IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No.: 289/2016

Appeal Case No: 145/2015

WCC Case No: 8647/13

In the matter between:

THE HELEN SUZMAN FOUNDATION **Applicant**

and

JUDICIAL SERVICE COMMISSION **Respondent**

RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. The applicant is appealing against the whole of the judgment and order handed down by the Supreme Court of Appeal ("**SCA**") on 2 November 2016 under SCA case number 145/2015. The respondent (also referred to in these heads of argument as '**the JSC**') is not opposing the application for leave to appeal.

2. The respondent submits that the judgments of the SCA and the Western Cape are correct. These heads of argument will deal with the bases for this submission.

3. The respondents request that, in the interests of justice and certainty, this Court should determine definitively the question of whether and under what circumstances the respondent is required to disclose its deliberations as part of the record it is required to file in terms of Rule 53.[1]

THE SCA JUDGMENT

4. The judgment of the SCA comprehensively dealt with the special regime applicable to the JSC, the balancing of the various rights of the parties, and the notions of open justice and public accountability.

5. Central to the SCA judgment is the protection of the integrity and dignity of the judiciary. The SCA found that:

> *"[29] Protecting the confidentiality of the deliberations clearly serves legitimate public interests in the circumstances. Whilst the JSC itself cannot lay claim to a general right to privacy as it discharges a public duty, the privacy and dignity of judicial candidates, who are assured by the JSC Act and its regulations that the deliberations concerning their suitability will be confidential, must be protected in the judicial interviewing and selection process. Non-disclosure of the deliberations therefore fosters this obligation. It likely encourages applicants who might otherwise not make themselves available for judicial appointment for fear of embarrassment were the JSC members' frank opinions on their competence or otherwise be made open to the public. This would compromise the efficacy of the judicial selection process. The cloak of confidentiality also enhances the judicial appointments process by*

[1] Appeal Record: p 230

allowing the members to robustly and candidly state facts and exchange views in discussing the suitability or otherwise of the candidates based on their skills, characters, weaknesses and strengths."[2]

6. This must be correct. Section 165(4) of the Constitution of the Republic of South Africa, 1996 (**"the Constitution"**) requires that *"organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."* The JSC by protecting the deliberations ensures that it protects the courts, the independence, the impartiality and the dignity of the judiciary.

7. As to the special regime applicable to the JSC, the SCA looked at the existence of the JSC within the constitutional paradigm. The regulatory framework also allows the JSC to depart from its procedure whenever it is appropriate to do so. This, the SCA found, is in line with the constitutionally conferred powers of the JSC to regulate its own procedure[3]. It is within this framework that the SCA found that the confidentiality of the deliberations enjoys recognition in legislation enacted to give effect to the very right to access to information enshrined in the Constitution.

8. With regard to open justice and public accountability, the SCA considered whether there was an absolute requirement of disclosure of the JSC's proceedings. The SCA found the answer lies in the weighing of the nature and relevance of the information sought, the extent of the disclosure and the

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[2] Appeal Record: p 171 - 172
[3] Appeal Record: p 167 para 23

circumstances under which the disclosure is sought, as well as the potential impact upon anyone, if disclosure is ordered or refused.

9. The applicant reasons that this finding must be flawed as candidates were well aware of the legislative carve-out provided for in section 38(1) of the Judicial Service Commission Act, 1994 ("**the JSC Act**"). This reasoning was also considered by the SCA when it found that protecting the confidentiality of the deliberations clearly serves legitimate public interests in this instance[4].

THE APPLICANT'S SUBMISSIONS IN THIS COURT

10. The applicant contends that there can be no doubt that the Recording forms part of the record under Rule 53 and that the whole content thereof is relevant to the Decisions. As there being no legal basis for the respondent to withhold the Recordings, it should be directed to disclose the full Record including the Recording and any transcripts thereof, to the applicant and to the Court.

11. The applicant further submits that if there are any parts of the Recording or Deliberations that this Court feels should not be made public, the Court is empowered to make a qualified disclosure order in accordance with established judicial precedent, in order to preserve the applicant's fair trial rights and to give effect to Rule 53. That said, no basis has been laid by the respondent in this matter for any limitation on the Record to be provided.

