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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Appeal Case No: 145/2015

WCC Case No: 8647/13

In the appeal between:

THE HELEN SUZMAN FOUNDATION **Appellant**

and

JUDICIAL SERVICE COMMISSION **Respondent**

POLICE AND PRISONS CIVIL RIGHTS UNION **First *amicus curiae***

NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS **Second *amicus curiae***

DEMOCRATIC GOVERNANCE AND RIGHTS UNIT **Third *amicus curia***

FILING NOTICE

Documents filed herewith: Respondent's Heads of Argument

DATED AT CAPE TOWN ON THIS 4th DAY OF AUGUST 2015.

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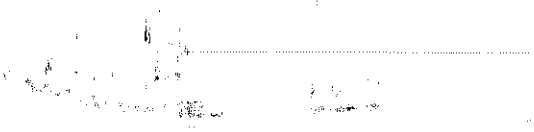

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RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. This is an appeal, with the leave of this court, against the whole of the judgment and order of the court *a quo,* in terms of which it dismissed the appellant's application before it, with no order as to costs[1].

2. The application in the court *a quo* was an interlocutory one, in terms of Rules 6 (11) and 30A, for an order directing the respondent (also referred to in these

[1] Appeal Record: p 111

heads of argument as 'the JSC') to despatch to the registrar the full record of the proceedings sought to be reviewed, including the audio recording and any transcript, of the deliberations of the JSC, after the interviews on 17 October 2012. The appellant also sought a costs order against the JSC, on the scale as between attorney and own client[2].

3. In the present appeal the appellant persists with seeking an order as sought in the court *a quo,* including a punitive costs order, the latter notwithstanding its counsel having abandoned such prayer in oral argument in the court *a quo,* and having indicated that, if successful, the appellant sought only a costs order on the ordinary scale.

4. Curiously, and despite the appeal relating to an interlocutory application, the appellant saw fit not to place before this court the main application, to which its interlocutory application relates[3]. It did so only after the JSC requested that the main application be placed before this court.

5. In its heads of argument filed in this court, the appellant continues its unjustified attack on the integrity of the JSC in relation to the latter not disclosing its confidential deliberations. It does so in circumstances where, at best for it, the issue of whether a record of deliberations forms part of a Rule 53 record is unclear, and a matter of great contestation, as is evidenced by this case. The appellant would, without any facts to support such a conclusion, have this court believe that the JSC has acted deliberately in

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[2] Appeal Record: p 1-2

[3] An application is incidental to pending proceedings, the language used in Rule 6(11), if it is subordinate or accessory to while at the same time being distinct from the main proceedings. See: *Massey-Ferguson (South Africa) Limited v Ermelo Motors (Pty) Ltd* 1973 (4) SA 206 (T) at 214G; *Antarers (Pty) Ltd v Hammond* 1977 (4) SA 29 (W) at 30 D.

order to flout the appellant's rights and to obstruct the courts' determination of this matter. These attacks on the JSC's conduct and integrity are entirely baseless.

6. The appellant's case is a blunt one: it contends that, in any review against it, regardless of the basis therefor, and without regard to the merits thereof, the JSC must, as a matter of course, disclose all of its confidential deliberations. It advances this case without regard for the constitutional and legislative context in which the JSC carries out its function of recommending the appointment of judges, and it is dismissive of any contention on the part of the JSC that its peculiar role, and the constitutional and legislative context in which it operates, warrants treatment different to that accorded any other administrative body.

7. The appellant also argues that a Rule 53 record must always include the deliberations of the body whose decision is sought to be reviewed, and characterises the authority relied upon by the JSC for the contrary proposition as being outdated and unpersuasive. In so doing, it ignores the fact that such authority includes persuasive authority of the Supreme Court of Appeal ('SCA'), as also a judgment strongly relied upon by itself in these proceedings[4].

8. The appellant relies on trite principles of law, relating to the completeness of the record in order to ensure that reviews are properly ventilated before the courts, and so that the parties have equal access to all relevant information, without, however, explaining how these principles require the disclosure of

[4] Lawyers for Human Rights v Rules Board for Courts of Law and Another 2012 (7) BCLR 754 (GNP) (11 April 2012)

deliberations, let alone confidential deliberations. The appellant also relies upon the open justice principle, which is clearly inapplicable to the question before this court.

9. In these heads of argument we deal with the following:

9.1. The meaning and extent of the Rule 53 record;

9.2. Is the JSC entitled to keep its deliberations confidential?

9.3. The JSC's deliberations are not relevant to the appellant's review;

9.4. The open justice principle;

9.5. Comparative practice;

9.6. Costs;

9.7. Appropriate order.

I THE MEANING AND EXTENT OF THE RULE 53 RECORD

10. The classic statement of what does, and does not, form part of a Rule 53 record appears in *Johannesburg City Council v The Administrator, Transvaal and Another (1)*.[5] Marais J held as follows:

[5] 1970 (2) SA 89 (T).

> *"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."*[6] (Emphasis supplied).

11. In the more than four decades since, this dictum has been repeatedly quoted with approval by our courts, including in the post-constitutional era.[7]

12. In *MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd*[8] the SCA was concerned with an application in terms of the

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[6] Ibid at 91H-92A.
[7] See, for example, *Free State Steam & Electrical CC v Minister of Public Works and Others* [2008] ZAGPHC 256; *Lawyers for Human Rights v Rules Board for Courts of Law and Another* [2012] ZAGPPHC 54; [2012] 3 All SA 153 (GNP); 2012 (7) BCLR 754 (GNP) at para 22; and *Pieters v Administrateur, Suidwes-Afrika, en 'n Ander* 1972 (2) SA 220 (SWA) at 227B-C

Promotion of Access to Information Act 2 of 2000 ("PAIA"). The information sought included "*Minutes of all other departmental meetings and relevant committee meetings at which the tenders in relation to the contracts were considered and evaluated.*"[9] The appellant argued that it was not obliged to provide the documents under PAIA, as the respondent could in any event obtain them by way of Rule 53.

13. In upholding the claim for the documents under PAIA, Maya JA quoted the same passage from *Johannesburg City Council* as we have above, and, crucially, emphasised the same portion thereof as we have emphasised above[10].

14. She referred to the aforesaid dictum from *Johannesburg City Council*, and emphasised the part thereof emphasised above, as part of her reasoning as to why the documents might not have to be furnished as part of the Rule 53 record.

15. The appellant dismisses *Intertrade* as unpersuasive[11] and as being clearly obiter, and palpably not an endorsement of *Johannesburg City Council*[12].

16. These contentions are without merit.

17. Firstly, the SCA, as pointed out above, emphasised the portion of the dictum in *Johannesburg City Council* to the effect that deliberations do not form part of the Rule 53 record. It is hard to conceive how it could do so without intending to support such dictum as a correct statement of the law.

