

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT289/2016

SCA CASE NUMBER: 145/2015

WESTERN CAPE HIGH COURT CASE NUMBER: 8647/2013

In the matter between:

HELEN SUZMAN FOUNDATION

Appellant / Applicant

and

JUDICIAL SERVICE COMMISSION

Respondent

THE TRUSTEES FOR THE TIME BEING OF

THE BASIC RIGHTS FOUNDATION OF SOUTH AFRICA *Amicus Curia*

HEADS OF ARGUMENT OF THE *AMICUS CURIA*

DATE OF APPEAL: THURSDAY 31 AUGUST 2017 AT 10H00

A. INTRODUCTION

1. The pertinent facts which form the backdrop to this appeal in relation to an interlocutory application brought by the Appellant are usefully summarized at paras 1-19 of its Heads of Argument (hereafter '**Appellant's HOA**'), excluding those comments and opinions expressed by the Appellant. The *Amicus Curia* does not seek to elaborate thereon, save to say that the main application is a judicial review of Respondent's decision taken at its October 2012 sitting to recommend only one and not two white males, i.e. both Advs. Owen L Rogers SC and Jeremy Gauntlett SC, as Judges of the Western Cape High Court. Only the former was recommended.

2. The Respondent's aforementioned Decision¹ raises an issue that is central in the main application, namely, the purpose and role of s 174(2) of the Constitution, 1996 in the judicial appointments process. That issue was left open in *Cape Bar Council v JSC* 2012 (4) BCLR 406 (WCC) para 145.
3. The Respondent's processes leading to its 'advice' under s 174(6) of the Constitution concerning the Decision forming the subject of the main application, are 'proceedings' contemplated by Uniform Rule 53(1)(b).
4. This appeal raises the following crisp legal issues:
 - (a) Whether the audio Recording² of the Respondent's deliberations in private conference leading to the Decision by secret ballot forms part of the '*record of ... proceedings*' that is subject to disclosure under Uniform Rule 53(1)(b).
 - (b) If (a) is answered in the affirmative, then the question arises whether denial of the Recording to the Appellant is *in casu* justifiable in an open and democratic society, based on human dignity, equality and freedom.
5. In sum, the following core submissions are made herein:
 - (a) The Judicial Service Commission (hereafter '**the JSC**') is an important public institution created under the Constitution with a mandate to give practical expression to the ideals of transformation in the judiciary with reference to, *inter alia*, the process of judicial appointment in the various High Courts of South Africa. The JSC and its internal processes represent a decisive break away from the secretive, undemocratic and

¹ The terms 'Decision' and 'the main application' are used herein as defined at para 10 (pg 5) of Appellant's Heads of Argument in this Court.

² The term 'the Recording' is used here within the meaning defined at para 14 (pg 7) of Appellant's HOA as 'any copy or transcript of the audio recording of the Deliberations'.

discriminatory judicial appointments process that was applied during South Africa's pre-constitutional era. The JSC's processes involve deliberation in private in accordance with a Ministerial regulation promulgated in Government Gazette 24596 of 27 March 2003 (hereafter '**the Regulation**'). This veil of privacy is in no way akin to the secretive judicial appointments process that tainted such processes in pre-1994 era. The deliberations in private, and the maintenance of their privacy, are consistent with the values of openness and transparency, and pass constitutional muster because the privacy thereof serves legitimate public purposes and/or interests that are deserving of protection. The privacy of the deliberations and the protection thereof enhance the efficacy of the JSC in fulfilling its mandate.

(b) The Appellant has not challenged the constitutionality of clause 3(k) in the Regulations which expressly provides that the JSC's deliberations to be conducted in "private". The Appellant's failure to challenge the constitutional validity of clause 3(k) ought to be fatal to its appeal.

(c) The process of deliberation undertaken by the Commission is not a single, once off event. Rather, in accordance with the ordinary, dictionary meaning of the word "deliberate", the process of deliberation is a complex process involving various acts and stages, such as discussion, reflection and consensus-seeking amongst members of the Commission. The Recording to which the Appellant seeks access under Uniform Rule 53(1) ought to be protected against disclosure in order not to undermine and/or threaten the integrity of the deliberative process undertaken by the Commission in the execution of its mandate for public benefit and/or public interest. Disclosure of the Recording will cause harm to the deliberation process because it would, *inter alia*, stifle open, frank, honest expression of opinion and views by members of the JSC in relation to judicial candidates, which expression is a necessary component of a robust, deliberative process in which the public can have faith and confidence.

(e) Having regard to the ordinary, grammatical meaning of the word “deliberate”, as well as the interplay between Uniform Rule 53(1) and clause 3(k) of the Regulation, non-disclosure of the Recording does not bring about an inequality of arms between Appellant and Respondent in a judicial review of the Decision, nor does it preclude a proper adjudication and/or determination of the rationality between the Decision and the material which served before JSC when the Decision was made.

6. The structure of these heads of argument is such that the following matters are discussed herein below in the order indicated here:

- (i) Importance of the privacy of the JSC’s deliberations and the purpose and public benefit of protecting the Recording’s confidentiality;
- (ii) Non-disclosure of Respondent’s private deliberations does not offend the constitutional values of transparency and accountability;
- (iii) The open and democratic nature of the JSC’s judicial selection process as a whole;
- (iv) Whether the content of the JSC members’ private deliberations have ‘relevant’ evidential value in a judicial review application;
- (v) Interpretation of Uniform Rule 53(1)(b); and
- (vi) Conclusions and the appropriate order to be issued by this Court.

