



CONSTITUTIONAL COURT OF SOUTH AFRICA

Justice Alliance of South Africa (JASA) v President of the Republic of South Africa and Others; Freedom Under Law NPC (FUL) v President of the Republic of South Africa and Others; Centre for Applied Legal Studies (CALS) and Council for the Advancement of the South African Constitution (CASAC) v President of the Republic of South Africa and Others; (National Association of Democratic Lawyers of South Africa (NADEL), the Black Lawyers Association (BLA), Mario Gaspare Oriani-Ambrosini, MP as Amici Curiae)

**Case No.: CCT 53/11; CCT 54/11; CCT 62/11
[2011] ZACC 23**

Date of Judgment: 29 July 2011

MEDIA SUMMARY

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

On Friday, 29 July 2011 the Constitutional Court handed down a judgment in three urgent applications for direct access about the purported extension of the term of office of the Chief Justice for 5 years by the President of the Republic of South Africa. But for this extension, the term of office of the Chief Justice will expire on 14 August 2011.

Section 176(1) of the Constitution provides that a Constitutional Court judge holds office for a non-renewable term of 12 years or until he or she reaches the age of 70 years, whichever is the sooner, except where an Act of Parliament extends the term of office of a Constitutional Court judge. Section 8(a) of the Judges' Remuneration and Conditions of Employment Act (the Act) allows the President to request a Chief Justice who is about to be discharged from active service to continue in office as the Chief Justice for an additional period determined by the President if the Chief Justice accedes to that request. The applicants asked the Constitutional Court to declare section 8 (a) of the Act inconsistent with section 176(1) of the Constitution. All the applicants contended that section 176(1) empowers an "Act of Parliament" to extend the term of office of the Chief Justice. Accordingly, to the extent that section 8(a) gives this power to the President, it is an unlawful delegation of a legislative power. FUL and JASA relied on a second ground. They argued that the phrase "a Constitutional Court Judge" in the second half of section 176(1) authorises Parliament to extend the term of all the judges of the Constitutional Court and not the term of office of the Chief Justice alone. The Act is inconsistent with the Constitution because it allows the office of the Chief Justice alone to be extended without extending the terms of office of the other Constitutional Court judges.

The President of South Africa and the Minister for Justice and Constitutional Development, argued that Parliament had not delegated its power but had in fact extended the term of office of the Chief Justice by authorising the President to do so by requesting the Chief Justice to continue active service. The President and the Minister, supported by CALS and CASAC, contended that section 176(1) did permit an extension of the term of a category of Constitutional Court judge like the Chief Justice.

The Chief Justice did not take part in the case except to say that he abides the decision of the Constitutional Court.

NADEL and the BLA submitted as amici curiae that the Court should, if it found the section unconstitutional, suspend the order of invalidity to give Parliament a chance to remedy the defect. Member of Parliament, Mario Orini-Ambrosini, also an amicus, gave the Court certain information and asked it to give guidance to Parliament on what was necessary to cure the defect. The submission of the Democratic Governance and Rights Unit that Parliament could extend the term of office of a specific judge only was considered by the Court although the Unit could not be admitted as amicus curiae before the hearing.

The parties agreed by the end of argument that direct access should be granted and that the case should be decided urgently so that Parliament had time, if necessary, to cure the defect before the office of the Chief Justice came to an end on 14 August 2011. This the Court did.

In its judgment, the Court unanimously held that section 176(1) must be interpreted against the background of the constitutional imperatives of the rule of law, separation of powers and the independence of the judiciary. The Court found that a non-renewable term of office is an important feature of these constitutional imperatives.

Against this background, the Court held first, that section 8(a) permitted the President to extend the term of office of the Chief Justice and by this surrendered and usurped the power of Parliament. Parliament alone had the power to extend a Constitutional Court judge's term of office. It therefore amounted to an unlawful delegation of a legislative power.

The Court held secondly, that the term "a Constitutional Court judge" in the second half of section 176(1), properly interpreted, meant that section 176(1) does not permit the singling out of any one of the Constitutional Court judges for the extension of their terms. The Court was unanimous that the extension of the term of office of the Chief Justice only was unconstitutional in this case.

Three members of the Court were of the opinion that the singling out of the Chief Justice may be permitted by section 176(1) if done by an Act of Parliament of general application, rationally connected to a legitimate governmental purpose and furthering judicial independence. They however held that these requirements have not been satisfied.

Further, the Court held that it was not just and equitable to order a suspension of invalidity for two reasons. Firstly, insufficient information had been placed before the Court to justify an order suspending the declaration of invalidity. Secondly, it was not appropriate to suspend a declaration of invalidity of a provision that had not yet been effectively utilised in circumstances where material dislocation would not result.

The Constitutional Court accordingly granted direct access, declared section 8(a) and all conduct pursuant to it unconstitutional. The extension of the term of office of the Chief Justice was of no force and effect. It also ordered the respondents to pay the costs of each of the applicants including the costs of two counsel.