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[8] 2006 (5) SA 1 (SCA).
[9] Ibid at para 7.
[10] Ibid at para 15.
[11] Appellant's heads of argument: para 25
[12] Appellant's heads of argument: para 54

18. Secondly, and to the extent that the SCA may have expressed itself in tentative language, this relates not to the aforementioned statement of the law, but, self-evidently, to the question of whether the particular documents at issue in *Intertrade* fell within the record, as properly defined, or not. That question, which requires an application of the law to the facts, is one that the SCA clearly did not apply its mind to.

19. The appellant characterises the *Johannesburg City Council* approach as being '*from 1970 [and] one that has been overtaken by constitutional democracy and the associated principles of transparency and accountability that now underpin Rule 53*'[13].

20. In so characterising the *Johannesburg City Council* approach, the appellant however ignores the fact that the judgment, and the dictum therefrom relied upon by the JSC, has been endorsed, in recent times, not only in *Intertrade* but in a decision steeped in constitutionalism and upon which the appellant itself relies heavily. In *Lawyers for Human Rights v Rules Board for Court of Law and Another* (supra), the court introduced this section of its judgment as follows:

> *"I deem it expedient at this stage to refer to a few decisions in which our Courts have dealt with the purpose, need and effect of the provisions of, particularly, Rule 53."*[14]

[13] Appellant's heads of argument: para 47
[14] Ibid at para [22]

21. The court then referred to dicta from *Jockey Club of South Africa v Forbes*[15] and *Johannesburg City Council* as setting out the legal position in relation to a proper interpretation and understanding of Rule 53. In so doing, the court quoted the same passage from *Johannesburg City Council* as is relied upon by the JSC, and as was endorsed in *Intertrade*.

22. It is indisputable that the court in *Lawyers for Human Rights* was endorsing the statement from *Johannesburg City Council* as to what constituted the record of proceedings as being a correct statement of the law, which specifically included the part excluding deliberations from the record.

23. What is significant is that, notwithstanding the deliberations being excluded from the record, the court in *Lawyers for Human Rights* nonetheless concludes 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."*[16]

24. It is unsurprising that, in both *Intertrade* and *Lawyers for Human Rights*, the SCA and the High Court had no difficulty in construing Rule 53, in a post-constitutional era, as nonetheless excluding deliberations from the ambit of the record.

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[15] 1993 (1) SA 649 (A)
[16] Ibid at para [23]

25. This is because excluding deliberations from the record does not impinge in any manner upon an applicant's fair trial rights, his or her right to an equality of arms in the litigation, and to accountability and transparency on the part of the organ of state being reviewed. This is because, in accordance with the long-held principle set out in *Johannesburg City Council,* an applicant is entitled to '*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] include[s] every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially.*'[17]

26. Armed with the record, so interpreted, an applicant is able to challenge the decision-maker, on an equal footing, and in a manner that enables any challenge that it wishes to raise, to be properly ventilated. The need for the record to include the deliberations simply does not arise, and is certainly not compelled by constitutional considerations.

27. This is of course not to say that, in appropriate circumstances, a body whose decision it is sought to review may not have to disclose its deliberations or at least some aspects thereof. For example, the JSC is required, in terms of section 178 (6) of the Constitution, to take decisions with the support of a majority of its members. If a challenge was launched that a majority of members had not supported a particular decision, disclosure of parts of the deliberations, including an indication of the number of members who had voted in support of a particular decision, would clearly be warranted, as the best evidence to refute the attack. Similarly, s 178 (1) of the Constitution

[17] Ibid

requires the JSC to be composed in a particular way, *inter alia,* when making a decision relating to a specific High Court. If it was alleged that the JSC's composition was deficient when it made a particular decision, once again disclosure of those parts of the deliberations to establish who was present, would be warranted, and would be the best, if not the only, way of refuting the attack. As we discuss hereunder, this however is not a case that warrants the disclosure of any part of the JSC's deliberations.

28. The appellant also relies upon what it calls a welter of provincial authority pointing clearly in the direction of including deliberations in the Rule 53 record[18]. We deal briefly with the authorities relied upon by the appellant, and demonstrate that those judgments are unpersuasive and are based, in the main, upon the particular legislative provisions pertaining to the bodies whose decisions were being reviewed.

29. Firstly, in *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others*[19] Southwood J held that an applicant was entitled to a video recording of the deliberations of a gambling board. It is clear from the following passages that Southwood J was motivated primarily by the provisions of the legislation in issue, and that he was not rejecting *Johannesburg City Council* as being an incorrect statement of the law:

> *"In terms of s11(1) of the Act the Board shall, subject to ss(2): function in a transparent and open manner ...In an open and transparent*

[18] Appellant's heads of argument: para 59
[19] 1999 (2) SA 599 (T)

system such as contemplated by the Act, the minutes should always be disclosed unless there is a legally justifiable reason for withholding disclosure ... Disclosure of the minutes of the deliberations is therefore necessary if the requirement in S11 (1) that the Board function in an open and transparent manner be given practical expression."[20]

(Emphasis supplied)

30. Secondly, in *Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape and Others*[21] Leach J adopted a similar approach to that of the court in *Afrisun.* As in *Afrisun*, the case concerned the review of a decision of a gambling board, and as in *Afrisun,* the legislation required the board to conduct its affairs in an open and transparent manner. The question was whether the applicant was entitled to know the identity of the individual members of the Board who had completed the individual score sheets.

31. Unsurprisingly, the court ordered the Board to disclose the identity of the individual scorers. Its reasoning was based on the Board's statutory and constitutional obligations to act openly and transparently.[22]

32. Here, as we explain in the next section, the constitutional and legislative scheme is different. For reasons acknowledged, not only in our constitutional and legislative framework, but, we submit, universally, the deliberations of a body nominating officers for judicial appointment should be permitted to take place confidentially.

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[20] Ibid at 631 A – 632 B
[21] 2010 (1) SA 228 (E)
[22] Ibid at para [20]

33. *Ekuphumleni* accordingly does not constitute a rejection of the approach in *Johannesburg City Council,* which is not referred to in the judgment, or the endorsement thereof in *Intertrade,* which is referred to but not on this point.

34. Thirdly, appellant relies on the judgment of Binns-Ward J in *City of Cape Town v South African National Roads Agency Ltd and Others*[23].

