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

CASE NO: 8647/13

In the matter between:

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

FILING SHEET

Document filed herewith: Applicant's Heads of Argument.

Dated at CAPE TOWN on this 24th day of July 2014.

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APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. This is an application under Rule 30A for an order directing the respondent to comply with Rule 53(1)(b) of the Uniform Rules of Court (**"the interlocutory application"**).

2. On 4 June 2013, the applicant instituted review proceedings against the respondent for an order, *inter alia*, declaring that the decision taken by the respondent, under section 174(6) of the Constitution, to advise the President of the Republic of South Africa to appoint certain candidates, and not to advise him to appoint certain other candidates (collectively, **"the candidates"**), as judges of this Honourable Court (**"the Decision"**) was unlawful and / or irrational and was thus invalid (**"the main application"**).

3. The main application was served on the respondent on 6 June 2013. Within 15 days thereafter, the respondent was required, under Rule 53(1)(b), to dispatch to the Registrar of this Honourable Court the record of the Decision, together with any reasons for the Decision it was legally obligated to give (collectively, "**the Record**"), and to notify the applicant that it had done so. That period expired on 28 June 2013, by which date the applicant had received no such notification from the respondent.

The record furnished by the respondent under Rule 53

4. After an unexplained delay of over a month, the applicant was notified that the Record had finally been lodged with the Registrar of this Honourable Court. The Record, as lodged, comprised six volumes containing copies of the following:

4.1 the reasons for the Decision ("**the Reasons**")[1], setting out "considerations" in respect of each of the candidates, which:

4.1.1 "*would have occupied the minds of Commissioners when they were called upon to vote*";

4.1.2 "*can therefore be concluded [to] constitute the reasons why they voted as they did*"; and

4.1.3 "*have been compiled by the Chief Justice from the contributions of Commissioners during the deliberations, as mandated by the Commissioners at the end of the meeting*".

4.2 transcripts of the respondent's interviews with each of the candidates;

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[1] Annexed to the applicant's founding affidavit in the interlocutory application marked "**MH5**"

4.3 each candidate's application for appointment;

4.4 comments on the candidates from professional bodies and individuals; and

4.5 related research, submissions and correspondence.

Inadequacy of the Record

5. The "Record" as lodged did not include any minutes, transcripts, recordings or other contemporaneous records of the respondent's official deliberations after interviewing the candidates up to the time of taking the Decision (**"the Deliberations"**). The applicant was not, at that time, aware of the existence of the aforesaid records.

6. On 11 September 2013, and two days before it was due to file its supplementary founding affidavit, the applicant became aware that, at least at the time of taking the Decision, the respondent employed a practice of making and maintaining audio recordings of its proceedings. It thus became clear that the Record was incomplete and not in compliance with Rule 53(1)(b), for want of inclusion of any copy or transcript of the audio recording of the Deliberations (collectively **"the Recording"**), or any reference to it.

7. The Recording is patently the most immediate and accurate record of the Decision and the process leading up to the Decision. The Recording is indispensable to any proper determination of whether there is a rational connection between the Deliberations, the Decision and the Reasons.

8. Despite being relevant and a central aspect of the Record, disclosure of which is clearly required by Rule 53(1)(b), and despite the respondent

confirming the existence of the Recording, the respondent failed and/or refused to lodge the Recording as part of the Record.

9. As will be shown below, the respondent's refusal to dispatch the Recording to the Registrar, and thus to comply fully with Rule 53(1)(b), is procedurally and substantively deficient. We submit that this refusal cannot be countenanced by this Honourable Court, whose rules the respondent has consciously flouted, even in the face of repeated demands by the applicant. Through its conduct it has (without any justification) put the applicant, a non-governmental organisation, to considerable effort and expense in these collateral proceedings and has deprived the applicant of the procedural and substantive safeguards and tools which are the very rationale for Rule 53. As the Appellate Division held in *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A), the manifest purpose of Rule 53 is to "*confer the benefit [on the applicant] that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.... It confers real benefits on the applicant, benefits which he may enjoy if and to the extent needed in his particular circumstances*" (at pages 660 and 662).

10. The applicant and the Court have plainly been denied this benefit, and are now forced to evaluate and argue the rationality, lawfulness and reasonableness of the relevant decisions without key relevant documents. Not only is this an infraction on the applicant's rights under the Rules, but it is in breach of the equality of arms required by section 34 of the Constitution.

11. Further, the respondent does not even set out in its answering affidavit grounds 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. As will be shown below, the respondent has failed to fulfil its duty as an organ of state under section 165 of the Constitution.

STRUCTURE OF THESE SUBMISSIONS

12. The respondent and *amici*[2] have together obfuscated the crisp legal issue to be determined by this Honourable Court in the present interlocutory application. Their arguments betray a fundamental misconception of the issues for determination in the application.

13. In an effort to clarify the real issues that are before the Court, these submissions are structured as follows:

13.1 **Preliminary points:**

13.2 What the Constitution demands and the ambit of the applicant's challenge;

13.2.1 The legal duty on the respondent as an organ of state under section 165 of the Constitution;

13.2.2 Justification for a punitive costs order against the respondent; and

13.3 The applicability of Rule 53.

13.4 **The interlocutory application**

13.5 A brief summary of the arguments raised by the respondent and *amici curiae*;

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[2] To date, POPCRU, NADEL and DGRU have been admitted as *amici curiae*. In addition, HETN and AFT also seek admission as *amici curiae* before this Honourable Court.

13.6 The settled meaning of the "Record" in our law;

13.7 The failure and / or refusal to disclose the Recording;

13.7.1 Procedural defects;

13.7.2 Substantive defects.

WHAT THE CONSTITUTION DEMANDS AND THE AMBIT OF THE APPLICANT'S CHALLENGE

14. The applicant is entitled to the protection that the Constitution affords it and is entitled to enforce, through the courts, the obligations owed to it under the Constitution. Section 34 entitles the applicant to have any dispute that can be resolved by the application of law decided in a fair public hearing before the Court. Section 165 of the Constitution provides that "*[o]rgans of state, though legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts*."

15. The respondent in this matter has a duty as an organ of state to act in accordance with section 165 and to comply with the Uniform Rules of Court. As set out below the respondent has, however, purposefully acted in a manner that is at odds with its duties under section 165. The respondent has acted in the main application and in this application, with a clear objective to frustrate the rights of the applicant, in contravention of the law. The existence of the Recording was within the sole purview of the respondent and may never have emerged but for the applicant, by chance, becoming aware of its existence.

16. Such conduct undermines this Honourable Court's processes, is contrary to the duty on the respondent to ensure the dignity, accessibility and effectiveness of the courts (pursuant to section 165 of the Constitution), is clearly contrary to the very purpose of the disclosure of the record under Rule 53 and severely hampers the applicant's rights to fair process.

17. Such behaviour, amounting to a public body concealing important information from the Court, is thus clearly inimical to the constitutional principles of transparency and accountability. In this application, the respondents have deliberately withheld the Recording as part of the Record even though it is clearly required to disclose this to the applicant and the Court under Rule 53. As set out in detail below, the respondent has failed to provide any satisfactory explanation for its deliberate non-compliance with Rule 53. Further, the respondent did not apply for condonation for the late filing of its answering affidavit and no satisfactory explanation for this failure has been provided to date. The applicant thus asks for a punitive costs order against the respondent.

18. The applicant contends that there can be no doubt that the Recording forms part of the Record and that the whole content thereof is relevant to the decisions which are sought to be declared unlawful. There being no legal basis for the respondents to withhold the Recordings, the court should direct that the respondents disclose the full Record, including the Recording and any transcript thereof, to the applicants and to the Court.

19. The applicant further submits that if there are any parts of the Recording or Deliberations that this Honourable Court feels should not be made public, the Court should make a qualified disclosure order in accordance with established judicial precedent, in order to preserve the applicant's fair trial

rights and to give effect to Rule 53. That said, no basis has been laid by the respondent in this matter for any limitation on the Record to be provided.

THE APPLICABILITY OF RULE 53

20. The respondent objects to the applicability of Rule 53 to these proceedings.

21. The respondent contends simplistically, in our respectful submission, 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.[3]

22. The respondent's contentions in this regard are based on a caricature of the applicant's case:

22.1 The applicant has never averred that the main application was brought under PAJA;

22.2 It is settled law that the exercise of public power is reviewable under the principle of legality (see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 29; *President of RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA

[3] See paragraphs 8 to 15 of the respondent's answering affidavit.

674 (CC) para 85). 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.

22.3 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.

22.4 The wording of Rule 53 is 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*".

22.5 Rule 53 is accordingly not limited to reviews brought under PAJA – but extends to the review of any decision by a tribunal such as the respondent.

22.6 It is trite that an applicant in review proceedings is entitled to the full record of the decision sought to be reviewed and set aside (*South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons* 2003 (3) SA 313 (SCA) at para 5).

22.7 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. It allows an applicant to interrogate the decision and, if necessary, to amend his / her notice of motion and supplement his / her grounds for review. Kriegler AJA remarked as follows in *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A) at 660 and 662:

> "*Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings or any knowledge of the reasons founding the decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s), he could then apply to amend his notice of motion and to supplement his founding papers. Manifestly the procedure created by the Rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record*".
>
> "*The purpose of Rule 53 is not to protect the 'decision-maker' but to facilitate applications for review and to ensure their speedy and orderly presentation. Such benefits as it may confer on a respondent, in contradistinction to those ordinarily enjoyed by a respondent under Rule 6, are incidental and minor. It confers real benefits on the applicant, benefits which he may enjoy if and to the extent needed in his particular circumstances*".

22.8 Relying on the decisions in *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A) and *Johannesburg City Council v The Administrator, Transvaal and Another* (1) 1970 (2) SA 89 (T), the Court in *Lawyers for Human Rights v Rules Board for Courts of Law and Another* 2012 (7) BCLR 754 (GNP) (11 April 2012) at para 23, remarked as follows:

"*From these decisions it is indisputably clear that the Courts have regarded the provisions of Rule 53 as an important tool in determining, on equal footing, disputes between an applicant and, particularly, a state respondent, the lawfulness and fairness of any administrative action which is mostly taken, so to speak, behind closed doors.*"

22.9 The filing of the complete Record is thus also a crucial tenet of an applicant's right of access to Court, and equality of arms. In brief, as the Court in *Lawyers for Human Rights* supra stressed, it means that everyone who is party to proceedings must have a reasonable opportunity of presenting his / her case to the Court under conditions that do not place him / her at a substantial disadvantage *vis-à-vis* his / her opponent.[4]

22.10 The requirement that there be proper disclosure of the Record under Rule 53 furthers the constitutional right of access to any information held by the state (section 32 of the Constitution; *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at para 32) and the constitutional requirement of public administration that is transparent and accountable (section 197 of the Constitution).

22.11 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

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[4] See for example the European Court of Human Rights decision in *De Haes and Gijsels v Belgium, Merits and Just Satisfaction*, App No 19983/92, Case No 7/1996/626/809, ECHR 1997-I.

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). 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. The respondent's effort now to change tack is a transparent and unconvincing effort to avoid disclosing the requested Recording.