B. IMPORTANCE OF THE PRIVACY OF THE JSC’s DELIBERATIONS

7. The JSC’s procedure was published on 27 March 2003 in GG 24596. Clause 3(k) reads: ‘After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates for the appointment by consensus or, if necessary, by majority vote’. (my emphasis)

8. In *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA), the Court accepted and approved the JSC's *modus operandi* of conducting meetings in private and to vote by secret ballot.
9. Appellant has not challenged the validity of clause 3(k) and the JSC's practice of conducting private deliberations, nor the validity of the JSC's practice of not disclosing the audio and transcripts of such deliberations. This failure ought to be fatal to its application that the Recording be disclosed under Uniform Rule 53(1) because these failures signify the Appellant's acquiescence that clause 3(k) and the practice of not disclosing the content of the deliberations serve legitimate public purposes that are not offensive to open justice and accountable public administration.
10. The Appellant cannot accept the validity of the legal framework permitting the Respondent's private deliberations whilst at the same time seek an order unsealing those discussions which it accepts are validly done in private in the execution of a lawful authority and for legitimate purposes.
11. Appellant contends that protecting the confidentiality of the Recording will detrimentally affect the public's faith and confidence in the JSC and its process. This submission is unfounded. The public's trust in the JSC stems not from access to its recording of deliberations but rather from, inter alia, the diversity of its composition, the accessibility of the media and public to the JSC's hearings and interviews, the publicity given to the outcome of the interviews, and the JSC fulfilling its mandate of transforming the judiciary.
12. The JSC has since its inception conducted its deliberations in private and have not disclosed the content of members' deliberations, save to declare decisions made by the JSC and the reasons for same. Accordingly, it is unfounded for the Appellant to contend that non-disclosure of the Recording will undermine or detract from the public's faith and confidence in the judicial appointments process followed by the JSC.

13. Except for the Appellant, SA's people have never demanded access to the recordings of the JSC's private deliberations nor the content thereof.
14. Appellant contends that there is, under Uniform Rule 53(1), a general duty on the JSC to disclose its audio recordings in all instances of a judicial review and that the JSC ought to apply to Court for exemption from this obligation in specific circumstances. Put differently, the Appellant contends that it has a general right to the Recording, unless a Court decides otherwise on application by the JSC. This submission ought to be rejected. It flies in the face of s 38(1)(c) of the JSC Act which permits disclosure of 'confidential information' only in terms of a court order on application.
15. A general duty to disclose Recording will not serve the public interest nor be for its benefit because (i) it will create a 'big brother' (watchdog) scenario, and (ii) it will expose the JSC and/or its members to the risk of civil suit and/or undue public scrutiny for comments made in the legitimate exercise of freedom of thought and opinion about a judicial nominee as part of a robust judicial appointments process. Such a state of affairs will promote the creation of fear in the mind of JSC members which will serve to stifle honest, frank, robust debate on a vital issue of national importance, namely, the suitability or otherwise of candidates for judicial office (or higher judicial office, as the case may be).
16. Consequently, the legal duty to disclose contended for by the Appellant carries the real risk of undermining the JSC's efficacy as a democracy-building institution mandated to fulfil the difficult task of strengthening the judiciary through the appointment of moral judges³ who subscribe to the Constitution's values and whose appointment satisfies the criteria in the Constitution, the legitimate demands of transformation, as well as such other criteria or standard as may be relevant in the circumstances.

³ Dugard J 'Omar: Support for Wacks's ideas on the judicial process?' (1987) 3 *SAJHR* 215 220.

17. In view of the foregoing, there is considerable public benefit in the JSC conducting its deliberations in private and the Recording remaining out of the public domain. Moreover, it promotes 'freedom' in the judicial appointments process. As shows below, 'freedom' is constitutional value.
18. A constitutional framework enabling the legal position expounded here is advantageous because it supports an environment that affords JSC members a protected space where they can express themselves freely and without hindrance or fear.
19. It is submitted that the behind closed doors communications of JSC members ought, thus, to be immunized from public scrutiny, unless exceptional circumstances are found to exist which justify disclosure under section 38(1)(c) of the JSC Act for purposes of a judicial review. For the reasons given below under the heading 'D', such a course is not inimical to the notion of open justice and public accountability.
20. Judicial support for this view is evident in *Judicial Service Commission v Cape Bar Council* supra (at para 50) where Brand JA held that 'if the reasons of the majority cannot be distilled from the open deliberations which precede the voting procedure, there appears to be no reason, on the face of it, why the members cannot be asked to provide their *reasons anonymously*'. (emphasis added). Brand JA's reference to 'open deliberations' exemplifies the ideal that JSC members are to deliberate freely, frankly and openly with each other. Brand JA accepted as lawful the JSC's process of 'open deliberations' in private and its voting procedure by secret ballot. The provision of 'reasons anonymously' is a clear indication that the court will protect the identity of JSC members in so far as concerns their individual views or reasons in the exercise of their official functions as JSC members.

21. In so doing, the Supreme Court of Appeal in *Judicial Service Commission v Cape Bar Council* supra recognised that openness in a constitutional democracy is not limitless and that, in the context of the JSC's processes, transparency has certain identifiable, permissible boundaries which are not to be trespassed.

