

**IN THE CONSTITUTIONAL COURT 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 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

**DEMOCRATIC GOVERNANCE AND RIGHTS UNIT of UCT** Third Amicus Curiae

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**WRITTEN SUBMISSIONS OF DEMOCRATIC GOVERNANCE AND RIGHTS UNIT OF  
THE UNIVERSITY OF CAPE TOWN (“DGRU”)**

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## INTRODUCTION

1. The Democratic Governance and Rights Unit, a research unit in the Law Faculty of the University of Cape Town (“**DGRU**”) has sought to be admitted to these proceedings as amicus curiae to make submissions on the proper interpretation of section 176(1) of the Constitution of the Republic of South Africa, 1996, (“the Constitution”) and its constitutional relationship with the provisions of the Judges’ Remuneration and Conditions of Employment Act 47 of 2001 (“the Judges’ Act”). The approach to interpreting section 176(1) of the Constitution adopted by the DGRU is different to that adopted by the primary parties and is intended to enrich this Honourable Court’s decision on what is perhaps one of the most important decisions impacting on the governance of the judiciary and the regulation of the terms of office of the Constitutional Court justices.
2. The dispute relates to the constitutional validity of section 8(a) of the Judges’ Act and was triggered by the President’s reliance on this provision to extend the term of office of the Chief Justice, whose term of office is coming to an end on 15 August 2011. If the Honourable Court finds that section 8(a) of the Judges’ Act is unconstitutional, then it must also find that the extension of the term of office of the Chief Justice by the President is therefore unlawful. The President’s action will therefore be set it aside. The consequences are that the Chief Justice cannot continue to serve in that capacity and must be discharged in terms of section 4(1) and 4(2) of the Judges’ Act.
3. There can be no doubt, having regard to the programmes relating to the transformation of

the judiciary which have been initiated and developed under this current Chief Justice, that the decision to extend his term of office is necessary and intended to advance the interests of the judiciary and the proper administration of the courts. The Applicants do not challenge the reasons for decision to extend the term of office of Chief Justice Ngcobo. It appears accepted by all the parties that when the President took steps to extend the term of office of the Chief Justice, it was done to “assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts”.<sup>1</sup>

4. The Applicants challenge the President’s legal basis for taking the decision to extend the term of office of the Chief Justice. The Applicants accept that an extension of the term of office of the Chief Justice cannot threaten judicial independence if taken lawfully. The proposition is correct; for it would erode public confidence in the judiciary and frustrate its proper functioning if the term of office of the Chief Justice or any judge for that matter, was found to be unlawful. The principle of legality and rule of law would be violated and the judiciary could not lawfully discharge its constitutional duties to uphold the Constitution and the law if the term of office was not founded on constitutional or lawful foundations.
5. There are therefore three points that are incontrovertible arising from the fact that the extension of the term of office of a Constitutional Court judge, or a Chief Justice in particular, cannot threaten judicial independence if taken lawfully. The first is that there is a presumption of judicial fitness and integrity that follows a judge whose term of office has ended. A judge whose term of office has ended does not suddenly become unfit to serve in that capacity and an extension of the term of office of a judge cannot be regarded as a threat to judicial independence. Surely a judge who has an unblemished judicial record until the end of his or her term of office cannot suddenly become a threat to judicial independence if

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<sup>1</sup> See s 165(4) of the Constitution of the Republic of South Africa, 1996

his or term of office is extended.

6. The second point is that an extension of the term of office of a Constitutional Court judge whose term of office has come to an end is an exception to the rule of non-renewable term of judicial office set out in section 176(1). This is borne out by the meaning of section 176(1) of the Constitution. Section 176(1) provides for a non renewable term of 12 years or the age limit of 70, whichever comes first. That is the position regarding the term of office of a Constitutional Court judge. However section 176(1) has an exception to that non renewable term office and that much is clear if one has due regard to the word “except”. We address the significance of this word “except” further in these heads.
7. The third point is that the extension of office of the Constitutional Court judges must be done by an Act of Parliament. The Act envisaged in section 176(1) must be an exception to the constitutional rule of non-renewable term of 12 years or the age limit of 70, whichever comes first.
8. The crisp question in this application is whether section 8 (a) of the Judges’ Act is the Act envisaged in section 176(1) in that it extends the term of office of a Constitutional Court judge.
9. These submissions follow the sequence set out below:
  - 9.1 Introduction;
  - 9.2 The background facts;
  - 9.3 The constitutional and legislative context relating to the tenure of office of the Constitutional Court judges;
    - 9.3.1 The extension for term of office for judges in terms of section 8 (a) of the

Judges' Act;

