

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)

In the matter between: **CASE NO: 62/11**

CENTRE FOR APPLIED LEGAL STUDIES First Applicant

**COUNCIL FOR THE ADVANCEMENT OF
THE SOUTH AFRICAN CONSTITUTION** Second Applicant

and

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 matter between: **CASE NO: 54/11**

FREEDOM UNDER LAW NPC Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

**DIRECTOR-GENERAL: JUSTICE AND
CONSTITUTIONAL DEVELOPMENT** Second Respondent

THE MINISTER OF JUSTICE AND Third Respondent

CONSTITUTIONAL DEVELOPMENT

CHIEF JUSTICE SANDILE NGCOBO

Fourth Respondent

and

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

First Amicus Curiae

BLACK LAWYERS ASSOCIATION

Second Amicus Curiae

In the matter between:

CASE NO: 53/11

JUSTICE ALLIANCE OF SOUTH AFRICA

Applicant

and

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

WRITTEN SUBMISSIONS OF NADEL

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INTRODUCTION

1. NADEL appreciates that the issues raised by the applicants go to the heart of the independence of and public confidence in the judiciary. However, NADEL does not seek to make any submissions in relation to the merits of the matters that are before the Court as these matters are fully traversed by the applicants. Instead, these submissions are concerned with what may be an appropriate remedy should this matter not be disposed of before 15 August 2011 or in the event that a finding of invalidity is made.
2. The affidavit in support of NADEL's application for admission as amicus curiae sets out what it considers to be the appropriate remedy in the circumstances as follows:

First, in the event that this matter is not capable of finalisation before 15 August 2011 (the day on which the Chief Justice's present appointment comes to an end), that the Court should consider making an interim order before 15 August 2011 declaring that:

The extension of the term of office of the Chief Justice will remain effective until the proceedings have been finally concluded before the Court; or

In the event that Parliament has commenced a process to pass a law of general application aimed at validating the extension of the Chief Justice's term of office, the extension will remain effective until such law has been passed.

Second, that in the event that this Court makes a finding of constitutional invalidity in relation to section 8(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 (the Judges' Act), the Court should consider granting an order to suspend the declaration of invalidity for a period of time in order to afford Parliament the opportunity to remedy the defect in the law.¹

¹ Affidavit of Malindi, at paragraphs 12 and 13.

3. The first proposed remedy (the interim remedy) would be sound whether or not the Court grants direct access to the applicants. Although, NADEL submits, in the event that the Court does not grant direct access, there would be a greater need for an interim remedy. The second proposed remedy (an order of suspension of invalidity) would apply in the event that direct access is granted and a finding of constitutional invalidity is made. NADEL makes submissions in relation to each of the scenarios below.

REMEDIES SOUGHT BY THE OTHER PARTIES

CALS and CASAC

4. The Centre for Applied Legal Studies (CALs) and the Council for the Advancement of the South African Constitution (CASAC) have applied for direct access in the event that direct access is granted to the other applicants. NADEL supports this conditional application. Indeed it would manifestly not be in the interests of justice to deny access to CALs and CASAC considering that the grounds of their application in the North Gauteng High Court have a direct bearing on the issues before the Court.
5. CALs and CASAC consider the circumstances where an order of invalidity of this Court is made after 15 August 2011. In these circumstances they contend that the order should be made with prospective effect, in other words that the Court should

make an ancillary order that limits the retrospective effect of the determination of invalidity.

6. This is consonant with the approach that NADEL seeks in similar circumstances, except for the following distinction: it is submitted that, in order to prevent uncertainty as to the validity of the Chief Justice's actions during that time (that is, the period beyond 15 August 2011 but before the Court's decision), the Court should grant an interim order that provides that the Chief Justice is to continue to perform the duties of his office under the cloak of constitutional validity. In other words, the only difference is the question of timing of the order: CALS and CASAC would have it granted at the point that the Court makes its final decision; NADEL would have it granted in advance. In NADEL's view greater clarity would pertain to the interim remedy that it seeks.

