IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT46/2011

In the matter between:

HLOPE, MANDLAKAYISE JOHN **APPLICANT**

and

FREEDOM UNDER LAW & 15 OTHERS **FIRST TO SIXTEENTH RESPONDENTS**

WRITTEN ARGUMENT SUBMITTED BY THE LAW SOCIETY OF SOUTH AFRICA

1. The written argument contained herein is submitted on behalf of the Law Society of South Africa at the invitation of the Honourable Chief Justice. Not being a party to the litigation in the Courts *a quo* or in this Court, no opinion is expressed herein by the Law Society on the merits of the complaint by the Justices of this Court against the Judge President, or the merits of the counter-complaint lodged by the Judge President. The merits of the application under Rule 19 are referred to only to the extent that is necessary for purposes of the written submissions below.

2. The basic dilemma faced by the Court and which prompted the invitation to various organisations to submit written argument to the Court, is the fact that seven of the eleven Judges of this Court were complainants in the complaint that underlies the matter. A further Judge namely Justice Mogoeng was involved in efforts to mediate the dispute.

3. The application under Rule 19 raises constitutional issues of which this Court is the final decision maker. In that regard, this Court recently stated in *Bernert v ABSA Bank Limited* 2011 (3) SA 92 (CC) at paragraph [22] that this Court "*as the ultimate guardian of the Constitution, has the duty to express the applicable law, in order to enhance certainty amongst judicial officers, litigants and legal representatives and, thereby, to contribute to public confidence in the administration of justice".* This is however said subject to the proviso that no person has a right of appeal to this Court. The basic approach in these written heads of argument is to assist the Court in as far as possible with the limited time available, to seek an acceptable solution to the problems posed by the application.

Recusal:

4. At the date of finalising this written argument, there is no application for the recusal of any of the Justices. The applicant pointed out that there seems to be a discrepancy between the two judgments of the Supreme Court of Appeal (the SCA). In the judgment of *The Acting Chairperson: Judicial Services Commission & Others v The Premier of the Western Cape Province* (SCA case no: 537/2010, hereinafter referred to as the *Zille* judgment) the SCA held that the JSC was not properly constituted and could therefore not take any decision. By contrast, the SCA in *Freedom Under Law v The Acting Chairperson: Judicial Service Commission & Others* (SCA 52/2011, the *FUL* judgment) the SCA by

contrast upheld the decision to reject the Judge President's complaint, and set aside the decision to reject the complaint by the Justices.

5. The merits of the underlying disputes between the Judge President and the Justices did not come into play in the *Zille* judgment and are not relevant to the application under Rule 19. If that judgment is correct, it follows that the JSC could not have taken any valid decision, with the result that the *FUL* judgment was incorrect in setting aside the "decision" referred to above. If that is so, the underlying merits of the disputes between the Judge President and the Justices also need not come into play at all.

6. Given the nature of the dispute that arises in the application under Rule 19, in which the merits of the complaint and counter-complaint need not necessarily be adjudicated upon, and taking into account the applicable legal principles in recusal applications, the relevant question to be answered is whether a reasonable, objective and informed person would in the circumstances of this case reasonably apprehend that the Justices presiding over this matter, other than those who made statements in the complaint and who may still be expected to give evidence should the JSC decide to re-open the investigation, will not bring impartial minds to bear on the adjudication of the case.[1]

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[1] See *President of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC) ("SARFU II"); *Bernert v ABSA Bank* 2011 (3) SA 92 (CC); *South African Catering and Allied Workers Union & Others v Irvin & Johnson Ltd* 2000 3 SA 705 (CC).

7. It is not irrelevant, so we submit, that the applicant, well knowing that seven of the eleven Judges were complainants in the case against him, approached this Court in his application for leave to appeal. Unless there is an application for recusal of some or all of the Judges by the applicant, or some other indication to the contrary, it must be assumed that the applicant himself does not have a reasonable apprehension that the Judges will be biased in adjudicating this application. In this respect the presumption of impartiality of the Judges, particular Judges of the highest Court who, as judicial offices, are required by the Constitution to apply the Constitution and the law impartially and without fear, favour or prejudice,[2] must be given sufficient weight in determining whether there is in fact a need for the majority of the Judges presiding over the matter, to recuse themselves.

8. In view of the aforegoing, it may therefore not necessarily be correct to accept that eight of the eleven Judges have to recuse themselves, although it is accepted that most legal practitioners and Judges, including the Justices concerned, probably hold the opinion that the seven complainants should recuse themselves.

9. The specific questions raised by the Honourable Chief Justice are addressed against the principles alluded to above.

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[2] See item 6 of Schedule II of the Constitution containing the Oath or solemn affirmation of judicial officers that they will "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law".

