

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

**CASE NO: 62/11**

In the application of

**CENTRE FOR APPLIED LEGAL STUDIES**

First Applicant

**COUNCIL FOR THE ADVANCEMENT OF  
THE SOUTH AFRICA CONSTITUTION**

Second Applicant

and

**PRESIDENT OF THE  
REPUBLIC OF SOUTH AFRICA**

First Respondent

**THE MINISTER OF JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT**

Second Respondent

**CHIEF JUSTICE NGCOBO**

Third Respondent

And 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 NGCOBO**

Third Respondent

and

**NATIONAL ASSOCIATION OF DEMOCRATIC  
LAWYERS**

*Amicus Curiae*

And in the application of:

**CASE NO: 54/11**

**FREEDOM UNDER LAW NPC**

Applicant

and

<b>PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA</b>	First Respondent
<b>DIRECTOR-GENERAL: JUSTICE AND CONSTITUTIONAL DEVELOPMENT</b>	Second Respondent
<b>MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT</b>	Third Respondent
<b>CHIEF JUSTICE SANDILE NGCOBO</b>	Fourth Respondent

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**AFFIDAVIT IN SUPPORT OF THE UNIVERSITY OF CAPE TOWN'S  
DEMOCRATIC GOVERNANCE AND RIGHTS UNIT TO BE ADMITTED AS  
AMICUS CURIAE**

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I, the undersigned,

**RICHARD CALLAND**

do hereby make an oath and say that:

1. I am the Head and Director of **Democratic Governance and Rights Unit** (“DGRU”) in the Department of Public Law at the University of Cape Town.  
I am duly authorized to bring this application on behalf of DGRU and to depose to this affidavit in pursuance thereto.
2. The facts contained herein are, unless the context indicates otherwise, within my personal knowledge and to the best of my belief both true and correct.  
Where in this affidavit I make legal submissions, I do so on the basis of legal

advice given to me by the DGRU's legal representatives, which advice I accept as true and correct.

3. DGRU has in terms of rule 10 (1) of the Constitutional Court Rules requested written consent of all the parties to the application, for DGRU to be admitted in these proceedings as amicus curiae. Copies of those requests are attached and marked "**RC1**" to "**RC5**". All the parties have all granted their consent to DGRU being admitted as amicus curie. I attach the letters of consent as "**RC6**" to "**RC9**".
4. In this affidavit, I will not deal with whether the application for direct access should be granted or not, although I accept that the matter at hand is of sufficient constitutional importance to require that this Court deals with it urgently. I leave the issue of whether a case for direct access to this Honourable Court has been made to the primary parties in this matter.

#### **DGRU'S INTEREST IN THIS APPLICATION**

5. The DGRU is an applied research unit within the Public Law Department at the University of Cape Town ("**UCT**"). The mission of DGRU is to advance, through research and advocacy, the principles and practices of constitutional democratic governance and human rights in Africa. It does so in collaboration with established research and advocacy organizations and supports law and policy reform intended to advance good and accountable governance through inter-disciplinary research and advocacy.

6. The DGRU's primary research and advocacy focus is on the relationship between governance and human rights. Its work focuses on the intersection between public administration, with the challenge of public accountability, on the one hand, and the realization of constitutionally-enshrined human rights on the other. The DGRU has established itself as one of South Africa's leading research centres in the area of the judicial governance, conducting research on the judicial appointments processes and research on the future institutional modality of the judicial branch of government.
  
7. DGRU has special research interest in the governance of the judiciary. To this end, DGRU has made available to the Judicial Service Commission ("JSC") researched reports on the candidates for judicial appointments. These reports cover each candidate's legal or judicial history, contributions in the advancements of a legal culture based on human rights, judicial philosophy and others. They are intended to assist the JSC in its deliberations on suitable candidates for appointment, and in identifying relevant interview questions and determining appropriate criteria for judging the suitability of candidates for judicial appointments. Researchers of the DGRU attend the public hearings on judicial appointments for the purpose of providing independent reports on candidates.
  
8. DGRU recognizes judicial governance to be a special focal area because of its central role mediating the contradictions of constitutional governance. The

DGRU's interest is ensuring that the judicial branch of government is strengthened, is independent and has integrity.

