

CONSTITUTIONAL COURT OF SOUTH AFRICA

[2011] ZACC 29  
Case CCT 41/11

In the matter between:

JUDGE PRESIDENT MANDLAKAYISE JOHN HLOPHE

Applicant

and

PREMIER OF THE WESTERN CAPE PROVINCE

Respondent

and

Case CCT 46/11

In the matter between:

JUDGE PRESIDENT MANDLAKAYISE JOHN HLOPHE

Applicant

and

FREEDOM UNDER LAW

First Respondent

ACTING CHAIRPERSON:  
JUDICIAL SERVICE COMMISSION

Second Respondent

JUDICIAL SERVICE COMMISSION

Third Respondent

CHIEF JUSTICE PIUS NKONZO LANGA

Fourth Respondent

DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE

Fifth Respondent

JUSTICE JENNIFER YVONNE MOKGORO

Sixth Respondent

JUSTICE CATHERINE MARY ELIZABETH O'REGAN

Seventh Respondent

JUSTICE ALBERT LOUIS SACHS

Eighth Respondent

JUSTICE SIRRAL SANDILE NGCOBO

Ninth Respondent

JUSTICE THEMBILE LEWIS SKWEYIYA

Tenth Respondent

JUSTICE JOHANN VAN DER WESTHUIZEN	Eleventh Respondent
JUSTICE ZAKARIA MOHAMMED YACOOB	Twelfth Respondent
JUSTICE BAAITSE ELIZABETH NKABINDE	Thirteenth Respondent
JUSTICE CHRISTOPHER NYAOLE JAFTA	Fourteenth Respondent
JUSTICE FRANKLIN KROON	Fifteenth Respondent
and	
CENTRE FOR APPLIED LEGAL STUDIES	First Amicus Curiae
GENERAL COUNCIL OF THE BAR	Second Amicus Curiae
LAW SOCIETY OF SOUTH AFRICA	Third Amicus Curiae
ADVOCATES FOR TRANSFORMATION	Fourth Amicus Curiae
BLACK LAWYERS' ASSOCIATION	Fifth Amicus Curiae
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Sixth Amicus Curiae

Date: 29 September 2011

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REASONS FOR POSTPONEMENT

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THE COURT:

[1] These two cases were set down for oral argument on 22 September 2011 on particular issues in terms of directions issued on 8 August 2011.<sup>1</sup> The set down followed earlier directions issued on 30 May 2011 for case CCT 41/11 and 6 June 2011 for case CCT 46/11, calling for written argument only on these issues.<sup>2</sup> On 12 September 2011

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<sup>1</sup> They read:

- “1. The application for leave to appeal against the judgment of the Supreme Court of Appeal is set down for oral argument on Thursday 22 September 2011 at 10h00 on solely the following issues:
  - (a) Since the majority of the members of the Court consider themselves disqualified from determining the merits of the dispute, with the result that only three judges are available, to what extent, if any, can or should the Court deal with the application?
  - (b) Does section 175(1) of the Constitution read with sections 174(3), (4) and (5) contemplate the appointment of acting judges when the majority of the members of the Court consider themselves disqualified from considering the merits of an application?
  - (c) If the answer to (b) is No, would any purpose be served by granting the application?
  - (d) What order should the Court make?
2. The record need not be lodged, nor the application re-paginated.
3. Written argument, if any, to supplement that already submitted, must be lodged by—
  - (a) the applicant on or before Thursday 1 September 2011;
  - (b) the respondents on or before Thursday 8 September 2011; and
  - (c) the amici on or before Thursday 15 September 2011;
  - (d) parties wishing to respond to the amici by Monday 19 September 2011.”

<sup>2</sup> The directions for the two matters are identical but for the dates on which written argument was to be lodged. They read:

- “1. Seven of the eleven judges of this Court, Chief Justice Ngcobo, Deputy Chief Justice Moseneke, Justice Jafta, Justice Nkabinde, Justice Skweyiya, Justice van der Westhuizen and Justice Yacoob, were complainants in the complaint that underlies this matter.
2. A further member of the Court, Justice Mogoeng, was involved in efforts to mediate the dispute between the Justices concerned and the applicant.
3. In the light of the above, the parties are directed to lodge written argument . . . on the following questions:
  - (a) Can the Court determine the merits of the dispute between the parties?
  - (b) What is the position if eight of the eleven members of the Court consider themselves disqualified from determining the merits of the dispute, with the result that only three judges are available?

further directions were issued, removing the cases from the roll of 22 September 2011 and setting them down for hearing on 29 November 2011. These directions read:

“In the light of the fact that three present judges of this Court find themselves unable to participate in the determination of the issues set down for hearing on Thursday 22 September 2011, the Chief Justice has issued the following further directions:

1. These matters are removed from the roll for hearing on Thursday 22 September 2011.
2. These matters are set down for hearing at 10h00 on 29 November 2011.”