7. With regard to an order for a suspension of invalidity, CALS and CASAC contend that NADEL justifies such an order on the basis that 'the incumbent Chief Justice is better able to perform the functions of his office than anybody else who might be appointed in his stead'. This is a misunderstanding of NADEL's position, which is this:

- 7.1. The transformation of the judiciary and the manner of administration of the court system is in progress.

- 7.2. It involves a fundamental shift from the manner in which the judiciary has been administered in the past, and seeks to create a much greater role and responsibility for the Office of the Chief Justice. This is welcome in order for the judiciary to maintain institutional independence.
- 7.3. However, managing the transition is a complex task, which the incumbent Chief Justice has been directing.
- 7.4. As a result he has institutional memory, has established relationships with those with whom he is required to work and consult, and has provided leadership in bringing the transformation initiatives to the current point.
- 7.5. Even though a new Chief Justice would in time be able to take over the functions of the Chief Justice, there would inevitably be a delay in advancing the transformation project, which has already plagued the judiciary for many years.²
8. However, CALS and CASAC are not opposed to a suspension order in principle. While it may be true that the respondents have not provided sufficient justification to warrant a suspension order, NADEL has.

Freedom Under Law

9. Freedom Under Law (FUL) contends that a suspension order would 'throw the administration of justice into disrepute and would open to question the

² See affidavit of Malindi at paragraphs 33 to 35 regarding the aspects of the transformation project that would be delayed.

independence of our courts'. They further contend that the Chief Justice, serving in these circumstances, would no longer be above reproach and that this 'would risk lowering the judiciary and the head of the judiciary in the eyes of the public.'

10. NADEL disagrees. Firstly, were the Court to grant such an order it would be on the basis that it is just and equitable in the circumstances to do so.

11. Second, the concerns about perceptions that may arise must take into account that any such perceptions must be reasonable. This Court in *Van Rooyen v The State*, stated:

When considering the issue of appearances or perceptions, attention must be paid to the fact that the test is an objective one. Canadian courts have held in testing for a lack of impartiality 'the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the questions and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person viewing the matter realistically and practically – and having thought the matter through – conclude". (footnote omitted)

....

The perception that is relevant ... is ... a perception based on a balanced view of all the material information. As a United States court has said, 'we ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person'.³ (footnotes omitted)

12. It is submitted that there would be no objective basis for anyone to hold the perceptions alluded to by FUL.

³ *Van Rooyen v The State* 2002 (5) SA 246 (CC) at paragraphs 33 and 34. See also *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1(CC).

13. It is common cause that the incumbent Chief Justice is above reproach. This is made clear by all the parties to this matter.⁴ It would not be reasonable to lay at his door the confusion that has resulted from the President's extension of his term and the challenge to that extension.

Justice Alliance of South Africa

14. In relation to a suspension order, the Justice Alliance of South Africa (JASA) argues that a short-term loss in efficiency is not justification for such an order. For the reasons set out above, it is submitted that the peculiar circumstances of the stage at which we are in judicial transformation warrants the continued leadership of the incumbent Chief Justice.

15. JASA also contends that it is only appropriate for the Court to grant a suspension order where an order of declaration of invalidity of a law would result in a lacuna. NADEL disagrees. First, JASA's opinion is based on a misreading of *J and Another v Director-General, Department of Home Affairs and Others*.⁵ While the Court reasoned that a suspension order would be appropriate in cases where a legislative lacuna would otherwise result, it did not limit the grant of such an order to only to such cases. NADEL has placed other facts before the Court that would justify the order it seeks in this regard.

⁴ See affidavit of Malindi at paragraphs 24 to 27.

⁵ 2003 (5) SA 621 (CC).

