



CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

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Portfolio Committee on Justice and Constitutional Development

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Dear Sirs

Re Judges' Remuneration and Conditions of Employment Amendment Bill [B12 – 2011]

1. The Centre for Constitutional Rights (the Centre) is a non-profit organization dedicated to upholding the Constitution¹. To this end, one of its main functions is to monitor developments, including draft legislation that might affect the Constitution. The Centre accordingly welcomes the opportunity to make submissions on the abovementioned Bill as it is concerned that the amendment does not pass constitutional muster since it offends against the principle of equality, the principle of legality and undermines the independence of the Judiciary.

2. Before commenting on each of these aspects, the Centre wishes to record that although the Bill is couched in general terms, it is common cause that the *raison d'être* for the Bill is to facilitate the extension of the term of office of the current Chief Justice. The Centre thus wishes to specifically record that criticism of the proposed amendment must not be seen to be criticism of the incumbent Chief Justice and must be viewed as comment regarding the office.

3. Against that background the Centre makes the following submissions regarding the proposed Bill and the constitutional violations.

4. *Ultra Vires* and the Principle of Legality

4.1 The proposed clause aims to extend the term of office of both the Chief Justice and the President of the Supreme Court through providing for a mandatory 7 year term of office

¹ Constitution of the Republic of South Africa, 1996

for them both, which may be truncated, on request by either of the judges, at the President's unfettered discretion.

4.2 In determining the constitutionality of this clause, two clear issues fall to be decided. The first is whether the Constitution permits the extension of tenure of individual judges, and specifically constitutional court judges? The second is whether the President is constitutionally empowered to truncate any extended tenure?

4.3 The power to extend the term of a Constitutional Court judge, and *ipso facto* the power to determine the length of that extension, is to be found in section 176(1) of the Constitution. This section provides that:

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

4.4 The determining factor in deciding whether the extension of individual judges is permissible is, thus, the meaning to be ascribed to the reference to "...a Constitutional court judge" in the exception.

4.5 In deciding this it is useful to look at the history of clause. Prior to this amendment, the Constitution prescribed that:

"A Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70."

4.6 Parliament however saw fit to amend section 176 to its present form by way of the Sixth Amendment². The Sixth Amendment sought to provide Parliament with the power to lengthen the periods provided in the original section 176(1).

4.7 The amendment however retained the substance of the original section 176(1), and simply gave Parliament the narrow power to extend, in respect of all Constitutional Court judges equally and collectively, the constitutionally prescribed objective criteria of a term of 12 years and retirement age of 70.

4.8 That is the extent of the clear wording of the Sixth Amendment and the change to the Constitution brought about by it.

4.9 This interpretation is supported by the application of canons of interpretation, which prescribe that in the absence of contrary indications, there is a presumption that an amendment to existing legislation interferes as little as possible with existing law.³ There is no indication that the Sixth Amendment sought to depart from the essential principles of

² Constitution Sixth Amendment Act, 2002

the equal application of fixed objective criteria, which were at the core of the original section 176(1).

4.10 It is also further supported if regard is had to the policy decisions taken by the Constitutional Assembly in drafting the clause. The thinking which underpinned the decision to have a fixed term of office was a recognition that many of the decisions to be made by that court would be bound up with socio-political issues. It would thus not be advisable to be hamstrung by outdated socio-political thinking.

4.11 For all these reasons, clause 8(a) is thus simply and plainly *ultra vires* section 176(1) of the Constitution, and is unconstitutional for that reason.

5. The Principle of Equality

5.1 The amendment is equally unconstitutional since it offends against the clear principle of equality which applies to the existing section 176(1) and its predecessor. For the proposed unequal treatment of the Chief Justice to be constitutionally compliant, it would be necessary to give the second reference to "*a Constitutional Court judge*", at the end of section 176(1), a meaning opposite to that which is given to the same phrase, at the beginning of section 176(1). On this interpretation, the second reference would have to be reference to Constitutional Court judges individually and severally.

5.2 There is however nothing in section 176(1) of the Constitution which indicates an intention to afford these identical phrases opposite meanings. To the contrary. When regard is had to the plain language and context of section 176(1), it is clear that these words should bear the same meaning, which is a generic reference to all of the judges of the Constitutional Court, equally, including the Chief Justice.