12. We turn now to deal with the following topics:

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

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[4] Appeal Record: p 171 para 29

12.2. The issue of confidentiality and section 38(1) of the JSC Act;

12.3. The open justice principle;

12.4. Foreign jurisdiction;

12.5. Relief.

I THE MEANING AND EXTENT OF THE RULE 53 RECORD

13. The applicant contends that the recording is relevant as it bears on the lawfulness, rationality and procedural fairness of the JSC's decisions and reveals whether the reasons proffered by the respondent conform to the deliberations and the information before it[5]. This contention is not in accord with the legal meaning and extent of what constitutes a Rule 53 record.

14. 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).*[6] Marais J held as follows:

> "*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*

[5] Applicant's Heads of Argument para 50
[6] 1970 (2) SA 89 (T).

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."[7] (Emphasis supplied).

15. In the more than four decades since, this dictum has been repeatedly quoted with approval by our courts, including in the post-constitutional era.[8] 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."*[9]

16. The court then referred to dicta from *Jockey Club of South Africa v Forbes*[10] 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*.

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[7] Ibid at 91H-92A.
[8] 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
[9] Ibid at para [22]
[10] 1993 (1) SA 649 (A)

17. 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."*[11]

18. However, in this matter the SCA clarified the dictum in *Johannesburg City Council*, when it stated that it is clear from recent constitutional jurisprudence that the principle needs qualification in so far as it excluded all and any deliberations of a decision-maker from the ambit of Rule 53[12]. The SCA went further to state that there may be instances when disclosing portions of the deliberations would be crucial to refute a challenge as to the composition of the JSC at the time of its deliberations or the number of members who voted in support of a particular decision.

19. Accordingly, the SCA qualified the principle as follows: *"(A) decision-maker's deliberations do not automatically form part of the record of the proceedings as contemplated in rule 53. The extent of the record must depend upon the facts of each case. In certain cases the decision-maker may be required to produce a full record of proceedings which includes its deliberations. But there*

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[11] Ibid at para [23]
[12] Appeal Record: p 161 para 15

may be cases, such as this one, where confidentiality may warrant non-disclosure of deliberations for the reasons set out above."[13]

20. In the present matter, the applicant's attack on the principal proceedings is based on an alleged over-emphasis of the transformative requirements as opposed to the other relevant requirements which the JSC is alleged not to have given sufficient weight to. The applicant seeks a declarator to this effect and does not seek to set aside the actual decisions of the JSC

21. In order to make its case, the applicant simply does not require a transcript of the deliberations. It has a transcript of the interviews, as also the reasons provided by the Chief Justice, and which have been distilled from the deliberation. Indeed, in the principle proceedings, it eschewed, the need for a record, and stated the courts now had all the information required to adjudicate upon its challenge.

22. Notwithstanding the above, we deal briefly with the authorities relied upon by the applicant, 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. These cases fail to take into consideration the special regime applicable to the JSC.

23. Firstly, in *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others*[14] 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

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[13] Appeal Record: p 176 para 39. See also MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd 2006 (5) SA 1 (SCA) at 91H-92A in which the court quoted with approval the same principle in the Johannesburg City Council case.
[14] 1999 (2) SA 599 (T)

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 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."*[15]
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> (Emphasis supplied)

24. Secondly, in *Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape and Others*[16] 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.

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[15] Ibid at 631 A – 632 B
[16] 2010 (1) SA 228 (E)

25. 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.[17]

26. The constitutional and legislative scheme of the JSC is different. 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. The SCA also found this proposition to be sound.

27. *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.

28. Thirdly, applicant relies on the judgment of Binns-Ward J in *City of Cape Town v South African National Roads Agency Ltd and Others*[18].

29. The applicant 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.[19]

30. 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[20]. 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 applicant:

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[17] Ibid at para [20]
[18] [2013] ZAWCHC 74.
[19] Applicant's heads of argument: para 58
[20] Ibid at para [47]

"On the approach enunciated 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 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."[21] (Emphasis supplied)

31. Thus, although, of the judgments relied upon by the applicant, 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.

32. The SCA also found that these decisions are immediately distinguishable in that they were mainly premised upon the particular legislative provisions

[21] Ibid at para [51]

pertaining to the bodies whose decisions were being reviewed. Those bodies' deliberations were not endowed with statutory confidentiality as is this case[22].