9. As a consequence of its research and advocacy work on constitutional governance and its particular focus on judicial governance, the DGRU has had contractual relations with the Office of the Chief Justice, whereby the DGRU has provided two researched report in recent months pertaining to comparative models for the institutionalization of the Office of Chief Justice and the strengthening of the judicial branch of government more generally. Through this relationship, the DGRU is well acquainted with the intricate programs that the Chief Justice has undertaken to strengthen the governance of the judiciary. The DGRU is also aware of the delicate stage of these programmes and is deeply concerned that any disruption to them would impact the process of judicial governance very negatively. It is for this reason that I have publicly expressed my support for the extension of the term of office of this Chief Justice, in order to enable him to work on these programmes and bring them to finality.

#### **DGRU'S SUBMISSIONS IN THESE PROCEEDINGS**

10. DGRU is offering to this Honourable Court an interpretation of section 176 (1) of the Constitution of the Republic of South Africa, 1996, which none of the parties have advanced. It is submitted that this interpretation will help not just this Honourable Court, but other relevant branches of government, in

finding an enduring legal solution to the fundamental issue of judicial tenure of Constitutional Court justices and the Chief Justice. The interpretation advanced by other parties does not help deal with the root cause of the current constitutional predicament and, if adopted by this Honourable Court, will not result in an appropriate remedy.

11. The constitutional question raised in these applications can be summarized as follows: whether the President's conduct is unlawful in that when he purported to extend the term of office of the current Chief Justice, he did so in terms of an Act of Parliament that is itself unconstitutional. Put differently, it is whether section 8 (a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 ("the Act") is unconstitutional in that in giving the President the power to effectively extend the term of office of a Chief Justice it constitutes an unlawful and excessive delegation of a constitutional power of Parliament provided for in section 176 (1) of the Constitution or an abdication of the said powers.
12. DGRU submits that section 176 (1) of the Constitution does not allow Parliament to extend the term of office of Constitutional Court justices generally. It only allows Parliament to pass legislation to extend the term of office of a specific judge or specific judges.

**INTEPRETATION OF SECTION 176(1) OF THE CONSTITUTION OF  
THE REPUBLIC OF SOUTH AFRICA, 1996**

13. It is submitted that section 176 (1) of the Constitution prescribes the term of office of a Constitutional Court judge, namely a non-renewable period of 12 years or until the judge attains the age of 70 years, whichever of the two occurs first. The section further provides for an exception to this general rule where an Act of Parliament may extend the term of office of a Constitutional Court judge. This exception to the constitutionally prescribed general rule of non-renewability is seen in the word “except” in section 176(1).
14. It is submitted that an exception is something that is not included in a general statement or which does not follow a general rule or pattern. It is never intended to replace the general statement, rule or pattern. It follows therefore that the non-renewable term of office provision in section 176(1) is the general constitutional position and an Act of Parliament extending the fixed term of office of a specific judge or judges, is an exception.
15. In response to section 176(1) Parliament passed the Judges’ Remuneration and Conditions of Employment Act and in section 4(1) and 4(4) effectively extended, in perpetuity, the term of office of the Constitutional Court justices from the prescribed fixed non-renewable term of office of 12 years or the age limit of 70, whichever came first, to a period of 15 years or an age limit of 75 years, whichever came first.
16. In other words, section 176 (1) does not, whether directly or indirectly, create an enabler for the amendment of a general constitutional rule of non-renewable fixed term of office for Constitutional Court judges without complying with the relevant provisions for the amendment of the Constitution.

If this approach to interpreting section 176(1) of the Constitution is correct, then it is not only section 8 of the Judges' Remuneration and Conditions of Employment Act, 2001 that is constitutionally faulty, but section 4 as well.

17. The Judges' Remuneration and Conditions of Employment Act provides for two extensions. The first extension of the term of office of a Constitutional Court justice is in section 4(1) and 4(2) of the Act, which provides that a Constitutional Court justice will serve up to 15 years or an age of 75 years whichever comes first. A Constitutional Court justice includes the Chief Justice. There is no separate tenure of office created for the Chief Justice. The second extension is in section 8(a) of the Judges Remuneration and Conditions of Employment Act that in essence provides for the extension of the term of office of the Chief Justice and the President of the Supreme Court of Appeal, by the President of the Republic of South Africa. It is this extension of the term of office that is challenged.
  
