IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO.18647/2013

In the matter between:

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

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FILING SHEET

DOCUMENT TO BE FILED:

1. Submissions obo The Third Amicus Curiae in the Interlocutory Application.

DATED AT CAPE TOWN ON THIS 4th DAY OF AUGUST 2014.

BOWMAN GILFILLAN INC.

Per: _____
K VAN DE POL

Bowman Gilfillan,
SA Reserve Bank Building,
60 St George's Mall,
Cape Town

TO: **THE REGISTRAR**
High Court
Cape Town

AND TO: **WEBBER WENTZEL ATTORNEYS**
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SUBMISSIONS ON BEHALF OF THE THIRD AMICUS CURIAE

IN THE INTERLOCUTORY APPLICATION

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INTRODUCTION

1. The Applicant instituted review proceedings against the Respondent ("**the JSC**") for an order, *inter alia*, declaring that the decision taken by the JSC under section 174(6) of the Constitution to advise the President of the Republic of South Africa to appoint certain candidates, and not to appoint other candidates, as judges of this Honourable Court is unlawful and/or irrational and accordingly invalid.

2. The substantive relief sought in the application has not been heard as yet. This is (at least in part) due to a dispute that has arisen between the parties as to whether audio recordings and transcripts of deliberations after the interviews of the JSC on 17 October 2012 ("**the deliberations**") form part of the Record in terms of Rule 53(1)(b) ("**the Record**").

3. This dispute has culminated in the hearing of this interlocutory application. The interlocutory application was brought in terms of a notice under Rules 6(11) and 30A to compel the JSC to comply with the provisions of Rule 53(1)(b) and to lodge the full record and transcript of its proceedings.

4. The submissions advanced on behalf of the Third Amicus Curiae in these proceedings are pursuant to an Order granted by this Court on 8 July 2014 in terms whereof it was admitted as the Third Amicus Curiae in these proceedings

and granted leave to make written and oral submissions in both the interlocutory application and the main application.

5. In support of the relief the Applicant seeks in this interlocutory application, it relies on the following core submissions:

5.1. The "Record" did not include any minutes, transcripts, recordings or other contemporaneous records of the JSC's official deliberations after interviewing the candidates at the time of taking the decision.[1] As a result, the Applicant contends that the Record filed by the JSC was incomplete and non-compliant with Rule 53(1)(b).[2] According to the Applicant, the deliberations are a central aspect of the Record, the disclosure of which "is clearly required by Rule 53(1)(b)".[3]

5.2. The Applicant has been denied the benefit of Rule 53 and is forced to evaluate and argue the rationality, lawfulness and reasonableness of decision without key relevant documents.[4]

5.3. Disclosure of the deliberations: (a) furthers the constitutional right of access to information held by the State; (b) furthers the constitutional

[1] Applicant's Heads of Argument; par 5.
[2] Applicant's Heads of Argument; par 6 and 8.
[3] Applicant's Heads of Argument; par 8.
[4] Applicant's Heads of Argument; par 10.

requirements of transparency and accountability; (c) is a crucial tenet of access to courts and equality of arms.[5]

6. In response, the Third Amicus Curiae makes the following submissions:

6.1. The deliberations do not form part of the Record envisaged by Rule 53(1)(b).

6.2. Arguments in respect of openness, transparency, equality of arms, access to information as well as the objectives of Rule 53 must be considered in light of the overall process adopted by the JSC in respect of judicial appointments as well as the documents and information that has been made available as part of the Record. We submit that when construed in this way, there is no ground for complaint.

6.3. The JSC's approach in relation to non disclosure of deliberations is reasoned, justifiable and in accordance with several comparative jurisdictions.

RULE 53 (1)(B) AND ITS INTERPRETATION

7. Rule 53 provides as follows:

"53 Reviews

[5] Applicant's Heads of Argument; par 22.9. and 22.10.

(1) Save where any law otherwise provides, 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 shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

(Own Emphasis)

8. As stated, the Applicant proceeds from the premise that a record of deliberations in review proceedings "clearly" constitutes part of the Record in terms of Rule 53(1)(b). We submit that this is not the case as is apparent from the case-law which has, by no means yielded a consistent answer on this issue.