23. 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. This has been clearly recognised in several judgments of the High Court and Supreme Court of Appeal, including in *Judicial Service Commission & Another v Cape Bar Council* 2013 (1) SA 170 (SCA) at 171, where it was stated, in relation to the respondent, that "*[i]t has become settled law that the principle of legality also required that the exercise of public power should not be arbitrary or irrational.*"

24. As such, the Decision and the process followed by the respondent leading to the Decision must be subject to judicial scrutiny in the form of a review under Rules 6 and 53 of the Rules.

25. 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 and opportunistic interpretation of the applicability of Rule 53), is wrong and falls to be rejected by this Court.

ARGUMENTS RAISED BY THE RESPONDENTS AND *AMICI CURIAE*

26. *Respondent's arguments*

26.1 In addition to the question of law raised by the respondent relating to Rule 53, discussed above, the respondent contends as follows in its answering affidavit regarding the substance of this application.

26.2 The primary grounds upon which the respondent seeks to oppose the interlocutory application is that the Deliberations have legitimately always been held in closed sessions and contain information and discussion regarding the candidates that must be kept confidential.

26.3 In this regard the respondents state that "*[b]y their nature, the deliberations are and have always been held in closed session by members of the Respondent, after which the Respondent records a decision which has been reached by way of a secret ballot voting process by its members.*"[5]

26.4 Although in agreement with the decision in *Judicial Service Commission & Another v Cape Bar Council* 2013 (1) SA 170 (SCA) requiring it to give reasons for its decision not to recommend a particular candidate, the respondent, however, suggests that the Supreme Court of Appeal specifically did not decide to what extent these reasons ought to be given. The respondent interprets this to be authority for its assertion that the reasons that were given by the respondent are sufficient and it

[5] See paras 18 of the respondent's answering affidavit.

is thus entitled to keep the recording confidential.[6] The respondent is thus of the opinion that the reasons given are an accurate record of the decision and are a clear indication of the connection between the deliberations and the decision in compliance with Rule 53.[7]

26.5 The respondent thus avers that the Record that was dispatched is the complete record. By virtue of purported compliance with Rule 53(1)(b) it contends that the applicant is not entitled to the Recording or to a transcript of the deliberations. The respondent further denies misleading the Court or the applicant, noting that it acted on legal advice that the deliberations are excluded from the Record.

26.6 The respondent refers to the procedure of the respondent, determined by it in terms of section 178(6) of the Constitution, and published by the Minister of Justice on 27 March 2003 in the Government Gazette. Relying on paragraph 3(k) providing for deliberations to be in private, it submits that allowing the applicant to gain access to the recording "*would make a nonsense of the Respondent's election, in the exercise of a constitutionally conferred power to determine its own procedure, to keep its deliberations confidential.*[8] The respondent submits that the applicant would have to challenge the exercise of this power before it can insist on the Recording being disclosed to it.

26.7 With regard to the alleged importance of keeping the deliberations confidential, the respondent further avers that, given the nature and

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[6] See paras 16 to 20 of the respondent's answering affidavit.

[7] See para 28.1 of the respondent's answering affidavit.

[8] See para 27.6 of the respondent's answering affidavit.

origin of the power, "*the need for frank, robust and honest discussion regarding the capabilities, personalities, strengths and weaknesses of candidates, and the chilling effect that public disclosure of these discussions might have on members of the Respondent, and on the willingness of candidates to put their names forward for judicial appointment, keeping discussions confidential is a lawful exercise of the Respondent's powers.*"[9]

26.8 Also important to the respondent was that "*[a]ll candidates for judicial offices who have thus far put their names forward for consideration by the Respondent have done so in the knowledge, and with the comfort, that the deliberations in respect of their applications will be undertaken in confidence. It would be unfair, and potentially damaging to their dignity, for those deliberations to now be made public.*"[10]

26.9 The respondent avers that the question of whether confidential information should be disclosed must be determined on the balancing of the public's interest in accountability and transparency weighed against the determination by the respondent that the deliberations be kept confidential and the interests of the aspirant judicial officers and the members of the respondent in being able to keep the deliberations confidential.[11]

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[9] See para 27.7 of the respondent's answering affidavit.

[10] See para 39.2 of the respondent's answering affidavit.

[11] See para 42 of the respondent's answering affidavit.

27. *Third* Amicus curiae's *arguments*

27.1 The only *amicus* to make submissions on the interlocutory application is the Democratic Governance and Rights Unit ("**DGRU**"). The DGRU submits in its application to be admitted as *amicus curiae* that having previously considered whether it would be desirable to compel the JSC to release recordings and transcripts of deliberations, it is not desirable to do so. Notwithstanding the argument for openness and transparency, it intends to argue that "*opening up deliberations might inhibit frank and open debate, and push the real decision making "into the corridors" and out of the public eye.*" It also intends to submit in argument that the JSC's regulations and the provisions of section 178(6) of the Constitution are at odds with the applicant's submissions.[12]

28. The applicant reserves its rights to file further submissions in response to any belated amici who are admitted.

29. For reasons we shall set out in detail further below, none of these contentions by the respondent or the amici have any substance. Before doing so, it is necessary to reiterate the trite position in our law regarding the meaning of the Record.

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[12] See para 36 of the DGRU's application to be admitted as *amicus curiae*.

THE MEANING OF THE "RECORD"

30. 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*". (emphasis added)

31. 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.*"

32. The applicant notes the following in relation to these telling statements:

32.1 As already discussed above, the respondent – with full knowledge of its rights and upon legal advice – waived any reliance on the non-applicability of Rule 53 when it dispatched the Record pursuant to its duties under Rule 53. The waiver of rights in respect of Rule 53 is thus both complete and final – and the efforts by the respondent to undo its election are unedifying and opportunistic.

32.2 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.

32.3 Effectively, if this line of reasoning were to be 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.

32.4 The respondent was obliged to disclose to this Court and the applicant the entirety of the Record which is relevant to the Decision, objectively construed. There can be no debate and is common cause that the Recording is relevant to the Decision. The only other basis on which the respondent can legitimately refuse to disclose information relevant to the Decision is if such information is legally privileged. Such assertion has not been made by the respondent. As such, the Recording must form part of and be disclosed as part of the Record. The respondent is not at liberty to disregard the Rules that govern the provision of information and documents in review applications before the High Court.

33. 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 the applicant "*could not have been aware that there were deliberations, and that these must have been recorded or minuted in some way.*"

34. The applicant in fact had no knowledge of the existence of the Recording, and the failure by the respondent to be open about its existence is never properly explained. At all times the applicant believed that the respondent acted in good faith and submitted a full, not partial Record.

35. For present purposes, what remains indisputable is that the Recording is relevant and liable to disclosure. On its own version the respondent has admitted that it relied on the very Recording to produce its reasons which are the subject of this application.

36. If the respondent has on its own version admitted the relevance of the Recording, the only real question is this: what is the extent of the record to which the applicant is entitled under Rule 53? The extent of the record that must be disclosed was set out as follows in *Johannesburg City Council v Administrator Transvaal and Another* 1970 (2) SA 89 (T) at 91:

36.1 "*The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially*".

37. Accordingly, the argument that the applicant ought to be satisfied with a summary of the Deliberations as reflected in the reasons is specious as it ignores not only that the applicant and this Court are entitled to the full record, but also because 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.

38. There is a fundamental inconsistency in the stance adopted by the respondent. If the reasons already encapsulate accurately what transpired in the Deliberations, there can be no objection based on confidentiality, in revealing the Recordings as all material aspects were already revealed. On the other hand, if the Recordings contain certain statements which are not encapsulated in the summary, then the assertion that the summary is complete is obviously incorrect. Indeed, the respondent's very defence must be premised on the submission that the summary does not fully reflect what transpired in the Deliberations. Yet without the applicant and this Court having full regard to the Deliberations it is not possible properly to determine whether irrelevant considerations were taken into account, whether relevant considerations were ignored, whether the decision was based on correct facts or law, whether it was taken for a proper purpose, whether there was bias on the part of any member of the decision-maker, whether the decision-maker applied its mind and whether the decision was (ir)rational. The Recording will obviously bear on whether any of the above factors was present. What was said and how it was said during the Deliberations is indispensable to the enquiry.

39. The respondent's efforts to fillet the record are thus unavailing. As was recently confirmed in *Comair Limited v The Minister of Public Enterprises and others* (NGHC case no: 13034/13) at 17, annexed hereto marked **"A"**, the applicant is entitled under Rule 53 to access the full deliberations of the decision maker, which entitlement furthers the constitutional goals of open and accountable decision making.

THE FAILURE AND / OR REFUSAL TO DISCLOSE THE RECORDING

40. *Procedural defects*

40.1 There is no lawful basis for a respondent in review proceedings to refuse to lodge the Record in full, as required by Rule 53(1)(b), without specifically seeking the leave of the Court to withhold a particular non-privileged portion of the record on good grounds shown.

40.2 The respondent in this matter has never sought such leave and, alarmingly, never notified the Court or the applicant, at the time of lodging the Record in incomplete form, of the fact that it had withheld an important part (indeed, the most important part) of the required Record, let alone of its reasons for doing so. The existence of the Recording was within the sole purview of the respondent and may never have emerged but for the applicant, by chance, becoming aware of its existence. As we previously submitted, such conduct undermines this Honourable Court's processes, is contrary to the duty on the respondent to ensure the dignity, accessibility and effectiveness of the courts (pursuant to section 165 of the Constitution), severely hampers the applicant's rights and the very purpose of the disclosure of the record under Rule 53, and inimical to the constitutional principles of transparency and accountability for a public body.

41. *Substantive defects*

41.1 Leaving aside, for the moment, the substantial procedural deficiencies in the respondent's refusal to reveal and to lodge the Recording, such refusal is in any event wholly unsound in substance.

Confidentiality is not a ground for refusing to produce documents

42. The respondent attempts to argue that despite the principles of openness, transparency and accountability in relation to the Deliberations and the disclosure of the Recording, it may refuse disclosure thereof on the basis of confidentiality.

43. It is plain 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.

44. The respondent is not permitted to hide behind bald statements of confidentiality and has failed to mount any argument which would justify non-disclosure of the Recording.

45. Further, the respondent's reliance on the fact that it is allowed to regulate its own process, is as misplaced as it is inconsequential.[13] Any attempts at self-regulation must be within the existing Rules of Court, and with due regard for the constitutional principles binding on the JSC. 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.

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[13] See paragraphs 27.3 to 27.7 of the respondent's answering affidavit.

46. The respondent states that the rationale for confidential deliberations is:

46.1 "*to enable Commissioners to have frank and robust debate around the suitability or otherwise of candidates*"; and

46.2 "*to protect the integrity and dignity of the candidates without impeding or undermining the ability of the Commissioners to submit them to robust assessment*".

47. This rationale cannot be correct, as a proposition of fact or as a proposition of law, for the reasons set out below.

48. As a proposition of fact, it is in irreconcilable conflict with what the respondent has previously placed on record. In the Reasons the respondent informed the Court clearly that the concise "*considerations*" set out therein had been "*compiled by the Chief Justice from the contributions of Commissioners during the deliberations, as mandated by the Commissioners at the end of the meeting*".[14]

49. The respondent's disclosure of these "*considerations*" in the Reasons does not in any way impair the "*integrity and dignity of the candidates*", nor in any way impede or undermine the ability of the respondent's members to "*submit them to robust assessment*". The respondent cannot contend that disclosure of the Recording could cause such impairment or impediment, any more than disclosure of the Reasons, without conceding that the Reasons inaccurately or incompletely capture the contents of the Deliberations and thus the record of the Decision.