16. Second, this Court has granted a suspension order in the absence of a legislative lacuna. In *Minister of Home Affairs v Fourie*, the Court declared a provision of the Marriage Act (and the common law definition of marriage) to be unconstitutional and invalid to the extent that it did not accord to same-sex couples the equal status and benefits of marriage.⁶ In other words the problem with the law was not what it said, but what it didn't say. Instead of reading in words to remedy the law, the Court granted a suspension order to afford Parliament the opportunity to remedy the law. In this case, Sachs J stated:

*What these cases highlight is the need to look at the precise circumstances of each case with a view to determining how best the values of the Constitution can be promoted by an order that is just and equitable.*⁷

17. JASA makes no submission in relation to a possible interim order. However, it submits in relation to the Chief Justice that should the situation arise where a finding of unconstitutionality takes place after 15 August 2011: 'all conduct and every decision he made from that date, as head of the judiciary, of the JSC, and as a Judge of this Court, would be irregular, invalid, and open to dispute by any aggrieved party. It would likely undermine all important processes and decisions of all three vital bodies, and undo all the positive things the Third Respondent might have achieved in that time.'⁸

⁶ *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).

⁷ *Fourie* at paragraph 135.

⁸ At paragraph 15 of their written submissions.

18. It is for these very reasons that an interim order is called for. The important process and decisions of the JSC, Constitutional Court and the judiciary in general under the Chief Justice's leadership require protection from invalidity until the Court has made its decision.

INTERIM RELIEF

19. On 8 July 2011, the Judges' Remuneration and Conditions of Employment Amendment Bill [B 12 – 2011] (the Bill) was introduced in the National Assembly. A copy of the Bill is annexed to these written submissions since it was published only after all the affidavits were filed in this matter.

20. NADEL does not wish to comment or elicit the Court's comment on the contents of the Bill. However the Bill is relevant to the extent that it proposes to amend section 8(a) of the Judges' Act in order to bring it in line with section 176(1) of the Constitution.⁹ In other words, the very issues raised in the matters before the Court are in the process of being remedied by Parliament.

21. An announcement has been made by the Portfolio Committee on Justice and Constitutional Development in the National Assembly calling for public comment by 22 July 2011. Public hearings will be held on 26 July 2011. A copy of the announcement is annexed to these written submissions.

⁹ Explanatory Memorandum to the Bill, paragraph 2.

22. It is NADEL's contention that the introduction of the Bill raises a fundamental question as to the necessity for a finding on the merits. It would appear that the respondents have considered the concerns that are being raised by the applicants. Whether the Bill passes constitutional scrutiny is a question to be addressed in the parliamentary process and after.

23. However, were the constitutionality of the Bill, or the amendment Act (once enacted), to be put in issue, more time would be required to resolve the issues. This intensifies the urgency of the need for interim relief to be considered by the Court.

24. In the event that this Court does not determine the constitutionality and validity of section 8(a) of the Judges' Act and the President's exercise of his powers in terms of that statutory provision before 15 August 2011, the current Chief Justice's term of office will be extended in one of two ways:

24.1. The term of office will be extended on or before 15 August 2011 if the Bill has been enacted in its current or similar form and assented to by the President by then; or

24.2. In the event that section 8(a) of the Judges' Act is not validly amended in time, the term of office will be extended in terms of the President's impugned decision made in terms of that provision.

25. NADEL's concern is also that there is a risk that the Bill may not be enacted before 15 August 2011, or that its validity may be challenged immediately upon enactment. This is not intended to question the bona fides of the respondents. However, it must be anticipated that the vagaries of parliamentary process could pose a danger to the timeous passage of the Bill. If there is a risk, NADEL believes that it should be forestalled.

26. In the event that the Bill is not passed in time, the Chief Justice would continue to serve in terms of a statutory provision that may at some later stage be challenged and declared unconstitutional and invalid.¹⁰ If this were to happen, the Court would at this later stage have to address the validity of the decisions taken by the Chief Justice during the period between 16 August 2011 and the date of its decision declaring it unconstitutional. NADEL is of the view that temporary relief should be granted by this Court to avert this risk.

27. It is submitted that it is in the interests of justice, the integrity of the judicial system and public confidence in the judiciary that a repeated tug-of-war over the validity of conduct of the Chief Justice during such intervening period is avoided.