9. In **Johannesburg City Council v Administrator, Transvaal and Another (1) 1970 (2) SA 89 (T)** the Court held:

"Mr. Eloff, for the Administrator, has, however, questioned whether the phrase 'record of proceedings' in Rule 53 can properly be said to include the documents of the previous application. 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 has 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. A record of proceedings is analagous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it. Thus the previous decision of the Administrator, and the documents pertaining to the merits of that decision, could not have been otherwise than present to the mind of the Administrator-in-Executive-Committee at the time he made the second decision. If they were not, he could not have brought his mind to bear properly on this issue before him, which is of course denied by the respondents."

(Own Emphasis)

10. Although the question of recordings of deliberations was also not pertinently in issue in **MEC for Roads & Public Works, EC v Intertrade Two (Pty) Ltd 2006 (5) SA 1 (SCA)**, the SCA referred to the above *dictum* in coming to its conclusion that some of the documents that were sought may not be obtainable in terms of Rule 53 or Rule 35.[6] The SCA also accorded emphasis to the underlined portions of the *dictum* in the above quotation. We submit that what is clear from this judgment of the SCA is that there are limits to what is provided in a Record provided in terms of Rule 53(1)(b). In defining those limits, the SCA had regard and indeed applied to the *dictum* quoted above in the **Johannesburg City Council** matter.

[6] At par 15.

11. In **Lawyers for Human Rights v Rules Board for Courts of Law 2012 (7) BCLR 754 (GNP)**, the constitutionality of the Rules under the Promotion of Administrative Justice Act No. 3 of 2000 were at issue. In the order it made, the Court recognised the importance ensuring access to "every document that was before or available to the administrator when the administrator took the decision sought to be reviewed." (Own Emphasis)

12. Notwithstanding the abovementioned decisions, there have been other decisions where it was held that recordings of meetings and deliberations form part of the Record in terms of Rule 53.[7]

13. In our submission, the difference in the approaches taken by the various courts, is a clear indicator that the interpretation of Rule 53(1)(b), at least in respect of recordings of deliberations, is by no means a clear cut issue. Certainly the Rule, in its current form does not appear to yield a consistent answer to the question. This uncertainty is not helped on the facts of this matter given the *sui generis* nature of the JSC and the confidentiality of its deliberations. We submit that the following factors are relevant to determining whether the deliberations in this matter ought to form part of the Record:

    13.1. The purpose to be served by the Record provided pursuant to Rule 53(1)(b).

[7] See for example: Afrisun Mpumalanga (Pty) Ltd v Kunene NO 1999 (2) SA 599 (T) and City of Cape Town v South African National Roads Agency Ltd and Others (6165/2012) [2013] ZAWCHC 74 (21 May 2013) at par 47 and 48.

13.2. The *sui generis* nature of the JSC and the latitude afforded to it in determining its own processes.

13.3. The justification for the exclusion of deliberations from the Record.

13.4. The overall process of the JSC in respect of judicial appointments accords with the objectives of transparency and openness.

13.5. The position in comparative jurisdictions.

THE PURPOSE OF RULE 53(1)(B)

14. In considering the question at hand, we submit that the point of departure is the purpose to be served by Rule 53(1)(b). In **Motaung v Mukubela & Anor NNO; Motaung v Mohiba NO 1975 (1) SA 618 (O) at 625E**, the Court held:

> "To my mind Rule 53 (1) (b) is primarily intended to operate in favour and to the benefit of an applicant in review proceedings, who may be, or who is in fact, unaware of the full or true reasons for the decision he seeks to have corrected or set aside and who may, after a perusal of the record of the proceedings in question and for the reasons, if any, for the decision in issue, decide to amend, add to or vary the terms of his notice of motion and to supplement his supporting affidavit, in order to formulate his application in such manner as he deems necessary to properly set out therein the true facts and their legal effect and consequences."
>
> (Own Emphasis)