C. NON-DISCLOSURE OF DELIBERATIONS IN AN ERA OF OPENNESS

22. The preceding discussion demonstrates that protection of the confidentiality of the content of the JSC's deliberations serve important public purposes and carries public benefit. These include:

- (i) it fosters the protection of the dignity and privacy of judicial candidates,⁴ the dignity of the courts to which they seek appointment⁵ as well as the dignity of the judicial appointments process itself (as discussed below);
- (ii) it enhances the effective fulfillment of the JSC's mandate since its members are not hamstrung in discussions and are able to speak freely, frankly and candidly about candidates and how, in their estimation, a candidate vying for judicial appointment or higher judicial office is viewed on the scales of transformation and other relevant considerations. This they would be able to do without fear of, for example, causing embarrassment or humiliation to a candidate outside of the JSC chamber. The performance of JSC functions without fear or inhibition is an important norm to be underscored and not undermined.

⁴ Hoexter C & Olivier M *The Judiciary in South Africa* (2014) 176 contends that the right to privacy and dignity must be respected in the judicial interviewing and selection process conducted by the JSC.

⁵ The Constitution (s 165(4)) reads: '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 is an organ of state as defined in the Constitution (s 239).

23. Appellant wrongly contends that the Respondent's failure to grant access to the Recording violates the values of accountability and transparency.
24. The Constitution requires transparent and accountable public administration.⁶ These democratic values do not create rights.⁷ They are simply interpretive guides favouring a certain way of understanding the constitutional project.⁸ Thus, Appellant has no justiciable right to accountable and transparent public administration by the JSC.
25. Openness and accountability are not absolute values. They are fettered by values such as, human rights, human dignity, freedoms. Thus, failure by the JSC to disclose the Recording will *per se* not be a secretive act incompatible with open justice. This is recognized in *JSC v Cape Bar Council* supra where Brand JA (at para 51) stated that the JSC is under no obligation to give reasons under all circumstances for each and every one of the myriad of potential decisions it has to take.
26. An indicator bolstering the submission that the JSC is not obliged to disclose all information in its possession or under its control, is its exemption from providing information when s 12(d) of the PAIA⁹ applies. This submission is reinforced by the general prohibition against disclosure in s 38(1) of the JSC Act (quoted in full at pg 45 of Appellant's HOA).

⁶ As an 'organ of state', the JSC is bound by s 195(1) of the Constitution. Section 195(1)(g) reads: 'Transparency must be fostered by providing the public with timely, accessible and accurate information.'

⁷ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders & Others* 2005 (3) SA 280 (CC) para 21.

⁸ Roux T 'Democracy' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 07-06) 10-26.

⁹ The relevant extract of s 12 reads: 'This Act does not apply to a record –... (d) 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 No. 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.' This provision has hitherto not been subjected to a constitutional challenge. The Appellant does not challenge its validity *in casu* either.

27. At paras 67 and 105 of the Appellant's HOA, it is contended that the JSC, like the South African Revenue Service (SARS), does not have an impenetrable veil of privacy. The comparison with SARS is misplaced. The provisions of sections 67 to 73 of the Tax Administration Act 28 of 2011 regulate the disclosure of 'taxpayer information' and spells out the specific circumstances and requirements for disclosure. This position is not comparable to the JSC under s 38(1) of the JSC Act.
28. The issue whether a non-disclosure of information is incongruent with the Constitution's values must be decided on the facts of each case. No hard and fast rules can be laid down in advance.
29. Consequently, even if this Honourable Court finds that, as a general proposition, the Recording is part of the 'record ... of proceedings' of the JSC for purposes of Uniform Rule 53(1), that would not be the end of the enquiry. It remains to be determined whether disclosure or non-disclosure thereof, as the case may be, is justified on the facts of this case.
30. A balancing of competing values, interests and/or rights must occur. Relevant factors to be considered are the nature of the information sought, the circumstances and conditions under which the information came into existence, the purpose of the disclosure, the relevance of the information sought in relation to the stated purpose, whether the information is protected by law, the potential sensitivity of the information, the impact to anyone if disclosure is ordered or not ordered (as the case may be), and the evidential weight attachable to the information sought if disclosed.
31. It is submitted that the Supreme Court of Appeal and the Court of first instance *in casu* correctly held that disclosure of the Recording is in casu not required under Uniform Rule 53(1)(b) and that non-disclosure thereof does not violate the democratic principles of openness and accountability.

32. The kernel of the Appellant's contention is that a denial of access to the Recording compromises its right of access to courts as it prejudices its main review application due to a lack of 'equality of arms'. This is not so. Appellant received six lever arch files containing all the documents which served at the JSC when it took the impugned Decision. The Appellant is, thus, in the same position as the JSC was when the Decision was made. Consequently, it has all the relevant information to build a case for the judicial review and make submissions on the (ir)rationality of the Decision.
33. However, even if an assumption is made in the Appellant's favour as to prejudice, this is not the end of the enquiry. As stated above, disclosure must be justified upon a proper weighing of all competing values, rights and interests, having regard to an array of factors. It is submitted that, for the further reasons given below, non-disclosure of the Recording is justifiable in law and consistent with the Constitution and its values.
34. The Bill of Rights (s 8(1))¹⁰ imposes a positive obligation on the JSC as an organ of state to respect and protect the fundamental rights of candidates interviewed by it. These include their rights to, for example, dignity.
35. The JSC operates in an open and democratic society based on human dignity, equality, and freedom. Its actions must be consonant with constitutional values and promote the protection of fundamental rights of judicial candidates. Although candidates consent to a public interview and scrutiny, thus does not detract from the JSC's duties to them under s 8(1).
36. Clause 3(k) of GG 24596 of March 2003 catering for private deliberations, and the JSC's practice of not disclosing the Recording, are measures furthering the fulfillment of the JSC's obligations towards the candidates arising from s 8(1) of the Constitution. The order sought by the Appellant unjustifiably seeks to undo the efficacy of these measures.