9.3.2 The meaning of "except" in section 176 (1) of the Constitution;

9.4 Implications of this approach;

9.5 Remedy: An enduring Constitutional Solution;

9.6 Conclusion.

## **THE BACKGROUND FACTS**

10. The background facts giving rise to this application are uncontroversial and are the following:

10.1 Chief Justice Ngcobo's current term ends on 15 August 2011.<sup>2</sup>

10.2 In April 2011 the President asked the Chief Justice to remain in office for a further five years, purportedly in terms of s 8(a) of the Act.<sup>3</sup>

10.3 The Chief Justice accepted the request on 2 June 2011.<sup>4</sup>

10.4 The President then informed the leaders of opposition political parties of his decision to extend the term of office of the Chief Justice.

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<sup>2</sup> First Respondent's Answering Affidavit ("AA") para 14(a); Record p 141.

<sup>3</sup> First Respondent's AA paras 14(c) and (d) and annexure "ZA"; Record p 142, and pp 168-169, respectively.

<sup>4</sup> First Respondent's AA para 14(d) and annexure "ZB"; Record p 142, and pp 170-171, respectively.

- 10.5 On 3 June 2011 the President officially extended the Chief Justice’s term of office until 16 August 2016.<sup>5</sup>

**THE CONSTITUTIONAL AND LEGISLATIVE CONTEXT OF THE TERM OF OFFICE OF THE JUDGES OF THE CONSTITUTIONAL COURT:**

11. Section 176(1) of the Constitution provides:

*“A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.”*

12. Section 165(4) of the Constitution provides that:

*“Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts”*

13. Section 4(1) of the Judges’ Act provides that:

*“A Constitutional Court judge whose 12-year term of office as a Constitutional Court judge expires before he or she has completed 15 years’ active service must, subject to subsection (2), continue to perform active service as a Constitutional Court judge to the date on which he or she completes a period of 15 years’ active service, whereupon he must or she must be discharged from active service as a Constitutional Court judge.”*

14. Section 4(2) of the Judges’ Act provides that:

*“A Constitutional Court judge who, on attaining the age of 70 years, has not yet*

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<sup>5</sup> First Respondent’s AA para 14(d) and annexure “ZD”; Record p 142, and p 174, respectively.

*completed 15 years' active service, must continue to perform active service as a Constitutional Court judge to the date on which he or she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged from active service as a Constitutional Court judge.*

15. Section 8 (a) of the Judges' Act provides:

*“A Chief Justice who becomes eligible for discharge from active service in terms of section 3 (1) (a) or 4 (1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.”*

16. Section 176(1) of the Constitution has two components to it. The first is that it establishes a non-renewable term of 12 years or an age limit of 70 years whichever occurs first. The second component is that it provides for an exception to the non-renewable term of office of a Constitutional Court judge.
17. The power to extend the term of a Constitutional Court judge found in s 176(1) of the Constitution is at the heart of the judicial independence. Judicial independence requires that judges enjoy a secure tenure of office that cannot easily be changed by the executive or the legislature. That is the reason why section 176(1) determined that “A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first...”. The power to extend the term of office of a Constitutional Court judge was given in terms of the Sixth Amendment,<sup>6</sup> and was intended to afford Parliament the power to extend the term of office of office of a Constitutional Court as an exception to the rule.

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<sup>6</sup> Constitution Sixth Amendment Act, 2001.

18. The power of Parliament to pass a law extending the term of office of a Constitutional Court judge was intended to be exercised as an exception and to ensure that the essential content of section 176(1) in respect of term of office was essentially unchanged. The extension of the term of office of a Constitutional Court judge cannot be a matter of course, but must be fully justified and subjected to the normal rigorous legislative process of Parliament to receive approval. This means that the extension of the term of office of a judge has to be debated and subjected to a vote by Parliament. It has to go through the normal rigorous parliamentary process of deliberation and discussion where Parliamentarians may express public views on what they think about judge or judges whose terms of office is being considered for extension. If Parliament agrees with the executive that it is necessary to extend the term of office of a particular judge, then it passes the law extending the term of office of that particular judge or particular judges. The legislation extending the term of office of a particular judge or particular judges would die when the extended term of office has been served. This approach to interpreting section 176(1) explains why Parliament, in amending section 176(1) did not tamper with the fixed terms of 12 years and age limit of 70. If Parliament intended that the envisaged Act would permit a wholesale change to the tenure of Constitutional Court judges, it would have said so when amending section 176(1). Instead what Parliament did was to amend section 176(1) to enable it to pass legislation that would operate as an exception to the non renewable fixed term.
19. The location of the power to extend the term of office of a Constitutional Court in Parliament clearly demonstrates that the legislation envisaged would operate in favour of a specific judge or specific judges. Such legislation would not bind current and future Constitutional Court judges. The fact that the power to extend is located in Parliament shows that an extension of the term of office of a judge must be debated and subjected to elaborate and intense public participation processes. This alone demonstrates that the Act of

