

**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

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

**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

**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

and

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

First Amicus Curiae

WRITTEN SUBMISSIONS BY THE BLA

INTRODUCTION

1. The BLA joined these proceedings at a late stage and worked under severe time pressure in the preparation of its founding affidavit and its written submissions.
2. At the time of preparing these submissions, there was very little time and efforts made were always and were indeed limited to the crisp issues particularly on the remedy and with great care taken not to repeat what has been said by all parties herein.
3. The submissions by the BLA in the circumstances will be very short given the above and may not necessarily cover all aspects necessary and that the BLA would have ideally dealt with. However some if not all have been covered and the BLA believes that they are submissions that may convince the honourable court in reaching a just and equitable decision.

4. These submissions are made on the premise that the above honourable court would make an order of invalidity.

5. The BLA seeks relief similar to that sought by National Democratic Association NADEL with the exception of the interim relief however; the BLA relies on two distinguishable grounds which will be set out hereunder.

SUBMISSIONS BY THE APPLICANTS

6. It has been submitted that the applicants are seeking direct access to constitutional court and BLA does not have objection to such a relief.

7. It has further been submitted by the applicants, that the appointment of the first respondent by the third respondent remains unconstitutional and that the said appointment should be declared unconstitutional as it is unlawful and invalid.

8. The Applicant under case number 53/11 Justice Alliance of South Africa in a nutshell submits that the process of consultation should have been followed in the extension decision taken by the first respondent. It is the BLA's submission that in the present circumstances such process would almost be unnecessary seeing that the bill has already being tabled in parliament.

9. The applicant's further contends that in the event the appointment is declared invalid, the term of office of the third respondent, the Chief Justice should not be extended. The BLA submits that the term of office of the Chief justice should and can be extended and that the independence of the Judiciary and its functionality would not be detrimental to our new democracy.

SUBMISSIONS BY THE SECOND AMICUS CURIAE "BLA"

10. The BLA submits that acts of Parliament are not subject to certification of the Constitutional court after approval by Parliament because it is assumed that Parliament will pass laws that are valid. This is still the assumption until the present challenge.
11. The Constitution of the Republic of South Africa was passed subject to certification by the Constitutional court to avoid uncertainty and ambiguity, give the status of the constitution as the supreme law of the land. Had the Constitution Act provided for a provision similar to section 163(6) of the Kenya Constitution, it is the B.L.A. submission that, in all likelihood the first respondent would have been advised by the second respondent to seek a judicial advisory opinion before deciding to appoint the third respondent before relying on section 8 of the Remuneration of Judges Act.
12. The BLA submits that the lacuna equivalent to section 163 (6) of the Kenya Constitution (as in the Kenyan Constitution) renders the first respondent's extension of the Chief Justice's term excusable.

13. The issue before this honourable court relates to the conduct or act of the first respondent and not the person, fitness or integrity of the Chief Justice or the office of the Chief Justice. This is common cause.
14. The BLA therefore submits that in these circumstances the erroneous interpretation of the provisions of section 8 by all respondents and in particular the third respondent as evidenced by his acceptance of the extension of his term of office is excusable.
15. The term “excusable” or “excuse” is applied in an African jurisprudence and as applied in Lekgotla (African Court) meaning “tshwarela”¹ (the literal English equivalent is “hold for me”). Tshwarela or tshwarelo means erasing the wrong permanently as you would be holding that wrong permanently on behalf of the wrongdoer (it should be noted that “forgive” or “forgiveness” is not equivalent to “tshwarelo”).
16. In African jurisprudence a wrongdoer who has been “tshwarelad” is deemed not to have committed any wrong doing. The wrongful conduct is expunged by the victim and/or Lekgotla by “holding it” (“tshwarela”) for the wrong doer. Tshwarelo is preceded by an unequivocal acceptance of wrong doing by the wrong doer.
17. The submission of an amendment act to Parliament by the first respondent is tantamount to an unequivocal acceptance of wrong doing by the first respondent. The first respondent is therefore saying to the nation: “ntshwareleng”² (hold this for me). Tshwarelo(holding) covers both intentional and unintentional wrong doing.

¹ All official languages of South Africa except English and Afrikaans has the same meaning and context of this term. Tshwarela has the same dictionary meaning in all Sotho languages. In Venda it is farela, in Nguni it means bambela and in Tsonga it means khomela “hold for me”

² In Venda ndifareleni and in Tsonga ndzikhomeleni.

18. The Constitution Act makes provision for the recognition of African indigenous law (customary law). This honourable court can take Judicial notice of this African principle of jurisprudence.

19. The BLA therefore relies on this second ground of “tshwarelo” for the suspension of the order of invalidity in addition to reliance of section 163 (6) of Kenya constitution act.

CONCLUSION

20. In the circumstances the BLA submits that the extension of the term of office becomes necessary more so when the independence of the judiciary by the public would not be tainted by such extension. Similarly what has been done by the First respondent in appointing the third respondent has not and will not in any any way affect the independence of the judiciary.

21. The BLA request the court to make its finding not later than 15 August 2011 and is therefore not in favour of an interim relief as an interim relief is not in the interest of South Africa.

22. The BLA submits that this honourable court recommend that the Kenyan Constitution and in particular section 163 (6) be incorporated in the South African Constitution.

23. There is nothing that warrants the term of the Chief Justice being effectively ended as contended by applicants instead corrective measures are well nearing finalization.

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