35. The appellant has quoted paragraphs [48] and [49] from *SANRAL,* where the learned Judge expressed doubt as to the correctness of *Johannesburg City Council* insofar as it stated that deliberations were excluded from the record.[24]

36. It is clear from the judgment in *SANRAL* that predominant for Binns-Ward J as to what formed part of the record was the question of relevance[25]. That the court remained alive however to the distinction between the decision and the proceedings leading up to the decision emerges from the following paragraph in the judgment that is not referred to by the appellant:

> *"On the approach annunciated in the passage from Johannesburg City Council, quoted above, documentation showing the authorisation of the decision by SANRAL's Board would fall to be regarded as the decision rather than that of the proceedings leading to the decision and thus arguably not properly part of the record. However, inasmuch as it is clear from the provisions of s18 (5) (d) of the SANRAL Act that a declaration in terms of s27 (1) of the Act is a non-delegable function of the Board, and inasmuch as s17 of the Act requires the Board to keep*

[23] [2013] ZAWCHC 74.
[24] Appellant's heads of argument: para 44
[25] Ibid at para [47]

> *a record of its proceedings, amongst other reasons, for use as evidence in any proceedings before a court of law, it seems axiomatic that any pertinent record of the board's proceedings in relation to the impugned declaration is relevant and should have been produced as part of the record of proceedings on the indicated generous approach to an interpretation of the term in Rule 53."*[26] (Emphasis supplied)

37. Thus, although, of the judgments relied upon by the appellant, SANRAL comes closest, it would appear that even in that case, the court did not lay down a general and inflexible rule that deliberations always had to be included as part of the review record. Rather, given the grounds of review, as also the legislative backdrop against which SANRAL operated, the court found that its deliberations had to be included in the record.

38. Fourthly, in *Comair Limited v The Minister of Public Enterprises and Others*[27] the court, after quoting the passage from *Johannesburg City Council* without the portion excluding deliberations from the record, held that Rule 53 entitled an applicant to access deliberations. The court did not support this finding, other than to refer to *Afrisun*.

39. The appellant also submits that its position regarding the content of the record is further bolstered by the recent decision of this court in *City of Cape Town v South African National Roads Authority Limited and Others*[28]. That case however had nothing to do with the question of the content of the record, and in particular, with whether deliberations form part thereof, but dealt with the

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[26] Ibid at para [51]
[27] 2014 (5) SA 608 (GP).
[28] 2015 (3) SA 386 (SA)

question of whether court proceedings should be open, i.e. the right to open justice. It was in that context that the court found that such right included the right to have access to the papers and written arguments which are an integral part of court proceedings.[29]

40. It is submitted that a conspectus of the relevant case law reveals that the distinction between the record that served before a body whose decision is sought to be reviewed, and the deliberations of that body, remains, and has survived the commencement of the constitutional era.

41. This is not to say that, in appropriate cases, a body whose decision is sought to be reviewed may not have to disclose its deliberations. However, that would not be the norm. Furthermore, and as we deal with in the next section, before the deliberations of a body such as the JSC must be disclosed, extremely compelling considerations would have to be brought to the fore, in order to outweigh the JSC's legitimate claims to the confidentiality of its deliberations when it comes to recommending judicial appointments.

II IS THE JSC ENTITLED TO KEEP ITS DELIBERATIONS CONFIDENTIAL?

42. Uniquely, the Constitution itself is the source of the JSC's power to regulate its process. S178 (6) of the Constitution provides:

> *"The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members."*

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[29] at para 19

43. Regulations have been promulgated that regulate the process to be followed by the JSC in respect of the recommendation of persons for judicial appointment[30]. Regulation 3(j), which deals with the appointment of High Court judges, provides: "*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.*"[31]

44. The appellant submits that the regulations concern only the process to be followed by the JSC in performing its functions, and 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[32]. The problem with this submission is that, if accepted, it would mean that, in every challenge to a decision of the JSC in relation to the recommendation of judicial appointments, the JSC would have to disclose its deliberations in full. This would of course negate the whole purpose and effect of the regulations, which are that the deliberations take place in private. The appellant provides no justification as to why the regulations should be negated in such a summary and invariable fashion.

45. The appellant next submits that the JSC's reliance on the fact that it is allowed to regulate its own process, is as misplaced as it is inconsequential. Any attempts at self-regulation, so it argues, must be within the existing rules of

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[30] GN R114 in GG 16952 of 2 February 1996, as amended by GN R795 in GG 18059 of 13 June 1997 GN R402 in GG 23277 of 5 April 2002.

[31] Regulation 2(j), which concerns the appointment of Constitutional Court judges is substantially similar. It reads: "*After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates to be recommended for appointment in terms of section 99(5) of the Constitution by consensus or, if necessary, by majority vote.*"

[32] Appellant's heads of argument: para 100

court, and with due regard for the constitutional principles binding the JSC. The JSC's response to this argument is as follows:

45.1. The framers of the Constitution saw fit, uniquely, to allow the JSC to determine its own procedure, subject only to the requirement that its decision must be supported by a majority of its members[33].

45.2. The JSC Act and the regulations are based on the aforementioned provision in the Constitution. They have not been challenged by the appellant.

45.3. Appellant provides no basis or authority for its contention that the constitutionally ordained procedures of the JSC must comply with the existing rules of court. On its face, and given their respective provenance, the rules that the JSC has adopted for itself will enjoy, at least, equal weight to that of the rules of court. However, and as dealt with above, the rules of court, so the JSC contends, properly construed, are not in conflict with the JSC's procedures.

45.4. The JSC accepts that it's processes must be in accordance with the constitutional principles that bind it and all other organs of state. However, given the extent of the openness and transparency within which the JSC operates, and particularly having regard to comparative practice abroad, the JSC conducts itself in accordance with constitutional norms.

The JSC's interest in confidentiality

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[33] S 178 (6)

46. The confidentiality attaching to the deliberations of the JSC is already recognised in legislation. First, as noted above, the confidentiality of JSC proceedings is protected by the JSC Act read with the regulations.

47. Secondly, the Promotion of Access to Information Act 2 of 2000 ("PAIA") exempts deliberations of the JSC. Section 12(d) provides: "*This Act does not apply to a record relating to a decision referred to in paragraph (gg) of the definition of 'administrative action' in section 1 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law.*"[34]

48. Neither PAIA or PAJA have been challenged as being unconstitutional, by virtue of the fact that proceedings of the JSC in relation to the nomination, selection or appointment of judicial officers is not covered by either statute.

49. The Supreme Court of Appeal and the High Court, too, have recognised the need for at least some confidentiality in JSC proceedings. In *Judicial Service Commission v Cape Bar Council*, Brand JA accepted that the JSC: (a) was entitled to disclose its reasons as a summary of its deliberations; and (b) was entitled to vote in secret. He went so far as to suggest that, if the deliberations were insufficient for the Chief Justice to compile the reasons of the JSC, the commissioners could "*be asked to provide their reasons*

[34] Paragraph (gg) of the definition of "*administrative action*" in PAJA excludes "*a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law*" from review under PAJA.

anonymously."[35] There would be no reason for anonymity if there was no value in secret voting.