18. Therefore contrary to the submissions made by the other parties, section 176 (1) does not mean that an Act of Parliament (which is an exception to the rule on term of office of the Constitutional Court justices) can be passed to change the term of office of Constitutional Court judges in general (and without amending the fixed term of office set out in section 176(1)). The approach of the other parties is problematic because it essentially permits the passing of a law that effectively amends the current non-renewable fixed term of office in section 176 (1) without following the constitutionally prescribed procedure for amending the Constitution. If this interpretation to section 176(1) were to be

the correct one, then Parliament could pass a law (as it has done in section 4(1) and 4(2) and 8(a) of the Judges' Remuneration and Conditions of Employment Act) effectively amending the term of office fixed by the Constitution without following the prescribed legislative procedures for the amendment of the Constitution.

19. In our approach to section 176 (1) of the Constitution, as a general rule, the term office of a Constitutional Court judge is a non-renewable, fixed term of 12 years or until the judge attains the age of 70, whichever of the two occurs first. To that fixed, non-renewable term of office, there is an exception that may be applied to the term of office of a specific incumbent judge or judges. In terms of that exception, Parliament may pass a law extending the term of office of a specific judge or specific judges, but Parliament cannot amend the non-renewable fixed term of 12 years through the envisaged exceptional Act of Parliament without following the prescribed legislative process for amending a provision of the Constitution.
20. Normally, the process for the passage of the envisaged exceptional Act of Parliament would be triggered when the national executive determines that in a particular moment in history, it is necessary for a term of office of a particular judge or judges of the Constitutional Court to be extended as an exception to the constitutional rule of non-renewability. To that end, the executive will have to approach Parliament with a proposal motivating for such an exception to be permitted in terms of section 176 (1) of the Constitution. Parliament can in its normal legislative duties debate and pass a specific legislation for the extension of the term of office of that specific judge

or judges. The law that Parliament can pass in terms of section 176(1) of the Constitution is only an exception to the general rule and will only apply to the specific judge or specific judges.

21. If our approach to interpreting section 176(1) of the Constitution is the correct one, then it is not only section 8 (a) of the Judge' Remuneration and Conditions of Employment Act that is potentially unconstitutional but section 4 as well. In other words the entire legislative regime of the Judges Remuneration and Conditions of Employment in so far as it relates to the term of office of the Constitutional Court justices is constitutionally faulty. Parliament does not have standing powers to extend the term of office of all present and future Chief Justices. (own emphasis) It only has the powers to extend the term of office of a specific judge or judges of the Constitutional Court as an exception, and the relevant legislation will apply to only that specific judge or specific judges.
22. As submitted before, section 8 (a) of the Judges Remuneration and Conditions of Employment Act amounts to a second extension of the term of office of a Constitutional Court justice, in addition to the extension already provided for in regard to all Constitutional Court judges in section 4 of the Act. Section 176 (1) does not provide for two occasions during which the term of office of a Constitutional Court judge may be extended and most certainly does not provide for an exceptional legislative procedure for amending the Constitution.
23. The approach and contribution of the DGRU to interpreting the law governing the term of office of Constitutional Court justices is therefore different to the

submissions made by both the Applicants and the Respondents in the following manner;

- 23.1. Section 176(1) of the Constitution does not permit a law that change the fixed term of office of the Constitutional Court justices. It permits a case by case legislative extension of the term of the Constitutional Court justices as an exception to the rule. It does not permit a general extension that has the effect of amending the fixed and non-renewable term of office as has happened in the Judges' Remuneration and Conditions of Employment Act.
- 23.2. Section 176(1) of the Constitution does not permit Parliament to pass a law in which the executive- merely in its discretion extends the term of office of the Chief Justice.
- 23.3. In the approach of DGRU, the process that is permitted in section 176(1) of the Constitution does two things. First the executive must report to Parliament on the state of the judiciary and in particular whether there is any policy or legislative changes, budgetary or resources that are required to assist the Courts. The executive could trigger a legislative intervention by submitting a report to Parliament in which it recommends that the term of office of a particular judge or particular judges be extended. Parliament must debate the report and if it deems that an extension of the term of office of a particular judge or judges is warranted then pass a law amending the term of office. Section 165(4) of the Constitution would support this approach and

justify the extension of a term of office as an exception to the rule of fixed and non-renewable term of office.

### **IMPLICATIONS OF THIS APPROACH**

24. If the approach to interpreting section 176(1) of the Constitution above is constitutionally correct and sound, then the implications are profound. It means that Parliament is obliged to pass a law that operates as an exception to the constitutional rule of fixed non-renewable term of office. This further means that Parliament must pass a law extending the term of office of Chief Justice Ngcobo only.
  