28. This could be avoided by an order of this Court, which provides that the Chief Justice's performance of his duties during the intervening period is insulated from

¹⁰ See *The State and Another v The Acting Regional Magistrate, Boksburg and Another* CCT 109/10 (2011), where the Court held that the enactment of new legislation that superseded the common law offence of rape did not preclude the investigation and prosecution of the common law offence of rape before the commencement of the new law.

legal challenge on the grounds currently before the Court, whether or not there is an ultimate finding of invalidity of the President's decision under section 8(a). The fact that the second respondent has initiated remedial legislation to meet the challenge to section 8(a) of the Judges' Act is a significant factor for the Court to take into account in considering temporary relief.

The Court has the power to grant interim relief

29. Section 38 of the Constitution provides in relevant part:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

30. Section 172(1)(b) of the Constitution provides that when deciding a constitutional matter within its power, a court may make any order that is "just and equitable".

31. The following dictum in *Fose v Minister of Safety and Security* expresses the remedial power of the Court as being broad and including innovative orders:

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.¹¹

32. In *Hoffmann v South African Airways* the Court stated that:

¹¹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paragraph 19.

'appropriate relief' must be construed purposively, and in the light of section 172(1)(b) ... Thus construed, appropriate relief must be fair and just in the circumstance of the particular case. ...

*Fairness requires a consideration of the interests of all those who might be affected by the order.*¹²

33. The power of the Court to grant just and equitable orders is not limited to circumstances where the Court is making an order as to the constitutional invalidity of law or conduct. In *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*, the Court reasoned:

*The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements.*¹³

34. It is submitted that the requirement to make an order that is just and equitable would be satisfied by an order that maintains the status quo expressly by extending the Chief Justice's term of office and authorising him to continue to exercise the duties conferred upon him by law.

35. In *Minister of Justice and Constitutional Development v Nyathi*,¹⁴ the Court was required to consider an application for an extension of an earlier suspension order. The application was made to the Court one day before the suspension deadline was

¹² *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at paragraphs 42 and 43.

¹³ *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC) at paragraph 97.

¹⁴ *Minister of Justice and Constitutional Development v Nyathi* 2010 (4) SA 567 (CC).

to take effect. In response, the Court immediately, and without a hearing, issued an order that the period of suspension would be further extended for three months pending the final determination of the matter. Mokgoro J, writing for the Court, stated that the temporary order was 'granted in order to afford an opportunity for a full airing of the issues and for consideration of the interests of the public'.¹⁵

SUSPENSION OF AN ORDER OF INVALIDITY

36. NADEL makes submissions in relation to this remedy in the event that the Court finds that the impugned section is unconstitutional and invalid.

37. Section 172(1)(b) of the Constitution provides that when deciding a constitutional matter within its power, a court may make any order that is "just and equitable", including "an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect." It is a remedy that has been used on a number of occasions by this Court.

38. Section 98(5) of the interim Constitution was the predecessor to section 172(1)(b). The earlier section provided for the suspension of a declaration of invalidity where it was "in the interests of justice and good government".

39. That approach has informed the interpretation of section 172 (1)(b). The remedy is employed when it is preferable for the court to allow the relevant authority an

¹⁵ *Nyathi* at para 11.

opportunity to remedy the defect, rather than the court attempting to do so itself, particularly where the remedial action will require policy choices to be made by Parliament.

40. In *S v Ntuli*, Didcott J stated:

*The long perpetuation of an unconstitutional scheme is admittedly unfortunate. But the statute book cannot be purged suddenly of all its old elements that are now repugnant to the Constitution. And, if fresh problems are to be avoided, the removal of the objectionable parts and their replacement by ones that are sound and realistic has to be both thorough and thoughtful. That, I have no doubt, is 'in the interests of justice and good government'. We must therefore provide the opportunity for it.*¹⁶

41. In *Minister of Justice v Ntuli* the Constitutional Court held that:

*It is the duty of the Minister responsible for the administration of the statute who wishes to ask for an order of invalidity to be suspended, whether under the interim or the 1996 Constitution, to place sufficient information before the Court to justify the making of such an order, and to show the time that will be needed to remedy the defect in the legislation. This should be done with due regard to the importance of the fundamental rights enshrined in the Constitution, and to the fact that it is an obligation of the government to ensure that such rights are upheld and that the suspension of rights consequent upon the difficulties of the transition is kept to a minimum.*¹⁷

