

CONSTITUTIONAL COURT OF SOUTH AFRICA

[2011] ZACC 23

Case CCT 53/11

In the matter between:

JUSTICE ALLIANCE OF SOUTH AFRICA

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

MINISTER FOR JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

Second Respondent

CHIEF JUSTICE SANDILE NGCOBO

Third Respondent

and

Case CCT 54/11

In the matter between:

FREEDOM UNDER LAW

Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Respondent

DIRECTOR-GENERAL: JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

Second Respondent

MINISTER FOR JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

Third Respondent

CHIEF JUSTICE SANDILE NGCOBO

Fourth Respondent

and

Case CCT 62/11

In the matter between:

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

MINISTER FOR 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

MARIO GASPARE ORIANI-AMBROSINI MP

Third Amicus Curiae

Heard on : 18 July 2011

Decided on : 29 July 2011

JUDGMENT

THE COURT:

Introduction

[1] The three applications for direct access before us arise from a decision by the President of the Republic of South Africa to extend the term of office of the Chief Justice of South Africa for five years. They were all brought during the court recess and heard together. All the applicants challenge the constitutionality of the law that authorises the process by which the term of office of the Chief Justice was extended and, if the law is found to be valid, put in issue the constitutional validity of the conduct of the President in the process of extending that term of office.

Background

[2] Before its amendment in 2001,¹ section 176 of the Constitution provided that a Constitutional Court judge is appointed for a non-renewable term of 12 years but must retire at the age of 70. The 2001 amendment did not alter the term of appointment of a Constitutional Court judge but gave Parliament the power to extend the term of office of a Constitutional Court judge. Section 176(1) now 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.”

¹ Constitution of the Republic of South Africa Amendment Act 34 of 2001 (2001 amendment).

[3] Section 4 of the Judges’ Remuneration and Conditions of Employment Act² (Act) provides that a Constitutional Court judge, whose 12-year term of office expires or who reaches the age of 70 years before completing 15 years’ active service, must continue in office until the completion of 15 years’ active service or until that judge attains the age of 75 years, whichever is the sooner.³

[4] Section 8(a) of the Act⁴ provides:

² 47 of 2001.

³ Section 4 provides:

- “(1) 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 or she must be discharged from active service as a Constitutional Court judge.
- (2) A Constitutional Court judge who, on attaining the age of 70 years, has not yet 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.”

This provision applied to the judges who were members of this Court at the time of its enactment, including Chief Justice Chaskalson.

⁴ This provision in substance re-enacted section 7A of the Judges’ Remuneration and Conditions of Employment Act 88 of 1989. Section 7A of that Act came into force on 7 July 1993, before the 1993 Constitution was adopted. Section 7A provided:

- “(1) A Chief Justice who has been discharged from active service, except a Chief Justice who has been discharged from active service in terms of section 3(1)(b), (c) or (d), may, at the request of the State President, from the date on which he has been discharged from active service, perform service as Chief Justice of South Africa for a period determined by the State President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.
- (2) A Chief Justice who performs service in terms of subsection (1) shall monthly be paid such remuneration as the State President may determine.”

The 1993 amendment was occasioned by the controversial circumstances under which Chief Justice Rabie agreed to stay on in office, after reaching retirement age, despite the absence of statutory warrant or precedent for doing so. See Cameron “Nude monarchy: the case of South Africa’s judges” (1987) 3 *South African Journal on Human Rights* 338 at 343-6.

“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.”

[5] In effect, section 8(a) permits the further extension of the term of office of the Chief Justice exclusively. It allows a Chief Justice, whose 12-year term in this Court is to expire and who will have completed 15 years’ active service, to remain the Chief Justice of South Africa at the request of and for a period determined by the President.

[6] The 12-year term of office of the incumbent Chief Justice expires at midnight on 14 August 2011.⁵ He will also have completed more than 15 years’ active judicial service by this date.⁶ It follows that the Chief Justice cannot continue in office beyond midnight on 14 August 2011 unless his term of office is validly extended before that date.

[7] On 11 April 2011 the President requested the Chief Justice in writing to remain in office for an additional period of five years:

“Dear Chief Justice Ngcobo

⁵ The Chief Justice was appointed to the office of a Constitutional Court judge with effect from 15 August 1999. The Act makes no provision for the computation of time. The civilian method accordingly applies. It follows that his term of office expires at midnight on 14 August 2011. See *Ex parte Minister of Social Development and Others* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at paras 23-4. Compare also Devenish *Interpretation of Statutes* (1 ed) (Juta, Cape Town 1992) at 246.

⁶ The Chief Justice was appointed as a judge in the High Court in 1996.

REQUEST TO CONTINUE TO PERFORM ACTIVE SERVICE AS CHIEF JUSTICE OF SOUTH AFRICA

I am advised by the Minister of Justice and Constitutional Development, Mr JT Radebe, MP, that on 15 August 2011 you will complete 15 years of active service as defined in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001) (the Act), and consequently that you will, in terms of section 176(1) of the Constitution of the Republic of South Africa, 1996, read with section 3(1)(a) of the Act, be eligible to be discharged from active service with effect from the said date.

I am also aware that Cabinet has recently approved the Constitution Seventeenth Amendment Bill and the Superior Courts Bill which seek to consolidate the outstanding aspects relating to the transformation of the judicial system and the judiciary in particular, and to enhance judicial accountability and access to justice in general. I am further advised that Parliament will soon be seized with these Bills and other Bills which impact directly on the judiciary, which have been outstanding for a long time. I take cognizance of the critical role you have, of providing leadership to the Judicial Branch of Government whose contribution will be vital during the stages of processing these Bills and their ultimate enactment and implementation.

Section 8(a) of the Act provides that, '*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*'.

Having regard to the above, I, in terms of section 8(a) of the Act, would like to request you to continue to perform active service as Chief Justice of South Africa from the 15th August 2011 until 15 August 2016.

I will appreciate your response to my request, as well as your views on the period I have suggested.

Yours sincerely

JACOB GEDLEYIHLEKISA ZUMA
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA”

[8] This is the first time that section 8(a) has been used by the President.

[9] On 2 June 2011 the Chief Justice responded to the President’s request in writing:

“Dear Mr President

REQUEST FOR THE CHIEF JUSTICE TO CONTINUE TO PERFORM ACTIVE
SERVICE AS CHIEF JUSTICE OF SOUTH AFRICA

I refer to the letter from the President of 11 April 2011 requesting me to continue to perform active service as Chief Justice of South Africa.

I have carefully considered the reasons for the request and the period suggested by the President. I have decided to accede to the request and continue to lead the Judicial Branch of Government during this critical time of the transformation of the Judiciary and Judicial system in South Africa.

A number of judicial transformative initiatives have recently been undertaken by the Minister of Justice and Constitutional Development in collaboration with the Chief Justice and the Judiciary. Some of the most important programmes which require leadership over the next five years are the following:

- i) The process of implementing Proclamation No. 44 of 2010 by the President establishing the Office of the Chief Justice as a national department located within the Public Service would only be completed over the next year;

- ii) The development of a model and policy in respect of the creation of an independent Office of the Chief Justice in line with the independence of the Judiciary is only expected to be finalised over the next two years;
- iii) The establishment of the Constitutional Court as the apex Court of South Africa and the constitutional recognition of the Chief Justice as the Head of the Judiciary and Head of the Constitutional Court proposed in the Constitution Seventeenth Amendment Bill and the Superior Courts Bill, must still be piloted through Parliament and the subsequent implementation would have to occur over the next five years;
- iv) The Access to Justice Conference scheduled for July 2011, is expected to yield programmes to improve access to justice throughout the country, including the deep rural areas of South Africa, and their implementation would require the Judiciary to work together with the Minister of Justice and Constitutional Development over the next five years;
- v) Consultation and negotiation with the Minister of Justice and Constitutional Development on the draft Judicial Code of Conduct and the Regulations for the Register of Registrable Interests for Judges, are currently underway; and
- vi) The changes to the legislative framework for dealing with complaints on judicial conduct are only in the first stages of implementation and it is expected that substantial development to improve judicial accountability will take place over the next five years.