25. Parliament has, in the provisions of the Judges' Remuneration and Conditions of Employment Act, created a general rule effectively amending section 176(1) of the Constitution, but without expressly saying so or following the prescribed legislative procedure for amending the Constitution. Since this law was not treated as a constitutional amendment of the terms of office in section 176(1), it is possible that the procedure for passing this legislation was deficient in that it was not the one prescribed for amending the Constitution. Section 4(2) of the Judges Remuneration and Conditions of Employment Act, 2001 provides for the continuation of active service by Constitutional Court judges and judges to 15 years or until the judge attains the age of 75, whichever comes first. In other words, section 4(1) and 4(2) of the Act now creates a situation where a judge who has completed 12 years must continue to serve as a Constitutional Court judge to 15 years or until he or she attains the

age of 75 whichever comes first. The effect of this amendment is that judges of the Constitutional Court no longer serve for a fixed term of 12 years or until the age of 70 years, whichever comes first but for 15 years or until the age of 75 years whichever comes first. As a general rule, this is constitutionally impermissible and if challenged may be found to be unconstitutional.

**REMEDY: AN ENDURING CONSTITUTIONAL SOLUTION**

26. Section 8(a) of the Judges Remuneration and Conditions of Employment Act would fail since it purports to regulate the term of Office of the Chief Justice (a Constitutional Court judge) in a manner not permitted in terms of section 176(1) of the Constitution. Should this Honourable Court hold that section 8 (a) of the Act is unconstitutional, it must, having regard to the provisions of section 165(4) and to the intentions of the executive to strengthen judicial independence and advance the interests of the proper administration of justice order that:

26.1. The Minister of Justice and Constitutional Development, as the Cabinet member responsible for the administration of justice, is to introduce a Bill in the National Assembly for the extension of the term of office Chief Justice Ngcobo to 15 August 2016.

24.1. Parliament must deliberate on the bill within the applicable legislative rules and pass it.

24.2. The President must assent to the legislation.

- 24.3. The President or the executive member responsible for the administration of justice must take necessary steps to inform this Honourable Court that these steps have been taken and that the Chief Justice's term of office is duly extended.
27. This approach will ensure that the constitutional integrity of section 176(1) remains intact. A Constitutional Court judge will serve for a period of 12 years or until the age of 70, whichever comes first. The executive will determine whether there is a need to extend such a term having regard to the provisions of section 165(4) of the Constitution and if such a need arises, advise Parliament accordingly. Parliament will debate and pass such a law and the President will assent. An interpretation that permits a law that applies generally will essentially amount to an amendment of section 176(1) of the Constitution. This approach would preserve the essential content of section 176(1) while permitting legislative exceptions that do not violate the fixed non-renewable term of office established in section 176(1). This approach furthermore permits a constant evaluation of the needs of the Constitutional Court at any given time and where it requires that an exception is granted, appropriate legislative interventions are adopted.
28. Until the Constitution is amended through the prescribed procedure laid down in section 74 (3) of the Constitution and the term of office set out in section 176(1) specifically amended, the current legislative changes are constitutionally impermissible. The current Bill<sup>1</sup> is built on faulty

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<sup>1</sup> Judges' Remuneration and Conditions of Employment Amendment Bill

constitutional foundations and therefore susceptible to successful future constitutional attacks.

## **CONCLUSION**

29. Against the above background, the submissions that we make are significantly and substantially different to those made by the other parties. I submit that the interpretation of section 176 (1) of the Constitution, which DGRU is offering, will help the Court in finding an enduring solution to the current constitutional predicament leading to greater stability and certainly in relation to the term of office of Constitutional Courts judge.
30. It is submitted the judicial independence cannot be protected if the term of office of office of the Chief Justice is subject to constitutional attacks and doubts. It is however more important that the constitutional integrity of the laws intended to protect the tenure of office of the judges of the Constitutional Court is protected by all organs of state. The judiciary, as with all other branches of government, must ensure that the integrity of the Office of the Chief Justice is not subject to embarrassing litigation that has the effect of weakening public confidence in the Courts.
31. It is my submission that a secure constitutional approach would be to give effect to the exception provided for in section 176 (1) of the Constitution by allowing Parliament to pass a judge-specific legislation to extend the term of office of Chief Justice Ngcobo. Such law cannot be correctly attacked for inconsistency with any provision of the Constitution.

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**RICHARD CALLAND**

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn before me at \_\_\_\_\_ on this the **14<sup>th</sup> Day** of **JULY** 2011, in accordance with the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended and Government Notice No. R1648 of 19 August 1977, as amended.

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**COMMISSIONER OF OATHS**