50. Similarly, in *Mail & Guardian v Judicial Service Commission* Malan J recognised the need for confidentiality. Although he upheld an application by the media applicants for access to the disciplinary hearing of Judge President Hlophe,[36] the main justification was that the proceedings had already been completely open, and no explanation was furthered for closing them. While generally emphasising the importance of openness by the JSC, Malan J accepted the need for confidentiality at the early stage of disciplinary proceedings:

> *"Confidentiality would encourage the filing of complaints but also protect judges from unwarranted and vexatious complaints and maintain confidence in the judiciary by avoiding premature announcements of groundless complaints. Moreover, it would facilitate the work of the disciplinary authority by giving it flexibility to accomplish its functions through voluntary retirement or resignation. 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."*[37]

51. The High Court has already accepted that some confidentiality in JSC proceedings is justified. There is clearly no absolute requirement for

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[35] *Judicial Service Commission* (n4 above) at para 50.
[36] [2009] ZAGPJHC 29; [2010] 1 All SA 148 (GSJ); 2010 (6) BCLR 615 (GSJ).
[37] Ibid at para 20.

disclosure of JSC proceedings. It is a question of what degree of disclosure best serves the public interest in the JSC performing its constitutional functions to the best of its ability.

52. There are good reasons for the confidentiality of the JSC's deliberations. The JSC has identified four reasons:

52.1. It will affect the rigour and candour of the deliberations;

52.2. It will deter future applicants;

52.3. It will affect the dignity and privacy of applicants who applied with the expectation of confidentiality; and

52.4. It will have the unintended consequence of encouraging the JSC to cease recording its deliberations.

Candour

53. It is vital that the members of the Commission are able to engage in frank and robust discussions about the capabilities, personalities, strengths and weaknesses of the candidates.[38] Allowing the disclosure of the JSC's deliberations whenever a person takes a decision of the JSC on review would seriously undermine the need for candour in selecting the nation's judges.

54. Courts the world over have recognised the need to ensure confidentiality of government discussions in order to preserve the ability to talk with candour. In *Babcock v. Canada (Attorney General)* the Court affirmed the long-

[38] Answering Affidavit at para 27.7; Record p 51 – 52.

recognised need for confidentiality of cabinet minutes.[39] "*The reasons*", McLachlin CJ explained, "*are obvious.*"

> "*Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: ... If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. ... The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.*"[40]

55. The House of Lords and the High Court of Australia have reached similar conclusions regarding cabinet minutes. In *Conway v Rimmer*, Lord Reid expressed some doubt that the possibility of disclosure would decrease cabinet ministers' candour, but nonetheless identified a strong justification for non-disclosure:

> "*To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the*

[39] 2002 SCC 57, [2002] 3 SCR 3.
[40] Ibid at para 18. See also *Carey v Ontario* [1986] 2 SCR 637 (The court closely examined the validity of the candour rationale, and ultimately upheld it, at least for high level government documents);

government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition."[41]

56. Gibbs ACJ, of the High Court of Australia, by contrast, accepted that candour was a legitimate basis for protecting the confidentiality of government documents:

> "*One reason that is traditionally given for the protection of documents of this class it that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure. For instance, not all Crown servants can be expected to be*

[41] [1968] AC 910 at 952, quoted with approval by the Supreme Court of Canada in *Carey* (note 40 above) at paras 50-51.

made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned."[42]

57. None of these courts adopt an absolute immunity for cabinet minutes or other similar government documents; they all accept that there are situations where the need for candour and protection from improper public and political influence requires that state documents remain private.

58. The JSC is exactly the type of body that all these courts have recognised require candour. It makes constitutionally important and politically sensitive decisions. Yet it is designed to take decisions not based on purely political concerns, but on the basis of the constitutional suitability of the candidates. In order to perform that task, its members must be able to deliberate candidly.

Encouraging Applicants

59. There is an additional reason that JSC meetings must be confidential. The JSC depends on people being willing to come forward to accept nominations, attend public interviews, and have their character and abilities discussed by the Commission. Knowing that the Commissioners' views on their suitability will be public will deter people from making themselves available for appointment.[43] In order for the JSC to perform its function, it needs to attract

[42] *Sankey v Whitlam* (1978) 21 ALR 505 (HC) at para 39.
[43] Answering Affidavit at paras 27.7 and 38.3; Record p 51 - 52 and 57.

high quality candidates. The more likely that the process will result in embarrassment, the less likely people will apply.

Dignity and privacy of Applicants

60. Those candidates who were considered in the round under review applied with the legitimate expectation that the deliberations of the JSC about their applications would be confidential. They had been assured confidentiality by the JSC Act and Regulations. It would be a serious infringement of their privacy and their dignity to reveal the opinions of the Commissioners.

Unintended consequences

61. Lastly, making the JSC's deliberations subject to disclosure in review proceedings is likely to result in the JSC ceasing to record its deliberations. The JSC has a clear interest in keeping its deliberations secret. If the only way to achieve that is to stop recording those deliberations, the JSC may take that course. That would be unfortunate.

III THE JSC's DELIBERATIONS ARE NOT RELEVANT TO THE APPELLANT'S REVIEW

62. The appellant, in the main application, seeks an order declaring that the decision of the JSC to nominate certain candidates for judicial appointment and to not nominate others, was unlawful and/or irrational and invalid, and in the alternative, for a declaration that the process followed by the JSC before

making its decision was unlawful and/or irrational and invalid[44]. In its founding affidavit the appellant says the following:

> *"The HSF submits that this matter is now ripe for determination by this Honourable Court. The reasons provided by the JSC, as delineated below, together with certain recent public statements by, inter alios, the Chief Justice of the Republic of South Africa and the spokesperson for the JSC, Ms Dumisa Ntsebenza SC, provide this Honourable Court with the necessary context to consider the relief sought in the Notice of Motion accompanying this affidavit."*[45]

63. Further, in the body of the affidavit and under the heading 'Grounds of Review', the appellant states the following:

> *"40. In the first JSC letter two reasons were given for the decision not to recommend Mr Gauntlett for appointment as a judge of the WCC. They concerned doubts about his 'humility and judicial temperament' and the belief that appointing 'two white males' to the WCC would do 'violence' to the provisions of section 174 (2) of the Constitution.*
>
> ***Failure to consider relevant factors***

[44] Notice of Motion: paras 1.1 and 1.2, Supplementary Volume: 142 - 143
[45] Supplementary Volume: para 7, p 148

41. *Whist temperament and race in general are materially relevant factors that must be considered by the JSC when exercising its power under section 174 (6) there are many others that must be considered as well. There is no evidence that the JSC considered the many relevant factors delineated above ...*

45. *The failure to consider all material relevant considerations, in a meaningful, comprehensive and comparative manner, tainted the entire decision-making process with unlawfulness and irrationality, thus rendering the Decision unlawful and irrational.*

Error of law / JSC misconstrued its powers

...