5.3 The words "*A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first*", thus, mean that the tenure of *all* the judges of the Constitutional Court (including the Chief Justice) is subject to the same objective, uniform criteria: a non-renewable term of 12 years, or until a particular judge attains the age of 70.

5.4 In terms of section 176(1) Parliament is thus only empowered to extend:

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

5.4.2 in respect of all the Constitutional Court judges, collectively and equally.

Section 176(1) does not permit, as clause 8(a) of the Bill provides, an extension of

³ *Johannesburg Municipality v Cohen's Trustee* 1909 TS 818 (per Innes CJ). For a clear exposition of the common law and caselaw see *Steun Uitleg van Wette* (5th ed 1983) 96-99. See too Devenish *Interpretation of Statutes* (1992) 159-161.

one Constitutional Court judge's tenure on an individual basis.

Had it been the intention of the drafters that the Chief Justice as merely *primus inter partes* should be treated differently, clear and express language would have to be found.

6. The Independence of the Judiciary.

6.1 Clause 8(a) also strikes at the principles of the separation of powers and the independence of the judiciary since it undermines the perception and reality of judicial independence.

6.2 The tenure of judicial officers goes to the core of both judicial independence and the separation of powers. This is so since public confidence in both the actual and the perceived independence of the judiciary is critical to the effectiveness of the judiciary as it is the “public’s confidence that makes the public accept the legitimacy of judicial decisions even if it disagrees with the decisions.”⁴ An independent effective judiciary is, in turn, essential to the separation of powers.

6.3 A fixed term of office is an important component of judicial independence. This is because the power to determine tenure enables the holder to decide the professional fate of judges. As such there will inevitably be a suspicion or perception that they will be beholden to the person who has the power to truncate the term of office of their appointment.

6.4 Both the Chief Justice and the President of the Supreme Court are part of the judiciary, which is the ultimate adjudicator on the constitutionality of the conduct of the other branches of government. That suspicion of impartiality is thus heightened when the Head of one of those branches is the person responsible for determining their tenure.

7. Power to Delegate

As stated earlier, the sixth Amendment sought to delegate the power to determine the tenure of office to Parliament. There is no indication either from the meaning of the words or from the application of canons of interpretation that the Sixth Amendment sought to depart from the essential principle of the equal application of fixed objective criteria. Neither is there any indication that the power granted under section 176(1) should be sub- delegated to any third person. In the absence of any express or implied authority to sub-delegate the *delectus personae* for the exercise

^{4 4} Chief Justice Sandile Ngcobo “Enhancing Access to Justice: The search for better justice.” Access to Justice Conference, Hilton hotel, Sandton 7 – 10 July 2011

of the power under section 176(1) is Parliament and Parliament alone. The delegation to the President in clause 8 is thus unconstitutional.

8. Disproportionate Influence

8.1 The last concern with the amendment arises from the resultant disproportionate influence that the proposed amendment will give the Chief Justice, particularly when this amendment is read in conjunction with Constitutional Seventeenth Amendment Bill and the Superior Courts Bill.

8.2 The Constitutional Seventeenth Amendment Bill seeks to amend section 165 of the Constitution so as to make the Chief Justice the head of the judiciary whilst the Superior Courts Bill, through proposed clause 8 seeks, *inter alia*, to bestow extensive unlimited powers on the Chief Justice over the administration of the Courts.

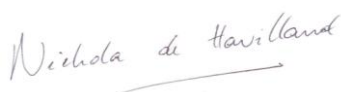
8.3 In its present form, the President would conceivably be able to appoint the Chief Justice as such during his 15th and last year of office as a Constitutional Court Judge, thereby extending his tenure for a further 7 years. This would not only give him a disproportionate role and influence on developing constitutional law that 22 years is bound to create, but could also arguably stultify constitutional jurisprudence.

8.4 As noted earlier, many of the decisions taken by the Constitutional Court will depend, in the final analysis on a determination of socio-political issues. As such, it is important that the development of constitutional jurisprudence is not stultified by being dominated by socio-political attitudes of yesteryear. This important principle will be undermined by a 22 year tenure.

9. For the above reasons the Centre submits that the Bill does not pass constitutional muster and simultaneously undermines a valuable constitutional principle sought to be achieved by the framers of our constitution.

10. The Centre would like to contribute positively to the finalization of this Bill. If it is felt that oral submissions will be of assistance, please do not hesitate to call on the Centre.

Yours faithfully,



Adv N de Havilland
Director