I am therefore in agreement with the President that a five year term is appropriate and adequate to place the independence of the judiciary, judicial accountability and access to justice on a sound footing and continuity in leadership is vital at this stage of these transformative changes.

Warmest regards,

I am, sincerely,

S. SANDILE NGCOBO

CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA”

[10] On 3 June 2011 the President effected the extension of the term of office of the Chief Justice.⁷ Later that day, the President communicated this decision to the Judicial Service Commission (JSC) and to leaders of the political parties represented in the National Assembly before he announced his decision in an address to Parliament.

Applications before this Court

[11] The first application for direct access was brought on 20 June 2011 by the Justice Alliance of South Africa (JASA), a voluntary association with legal capacity. The second application was launched on the same day by Freedom Under Law NPC (FUL), a non-profit company.⁸ The third application for direct access was brought before this Court three days later,⁹ jointly by the Centre for Applied Legal Studies (CALs) and the Council for the Advancement of the South African Constitution (CASAC). CALs is institutionally part of the University of the Witwatersrand; CASAC is an association with legal capacity. The application by CALs and CASAC was in some sense precipitated by the first two applications. CALs and CASAC had, before the launch of the applications in this Court by JASA and FUL, instituted proceedings in the North Gauteng High Court, Pretoria for a declaration of constitutional invalidity of section 8(a) of the Act, but sought to put those issues before this Court, if direct access were granted to JASA and FUL.

⁷ The extension was effected by Presidential Minute No. 139, signed by the President and co-signed by the Minister Justice and Constitutional Development (Minister).

⁸ An association incorporated under section 21 of the Companies Act 61 of 1973.

⁹ On 23 June 2011.

[12] On 22 June 2011, and before the application by CALS and CASAC had materialised, this Court issued directions, calling upon those opposing the applications to respond fully and quickly.¹⁰ The CALS and CASAC application soon arrived and similar directions were issued a day later.¹¹ We recognised the importance of all three applications being heard together early enough for a judgment to be delivered before the term of the Chief Justice expires and scheduled the hearing accordingly.¹²

[13] The President, the Minister and the Chief Justice are respondents in all three applications. The President and the Minister oppose all applications while the Chief Justice abides the decision of this Court. Although the Director-General for Justice and Constitutional Development, who is an additional respondent in the FUL application, filed an intention to oppose, she took no active part in the proceedings.

[14] The National Association of Democratic Lawyers (NADEL)¹³ and the Black Lawyers Association (BLA)¹⁴ were admitted as amici curiae. Both organisations sought to make submissions on remedy only. In the event of a finding of constitutional

¹⁰ Notices of intention to oppose were to be filed by 27 June 2011 and answering affidavits were to be filed by 4 July 2011.

¹¹ On 24 June 2011.

¹² The hearing was set down for 18 July 2011 and argument had to be filed by the applicants on or before Friday 8 July 2011 and by those respondents who were opposing on or before 14 July 2011.

¹³ On 11 July 2011.

¹⁴ On 13 July 2011.

invalidity, they seek a final order suspending the constitutional invalidity, in order to permit Parliament to remedy the defect, the effect of which would be to allow the Chief Justice to continue in office beyond 14 August 2011. A Member of Parliament for the Inkatha Freedom Party, Dr Oriani-Ambrosini, was also admitted in his personal capacity as the third amicus curiae.¹⁵ He provided the Court with certain information regarding the parliamentary deliberations. He also attached the Judges' Remuneration and Conditions of Employment Amendment Bill¹⁶ (Bill), which he said was to be considered to remedy any defect in section 8(a), and asked the Court to give guidance on its content.

[15] The last application for admission as an amicus curiae by the Democratic Governance and Rights Unit (DGRU), was lodged too late to give other parties an opportunity to respond.¹⁷ This applicant was informed that its submissions would be taken into account in the course of this judgment.

[16] On the morning of the hearing the Minister filed a supplementary affidavit to which he had attached the Bill. The affidavit states that the Minister does not accept that section 8(a) is unconstitutional. However, out of excessive caution (“*ex abundante cautela*”) he has resolved to seek an amendment of section 8(a) in order to remove any vagueness or ambiguity that may be considered to exist in respect of the extension of the term of active service of the Chief Justice. He explains that, to this end, on 7 July 2011

¹⁵ On 14 July 2011.

¹⁶ B12 of 2011

¹⁷ On the afternoon of 15 July 2011.

he introduced the Bill in the National Assembly. It provides, amongst other things, for a minimum period of active service of the Chief Justice. He added that it is reasonably expected that the Bill will be passed by both houses of Parliament in the first half of August 2011.

Standing, direct access and urgency

[17] There was ultimately no debate in relation to standing, direct access and urgency. We dispose of them briefly. All the applicants claimed standing in the public interest, in the interest of their members or in their own interest, pursuant to the standing provision of the Constitution.¹⁸ They relied variously on certain constitutional or democratic concepts, which may be summarised as follows: the protection of the Constitution; the protection and advancement of the understanding of and respect for the rule of law and the principle of legality; the protection of the administration of justice and the independence of the judiciary; the promotion, protection and advancement of human rights; the strengthening of constitutional democracy; the promotion of social justice and equality; public accountability and open governance. The President and the Minister do

¹⁸ Section 38 of the Constitution provides:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

not dispute the applicants' standing. That the applicants have standing cannot be gainsaid.

[18] Issues of direct access and urgency were disputed by the President and the Minister in their answering affidavits. By the close of the hearing, however, both the President and the Minister conceded that it was in the interests of justice for this Court to give a final determination on all issues raised. They urged us to decide the matter as quickly as possible, so as to enable the Executive and Parliament to determine an appropriate course of action, if any change indeed proves necessary before 14 August 2011. We accept that the matter is urgent and must be resolved as quickly as possible. We have endeavoured to achieve this result.

[19] Direct access is accordingly granted to all the applicants.

Constitutional and legal framework

[20] The determination of this case turns on the interpretation of section 176(1) of the Constitution and section 8(a) of the Act, against the background of the constitutional imperatives of the rule of law, the separation of powers and judicial independence. It is convenient first to set out the applicable constitutional and statutory framework, before identifying the issues to be decided.

[21] The appointment of judicial officers to this Court is governed by section 174 of the Constitution. Section 174(3) provides:

“The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.”

[22] The provision creates a distinctive procedure for appointing the Chief Justice and Deputy Chief Justice. The President, after consulting with the JSC and the leaders of the parties represented in the National Assembly, appoints the Chief Justice and Deputy Chief Justice.

[23] Section 174(4) deals with the procedure for appointing the other judges of this Court. The JSC is required to compose a list of nominees, which must have three more names than the number of vacancies, and submit this list to the President. The President then makes appointments from this list, or from a supplemented list, if need be. The President is required to consult with the Chief Justice and the leaders of the parties, represented in Parliament, before making an appointment.¹⁹

¹⁹ Section 174(4) of the Constitution provides:

“The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:

- (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.

[24] The tenure of Constitutional Court judges is governed by section 176(1) of the Constitution,²⁰ stating that a Constitutional Court judge holds office for a non-renewable term of 12 years or until she or he is 70 years old, whichever comes first.

[25] Section 176(1) also contains an exception: an Act of Parliament may extend the term of a Constitutional Court Judge.²¹ The original formulation of section 176(1) did not contain the caveat “except where an Act of Parliament extends the term of office of a Constitutional Court judge.”²² This was added by section 15 of the 2001 amendment of the Constitution.²³ In its original form, section 176 read: “[a] Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70.”

[26] The Act deals with the remuneration and conditions of employment of judges. According to its long title, its purpose is “[t]o provide for the remuneration and conditions of employment of judges of the Constitutional Court, the Supreme Court of Appeal and the High Courts; and for matters connected therewith.” The Act engages

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- (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
 - (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.”

²⁰ For the wording of section 176(1), see [2] above.

²¹ *Id.*

²² *Id.*

²³ See above n 1.

section 176(1) of the Constitution in two provisions: section 4 and section 8(a). These sections both purport to give effect to the amended section 176(1).