42. The Constitutional Court in *Mistry v Interim Medical and Dental Council of South*

Africa clarified these requirements for such a remedy and expanded as follows:

A party wishing the Court to make such an order must provide it with reliable information to justify it doing so. The requisite information will necessarily depend for its detail on the nature of the law in question and the character of the defect to be corrected. Yet, as a general rule, a government organ or other party wishing to keep an unconstitutional

¹⁶ *S v Ntuli* 1996 (1) SA 1207 (CC) at paragraph 29.

¹⁷ *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) at paragraph 41

provision alive should at least indicate the following: what the negative consequences for justice and good government of an immediately operational declaration of invalidity would be; why other existing measures would not be an adequate alternative stop-gap; what legislation on the subject, if any, is in the pipeline; and how much time would reasonably be required to adopt corrective legislation. Parties interested in opposing such an order should be given an opportunity to motivate their opposition. Legal representatives should ensure that they have appropriate and timely instructions on the matter, and not do their best while on their feet or else rely on a rushed telephone call at the tail-end of the hearing.¹⁸

43. In deciding the appropriate remedy in *Dawood v Minister of Home Affairs*, the Court held that there were two primary considerations:¹⁹

- 43.1. the need to afford appropriate relief to successful litigants, on the one hand; and
- 43.2. the need to respect the separation of powers, and, in particular, the role of the legislature as the institution constitutionally entrusted with the task of enacting legislation.

44. In *Dawood*, O'Regan J gave due consideration to the legislative process already underway in determining the appropriate order in the circumstances.²⁰

45. The learned judge expressed caution against providing a legislative cure for the unconstitutionality of the impugned provisions in circumstances where a legislative process was already underway:

It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining

¹⁸ *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) at paragraph 37.

¹⁹ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 935 (CC) at paragraph 62.

²⁰ *Dawood* at paragraph 65.

*what guidance should be given to the decision-makers, and in particular, the circumstances in which a permit may justifiably be refused, is primarily a task for the legislature and should be undertaken by it.*²¹

46. O'Regan J stated further that:

*In determining the appropriate order, I am mindful of the fact that the Department has published a White Paper on International Migration which suggests that a fundamental review of the legislation under scrutiny in this case is in train. It is for these reasons that I think it is appropriate to suspend the order of invalidity for a period of two years which should be sufficient time to permit the legislature to attend to rectifying the cause for constitutional complaint in the legislation.*²²

47. The court in *Dawood* afforded interim relief to the applicants and those persons similarly situated requiring decision-makers to comply with certain requirements in considering applications for temporary residence permits pending the enactment of legislation by Parliament or the expiry of the period of suspension.

48. The approach in *Dawood*, it is submitted, is appropriate in this context, where legislation is similarly in the pipeline. One difference here, however, is that the time period granted to the legislature to remedy the law need not be lengthy. Legislation is before Parliament and a date for public hearings (26 July 2011) has been set.

49. The Court is constitutionally empowered to impose tight timeframes so as to ensure that an unconstitutional state of affairs lasts only for as long as is reasonably required for Parliament to amend the identified defect. Absent swift action, the period of suspension would expire and the Chief Justice's term of office would automatically end.

²¹ *Dawood* at paragraph 63.

²² *Dawood* at paragraph 65.

50. Section 237 of the Constitution places the Minister and Parliament under a constitutional duty to act diligently and without delay. Given the fact that only a single subsection of an Act of Parliament has been challenged, the tabling of the Bill, as well as the broad support for the extension of the Chief Justice's term across the spectrum, an exceptionally narrow period would be appropriate.

51. NADEL therefore supports the President and Minister's submissions that in the event that the Court finds that section 8(a) is unconstitutional and therefore that the extension of the Chief Justice's term of office is invalid, the appropriate remedy would be to suspend the order of invalidity and afford Parliament an opportunity to remedy the defect in the law; and expressly to hold that for the sake of clarity, during that period the Chief Justice is entitled to continue to perform his functions as Chief Justice.

