

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 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

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
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

FIRST RESPONDENT'S PRACTICE NOTE

NATURE OF THE PROCEEDINGS

The Applicants have brought these applications and essentially seek:

- an order granting the Applicant's direct access to this Court;
- orders declaring invalid Section 8(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 and the First Respondent's decision in terms of that section to extend the term

of the current Chief Justice.

ISSUES TO BE ARGUED

1. Whether section 8(a) of the Judges' Act is legislation contemplated by section 176(1) of the Constitution.
2. Whether section 8(a) of the Judges' Act offends the doctrine of separation of powers and the concomitant necessary independence of the judiciary.
3. Depending on the outcome of the above arguments, the appropriate remedy.

PORTION OF THE RECORD NECESSARY FOR DETERMINATION OF THE MATTER

There are no disputed facts. The issues raised in the record are

largely in the nature of legal argument. There is no particular portion of the record necessary for the determination of the matter.

ESTIMATED DURATION OF ORAL ARGUMENT

The matter has been set down for one day. Argument for the First Respondent is estimated to be an hour.

SUMMARY OF ARGUMENT

1. While it is submitted that this Court could have benefitted from the considered views of High Court and Supreme Court of Appeal Judges it is also noted that this is a matter destined to be finalised in this Court and the fact remains that the issues have now been raised, are squarely before this Court and the practical implications thereof imminent. The First Respondent thus abides the decision of this Court.

2. The First Respondent submits that Section 8(a) of the Judges’

Act is constitutionally valid because:

2.1 Section 8(a) of the Judges’ Act can be sourced back to Section 176(1) of the Constitution;

2.2 the contention that any extensions in terms of office to be valid must equate to an extension of all terms of office of all Constitutional Court Judges is untenable on a proper reading of Section 176(1) of the Constitution.

3. The First Respondent submits that Section 8(a) does not offend the separation of powers doctrine for the following reasons:

3.1 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;

- 3.2 the involvement of the Executive in appointing members of the Judiciary, and their appointment by the Executive does not violate the doctrine so as to trigger invalidity;
 - 3.3 the power of extension can only be utilized once in respect of a particular Chief Justice and the period of the once off extended tenure must be specified at the outset;
 - 3.4 any perception that an extension by the President may and does harm the independence of the judiciary falls short of the threshold of a realistic and rational perception to impugn such process.
4. The First Respondent submits that consultation is not necessary given the nature of extension (rather than appointment) but if it is held to be necessary, abides by this decision.
5. Should this Court find that Section 8(a) is unconstitutional for

any of the reasons advanced by the Applicants or that the *de facto* process in question did not meet the requirements of Section 174(3) of the Constitution, it is submitted 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 order to deal with the practical implications of such an order.

LIST OF AUTHORITIES

BEKKER NO V TOTAL SOUTH AFRICA (PTY) LTD 1990 3 SA 159 (T)

DE KOCK AND OTHERS V VAN ROOYEN 2005 1 SA 1 (SCA)

DESERT PALACE HOTEL RESORT (PTY) LTD v NORTHERN CAPE GAMBLING BOARD 2007 3 SA 187 (SCA)

DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, AND OTHERS 2009 4 SA 222 (CC)

EXECUTIVE COUNCIL, WESTERN CAPE LEGISLATURE, AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 1995 4 SA 877 (CC)

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)

EX PARTE MINISTER OF SAFETY AND SECURITY AND OTHERS: IN RE S v WALTERS AND ANOTHER 2002 (4) SA 613 (CC)

IN RE CERTIFICATION OF THE CONSTITUTION OF THE RSA, 1996 1996 (4) SA 744 (CC)

PHILLIPS AND ANOTHER v DIRECTOR OF PUBLIC PROSECUTIONS, WITWATERSRAND LOCAL DIVISION, AND OTHERS 2003 3 SA 345 (CC)

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS 1999 4 SA 147 (CC)

RAF v RAMPUKAR 2008 2 SA 534 (SCA)

S v BASSON 2004 1 SA 246 (SCA)

S v DODO 2001 3 SA 382 (CC)

S v MAKWANYANE AND ANOTHER 1995 (3) SA 391 (CC)

S v TOMS; S v BRUCE 1990 2 SA 802 (A)

SOUTH AFRICAN ASSOCIATION OF PERSONAL INJURY LAWYERS v HEATH AND OTHERS 2001 1 SA 883 (CC)

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)

VAN ROOYEN AND OTHERS v THE STATE AND OTHERS (GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA INTERVENING) 2002 5 SA 246 (CC)

KJ KEMP SC

LK OLSEN

Chambers Durban

14th July 2011.