[27] Section 4(1)²⁴ allows for the extension of the term of office of a Constitutional Court judge if, at the point when his or her 12-year term has expired, he or she has not yet completed 15 years' active service.²⁵ Section 4(2) allows a Constitutional Court judge to continue serving until the age of 75, if he or she has not yet completed 15 years of active service at the age of 70.

[28] Section 8(a) empowers the President to extend the term of service of a Chief Justice for a period to be determined by the President which does not extend beyond the time at which the Chief Justice attains the age of 75.²⁶

[29] The interpretation of section 176(1) and section 8(a) necessarily engages the concepts of the rule of law, the separation of powers and the independence of the

²⁴ See above n 3.

²⁵ Section 1 of the Act defines "active service" as follows:

"'active service' means any service performed as a Constitutional Court judge or judge in a permanent capacity, irrespective of whether or not such service was performed prior to or after the date of commencement of this Act, and includes any continuous period—

- (a) of longer than 29 days of such service in an acting capacity prior to assuming office as a Constitutional Court judge or judge in a permanent capacity if such service was performed before the date of commencement of this Act; and
- (b) of such service in an acting capacity prior to assuming office as a Constitutional Court judge or judge in a permanent capacity if such service was performed after the date of commencement of this Act".

²⁶ For the full wording of section 8(a), see [4] above.

judiciary. The Constitution and decisions of this Court give specific meaning to these concepts.

[30] Section 1 of the Constitution sets out the founding values of our democratic state, namely human dignity, equality, freedom, non-racialism and non-sexism, supremacy of the Constitution and the rule of law, and universal adult suffrage.²⁷ The significance of the rule of law and its close relationship with the ideal of a constitutional democracy cannot be over-emphasised.

[31] Section 2 of the Constitution enshrines the supremacy of the Constitution. It states that the Constitution is the supreme law of the country and that any law or conduct inconsistent with it is invalid.²⁸

[32] The principle of the separation of powers emanates from the wording and structure of the Constitution. The Constitution delineates between the legislature, the executive

²⁷ Section 1 of the Constitution provides:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

²⁸ Section 2 of the Constitution provides:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

and the judiciary. This Court recognised a fundamental premise of the new constitutional text as being “a separation of powers between the Legislature, Executive and Judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness”.²⁹

[33] The Court has highlighted the importance of separation of powers in ensuring that the courts are able to discharge their constitutional duty of ensuring the legitimate exercise of public power, cautioning that—

“[t]he separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined.”³⁰

[34] Section 165 of the Constitution highlights the importance of judicial independence. It vests judicial authority in the courts and nowhere else. Organs of state must not only refrain from interfering with the courts, but they must also “assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the

²⁹ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*Certification I*) at para 45.

³⁰ *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 873 (CC); 2001 (1) BCLR 77 (CC) at para 26.

courts.”³¹ This Court has held that “[a]n essential part of the separation of powers is that there be an independent judiciary.”³²

[35] The requirement of judicial independence is further underscored by the oath or solemn affirmation taken by all judges when entering office. Judges undertake to uphold and protect the Constitution and administer justice “without fear, favour or prejudice”.³³

[36] Judicial independence is crucial to the courts for the fulfilment of their constitutional role. It is “foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.”³⁴ What is vital

³¹ Section 165 of the Constitution provides:

- “(1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) 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.
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”

³² *Certification I* above n 29 at para 123.

³³ Section 6(1) of Schedule 2 to the Constitution provides:

“Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows:

I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

(In the case of an oath: So help me God.)”

³⁴ *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 59.

to judicial independence is that “the Judiciary should enforce the law impartially and that it should function independently of the Legislature and the Executive.”³⁵

[37] The constitutional and statutory provisions at the core of this matter must be interpreted within the context of the Constitution and its values as a whole. International law is relevant. Section 233 of the Constitution requires courts to draw guidance from international law in the interpretation of legislation.³⁶ In terms of section 39(1),³⁷ international law must and foreign law may be considered in the interpretation of the Bill of Rights.

[38] Judicial independence in a democracy is recognised internationally. The international community has subscribed to basic principles of judicial independence through a number of international legal instruments. These include the United Nations Basic Principles on the Independence of the Judiciary,³⁸ which state that “[t]he

³⁵ *Certification I* above n 29 at para 123.

³⁶ Section 233 of the Constitution provides:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

³⁷ Section 39(1) of the Constitution provides:

“When interpreting the Bill of Rights, a court, tribunal or forum—

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”

³⁸ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by United Nations General Assembly Resolutions 40/32 (29 November 1985) and 40/146 (13 December 1985).

independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.”³⁹ The international standards acknowledge that guaranteed tenure and conditions of service, adequately secured by law,⁴⁰ are amongst the conditions necessary to secure and promote the independence of judges.

[39] On our continent, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa recognise judicial independence as a general principle applicable to all legal proceedings.⁴¹ The document includes a number of attributes that form the content of the principle, including a transparent and accountable appointment process,⁴² security of tenure⁴³ and other conditions of service that are prescribed and guaranteed by law.⁴⁴ Similar principles have been adopted in other regions of the world.⁴⁵

[40] The principles of the rule of law, the separation of powers and judicial independence, underscored by international law, are indispensable cornerstones of our constitutional democracy.

³⁹ Id at principle 1.

⁴⁰ Id at principles 11 and 12.

⁴¹ DOC/OS(XXX)247 at principle 4.

⁴² Id at principle 4(h).

⁴³ Id at principle 4(l).

⁴⁴ Id at principle 4(m).

⁴⁵ See, for example, the European Charter on the statute for judges, adopted by the member states of the Council of Europe (DAJ/DOC (98) 23), July 1998; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, adopted by the Chief Justices and other judges of the LAWASIA region (Asia and the Pacific) in 1995 and 1997.

The issues

[41] The central issue that arises for determination is whether section 8(a) of the Act is consistent with section 176(1) of the Constitution. That enquiry, in turn, requires us to determine:

- (a) whether section 8(a) of the Act delegates the power to extend to the President; if so, whether delegation is permitted by section 176(1) of the Constitution; and, if so, whether the delegation was validly done;
- (b) whether section 176(1) authorises a differentiation of terms of office of judges of the Constitutional Court;
- (c) if section 8(a) is constitutionally valid, whether the President is obliged to consult the JSC and political parties, before granting an extension; and
- (d) the appropriate remedy and the costs order.

Delegation

[42] The applicants impugn the constitutional validity of section 8(a) of the Act on at least three separate grounds. However, on one ground they make common cause. That is that section 8(a) is invalid because it violates the provisions of section 176(1) of the Constitution. This is so, they contend, because its provisions are an impermissible delegation of the legislative power of Parliament to extend the term of office of a Constitutional Court judge to the President.

[43] The applicants contend that, from the language employed by section 176(1), only Parliament is vested with the power to extend the term of office of a Constitutional Court judge and that, in the absence of express or implied power to delegate to another authority, Parliament may not do so.

[44] The applicants also contend that there are a number of textual and contextual indicators in section 176(1) that show that the power to extend the term of service of judges of this Court may not be delegated. They draw attention to the words “Act of Parliament extends the term of office” and make the submission that this is a plain textual indicator that Parliament, and not any other body, may extend a Constitutional Court judge’s term of office. Thus, whilst section 176(1) of the Constitution vests the power to extend the term of office of judges of this Court in Parliament, section 8(a) of the Act purports to delegate that power, they submit, impermissibly to the President.

[45] The President and the Minister argue that section 8(a) does not purport to delegate the power to extend the term of the Chief Justice to the President. In the President’s argument “section 8 qualifies under the exception as an Extension by Act of Parliament as intended in Section 176” and that “[t]he power of Parliament to extend the term of office of a Constitutional Court judge, clearly included the power to prescribe that such extension is to be determined by the President” (footnote omitted). Thus, they argue, section 8(a) confers on the President merely the discretion to enable him to “meet contingencies”. That discretion entails implementing “an extension of the term of office

of the Chief Justice . . . by determining the period of extension and seeking the Chief Justice's assent which is a *sine qua non* [pre-requisite] of such extension.”