[2] Reasons for the postponement would in the normal course have been given in the judgment after hearing oral argument, but it has become necessary to do so now, for the reasons that follow.

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- (c) In this regard, does section 175(1) of the Constitution read with sections 174(3), (4) and (5), contemplate –
    - (i) the appointment of an acting judge or judges when a judge or judges of this Court recuse themselves from determining a matter; and
    - (ii) acting appointments where the majority of the Court considers itself disqualified from considering the merits of a matter?
  - (d) If not, would any purpose be served by granting the application for leave to appeal?
  - (e) Is the doctrine of necessity in recusal applicable, and, if so, how and to what extent?
  - (f) If so, what order should the Court make?
  4. The following organisations are invited to submit written argument by Wednesday 22 June 2011 on these questions:
    - 4.1 The General Council of the Bar;
    - 4.2 The Law Society of South Africa;
    - 4.3 Advocates for Transformation;
    - 4.4 The Black Lawyers’ Association; and
    - 4.5 The National Association of Democratic Lawyers.
  5. Further directions may be given in due course.”

[3] 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 this Court would not be quorate on 29 November 2011.

[4] In view of the exceptional circumstances we accede to this request at this stage and give reasons now.

[5] Two Justices, Jafta J and Nkabinde J, recused themselves from consideration of the cases right from the outset. They were not party to the decision to issue the directions dated 30 May 2011 in case CCT 41/11 and 6 June 2011 in case CCT 46/11, calling for written argument, nor to the directions issued on 8 August 2011, setting the cases down for oral argument on 22 September 2011.

[6] The initial directions dated 30 May 2011 for case CCT 41/11 and 6 June 2011 for case CCT 46/11, calling for written argument, were issued by the Chief Justice.<sup>3</sup> The

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<sup>3</sup> Rule 11(4) of the rules of this Court reads:

“When an application is placed before the Chief Justice in terms of subrule (3)(c), he or she shall give directions as to how the application shall be dealt with and, in particular, as to whether it shall be set down for hearing or whether it shall be dealt with on the basis of written argument or summarily on the basis of the information contained in the affidavits.”

term of office of Ngcobo CJ came to an end on 14 August 2011. He nevertheless did not participate in the decision to issue directions on 8 August 2011, setting the cases down for oral argument on 22 September 2011. The Deputy Chief Justice, Moseneke DCJ, was a party to that decision.

[7] After reconsideration the Deputy Chief Justice came to the conclusion, on 12 September 2011, that he too needed to recuse himself from further participation. It was this decision that necessitated the postponement of the cases from that date. Until then, there was always a quorum of judges to hear the cases. His recusal reduced the number of judges available to hear oral argument in these cases during this term to seven, one less than the quorum of eight required by the Constitution.<sup>4</sup> The cases could thus not be heard on 22 September 2011 by a quorate Court.

[8] 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. Retired judges, Chief Justice Langa and Justice Mokgoro also testified. 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.

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<sup>4</sup> In terms of section 167(2) of the Constitution, a matter before the Constitutional Court must be heard by at least eight judges.

[9] The retirement of the former Chief Justice necessitates the appointment of an acting judge of the Court until a permanent appointment is made to fill the current vacancy in the Court. An acting appointment for the normal business of the Court for the fourth term is expected soon. This appointment will have the incidental result that the Court will have a quorum also to hear these cases in the fourth term.

[10] The reason for the decision to postpone the cases to 29 November 2011 was thus that the Court would have lacked a quorum on 22 September 2011.

[11] The Court regrets the inconvenience to the parties.

[12] The two Justices, Jafta J and Nkabinde J, although not party to the decision to postpone, have consented to the reasons for their earlier recusal being recorded here.

Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Skweyiya J, Van der Westhuizen J and Yacoob J.