



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)

Case CCT 41/11; CCT 46/11

Date of Hand Down: 29 September 2011

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting these reasons for postponement and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 29 September 2011 the Constitutional Court handed down reasons for postponing two cases that were set down for oral argument on particular issues on 22 September 2011. Both cases, CCT 41/11 and CCT 46/11 are applications for leave to appeal against decisions of the Supreme Court of Appeal reviewing and setting aside decisions of the Judicial Service Commission in disciplinary hearings involving Judge-President Hlophe.

On 12 September 2011, in light of the fact that the Constitutional Court would not be quorate at the hearing on 22 September 2011, the Court issued directions postponing the hearing to 29 November 2011.

On 20 September 2011 the attorneys acting for the Premier of the Western Cape Province, the respondent in case CCT 41/11, wrote a letter to this Court asking: (a) who the three judges were who found themselves unable to participate in the determination of the issues set down for oral argument on 22 September 2011; (b) the reasons why they found themselves unable to participate; and (c) the basis on which 29 November 2011

was allocated for the hearing. Concern was expressed that the Court would not be quorate on 29 November 2011.

In response to the above letter and in light of the exceptional circumstances of the case, the Court acceded to the request by handing down the reason for the postponement.

The reason for the decision to postpone the cases to 29 November 2011 was that the Court would have lacked a quorum on 22 September 2011. Two Justices, Jafta J and Nkabinde J, recused themselves from consideration of the cases right from the outset. The Deputy Chief Justice participated in the decision of the Court to issue directions setting down the cases for oral argument on 22 September 2011. After reconsideration the Deputy Chief Justice came to the conclusion, on 12 September 2011, that he too needed to recuse himself from further participation. This decision necessitated the postponement of the cases. His recusal reduced the number of judges available to hear oral argument in this term to seven, one less than the quorum of eight required by the Constitution. The cases could thus not be heard on 22 September 2011.

The three judges who recused themselves from the cases were complainants in the matter against the applicant. Unlike any of the other complainants, they were called as witnesses and testified before the Judicial Service Commission at the initial hearings into the complaint. The three judges consider that, depending on the outcome of the applications for leave to appeal, they may be required to testify again. It is for that reason that they considered it necessary to recuse themselves from further participation.

29 November 2011 is suitable since it is anticipated that an acting judge will have been appointed for the normal business of the Court in the fourth term.