¹⁰ The Constitution (s 8(1)) reads: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

37. Relying on *e TV (Pty) Ltd and Others v Judicial Service Commission*,¹¹ and *Mail and Guardian Limited and Others v Judicial Service Commission*,¹² the nub of the Appellant's argument is that non-disclosure of the Recording is inimical to the notion of open justice. These decisions are not on point. They are factually distinguishable. Both dealt with access to a 'public proceeding'. Neither dealt with the question with which this Court is seized, namely, whether a third party is entitled to access the audio recordings of an organ of state containing the private deliberations which occurred after a public hearing had been completed.

38. To the extent that the above cited cases may be relevant to the JSC, they may serve as authority for access to the JSC's interviews of candidates and disciplinary hearings. They do not serve as authority for the proposition that access is permitted to the private deliberations which take place pursuant to any such interview (or disciplinary hearing), nor to the audio recordings of any such private deliberations. To this end, the JSC deliberations and the Recording ought to be protected as, for example, behind closed door discussions / deliberations by Magistrates and their assessors, as well as Judges of the High Court and their fellow Tax Court members, including their handwritten or typed notes. In judicial review proceedings under Uniform Rule 53(1), any such recording ought not to be 'fair game'. It ought to be 'off limits'.

D. THE JSC'S SELECTION PROCESS SATISFIES THE PRESCRIPTS OF 'AN OPEN AND DEMOCRATIC SOCIETY BASED ON HUMAN DIGNITY, EQUALITY AND FREEDOM'

39. For the ensuing reasons, it is submitted that the JSC's judicial selection process as a whole bears the hallmarks of a transparent and accountable process adhering to the values of an open and democratic society.

¹¹ 2010 (1) SA 537 (GSJ).

¹² 2010 (6) BCLR 615 (GSJ).

40. Appellant contends that non-disclosure of the Recording would render the JSC to be a non-transparent institution whose judicial selection process cannot be described as fully or truly open and accountable. This submission is incorrect.
41. The transparency and accountability of the judicial selection process cannot be viewed in isolation with reference only to the non-disclosure of the JSC's deliberations. To do so would lead to a distortion of the true position since that phase is but a part of a holistic, comprehensive selection and appointment process and must be viewed within its proper context therein.
42. The JSC's processes as a whole cannot be defined, or characterized, by a single element thereof. Instead, the processes must be seen in their totality and then a determination made as to whether, all things considered, those processes pass the muster of the Constitution in the sense that they are injected with the standards and values of an open and democratic society.
43. The judicial selection and appointments process followed by the JSC is infused with the hallmarks of democracy in that it, inter alia, embraces fair and inclusive decision-making processes that afford all its members equal opportunity to participate in its decisions and decision-making process. Members are entitled to prior notice of a JSC meeting, have the equal right to attend, speak and vote there, are entitled to receive documents to be presented there, and are also entitled to a copy of JSC decisions made.
44. The selection and appointment process for High Court judges, and the individual parts of that process, must be understood within its historical context. The pre-1994 process of selecting and appointing judges was wholly undemocratic, shrouded in secrecy and largely a political decision

by the Head of State acting on the advice of the Minister of Justice.¹³ The entire process lacked legitimacy. There was no transparency and accountability. Public participation was wholly lacking.

45. Apart from these weaknesses, the general public's lack of faith and confidence in judicial selection and appointment was rooted in the deep-seated practice of discriminating against persons on the basis of, inter alia, race, gender, ethnicity, sexual orientation and qualification. The 1993 interim and 1996 final Constitutions completely overhauled this process and introduced a new process which, as shown below, is suffused with the democratic values of fairness, openness, accountability and efficiency.

46. The key constitutional changes that transformed the judicial selection and appointments process for High Court judges are: first, the JSC was created as a sui generis construct of the 1993 interim Constitution whose powers and functions are, for present purposes, demarcated within the 1996 final Constitution (ss 174, 178) read with the JSC Act.¹⁴ Secondly, the JSC comprises 25 persons from diverse backgrounds (ss 178(1)(a)-(k)), including politicians, senior Judges (namely, the Chief Justice, President of the SCA and Judges President), legal practitioners, an academic and members of civil society (such as, NADEL and Black Lawyers Association). Thirdly, basic criteria and standards for judicial appointment are prescribed (ss 174(1), (2)).¹⁵ Fourthly, High Court judges are appointed by the President on the JSC's advice (s 174(6)). Fifthly, the Bill of Rights is

¹³ For a discussion of the pre-1994 judicial appointments process, see Davis DM 'Judicial appointments in South Africa' (2010) available at <http://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp40-43.pdf> (accessed 15 August 2015); van Blerk AE 'Judicial appointments: some reflections' 1992 *THRHR* 559.

¹⁴ The Constitution (s 178(4)) reads: 'The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.'

¹⁵ The Constitution (s 174(1)) reads: 'Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. ...' Section 174(2) reads: 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'

binding on the JSC as an 'organ of state'.¹⁶ Sixth, democratic principles are crafted for public administration and are enumerated in s 195(1) which is made binding on the JSC by s 195(2) of the Constitution.

