IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 8647/13

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
JUDICIAL SERVICE COMMISSION	Respondent
with	
POLICE AND PRISONS CIVIL RIGHTS UNION	First *Amicus Curiae*
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Second *Amicus Curiae*

APPLICANT'S REPLYING AFFIDAVIT

I, the undersigned,

MORAY HOWARD HATHORN

do hereby make oath and state as follows:

1. I am an adult male attorney, practising at 10 Fricker Road, Illovo, Johannesburg, as a partner in Webber Wentzel, the attorneys of record for the applicant in this matter.

2. I am duly authorised by the applicant to depose to this affidavit. The facts set forth in this affidavit fall within my personal knowledge and are, to the best of my knowledge and belief, both true and correct. I adopt the definitions used in the founding affidavit unless the context indicates otherwise.

INTRODUCTION

3. This is a replying affidavit to the answering affidavit served and filed on behalf of the respondent on 18 February 2014 ("**answering affidavit**").

4. The present litigation (both in the main application and the current interlocutory proceedings) is tainted by the respondent's consistent and deliberate flouting of the Uniform Rules of Court ("**Rules**"). The applicant served and filed its notice of application under Rules 6(11) and 30A on 6 January 2014. The respondent was obliged to file its answering affidavit within 20 days of service of thereof, which time period expired on 3 February 2014.

5. On 10 February 2014, the applicant directed a letter to the respondent calling upon it to serve and file its answering affidavit (despite already being a week late) by 14 February 2014 together with the appropriate application for condonation for the late filing thereof.

6. On 14 February 2014, the State Attorney, on behalf of the respondent, served an electronic copy of "a version" of the answering affidavit with an undertaking that it would serve the hard copy of the answering affidavit on Monday, 17 February 2014. On perusing the electronic version of the answering affidavit it became clear that this version (a) was incomplete; (b) did not include the relevant notice in terms of Rule 6(5)(d) setting out the

point of law which the respondent seeks to raise; and (c) made no mention of the application for condonation or, at the very least, sought to explain the delay of almost two weeks in the service and filing of its answering affidavit.

7. It was only on Tuesday, 18 February 2014, that the respondent served and filed the hard copy of the answering affidavit complete with the relevant notice under Rule 6(5)(d). Once again, it did not, however, make any mention of condonation for the late filing of the answering affidavit, nor was there any attempt to explain the delay.

8. It is on this basis that the applicant served and filed this replying affidavit on 4 March 2014, being 10 days after service of the answering affidavit, i.e. 18 February 2014.

STRUCTURE OF THIS AFFIDAVIT

9. In responding to the answering affidavit, I note that the majority of the respondent's arguments are irrelevant to the limited (but fundamental) issues sought to be challenged in this application and, in any event, comprise largely of legal argument.

10. As a result, I do not address each and every paragraph of the answering affidavit as to do so will result in an unnecessary recapitulation of the contents of my founding affidavit. Rather, I deal *seriatum* with the respondent's arguments only insofar as they relate to the themes set out below.

11. Any averment in the answering affidavit which is not admitted, and to the extent that it differs from, or is not addressed in, what is stated in this affidavit or the founding affidavit, is denied.

12. The themes in the founding affidavit, tracked by the respondent to some extent in its answering affidavit, are as follows:

12.1 historical background;

12.2 the failure and / or refusal by the respondent to disclose the Recording; and

12.3 confidentiality.

THE APPLICABILITY OF RULE 53

13. Before addressing each of the themes set out above, I first deal with the point of law raised belatedly by the respondent.

14. The respondent raises an objection to the applicability of Rule 53 to these proceedings (see paragraphs 8 to 15 of the answering affidavit) stating simplistically that decisions of this nature (i.e. decisions relating to any aspect regarding the nomination, selection or appointment of a judicial officer by the JSC) are expressly excluded under section 1(gg) of the Promotion of Administrative Justice Act, 2000 ("**PAJA**"), and further, that because the respondent, in making the Decision was not performing a "judicial, quasi-judical or administrative function", it is not obliged to provide any record under Rule 53, let alone the Recording.