[46] In essence their contention is that section 8(a) is part of an Act of Parliament that gives effect to section 176(1) of the Constitution. Through it Parliament in effect extends the term of office of the Chief Justice and merely authorises the President to implement the extension. The delegation, to implement section 176(1) of the Constitution, permits the President to decide: whether to extend the term of office of a Chief Justice; if so, to determine the period of extension; and to seek the consent of the incumbent. This, they say, is a permissible delegation, not of legislative power but, of a discretion to implement an extension already made by an Act of Parliament.

[47] The President and the Minister contend that this Presidential discretion to implement the extension is permissible and consistent with the constitutional framework. In this regard, the President contends that section 174(3) of the Constitution vests in the President the power to appoint a Chief Justice. An extension of the term of office or, as the President puts it, “an effective re-appointment of the Chief Justice” without the President's participation, would frustrate his power to appoint a Chief Justice. Additionally, the President submits that individual personal appointments to State offices are not usually effected by Acts of Parliament. Thus the section 8(a) arrangement is an obvious mechanism for Parliament to resort to because whether the term of office of a particular Chief Justice is to be extended ordinarily would be capable of sensible answer

only at the time of his or her retirement. The decision must be made, they argue, when the “exigency is imminent”.

[48] The President further contends that the provisions of section 8(a) do not erode judicial independence because this Court sits as a college of eleven judges and decision-making depends on a quorum of eight judges. Implicit in this argument is that the judicial conduct or perceived conduct of a single judge cannot erode judicial independence. The President also argues that the extension of office of the Chief Justice may occur once only and for a specific period. The President says this means that there can be no further extension as an inducement to decisions in favour of the Executive. He submits further that the rationale for limiting the terms of office is to encourage renewal of this Court’s jurisprudence by weeding out “old wood”. This object will not be frustrated by section 8(a) of the Act, they argue, because the extension of the term of the Chief Justice relates to only one member of the Court and is made necessary because there are a number of important functions performed by the Chief Justice, other than judicial decision-making, which require continuity.

[49] It seems to us the first question to be resolved is whether the plain wording of the empowering provision of section 176(1) of the Constitution requires that an Act of Parliament extend the term of office of a Constitutional Court judge. That the respondents readily concede. The concession is properly made. As we have already stated, their argument is rather that Parliament has by enacting section 8(a) extended the

term of office of the Chief Justice and, that under section 8(a), the President merely takes an executive decision to implement the legislation. The second question is whether the Constitution permits Parliament to delegate its power to extend a Constitutional Court judge's, including the Chief Justice's, term of service. The third question is whether section 8(a) constitutes lawful delegation or not.

Does section 8(a) delegate?

[50] Section 8(a) states that a Chief Justice who becomes eligible for discharge from active service may continue to perform active service as a Chief Justice. However, that would happen only if the President decides so. The extension would be for an undefined period set by him provided it does not go beyond a date on which the Chief Justice attains the age of 75 years. Section 8(a) does not in its terms purport to delegate to the President any form of legislative power. It does not require the President to extend the term of office by making subordinate legislation in terms of an Act in Parliament as envisaged in section 239 of the Constitution.⁴⁶ What it does is confer on the President an executive discretion to decide whether to request a Chief Justice to continue to perform active service and, if he or she agrees, to set the period of the extension. The term of office cannot be extended unless the President decides so and the Chief Justice accedes to the

⁴⁶ Section 239 of the Constitution provides:

“‘national legislation’ includes—

(a) subordinate legislation made in terms of an Act of Parliament”.

request. The period of the extension too is in the exclusive discretion of the President and is unfettered in the sense that he is not required to consult.

[51] Thus section 8(a) confers a significant and wide discretion on the President, as reflected in the President's own understanding, that he could choose between appointing a new Chief Justice or extending the incumbent's term. In any event, in its purported delegation, Parliament has not sought to furnish any, let alone adequate, guidelines for the exercise of the discretion by the President.⁴⁷

[52] It seems self-evident that section 8(a) does not in itself extend the term of office of a Chief Justice. The provision clearly grants the President an executive discretion to extend or not to extend the term of office of a Chief Justice who is approaching the end of his or her term. In this, Parliament has delegated its power to the President and in doing so granted him an executive discretion whether to extend the term of office or not. The contention that the President merely takes an executive step to implement the extension granted by an Act of Parliament cannot be sustained. There is no doubt that, as section 8(a) stands, Parliament has surrendered its legislative power in favour of an executive election whether to extend the term of an incumbent or not.

⁴⁷ *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 34; *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* [2000] ZACC 18; 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) at para 25; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 47 and 54-5.

Is this a permissible delegation?

[53] This Court has frequently recognised that the Constitution sometimes permits Parliament to delegate its legislative powers and sometimes does not.⁴⁸ Shortly after the advent of our constitutional democracy, in *Executive Council I*,⁴⁹ Chaskalson P made plain:

“In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body”

[54] In any given case, the question whether Parliament is entitled to delegate must depend on whether the Constitution permits the delegation. This is so because the authority of Parliament to make laws, and so too to delegate that function, is subject to the Constitution. Thus whether Parliament may delegate its law-making power or

⁴⁸ *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (*Executive Council I*) at para 51. See also *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at paras 49, 93 and 122-3; *In re Constitutionality of the Mpumalanga Petitions Bill, 2000* [2001] ZACC 10; 2002 (1) SA 447 (CC); 2001 (11) BCLR 1126 (CC) at para 19; *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* [1999] ZACC 13; 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) (*Executive Council II*) at paras 123-4.

⁴⁹ *Executive Council I* above n 48 at para 51. Whilst this dictum related to the interim Constitution, it has been held to apply with equal force to the Constitution. See *Executive Council II* above n 48 at para 124.

regulatory authority is a matter of constitutional interpretation dependent, in most part, on the language and context of the empowering constitutional provision.⁵⁰

[55] In Chapter 4, the Constitution provides that the legislative authority of the national sphere of government is vested in Parliament and sets out the reach of that authority.⁵¹ In other chapters too, the Constitution confers legislative authority by using a variety of expressions. In Chapter 8, which regulates courts and the administration of justice, it confers legislative power on Parliament by resorting to various phrases such as “through legislative and other measures”,⁵² “by an Act of Parliament”,⁵³ “in terms of an Act of Parliament”,⁵⁴ “national legislation . . . must”,⁵⁵ “by national legislation”⁵⁶ and “national legislation may”.⁵⁷

[56] Confronted by a similar enquiry whether the Constitution had authorised a delegation of legislative powers, albeit in relation to another chapter of the Constitution, yet also concerning the extension of a term of office, in *Executive Council II*, Ngcobo J observed:

⁵⁰ *Executive Council II* above n 48 at para 124.

⁵¹ Sections 43 and 44 of the Constitution.

⁵² Section 165(4) of the Constitution.

⁵³ Sections 166(c), 168(3)(c), 169(a)(ii) and (b) and 170 of the Constitution.

⁵⁴ Sections 166(e) and 168(1) of the Constitution.

⁵⁵ Sections 167(6), 172(2)(c) and 179(3) and (4) of the Constitution.

⁵⁶ Section 179(7) of the Constitution.

⁵⁷ Section 180 of the Constitution.

“The Constitution uses a range of expressions when it confers legislative power upon the national Legislature in Chapter 7. Sometimes it states that ‘national legislation must’; at other times it states that something will be dealt with ‘as determined by national legislation’; and at other times it uses the formulation ‘national legislation may’. Where one of the first two formulations is used, it seems to me to be a strong indication that the legislative power may not be delegated by the Legislature, although this will of course also depend upon context.”⁵⁸

[57] There are indeed a number of textual and contextual indicators that section 176(1) of the Constitution does not empower Parliament to delegate the power to extend the term of service of a judge of this Court. The words “Act of Parliament extends” require that Parliament must take the legally significant step of extending the term of active service of a judge of this Court.

[58] The extension by the President does not qualify as an Act of Parliament as required. It does not bear the specific features of an Act of Parliament, such as originating from a Bill that was assented to and signed by the President.⁵⁹ The extension is made through an executive decision of the President. Section 176(1) explicitly refers to an Act of Parliament extending the term. That is a strong indication that the legislative power may not be delegated by the Legislature.