Parliament envisaged under section 176(1) would operate as an exception requiring extensive public debate and legislative input. Even though the principle of continuing judicial fitness applies to judges whose term of office has ended, their continued involvement in the judiciary through the extension of that term of office is a matter that must be justified by the executive, and then debated and accepted by the legislature. It is not a mere given that because there is a presumption of judicial fitness in favour of judges whose term of office has expired, the term of extension will be accepted by Parliament. Parliament may refuse to pass a law extending the term of office of a particular judge or judges because there is insufficient justification from the executive that such an extension is warranted.

**(i) The extension of the term of office for judges in terms of Section 4(1) and 4(2) of the Judges' Act.**

20. Parliament purported to pass a law to extend the term of office of judges in terms of subsections 4(1) and 4(2) of the Judges' Act. These provisions extended for all judges of the Constitutional Court the term of office to 15 years or until a judge attains the age of 75. This means that the term of office for all Constitutional Court judges is now 15 years or the age limit of 75 whichever comes first. Judges of the Constitutional Court are no longer discharged from office upon the completion of 12 years or reaching the age of 70 in terms of section 176 (1). The extension of the term of office of Constitutional Court judges in terms of section 4 (1) and 4 (2) is susceptible to constitutional challenge in that it has effectively

amended the fixed term of office in section 176 (1). Subsections 4 (1) and 4 (2) of the Judges' Act do not operate as an exception to the term of office set out in section 176 (1) of the Constitution. Instead, the replace section 176 (1).

21. The Judges' Act creates two regimes for extending the term of office of Constitutional Court judges. The first regime is in subsections 4 (1) and 4 (2) of the Act and is binding to all present and future Constitutional Court judges. The second is in section 8 (a) of the Judges Act which essentially regulates the further extension of the term of office of a Chief Justice. The Chief Justice is therefore a benefactor of two extensions- the section 4 (1) or (2) extensions and the section 8(a) extension. This is exactly what has happened on the facts of this case. The Chief Justice has completed his first term of office by virtue of having completed 15 years. Section 8 (a) of the Judges' Act provides for a further extension of the term of office of the Chief Justice which is triggered when the President makes a request to that Chief Justice to continue serving in that capacity and the Chief Justice accedes to the request.

**(ii). Extension of the term of office in term of section 8(a) of the Judges' Act**

22. Section 8(a) of the Judges' Act achieves the extension of the term of office only of the Chief Justice through the executive act. The President makes a request and if the Chief Justice accepts, then the term of office of the Chief Justice is extended. There is no basis in section 176 (1) for the separate regulation of the term of office of the Chief Justice. Section 176 (1) does not provide for the regulation of the process of extending the appointment of the Chief

Justice. It is submitted that section 8 (a) of the Act is not permissible under section 176 (1) for the reason that while it allows the extension of the term of office of a specific judge, such an extension must be via an Act of Parliament. The Act of Parliament must be passed and the President must assent to that Act in order to extend the term of office of a Constitutional Court judge.

23. It follows from this that if, however, Parliament had passed an Act extending the term of office of the current Chief Justice, such a law would be consistent with the meaning and purpose of section 176 (1).
24. The interpretation adopted above is clearly borne out by the reference to “[a] *Constitutional Court judge*” at the beginning of s 176(1). The words “A *Constitutional Court judge*” *holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first*”, is a reference to individual judges who are subject to different terms of office depending on whether they will serve a period of 12 year or until they reach 70 years whichever comes first. Each is treated differently. Not all judges of the Constitutional Court serve for a period of 12 years and similarly not all Constitutional Court judges serve until they reach the age of 70 years. Depending on when a specific judge of the Constitutional Court is appointed in terms of his or her age, it determines whether they serve for 12 years or until they have attained the age of 70.
25. To treat the reference to “A Constitutional Court judge” as referring to all Constitutional Court judges is to disregard the circumstances of each judge at the time of appointment. The second portion of section 176 (1) which says “*except where an Act of Parliament extends the term of office of a Constitutional Court judge*” is very important in the interpretation of section 176(1) and its relationship with the Judges’ Act. Parliament is empowered by s 176(1) only to extend:

25.1 the 12 year term and/or the retirement age of 70;

25.2 in respect a Constitutional Court judge;

