

**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

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**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**

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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

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**PRACTICE NOTE OF THE MINISTER**

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**(a) THE PARTIES**

The parties are as they appear in the citation above.

## **(b) THE NATURE OF THE PROCEEDINGS**

The Centre for Applied Legal Studies (“CALs”) and the Council for the Advancement of the South African Constitution (“CASAC”), Freedom Under the Law (“FUL”) and Justice Alliance of South Africa have brought three applications to this Court by way of direct access.

The applicants seek an order declaring invalid section 8(a) of the Judges’ Remuneration and Conditions of Employment Act 47 of 2001 (“the Act”) and the President’s decision in terms thereof to request the Chief Justice to continue to perform active service for a period of 5 years from 15 August 2011 to 16 August 2011.

## **(c) ISSUES TO BE ARGUED**

1. The applicability of sections 165 and 167(e) of the Constitution to the matters raised in these applications.
2. Whether section 8(a) of the Act violates section 176(1) of the Constitution;
3. The validity of the President’s conduct in terms of the section;
4. The applicability of the provisions of section 174(3) of the

Constitution to the President's exercise of his discretion in terms of section 8(a) to request the Chief Justice to continue to perform active service.

5. Appropriate remedy in the event the section is declared unconstitutional.

**(d) PORTIONS OF THE RECORD NECESSARY FOR DETERMINATION OF MATTER**

The whole record.

**(e) ESTIMATED DURATION OF ORAL ARGUMENT**

One day.

**(e) SUMMARY OF ARGUMENT**

1. The Minister contends that the Constitution does not impose any obligation on the President when exercising his powers in terms of section 8(a) of the Act. Consequently, there is no constitutional obligation that the President failed to discharge.
2. The provisions of section 165 of the Constitution on which FUL relies are not applicable to the issues raised in these applications. Furthermore, the failure by FUL to cite the Speaker of Parliament must be fatal to a challenge premised on

the section.

3. The Minister submits that section 8(a) of the Act is constitutional. In enacting the section, Parliament validly executed its power in terms of section 176(1) of the Constitution:

- 3.1. The Act extended the terms of office of different Constitutional Court judges as provided for in section 176(1);

- 3.2. The terms of different Constitutional Court judges have been extended in terms of sections 4(1) and (2) and section 8(a)

4. The power conferred on the President by section 8(a) does not constitute delegation of legislative authority, but merely a conferment of an authority or discretion as to the execution of the extension of the term of office of the Chief Justice. The Minister submits that the discretion is consistent with the Constitutional prerogative of appointment of the Chief Justice conferred on the President by section 174(3). Such conferment does not offend the provisions of the Constitution in general, and section 176(1) in particular.

5. The extensions of the terms of Constitutional Court judges in terms of sections 4(1) and (2) and 8(a) do not offend the principle of separation of powers or independence of the judiciary.
6. The Minister submits that in the event this Court were to declare the section invalid, such declaration must be suspended for an appropriate period to give Parliament opportunity to enact remedial legislation.
  - 6.1. The Minister will seek leave to file a supplementary affidavit in which he sets out the steps he has taken, without conceding the unconstitutionality of section 8(a) of the Act, and *ex abundante cautela*, to seek an amendment of the section to remove any vagueness or ambiguity that may be considered to exist.
  - 6.2. The Bill has been tabled before the National Assembly and the legislative process is expected to be completed during the first half of August 2011.

**(g) AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED**

A complete list of all authorities relied on by the Minister is

attached to the written argument. The authorities on which particular reliance will be placed are:

1. *Von Abo v President of The Republic of South Africa* 2009 (5) SA 345 (CC)
2. *Doctors For Life International v Speaker of The National Assembly and Others* 2006 (6) SA 416 (CC)
3. *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC)
4. *Catholic Bishops Publishing Co v State President and Another* 1990 (1) SA 849 (A)
5. *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC)
6. *Hampton JR & Co. v United States* 276 US 394, 72 L. ed
7. *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