⁵⁸ Above n 48 at para 125.

⁵⁹ Section 81 of the Constitution provides:

“A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.”

[59] This indication is strengthened when one considers the wording of section 176(1) against that employed in section 176(2) of the Constitution. That section states that other judges, that is judges who are not Constitutional Court judges, hold office until they are discharged from active service “in terms of an Act of Parliament.” There has been a deliberate differentiation in the wording, requiring direct action by Parliament in section 176(1) and a framework for action in section 176(2). Had it been contemplated that the power in section 176(1) be delegable, it is highly probable that the wording of section 176(2) would have been used.

[60] The respondents drew our attention to the fact that the debate on and the adoption of the constitutional amendment to section 176 and sections 3, 4 and 8(a) of the Act occurred simultaneously. From this they urged us to hold that section 8(a) is consistent with section 176(1), because Parliament was open-eyed in passing both. This contention cannot be supported because the fact that the two provisions were enacted at the same time is not relevant in assessing whether particular legislation is compatible with its empowering provision within the Constitution. The contention is faulty for yet another reason. It implies that the way in which Parliament understood the constitutional amendment that it approved is binding on the manner in which this Court must interpret the amendment. It cannot be so. Even if it were possible to arrive at this result, we are

obliged to determine objectively the meaning of the constitutional provision irrespective of the meaning as perceived by Parliament.⁶⁰

[61] Beyond the textual indicators, important considerations that flow from the scheme of our Constitution also point to this conclusion. The first of these relates to the nature and extent of the delegation.⁶¹ The primary reason for delegation is to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details. Thus, delegation relieves Parliament from dealing with detailed provisions that are often required for the purpose of implementing and regulating laws. As Chaskalson P observed in *Executive Council I*, delegation “is necessary for effective law-making.”⁶² However, the Court properly draws a distinction between delegation to make subordinate legislation within the framework of an empowering statute and “assigning plenary legislative powers to another body.”⁶³

[62] Section 8(a) does not delegate the determination of mere minor detail to the Executive, but shifts all of the power granted by section 176(1) from Parliament to the Executive. The provision usurps the legislative power granted only to Parliament and therefore constitutes an unlawful delegation.

⁶⁰ *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 14-9.

⁶¹ Delegation is the conferral of a power for a specific reason, often a pragmatic grant of power to fill in the detail of a policy laid down by primary legislation. It is not power which has been transferred to the final decision-maker, to be used as they see fit, or alienated by them in turn. See McHarg “What is Delegated Legislation?” (2006) *Public Law* 539 at 557.

⁶² Above n 48 at para 51.

⁶³ *Id.*

[63] It would have been an easy matter for Parliament to regulate the term of office of a Constitutional Court judge without being overwhelmed by the necessity to determine minor regulatory detail. Instead it chose to delegate all its legislative power in this regard to the President.

[64] It is indeed so that section 174(3) of the Constitution vests the power to appoint the Chief Justice in the President subject to a requirement to consult. The first respondent's argument, that because the President has the power to appoint the Chief Justice he or she ought to be involved in the extension of the Chief Justice's term, cannot be sustained. All that section 176(1) of the Constitution does is to vest the power to extend the term of a Constitutional Court judge in Parliament. It is not concerned with the power to appoint the Chief Justice under section 174(3) of the Constitution. These are separate powers.

[65] Where the doctrine of parliamentary sovereignty governs, Parliament may delegate as much power as it chooses. In a constitutional democracy, Parliament may not ordinarily delegate its essential legislative functions.⁶⁴ The power to extend the term of a Constitutional Court judge goes to the core of the tenure of the judicial office, judicial independence and the separation of powers. The term or extension of the office of the highest judicial officer is a matter of great moment in our constitutional democracy. Up until the 2001 amendment to section 176(1) of the Constitution, the term of office of

⁶⁴ Id at para 62.

judges of this Court was regulated exclusively by the Constitution. The 2001 amendment requires an Act of Parliament to extend the term of office. It requires Parliament itself to set the term of office. Relying on section 176(1) of the Constitution, Parliament extended the term of office of all judges of this Court under sections 3 and 4 of the Act.⁶⁵ However, under section 8(a) Parliament chose to delegate that power to the President.

[66] Another important consideration in deciding whether section 8(a) is constitutionally compliant is the constitutional imperative of judicial independence. This Court is the highest court in all constitutional matters. The independence of its judges is given vigorous protection by means of detailed and specific provisions regulating their appointment.⁶⁶ The Chief Justice is at the pinnacle of the judiciary and thus the protection of his or her independence is just as important.

[67] It is so that section 176(1) of the Constitution creates an exception to the requirement that a term of a Constitutional Court judge is fixed. That authority, however, vests in Parliament and nowhere else. It is notable that section 176(1) does not merely bestow a legislative power, but by doing so also marks out Parliament's significant role in the separation of powers and protection of judicial independence. The nature of this

⁶⁵ For the text of section 4 of the Act, see above n 3.

⁶⁶ Section 174 of the Constitution.

power cannot be overlooked, and the Constitution’s delegation to Parliament must be restrictively construed to realise that protection.⁶⁷

[68] Accordingly, section 8(a) violates the principle of judicial independence. This kind of open-ended discretion may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive.⁶⁸ The truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference.⁶⁹

[69] In all the circumstances, we conclude that the Constitution determines that a Constitutional Court judge holds office for a non-renewable term, “except where an Act of Parliament extends the term of office of a Constitutional Court judge.” It is only by an Act of Parliament that an extension may occur. The provisions of section 8(a) amount to an impermissible delegation and are invalid because they are inconsistent with the provisions of section 176(1) of the Constitution. Any steps taken or decision made

⁶⁷ See *Executive Council I* above n 48 at para 60; and compare *Bradley v Fisher* 80 US 335 (1871) at 347; *R v Kirby and Others; Ex Parte Boilermakers’ Society of Australia* [1956] HCA 10; (1956) 94 CLR 254 at 275-9; Article 2 of the United Nations Basic Principles on the Independence of the Judiciary above n 38; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa above n 41 at principle 4; International Commission of Jurists “Section 6” of *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No 1* (ICJ, Geneva 2007) at 51-4; McLachlin “Judicial Independence: A Functional Perspective” in Andenas and Fairgrieve (eds) *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (OUP, New York 2009) at 273-6.

⁶⁸ The mechanisms considered to ensure the independence of the judiciary, so it may be seen as free from the influence of the Executive, can be seen in the following: *R v Valente* [1985] 2 SCR 673 at 694-5; *R v Beauregard* [1986] 2 SCR 56 at 69-70; *United States v. Hatter* 532 US 557 (2001) at 567-8; Jackson “Packages of Judicial Independence: The Selection and Tenure of Article III Judges” (2007) 95 *Georgetown Law Journal* 965 at 992-3; McLachlin above n 67 at 276-81.

⁶⁹ *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 32.

pursuant to the provisions of section 8(a) of the Act is inconsistent with the Constitution and equally invalid.

Does section 176(1) permit differentiation of terms of office?

[70] The Court has concluded that there is a further reason why section 8(a) is inconsistent with the Constitution. The Court considers that the provision makes a differentiation in regard to the term of “a Constitutional Court judge” that the Constitution does not permit. Both the President and the Minister asked the Court to determine this issue in addition to the delegation point. Counsel for the President asked the Court to do so for the guidance of the President. Counsel for the Minister stated that it was important for the President, the Minister, the Cabinet and Parliament that the Court determine whether this basis of constitutional challenge is sound.

[71] The President and the Minister, joined on this point by CALS and CASAC, contend that section 176(1) permits the Chief Justice to be singled out when the parliamentary power to extend the term of office of a Constitutional Court judge is exercised. By contrast, FUL and JASA urge that no differentiation is permitted between the Chief Justice and the other members of the Court.