15. In **Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 661E – F**, the then AD held:

> "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 nor any knowledge of the reasons founding such 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) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. 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. In terms of para (b) of subrule (1) the official concerned is obliged to forward the record to the Registrar and to notify the applicant that he has done so. Subrule (3) then affords the applicant access to the record. (It also obliges him to make certified copies of the relevant part thereof available to the Court and his opponents. The Rule thus confers the benefit 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.) More important in the present context is subrule (4), which enables the applicant, as of right and without the expense and delay of an interlocutory application, to 'amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit'. Subrule (5) in turn regulates the procedure to be adopted by prospective opponents and the succeeding subrules import the usual procedure under Rule 6 for the filing of the applicant's reply and for set down."
>
> (Own Emphasis)

16. In light of the above *dicta*, we submit that a core question is whether, in the absence of a record of the deliberations, the Applicant is being constrained to launch a review application "in the dark". This is clearly not the case. Indeed, it appears to be common cause that the JSC dispatched to the Registrar "6 lever arch files which contain all the documentation and transcripts of the proceedings which took place and resulted in the judicial appointment of five candidates to this court."[8] There also appears to be no dispute that the Record includes: (a) reasons for the JSC's decision to recommend certain candidates

[8] Record: Page 45; par 16 read with page 70; par 21.

and not to recommend others; (b) transcripts of the candidates' interviews; (c) the candidates' applications for judicial appointments; (d) comments on the candidates from professional bodies and individuals; and (e) other related submissions and correspondence.[9] The JSC further explains that the reasons compiled for the Record contain the views which were expressed by the members of the JSC during the course of deliberations.[10]

17. Against this background, we submit that absent a record of the deliberations, the Applicant is not being "deprived of the procedural and substantive safeguards and tools which are the very rationale for Rule 53."[11] Contrary to the Applicant's contention, it is not forced to evaluate and argue the rationality, lawfulness and reasonableness of the impugned decisions without key relevant documents.[12] On the contrary, it has at its disposal six lever arch files which appear to contain all information relevant to the impugned decisions, save for the deliberations. The objective and purpose of the Rule has thereby been served.

THE JSC AND ITS REGULATORY FRAMEWORK

18. The JSC is a *sui generis* entity tasked with an important role in the appointment[13] and removal of judges.[14] It may also advise the national

[9] Record: Page 46; par 17 read with page 70; par 21.
[10] Record: Page 47; par 20; page 48, par 26.2; page 51, par 28.1.
[11] Applicant's Heads of Argument; par 9.
[12] Applicant's Heads of Argument; par 10.
[13] Section 174 of the Constitution.
[14] Section 177 of the Constitution.

government on any matter relating to the judiciary or the administration of justice.[15]

19. In terms of section 178 (4) of the Constitution, the JSC has the powers and functions assigned to it in the Constitution and national legislation.

20. It is apparent from section 178(6) of the Constitution that while by no means unaccountable, the JSC is given a wide degree of latitude in respect of its processes. In terms thereof, the JSC may determine its own procedure but its decisions must be supported by a majority of its members. As regards the interpretation of this section, the SCA has held that although section 178(6) of the Constitution allows the JSC a wide discretion to determine its own procedure, that procedure must, as a matter of principle, enable the JSC to comply with its constitutional and legal obligations. If it does not, the procedure must be changed.[16]

21. The Judicial Service Commission Act 9 of 1994 ("**the JSC Act**") provides in section 5 that the Minister, must, by notice in the Gazette, make known the particulars of the procedure which the JSC has determined in terms of section 178 (6) of the Constitution.

[15] Section 178(5) of the Constitution.
[16] Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA) at par 47.

22. Pursuant thereto, the procedure of the JSC was published in the Government Gazette on 27 March 2003[17] (**"the Procedure"**). Significantly, the prescribed procedure in respect of the appointment of judges to the High Court provides that after the completion of the interviews, the Commission "shall deliberate in private and shall, if deemed appropriate, select the candidates for the appointment by consensus or, if necessary, majority vote." (Own Emphasis)

23. We emphasise the following in respect of the regulatory framework:

23.1. First, when candidates applied for judicial vacancies in 2012 they did so in the knowledge that the deliberations in relation to their appointment would occur in private. This was the prescribed procedure.

