

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(REPUBLIC 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

**PRESIDENT OF THE
REPUBLIC OF SOUTH AFRICA**

First Respondent

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Second Respondent

CHIEF JUSTICE SANDILE NGCOBO

Third Respondent

In the application of:

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

In the application of:

CASE NO: 54/11

FREEDOM UNDER LAW

Applicant

and

**PRESIDENT OF THE
REPUBLIC OF SOUTH AFRICA**

First Respondent

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

Second Respondent

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Third Respondent

CHIEF JUSTICE SANDILE NGCOBO

Fourth Respondent

**AFFIDAVIT IN SUPPORT OF BLACK LAWYERS ASSOCIATION'S
APPLICATION TO BE ADMITTED AS AMICUS CURIAE**

I,

the undersigned,

Nano Matlala

Do hereby affirm that:

1.

I am the President of the Black Lawyers Association a voluntary lawyers association of members in the legal profession hereinafter referred to as the BLA. The National Executive Committee (NEC) has authorized me to depose to this affidavit on behalf of the BLA in relation the above matter. I refer to annexure **NM1**. The BLA is a Juristic person with powers to sue and being sued in its own name.

2.

The facts contained herein are, unless the context indicates otherwise, within my personal knowledge and are to the best of my belief both true and correct.

3.

BLA's attorneys of record will, in terms of Rule 10(1) of the Constitutional Court Rules, request the written consent of all the parties for Black lawyers Association to be admitted in these proceedings as amicus curiae. Copies of the letters from parties herein will be provided at later stage when available. BLA does not foresee any

opposition for its admission as amicus curiae given the fact that NADEL has been given consent by both the applicants and respondents.

4.

The BLA is an association of lawyers which is committed towards a democratic society and an independent judiciary that is transparent, accountable, non sexist and non racial. The applicants' application pending before this court if granted will have an adverse and prejudicial consequences to the administration of justice and confidence in the judiciary. The BLA has a direct interest in ensuring that the administration of justice and the rule of law are not put to question by the South African citizenry. The BLA is therefore directly interested in the outcome of the applicants' application and is therefore approaching the above honorable court to assist it in arriving at an appropriate an equitable decision.

5.

I have read the affidavit of Gcinumuzi Malindi, the President of NADEL and align myself with Nadel's submissions in support of its application seeking inter alia an order of suspension in the event of a finding of constitutional invalidity relating to the appointment of the third respondent by the first respondent as the Chief Justice of South Africa.

6.

The Applicants are seeking an order in terms of which the appointment of the third respondent by the first respondent is declared unconstitutional. The first respondent vehemently opposes the applicant's application and submits that the appointment of the third respondent is constitutional. The first respondent further states that the legal instrument in terms whereof the first respondent has appointed the third respondent, has been in statute books for a period of 10 years. It therefore comes as a surprise that its validity is put to question. Further, the first respondents submission cannot of its own, make the legal instrument constitutional until a court of law makes that finding. The same applies to the submission made by the applicants that the legal instrument is

unconstitutional. The BLA submits that unless a legal instrument is found to be unconstitutional (by a court of law having jurisdiction) reliance on such legal instrument is deemed to be constitutional.

7.

Our constitution, unlike the Kenyan Constitution Act ,does not provide for the giving of an advisory opinion to government by an apex court at the former's request to ascertain legal, regulatory and constitutional compliance in case, inter alia of legal, regulatory and constitutional ambiguity. The relevant provision in the Kenyan constitution is section 163 (6) which provide as follows:

“The Supreme Court¹ may give an advisory opinion at the request of the national Government, any state organs or any county government² with respect to any matter Concerning county government”³.

¹The apex court of Kenya same as our Constitutional court.

²In SA context Provincial government.

³The full text of section 163 reads as follows:

163(1).There shall be the supreme court, which shall consists of

(a) the chief Justice , who shall be the president of the court

(b) the deputy chief Justice, who shall-

(i) deputise for the chief Justice ; and

(ii) be there vice- president of the court; and

(c) five other Judges

2. The Supreme court shall be properly constituted for the purposes of its proceedings if it is composed of five judges.

3.The Supreme court shall have-

(a) Exclusive original jurisdiction to hear and determine disputes relating to the elections of the office of president arising under article 140; and

(b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from-

1. Court of appeal; and

2. Any other court or tribunal as prescribed by national legislation

4. Appeals shall lie from Court of appeal to the Supreme Court-

(a) As of right in any case involving the interpretation or application of this constitution ; and

(b) In any other case in which the supreme court, or the court of appeal certifies that amatter of general importance is involved , subject to clause (5)

5. A certification by the court of appeal under clause (4)(b) may be reviewed by the supreme court, and either affirmed, varied or overturned.

6. The Supreme Court may give an advisory opinion at the request of the national government, any state organ, or any county government within respect to any other matter concerning county government.

7. All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

8. The Supreme Court shall make rules for all exercise of its jurisdiction.....

The BLA submits that section 163(3) of the Kenya Constitution Act could only have been enacted within its historical experience in the administration of justice and the rule of law. The BLA further submits that if the South African Constitution has a similar Kenyan provision, the extension of the third respondent's term by the first respondent would in all likelihood have been preceded by an advisory opinion of this honourable court to ensure that the appointment of the third respondent is constitutional.

8.

The BLA submits that the third respondent appointment if it is found to be unconstitutional it should not be annulled with immediate effect but that it be remedied by the suspension of the order of invalidity pending the enactment of a law of general application.

WHEREFORE: the BLA prays that:

- 1 In the event of a finding of constitutional invalidity the order is suspended for a period of six months to enable parliament to pass legislation to remedy the constitutional invalidity.
 - 2 In the event that the court is unable to decide this matter before the term of the chief Justice ends, an interim relief is granted that the appointment of justice be
-

extended until the final order of this court is made in any application pending before court.

DEPONENT

SIGNED AND AFFIRMED BEFORE ME AT JOHANNESBURG ON THIS THE 08TH DAY OF JULY 2011, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT AND THAT HE CONSIDERS THE AFFIRMATION AS BINDING ON HIS CONSCIENCE.

COMMISSIONER OF OATHS

**Resolution of the National Executive Committee of the BLACK LAWYERS ASSOCIATION
passed at a special meeting on the 6th of July 2011 by Teleconference.**

Resolved that:

1. That the Black Lawyers Association must make an application to court to be admitted as *amicus curiae* in the Application between:

Centre for Legal Studies

First Applicant

Council for the Advancement of the 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

Under case No. **62/11** and also in the application between:

Freedom of the Law

Applicant

And

The President of the Republic of South Africa

First Respondent

Director General Justice and Constitutional

Development

Second

Respondent

The Minister of Justice and Constitutional

Development

Third Respondent

Chief Justice Sandile Ngcobo

Fourth

Respondent

Under case no. 62/11 held in the Constitutional Court of the Republic of South Africa.

2. And that Nano Matlala in his capacity as the president of the Black Lawyers Association be and is hereby authorized to appoint attorneys of record and sign all the documents which may be necessary in this respect on behalf of the Black Lawyers Association.

Certified A true copy

General Secretary

Date: 06th of July 2011

Place: Johannesburg