[72] In construing section 176(1) we do more than merely parse the words.⁷⁰ In giving meaning to its words we approach them against the background of the structure of the Constitution as a whole, and the setting of section 176 within Chapter 8 of the Constitution, which regulates courts and administration of justice. So approached, the supremacy of the Constitution and the rule of law, a founding value of the Republic,⁷¹ the separation of powers between the Legislature, Executive and Judiciary, and the independence of the judiciary provide the setting in which the meaning of the provision must be determined.

[73] It is well established on both foreign⁷² and local authority⁷³ that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gives strong warrant to this principle in providing that a Constitutional Court judge holds office for a non-renewable term. Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.

⁷⁰ See [20]-[40] above.

⁷¹ See above n 27.

⁷² For the position in other jurisdictions, see *Marbury v Madison* 5 US 137 (1803) at 138 and *Leblanc v The Queen* 2011 CMAC 2 at paras 38-9, 43-4 and 59.

⁷³ *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at paras 222-3.

[74] As our earlier exposition has indicated,⁷⁴ the fixed nature of a Constitutional Court judge's term was the main feature of the provision until it was substituted by the 2001 amendment. That amendment added a provision that empowered Parliament by statute to extend the term of office of a Constitutional Court judge. In its pre-amendment form, the provision's reference to "a Constitutional Court judge" embraced every Constitutional Court judge. The question is whether the power conferred on Parliament to extend by statute the term of office of "a Constitutional Court judge" empowered it to single out a particular Constitutional Court judge.

[75] In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the possibility of far-fetched perceptions should not dominate the interpretive process,⁷⁵ it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in section 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it.

⁷⁴ See [2] above.

⁷⁵ *Van Rooyen* above n 69 at para 34, citing *US v Jordan* 49 F 3d 152 (5th Cir. 1995) at 156 and *In Re Mason* 916 F 2d 384 (7th Cir. 1990) at 386.

[76] In conferring the power on the President to extend the term of office of “a Constitutional Court judge”, section 8(a) limits the beneficiary of the conferral to the Chief Justice alone. The question is whether this is compatible with section 176(1) in its setting in Chapter 8, understood against the broader background of the Constitution.

[77] In our view, the singling out of the Chief Justice, alone amongst the members of this Court, is incompatible with section 176(1). It is indeed so that the Constitution itself creates the office of the Chief Justice and Deputy Chief Justice and to this extent singles them out from the other members of the Court. The Constitution provides that this Court “consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.”⁷⁶ What is more, the Constitution provides a special appointment process by which the President as head of the national executive appoints the Chief Justice and Deputy Chief Justice, after consulting the JSC and the leaders of the parties represented in the National Assembly.⁷⁷ These provisions establish the distinctive offices of Chief Justice and Deputy Chief Justice, and confer special power on the President to appoint them after consultation. As indicated earlier,⁷⁸ the other judges of this Court are appointed by the President, also after consultation, from a list the JSC provides.⁷⁹

⁷⁶ Section 167(1) of the Constitution.

⁷⁷ For full text of Section 174(3) and (4), see [21] and n 19 above respectively.

⁷⁸ See [23] above.

⁷⁹ See above n 19.

[78] The distinctive appointment process for the Chief Justice and Deputy Chief Justice indicates the high importance of their offices. It signifies that their duties may require them to represent the judiciary and to act on its behalf in dealings with the other arms of government. In addition to their judicial functions, they may be called upon to perform ceremonial and administrative duties. Indeed, the Chief Justice and the Deputy Chief Justice are the most senior judges in the judicial arm of government, and their distinctive manner of appointment reflects the fact that they may be called upon to liaise and interact with the Executive and Parliament on behalf of the Judiciary.

[79] Once appointed, however, the Chief Justice and Deputy Chief Justice take their place alongside nine other judges in constituting the membership of this Court. The Constitution provides that a matter before this Court “must be heard by at least eight judges”.⁸⁰ Here the Constitution makes no differentiation between the Chief Justice, the Deputy Chief Justice and the other judges of this Court in how the quorum is constituted. The Chief Justice and Deputy Chief Justice add to the tally of eight without contributing more than their individual weight. Their high office and the extra-judicial duties they may be called upon to perform add nothing to the tally.

[80] Nor does their office count when this Court determines the cases and the matters before it. Their views count and their voices are heard equally with the respect and authority accorded every member of this Court.

⁸⁰ Section 167(2) of the Constitution.

[81] The same scheme appears from the power the Constitution affords the President to appoint a woman or a man to be an acting judge of this Court if there is a vacancy or if a judge is absent.⁸¹ The appointment must be made with the concurrence of the Chief Justice, but there is no constitutional differentiation in the provision for the vacancy or absence. The vacancy or absence of the Chief Justice or Deputy Chief Justice counts in the same way as the vacancy or absence of any other judge of this Court for the purpose of the presidential power to appoint an acting judge to this Court.

[82] These provisions establish two contextual signifiers that assist in clarifying the meaning of section 176(1). The first is that when it comes to the functioning of this Court as the highest court in constitutional matters, there is no distinction among the Chief Justice, the Deputy Chief Justice and the nine other judges. The Chief Justice is first among equals (*primus inter pares*),⁸² but in the discharge of the Court's judicial functions he is no different from the other judges.

⁸¹ Section 175(1) of the Constitution

⁸² Compare *R v Reilly* [1999] 64 CRR (2d) 57 at 79 and *Gillespie v Manitoba (Attorney General)* [2000] 185 DLR (4th) 214 at para 34; 74 CRR (2d) 129 at 141 where it is stated of a provision singling out the Chief Justice and his duties that—

“it is directed solely at the organization of the judges and business of the court. It gives the Chief Justice responsibility for the judicial functions of the court, but adds nothing to his or the court's jurisdiction. He is the first and most important judge, but the first among equals as far as jurisdiction is concerned.”

[83] The second illumination these provisions give is that where the Constitution seeks to single out the Chief Justice and the Deputy Chief Justice, it does so deliberately and plainly. It does so solely in creating the offices of the Chief Justice and the Deputy Chief Justice, and in making special provision for the President to appoint them. It does so nowhere else.

[84] It is so that both statute and the Constitution place special obligations on the Chief Justice.⁸³ However, in the discharge of this Court's constitutional duty of adjudication, the Chief Justice serves as "a Constitutional Court judge". In making this Court the guardian of the Constitution and the highest court in constitutional matters, the Constitution vested all eleven members of the Court with the authority to decide the matters before it without affording additional weight or authority to those holding the offices of Chief Justice and Deputy Chief Justice. For the purpose of adjudication, the Chief Justice is a judge of this Court and a member of it, no different from the other judges.

[85] It is plain that the provision does not allow Parliament to single out any individual Constitutional Court judge by name. On this all the parties before us were rightly agreed. It is also plain that no individual may be singled out on the basis of an irrelevant

⁸³ See, for example, the following sections of the Constitution: 51(1); 52(2); 64(4); 86(2) and (3); 110(1); 111(2); 128(2) and (3); 174(4); 175(1); 178(1)(a); Schedule 2, sections 1, 2, 3, 4(1), 5 and 6(1); and Schedule 3, section 9. See also sections 7(1) and 8(1) of the South African Judicial Education Institute Act 14 of 2008; sections 1 and 8 of the Judicial Service Commission Act 9 of 1994 (making the Chief Justice the head of the JSC and the head of the Judicial Conduct Committee, which receives, considers and deals with complaints against judges); and Government Gazette 33500 GN R 44, 3 September 2010 (Presidential Proclamation establishing the Office of the Chief Justice).

individual characteristic or feature. This was common cause. It follows that the term “a Constitutional Court judge” in section 176(1) does not permit singling out any one Constitutional Court judge on the basis of his or her individual identity or position within the Court.

[86] Does holding the office of Chief Justice enable Parliament to single out the office in permitting the President to extend the term of office, as section 8(a) currently does? In answering this question two considerations must be borne in mind. The first, as explained earlier, is that the power of extension, where granted, must be circumscribed carefully to the express terms of the constitutional authorisation. The power should not be over-amply interpreted, since an extension may reasonably be seen as a benefit.

