CONSTITUTIONAL COURT OF SOUTH AFRICA

Mandlakayise John Hlophe v Premier of the Western Cape Province; Mandlakayise John Hlophe v Freedom Under Law and Others (Centre for Applied Legal Studies, General Council of the Bar, Law Society of South Africa, Advocates for Transformation, Black Lawyers Association and National Association of Democratic Lawyers as Amici Curiae)

CCT 41/11; CCT 46/11
[2012] ZACC 4

Date of Hearing: 29 November 2011
Date of Judgment: 30 March 2012

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Friday 30 March 2012, the Constitutional Court gave judgment on two applications for leave to appeal against judgments of the Supreme Court of Appeal. Both applications have their origins in a complaint made by the judges of the Constitutional Court against the Judge President of the Western Cape High Court and a counter-complaint made against the Constitutional Court judges by the Judge President. The complaint was that the Judge President had tried improperly to influence two of the judges of the Constitutional Court in making a decision in a case before the Court while the counter-complaint alleged impropriety on the part of the Constitutional Court judges because they had made a press statement on their complaint. The Judicial Services Commission had decided that neither of the complaints before it justified a finding that any of the judges concerned was guilty of gross misconduct.

The judgments of the Supreme Court of Appeal meant that the Judicial Services Commission had to again decide the complaints before it.

The applications were heard by a bare quorum of eight judges because three members of the Court had recused themselves prior to the hearing. Three of the sitting judges were also complainants against the applicant before the JSC and another two were involved in attempts to mediate the dispute between the Constitutional Court judges and the applicant. If the three judges who had been parties to the lodging of the complaint before the JSC had recused themselves, as they would have ordinarily been obliged to do, there would have been no

quorum. The difficulty that arose was how both cases should be finalised in these exceptional circumstances. All the parties had agreed that the Constitutional Court could determine the matter.

The first issue was whether acting judges may be appointed to the Constitutional Court under section 175(1) of the Constitution to hear the applications. The Court held in a unanimous judgment that the section does not allow for the appointment of individual acting judges to hear a specific case where serving Constitutional Court judges recuse themselves from hearing a matter. The Court also concluded that the purpose of section 175(1) is to deal with normal instances of vacancies and physical absences of Constitutional Court judges, not with the exceptional occurrence where recusal leads to the lack of a quorum.

In considering the applications for leave to appeal, the Constitutional Court held that a balance needed to be struck between the Court's obligation to provide finality on the one hand and the possible injustice to the applicant on the other, that the applications could not remain pending, and that the dismissal of the applications will not in itself amount to a finding against the Judge President on the substance of the complaints. The Court took account of the fact that the Supreme Court of Appeal had considered both cases and that the threat of injustice was mitigated. The Constitutional Court concluded that leave to appeal should be refused.