15. I note the following in relation to this objection:

15.1 There is no indication in the founding affidavit (either in the main application or these interlocutory proceedings) that the main application was brought under PAJA;

15.2 It is trite that even if a review of the Decision is excluded under PAJA the JSC is not immune from judicial scrutiny under the principle of legality. The application of Rule 53 is not limited to reviews under PAJA.

15.3 Contrary to what the respondent suggests in its reliance on the Supreme Court of Appeal judgment in *Judicial Service Commission and Another v Cape Bar Council and Another 2013* (1) SA 170 (SCA), this case supports the applicant's position, i.e. that the respondent's power to advise the President on the appointment of judges of the high court derives from section 174(6) of the Constitution, is undoubtedly a public power and is subject to review under the principle of legality.

15.4 The wording of Rule 53 is quite clear. It applies to:

> "*all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions*".

15.5 It is undoubtedly the case that when the respondent made the Decision, it was performing an administrative function as contemplated under Rule 53.

15.6 Rule 53 is an evolution of normal motion proceedings in terms of Rule 6. It was designed to be used for common law review and sets out a compulsory form of motion procedure for this very specific purpose.

The Rule was created before the current constitutional dispensation, i.e. prior to "*administrative justice*" in terms of section 33 of the Constitution and PAJA in order to determine the process of common law review. Rule 53 was therefore expressly enacted with a pre-constitutional review procedure in mind, i.e. review based on the principle of legality.

15.7 Our courts have consistently held that the purpose of Rule 53 is to facilitate applications for review, chiefly by providing for access to the record of the decision. Further argument will be advanced in this regard at the hearing of this matter.

15.8 Finally and in any event, the respondent has waived any reliance on the non-applicability of Rule 53 on the basis that it lodged the Record explicitly under Rule 53. Thus, at the time that the respondent decided what information to include and exclude from the Record, it elected to conduct itself within the purview of Rule 53 by filing the Record (albeit incomplete). The respondent's effort to change tack is a transparent and unbecoming effort to avoid disclosing the requested Recording.

16. I maintain that the members of the respondent exercise an enormous public power and are vested with substantial public and constitutional responsibility which they must discharge lawfully, rationally and in a procedurally fair, unbiased manner. As such, the Decision and the process followed by the JSC leading to the Decision must be subject to judicial scrutiny in the form of a review under Rules 6 and 53 of the Rules.

17. The respondent's attempt to shield the Decision and / or the process it followed in reaching the Decision from review (by deliberately placing it

outside the realm of judicial review via a contrived interpretation of the applicability of Rule 53), is wrong and falls to be rejected by this Court.

HISTORICAL BACKGROUND

18. The respondent deals with the history of the matter at paragraphs 4 to 7 of its answering affidavit. To avoid unnecessary recapitulation I refer this Court to paragraphs 3 to 19 of my founding affidavit in these proceedings, save to say that the respondent has chosen not to address the issue of the unreasonable delay in the filing of the record in the main application and of its answering affidavit in these proceedings. The respondent makes no mention of the necessary application for condonation for the late filing of its answering affidavit nor does it proffer a satisfactory explanation for its deliberate and consistent non-compliance with the Rules.

19. Further legal argument regarding the duties upon organs of state, including in relation to the question of punitive costs against the respondent, will be directed at the hearing of this matter.

THE FAILURE AND / OR REFUSAL BY THE RESPONDENT TO DISCLOSE THE RECORDING

The Record

20. At paragraph 6 of its answering affidavit, the respondent states that it filed a record of proceedings which "*it considered was required by Rule 53(1)(b) of the Rules*". (My emphasis)

21. Further, at paragraph 16 of its answering affidavit, the respondent admits to providing certain information "*save for a transcript of the post-interview*

deliberations which were held by the members of the Respondent in a closed meeting."

22. Save for what I have already stated in my founding affidavit, I note the following in relation to these telling statements:

22.1 As set out in paragraph 15.8 above, the respondent waived any reliance on the non-applicability of Rule 53 when it despatched the Record pursuant to its duties under Rule 53. If the respondent had a *bona fide* objection to the applicability of Rule 53, it ought to have raised such objection at the stage of being served with the notice of application in these proceedings, rather than at this late stage and after it has purportedly complied with and accepted the applicability of Rule 53. As I have set out above, it is clear that Rule 53 applies to these proceedings – and the respondent is well aware of this, as demonstrated by its own prior conduct.