33. Fourthly, in *Comair Limited v The Minister of Public Enterprises and Others*[23] 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*.

34. 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.

35. 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 THE ISSUE OF CONFIDENTIALITY AND SECTION 38(1) OF THE JSC ACT

36. The applicant contends that confidentiality, whether statutorily protected or otherwise, is not in itself a sufficient reason for depriving an applicant of its procedural right to the record under Rule 53 and that section 38 of the JSC

[22] Appeal Record: p 164 para 18
[23] 2014 (5) SA 608 (GP).

Act is not a bar to disclosure. It is submitted that this reasoning is incorrect for the reasons submitted below.

37. 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."*

38. Regulations have been promulgated that regulate the process to be followed by the JSC in respect of the recommendation of persons for judicial appointment[24]. 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.*"[25]

39. The applicant submits that the overall process undertaken by the JSC in the appointment process (such as the fact that the interviews are public) also does not detract, in any way, from the JSC's obligation to conduct its business in an open, transparent and accountable manner; and further to disclose the deliberations when its decisions are tested by judicial review before the courts[26]. The problem with this submission is that, if accepted, it would mean that, in <u>every</u> challenge to a decision of the JSC in relation to the

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[24] 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.
[25] 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.*"
[26] Applicant's heads of argument: para 97

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 applicant provides no justification as to why the regulations should be negated in such a summary and invariable fashion.

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

40.1. 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[27].

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

40.3. Applicant 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.

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[27] S 178 (6)

40.4. The JSC accepts that its processes must be in accordance with the constitutional principles that bind it and all other organs of state. However, given the constitutional and statutory context within which the JSC operates, and having regard to comparative practice abroad, the JSC conducts itself in accordance with constitutional norms.

The JSC's interest in confidentiality

41. 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.

42. 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.*"[28]

43. 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.

44. The SCA has recognised, in this case and others, the need for at least some confidentiality in JSC proceedings. In *Judicial Service Commission v Cape*

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[28] 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.

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 anonymously.*"[29] There would be no reason for anonymity if there was no value in secret voting.

45. 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,[30] 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*

[29] *Judicial Service Commission* (n4 above) at para 50.
[30] [2009] ZAGPJHC 29; [2010] 1 All SA 148 (GSJ); 2010 (6) BCLR 615 (GSJ).

resolve the complaint prior to formal proceedings and to protect the privacy of the judge."[31]

46. The SCA and the High Court have already accepted that some confidentiality in JSC proceedings is justified. There is clearly no absolute requirement for 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.

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

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

47.2. It will deter future applicants;

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

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

Candour

48. 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.[32] Allowing the disclosure of the JSC's

[31] Ibid at para 20.
[32] Answering Affidavit at para 27.7; Record p 51 – 52.

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.

49. 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-recognised need for confidentiality of cabinet minutes.[33] "*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.*"[34]

50. 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

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[33] 2002 SCC 57, [2002] 3 SCR 3.
[34] 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);

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 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.*"[35]

51. 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*

[35] [1968] AC 910 at 952, quoted with approval by the Supreme Court of Canada in *Carey* (note 40 above) at paras 50-51.

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 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."[36]

52. 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.

53. 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

54. 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

[36] *Sankey v Whitlam* (1978) 21 ALR 505 (HC) at para 39.

the Commission. Knowing that the Commissioners' views on their suitability will be public will deter people from making themselves available for appointment.[37] In order for the JSC to perform its function, it needs to attract high quality candidates. The more likely that the process will result in embarrassment, the less likely people will apply.

Dignity and privacy of Applicants

55. 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

56. 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 OPEN JUSTICE PRINCIPLE

57. 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

[37] Answering Affidavit at paras 27.7 and 38.3; Record p 51 - 52 and 57.

the JSC.[38] It also relies on the constitutional principle of open justice,[39] which has been endorsed by the Constitutional Court,[40] and generally requires documents in court proceedings to be publicly available.

58. 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.[41] It is true that the High Courts referred to it when considering media access to the JSC's disciplinary proceedings.[42] 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.