47. *The JSC elevated [the] factor listed in section 174(2) to a level of importance that it precluded appointment of more than one white male to the WCC. This is apparent from the first and second JSC letters. And it did this before considering any other factors that are relevant to the appointment of judicial officers. It appears to have considered the composition of the WCC and then concluded that because that judiciary did not broadly reflect the racial and gender composition of South Africa, it would not be lawful for it to advise appointment of more than one while male. This constitutes an error of law."*[46]

[46] Supplementary Volume: p 161 - 164

64. In response to that challenge, the JSC, on 8 August 2013, filed the Record consisting of six volumes comprising the documents referred to in paragraph 11 of the founding affidavit in the interlocutory application[47].

65. It is trite that the whole record of the proceedings sought to be corrected or set aside need not be furnished: only that part of the record relevant to the decision or ruling sought to be reviewed need be furnished[48]. In SANRAL (supra) *Binns-Ward J* regarded relevance, to be determined with reference to the basis of the review made out in the founding papers, as '*one of the touchstones for what must be included in the record of proceedings*'[49].

66. As is apparent from the extracts from the founding affidavit in the main application referred to above, the appellant's case in the review proceedings is two-fold, *viz* (1) that the JSC elevated the consideration in Section 174 (2) of the Constitution above all others[50], (2) that the JSC failed to take any other consideration into account, and failed to engage in any comparative analysis of the respective strengths and weaknesses of the various candidates.

67. As is apparent from the reasons compiled by the Chief Justice and which were taken from the contributions of the various Commissioners[51], these grounds of attack are without foundation.

68. The approach adopted by the appellant in these interlocutory proceedings is entirely at odds with the approach that it initially adopted. When the JSC's attorney wrote to the appellant's attorney on 1 July 2013 indicating that more

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[47] Founding Affidavit: para 11, Record 7 -8
[48] Muller v The Master 1991 (2) SA 217 (N) at 220D-F; Ekuphumleni Resort (supra) at 233 D
[49] At para [47]
[50] S 174(2) provides as follows: "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."
[51] The Reasons are annexure MH5 to the interlocutory application, Record: p 28 – 33.

time was required to finalise the record[52], the appellant's attorney responded as follows:

> *"In the closing paragraph of [your letter of 16 November 2013] your client indicated to Mr Cloete that 'this letter as well as the previous one [addressed to Mr Cloete on 6 November 2013], has now given you all necessary information'. Accordingly, given your client's stated position, that it has already furnished Mr Cloete with a totality of its record of and reasons for the decision that is challenged in this matter, it is unclear what record remains to be 'compiled or finalised' by your client under Rule 53."*[53]

69. Notwithstanding that position, the appellant now insists on being furnished with the full transcript of the JSC's deliberations, without it ever having challenged the sufficiency or accuracy of the reasons compiled by the Chief Justice from the contribution of Commissioners during the course of such deliberations. Such insistence is, clearly, a 'fishing expedition' and the deliberations are not required for the proper prosecution of the review.

IV. THE OPEN JUSTICE PRINCIPLE

70. The applicant emphasises the importance of transparency and openness in the JSC's proceedings. It notes, correctly, that the High Court has endorsed the importance of these principles in the context of disciplinary hearings by

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[52] Annexure MH1 to the Interlocutory Application, Record: p 20.
[53] Annexure MH2 to the Interlocutory Application, Record p 21.

the JSC.[54] It also relies on the constitutional principle of open justice,[55] which has been endorsed by the Constitutional Court,[56] and generally requires documents in court proceedings to be publicly available.

71. It is questionable whether open justice applies at all in this context. In *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* the Constitutional Court was sceptical about whether the principle applied to the proceedings of the Refugee Appeals Board.[57] It is true that the High Courts referred to it when considering media access to the JSC's disciplinary proceedings.[58] But deliberations about applications are not the same as a disciplinary hearing. It is not necessary to ensure that the process or conduct of deliberations are fair in the same way that openness is necessary to ensure the fairness of trial or disciplinary proceedings. The JSC therefore denies that open justice is directly applicable to its deliberations about applicants.

72. However, even if the principle is relevant, it, like the protection of confidentiality on which the JSC relies, "*has never been absolute.*"[59] As the Constitutional Court held in *Independent Newspapers*, the correct approach: "*is to recognise that the cluster of rights that enjoins open justice derives from the Bill of Rights and that important as these rights are individually and collectively, like all entrenched rights, they are not absolute. They may be*

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[54] See *eTV (Pty) Ltd and Others v Judicial Service Commission and Others* [2009] ZAGPJHC 12; 2010 (1) SA 537 (GSJ); *Mail and Guardian Limited and Others v Judicial Service Commission and Others* [2009] ZAGPJHC 29; [2010] 1 All SA 148 (GSJ); 2010 (6) BCLR 615 (GSJ).
[55] See, for example, Applicant's Heads of Argument at para 67.
[56] See *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC); *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); [2006] JOL 18339 (CC).
[57] [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) at para 53.
[58] *eTV* (n 54 above) and *M&G* (n 54 above).
[59] *SABC* (note 56 above) at para 50.

limited by a law of general application provided the limitation is reasonable and justifiable."[60] (Emphasis supplied)

73. The limits of open justice are apparent in two of the cases where the Constitutional Court has considered it. In *SABC*, the Court held that concerns about the right to a fair trial justified a limitation on the principle, and in *Independent Newspapers* national security concerns justified limiting public access to documents before the Constitutional Court.

74. Moreover, in both *SABC* and *Independent Newspapers* the Court concluded that there was no onus on the party seeking to restrict access to court documents. As Moseneke DCJ put it in *Independent Newspapers*:

> "*Lastly, it was argued that a party that seeks to restrict open justice must bear an onus. It is so that a party that contends for a restriction of a right protected in the Bill of Rights must place before the court material which justifies the limitation sought. This does not, however, mean that that party carries an evidentiary burden or an onus in the strict sense of the word. At the end of the day, a court is obliged to have regard to all factual matter and factors before it in order to decide whether the limitation on the right to open courtrooms passes constitutional muster.*"[61]

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[60] *Independent Newspapers* (note 56 above) at para 44 (emphasis added).
[61] Ibid at para 46. See also *SABC* (n 97 above) paras 44-46 (the majority accepted and applied the approach adopted by the Supreme Court of Appeal which did not place an onus on either party).