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[14] The Reasons are annexed to the founding affidavit marked "**MH5**".

50. The unavoidable conclusion is thus that the "*rationale*" provided for the confidentiality of the Recording is factually unfounded and that the refusal to lodge the Recording with the Registrar is likewise factually unfounded.

51. As a proposition of law, the respondent's rationale for refusing to lodge the Recording is seriously misconceived, for the reasons set out below.

52. In the first place, as a matter of principle, confidentiality is not a valid ground for refusing to produce documents under Rule 53. It is settled that the fact that documents contain information of a confidential nature does not *per se* in our law confer on them any privilege against disclosure (see *Rutland v Engelbrecht* 1956 (2) SA 578 (C) at 579; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260; *S v Naicker and Another* 1965 (2) SA 919 (N); *Crown Cork and Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W) at 1099). Privilege has not been alleged and is clearly inapplicable to this case.

53. In the case of *Comair Limited v The Minister of Public Enterprises and others* (NGHC case no: 13034/13) the North Gauteng High Court, as in the present matter, was faced with the question of whether confidentiality should be allowed to act as an absolute bar to the disclosure of documents under a Rule 53 application.[15] It was noted in this case that confidentiality was not a basis for a claim of privilege and did not in itself justify a refusal to disclose the documents.[16]

54. Confidentiality is not in itself a sufficient reason for depriving an applicant of its procedural right to the whole of the record under Rule 53. Access to the

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[15] *Comair Limited v The Minister of Public Enterprises and others* (NGHC case no: 13034/13) at 4.

[16] *Comair Limited v The Minister of Public Enterprises and others* (NGHC case no: 13034/13) at 18.

full record is a right of the applicant under Rule 53 and depriving an applicant of this should not be done unless there is a clear justification. See *Afrisun Mpumalanga (Pty) Limited v Kunene NO and Others* 1999 (2) SA 599 (T) at 628-9, where it was stated:

> "*The object of the review proceedings in terms of Rule 53 is to enable an aggrieved party to get quick relief where his rights or interests are prejudiced by wrongful administrative action and the furnishing of the record of the proceedings is an important element in the review proceedings: see Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 660D-I; S v Baleka and Others 1986 (1) SA 361 (T) at 397I-398A. The applicant should not be deprived of the benefit of this procedural right unless there is clear justification therefor: see Crown Cork & Seal Co Inc. and Another v Rheem South Africa (Pty) Ltd and Others 1980 (3) SA 1093 (W) at 1095F-H.*" (emphasis added)

55. Further, as was held in *Johannesburg City Council v Administrator Transvaal and Another* 1970 (2) SA 89 (T) at 93, an applicant's reliance on the record of the proceedings before it finalises its grounds of review should not be construed as a "*fishing excursion*", but as a legitimate endeavour "*to determine objectively what considerations were probably operative in the minds of the Administrator (the decision-maker)..... when they passed the resolution in question*" (See also *Lawyers for Human Rights v Rules Board for Courts of Law and Another* 2012 (7) BCLR 754 (GNP) (11 April 2012) at para 23).

56. This general proposition is all the more so in a constitutional democracy, since access to the full record of the proceedings is fundamental to the proper ventilation of the review before the court.

57. As this Honourable Court's Gauteng Division in Pretoria (through Mathopo J) held in *Democratic Alliance v Acting National Director of Public Prosecutions*, [2013] 4 All SA 610 (GNP) (16 August 2013) at para 29, concerning the alleged confidentiality of the so-called "spy tapes" submitted to the prosecution, in an application for a review of the decision to withdraw charges based on such submission:

> "*In my view it is not appropriate for a court exercising its powers of scrutiny and legality to have its powers limited by the ipse dixit of one party. A substantial prejudice will occur if reliance is placed on the value judgment of the first respondent. To permit the first respondent to be final arbiter and determine which documents must be produced is illogical. … [T]he first respondent has no right to independently edit the record. It must produce everything.*"

58. Further, the applicant must be allowed access to available information sufficient for it to make its case. As was stated in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 486F-G, the applicant should be "*put in possession of such information as will render [its] right to make representations a real and not an illusory one.*" The claim of confidentiality cannot operate in contravention of the rights of the applicant to set out its case on all the available facts.

59. Not only will the applicant be forced to fight with one arm behind its back, this Court's ability to do its duty will similarly be hampered. Without the full record the Court will not be able to perform its constitutionally entrenched review function. In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) at 501 the Court stated it as follows:

"*It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of a decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.*"

60. In addition to this, the requirement that there be proper disclosure of the record under Rule 53 furthers the constitutional guarantee of just administrative action, as well as the right of access to any information held by the state and the constitutional requirement of public administration that is transparent and accountable.

61. The importance of transparency regarding access to information involving public administrative bodies was set out in *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at 346:

"*Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information"."*

62. This was reaffirmed in *M & G Media Limited v President of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP) at para 60.

63. The following remarks of Lord Denning in *Riddick v Thames Board Mills Ltd* (1977) 3 All ER 677 (CA) at 687, and cited as authority in *Comair Limited v*

Minister of Public Enterprises (NGHC case no: 13034/13) at 22, describe the public interest in disclosure of the full record in situations such as this:

> "*The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e. in making full disclosure.*" (emphasis added)

64. It is thus in the public interest that the whole record be disclosed. Nothing in this case permits a departure from that generally established principle.

65. Section 178(6) of the Constitution empowers the respondent to determine its own procedure. Section 5 of the Judicial Service Commission Act, 1994 ("**the Act**") provides for such procedure, once determined, to be promulgated by the Minister of Justice. It is notable that neither provision empowers the respondent to impose an impenetrable regime of secrecy over its procedure.

66. Although the Regulations: Procedure of the Commission, determined by the respondent and promulgated by the Minister of Justice in February 1996, do provide that interviews of candidates "*shall be open to the public and the media*" (regulation 2(i)) but that the respondent thereafter "*shall deliberate in private*" (regulation 2(j)), this does not denote any régime of secrecy. More importantly, for present purposes, these regulations concern only the process to be followed by the respondent in performing its functions: they in no way provide a basis for the refusal of the production of records of its decisions when they have been challenged before a Court under Rule 53.

67. In any event, the respondent is constitutionally bound to the principles of transparency, accountability and rationality, which plainly require disclosure of the Deliberations. This is consistent with the constitutional principle of open justice, which has been endorsed by the Constitutional Court on several occasions (see *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (2) BCLR 167 (CC)). The implication of this principle is that disclosure ensures transparency and accountability, thereby enhancing public confidence in an institution and ensuring that it is fully and fairly dedicated to its constitutional purpose. Openness thus acts as an inherent safeguard against bias, arbitrariness and other risks attendant upon the exercise of public power. Accordingly, far from impeding the respondent's members from submitting judicial candidates to "*robust assessment*", revealing its deliberations in appropriate circumstances (in this case, through mandatory disclosure of the Recording under Rule 53), would rather - and much more effectively - ensure that they do exactly that. Accordingly, the respondent's rationale is legally misconceived.

68. The applicant submits that the respondent's rationale falls to be rejected equally in relation to the Deliberations. The candidates all applied for appointment to a seat of profound public power and prestige, to which an appropriately high standard of public scrutiny and accountability is attached. For this very reason, each candidate was rightly required to endure, in full view of the public, interviews in which the respondent's members could, would and did ask difficult and potentially very embarrassing questions, ranging from disciplinary indiscretions to personality flaws. Each candidate accepted this scrutiny, as an appropriate democratic safeguard against the risk of unsuitable individuals being vested with judicial authority.

69. The suggestion that these candidates, who would assume the power to pass judgment on members of the public, should have their feelings insulated from the judgment of the respondent and the public, is baseless.

70. Indeed, if any of the respondent's members would have spoken about any candidate in terms or tones which did or would impair the dignity and integrity of such candidates, this is precisely a reason for this Court and the applicant to see the Recording, rather than to be precluded from seeing it.

71. Moreover, the respondent's contentions in this regard have already been firmly rejected in two judgments concerning public access to the respondent's proceedings, where it was dealing with a complaint by several Constitutional Court judges against the Honourable Mr Justice Hlophe.

72. In *eTV (Pty) Ltd and Others v Judicial Service Commission and Others* 2010 (1) SA 537 (GSJ), the respondent had refused to open the proceedings to the public as the respondent "*consider[ed] it imperative to protect the dignity and stature of the office of the Chief Justice and the Deputy Chief Justice, and that of the Judge President*", and that public proceedings "*would damage the dignity and stature of the office of the said judicial officers, and in turn that of the entire judiciary*"(at 542).

73. The Court disagreed, holding that "*ultimately the dignity and stature of the office of the Chief Justice, the Deputy Chief Justice, the Judge President of the Cape and indeed of the entire judiciary will be enhanced rather than diminished by there being an open and public hearing*" (page 546). Indeed, it found that, if the proceedings were closed, "*there will be all sorts of undue and unfortunate speculations regardless of the outcome. There will be suspicion. There will be an erosion of public confidence in the judiciary, all of*

which I would consider to be most unfortunate. It seems to me that the dignity of our entire bench will be done a favour by these proceedings being public, and by the public having access thereto. ... Of course, protecting the dignity of the judiciary is an important consideration but we have all been left in the dark as to why the holding of this particular hearing behind closed doors will protect the dignity the persons sought to be protected. Mere say-so, a vague and laconic statement to this effect, is not good enough."(pages 546-7)

74. The applicant submits that the above reasoning disposes of the respondent's feted concern for the protection of the candidates' integrity and dignity and that of the JSC itself.

75. We further submit that the second leg of the respondent's rationale (that disclosure would impede the respondent from submitting the candidates to "*robust assessment*") is also refuted by the reasoning of the *eTV* judgment discussed above. The Court cited the constitutional principle of open justice, captured as follows by the House of Lords in *Scott v Scott* [1913] AC 417 (HL), which the Court quoted with approval: "*Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.*"(page 546) The implication of this principle, which has been endorsed by the Constitutional Court on several occasions, is that open proceedings ensure transparency and accountability, thereby enhancing public confidence in an institution and ensuring that it is fully and fairly dedicated to its constitutional purpose. Open proceedings thus act as an inherent safeguard against bias, arbitrariness and other risks attendant upon the exercise of public power. Accordingly, far from impeding the respondent's members from submitting judicial candidates to "*robust*

assessment", revealing its deliberations in appropriate circumstances (in this case, through mandatory disclosure of the Recording under Rule 53), would rather - and much more effectively - ensure that they do exactly that.

76. In *Mail and Guardian Limited and Others v Judicial Service Commission and Others* 2010 (6) BCLR 615 (GSJ), the Court made several further pronouncements which, we respectfully submit, are instructive in the present proceedings as well, even though they were made in the context of disciplinary hearings rather than appointment deliberations:

> "*[20] Confidentiality is required to protect a judge from frivolous and unfounded complaints; to allow a judge to recognise and correct his or her own mistakes; to resolve the complaint prior to formal proceedings and to protect the privacy of the judge.*
>
> *[21] However, none of these considerations apply in this matter. ... The identity of the judge involved is known as are the names of the complainants. Some of them have already testified in open public hearings... The details of the complaint and counter-complaint are in the public domain: not only in the media but also in the form of affidavits in the various court proceedings. ... The public deserves access to the further proceedings.*
>
> *[22] The reasons advanced by the JSC do not justify the closed nature of the proposed proceedings. Any benefit that may or might have been be gained by a hearing 'outside the intrusive glare of publicity' will be discounted by negative perceptions of the judiciary and the administration of justice in general. This matter has attracted immense public interest and has been the subject of a debate in the media.*

There is every need to ensure the public's continued access to the issues.