59. However, even if the principle is relevant, it, like the protection of confidentiality on which the JSC relies, "*has never been absolute.*"[43] 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*

[38] 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).
[39] See, for example, Applicant's Heads of Argument at para 67.
[40] 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).
[41] [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) at para 53.
[42] *eTV* (n 54 above) and *M&G* (n 54 above).
[43] *SABC* (note 56 above) at para 50.

limited by a law of general application provided the limitation is reasonable and justifiable."[44] (Emphasis supplied)

60. 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.

61. 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.*"[45]

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[44] *Independent Newspapers* (note 56 above) at para 44 (emphasis added).
[45] 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).

IV FOREIGN JURISDICTION

62. The applicant contends that no weight should be accorded to foreign jurisprudence in this matter; as such jurisprudence is distinguishable from this case and South Africa's constitutional framework. The applicant further states that all that the referenced foreign jurisdiction indicates is that certain foreign jurisdictions have opted to legislate privilege or a certain degree of non-disclosure into their legal framework. These are different considerations, so the argument goes, to the confidentiality provisions in the JSC Act, which provides for disclosure to be made by order of court.[46]

63. It is submitted that it is more than informative to compare the practices of foreign jurisdictions in order to establish best practice.

64. 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.

65. 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[47] which now appoints all judges in the United Kingdom (except the Supreme Court).

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[46] Applicant's heads of argument para 121
[47] Established by the Constitutional Reform Act (CRA) 2005.

Many states in the USA and provinces in Canada also use selection commissions to appoint their judges.

66. 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.

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

68. We discuss the following jurisdictions:

68.1. USA;

68.2. Canada;

68.3. United Kingdom; and

68.4. Australia.

USA

69. 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.

70. In *Public Citizen v Department of Justice*,[48] a public interest body requested access to the reports and minutes of meetings of the ABA, under freedom of information legislation known as FACA.[49] 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.*"[50]

71. 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*

[48] 491 US 440 (1989).
[49] Federal Advisory Committee Act 86 Stat. 770.
[50] 691 F.Supp. 483 (1988) at 496 (emphasis added).

during the nomination process".[51] 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.

72. 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".

73. 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 organisation that monitors and advocates on issues of judicial selection – conducted an analysis of all states that have judicial selection commissions.[52] Of the 33 states, only five do not have a provision requiring that deliberations are confidential.[53] 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*

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[51] *Public Citizen* (note 63 above) at 488.
[52] American Judicature Society *Judicial Merit Selection: Current Status* (2011) available at www.judicialselection.us/.../Judicial_Merit_Charts_0FC20225EC6C2.pdf.
[53] 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.

encourage frank discussion of the applicants and their qualifications by the commissioners."[54]

74. 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.*"[55] 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 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, <u>the final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates' qualifications.</u>*"[56]

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[54] M Greenstein, rev. K Sampson *Handbook for Judicial Nominating Commissioners* (2004) at 24.
[55] Ibid at 7.
[56] Ibid at 7-8 (emphasis added).

Canada

75. 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.

76. 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, the substance or details of any interviews held, of discussions within the Committee nor of recommendations made.*"[57] (Emphasis supplied)

77. 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*

[57] Available at http://www.fja.gc.ca/appointments-nominations/committees-comites/ethics-ethiques-eng.html.

outside the Committee."[58] 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.[59]

United Kingdom

78. 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.[60] 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 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*

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[58] Available at http://www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#Confidentiality.
[59] Ibid.
[60] 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.

information we hold. Therefore the information that we can place in the public domain about our work is limited."[61]

Australia

79. 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*".[62]

80. In a separate article proposing reform of the Australian selection process, Evans and Williams accept the importance of transparency in judicial selection.[63] But they also identify the need for the confidentiality of judicial selection committee proceedings:

> "*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*

[61] Judicial Appointments Commission's website, available at http://jac.judiciary.gov.uk/about-jac/freedom-of-information.htm.
[62] 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.
[63] Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 294.

> *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."*[64]

81. They too conclude that, while accountability is important, "*applications, references, interviews and assessments, as well of the Commission's deliberations*" should be confidential.[65]

V RELIEF

82. In the event that the appeal is unsuccessful, the JSC does not seek costs against the applicant. 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.

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

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[64] Ibid at 303-304.
[65] Ibid at 327.

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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