V COMPARATIVE PRACTICE OF JUDICIAL SELECTION

75. The use of judicial selection commissions is somewhat unusual in the commonwealth world. Many countries – such as Australia and New Zealand – afford the executive a free hand in selecting judges, while in the USA federal judges are nominated by the President and approved by the Senate. Other countries, such as India, allow judges of the Supreme Court to select replacements. These selection processes are either mostly or entirely secret.

76. However, there is a growing recognition that judicial selection committees represent the best way to select judges. The United Kingdom recently reformed their laws to establish a Judicial Appointments Commission[62] which now appoints all judges in the United Kingdom (except the Supreme Court). Many states in the USA and provinces in Canada also use selection commissions to appoint their judges.

77. When the JSC is compared to these systems, two facts emerge. First, employing a body such as the JSC represents international best practice for the selection of judges. Second, the JSC is already far more transparent than the majority of comparable bodies across the globe. While transparency in judicial selection should obviously be welcomed, the continuing entrenchment of some degree of secrecy in all comparable systems demonstrates that a claim to confidentiality is well-founded.

78. In addition, courts and academics in all these states have recognised the justifications for confidential deliberations the JSC has advanced. They have held that confidentiality breeds candour, that candour is vital for effective

[62] Established by the Constitutional Reform Act (CRA) 2005.

judicial selection, and that too much transparency discourages applicants. The appellant's blunt position flies in the face of all this international experience.

79. We discuss the following jurisdictions:

79.1. USA;

79.2. Canada;

79.3. United Kingdom; and

79.4. Australia.

USA

80. There are two tiers of judicial selection in the United States. At the federal level, the President nominates people whose appointment must be confirmed by the Senate. The United States Supreme Court has recognised the importance of confidentiality in that process. In order to assist the President in his task of nominating judges, the Department of Justice regularly seeks advice from the Standing Committee on Federal Judiciary of the American Bar Association ("**ABA**"). The ABA considers a wide range of information and prepares a report on whether the candidate is suitable for judicial office. The President is not bound by this report, but it is extremely persuasive. The ABA did not release its reports to the public, unless the candidate was in fact nominated, in which case only the ranking was released.

81. In *Public Citizen v Department of Justice*,[63] a public interest body requested access to the reports and minutes of meetings of the ABA, under freedom of

[63] 491 US 440 (1989).

information legislation known as FACA.[64] The Department of Justice refused, and the body approached the courts. The District Court concluded that the legislation could not be interpreted to require disclosure of the ABA materials as "*any need for applying FACA to the ABA Committee is outweighed by the President's interest in preserving confidentiality and freedom of consultation in selecting judicial nominees.*"[65]

82. The Supreme Court confirmed this conclusion. The majority of the Court (per Brennan J), relied primarily on the legislative history of FACA to conclude that it was not intended to apply to bodies such as the ABA. However, Justice Kennedy wrote a concurring judgment (joined by Rehnquist CJ and O'Connor J) which endorsed the District Court's findings that: "*at minimum, ... the application of FACA to the ABA Committee would potentially inhibit the President's freedom to investigate, to be informed, to evaluate, and to consult during the nomination process*".[66] This recognises the importance of confidentiality in the nomination and appointment of judges, even where the process is not managed by a judicial selection tribunal.

83. The position at the state level even more clearly favours the exclusion of deliberations from consideration. The fifty states adopt a variety of methods to select judges – some use selection commissions, others elect their judges. However, there is clear support in the literature for selection by commission; what the Americans call "merit selection".

84. In those states that use selection commissions, there is virtually universal support for confidentiality in the selection process, and especially for keeping the deliberations private. The American Judicature Society ("**AJS**") – an

[64] Federal Advisory Committee Act 86 Stat. 770.
[65] 691 F.Supp. 483 (1988) at 496 (emphasis added).
[66] *Public Citizen* (note 63 above) at 488.

organisation that monitors and advocates on issues of judicial selection – conducted an analysis of all states that have judicial selection commissions.[67] Of the 33 states, only five do not have a provision requiring that deliberations are confidential.[68] As the AJS explains in its handbook for judicial selection commissions:

> *With few exceptions, nearly every jurisdiction conducts confidential deliberations. Even in jurisdictions that provide little or no confidentiality protections for applicants, commission deliberations are afforded extensive confidentiality. Confidentiality of deliberations is intended to encourage frank discussion of the applicants and their qualifications by the commissioners."*[69]

85. The AJS also publishes a document called "*Model Judicial Selection Provisions*" as an aid to states adopting merit selection. The Provisions recommends open meetings for discussing procedures and selection requirements, and leaves it to the state to determine whether interviews should be public. But it is clear about deliberations: "*All final deliberations of the judicial nominating commission shall be secret and confidential.*"[70] The AJS explains this nuanced position as follows:

> "*Finding the appropriate balance between preserving the privacy of judicial applicants and providing transparency in the screening process is one of the greatest challenges that nominating commissions face. Applicants should be protected from public scrutiny regarding their*

[67] American Judicature Society *Judicial Merit Selection: Current Status* (2011) available at www.judicialselection.us/.../Judicial_Merit_Charts_0FC20225EC6C2.pdf.
[68] Ibid at Table 4. Some of the states have different rules in different counties. The five states that do not keep their deliberations confidential include any state where even one county does not require confidentiality. See also J Goldschmidt 'Merit Selection: Current Status, Procedures, and Issues' (1994) 49 *University of Miami Law Review* 1 at 33.
[69] M Greenstein, rev. K Sampson *Handbook for Judicial Nominating Commissioners* (2004) at 24.
[70] Ibid at 7.

private lives and from public embarrassment that could result from failure to receive a nomination. At the same time, the public should have sufficient knowledge of the nominating process to maintain confidence in that process. Commission proceedings should be as open as possible. However, the final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates' qualifications."[71]

Canada

86. Canada has several levels of courts with different appointment processes. Supreme Court Judges are appointed by the Governor-General on the recommendation of the Prime Minister. But lower federal judges and provincial judges are generally selected or recommended by some form of committee. Confidentiality of the application and deliberation process are virtually absolute in all these systems.