77. Applying the above reasoning to the present proceedings, it is clear that there is no legitimate interest to be served by secrecy when the identities of the candidates and the reasons advanced against their suitability for office have already been aired in the public interviews and the Reasons compiled by the Chief Justice. On the contrary, the continued concealment of the most immediate and accurate record of the Deliberations, despite disclosure of the remainder of the Record, can only fuel speculation and suspicion, and thereby erode public confidence in the processes of the respondent, which itself is an important pillar of public confidence in the judiciary as a whole.

78. The Court also addressed the contention that opening the proceedings would impede the persons involved from speaking frankly (echoed in this matter as the second leg of the respondent's rationale). The Court firmly rejected "*the contention that the closed nature of the investigation will allow the parties to speak 'freely without the pressures of a witness in a public hearing*", as some of the judges involved had already testified in public: "*There is no suggestion, and there can be none, that the Justices or the Judge President [Hlophe] will be intimidated and not speak 'freely'.*"(at para 23)

79. Similarly, the applicant submits, there can be no credible suggestion that the prospect of publicity would cause any member of the respondent to be intimidated and not to speak freely. The respondent's members 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. Such members must be accountable for the exercise of power and fulfilment of responsibility and the

public must have mechanisms for holding them accountable. If such members did or said something which they could not properly or lawfully do or say, then this is again a reason for, not against, disclosure. It would undermine the entire purpose of the respondent and its constitutional role if its actions could be shielded not only from public view, but also judicial scrutiny.

The applicant's undertaking of limited access will mitigate any alleged harm or prejudice

80. Even if there was any substance to the respondent's claims of confidentiality, which the applicant firmly denies, the respondent would still not be entitled to conceal the Recording from the Court, and it would certainly never be entitled to conceal the very existence of the Recording from the Court.

81. To the extent that there were any merit in the respondent's concerns about confidentiality and its ostensible concern for the dignity of the judicial candidates, the applicant submits that an order of limited access to the Recording can be utilised to limit the disclosure of the Recording to the applicant and its legal representatives, thus mitigating any alleged harm or prejudice.

82. As precedent for this approach, the applicant refers to the orders made in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W); *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W); *Competition Commission v Unilever plc and others* 2004 (3) SA 23 (CAC) and *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA).

83. The appropriate process, to the extent that any parts of a record are established by the respondent to require confidential treatment, is to seek the leave of the Court to identify and mark such parts as confidential, so that they may be viewed only by the Court and certain persons, including the applicant's legal representatives and the applicant, possibly subject to a confidentiality undertaking.

84. The approach can be utilised in order to achieve a fair balance between the applicant's right of access to documentation necessary for prosecuting its case, on the one hand, and any right to confidentiality established by the respondent on the other.

85. The applicant's officers and legal representatives have been to date and remain, of course, prepared to furnish any requisite confidentiality undertakings in respect of any parts of the record which are established to be confidential. An order of limited access may in the circumstances be used to protect aspects of the Record that this Honourable Court may find confidential whilst allowing the applicant and its legal representatives an opportunity to interrogate its contents, thus avoiding a situation where the applicant and its legal representatives are required to argue the application behind a "*veil of ignorance*" (See *Comair Limited v The Minister of Public Enterprises and Others* (NGHC case no: 13034/13) at 29; *Competition Commission v Unilever plc* 2004 (3) SA 23 (CAC) at 30; and *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at para 31).

86. In the present case, no basis for such an order has been made out by the respondent: it simply asserts that Rule 53 does not require it to disclose the Recording to this Court and the applicant at all. Indeed, the respondent

simply states that this interlocutory application should be dismissed: it does not suggest that any structured order should be issued so as to limit the extent of disclosure *in casu*.

87. Accordingly, and without conceding that confidentiality is a valid basis for refusing full disclosure under Rule 53, to ensure the full ventilation of the issues involved in this matter the applicant has always been agreeable to this approach being adopted in respect of any parts of the Record which are established to be so confidential as to be withheld from the public.

Reasons

88. The respondent persists with the stance that it has complied with Rule 53 in providing "*extensive reasons*" which were "*compiled by the Chief Justice from the views expressed by the commissioners during the post-interview deliberations.*" As discussed above, the Deliberations themselves are, however, the most accurate and complete account of what transpired in making the Decision, are relevant, and are of vital importance in determining whether the Decision was lawful, rational and procedurally fair. The complete Record, including the Recording, must be disclosed.

COSTS

89. As shown above the respondents clearly and purposefully flouted the requirements of Rule 53 and opposed this application merely to frustrate the rights of the applicant. Further, the respondent has made 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 non-compliance with the Rules. A punitive costs order against the respondent is thus warranted in this case.

RELIEF

90. For the reasons above, none of the respondent's grounds for opposition to the applicant's interlocutory application has any merit. Accordingly, the applicant prays for the relief set out in its notice of motion.

DAVID UNTERHALTER SC

MAX DU PLESSIS

TEMBEKA NGCUKAITOBI

Chambers, Sandton and Durban

24 JULY 2014

"A"

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO.: 13034/13

In the matter between:

COMAIR LIMITED Applicant

and

THE MINISTER OF PUBLIC ENTERPRISES First Respondent

THE MINISTER OF FINANCE Second Respondent

THE MINISTER OF TRANSPORT Third Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Fourth Respondent

SOUTH AFRICAN AIRWAYS SOC LIMITED Fifth Respondent

JUDGEMENT

Jordaan J:

The Applicant, Comair Limited, brings a Rule 30A application ("interlocutory application") to compel the First Respondent, the Minister of Public Enterprises, to furnish its legal representatives and independent experts with complete and un-redacted copies of the minutes of the Fifth Respondent's (South African Airways) Monitoring Committee Meetings held between the Fifth Respondent, the Department of Public Enterprises and the National Treasury on 18 April 2012, 10 May 2012, 6 June 2012, 11 July 2012, 8 August 2012 and 11 September 2012 (hereinafter collectively referred to as "the Minutes").

The Minutes form part of the record, contemplated in Rule 53 (1) (b), and filed by the First Respondent in the main review application ("the main application"). At present, these Minutes appear in heavily redacted form in the First Respondent's record and are, according to the applicant, particularly relevant to the decision that is the subject of the review proceedings in the main application. It is submitted their production in redacted form constitutes a breach of Rule 53 (1) (b).

On behalf of the applicants it was submitted that the key question that this Court is called upon to determine, is:

1 whether the full, un-redacted, Minutes which already form part of the record (albeit in a redacted form) and are relevant to the main application, should be disclosed on a limited basis only to the Applicant's legal representatives and independent experts, so that they and this Court can properly deal with the review proceedings with due regard to all the

relevant documentation; or,

2 whether, the First Respondent's claim to confidentiality should be allowed to act as an absolute bar to the disclosure of relevant documentation, thus frustrating not only the Applicant's ability to properly prosecute its review application, but also this Court's ability to determine the review on the basis of all the relevant documentation, notwithstanding the proposal of a confidentiality regime that would protect the claimed confidentiality while ensuring limited, yet necessary, access to the relevant documents.

The background to this interlocutory application is as follows.

The Applicant is a fierce competitor of SAA in the domestic airline transport market. On 27 February 2013, the Applicant launched the main application in this Court in terms of Rule 53. The following relief is, *inter alia*, sought in the main application:

1 the review of the decision of the First Respondent, made with the concurrence of the Second Respondent, the Minister of Finance, on or about 26 September 2012, to provide SAA with a R5 billion guarantee ("the Guarantee decision"). This guarantee binds the Fourth Respondent, the government, for 2 years from 1 September 2012;

2 a declaration that the Guarantee decision is unconstitutional and unlawful; and

3 an order setting aside the Guarantee decision and suspending the setting

aside of the Guarantee decision for six months from the date of the order.

In terms of Rule 53 (1) (b), the First Respondent was required to dispatch to the Registrar the record of all documents and all electronic records that relate to the making of the Guarantee decision within fifteen days of receipt of the notice of motion. The notice of motion expressly required the respondents to provide, *inter alia*, any:

1 "minutes, submissions, memoranda and other documentation in relation to all meetings between the First and Second Respondents in relation to the Guarantee decision"; and

2 "minutes, submissions, memoranda and other documentation in relation to all meetings between the Fifth Respondent and/or the Department of Public Enterprises and/or the National Treasury and/or the Guarantee Certification Committee, and/or the Department of Transport, and/or the Competition Commission, in relation to the Guarantee decision..., and all requests for funding by the Fifth Respondent leading up to the Guarantee decision".

The First Respondent furnished his record on 10 April 2013 in three parts:

1 a table, which specifically responds to the various documents that were explicitly requested as part of the record in the notice of motion filed by the Applicant;

2 "Bundle A", a bundle of documents that the First Respondent accepted was not confidential, although certain portions of the documents provided were redacted; and

3 "Bundle B", a bundle of documents that the First Respondent claims are confidential. The State Attorney, on behalf of the First Respondent, explicitly indicated to the Applicant's attorneys that the documents in the bundle should not be divulged to the Applicant or any of its employees and could only be shown to the Applicant's legal representatives, subject to the State Attorney consenting to additional persons (such as independent experts) being entitled to see the documents. Notwithstanding that this was a confidential bundle that could not be seen by the Applicant, large portions of the documents were redacted such that not even the Applicant's legal representatives or independent experts could see what was set out in the documents.

The Minutes, which are the subject of this interlocutory application, were provided on a confidential basis in Bundle B. The applicant correctly indicates that they are redacted to such an extent that it is impossible to ascertain what was discussed in the meetings they seek to record. In all but a few instances only the headings have survived the First Respondent's redaction. The applicant contends that this is notwithstanding the fact that certain headings, which have not been redacted, suggest that the content was clearly relevant to the Guarantee decision.

As an illustration the applicant refers to the minutes of the meeting held on 8 August 2013 contain the following un-redacted headings: "**3. Going Concern**

report", "**8. SAA funding position**", "**Strategic business case**", "**7. New route launches**", "**2. FINANCIAL STATUS UPDATE**" and "**fleet planning**". The First Respondent confirms in his answering affidavit in this application that "[t]he full and complete set of Minutes contains information relating to the financial and operational information of the Fifth Respondent."

The applicant submits that the Guarantee decision required a proper consideration of SAA's past, present, and future financial position. Thus, what the First Respondent knew about the financial position of SAA, and what information he had before him in this regard, at the time of taking the Guarantee decision, is highly relevant to the main application because it provides the proper basis for assessing the rationality, reasonableness and lawfulness of his decision.

The applicant correctly contend that the Minutes were evidently included in the record provided by the First Respondent because they constituted, "minutes... in relation to...meetings between the Fifth Respondent and/or the Department of Public Enterprises and/or the National Treasury ... in relation to the Guarantee decision", as specified in the Applicant's notice of motion in the main application.

The Applicant's attorneys wrote to the State Attorney on 18 April 2013 urging the First Respondent to reconsider his approach to the record. The Applicant's attorneys noted that confidentiality was not a basis for a claim of privilege and therefore did not justify a refusal to disclose documents, or the redaction of portions thereof.