23.2. Second, when members of the JSC deliberated in relation to the applicants for appointment in 2012, they did so in the knowledge that their comments and exchanges were being made "in private". Again, this was on account of the prescribed procedure.

23.3. Third, given that the Procedure prefers a selection by consensus it stands to reason that deliberations are frank, robust and uninhibited.

[17] Government Gazette No. 24596, 27 March 2003.

23.4. Fourth, notwithstanding the Procedure having been in place since March 2003 there has never been a challenge to the requirement that deliberations occur in private.

23.5. Fifth, despite the relief sought in the interlocutory application there is still no challenge to the Procedure. This, notwithstanding the fact that the JSC is responsible for determining its own procedure.

OPENNESS AND TRANSPARENCY IN THE OVERALL APPOINTMENT PROCESS

24. The transparency and accountability of the JSC process cannot be determined solely on the basis of whether its deliberations are subject to disclosure or not. It is submitted that the overall process in respect of judicial appointments must be considered in order to determine whether there is merit to the Applicant's complaints in respect of openness, transparency, equality of arms and access to information.

The procedure for the appointment of Judges of the High Court

25. The following aspects of the Procedure of the JSC in respect of Judges of the High Court warrant highlighting:

25.1. A procedure is prescribed in respect of calling for nominations.[18] A nomination shall consist of[19]:

[18] Clause 3(b), (c) and (d).

25.1.1. A letter of nomination which identifies the person making the nomination, the candidate and the division of the High Court for which he or she is nominated.

25.1.2. The candidate's written acceptance of the nomination.

25.1.3. The detailed curriculum vitae of the candidate which shall disclose his or her formal qualifications for appointment as prescribed in section 174(1) of the Constitution, together with a questionnaire prepared by the Commission and completed by the candidate.

25.1.4. Such further pertinent information concerning the candidate as he or she or the person nominating him or her wishes to provide.

(It appears that the entire nomination forms part of the Record provided by the JSC.)

25.2. After the closing date, the short list compiled and all the material received on short-listed candidates shall be distributed to all the members of the Commission.[20]

25.3. Thereafter, the Commission interviews all short-listed candidates.[21]

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[19] Clause 3(c).
[20] Clause 3(g).
[21] Clause 3(i).

25.4. The interviews shall be open to the public and the media subject to the same rules as those ordinarily applicable in courts of law and shall not be subject to a set time-limit.[22]

25.5. After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidate for appointment by consensus or, if necessary, majority vote.[23]

25.6. The Commission shall advise the President of the name of the successful candidate.[24]

25.7. The Commission shall announce publicly the name of the successful candidate.[25]

The criteria for the selection of Judges

26. In addition to regulating its procedure, the JSC has also sought to ensure transparency in respect of certain substantive elements regarding judicial appointments. In this regard, the JSC has adopted a summary of the criteria used by it when considering candidates for judicial appointments ("**the Selection Criteria**").[26] The Preamble to that document states as follows:

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[22] Clause 3(j).
[23] Clause 3(k).
[24] Clause 3(l).
[25] Clause 3(m).
[26] These are attached as "FA8 to the founding affidavit in the main application.

> "At its Special Sitting held, in Johannesburg on 10 September 2010, the Judicial Service Commission resolved, after a lengthy debate and review of the Guidelines that had been adopted in 1998, to publish criteria used when considering candidates for judicial appointments. This decision is in line with the JSC's principle that the process of judicial appointments should be open and transparent to the public so as to enhance public trust in the judiciary.
>
> The following criteria are used in the interview of candidates, and in the evaluation exercise during the deliberations by the members of the Commissions: ...."