87. The Federal Judicial Appointments Advisory Committee's – which recommends the appointment of judges in lower federal and superior provincial courts – code of ethics for its commissioners includes the following:

> *"All Committee discussions and proceedings shall be treated as strictly confidential and must not be disclosed outside the Committee, except to the Minister of Justice, except that a Committee Chair may inform the Chief Justice of the names of the candidates who have been recommended by the committee. A member shall not communicate to a candidate or to any other person, during his or her term or thereafter,*

[71] Ibid at 7-8 (emphasis added).

the substance or details of any interviews held, of discussions within the Committee nor of recommendations made."[72] (Emphasis supplied)

88. The Guidelines for Committee Members expands on the obligations of confidentiality. It too states that "*[a]ll Committee discussions and proceedings must be treated as strictly confidential, and must not be disclosed to persons outside the Committee.*"[73] It also requires that all documents submitted as part of the application are confidential, as is information obtained from references or sources and that confidentiality endures after a member leaves the committee.[74]

United Kingdom

89. The United Kingdom recently established the Judicial Appointments Committee ("**JAC**"). The JAC's empowering statute makes all information that pertains to a particular person, and is obtained during the appointment process, confidential.[75] The JAC explains its publication policy as follows:

One of the key principles of good administration is to be open and accountable. We are committed to publishing a wide range of information about our activities and on subjects in which there is known to be a public interest. Under the terms of the Constitutional Reform Act 2005, our processes must be undertaken confidentially and any information that we gather for the purposes of making selections for

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[72] Available at http://www.fja.gc.ca/appointments-nominations/committees-comites/ethics-ethiques-eng.html.
[73] Available at http://www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#Confidentiality.
[74] Ibid.
[75] Constitutional Reform Act, 2005, s 132. The statute does, however, permit disclosure if it is "*required, under rules of court or a court order, for the purposes of legal proceedings of any description.*" Section1 32(4)(c). Read in context, this is not permission to disclose all information no matter what the nature of the legal proceedings.

judicial appointments can only be disclosed in very specific circumstances. We must also balance our wish to operate openly and transparently with our duty to protect the personal and confidential information we hold. Therefore the information that we can place in the public domain about our work is limited."[76]

Australia

90. Australia does not have a judicial appointments commission. However, several academics in that country have recommended that its laws should be reformed to establish one. In making their recommendations, they have expressly recommended confidentiality not only of the new commission's deliberations, but also applications and shortlists. Rachel Davis and George Williams write that one of the "*central features of an Australian judicial appointments commission should be [that] ... [e]xpressions of interest in judicial appointment, the deliberations of the commission and its short list and accompanying statement must be confidential*".[77]

91. In a separate article proposing reform of the Australian selection process, Evans and Williams accept the importance of transparency in judicial selection.[78] But they also identify the need for the confidentiality of judicial selection committee proceedings:

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[76] Judicial Appointments Commission's website, available at http://jac.judiciary.gov.uk/about-jac/freedom-of-information.htm.
[77] R Davis and G Williams 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819 at 863.
[78] Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 294.

> "*There are powerful institutional and pragmatic reasons for preserving strict confidentiality of aspects of the process. For example, if names of potential appointees, especially in small jurisdictions, were made public it may adversely affect relationships with clients. The upshot may be to discourage meritorious individuals from seeking appointment. Even in larger jurisdictions, breaches of confidentiality would undermine the operation of the system. This is not special pleading for judicial appointments. Confidentiality is a common feature of appointments processes generally. It ensures that meritorious candidates are not deterred by the prospect of disclosure of a candidacy that might be perceived as overreaching or that might (wrongly) be perceived as reflecting badly on the candidate if it was ultimately unsuccessful. Equally, confidentiality of references ensures that referees are not deterred from being fully candid about the evidence that supports (or undermines) the candidate's application.*"[79]

92. They too conclude that, while accountability is important, "*applications, references, interviews and assessments, as well of the Commission's deliberations*" should be confidential.[80]

VI COSTS

93. In the event that the appeal is unsuccessful, the JSC does not seek costs against the appellant. In the event that the appeal succeeds, it is submitted that the appropriate order would be that costs be awarded on the ordinary scale both in this court and the court below, such costs to include those of two counsel.

VII APPROPRIATE ORDER

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[79] Ibid at 303-304.
[80] Ibid at 327.

94. It is submitted that the appropriate order in this appeal is that the appeal be dismissed.

ISMAIL JAMIE SC

ANTHEA PLATT

NAMHLA PAKADE

Respondent's Counsel

Chambers, Cape Town

and Johannesburg

3 August 2015

LIST OF AUTHORITIES

1. *Massey-Ferguson (South Africa) Limited v Ermelo Motors (Pty) Ltd* 1973 (4) SA 206 (T)

2. *Antarers (Pty) Ltd v Hammond* 1977 (4) SA 29 (W)

3. *Lawyers for Human Rights v Rules Board for Courts of Law and Another* 2012 (7) BCLR 754 (GNP) (11 April 2012) *

4. *Johannesburg City Council v The Administrator, Transvaal and Another (1).* 1970 (2) SA 89 (T). *

5. *Free State Steam & Electrical CC v Minister of Public Works and Others* [2008] ZAGPHC 256

6. *Pieters v Administrateur, Suidwes-Afrika, en 'n Ander* 1972 (2) SA 220 (SWA)

7. *MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA). *

8. *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A)

9. *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T) *

10. *Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape and Others* 2010 (1) SA 228 (E) *

11. *City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74. *

12. *Comair Limited v The Minister of Public Enterprises and Others* 2014 (5) SA 608 (GP).

13. *City of Cape Town v South African National Roads Authority Limited and Others* 2015 (3) SA 386 (SCA)

14. *Constitution of the Republic of South Africa*, 1996 s 178 (6); s 174(2)

15. *Mail & Guardian v Judicial Service Commission* [2009] ZAGPJHC 29; [2010] 1 All SA 148 (GSJ); 2010 (6) BCLR 615 (GSJ).

16. *Babcock v. Canada (Attorney General)* 2002 SCC 57, [2002] 3 SCR 3

17. *Sankey v Whitlam* (1978) 21 ALR 505 (HC)

18. Muller v The Master 1991 (2) SA 217 (N) at 220D-F

19. *eTV (Pty) Ltd and Others v Judicial Service Commission and Others* [2009] ZAGPJHC 12; 2010 (1) SA 537 (GSJ);

20. *Mail and Guardian Limited and Others v Judicial Service Commission and Others* [2009] ZAGPJHC 29; [2010] 1 All SA 148 (GSJ); 2010 (6) BCLR 615 (GSJ).

21. *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC)

22. *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); [2006] JOL 18339 (CC).

23. *Guardian Media Ltd and Others v Chipu N.O. and Others* [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) at para 53.

24. Constitutional Reform Act (CRA) 2005

25. *Public Citizen v Department of Justice* 491 US 440 (1989).

26. Federal Advisory Committee Act 86 Stat. 770

27. M Greenstein, rev. K Sampson *Handbook for Judicial Nominating Commissioners* (2004)

28. *Lambert v Barsky* N.Y.Supr. 91 Misc.2d 443, 398 N.Y.S.2d 84 (1977)

29. *Justice Coalition v First District Court of Appeal Judicial Nominating Commission* 823 So. 2d 185 (Fla. Dist. Ct. App. 2002

30. *Guy v Judicial Nominating Commission*, 659 A.2d 777 (Del. Super. 1995).