The Applicant contend that First Respondent's approach violated his obligation to file a proper record in terms of Rule 53, and the Applicant's attorneys noted that, failing a

reconsideration by the First Respondent of his approach to the redaction of the record, the Applicant would make application to the Court for an order compelling the proper filing of a complete Rule 53 record.

When no response was received to the letter, the Applicant, on 6 May 2013, served a notice in terms of Rule 30A on the Respondents on the basis of the First Respondent's failure to comply with the requirements of Rule 53 (1) (b). The Rule 30A notice requested that the First Respondent furnish the Applicant with, *inter alia*, complete and un-redacted versions of the Minutes, making it clear that redacted versions would not suffice.

On 16 May 2013, the First Respondent filed a response to the Rule 30A notice, which included an amended index to Bundle A and two further documents were added to the Bundle:

1 an economic report by Oxford Economics entitled "South African Airways: Its impact on South Africa's Economy", dated June 2012; and

2 an email from the Department of Public Enterprises to the National Treasury, dated 17 October 2012.

The First Respondent did not provide any of the other documents requested in the Rule 30A notice.

In particular, according to the First Respondent, the Minutes (which were called for in the Rule 30A (1) notice) and the Diagnostic Review of SAA, dated August 2012,

(another document provided in the confidential bundle in a heavily redacted form which was also called for in the notice) "contain commercially sensitive information that is of a confidential nature, and which therefore is not subject to production of the kind sought by the Applicant".

Despite the fact that the filed record, according to the Applicant, was wholly inadequate and failed to comply with the duty of the First Respondent under the Rules of this Court, the Applicant decided to proceed with filing its supplementary founding papers in order to, so it alleges, expeditiously deal with this main application. The Applicant says it was thought that a protracted fight over the record would not be in the interests of justice.

On behalf of the First Respondent it was argued that this decision to proceed with

the filing of these papers now bars the Applicant to seek the relief now sought in the

present application. However, in a letter from the Applicant's attorney's on 23 May 2013 communicating the Applicant's decision to the State Attorney, it was made clear that this decision was taken on the basis that the First Respondent could not "rely [in the main application] on any documents not included in the incomplete record (including the redacted portions of the documents produced)". It was reiterated that, despite this decision, the Applicant remained "firmly of the view that [the First Respondent's] refusal to produce the full non-redacted record on the grounds of confidentiality is not only entirely at odds with the provisions of Rule 53(1)(b) of the Uniform Rules of Court but also with the High Court's current position on the interpretation of this rule".

This condition was again reiterated in the Applicant's supplementary founding affidavit in the main application, filed on 10 June 2013. After describing the history relating to the Rule 30A notice, at paragraph 31 the Applicant notes that "in opposing [its] review, (the First and Second Respondent's) cannot rely on new documents that they did not include in the record, nor can either (The First or Second Respondent) rely on portions of the record that the First Respondent has chosen to redact".

On 30 July 2013, the First Respondent filed his answering affidavit in the main application. It was argued by the Applicants that notwithstanding his failure to disclose complete and un-redacted versions of the Diagnostic Review and the Minutes in providing his Rule 53 Record, and despite the Applicant's indication that it would not be permissible for the First Respondent to rely on redacted portions thereof without first disclosing them, the First Respondent relies on and seeks to press certain conclusions arising from the full content of both of these documents in his answering affidavit, but without providing un-redacted versions thereof to the Applicant or this Court. In particular, the First Respondent relies on:

1 the Diagnostic Review in paragraphs 43; 44; 72.3; 95.3; 95.4; 95.8; 153.6; and 200.5. With the exception of paragraph 153.6, the First Respondent relies on the whole document in these paragraphs and not merely the un-redacted portions made available to the Applicant's legal representatives and independent experts in the confidential part of his record; and

2 the Minutes in paragraphs 95.7 and 95.8. Again, the First Respondent does not confine himself to the un-redacted portions of the Minutes, but relies on them

in their entirety.

Due to the First Respondent's reliance on the un-redacted portions of the Minutes and the Diagnostic Review the Applicant's attorneys sent letters to the State Attorney requesting that the First Respondent produce un-redacted copies of the Diagnostic Review (on 2 September 2013) and the Minutes (on 9 September 2013). In both letters it was made clear that, without access to the whole content of these documents, the Applicant would be unable to adequately reply to the First Respondent's answering affidavit.

In both letters it was emphasised that the Applicant is happy to receive the documents on a confidential basis such that the documents will only be disclosed to the Applicant's legal representatives and independent experts, thus meeting any concerns in relation to the disclosure of what the First Respondent claims is commercially sensitive information.

Thereafter, under cover of a letter dated 11 September 2013, the State Attorney provided the Applicant's attorneys with an un-redacted copy of the Diagnostic Review on the understanding that it would only be disclosed, on a confidential basis, to the Applicant's legal representatives and independent experts.

In the same letter, however the State Attorney refused to provide the Applicant's legal representatives and independent experts with the Minutes, which were requested on the same basis as the Diagnostic Review. The State Attorney stated the Applicant was "not entitled to the minutes".

After a further letter to the State Attorney on 13 September 2013 again requesting the First Respondent to provide the Minutes and threatening an application to compel their production, and a telephone call to the State Attorney on 19 September 2013, the First Respondent persisted in his refusal to provide the Applicant with the Minutes. The Applicant alleges that given this position adopted by the First Respondent, on 23 September 2013 it was left no choice but to serve its notice of motion and founding affidavit in this interlocutory application presently before me on the First Respondent and the other respondents in the main application.

The above history of the events that led to the present application is but a repetition of what was set out in the heads of argument provided to me at this application. I made liberal use of the contents of the applicant's heads, not only because it provides a crisp summary of the events that led to this application, but also because the history is by and large common cause.

The Applicant contends that there can be no doubt that the Minutes form part of the record and that their whole content is relevant to the Guarantee decision taken by the First and Second Respondents. They argue:

1 the un-redacted headings clearly indicate the relevance of the Minutes to the Guarantee decision; and

2 the First Respondent, in his own affidavit, relies on the whole content of the

Minutes (being the minutes of the Fifth Respondent's Monitoring Committee

meetings and the information presented at these meetings, even though the minutes of these meetings have been almost completely redacted), and not merely the un-redacted portions thereof, as part of the basis for the Guarantee Decision. They say this demonstrates that the whole content of the Minutes is relevant to the review proceedings in the main application and was before the First Respondent when he made the Guarantee decision, and is thus properly part of the record.

They rely on the following portions of the First Respondent's answering affidavit:

> **"95.7. From the monthly meetings held with SAA** (recorded in the Minutes) **and the quarterly review of its operations that were submitted in terms of the provisions of the PFMA, I was acutely aware that there was a real likelihood that SAA's funds would be exhausted by the end of the 2011/12 financial years. In the circumstances, I knew that the auditors would not be in a position to sign off on the companies' financial statements.**
>
> **95.8. In considering the request for a guarantee, the material before me included information on the socio-economic role of SAA; the contents of the Going Concern Review; the information at my disposal consequent on the monthly engagements the Department had with SAA** (that is the Minutes and information recorded in the Minutes)**, and the contents of the**

Diagnostic Review of SAA." (emphasis added. The portions in brackets are added by the Applicant.)

(I will come to the version of the version of the First Respondent hereunder but state that the attendance registers of the meetings concerned are attached to the relevant reducted minutes. At none the First Respondant is recorded as being present. Insofar as he had regard to the meetings his only source of information must have been the minutes.)

> It is argued by the Applicant that, in the light of what was stated in the above mentioned paragraphs, it is hardly surprising that the First Respondent, when called upon in the notice of motion in the main application to ensure that the minutes of meetings in relation to the Guarantee decision were included in the record, elected to include the Minutes in the Rule 53 Record (albeit in a redacted form and on a confidential basis). The inclusion of the Minutes in the record clearly presupposes that the First Respondent accepted that these documents were relevant to the review, and thus properly part of the record.

The Applicant furthermore contends that there can be no defensible claim to confidentiality in respect of the Minutes on the part of the First Respondent, not only because this is not a sound basis for non-disclosure of a portion of the record, but more so as the Applicant was willing to accept the documents on the basis that they would only be disclosed to its legal representatives and independent experts. The Applicant itself would have no access to the redacted Minutes.

The Applicant contends that with regard to it's decision to not proceed with the application immediately after the lapsing of the 10 days, this was, as was noted in the Applicant's attorneys' letter to the State Attorney on 23 May 2013, and again emphasised in the supplementary founding affidavit in the main application, premised on the understanding that the First Respondent would not rely on any redacted portions of the record at the time it filed its answering affidavit. By nevertheless relying on the Minutes in his answering affidavit, and by refusing to disclose these Minutes in an un-redacted form, the First Respondent did not abide by this understanding.

The primary ground upon which the First Respondent seeks to oppose the interlocutory application is that the redacted portions of the Minutes contain confidential information. The First Respondent avers that their contents are of a commercially sensitive nature in that they relate to the financial and operational information of SAA.

The First Respondent also oppose the application on two other grounds:

1 the redacted portions of the Minutes are not relevant to the main application; and

2 the Applicant elected to not institute its application to compel, and is bound by this election.

The Applicant argues that none of these grounds have any merit.

On behalf of the Applicant the legal principles that relate to Rule 53 records are summarised as follows:

An applicant in review proceedings is entitled to the full record of the proceedings sought to be reviewed and set aside. (See Rule 53 (1) (b) and *South African Football Association v Stanton Woodrush (Pty) Limited t/a Stan Smidt & Sons* 2003 (3) SA 313 (SCA) at paragraph 5.

The Applicant argues, correctly so, that purpose of the record is to enable the applicant and the court fully to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend his or her notice of motion and supplement his or her grounds of review under Rule 53(4). The Applicant refers to the remarks of Kriegler AJA in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660.

> *"Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings or any knowledge of the reasons founding the decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s), he could then apply to amend his notice of motion and to supplement his founding papers. Manifestly the procedure created by the Rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record".*

The Applicant submits that filing of the record also introduces equality-of-arms between the parties to the review proceedings since it means that *"all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court". Jockey Club v Forbes* at 660.

The Applicant argues that access to the full record of the proceedings is thus fundamental to the proper ventilation of the review before the court. Without the full record the court cannot perform its constitutionally entrenched review function. In this regard they refer to *Democratic Alliance And Others v Acting National Director Of Public Prosecutions and Others* 2012 (3) SA 486 (SCA).

> *"It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."*

The Applicant argues that the requirement that there be proper disclosure of the record under Rule 53 furthers the constitutional guarantee of just administrative action, (see Section 33 of the Constitution) as well the right of access to any

information held by the state (See Section 32 of the Constitution and *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at para 32) and the constitutional requirement of public administration that is transparent and accountable. (See Section 195 of the Constitution.)

The extent of the record to which the applicant is entitled under Rule 53 is described as follows in *Johannesburg City Council v Administrator Transvaal and Another*, 1970 (2) SA 89 (T) at 91-2.

> *"The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially…. It does … include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it."*

It is correctly argued that the applicant is also entitled under Rule 53 to access to the deliberations of the decision-maker, which entitlement furthers the constitutional goals of open and accountable decision-making. In this regard reference is made to

Afrisun Mpumalanga (Pty) Limited v Kunene NO and Others 1999 (2) SA 599 (T) at 631-2.