26. The law envisaged in section 176(1) is an exception to the rule. What Parliament has done in section 4(1) and 4(2) of the Judges' Act is to extend the 12 year term to 15 year term and extend the retirement age of 70 to 75 years. In doing so, Parliament has not created an exception to the 12 year term or the retirement age of 70, but effectively replaced them. The 12 year term or retirement age of 70 prescribed in section 176(1) has no legal effect whatsoever since it has now been replaced by subsections 4 (1) and 4 (2) of the Judges' Act. Secondly, subsections 4 (1) and 4 (2) of the Judges' Act apply to all present and future judges.
27. Section 8 (a) of the Judges' Act provides for the procedure for the extension of the Chief Justice, upon the request of the President who can extend the term of office for *indefinite period*, subject only to the new retirement age with no other circumscription upon the exercise of his or her discretion.
28. Therefore section 8 (a) is *ultra vires* section 176 (1) of the Constitution, and is unconstitutional.
29. DGRU has submitted that the fact that the term of office of the Constitutional Court judges in section 176 (1) has not been amended means that they have legal and constitutional effect. Prior to its amendment, section 176(1) stated that "A Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70". ("the original s 176(1)"). This is the constitutional rule that has not been amended through a constitutional amendment. Section 176(1) imposes a definite term of office that can only be changed through a constitutional amendment. It is this constitutional rule to which an

exception was made.

30. Parliament amended section 176 in the Sixth Amendment but retained the substance of section 176(1). The amendment gave Parliament the power to extend “the term of office of a Constitutional Court judge.” This was to be done as an exception to the rule and it is clear that it should be on a case by case basis. This differential treatment is understandable because the circumstances of the individual Constitutional Court judges cannot be expected to be the same. Any deviation from the rule had to be motivated, debated intensely by Parliament before its approval. Depending on the specific circumstances affecting the judiciary, Parliament is entitled to pass a law that “*extends the term of office of a Constitutional Court judge*” [or specific judges]. There is nothing in section 176 (1) that permits the interpretation contended for by some of the Applicants<sup>7</sup> which is that the Act envisaged in section 176(1) must extend to all judges, present and future. That can be achieved only through a constitutional amendment of section 176 (1) and certainly not through an Act envisaged in section 176 (1) that may be passed to extend the term of office of a Constitutional Court judge.

31. The approach adopted above is supported by the basic principles of statutory and constitutional interpretation. It is also supported by the provisions of section 165(4) of the Constitution which provides that “organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.” It is further supported by fact that each extension of the term of office of a Constitutional Court judge is an exception to the rule and must therefore be adequately motivated, debated by Parliament and passed into law.

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<sup>7</sup> See heads of argument of FUL

**(iii). The meaning of “except” in section 176(1)**

32. Parliament may extend the term of office of a specific Constitutional Court judge or specific judges. This means that Parliament may change the duration of the term beyond the period prescribed in section 176(1). Parliament would do so through its legislative process. When Parliament utilises the powers to extend the term of office under section 176(1), it is not exercising a power to amend the Constitution. It is exercising a special legislative power to create a legislative intervention intended to extend the term of office of a specific Constitutional Court judge or judges.
33. The approach of the DGRU to section 176 (1) is supported by the ordinary principle of statutory interpretation that statutes should be construed so as to avoid absurdities or anomalous results.<sup>8</sup> Section 176(1) cannot be interpreted as giving Parliament the right to amend the term of office prescribed for Constitutional Court judges in general or as generic class. If Parliament had intended to pass a law to change the term of office of all the Constitutional judges, it would not do so via section 176 (1) but would effectively amend the Constitution to remove the term of office in section 176(1) and replace it with a new

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<sup>8</sup> The classical exposition of this rule was made by Lord Wensleydale in *Grey & Others v Pearson & Others* [1843-60] All ER Rep 21 (HL) at 36: “[T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to an absurdity. Or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid an absurdity and inconsistency, but no farther.” See *S v Mhlungu & Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) paras 76 and 77; *Zantsi v Council of State, Ciskei & Others* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) para 37; *Ex Parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No 83 of 1995* (3) SA 289 (CC); 1996 BCLR 518 (CC) para 7; *Ex Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC); 2000 (1) BCLR 1 (CC) paras 55 and 57

one.