22.2 More alarmingly, it becomes evident from the choice of words used by the respondent that it believes that the inclusion or exclusion of information which constitutes the Record is a subjective analysis at the behest of the very individuals who made the Decision which the applicant seeks to set aside in the main application.

22.3 Effectively, if this line of reasoning is accepted, where records are demanded of any person or body (such as the respondent), that person or body may subjectively determine what to include or exclude from the Record despite the clear purpose of the Rule. It cannot be accepted that such a subjective determination is made and sustained by the

individuals who have exclusive knowledge as to the existence and contents of the information which, as a matter of law, must form part of the record of decision under Rule 53.

23. All the documentation disclosed by the respondent in the Record thus far is publically available and forms *part* of the Record. They are not its sum total. Yet the respondent takes the position that the applicant ought to have known about the existence of the Recording, saying (at paragraph 26.1 of its answering affidavit) that it is puzzling how of the applicant "*could not have been aware that there were deliberations, and that these must have been recorded or minuted in some way.*"

24. As I have clearly set out in my founding affidavit, the applicant had no knowledge of the existence of the Recording as set out in the founding affidavit. The Recording (or at the very lease a minute or transcription of the Recording) is patently the most immediate accurate record of the Decision and the process leading up to the Decision. The Recording will be indispensable in determining whether there is a rational connection between the Deliberations, the Decision and the Reasons.

25. The fact that the respondent admits to the production of a summary or minute of the Deliberations, having concealed its existence and excluded it from the Record, in whatever form, is fatal. In any event, the argument that the applicant ought to be satisfied with a summary of the Deliberations is specious as it ignores the reality that the drafter of the summary has the power to determine what goes into the summary and would be in a position to tailor the reflection of the Deliberations.

Reasons

26. The respondent persists with the stance that it has provided "*extensive reasons*" which were "*compiled by the Chief Justice from the views expressed by the commissioners during the post-interview deliberations.*" Without commenting on the accuracy of this statement, especially in relation to the adequacy of reasons provided (which is a matter, I believe, for legal argument), I maintain that the reasons provided by the respondent, compounded by the failure to disclose the Recording, is wholly inadequate for the purposes of complying with Rule 53. The first and second JSC letters reflect, in their totality, the reasons and canvassed fully the factors taken into account by the JSC when exercising its powers under the Constitution.

CONFIDENTIALITY

27. The respondent attempts to argue that openness, transparency and accountability in relation to the Deliberations and the disclosure of the Recording is inimical to confidentiality in two respects: First, with respect to what the Commissioners may have said during the Deliberations and (b) with respect to the dignity of the candidates.

28. I maintain that if any of the respondent's members spoke about any candidate in terms or tones which did or would impair the dignity and integrity of such candidate, then this could have a bearing on the procedural fairness, lawfulness and rationality of the Decision. The respondent's stated implication that the Deliberations entailed conduct or discussions which could or did result in an impairment of dignity and integrity, in fact, clearly weighs overwhelmingly in favour of disclosure rather than against it.

29. The respondent is not allowed to hide behind bald statements of confidentiality and has failed to mount any argument which surpasses the threshold of non-disclosure of the Recording, especially in light of express authority from the Supreme Court of Appeal as I set out in my founding affidavit.

30. Further, the respondent's reliance on the fact that it is allowed to regulate its own process (see paragraphs 27.3 - 27.7 of the answering affidavit) is as misplaced as it is inconsequential. It is not open to the respondent to regulate its decisions and decision-making process out of the spotlight of judicial review nor is it open to the respondent to shield its decisions and decision making process from judicial scrutiny through reliance on an incorrect interpretation of the requirements of confidentiality.

CONCLUSION

31. For all the reasons set out above, the applicant maintains that the respondent's position is untenable and highly prejudicial to the applicant and the rule of law. The respondent has deliberately not complied with Rule 53(1)(b) and has failed to mount any argument (substantively or procedurally) which saves it from the consequences of such failure.

32. The applicant accordingly prays for the relief set out in the notice of motion accompanying the founding affidavit in these proceedings.

DEPONENT

I **HEREBY CERTIFY** that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Illovo on this the 3rd day of **MARCH 2014**, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

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