47. The Constitution is silent on the formal process of selecting and appointing High Court judges. Section 178(6) confers on the JSC wide latitude to determine its own internal procedure, subject only to the requirement that JSC decisions must be taken by majority vote.¹⁷ Thus, the Constitution creates no express duty to deliberate nor prescribes the manner thereof.

48. By notice in GG 24596 of 27 March 2003, the Minister of Justice and Constitutional Development, acting in terms of s 5 of the JSC Act, outlined a formal procedure in clauses 3(a)-(m) for the JSC to follow in relation to the selection of candidates for appointment as High Court judges. Clause 3(k) quoted above requires the JSC to deliberate after interviewing candidates for High Court appointment. However, that procedure is not mandatory on the JSC. In accordance with the JSC's wide powers under the s 178(6) of the Constitution, clause 7 of the notice reads: 'The Commission may depart from this procedure or condone any departure from this procedure whenever, in its opinion, it is appropriate to do so.'

49. Clauses 3(a)-(m) in GG 24596 of March 2003 was adhered to by the JSC for the selection of Judges to the Western Cape High Court at its October 2012 sitting. It is submitted that, for reasons given in the succeeding paragraph, this process embodied the values which are traits of an open and democratic society based on human dignity, equality and freedom. It is further submitted that non-disclosure of the Recording, as contended for herein, does not detract from, nor erodes, this undeniable fact.

¹⁶ Section 8(1), the Constitution read with para (b) of the definition of 'organ of state' in s 239.

¹⁷ The Constitution (s 178(6)) reads: 'The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.'

50. The JSC's internal processes satisfy the norms and standards of an open and democratic society based on human dignity, equality and freedom because the following objective facts are hallmarks of that process:

- The nomination, selection and appointment process is governed by law freely accessible to the public;¹⁸
- Judicial vacancies were publicly advertised and nominations invited;
- The JSC publicized the criteria for eligibility for judicial appointment;
- The JSC appointed a screening committee to review applications and short-list candidates for interviews;
- The JSC advertised the short-listed candidates as well as the date, time and venue of their interviews;
- The JSC accepted comments from institutions and the public as regards the suitability of candidates short-listed by the JSC;
- As part of its quality control measures, the JSC instructed an independent organization to conduct a background check on every short-listed person. A report was then compiled on each candidate;
- Each short-listed candidate was furnished with a copy of documents to be used in the selection process by the JSC;
- Interviews were conducted in the presence of the public and media;
- The JSC members deliberated on the interviewees and, since no consensus was reached, candidates were selected by majority vote. This is democratic, particularly since each member can exercise 'free will' when voting and each member has an equal vote regardless of his/her status, office, profession or qualification;
- In accordance with the democratic values of open, speedy and efficient public administration, the JSC publicly announced its advice for judicial appointment within a few days of the interviews;¹⁹

¹⁸ For a detailed study on judicial appointments in SA, see Cowen S 'Judicial Selection in South Africa' (October 2010) available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf> (accessed 15 August 2015).

- In accordance with the democratic principle of accountability, the JSC provided reasons for its favourable advice relating to certain candidates and, on request, gave written reasons for the unfavourable decision regarding other candidates; and
- The JSC's composition comprises persons from the three arms of government (that is, legislative, executive and judiciary), the legal and academic profession, as well as civil society. Owing to the diversity of its composition from various sectors of SA society, a JSC decision as regards the appointment of a High Court judge may, thus, in a sense be described as 'the will of the people'.
- The clearest indication that the process of selecting and appointing High Court judges is democratic lies in the fact that the President of SA is obliged to appoint persons approved by the JSC and cannot overrule its decision in this regard. This is evident from the peremptory language of s 174(6). It reads: 'The President *must* appoint the judges of all other courts on the advice of the Judicial Service Commission.' (my emphasis) This bears testimony to the JSC's institutional independence, a characteristic of SA's democratic hygiene and that the judicial selection process viewed holistically accords with the norms and standards of the Constitution.

51. Failure to disclose the Recording does not render the JSC's judicial selection process secretive or inimical to the Constitution's democratic values and ethos. The Appellant's contention to the contrary is misguided. Non-disclosure does not taint the selection process.

¹⁹ The Constitution (s 237) reads: 'All constitutional obligations must be performed diligently and without delay.'

E. DOES THE RECORDING HAVE ‘RELEVANT’ EVIDENTIAL VALUE IN THE MAIN REVIEW APPLICATION?

52. The Appellant contends that the Recording is a contemporaneous ‘record of such proceedings sought to be corrected or set aside’ so that it is entitled thereto under Uniform Rule 53(1)(b). The Respondent and the Amicus Curia dispute this. Both align themselves with the decisions of the Supreme Court of Appeal and Court of first instance, namely, that the Recording is not relevant evidential material for the main application.
53. An applicant in a review under Uniform Rule 53(1)(b) is generally entitled to the full record of a decision.²⁰ However, the guiding principle is that the whole record of the proceedings under review need not be furnished: *only that part which is relevant to the decision being reviewed need to be furnished.*²¹
54. Therefore, even if this Honourable Court finds that audio recordings of the JSC’s private, behind close door deliberations forms part of the record of the proceedings for purposes of Uniform Rule 53(1), that would in and of itself not entitle the Appellant as of right to access the Recording.
55. In order for the Recording to be subject to disclosure, it must pass the test for relevance.
56. Alternatively, in the context of this case, any relevance which the Recording may have is tenuous and outweighed by the public interest and/or benefit in retaining the confidentiality of its content and protect it against public consumption.

²⁰ *Democratic Alliance v Acting NDPP* 2012 (3) SA 486 (SCA) 501.