The main ground on which the First Respondent opposes the interlocutory application is that the Minutes contain "financial and operational information of the Fifth Respondent" which is "commercially sensitive", and therefore confidential. The Applicant submits that the First Respondent's reliance on confidentiality is misplaced. It is argued that confidentiality is not a ground for refusing to produce documents.

It is argued that even if the redacted portions of the Minutes are confidential, this would in any event not entitle the First Respondent to refuse to furnish the Minutes (or redact portions thereof) as part of the Rule 53 record.

The Applicant is entitled to the full record of the proceedings, save only for documents that are privileged. In this regard I was referred to *Afrisun Mpumalanga (Pty) Limited v Kunene NO and Others*, 1999 (2) SA 599 (T) at 631-2.

> *"The object of review proceedings in terms of Rule 53 is to enable an aggrieved party to get quick relief where his rights or interests are prejudiced by wrongful administrative action and the furnishing of the record of the proceedings is an important element in the review proceedings: see Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 660D-I; S v Baleka and Others 1986 (1) SA 361 (T) at 397I-398A. The applicant should not be deprived of the benefit of this procedural right unless there is clear justification therefor: see Crown*

Cork & Seal Co Inc. and Another v Rheem South Africa (Pty) Ltd and Others 1980 (3) SA 1093 (W) at 1095F-H."

It is argued that confidentiality *per se* is not a ground for objecting to the disclosure of documents in our law. In this regard I was referred to *Rutland v Engelbrecht* 1956 (2) SA 578 (C) at 579; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260; *S v Naicker and Another* 1965 (2) SA 919 (N); *Crown Cork and Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W) at 1099 and De Ville *Judicial Review of Administrative Action in South Africa* (2005) revised first ed. at 310. The fact that documents contain information of a confidential nature *"does not per se in our law confer on them any privilege against disclosure"*. See *Unilever plc v Polagric (Pty) Ltd* 2001 2 SA 329 (C) at 340A.

In respect of confidential commercial information, Colman J held as follows in *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd*: 1968 (3) SA 381 (W).

"It was pointed out, on behalf of the respondent, that the applicant is its trade competitor, and that disclosure of what is relevant to the action may also involve disclosure of confidential information, which the respondent does not want its competitor to see. The respondent would, I was told, rather abandon part of its claim than make such information available to the applicant. I have some sympathy for the respondent in that regard, but I am unable to assist it. <u>It need disclose nothing that is not material; but what is material, in the wide sense that</u>

that word bears in relation to the duty to make discovery, must be disclosed, whatever the commercial consequences may be ...".

The Applicant points out that the First Respondent does not claim, nor could it claim, any privilege over the Minutes. It relies on the professed confidentiality of the Minutes, on commercial grounds belonging to SAA. (It should be noted that SAA does not oppose this application.)

The Applicant argues that as is clear from the above, this is no basis for refusing to disclose documents under Rule 53. The Applicant argues that it follows that, even if the First Respondent is correct in his averment that the Minutes are confidential, this would not entitle him to refuse to produce the Minutes as part of the Rule 53 record. It is argued that this appears to have been recognised by the First Respondent himself when he provided the Applicant with the Diagnostic Review, which had initially been refused on the same basis of commercial confidentiality. There is no basis for disclosing the Diagnostic Review whilst simultaneously refusing disclosure of the Minutes. It is argued this distinction is itself arbitrary and violates the duty of accountability and transparency.

The Applicant also points out that the Applicant seeks disclosure of the Minutes in terms of a confidentiality regime that will ensure that only the Applicant's legal representatives and independent experts have access to the documents.

The Applicant argues that disclosure is in the public interest. It submits that this Court does not have a discretion to refuse to compel the First Respondent to

produce an un-redacted version of the Minutes as part of the Rule 53 record, alternatively if this Court does have such a discretion, such discretion should be exercised against the First Respondent.

It is argued that the fact that information has been communicated by one party to another in confidence is not, in itself, a sufficient ground to refuse an application for discovery or production if the information would assist the Court to ascertain facts which are relevant to a matter in issue. The confidentiality must yield to the general public interest that, in the administration of justice, the truth will out.

The Applicant submits that the First Respondent's reliance on confidentiality should only be upheld in circumstances where the public interest in favour of non-disclosure clearly outweighs the public interest in disclosure. It is argued this is not the case in the present proceedings for two reasons:

First: the main application concerns matters of compelling public interest, including just administrative action and accountable public administration in relation to government's conduct in the domestic airline industry.

> There is a manifest need to ensure that matters are properly ventilated in the review proceedings in order for the Court to scrutinise whether the First and Second Respondents acted rationally, reasonably, and lawfully in the process of issuing the guarantee to SAA. The public interest demands that the truth be discovered. In this regard I was referred to the following remarks of Lord Denning MR in *Riddick v Thames Board Mills Ltd*, (1977) 3 All ER 677 (CA) at 687.

"The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e. in making full disclosure".

It is argued only with a complete record before it will the Court be able to assess whether the First Respondent has acted lawfully. The First Respondent's claim of confidentiality in relation to the Minutes thus frustrates the very purpose of Rule 53 and denies the Court and the Applicant an opportunity to properly assess the decision-making process of the First Respondent.

It was submitted that the public interest favours disclosure of the documents sought. Without sight of such documents, the Applicant (through the services of its legal representatives and independent experts) and the Court cannot properly assess the manner in which the First Respondent made the Guarantee decision.

Second: the confidentiality asserted by the First Respondent is confined to commercial information and is not of such a nature as to justify overriding the manifest public interest in the proper ventilation of the review.

Reliance was placed on the quoted extract of Coleman J in *Claude Neon Lights* above. Confidentiality with respect to commercial information is not justification for refusing to disclose documents. The First Respondent *"need disclose nothing that is not material; but what is material, in the wide sense that that word*

bears in relation to the duty to make discovery, must be disclosed, whatever the commercial consequences may be ..." (emphasis added by the Applicant), at 385A-C.

The Applicant also points out, as I have stated above, SAA itself, to which the purportedly confidential information relates, has not sought to oppose this interlocutory application.

The Applicant also argues that the First Respondent has failed to show what harm or prejudice, if any, will eventuate should the Minutes be disclosed for purposes of this litigation. It is argued that the First Respondent has rather resorted to general and unsubstantiated assertions of confidentiality without any factual evidence to explain why the resort to confidentiality is necessary. It was submitted that a Court should be slow to find that information in the record is "confidential" on the basis of bald statements by a party that the information is "commercially sensitive". See *Afrisun Mpumulanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T) at 628H-629B.

The Applicant further only claims limited access to the Minutes which would remove (or at the very least, significantly reduce) the risk of the Fifth Respondent suffering any apprehended harm or prejudice, since only the Applicant's legal representatives and independent experts will have access to the Minutes.

Third: the First Respondent has seen fit to disclose, on the same limited basis as now sought in relation to the Minutes (that only the Applicant's legal representatives and independent experts have access), the Diagnostic Review, which disclosure was

initially refused on the same basis of commercial confidentiality as the Minutes. This indicates an acceptance by the First Respondent that the limited basis on which the Diagnostic Review was disclosed will ensure that its disclosure occasions no harm or prejudice to SAA. It is argued that there is thus no reason why providing the Minutes to the Applicant's legal representatives and independent experts on a similar basis, would not avoid any harm or prejudice to SAA.

It was accordingly submitted that, if the Court decides that it has any discretion in the matter, it should exercise its discretion in favour of compelling the First Respondent to furnish the Minutes as part of the Rule 53 record in that the claims of confidentiality by the First Respondent do not dislodge the interest that the public has in rational and lawful decision-making and in an accountable review process by which unlawful decisions may be challenged.

The Applicant has undertaken limited access to mitigate any alleged harm or prejudice.

To mitigate any alleged prejudice that could be suffered by any of the respondents in the main application, particularly SAA, the order sought in the notice of motion would limit the disclosure of the Minutes to the Applicant's legal representatives and independent experts.

As precedent for this approach, I was referred to the orders made in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others*, 1980 (3) SA 1093 (W). Per Schutz AJ (as he then was) at 1103: "*... although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of*

the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access".

Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another, 1979 (2) SA 457 (W). Per Botha J (as he then was) at 465: *"It seems to me that the position is as reflected in [Horner Lambert Co v Elaxo Laboratories 1975 RPC 354], that the Court should endeavour to impose suitable conditions relative to the inspection of documents and machinery in the possession of the respondents, so as to protect the respondents as far as may be practicable, whilst at the same time affording the applicant a reasonable opportunity of achieving its purpose"*

Competition Commission v Unilever plc and others, 2004 3 SA 23 (CAC). The order of the Competition Appeal Court may be found at 26H-27C.

Tetra Mobile Radio (Pty) Ltd v MEC, Department Of Works. 2008 (1) SA 438 (SCA), at para 17 (see order 3.2). The order granted by the SCA *inter alia* provided that:

"3.1 On the copy of each document referred to in para 1 above, the respondents shall mark or record that part of the document which it considers to be confidential.

3.2 Save for purposes of consulting with counsel or an independent expert, the applicant's attorney shall not disclose to any other party, including the applicant, any

part of a document in E respect of which the respondents claim confidentiality.

.3.3. Should the applicant dispute any claim to confidentiality and should the parties be unable to resolve such dispute, the applicant shall on notice to the respondents and any person having an F interest therein, have the right to apply to a judge of the Pietermaritzburg High Court in chambers for a ruling on the issue."

In *Moulded Components, supra,* at 466E it was held that *"[i]t does not follow … that, because the respondents require protection* (in regard to purportedly confidential documentation), *the applicant is to be denied relief".*

In *Tetra Mobile, supra,* (Par [14]) the Supreme Court of Appeal granted an order allowing for a confidentiality regime in relation any portion of the documents that were claimed to be confidential that were relevant to the one party's appeal against a tender award that lay to the Appeal Tribunal. This order was granted consequent upon the SCA holding, in acceptance of the argument advanced by the appellant, that:

> *"if there was any apprehension on the part of the respondent regarding [the confidentiality of] any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd, where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the applicant's attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent*

expert. In that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other."

I was also referred to *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA), which involved an appeal arising from an interlocutory application for access to confidential information pursuant to a review of the International Trade Administration Commission's recommendations in relation to certain anti-dumping duties and the Minister of Trade and Industries' acceptance and implementation thereof. The appeal specifically dealt with the High Court's imposition of a particular confidentiality regime in relation to certain documents. It was submitted that while the legal position in this case was, *inter alia*, governed by specific provisions in relation to confidential documents in the International Trade Administration Act 71 of 2002, the SCA's comments about the rights protected are of equal force in the present matter, and the judgment also demonstrates our courts' willingness to balance competing interests, where there is alleged confidential information involved, by way of a confidentiality regime. The SCA in upholding the confidentiality regime ordered in the High Court – which *"order limit[ed] access to the confidential part of the Commission's record to legal representatives of the parties in the main application and one independent expert appointed by each party to assist in that application" – inter alia*, opined that:

"The Commission expressly stated that it had relied on Bridon's confidential information in arriving at the decision which Casar seeks to challenge in the main application. It follows that, without knowing the basis for the decision, Casar will have to mount that challenge in the dark against an opponent with

perfect night vision, in that it knows exactly what information it had considered. For example, Casar will hardly be able to contend that the decision was irrational; that irrelevant considerations were taken into account; or that the decision was taken arbitrarily or capriciously. These, of course, would all constitute legitimate grounds for review under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). What is more, it is not only the confidential information actually relied upon by the Commission that may potentially be material. Disclosure of Bridon's confidential information that was available to the Commission may show that it had failed to have regard to relevant considerations, which is another review ground contemplated in s 6(2)(e) of PAJA.