34. Section 176(1) refers to the law that may be passed by Parliament to extend the term of office of a Constitutional Court judge as an exception to the rule. In the context of s 176(1), then, there is a presumption that the phrase, “*a Constitutional Court judge*”, when used at the beginning and end of s 176 (1) of the Constitution, bears the same meaning. Tenure applies to specific judges in their individual capacities. As used in section 176 (1) it means that an Act may be passed by Parliament that “extends the term of office of a Constitutional Court judge.” The law envisaged in section 176 (1) is specific and is intended to extend the term of office of a Constitutional Court, through the legislative process and in exceptional circumstances.
35. Our Courts have overtime established the principle that it will prefer and adopt an interpretation that gives effect to the values of the Constitution to an interpretation that does not.<sup>9</sup> As stated by Ngcobo J in *Matatiele Municipality & Others v President of the Republic of South Africa & Others*:<sup>10</sup>

*“The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution.”*

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<sup>9</sup> see, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para [91]; *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at paras [20] - [23].

<sup>10</sup> 2007 (6) SA 477 (CC).

36. The interpretation of s 176(1) of the Constitution offered by the DGRU is consistent with the essential content of section 176(1), is contextual and promotes the objectives of judicial independence as set out in section 165 of the Constitution. Section 176 (1) does not permit the amendment of the non-renewable term of office – which now stands amended by subsections 4(1) and 4(2) of the Judges’ Act and can be varied when section 8 (a) is invoked. When regard is had to the interests of good judicial governance, the principles of judicial independence- which are protected by a fixed non-renewable term of office – which can only be tempered with in exceptional circumstances and via an involved legislative process, the correct approach to section 176(1) is the one advanced by the DGRU. The approach ensures that the term of office of a judge of the Constitutional Court is only changed in very restrictive and exceptional circumstances requiring the invocation of the legislative process. The change in the term of office of a Constitutional Court judge must be justified. An extension of the term of office of a specific judge cannot be given generally and be made binding to present and future cases – without amending the Constitution itself.
37. The approach to section 176(1) advocated by DGRU preserves the essence of judicial independence as set out in section 165 and numerous cases of this Honourable Court.<sup>11</sup> At the heart of the rule of law are the requirements of an independent judiciary and separation of powers which is protected through a secure tenure that cannot simply be changed by Parliament or the executive.

## **IMPLICATIONS OF THIS APPROACH**

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<sup>11</sup> De Lange v Smuts NO at para 59 "*judicial independence is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law*"; South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) at paras 25 and 26

38. If the approach to interpreting section 176 (1) of the Constitution above is constitutionally correct and sound, which is our submission, 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 can pass a law extending the term of office of Chief Justice Ngcobo.
39. Parliament has, in the provisions of the Judges' 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 of the Judges' Act 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**

40. Section 8(a) of the Judges Remuneration and Conditions of Employment Act, 20001 (“Judges’ 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 the that the correct procedure is the following:-

39.1. 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 (on the assumption that the executive’s intention continues to be that Chief Justice Ngcobo remains in office for a further five years, as contemplated in a Bill that has recently been introduced in Parliament by the executive.)

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

39.3. The President must assent to the legislation.

39.4. 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.

40. This approach will ensure that the constitutional integrity of section 176(1) remains intact by preserving its essential content whilst the country enjoys its exceptional permissions. 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. The approach of DGRU 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. The current Bill before Parliament is built on faulty constitutional foundations and therefore susceptible to successful constitutional attacks.

41. 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 problematic and will continue to expose the judiciary to challenges that are likely to erode public confidence in the judicial and ultimately weaken its capacity and effectiveness to perform its supreme constitutional obligations, namely to uphold the Constitution and the rule of law.

42. Accordingly, if the government believes that the term of Constitutional Court judges should be different from that provided for in the section 176 (1) and/ or that the term of office of the Chief Justice should be separately provided for (as proposed in the Bill that the executive has recently introduced) then a Constitutional Amendment should be tabled, and then debated and passed by Parliament.

## **CONCLUSION**

43. Against the above background, the submissions that we make are significantly and substantially different to those made by the other parties. It is submitted that the interpretation of section 176 (1) of the Constitution, that DGRU is offering, will help the Court in finding an enduring solution to the current constitutional predicament, leading to stability and certainty in relation to the term of office of Constitutional Court judges.
44. It is submitted further that the judicial independence cannot be protected if the term of office of office of the Chief Justice (as indeed all the Constitutional Court judges) is open to

constitutional attacks and uncertainty. 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 are properly enacted by the relevant organs of government. The judiciary as all other branches of government must ensure that the integrity of the office of the Chief Justice (and all the Constitutional Court judges) is not subject to legal doubt.

45. The submission of the DGRU is therefore that the most 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 law extending the term of office of Chief Justice Ngcobo. Such law cannot be correctly attacked for inconsistency with any provision of the Constitution.

**T MASUKU**

**MK MATHIPA**

**TS SIDAKI**

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Chambers, Cape Town and Johannesburg

15 July 2011