[87] The second consideration is that the primary effect of extending the term of office of a Constitutional Court judge is to confer extended power to perform the judicial function of this Court. In that, the Chief Justice and the Deputy Chief Justice are no different from the nine other judges of this Court. They are judges first in performing their judicial duties and judges only when the power the Constitution creates to extend the term of office of a Constitutional Court judge is considered.

[88] A signal feature of section 176(1) is that no mention is made of the Chief Justice or Deputy Chief Justice. The power to extend is afforded indifferently in relation to “a Constitutional Court judge”. That description embraces each and every Constitutional

Court judge, and singles out none of them. Incumbency of the office of Chief Justice or Deputy Chief Justice makes no difference and confers no special entitlement to extension.

[89] The DGRU contends, novelly, that Parliament does not have any power to extend the term of office of all Constitutional Court judges generally, or that of all present and future Chief Justices. It has, the DGRU urges, only the power to extend the term of office of a specific judge or judges of the Constitutional Court, and the legislation exercising the power section 176(1) confers may apply only to that specific judge or those judges. The DGRU concludes that to exercise the power validly, Parliament must pass a law extending the term of office of the incumbent Chief Justice by name only.

[90] We are not persuaded. The argument fails to interpret section 176(1) against the background of the constitutional values that are essential to its understanding, in particular the need for fixed terms of office. What is more, it attributes an atomised and individualised meaning to “a Constitutional Court judge”, when the language and setting of the provision indicate without doubt that the phrase encompasses the members of this Court collectively.

[91] It follows that in exercising the power to extend the term of office of a Constitutional Court judge, Parliament may not single out the Chief Justice. The provision does not allow any member of the category of Constitutional Court judge to be

singled out, whether on the basis of individual characteristic, idiosyncratic feature or the incumbency of office. Age is an indifferent criterion that may be applied in extending the term of office of a Constitutional Court judge. Age is an attribute that everyone attains. Previous judicial service is another criterion that may be indifferently applied to all the judges of this Court. The Act provides that a Constitutional Court judge whose 12-year term of office expires before he or she has completed 15 years' active service as a judge must, subject to attaining the age of 75, serve for 15 years in this Court.⁸⁴

[92] In effect, these provisions entail that to receive a full judicial pension on retiring from this Court, a judge must have completed at least 15 years' active service, whether in this Court or other courts, subject only to attaining the age of 75, and to a minimum 12-year term in this Court.⁸⁵

[93] Unlike the criteria of age and service, the offices of Chief Justice and Deputy Chief Justice are by definition singular and person-specific. They can at any one time be filled respectively by only one incumbent. Section 176(1) does not permit the holders of these offices to be singled out individually for extension by virtue of their incumbency of office. For this purpose, the holders of these offices are merely judges of this Court.

⁸⁴ For the text of section 4 of the Act, see above n 3.

⁸⁵ The DGRU notes that a consequence of its argument, set out at [89] above, is that the provisions of the Act that require all judges of this Court who have not yet completed 15 years' active service to do so before being discharged are invalid. No other party supports this position.

Their terms, if they are to be extended, must be extended uniformly with those of the other members of the Court.

[94] To create a special category for the extension of the term of office of the Chief Justice or Deputy Chief Justice would be in each case to single out one judge. It would be to single out a member of this Court on the basis of incumbency of an office that is irrelevant to the delineation of the members of this Court in section 176(1). This section 176(1) does not license.

[95] Three members of the Court agree with the conclusion that section 8(a) is invalid on the basis of the differentiation it effects. However, they do not agree that section 176(1) never permits differentiation on the basis of the office the Chief Justice holds. In their view, section 176(1) must be interpreted purposively in the light of the language used, its constitutional and historical context and the imperative of judicial independence. So interpreted, the provision may permit Parliament to extend the term of office of the Chief Justice. The condition is that the extension must be effected through an Act of Parliament of general application which rationally pursues a legitimate governmental purpose. In particular the measure must further judicial independence.

[96] In this case, not all these requirements have been fulfilled. Understandably, given the power that section 8(a) purported to confer on the President, the responding affidavits were directed at justifying the President's exercise of his discretion under the existing

provision. They did not seek to provide a more general rationale for an extension of the terms of office of all Chief Justices in the furtherance of judicial independence. Although the provision is in an Act of Parliament, it is capable of individualised application and it is uncertain that it furthers judicial independence. It follows, in the view of these colleagues, that the provision, in enabling the Chief Justice to be singled out in these circumstances, fails to pass constitutional muster.

[97] Having unanimously found that section 8(a) is on both grounds inconsistent with the Constitution and invalid, next for determination is the appropriate remedy. It is not necessary in the circumstances to decide whether the President was required to consult.

Remedy

[98] When deciding a constitutional matter, a court must declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency and may also make any order that is just and equitable, including one that limits the retrospective effect of a declaration of invalidity or suspends the declaration of invalidity to allow the competent authority to correct the defect.⁸⁶ In view of our finding that section 8(a) of the

⁸⁶ Section 172(1) of the Constitution provides:

“When deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and

Act is constitutionally invalid a declaration to that effect must follow. There is no need to limit its retrospective effect.

[99] The only remaining issue is whether an order suspending the declaration of invalidity should be made as contended for by the President and the Minister as well as the amici (NADEL and BLA).

[100] The competence to make a just and equitable order which may include an order suspending the declaration of invalidity for any period is a wide one. Importantly, the precise circumstances of each case need to be considered in order to determine how best the values of the Constitution can be promoted by an order that is just and equitable.⁸⁷

[101] There are, however, two particular difficulties in the present matter that add to the often complex evaluation of what just and equitable order to make. The first is the lack of particular facts and circumstances that would justify an order suspending the declaration of invalidity. The second is that this judgment is delivered before the purported extension of the Chief Justice's term would have taken effect on 15 August

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- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

⁸⁷ *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 135. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at paras 75-7.

2011. What we are in effect asked to do is to render valid an extension that is invalid and that has not yet come into effect.

[102] In relation to the first difficulty this Court has on a number of occasions laid down guidelines on how and what kind of information should be placed before the Court in order to enable an informed decision to be made on the issue.⁸⁸ For example, in *Mistry*⁸⁹ it was stated:

“A party wishing the Court to make such an order must provide it with reliable information to justify it doing so. The requisite information will necessarily depend for its detail on the nature of the law in question and the character of the defect to be corrected. Yet, as a general rule, a government organ or other party wishing to keep an unconstitutional provision alive should at least indicate the following: what the negative consequences for justice and good government of an immediately operational declaration of invalidity would be; why other existing measures would not be an adequate alternative stop-gap; what legislation on the subject, if any, is in the pipeline; and how much time would reasonably be required to adopt corrective legislation. Parties interested in opposing such an order should be given an opportunity to motivate their opposition.”

⁸⁸ See *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 33; *S v Ntsele* [1997] ZACC 14; 1997 (11) BCLR 1543 (CC) at para 13; *S v Mello* [1998] ZACC 7; 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at para 11; *S v Mbatha*; *S v Prinsloo* [1996] ZACC 1; 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 30; *S v Bhulwana*; *S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 30. A court is not obliged to grant suspension of a declaration of invalidity and that relief is not there for the asking. In *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 42, this Court remarked:

“It should not be assumed that [this Court] will lightly grant the suspension of an order made by it declaring a statutory provision to be invalid and of no force and effect . . . for the defect in the legislation to be cured.”

⁸⁹ *Mistry v Interim Medical and Dental Council of South Africa* [1998] ZACC 10; 1998 (4) SA 1127 (CC) at para 37; 1998 (8) BCLR 880 (CC) at para 30.

[103] It is clear that the papers filed on behalf of the President and the Minister do not meet these requirements. NADEL seeks to address the problem of lack of information by reference to the following. It asserts: (a) the transformation of the judiciary and of the manner of administration of the court system is at a crucial stage of its progress; (b) the transformation involves a fundamental shift to court-controlled administration of the judiciary under the auspices of the Office of the Chief Justice; (c) this will entrench the institutional independence of the judiciary; (d) the Chief Justice has been intimately and instrumentally involved in managing this complex task and as a result has “institutional memory”, has established relationships with those he is required to consult and work with and has provided leadership in bringing the transformation initiatives to their current status; and (e) even though new leadership will in time be able to continue, there will inevitably be a delay in advancing the transformation project.