[32] In short, I agree with the sentiment expressed by Preller J in the court a quo, that a ban on disclosure of Bridon's confidential information will effectively deprive Casar of a fair hearing in the main application. As I see it, Casar's interest in disclosure therefore enjoys constitutional protection, not only under s 32, which guarantees everyone's right of access to any information held by the state, but also under s 34, which guarantees the right to a fair public hearing before a court."

It was submitted on behalf of the Applicant that an order of limited access such as is sought in this interlocutory application would protect the confidentiality of the Minutes (to the extent that the Minutes are, in fact, confidential) whilst allowing the Applicant's legal representatives and independent experts to interrogate their content.

This avoids a situation where the Applicant's legal representatives are required to

argue the main application behind a *"veil of ignorance"* (or are forced *"to mount [their] challenge in the dark against an opponent with perfect night vision"*) by virtue of their being denied access to the Minutes that were before the First Respondent and which he relied on in making the Guarantee decision. See *Competition Commission v Unilever plc* 2004 3 SA 23 (CAC) at 30H, and *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at para 31, respectively.

It was argued that in these circumstances, the First Respondent cannot be heard to claim that the disclosure of the Minutes – on the limited basis envisaged in the notice of motion – will occasion any harm or prejudice to the SAA – particularly where none is claimed by SAA itself.

It was submitted that the First Respondent's reliance on confidentiality is misplaced, and that the Applicant is entitled to be furnished with an un-redacted version of the Minutes, particularly as the Applicant has undertaken to limit access to the Minutes in order to mitigate any apprehended harm or prejudice SAA might suffer as a result of their disclosure.

With regard to the relevance of the Minutes the First Respondent contends at numerous places in his answering affidavit in this interlocutory application that "the redacted portions (of the Minutes) are not relevant to the case of (the Applicant)" and that "the record in its current form including the un-redacted portions of the record suffice". The Applicant argues that the First Respondent is clearly wrong – the Minutes are relevant. Furthermore, the First Respondent contradicts this assertion in other parts of his answering affidavit, rendering it internally inconsistent.

The Applicant's claim to the relevance of the Minutes to the Guarantee decision and the review proceedings in the main application rests on two primary bases:

1 the un-redacted headings which clearly indicate the relevance of the Minutes to the Guarantee decision; and

2 the First Respondent, in his own answering affidavit in the main application, relies on the whole content of the Minutes, and not merely the un-redacted portions thereof, as part of the basis for the Guarantee decision..

The Applicant submits that the bald assertions of the First Respondent that the Minutes are not relevant to the main application meet neither of these challenges.

With regard to the un-redacted headings in the Minutes the following arguments were advanced on behalf of the Applicant:

The Applicant contends in paragraph 17 of it's founding affidavit in this interlocutory application that the un-redacted headings in the Minutes demonstrate that the redacted content was "clearly relevant" to the Guarantee decision. The First Respondent fails to properly dispute this contention, but rather states that he "stand[s] by [his] contention that the Minutes are confidential and aver[s] that the headings were sufficient as they indicated the subject matter under discussion without divulging the content thereof". The Applicant submits that the First Respondent therefore effectively admits that the redacted portions of the Minutes are relevant to the review in the main application.

As indicated above, the Applicant argues that confidentiality is no basis for refusing disclosure under Rule 53(1)(b).

The Applicant also makes this averment in paragraph 43.2 of its founding affidavit. The Applicant points out that the First Respondent's response to the paragraph is perplexing. He first states, at paragraph 35.1, "that he admits that the Minutes form part of the record" – and not merely the redacted portions thereof – again thereby admitting that the full content of the Minutes is relevant to the review proceedings in the main application. However, he then proceeds, at paragraph 35.3, to state that "[t]he redacted Minutes as they stand suffice" as "the headings indicate the subject matter of the discussion, and the detail is not relevant to the review application".

The Applicant argues that this self-justifying contention provides no basis for the First Respondent's assertion that the redacted portions are not relevant to the review proceedings in the main application, and does nothing to refute the Applicant's compelling contentions to the contrary. I agree. How can the relevance thereof be ascertained without seeing the contents thereof.

Rather, so the applicant contends, the headings stand as telling indications of the content of the redacted parts of the Minutes that they preface. It is argued not only is it highly improbable that this content bears no relation to these headings and is not relevant to the review proceedings, but neither the Applicant nor the Court can properly test the First Respondent's bald assertion that "the detail is not relevant" without having sight of it. Rather, the Applicant and the Court are forced to rely on the headings which do, as is suggested above and in the founding papers for this application, cogently indicate the relevance of the content.

The Applicant argues that in any event, the First Respondent's own averments in his answering affidavit put the relevance of the redacted portions of the minutes to the review beyond doubt. He states that:

> "The full and complete set of Minutes contains information relating to the financial and operational information of the Fifth Respondent."

The Applicant submits that the First Respondent has failed to counter the Applicant's contention that the headings that remain un-redacted in the Minutes demonstrate the relevance of the redacted content, has provided no support for his contention that the content is not relevant, and has, by his own averments, confirmed the relevance of the redacted portions of the minutes.

The applicant further submits that the First Respondent's reliance on the Minutes indicates the relevance thereof.

The Applicant argues that the First Respondent again does nothing to properly counter the Applicant's second contention with regard to the relevance of the Minutes. In relation to paragraph 31.2, where the Applicant first makes this contention, the First Respondent does little more than to state that the Minutes are relied on to respond to certain allegations made by the Applicant (paragraphs 29.3-29.5) – which is trite. He also quotes the paragraphs of his answering affidavit in the main application which rely on the Minutes (paragraph 29.6). From this, the First Respondent then concludes that "[b]oth paragraphs make reference to more than one source of information regarding the financial status and the socio-economic role of SAA" and that, accordingly, the Applicant's "proposition that [he] should not have

mentioned the SAA's monthly performance as being information that was at [his] disposal when [he] made the decision to issue the guarantee is misconceived".

The Applicant points out that the First Respondent "should not have mentioned the SAA's monthly performance" is manifestly not the Applicant's "proposition" – and appears nowhere in the Applicant's founding affidavit in this application. The Applicant's proposition is rather that the First Respondent's reliance on the full content of the Minutes in his answering affidavit demonstrates their relevance and that they properly form part of the Rule 53 record. The Applicant argues that the First Respondent's averments indicate that he accepted that the Minutes provided information about "SAA's monthly performance" and constituted "information that was at [his] disposal when [he] made the decision to issue the guarantee." Since, the financial position and "performance" of SAA is at the very heart of the review of the decision to grant it a government guarantee (the subject of the main application), the Minutes (in un-redacted form) are clearly relevant.

The Applicant furthermore contends that the First Respondent cannot so rely on the Minutes while failing to disclose them. The fact that the First Respondent states that it relies on "more than one source of information" is of no consequence, and does not detract from the fact that the Minutes are one of these sources relied upon and are, thus, relevant to the main application. As indicated above none of the relevant Minutes indicates the First Respondent being present at any of them. The Minutes thus had to be one of his sources of information. Without the limited disclosure of the Minutes sought in this application, the Applicant (through its legal representatives and/or independent experts) would have no ability to properly interrogate and challenge the reasonableness, rationality and lawfulness of the alleged reliance by

the First Respondent on the Minutes as one of the sources of information that he considered in making the Guarantee decision. It is argued that it would further preclude the Applicant from properly interrogating his allegation that this information led him to believe that "there was a real likelihood that SAA's funds would be exhausted by the end of the 2011/12 financial years", which in turn led him to conclude that "the auditors would not be in a position to sign off on the companies' financial statements."

The Applicant points out that the First Respondent also claims that the averments in his answering affidavit in the main application in relation to the Minutes were "a mere disclosure of the information that was before [him] at the time the impugned Guarantee decision was made". Rather than disputing the relevance of the Minutes, and that they properly form part of the Rule 53 record, the First Respondent's assertion, without more, appears to confirm this. The Applicant argues as held in *Bridon "it is not only the confidential information actually relied upon by the [decision maker] that may potentially be material. Disclosure of ...confidential information that was available to the [the decision maker] may show that it had failed to have regard to relevant considerations, which is another review ground contemplated in s 6(2)(e) of PAJA."*

The First Respondent also appears to rely on the fact that the "averments were general in nature and do not refer to any specific portion of the minutes". The Applicant argues this is, again, no answer to it's argument as to the Minutes' relevance. It confirms the Applicant's point that the First Respondent relied on the full content of the Minutes in his answering papers, and not merely specific un-redacted portions thereof.

The Applicant argues that documents relevant to review proceedings must be disclosed as part of the record.

The law applicable to Rule 53 records underscores that the record includes all documents that were before the decision-maker when he or she made the decision subject to the review proceedings and which informed the decision. In other words, all documents which are relevant to the decision must be disclosed. In this regard reference is made to *Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape and Others*, 2010 (1) SA 228 (E). Leach J (as he then was) held as follows:

> *"it is self-evident that all portions of a record relevant to the decision in question should be made available. And, in considering the question of relevance, it is important to bear in mind that there is now a constitutional obligation for reasons to be given for administrative decisions, which must be justifiable as rational and reasonably sustainable".*

The Applicant submits that the full content of the Minutes is clearly relevant to the Guarantee decision and the review in the main application for the reasons provided in the Applicant's founding affidavit, which have not properly been countered by the First Respondent. The applicant submits that the full content of the Minutes properly form part of the record of the decision and, for this reason, ought to be disclosed in their entirety. Any remaining concerns around commercial confidentiality, are fully met by the order sought by the Applicant, which would ensure that the un-redacted Minutes are only made available to its legal representatives and independent

experts, and not to the Applicant itself.

The First Respondent heavily relies on the Applicants initial decision not to institute an application to compel. The First Respondent contends that as the Applicant elected not to proceed with its compelling application in respect of the Minutes before filing its supplementary founding affidavit, it is bound by this election and cannot now proceed with the application.

At paragraph 182.2.4 of his answering affidavit in the main application the First Respondent notes that "[the Applicant] elected no longer to pursue its contention that the record and the supplementary record that were produced were incomplete" and that "it proceeded to formulate and file its supplementary affidavit, with reference to the record" as it existed at that stage. It appears to be on this basis that the First Respondent then concludes, at paragraph 182.3, that "it is no longer open to [the Applicant] to claim that the record of proceedings so produced was incomplete".

The Applicant contends that this contention is inconsistent with other parts of the First Respondent's answering affidavit in the compelling application, which bear no explicit mention of such an argument and in fact appear to accept that the Applicant is within its rights to now institute the interlocutory application.

1 The First Respondent, at paragraph 37 of his answering affidavit in this application, fails to deny, and must thus be taken to admit, the Applicant's assertion at paragraph 45 of the founding affidavit in the interlocutory application that the Applicant's decision not to proceed with the interlocutory application immediately before filing its supplementary

founding affidavit was "premised on the understanding that the First Respondent would not rely on any redacted portions of the record".