²¹ *Muller v The Master* 1991 (2) SA 217 (N) 220D-F; *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E) 233D. See also Erasmus *Superior Court Practice* Service 45, 2014 at B1-386.

57. The Appellant relies chiefly on the decision of Binns-Ward J in *City of Cape Town v SANRAL*²² as authority for the proposition that the Recording forms part of Respondent's 'record' of proceedings at its October 2012 sitting. It is submitted that Appellant's reliance on SANRAL is misplaced. First, SANRAL is factually distinguishable because the nature of the decision-maker involved in that instance is wholly different. The JSC is a sui generis institution created by the 1993 interim Constitution whose powers and functions are ordained in, and regulated by, the 1996 final Constitution. Its deliberations take place in private in terms of a Ministerial notice and its deliberations are, by virtue of s 12(d) of the PAIA, cast outside of the public domain and shielded from public scrutiny. None of these considerations applied to the decision-maker in *SANRAL supra*.

58. In *SANRAL supra*, Binns-Ward J also emphasized that an applicant is not entitled, as of right, to access all deliberations of a decision-maker. The learned Judge underscores that an applicant may access deliberations which are 'relevant' to a review. In other words, as a matter of law, the mere existence of audio recordings (or transcripts) of deliberations by the JSC does not in and of itself entitle the Appellant to access same for its review application. The relevance thereof must be shown to exist. For reasons given below, it is submitted that the Recording does not satisfy the test for 'relevance' at a judicial review. Hence, this appeal must fail.

59. *In casu*, the Appellant states that it seeks to ascertain from the Recording whether 'relevant considerations' were ignored and 'irrelevant considerations' taken into account. In other words, it seeks to establish a positive and a negative. On the one hand, as regards the successful candidates, it seeks to ascertain whether the Recording has discussions indicating that relevant factors were ignored and irrelevant ones canvassed. On the other hand, in relation to the unsuccessful candidates, it

²² [2013] ZAWCHC 74. See paras 58-59 (pgs 18-19) of Appellant's HOA.

seeks to determine whether the Recording contains discussions indicating that irrelevant factors were considered and relevant ones ignored.

60. It is submitted that the Appellant is engaged in a fishing expedition geared to second-guessing the JSC members' legitimate exercise of 'free will' in the sense of the freedom to vote in a manner consistent with their individual conscience and preference, without fear, favour or prejudice.
61. An order granting access to the Recording undermines the integrity of the judicial appointments process which will tarnish the judiciary in the eyes of the general public. At the same time, a real risk is created of reputational damage being caused to the successful candidates appointed as Judges.
62. Even if access to the Recording is assumed not to be a fishing expedition, it must still pass the muster of the 'relevance' test. *In casu*, it is submitted that the Recording has no evidential relevance as found in the court a quo.
63. The absence of evidential relevance is clear when due consideration is given to the nature and complexity of the deliberation process undertaken by JSC members. It is to this aspect that attention will now be turned.
64. The starting point is consideration of the background and objective of GG 24596 dated 27 March 2003. It is a Ministerial Regulation issued pursuant to the JSC Act (s 5), a national statute with its roots in s 178(4) of the Constitution. The Regulation's purpose is to outline procedural steps to be followed by the JSC in the selection and appointment of judicial officers.
65. Although clause 3(k) of the Regulation provides for deliberation, no guidelines are given as to the manner, form, duration and content thereof, or the location where and time when same must occur. Thus, these are matters to be determined by the JSC exercising its wide powers conferred in the Constitution under s 178(6).

66. As regards the language used in clause 3(k), the meaning of 'deliberate' is important. In its context, this word is used as a verb. When used as a verb, the Oxford Dictionary²³ defines 'deliberate' to mean 'engage in long and careful consideration or discussion'. As a noun, the Oxford Dictionary defines 'deliberation' as 'long and careful consideration or discussion' and 'slow and careful movement or thought'. Viewed in this light, 'deliberate' in clause 3(k) is not a single, once off act or event but a thought-provoking, lengthy process of debate and reflection ('consideration or discussion') on the suitability or not of candidates competing for judicial appointment.
67. Accordingly, 'the Commission shall deliberate in private' as used in clause 3(k) entails the JSC members analysing, evaluating and assessing, for e.g., documents in their possession and performance of candidates. Clause 3(k) envisages JSC members to discuss the suitability or otherwise of judicial candidates and apply their minds ('consideration') on whether a candidate(s) may be selected by consensus through compromise.
68. JSC members are required to be open-minded throughout the deliberation process so as to be open to persuasion ('slow and careful movement or thought'). If there is no consensus or meeting of minds, then voting by secret ballot occurs as it did at the October 2012 sitting. As shown below, this creates a hurdle to establishing 'relevance' of the Recording.
69. Opinions held by JSC members in relation to judicial candidates are not, and should not be, static. Since members are required to be open-minded during the deliberation phase, their thoughts are susceptible to movement (or change) as they think fit in the exercise of their discretion. This is part of freedom and the advancement of freedoms, a founding value in the Constitution (s 1(a)). In relation to the JSC, freedom in the judicial selection and appointments process is designed to serve and protect judicial transformation, a constitutional aim.

²³

See <http://www.oxforddictionaries.com/definition/english> (accessed 19 August 2017).

