice to continue in active service would thus become unconstitutional only at the end of the period of suspension[25].

89. Contrary to what some of the applicants contend, suspension of an order of invalidity is not granted only where invalidation of the unconstitutional law leaves a lacuna. As pointed out by Chaskalson J in *Executive Council, Western Cape* the duty of this Court is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, *and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution[26].*

90. A decision not to suspend any declaration of invalidity would have a detrimental effect on the process of the appointment of a new Chief Justice. It would mean that the President must identify, meaningfully consult with leaders of political parties in the National Assembly and

---

[25] See De Kock And Others V Van Rooyen 2005 (1) SA 1 (SCA) at [20] – [28]
[26] At [100]

the JSC and appoint a Chief Justice in less than four weeks. This will undoubtedly adversely impact on, and undermine, any meaningful consultations and attract valid criticism from the public. This would impugn the integrity of the office of the Chief Justice and the judiciary in general. The harm would be disproportional to any perceived harm which would result from giving the legislation temporary validity, the very situation that Chaskalson J cautioned against.

91. We respectfully associate ourselves with the submissions of NADEL in this regard.

92. In the result we submit, that it would be just and equitable to suspend the declaration of invalidity for an appropriate period in the terms contemplated in section 172(1)(b) and no prejudice would be caused thereby.

93. As a matter of fact, on 7 July 2011 and *ex abundante cautela,* the Minister introduced a Bill in the National Assembly to amend the period of active service of, *inter* alios, the Chief Justice. With the leave of this Court, an affidavit by the Minister confirming this fact will be filed at the hearing of these matters.

K. Conclusion

94. In the circumstances we submit that the applications must be dismissed.

95. In the event this Court is persuaded that section 8(a) of the Act is unconstitutional, it is our submission that such a declaration should be suspended for an appropriate period.

_____

M T K MOERANE SC
M SELLO
Chambers, Johannesburg
13 July 2011

TABLE OF AUTHORITIES

1. Gundwana V Steko Development And Others 2011 (3) SA 608 (CC)

2. Transvaal Agricultural Union V Minister Of Land Affairs And Another 1997 (2) SA 621 (CC)

3. Glenister V President Of The Republic Of South Africa And Others 2011 (3) SA 347 (CC)

4. President of The Republic Of South Africa and Others v South African Rugby Football Union And Others 1999 (2) SA 14 (CC)

5. Doctors For Life International v Speaker of The National Assembly and Others 2006 (6) SA 416 (CC)

6. Von Abo v President of The Republic of South Africa 2009 (5) SA 345 (CC)

7. Catholic Bishops Publishing Co v State President and Another 1990 (1) SA 849 (A)

8. Catholic Bishops Publishing Co v State President and Another 1990 (1) SA 849 (A)

9. Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others 1995(4) SA 877 (CC)

10. Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC)

FOREIGN AUTHORITIES

India

1. Sarwarlal and Others v The State of Hyderabad 1960 AIR 862, 1960(3) SCR 311

2. The Consumer Action Group & Anr. v. State of Tamil Nadu & Ors. 2000 AIR 3060, 2000(2) Suppl.SCR 523, 2000(7)SCC 425, 2000(6) SCALE1, 2000(9)JT 272

3. M.P. High Court Bar Association v. Union Of India and Others 2005 AIR 4114, 2004(4) Suppl. SCR520, 2004(11)SCC766, 2004 (8) SCALE43, 2004(7) JT548

USA

4. Hampton JR & Co. v United States 276 US 394, 72 L. ed

5. William Graham v John Deere Co of Kansas City, 388 US 1, 15 L ed 2d 545,86 S Ct 684

Australia

6. Baxter v AH Way (1909) 8 C.L.R. 626; 15 A.L.R 603 (H.C)