2 The First Respondent also does not contest the Applicant's assertion in this paragraph that, by relying on the Minutes in his answering affidavit in the main application, and by refusing to disclose the Minutes, the First Respondent has not abided by this understanding.

The Applicant alleges that the First Respondent failed to abide by the Applicant's understanding. In the Applicant's correspondence with the First Respondent on 23 May 2013 which communicated its decision not to proceed with its compelling application before filing its supplementary affidavit, it was made clear that this decision was made on the understanding that the First Respondent would not be permitted to rely on redacted portions of the record in his defence of the application. The Applicant argues that this is an unsurprising approach for the Applicant to adopt given that it is not able to respond to allegations regarding documents or portions of which it has not had sight. This is also a common sense approach given that the Court would also not be able to test the veracity of these allegations.

The correspondence also made it clear that the Applicant still adopted the position that the First Respondent's approach to the record was a breach of Rule 53.

The understanding on which the Applicant elected not to proceed with its compelling application immediately was also communicated to the First Respondent in the supplementary founding affidavit in the main application.

The applicant points out that the First Respondent nowhere denies that this was the basis upon which the Applicant decided not to proceed with the compelling application before filing its supplementary founding affidavit. This is evidence of his recognition of the fact that this would, in any event, be an unsustainable position to adopt in the face of the clear enunciation of the approach adopted by the Applicant in the letter of 23 May 2013, and reiterated in its supplementary founding affidavit.

The Applicant submits, correctly in my view, that it is also clear from the above that the First Respondent has relied on the full content of the Minutes in his answering affidavit in the main application. The decision to rely on the Minutes is thus clearly at variance with the Applicant's understanding, and thus entitles the Applicant to proceed with its compelling application.

The Applicant has only proceeded with its compelling application in respect of the Minutes and has not claimed any other documents listed in its Rule 30A notice. This is consistent with the basis upon which the Applicant elected not to proceed with its compelling application before filing its supplementary founding affidavit.

The Applicant argues that the First Respondent cannot now claim, in the face of his conduct to the contrary of the Applicant's understanding, that the Applicant cannot proceed with the interlocutory application in respect of the Minutes.

Moreover, the approach adopted by the Applicant, which the First Respondent now takes issue with, was identical to that adopted in relation to the Diagnostic Review. When the First Respondent relied, in his answering affidavit, on the whole Diagnostic Review, which he had previously provided only in a heavily redacted form, the

Applicant wrote to the First Respondent and requested the production of an un-redacted copy of the Diagnostic Review (on a confidential basis), since without access to the whole content thereof, the Applicant would be unable to adequately reply to the First Respondent's answering affidavit. Pursuant to that request, the First Respondent duly provided an un-redacted copy of the Diagnostic Review on a confidential basis – and certainly did not contend that the Applicant was disentitled thereto by virtue of its "election".

It is argued there can be no proper basis for the First Respondent to persist in seeking to frustrate the attempt by the Applicant's legal representatives and independent experts to obtain access to un-redacted copies of the Minutes, which are sought on the same basis, and subject to the same conditions, as applicable to the Diagnostic Review.

The Applicant submits that given the above the Applicant is not constrained from proceeding with this interlocutory application in respect of the Minutes by an election it previously made not to proceed with such application. This decision was premised on an understanding by which the First Respondent did not abide.

The applicant correctly argues that the law on waiver is well established. The onus is upon a party asserting waiver to show that the other party, with full knowledge of his right, has decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. It is an onus not easily discharged. It has to be specifically alleged by the party relying on it, and proved.

It can hardly be said that the Applicant has expressly or by conduct plainly

inconsistent with the intention to enforce it, abandoned its right to seek production of the un-redacted Minutes.

The Applicant concludes its argument that none of the First Respondent's grounds for opposition to the Applicant's interlocutory application have any merit and prays for the relief set out in its notice of motion in this interlocutory application.

On behalf of the First Respondent it is argued it has the right to protect confidential information. The un-redacted portion of the minutes reveal that what was discussed at the meetings of the Monitoring Committee are matters relating to financial affairs of the fifth respondent, its strategic operational activities, including fleet planning on international, domestic and routes; withdrawal of certain of its routes, more particularly the withdrawal of the Cape Town to London route; the launch of new routes; key performance indicators of its operations as well as discussion of monthly management accounts.

It is argued that the discussions reflect matters of a confidential nature relating to the operations of the fifth respondent. However, as indicated above the Applicant merely asks for limited disclosure thereof, in the sense that only the legal advisors and independent experts will have access thereto. It will be remembered that the First respondent had the identical view regarding the Diagnostic Review and later disclosed it on the very basis the Applicant now seeks access to the Minutes. By making the Minutes part of the Rule 53 record, in my view, conceded the relevance thereof. On behalf of the Applicant an undertaking was made that the contents of the Minutes, as in the case of the Diagnostic Review, will not be shown to the Applicant.

The fear that confidential information will be disclosed is therefore unfounded. Furthermore the Minutes in its present redacted form will be of no use to the court hearing the matter. As correctly argued by the Applicant it will be at an unfair disadvantage. It need further be noted that this application is not opposed by SAA.

As indicated above the First Respondent takes tha stance that the Applicant waived its right now to apply for access to the Minutes.

It is argued that the Applicant did not immediately proceed to bring any application to compel disclosure of the un-redacted version of the minutes immediately after ten days of the first respondent's reply to the initial Rule 30A notice issued by the applicant on 6 May 2013.

Instead of bringing its application to compel, in the light of the first respondent's response, the applicant "*elected*" to prepare and deliver its supplementary affidavits, on 10 June 2013 as well as its replying affidavit on 4 November 2013, notwithstanding the claim of non-compliance. However, as indicated above, it is clear from the correspondence that there was most certainly not an unconditional waiver on behalf of the Applicant. The First Respondent has now breached the condition on which the election was made by relying on the redacted part of the minutes in his answering affidavit as shown above.

It is argued that the applicant does not claim at all that it was not able to formulate the supplementary and replying affidavits because of lack of access to the un-redacted version of the minutes, and that it has been materially prejudiced in that regard. On the contrary, it has prepared and delivered its supplementary and replying affidavits, without access to the un-redacted version of the minutes. In my view this does not detract from the disadvantage the Applicant and the court will be in not seeing material information the First Respondent had before him when the decision was made. As indicated the First Respondent did not attend the meetings concerned and must have had reliance to the Minutes.

It is argued that the provisions of Rule 53(1) relating to the production of the record are made to provide procedural benefits to the applicant, and it may elect the extent to which it wishes to enjoy the extent of the procedural benefits conferred upon it in terms of that Rule. In this case, the applicant has elected the extent to which it wishes to enjoy the benefits of Rule 53. It is an election which was made fully conscious of the alleged non-compliance by the first respondent. It must be held bound to that election. This argument does not take account of the fact that the Applicant "waived" its right under the condition that no-one will make use of the Minutes in the Rule 53 proceedings as the First Respondent clearly did.

It is argued that the paragraphs referred to by the Applicant on which it relies to indicate that the Minutes formed part of the information the First Respondent relied upon do not refer at all to the Minutes. They merely refer to monthly meetings which the First Respondent held with the officials of the fifth respondent about its financial

affairs. This argument is disingenuous. Not only did the First respondent not attend the meetings but I am at a loss to see what else the minutes would reflect other than what was discussed at the meetings.

I am not persuaded that the Applicant has waived its right to obtain access to the un-redacted version of the minutes.

The first respondent maintains that the redacted portion of the minutes was not relevant to enable the applicant to file its replying affidavit.

In motion proceedings such as the main application, affidavits constitute both pleadings, setting out the parties' causes of action and defences, as well as evidence tendered by them or on their behalf to support the causes of action or defences so pleaded. In the main application, the applicant has described its grounds of review, in both the founding and supplementary affidavits. It has tendered its evidence to support the grounds of review, without the need to rely or refer to the un-redacted version of minutes. In my view this argument does not address the fact that the Applicant does not have access to all the information the First respondent had at its disposal when making its decision. They will have to argue its case at a disadvantage. It is a matter of great public interest. R 5 Billion of tax payers money is at stake. Clearly all aspects of this case must be ventelated before the court without any of the parties being at a disadvantage.

I am not persuaded that the un-redacted version of the minutes is not relevant. It is submitted that there is no reason for the expert advisors of the applicant to gain access to the un-redacted version of minutes. There is no suggestion that they might file further expert testimony in the light of those minutes, once they have gained access. This question can only be answered once the Minutes are produced as its contents are at this stage only known by the Respondents.

It was argued on behalf of the First Respondent that in *Bridon International GMBH v International Trade Administration Commission and Others*, supra, paras 26 and 27 the SCA made it clear that where there are conflicting interests arising from the protection of confidential information, on the one hand, and the need to promote fairness in litigation, a Court is required to exercise its discretion to bring about a fair outcome, taking into account circumstances of each case.

It was submitted that the following considerations weigh heavily against disclosure of the un-redacted version of the minutes:

The applicant has already elected not to pursue legal remedies which were available to it to press for access to the un-redacted version of the minutes, it at time when that version of the minutes could have been necessary, in the interest of fair litigation. It elected not to do so. Instead it proceeded to prepare and file its subsequent affidavits, without any complaint of material prejudice. This case is fundamentally distinguishable from many others considered by the Courts, where

access was sought to the complete record before further affidavits were filed. I think this aspect has been fully dealt with above.

It is argued that the basis on which the applicant now wants to go back to the election it has previously made is simply unfounded as a matter of fact. This has also been dealt with above.

It is further argued that the purpose for which the applicant wishes to gain confidential access to the un-redacted version of the minutes is not to promote fair litigation. I cannot agree with this submission. Fair litigation presupposes a level playing field.

It is argued that the confidential basis on which the applicant wishes its legal representatives and expert advisors to gain access is not sufficient to protect the confidentiality of the minutes for two reasons:

The applicant's legal representatives and expert advisors have not executed written undertakings of confidentiality to afford the first respondent a reasonable comfort that they will maintain confidentiality of the minutes and the consequences of breach of the undertakings;

Secondly, the applicant has not undertaken that submissions which are sought to be made, will be made in a manner that protects confidentiality of the minutes concerned.

At this stage of the proceedings, those submissions will be made in documents which will be part of the public record, and are likely to be repeated in open Court where the applicant's employees and other interested members of the public will be entitled to be present.

As stated above it has been undertaken (in open court) that SAA's confidentiality will be maintained. I have no fear that respected members of the legal profession will not abide thereto. In any event, if the order prayed for in the notice of motion is granted they will be prevented by a court order to disclose information at variance thereto. The same applies to the Diagnostic Review which the First Respondent in the meantime disclosed on the exact basis the Applicant now seeks the Minutes to be disclosed.

I am satisfied that the applicant has made out a case for the relief claimed.

The following order is made:

1. The First Respondent is ordered to comply with the provisions of Rule 53 (1) (b) of the Uniform Rules of Court namely to dispatch to the Registrar and to

notify the Applicant that it had done so, within 5 (five) days of the date of the order, un-redacted copies of the Minutes that were the subject matter of this application;

2. That save for purposes of consulting with counsel or any independent experts, the Applicant's attorneys shall not disclose to any other party, including the Applicant, any part of the aforesaid documents.
3. The First respondent is ordered to pay the costs of the application including the costs consequent upon the employment of two counsel.