CONCLUSION

52. NADEL believes in the independence of the judiciary and that the state should offer no incentive to any aspirant or sitting judge to compromise their impartiality. It is submitted that an extension of a judge's term of office or that of the Chief Justice or President of the Supreme Court of Appeal (or of any person holding office in any capacity) is not per se wrong. Exceptional circumstances arise in many spheres of life requiring that incumbents stay longer instead of immediately appointing or

employing their replacements. This is already contemplated by section 176(1) and only requires to be done in terms of legislation that is consistent with the Constitution.

53. There is no reason to believe that any judge whose term of office has been extended under these circumstances would act without impartiality or contrary to what section 165(1) and their oaths/affirmations of office in terms of Schedule 2(6) of the Constitution require. A judge's oath/affirmation of office requires impartiality. Secondly, such a judge continues to enjoy the terms and conditions for judicial office which guarantee a judge's independence. It is submitted therefore that an extension of the term of office arising out of a law of general application will meet any suggestion of compromise to independence.

54. The applicants resist a suspension order. FUL and JASA don't provide reasons for why the Chief Justice is not entitled to such relief that is generally applicable in other cases. The most they say is that the perceptions would be detrimental to the integrity of the judiciary. Yet, consider what the reality would be in the absence of a suspension order. The term of the Chief Justice will cease on 15 August 2011. At this time steps would have to be taken to fill the hiatus.

55. NADEL is informed that there are reservations about the constitutionality of the Bill but refrains from making any comment. Should that be the case however, there will be great uncertainty for a considerable period of time as to what would occur.

During this time public confidence in the judiciary will be shaken, and the perceptions are likely to be more deleterious than any perceptions that may arise should a suspension order be granted.

56. In the circumstances, NADEL seeks the following remedies.

Interim relief

57. If the matter is not decided by this Court before 15 August 2011:

57.1. Pending the determination of the application for the relief sought in the notice of motion under case numbers CCT 53/11, 54/11 and 62/11 or until Parliament enacts remedial legislation, it is ordered that:

57.1.1. the appointment of the Chief Justice is deemed to be extended; and

57.1.2. the Chief Justice may continue to exercise the duties conferred upon him by law.

Order suspending the declaration of invalidity

58. In the event that the Court finds, on or before 15 August 2011, that section 8(a) is unconstitutional and therefore that the extension of the Chief Justice's term of office is invalid, NADEL seeks final relief in the following terms:

- 58.1. The declaration of invalidity is suspended for six months from the date of this order.
- 58.2. The Chief Justice may continue to exercise the duties conferred upon him by law during that period.
- 58.3. During the period of suspension Parliament must enact legislation to remedy the law to the extent of its unconstitutionality.

COSTS

59. NADEL does not seek an order as to costs.

GEORGE BIZOS SC

ADILA HASSIM

Counsel for the amicus curiae

Chambers, Johannesburg

13 July 2011

LIST OF AUTHORITIES

Dawood and Another v Minister of Home Affairs and Others 2000 (3) SA 935 (CC):

pp 18, 19

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC): p 14

Fourie v Minister of Home Affairs 2005 (3) BCLR 241: p 10

Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo 2010 (2) SA 415 (CC): p 15

Hoffmann v South African Airways 2001 (1) SA 1 CC: pp 14, 15

J and Another v Director-General, Department of Home Affairs and Others 2003 (5) SA 621 (CC): p 9

Minister of Justice and Constitutional Development v Nyathi 2010 (4) SA 567 (CC): pp 15, 16

Minister of Justice v Ntuli 1997 (3) SA 772 (CC): p 17

Mistry v Interim Medical and Dental Council of South Africa 1998 (4) SA 1127 (CC): pp 17, 18

President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1(CC): p 8

S v Ntuli 1996 (1) SA 1207 (CC): p 17

The State and Another v the Acting Regional Magistrate, Boksburg CCT 109/10 (2011): p 13

Van Rooyen v The State 2002 (5) SA 246 (CC): p 8