Can the Court determine the merits of the dispute between the parties?

10. Should eight of the eleven members of the Court consider themselves disqualified from determining the merits, with the result that only three Judges are available, there will not be compliance with s 167(2) of the Constitution which provides that a matter before the Constitutional Court must be heard by at least eight Judges. Unless those positions can be filled by Acting Judges, or if the doctrine of necessity is invoked, both of which are discussed below, the Court cannot determine the merits of the dispute between the parties, with the result that the judgments in the SCA stand.

11. Such a solution is not without precedent. In the matter of *American Isuzu Motors, Incorporated, et al, Petitioners v Lungisile Ntsebeza, et al.* the Supreme Court of the United States in a similar situation made the following order:

> *"Because the Court lacks a quorum, 28 U.S.C. § 1, and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment is affirmed under 28 U.S.C. § 2109, which provides that under these circumstances the Court shall enter its order affirming the judgment of*

the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court.

THE CHIEF JUSTICE, Justice KENNEDY, Justice BREYER, and Justice ALITO took no part in the consideration or decision of this petition".

12. Within the South African context, there is the example of *Fedsure Life Assurance v Greater Johannesburg TMC 1999 (1) SA 374 (CC) at para [79] and [115].* The applicant of course has no right of appeal.[3] The application may also in terms of Rule 19(6)(b) be dealt with summarily.

13. **The interpretation of section 175(1) of the Constitution:**

13.1 Section 175(1) of the Constitution, dealing with Acting Judges, provides that the President "*may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of Justice acting with the concurrence of the Chief Justice".*

[3] See for example *Besserglik v Minister of Trade, Industry and Tourism and Others 1996 (4) SA 331 (CC); National Union of Metalworkers of SA & Others v Fry's Metals (Pty) Ltd 2005 (5) SA 433 (SCA) at para [31].*

13.2 The interpretation of this particular section within the context of this case becomes important. In *SARFU II*[4] the specific problem raised by the Honourable Chief Justice in paragraph 3(c) of the directions dated 6 June 2011 was mentioned, but not decided. This in itself shows that, unusual though the facts of this matter may be, this problem poses important constitutional issues which may very well again arise in future. In the *SARFU II* matter this Court said the following in its judgment regarding the appointment of Acting Judges:

> *"Were the quorum of the Court to be broken by recusal, it would be necessary to make such appointments if that were constitutionally permissible. If it were not, there would be no quorate Court to hear the appeal. Assuming that the recusal of members of this Court would enable Acting Judges to be appointed under s 175(1) of the Constitution, it would obviously be undesirable, particularly in a case such as the present, for the President to have appointed Acting Judges to make up the quorum. An objection to 'political appointments" would be heightened were this procedure to be followed. In the appointment of Acting Judges, there would be no role for the Judicial Service Commission, and no need for consultation with the leaders of parties represented in the National Assembly. The consideration referred to by Rehnquist J is thus apposite to the recusal of a member or members of this Court".*

[4] At paragraph [47] with reference to footnote 58.

13.3 In that particular matter, as appears from footnote 58, counsel for the President submitted that a vacancy caused by the recusal of a member of the Constitutional Court would not create a vacancy on the Court or cause that Judge to be "absent". The Court did not find it necessary in that case to decide the issue. That issue is now however pertinently before this Court should the quorum of the Court be broken by the recusal of some or all of the Judges mentioned in the Chief Justice's directions.

13.4 The consideration by Rehnquist, J in the United States Supreme Court referred to in *SARFU II* was the following: "*I think that the policy in favour of the 'equal duty' concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one Judge may be substituted for another in the district courts".*

13.5 This brings one back to the question whether there is a need for the Judges of this Court, save for those who made statements to the JSC and who are therefore more directly involved, to recuse themselves. In *SARFU II* this Court quoted with approval (see paragraph 46) an equally important observation made by Mason J of the High Court of Australia in the matter of *Re JRL: Ex parte: JFL* (1986) 161 CLR 342 (HCA) at 352 namely: "*Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties*

to believe that by seeking the disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour".

13.6 One possible interpretation of s 175(1), on a strict legalistic approach, is that the recusal of a Judge or Judges does not create a vacancy and such a Judge cannot be said to be "absent" as was argued in *SARFU II*. In the matter of *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) the Court had to interpret the word "absence" in the constitution of the Natal Rugby Union. In that particular case the Court *a quo* came to the conclusion that "absence" includes legal disqualification. The SCA overruled this decision.[5] Regarding the meaning of the word "absence" the Court said the following:

"Ordinarily the word 'absence' means the state of being absent, that is to say physically absent".