70. In accordance with the Constitution's democratic ethos, when exercising their equal voting rights, JSC members vote as individuals and exercise a freedom of choice of candidate, without fear, favour or prejudice, subject only to a member being satisfied that his vote accords favourably with his/her conscience, the Constitution and its criteria for judicial appointment.
71. Voting is purely a subjective exercise in which JSC members exercise 'free will'. It is strictly a member's personal choice. The reason a member votes for or against a candidate is based exclusively on factors he/she considered at the critical moment of casting a vote. In other words, voting by secret ballot logically entails each member engaging in some degree or form of own deliberation to reflect on how to exercise the right to vote.
72. Since clause 3(k) of the Regulation refers to 'the Commission', it envisages deliberation by JSC members as a collective group of 25 persons. However, the Regulation (clause 7) empowers the JSC to 'depart from this procedure or condone any departure from this procedure whenever, in its opinion, it is appropriate to do so'. Thus, there is no legal impediment precluding JSC members from deliberating on their own or in private (one-on-one) discussion with one or more JSC members.
73. Indeed, in practice, such private deliberation by members sitting and reflecting by themselves or in private groups would naturally occur. The deliberations by JSC members sitting by themselves are not covered by the Recording. Nor does the Recording contain the private deliberations between individual JSC members that took place outside of its formal conference session.
74. Deliberation, whether as the JSC or individually or in small groups, enables members to 'think aloud' and use each other as 'sound boards' for sharing of ideas about candidates. In this way they can reflect on their own observations and assessments of candidates. In so doing, they can decide

whether their initial view is merited or requires reconsideration so that they are able to cast a more informed or balanced vote. This is consonant with the 'slow and careful thought' process envisaged in the Oxford Dictionary meaning of 'deliberation' stated herein above.

75. The content of a JSC member's own (private) deliberation plays a pivotal role to inform how he/she cast a vote. Thus, when voting by secret ballot occurred at the JSC's October 2012 sitting, there is no indication as to what impact, if any, the JSC's group deliberations under clause 3(k) had on a member's ultimate vote for or against candidates jockeying for position on the Western Cape High Court Bench.

76. Accordingly, there is no justifiable basis upon which the Appellant can plausibly contend that the Recording is relevant for purposes of the rationality test in the main review application.

77. As stated above, voting at the JSC for or against a judicial candidate is, strictly speaking, a subjective exercise. A member's vote is influenced by an array of factors, some objective and others not. For example, there is no uniform definition of 'transformation', or of the qualities needed for a person to be a good, moral judge.

78. Hence, votes are cast for or against a candidate based on a JSC member's own understanding of transformation as well as his/her own belief as to the personal qualities or attributes that are to be exhibited by a candidate to justify a judicial appointment (or higher judicial office).

79. In addition, a JSC member's personal vote is also influenced by his/her own perception as to whether a candidate has sufficient own life experience (including, community involvement) and practical legal training to justify judicial appointment. This was, after all, the rationale which motivated the Constitution's drafters to make the JSC a diverse group of persons.

80. The subjective factors alluded to above are irrelevant for purposes of a rationality test at a judicial review. Therefore, the JSC's deliberations and the content thereof as per the Recording have no evidential value in the Appellant's main (review) application. They do not constitute a legitimate yardstick (or barometer) for assessing the rationality of the Decision.
81. Even if a factor was mentioned during the JSC deliberations which may be classified as 'irrelevant', that does not assist in the judicial review process because there is no indication as to what weight, if any at all, any JSC member placed on such factor at the crucial time of casting his/her vote. The only way of determining the influence any such 'irrelevant' factor may have had on the Decision under review is by polling every JSC member so as to ascertain the factors or considerations he/she actually took into account in deciding to cast his/her vote for (or against) a judicial candidate. This is a course which ought to be avoided as it would entail piercing the veil of anonymity behind a JSC's member's vote by secret ballot.
82. As stated above, the rationality of the Decision must be determined with reference to whether a rational connection exists between the documents which served at the JSC and the information at its members' disposal when the Decision was taken, having regard also to the various constitutional requirements and values, as well as other legally relevant considerations. In this regard, the Recording is irrelevant and has no evidential value.
83. In other words, the nature of the Recording's content is such that it cannot assist a reviewing court to establish the existence or absence of a rational relationship between, on the one hand, the objective factual material which served before the JSC at its October 2012 sitting in relation to the candidates and, on the other, the JSC's decision to advise the President to appoint the successful candidates and, by implication, not to appoint the unsuccessful candidates. Hence, this appeal ought to be dismissed.

84. The Constitution (s 178(6)) provides that 'decisions of the Commission must be supported by a majority of its members'. This means that a JSC 'decision' exists if at least 13 members support it. This creates an inherent conundrum in any judicial review of a JSC 'decision'. This is so because: Does a reviewer focus on the rationality of the decision with reference to the views of the majority who voted in its favour or with reference to the views of the minority members who voted against it, or on the rationality of the views or positions taken by both sides of the divide? Or, does the reviewer simply consider all the objective facts emanating from the documentation and information which served before the JSC when a 'decision' was taken and then adjudicate whether that result by majority vote passes the rationality test?

85. It is submitted that the latter applies. Consequently, the Recording is not relevant evidential material for the main review application.

86. The personal thoughts and perceptions of JSC members are irrelevant for a judicial review. A member's personal stance is not binding on the JSC or its membership as a whole. Hence, the Recording is irrelevant for the main review application. It contains non-binding, personal views of JSC members when they 'deliberated' on the candidates. In any event, views expressed in that process is preliminary and subject to change at any time before, or at the time of, voting.