The duty to give reasons and the purpose served thereby

27. In addition to the JSC's own Procedure and Selection Criteria, the prescripts of transparency and accountability have been further enhanced in **Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA)** where the SCA held:

27.1. Since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment, it follows that, as a matter of general principle, it is obliged to give reasons for its decision not to do so.[27]

27.2. The JSC is, as a general rule, obliged to give reasons for its decision not to recommend a particular candidate if properly called upon to do so. The Court expressly refrained from expressing any view as to how extensive these reasons should be or who would be entitled to request them, or under what circumstances such a request could legitimately

[27] At par 51.

be made. That, the Court held, would depend on the facts and circumstances of every case.[28]

27.3. The purpose to be served in the giving of reasons were, according to the SCA[29] articulated with admirable clarity by Lawrence Baxter Administrative Law (1984) at 228 in the following statement, which was endorsed by Schutz JA in **Transnet Limited v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA) (2001 (2) BCLR 176) para 5**:

> "In the first place, a duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conductive to public confidence in the administrative decision-making process. Thirdly — and probably a major reason for the reluctance to give reasons — rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.'

28. The result of the aforegoing is that transparency and openness of the JSC process is ensured by:

28.1. The open process in respect of calling for nominations.

[28] At par 45.
[29] At par 46.

28.2. The publication of objective criteria in respect of the selection of judges.

28.3. A public interview process.

28.4. An obligation to given reasons.

28.5. The content of the Record that has been filed.

29. Construed as such, we submit that non disclosure in respect of only the deliberations cannot taint the entire selection process as being non transparent.

THE JUSTIFICATION FOR NON DISCLOSURE

30. We respectfully submit that there are important policy reasons for the confidentiality procedure. These are as follows:

30.1. First, as contended for by the JSC, public disclosure of these deliberations will hinder the openness and frankness of the debate amongst the members of the JSC. Members of the JSC are likely to fear the repercussions of speaking their mind about a particular candidate's suitability – for example, the representative of the advocate's profession on the JSC would likely be more inclined to give a forthright negative opinion about a particular candidate's suitability if

his or her opinion was to remain confidential than if his or her opinion was to become known to the potential candidate who may ultimately be appointed to the bench where that advocate appears.

30.2. Second, the result of this stunted level of debate is that the real decision-making involved in judicial selection is likely to happen outside the formal constitutionally created arena of the JSC. This, in turn will be open to informal manipulation. Public disclosure of the JSC's deliberations is likely to result in a situation where these deliberations are made up of predominantly perfunctory and cursory opinions and sham debate that is shared only for the sake of appearances.

30.3. Third, there is the concern that potential candidates will be deterred from applying for the vacancies if, in addition to the already public interviews, the content of the JSC's deliberations becomes public knowledge. While it is correct, as the Applicant submits that each candidate accepts a high level of scrutiny to act as a safeguard against the appointment of unsuitable candidates,[30] the disclosure of deliberations (no matter how scathing) would, in our submission act as a potential deterrent to the application procedure. There can be no dispute that providing reasons is indeed very different from providing a record of deliberations in this regard. In the latter instance, would-be candidates may be wary of the potential professional reputational

[30] Record: page 15; par 36.

damage that would result from the public disclosure of negative opinions given by members of the Respondent.

30.4. Fourth, an unintended consequence of an order in favour of the Applicant in these proceedings is that recordings, which are presumably made for the purposes of facilitating a reasoned process (including the compilation of reasons) will no longer occur. This is likely to impede as opposed to enhance the objectives of reasoned decision-making within the JSC.

THE COMPARATIVE POSITION

31. The holding of deliberations in private is a common trend in several foreign jurisdictions. The JSC, in its heads of argument, has provided a comprehensive account in relation to: (a) the USA; (b) Canada; (c) the United Kingdom; (d) Australia; (e) the Commmonwealth. We accordingly do not traverse that ground herein. We do however provide the following examples:

32. In the **Bahamas**, Judicial and Legal Service Commission Regulations allow for the record to be privileged, if so certified by the Governor-General to be against the public interest for it to be disclosed:

> "Any report, statement of other communication or record of any meeting, inquiry or proceedings which the Commission may make in exercise of its functions or any member may make in performance of his duties, or in discharge of any duty to the

> Governor-General or to any public officer, shall be privileged in that its production may not be compelled in any legal proceedings if the Governor- General certifies that such production is not in the public interest."[31]