31. (2007) 34 *Fordham Urban LJ* 73

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Appeal Case No.: 145/2015

Case No: 8647/2013

In the matter between:

THE HELEN SUZMAN FOUNDATION	**Appellant**
and	
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***

RESPONDENT'S PRACTICE NOTE IN TERMS OF RULE 10A

NATURE OF THE APPEAL

1. The abovementioned Appellant has come before this Honourable Court seeking to appeal the whole of the judgment and order handed down by His Lordship, the Honourable Mr Justice Le Grange on 5 September 2014 in the High Court of South African, Western Cape Division, under case number 8647/2013.

2. On 4 June 2013 the Appellant instituted proceedings in the Western Cape High Court (**"the main application"**), reviewing the decision of the Respondent to advise the President of the Republic of South Africa to appoint the Honourable Madame Justices Judith Innes Cloete and Babalwa Pearl Mantame and the Honourable Messrs Justices Mokgoatji Josiah Dolamo, Owen Lloyd Rogers and Ashton Schippers, as judges of the Western Cape High Court, and the decision not to advise the President to appoint Ms Nonkosi Saba and Messrs Jeremy John Gauntlett and Stephen John Koen (**"the decision"**).

3. The Appellant sought an order from the court *a quo* declaring the decision to be unlawful and/or irrational and invalid. Alternatively, that the process followed by the JSC before making the decision was unlawful and/or irrational and unlawful.

4. Subsequently, the Respondent delivered the record of proceedings of the interviews in question, in terms of the requirements of Rule 53 (1)(b). The record as filed by the Respondent comprised 6 lever arch files, and contained the following:

4.1 reasons for the decision, setting out considerations in respect of each candidate;

4.2. transcripts of the Respondent's interviews with each of the candidates;

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.

5. After receiving the record, the Appellant then filed an interlocutory application in terms of Rules 6(11) and 30A to the High Court on 6 January 2014, contending that the Respondent had not complied with Rule 53(1) (b), in that the Respondent had not included as part of the record, the deliberations which were held by the Respondent in a closed session after the conclusion of the interviews of the candidates.

6. The interlocutory application was heard on 8 August 2014. Judge Le Grange delivered his judgment on 5 September 2014, wherein he held that the Appellant is not entitled to the full recording of the deliberations of the Respondent as part of the Rule 53 record. The application was hence dismissed. It is this judgment that the Appellant now appeals.

JURISDICTION OF THE SUPREME COURT OF APPEAL

7. This court has jurisdiction to hear this matter, given that:

7.1 Appellant was granted leave to appeal by this court on 9 February 2015;

7.2 The Appellant filed its Notice of Appeal on 5 March 2015;

7.3 The Appellant filed the Record of proceedings in the court a quo on 2 June 2015.

THE ISSUE ON APPEAL

8. Whether the deliberations held in a closed session by the Respondent should form part of the Rule 53 record.

ESTIMATED DURATION OF ARGUMENT

9. One day of argument will be sufficient in this matter.

10. The Respondent shall require no more than 2 hours to deliver its argument.

LANGUAGE

11. The entire record is in English.

PORTIONS OF THE RECORD WHICH ARE NECESSARY FOR THE COURT TO DETERMINE THE APPEAL

12.1 The Notice of Application under Rules 6(11) and 30A and the Affidavit in support of the application, and the annexures thereto (pages 1 to 41 of the appeal record);

12.2 The Respondent's Answering Affidavit, and the annexure thereto (pages 42 to 63 of the appeal record);

12.3 The Applicant's Replying Affidavit (pages 64 to 75 of the appeal record);

12.4 The judgment and order of the court *a quo* (pages 81 to 111);

12.5 The Appellant's notice of application for leave to appeal (pages 112 to 123 of the appeal record);

12.6 The court a quo's judgment on the application for leave to appeal (pages 124 to 126);

12.7 The Notice of Motion and Founding Affidavit of the application in the court a quo (pages 142 – 180 of the supplementary volume of the appeal record);

A SUMMARY OF THE RESPONDENT'S ARGUMENT

13. The Respondent disputes the Appellant's contention that the recording or transcript of the deliberations held after the interviews with the judicial candidates does form part of the record in terms of Rule 53. The Respondent submits that it has fully and completely complied with the rule, and has not deliberately flouted the rules of court, as the Appellant would like to suggest.

14. The Respondent submits, that in terms of the JSC Act and the Act's regulations, the Constitution of the Republic of South Africa, domestic case law, and international and foreign jurisprudence, deliberations such as those in question are not, as of right and in the ordinary course of a review, subject to disclosure in terms of Rule 53. It is the Respondent's submission that these closed session deliberations fall outside the ambit of the rule.

CORE BUNDLE

15. It is not necessary to compile a core bundle, as the record of appeal is not voluminous, and the contents thereof are largely relevant.

RULE 8(8) AND (9)

16. There has been compliance with Rule 8(8) and (9).

RULE 10 CERTIFICATE

17. A certificate as required by Rule 10 and 10(A), signed by the Respondent's counsel responsible for the drafting of the heads of argument is filed herewith.

ISMAIL JAMIE SC
ANTHEA PLATT
NAMHLA PAKADE
Respondent's Counsel
Chambers, Cape Town
and Johannesburg
3 August 2015

IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Appeal Case No: 145/2015

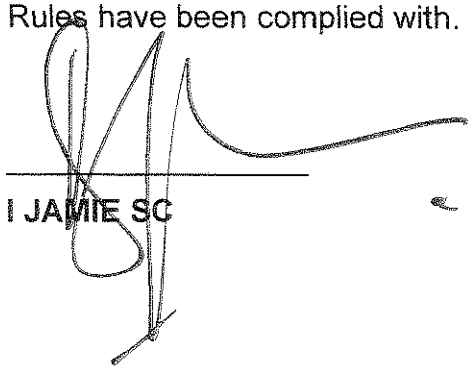
WCC Case No: 8647/13

In the appeal between:

THE HELEN SUZMAN FOUNDATION	**Appellant**
and	
JUDICIAL SERVICE COMMISSION	**Respondent**
POLICE AND PRISONS CIVIL RIGHTS UNION	**First *amicus curiae***
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	**Second *amicus curiae***
DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	**Third *amicus curia***

RESPONDENT'S COUNSELS CERTIFICATE OF COMPLIANCE

We hereby certify that Rules 10 and 10A(a) of the Supreme Court of Appeal Rules have been complied with.



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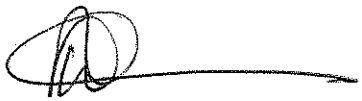

N PAKADE

4 AUGUST 2015