F. UNIFORM RULE 53 INTERPRETED THROUGH THE CONSTITUTION

87. The Decision is susceptible to judicial review. The Decision must satisfy the doctrine of legality. In terms thereof, the decisions must be rational and not arbitrary. See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para 4; *Minister of Military Veterans v Motau* 2014 (5) SA 69 (CC) at para 69. An arbitrary or irrational decision is unlawful.

88. The Appellant challenges the legality of the Decision in the main application. To that end, it relies on Uniform Rule 53(1) as the basis for its contention that the JSC is under a legal duty to disclose the Recording.

89. The relevant extract of Uniform Rule 53(1) reads as follows:

‘Save where any law provides otherwise, all proceedings to bring under review the decision ... of any tribunal, board performing ... administrative functions shall be by notice of motion directed and delivered ... to all other parties affected - ... (b) calling upon the ... chairman or officer ... to dispatch ... the record of such proceedings sought to be corrected or set aside’ (my emphasis)

90. In order to adjudicate this appeal, this Honourable Court is called upon to interpret Uniform Rule 53 and determine whether the Recording is a ‘record’ contemplated therein and, if so, whether the limits of Rule 53 as expounded by the Supreme Court of Appeal are tenable in our constitutional order.

91. The Amicus submits that the decision of the court below ought to be upheld in this regard having regard to the history, purpose and context of Rule 53(1), as well as its interplay with the Constitution.

92. Uniform Rule 53 is part of subordinate legislation. Its provisions must be interpreted purposively and in context. Moreover, under s 39(2) of the Constitution, Rule 53 must be construed through the prism of the Bill of Rights, that is, in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights’.²⁴

²⁴ See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 21; *FNB Ltd v CSARS* 2002 (4) SA 768 (CC) 787C-F; *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25 paras 34-35 (20 August 2015).

93. The origins (genealogy) of Rule 53 are usefully captured per Corbett JA (as he then was) in *Safcor Forwarding Johannesburg (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 667 – 673.

94. The purpose of Rule 53 is ‘to facilitate applications for review’.²⁵ Its aims are encapsulated in the following dictum per Kriegler AJA (as he then was)

‘Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit. Manifestly the procedure created by the Rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record.’²⁶

95. The Constitutional Court, in *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) at para 37, explained the importance of the role of Uniform Rule 53 as follows:

‘Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why ; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision- maker's stance; and in the performance of the reviewing court's function.’

²⁵ *Cape Town City Council v South African National Roads Authority* 2015 (3) SA 386 (SCA) at para 36.

²⁶ *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660 D-F.

96. In the Court below, Maya DP correctly expressed the objective of Rule 53 and its interplay with the Constitution and the proper functioning of the Courts as follows:

[13] The primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court. It is established in our law that the rule, which is intended to operate to the benefit of the applicant, is an important tool in determining objectively what considerations were probably operative in the mind of the decision-maker when he or she made the decision sought to be reviewed. The applicant must be given access to the available information sufficient for it to make its case and to place the parties on equal footing in the assessment of the lawfulness and rationality of such decision. By facilitating access to the record of the proceedings under review, the rule enables the courts to perform their inherent review function to scrutinise the exercise of public power for compliance with constitutional prescripts. This, in turn, gives effect to a litigant's right in terms of s 34 of the Constitution - to have a justiciable dispute decided in a fair public hearing before a court with all the issues being properly ventilated. Needless to say, it is unnecessary to furnish the whole record irrespective of whether or not it is relevant to the review. It is those portions of a record relevant to the decision in issue that should be made available. A key enquiry in determining whether the recording should be furnished is therefore its relevance to the decision sought to be reviewed.'

G. CONCLUSIONS AND APPROPRIATE ORDER

97. The decision of the court a quo strikes a fair balance between, on the one hand, the Appellant's right of access to certain information and, on the other, the Respondent's duty to maintain and preserve the integrity of the judicial selection and appointments process and the dignity of the candidates.

98. In view of all the foregoing submissions, this appeal ought to fail and the decision of the court below upheld.

DATED AT CAPE TOWN ON THIS 2nd DAY OF AUGUST 2017.

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Per: DR. FAREED MOOSA

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT289/2016

In the matter between:

HELEN SUZMAN FOUNDATION

Appellant
(Applicant in Court a quo)

and

JUDICIAL SERVICE COMMISSION

Respondent
(Respondent in Court a quo)

THE TRUSTEES FOR THE TIME BEING OF

THE BASIC RIGHTS FOUNDATION OF SOUTH AFRICA

Amicus Curia
(Applicant)

AMICUS CURIAE'S LIST OF AUTHORITIES

1. Statutes

Constitution of the Republic of South Africa, 1996

Judicial Service Commission Act 9 of 1994

Tax Administration Act 28 f 2011

2. Books, Journals, Reports and Online (internet) material

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- Davis DM 'Judicial appointments in South Africa' (2010) available at <http://www.sabar.co.za/law-journals/2010/december/2010-december-vol023-no3-pp40-43.pdf>
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3. Cases

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- *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25
- *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA)
- *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA)
- *Cape Bar Council v JSC and Another* 2012 (4) BCLR 406 (WCC)
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- *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E)
- *First National Bank Ltd v CSARS* 2002 (4) SA 768 (CC)
- *Holomisa v Argus Newspapers Ltd* 1996 (6) BCLR 836 (W)
- *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC)
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- *Judicial Service Commission & Another v Cape Bar Council* 2013 (1) SA 170 (SCA)
- *Lane and Fey NNO v Dabelstein* 2001 (2) SA 1187 (CC)
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