33. In **Jamaica**, the Judicial Service Commission Regulations, 1961 provide that the secretary of the commission is under a duty to record minutes of all the commission's meetings.[32] Copies of these minutes, as confirmed at a subsequent meeting or by the members following circulation, must "as soon as practicable thereafter" be forwarded to the Governor-General. The regulations do not expressly address the public dissemination or otherwise of these minutes, but information and documentation provided to or by the commission is subject to privilege. Except with the consent of the Governor-General, evidenced in writing, "a person shall not in any legal proceedings produce or be permitted to give secondary evidence of the contents or nature of any document, communication or information" which is "addressed, made or given" between the Commission and the Governor-General and various other officials.[33]

34. In **Malaysia**, the governing legislation[34] specifically provides for confidentiality – precluding any members of the Commission, officers and servants of the Commission, whether during or after their tenure or employment, or any other person with any means of access, from disclosing "any information or

[31] Judicial and Legal Service Commission Regulations; Regulation 7.
[32] Regulation 7(1).
[33] Regulation 11. These officials are the Chief Personnel Officer, a Permanent Secretary or Head of a government department. As with many other jurisdictions, the Jamaican JSC is involved not only in the appointment of judges, but also other officials involved in the administration of justice.
[34] Laws of Malaysia, Act 695, Judicial Appointments Commission Act 2009.

document obtained by him in the course of his duties."[35] On ceasing to be a member of the Commission, there is an obligation to return "all papers and documents entrusted to him by virtue of his membership of the Commission."[36] Non-compliance with these provisions is a criminal offence.[37]

35. In **Rwanda**, members of the Superior or High Council of the Judiciary, as well as any other individual attending a meeting in any capacity, are obliged to maintain the secrecy of the deliberations.[38]

36. In **Tanzania,** unless the Chairman of the Judicial Service Commission gives written consent, legal privilege attaches to any communications between the JSC and the Public Service Commission, Police or Prisons Service; and between members of the commission.[39] There is also a prohibition against the unauthorised publication disclosure of any information or documentation obtained in the course of exercising duties as a member of the commission.[40] Minutes must be kept of the business conducted at all meetings of the commission.[41]

37. In **Zambia,** any report, statement or other communication or record of any meeting, inquiry or proceedings of a Commission relating to the exercise of its

[35] Section 32(1) – (2).
[36] Section 32(3).
[37] Section 32(4).
[38] Article 17 of the Organic Law No. 2/2004 Determining the Organisation, Powers and Functioning of the Superior Council of the Judiciary. Accessed on: http://lip.alfaxp.com/lip/AmategekoDB.aspx?Mode=r&pid=7518&iid=1209&rid=30692723
[39] The Judicial Service Act, 2005, section 13.
[40] Section 17(1).
[41] First Schedule to the Act, section 4 (1).

functions or any report, statement or other communications or record made by a member in the course of his duties, and any application form, report or other communication dispatched to the Commission in connection with the exercise of its functions, and in the possession of the Commission" is privileged, unless the Chairman certifies that such production is not against the public interest.[42]

CONCLUSION

38. The relief sought in this interlocutory application gives rise to novel and difficult questions. The adjudication and determination of this matter cannot occur without proper regard to: (a) the transparency of the overall selection process of the JSC; (b) the effects of disclosure on the work of the JSC and the inevitable impact on candidates making themselves available for judicial selection; (c) the basis on which the 2012 deliberations were conducted and indeed the basis on which candidates applied for vacancies on the Bench at that stage; (d) the extremely limited purpose that access to the deliberations would serve in mounting an effective review given the content of the Record that has been filed; and (e) the objectives of Rule 53(1)(b).

39. Properly considered, the Third Amicus Curiae submits that should the relief sought herein be granted, the consequence would be to impede (as opposed to advance) the constitutional and legislative imperatives of the JSC. There are clearly valid and legitimate reasons for non disclosure of the deliberations;

[42] Chapter 259, The Service Commissions Act, section 15.

these reasons are by no means unique to South Africa as is indicated by the position taken in many foreign jurisdictions.

KARRISHA PILLAY

Counsel for the Third Amicus Curiae

1 August 2014

Chambers

Cape Town