13.7 To establish whether the word "absence" could be given an extended meaning to include "legally disqualified", as was done by the Court *a quo* in *Natal Rugby Union* case, the SCA analysed the specific provisions of the constitution of the rugby union concerned. It found that there was nothing in the express terms of the constitution which supported the Court *a quo's* conclusion that absence includes legal disqualification. In fact,

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5 See pages 440 to 441.

the wording of the constitution showed the opposite.

13.8 The *Natal Rugby Union* case is not necessarily applicable to the present situation (being case specific) and a strict legalistic approach to the interpretation of the Constitution, is certainly not the appropriate way in interpreting the Constitution itself. Section 167(1) of the Constitution provides specifically that the Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other Judges, therefore eleven members. Save for the provisions of section 175 dealing with Acting Judges, there is no other provision in the Constitution dealing with the situation where there is not a quorum of eight Judges as provided for by s 167(2) of the Constitution.

13.9 It is respectfully submitted that the word “vacancy” and the word “absent” in s 175 of the Constitution should be widely interpreted to include a situation where there is no quorum, for whatever reason.

13.10 There is no reason why the word “vacancy” should be strictly interpreted to only mean a permanent vacancy and not a temporary vacancy of the seat of one or more of the appointed Judges in a particular matter, created from example by the recusal of one or more Judges from a particular matter. The seat on the Bench of such Judge or Judges are left “empty” or vacant by such recusal. In similar fashion, although more strained, the word “absent” could be given an extended meaning. Such an

interpretation would be in line with the purposive approach to the interpretation of the Constitution followed by this Court.[6]

13.11 The same undesirability of the President appointing Acting Judges to make up a quorum in this matter, as was mentioned in paragraph [47] of *SARFU II*, may however apply in the present case given the background facts of the matter.

13.12 Even if the majority of the Court considers itself disqualified from considering the merits of the matter, there is undoubtedly a sufficient number of Judges in the various divisions of the High Court and in Courts of similar status who are by virtue of their previous experience and interest in Constitutional matters, likely candidates to be appointed as Acting Judges for this specific case, if that is the suggested solution. As sworn in Judges, having been through the process of appointment involving the JSC, they would bring with them the impartiality, experience and knowledge of seasoned Judges.

The doctrine of necessity:

14. The "doctrine of necessity", as applied in Public Law, may, if found

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6 See *S v Zuma and Others* 1995 (2) SA 642 (CC) in para 17; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) in paras 9 and 301 - 302; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) (2006 in para 232 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC)in para.

applicable in the South African context, provide an answer to the dilemma created by this case, but only in the event that the majority of the Judges recuse themselves and should the Court find that the vacancies so created cannot be filled by Acting Judges.

15. The Malawi Supreme Court of Appeal, in the matter of the *Attorney General v The Malawi Congress Party & Others*[7], held the doctrine of necessity to be applicable in interpreting the Malawi Constitution in order to avoid creating a legislative vacuum. The discussion by that Court of the doctrine is quoted in full:

> *An interesting development in the course of argument was the introduction of the "doctrine of necessity" by counsel for the appellant. There are five major cases in which the doctrine of necessity has been invoked. The first such case is the American case - Horn v. Lockhart, 84 U.S. 570 (1873). The second is a Pakistani case known as Special Reference No. 1 of 1955, P.L.R. 1956 W.P. 598. The third is the Cypriot case, Attorney General of the Republic v. Mustafa Ibrahim (1964), Cyprus Law Reports 195; next is Madzimbamuto v. Lardner-Burke (1969) 1 A.C. 645 (PC); and last, but of major significance, is the Re Manitoba Language Rights, (1985) 1 S.C.R., a Canadian case.*
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> *We attach major attention to the Re Manitoba case because it analyses all*

[7] MWSC 1 (31 January 1997) Civil Appeal no 22 of 1996.

previous cases on the subject and it lays down the principle that the doctrine of necessity is not confined to governments affected by insurgency operations, as Mr Msisha argued. But even in peacetime, the doctrine can be applied.

16. The cases discussed by the Malawi Supreme Court, concerned cases that involved illegal conduct of a Government during a state of necessity, challenges to the laws of an illegal and insurrectionary government, and cases upholding laws enacted by a lawful Government in contravention of express constitutional provisions under extraordinary circumstances which render it impossible for the Government to comply with the Constitution. None of the cases dealt with the doctrine within the context of recusal cases. The principle relied upon in those cases is that the doctrine of necessity is used "*to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any Constitution".*

17. In the case of *Marematlou Freedom Party v The Independence Electoral Commission & Others*,[8] the High Court of Lesotho discussed the doctrine of necessity within the context of an application for the recusal of the entire Bench which, if granted, would create "*a very serious constitutional crisis or dead lock and other practical difficulties ….*" as described by the Court. The Court said the following regarding this doctrine:

[8] [2007] LSHC (13 August 2007).