[104] In relation to the difficulty of providing a temporary legal cloak to what would have been a constitutionally invalid extension of the Chief Justice’s term of office, the Minister argues that a declaration of invalidity without suspension will bring into disrepute the office of the Chief Justice because the President will then have to decide on the appointment of a new Chief Justice in less than four weeks. NADEL argues that the administration of justice would not reasonably be seen as being brought into disrepute by suspending the declaration for a short period in order for the competent authority to take remedial action.

[105] NADEL's counsel went as far, in oral argument, as to suggest that a failure to suspend the invalidity would itself bring the administration of justice into disrepute, because it would be seen as denying the will of Parliament to extend the term of office of the Chief Justice (and the right of the Chief Justice to the extension). This was echoed in the Minister's submission that forcing the President to make a decision on the appointment of a new Chief Justice in a short time will reflect badly on the administration of justice.

[106] Relying on *Dawood*,⁹⁰ NADEL argued that although Parliament has begun the process of passing an appropriate law of general application to amend the impugned provision, the vagaries of parliamentary process and the possibility that the constitutionality of the Bill will be challenged strengthened the need for interim relief.

[107] The Minister supported the submissions by NADEL regarding relief.

[108] BLA takes a novel stance. It submitted that suspending the invalidity in order for the defect to be remedied would give expression to notions of restorative justice in customary African jurisprudence. It contended that a mistake has been made in good faith by all concerned and should be "forgiven". It argued that the term "tshwarelo" or

⁹⁰ *Dawood* above n 47. In our view, this case is clearly distinguishable from *Dawood* in which the defect in the impugned provisions lay in the legislative omission because of its failure to provide guidance to the decision-maker whether to grant or refuse or extend a temporary permit. This Court correctly held that the task of determining what guidance is required is primarily a task for the Legislature and should be undertaken by it to cure the defect in those provisions. In this case, the defect is irremediable because section 8(a) purports to entrust parliamentary power to the President.

“tshwarela” is applied in African jurisprudence, and is applied in “Lekgotla” (African traditional courts), meaning “excusable” or “excuse” and translates to “erasing the wrong permanently”.

[109] The counter to these arguments by FUL and JASA is that a finding of constitutional invalidity, on the ground that all Constitutional Court judges should be treated indifferently and that particular differentiation for only the Chief Justice was not constitutionally sanctioned, meant that the defect of individual extension of the Chief Justice’s term could not be remedied. It was not merely a procedural matter. The temporary absence of a Chief Justice was something that had happened in the past and any deleterious effect could be overcome in time. Nothing prevented the incumbent Chief Justice from assisting his successor in overcoming these problems. The Chief Justice had no right to an extended term of office and could not have expected to hold tenure under an unlawful legislative provision and executive decision. To suspend invalidity would undermine the rule of law and independence of the judiciary. They argue also that there is no need for any interim relief because the interests of justice are best served by a final decision on the merits.

[110] This judgment is delivered before the purported extension of the Chief Justice’s term of office would have come into effect on 15 August 2011. There is thus no need for an interim order pending this judgment, as asked for by NADEL. What remains is the issue of the suspension of the order of invalidity.

[111] The suspension would relate to future consequences that, but for a suspension order, would not eventuate. And there is no indication of any material dislocation if the suspension order were not to be granted. We have not been able to find an instance where this Court has made a suspension order in comparable circumstances, nor were we referred to any. A suspension order under section 172(1)(b) usually comes into play when the past implementation of invalid law or conduct has already led to practical consequences. Even in those cases this Court has emphasised that the rule of law must never be relinquished, but that the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of rigid legality.⁹¹ It is difficult to envisage how the rule of law will be served in this instance by protecting future constitutionally invalid uncertainty.

[112] The reasoning and implication of this judgment is that individual differentiation in relation to the extension of the term of a Constitutional Court judge is not constitutionally permissible. It is not the province of this Court to decide what, if anything, to do about this. Granting an order suspending the declaration of invalidity in the circumstances of this case, where proper information providing the basis for an order was not forthcoming from the responsible state organs and where the invalid extension had not yet come into operation, would have been problematic even if the defect was merely procedural.

⁹¹ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 85.

Where it is substantive and will require major rethinking and decision-making on the part of government, the justification for an order suspending the declaration of invalidity is even weaker.

[113] The justification advanced for a suspension order related to non-adjudicative responsibilities said to be intimately linked to the person of the Chief Justice. The judicial work of this Court will not be affected by the temporary absence of a Chief Justice appointed in terms of the Constitution. The important advances pioneered by the current Chief Justice in relation to the institutional transformation of the judiciary need not grind to a halt. Presumably the government will not abandon its co-operation simply because the present Chief Justice may not immediately continue in that position. There is nothing that prevents the incumbent Chief Justice from continuing to give his assistance regarding those projects on a practical level to any temporary or future appointment to the office of Chief Justice. A suspension order will perpetuate an unconstitutional extension of the term of office of the head of the judiciary. The interests of justice and the rule of law demand certainty on the issues before us. This view is fortified by the President's submission that the issues in this case deserve finality and clarity because their practical implications are imminent.

[114] We conclude that an order suspending the declaration of invalidity is not, in the circumstances, warranted.

Costs

[115] The applicants seek costs against the respondents jointly and severally including the costs of two counsel. The applicants have been materially successful and are entitled to costs, including the costs of two counsel.⁹² Even though the matter is of fundamental importance it was not factually complex and the legal issues were of a narrow compass. It thus does not justify an order for a third counsel, as asked for by CALS and CASAC.

Order

[116] In the result the following order is made:

1. The applications for direct access by Justice Alliance of South Africa and Freedom Under Law are granted.
2. The conditional joint application for direct access by the Centre for Applied Legal Studies and Council for the Advancement of the South African Constitution is granted.
3. It is declared that section 8(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 is inconsistent with the Constitution and invalid.
4. It is declared that the decision of the President of the Republic of South Africa to request the Chief Justice of South Africa to continue

⁹² As far as costs are concerned, the general rule in litigation is that the costs should follow the result. See *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 43, where this Court held that "the general rule for an award of costs in constitutional litigation between a private party and the State, is that if the private party is successful, it should have its costs paid by the State". See also *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at para 28.

performing active service as Chief Justice in terms of section 8(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 is inconsistent with the Constitution and invalid and that the consequent extension of the term of office of the Chief Justice is of no force and effect.

5. The President and the Minister for Justice and Constitutional Development are ordered to pay the costs, including the costs of two counsel, of—

- a. the applicant, Justice Alliance of South Africa, in Case CCT 53/11;
- b. the applicant, Freedom Under Law, in Case CCT 54/11; and
- c. the applicants, Centre for Applied Legal Studies and Council for the Advancement of the South African Constitution, in Case CCT 62/11.

CORAM: Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J.

For the Applicants:

In CCT 53/11: Advocate A Katz SC and Advocate D Simonsz instructed by Nortons Inc.

In CCT 54/11: Advocate JJ Gauntlett SC, Advocate M du Plessis and Advocate A Coutsooudis instructed by Webber Wentzel.

In CCT 62/11: Advocate W Trengove SC, Advocate G Marcus SC, Advocate S Budlender and Advocate N Mji instructed by CALS.

In CCT 62/11: Advocate V Maleka SC, Advocate G Budlender SC and Advocate T Ngcukaitobi instructed by CALS.

For the First Respondent:

Advocate KJ Kemp SC and Advocate LK Olsen instructed by the State Attorney, Johannesburg.

For the Second Respondent in CCT 53/11 and CCT 62/11 and the Third Respondent in CCT 54/11:

Advocate MTK Moerane SC and Advocate M Sello instructed by the State Attorney, Johannesburg.

For the First Amicus Curiae:

Advocate G Bizos SC and Advocate A Hassim instructed by SECTION27.

For the Second Amicus Curiae:

Advocate N Matlala instructed by T.T. Hlapolosa Attorneys Inc.