[23] We hold that Mr Trengove's submission on this aspect is quite ingenious and appealing. The doctrine of necessity provides that:

"...Although there is a general rule that a Judge who is not impartial is disqualified from hearing the case, there is an exception to this rule that allows a Judge who would otherwise be disqualified to hear the case nonetheless, if there is no impartial Judge who can take his place. The law recognized that in some situations a Judge who is not impartial and independent is preferable to no Judge at all. This doctrine seems to have gained general acceptance since 1430; and it has been applied by the highest courts of the several common law jurisdictions in Canada, Australia, United States and England." [my emphasis]

Halsbury's Law of England 4th ed (Butterworths 1989 Vol. 1 (1) para 93 states:-

"If all members of the only tribunal competent to determine a matter are subject to a disqualification, they may be authorized and obliged to hear and determine that matter by virtue of the operation of the common law doctrine of necessity." [Tracey — Disqualified Adjudicators: The Doctrine of Necessity in Public law [1982 - Public Law 628 at 641.

This doctrine seeks to prevent possible frustration of justice through any subterfuge and is raised only in exceptional circumstance.

The Court did not make any finding as to the applicability of the doctrine since it rejected the application for recusal.

18. Of importance is that the Lesotho High Court held that the doctrine is only to be invoked in exceptional circumstances. In the matter of *Attorney General v Masauli* (SG)[9] the Malawi Supreme Court of Appeal rejected an argument based on the doctrine of necessity finding it "*plainly not applicable to the facts of the present case. There were other ways to deal with the dispute that had arisen in this matter*".

19. There are not many references to the "doctrine of necessity" within the South African legal context.[10] In *Council of Review, SADF, & Others v Mönnig & Others* 1992 (3) SA 482 (AD) at 493 C-E, it was held that a military court should have recused itself. It was argued on appeal that it could not have been intended that a ground of recusal based on institutional bias could be raised, since it would disqualify all military courts. The Court on appeal however found that the legislature intended to confer concurrent jurisdiction

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9 Civil Appeal no 28 of 1998 [1999] MWSC 2 (24 March 1999) available at www.esaflii.org/

10 Within the context of martial law and civil unrest, see *Madzimbamuto v Lardner – Burke N.O. and Another N.O.; Baron v Ayre N.O. & Another* 1968 (2) SA 284 (RA) at 432-444; *Mangope v Van der Walt & Another* 1944 (3) 850 (BG) at 864.

with the result that, in the event of a military court being disqualified by reason of institutional bias, the accused may be brought to trial before a civil court. The appellant's argument was rejected as follows: "*This argument smacks of the so-called 'doctrine of necessity" described by De Smith Judicial Review of Administrative Action, 4th Edition*[11] *at 276 as follows:*

> *'An adjudicator who is subject to disqualification at common law may be required to sit if there is no competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice'*

In this case, because of the concurrent jurisdiction of the Civil Courts, no such necessity arises".

20. The authors Woolf, Jowell and Le Sueur in the sixth edition of *De Smith's Judicial Review* say the following about the doctrine of necessity at page 528, paragraph 10-061:

> *"The doctrine of necessity has been sparingly employed, and if possible the decision making body should remove that part of it which is infected with bias (for example, by the recusal of those members of a disciplinary committee who had been a part of a previous sub-committee which decided to institute proceedings against the claimant. Alternatively where possible the body should*

[11] Now *Woolf & Others De Smith's Judicial Review (6 ed), p 526 – 527.*

be reconstituted (e.g. by constituting a separate panel). However, as we have seen, this is not possible".

They sound the following warning in paragraph 10-062:

"*Since the Human Rights Act 1998, the doctrine of necessity may become difficult to assert in the face of a right to an independent and impartial tribunal under Art.6(1) ECHR"*

The same question can probably be asked in the South African context with reference to section 34 of the Constitution.

21. It seems as if Corbett CJ, in the *Mönnig* case adopted the description by De Smith of the doctrine of necessity, but found that it was not applicable under the circumstances of that case. It is not quite clear whether the Court regarded the doctrine to be part of the South African law. This decision in any event confirms the view that the doctrine is to be used only in exceptional cases, where there is no alternative.

22. It is therefore debatable whether this doctrine is applicable at all. If it is, it may provide an answer to the dilemma posed by the present Rule 19 application, but only if there are no other options available, i.e. if there are indeed exceptional circumstances and a clear necessity to invoke the doctrine.

DATED AT PRETORIA this **21st** day of **JUNE 2011.**

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