IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: 289/16
SCA CASE NO: 145/2015
WCC CASE NO: 8647/2013

In the matter between:

HELEN SUZMAN FOUNDATION Applicant

and

JUDICIAL SERVICE COMMISSION Respondent

with

THE TRUSTEES FOR THE TIME BEING OF
THE BASIC RIGHTS FOUNDATION OF SOUTH AFRICA *Amicus Curiae*

APPLICANT'S HEADS OF ARGUMENT IN REPLY TO THE AMICUS CURIAE'S HEADS OF ARGUMENT

Introduction

1. These heads of argument by the applicant ("**the HSF**") are submitted in reply to the arguments raised by the *amicus curiae*, the trustees for the time being of the Basic Rights Foundation of South Africa ("**the BRF**"). To the extent applicable, we adopt the defined terms used in the HSF's heads of argument dated 23 June 2017 ("**the HSF's main heads of argument**").

2. The arguments raised by the BRF overlap principally with those of the respondent and are, to this extent, impermissible. These arguments have, in any event, been adequately addressed in the HSF's main heads of argument.

BRF's submissions

3. Without in any way conceding their relevance or novelty, the HSF addresses the following contentions by the BRF:

3.1 Firstly, the BRF sets out argument relating to why the deliberations of the JSC should be kept private (paras 7 to 21 of its heads of argument). The BRF deals with what it considers the importance of the privacy of deliberations and the purported public benefit of protecting the confidentiality of the Recording.

3.2 Second, the BRF contends that non-disclosure of the JSC's private deliberations does not offend the constitutional values of transparency and accountability (paras 22 to 38 of its heads of argument). This argument, the BRF contends, supports non-disclosure.

3.3 Third, the BRF sets out what it considers to be the open and democratic nature of the JSC's judicial selection process as a whole (paras 39 to 51 of

its heads of argument). This argument, the BRF contends, also supports non-disclosure.

3.4 Fourth, the BRF contends (at paras 52 to 86 of its heads of argument) that the HSF is not entitled to have access to the Recording as part of the Rule 53 record as it is "*not relevant evidential material for the main review application*".

3.5 Fifth, the BRF contends (at paras 87 to 96 of its heads of argument) that the Recording does not form part of the "*record of proceedings*" within the meaning of Rule 53 as it does not form part of the objective information before the JSC.

BRF's submissions relating to the privacy of deliberations

4. In paragraphs 7 to 21 of its heads of argument, the BRF makes certain allegations in respect of why it contends that the deliberations of the JSC should be kept private. These arguments, as discussed in the HSF's main heads of argument, fail to answer the crisp legal point in this matter, which is <u>whether the deliberations form part of the record under Rule 53</u>.

5. Confidentiality, even when provided for by statute, cannot be relied on as a basis for withholding disclosure under Rule 53.[1] The arguments by the BRF fall on this ground alone. A number of specific averments regarding the privacy of the deliberations made by the BRF to which the HSF responds below, reveal further shortcomings in the BRF's reasoning on this point.

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[1] This is settled law. See *Comair Limited v The Minister of Public Enterprises & others* 2014 (5) SA 608 (GP); *Rutland v Engelbrecht* 1956 (2) SA 578 (C) at 579; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260; *S v Naicker and Another* 1965 (2) SA 919 (N); *Crown Cork and Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W) at 1099.

6. First, the words "*shall deliberate in private*" in GG 24596 clause 3(k) ("**clause 3(k)**") (referred to in para 7 of the BRF heads of argument) do not mean that deliberations are not required to be disclosed as part of the Rule 53 record. Privacy is not a reason for a blanket non-disclosure of parts of a record required under Rule 53.[2] To suggest that the HSF case is defective as it should have challenged the validity of the privacy provision under clause 3(k), and the JSC's practice of private deliberations or the JSC's practice of not disclosing the audio and transcripts of the deliberations, is to deny the HSF its rights under Rule 53, which includes access to the full record of proceedings. No underlying provisions need be challenged for the exercise of this right.

7. There is no exception in Rule 53 relating to information that is part of private proceedings or, indeed, confidential information. As set out in the HSF's main heads of argument, the fact that deliberations are held in private does not in and of itself render the information in connection therewith confidential.[3] In any event, at most, confidentiality, if properly established, may lead to the setting up of a confidentiality regime in respect of disclosure. The HSF insisting on enforcement of its rights under Rule 53, and not directly challenging the privacy provision in clause 3(k), certainly does not "*signify the [HSF'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*" (para 9 of the BRF's heads of argument). In fact, the opposite is true.

8. Second, it is an oversimplification to state that the HSF contends "*that there is, under Rule 53(1), a general duty on the JSC to disclose its audio recordings in all*

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2 See paras 74-82 of the HSF's main heads of argument.

3 Ibid.

instances of a judicial review" (emphasis added). Disclosure must be made under Rule 53 if the information is relevant and not privileged. The same standard applies to any person confronted with a Rule 53 obligation to provide a record. It is certainly not the case that, if the Court finds in favour of the HSF, all confidentiality related to private deliberations would be lost. The case is limited to disclosure for the specific purposes of the Rule 53 record in this case.

9. The BRF further contends that such a "*general duty*" flies in the face of section 38(1)(c) of the JSC Act, which allegedly "*permits disclosure of 'confidential information' only in terms of a court order on application*". Firstly, section 38(1) relates to non-disclosure of confidential information by natural persons in the service of the JSC and not to the JSC itself (this aspect is dealt with in the HSF's main heads of argument at paras 140 and 141). Second, the section does not purport to limit any obligations that the JSC, as a body, may have in terms of the Court rules. The section thus does not apply to obligations on the JSC in terms of the Court rules.

10. Third, the BRF states (at para 11) that "*[t]he public's trust in the JSC stems not from access to the Recording but rather from, inter alia, the diversity of the composition, the accessibility of the media and public to the JSC's hearings and interviews, and the JSC fulfilling its mandate of transforming the judiciary*". It is uncertain why this should necessarily be the case. The public's trust in the JSC's work will likely be enhanced through a transparent and justifiable account of its work – and, if its decision-making is not transparent, rational or otherwise justifiable, by a Court correcting its decision-making for future benefit. In any event, such allegations plainly do not justify throwing a shroud of secrecy over the essential element of decision-making in this case, being the deliberations, from

which the JSC's reasons were allegedly derived, and to which the HSF is entitled under law.

11. The BRF further states (from para 15) that a duty to disclose the Recording will not serve the public interest or be in the public interest as:

11.1 "*it will create a 'big brother' (watchdog) scenario*"; and

11.2 "*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 appointment process*".

12. Such a state of affairs, so the argument goes, will apparently promote the creation of fear in the minds of the JSC members and will "*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)*" (para 15). Disclosure thus apparently "*carries the real risk of undermining the JSC's efficacy as a democracy-building institution*" (para 16).

13. As discussed at para 127 of the HSF's main heads of argument, the JSC is constitutionally bound to the principles of transparency, accountability and rationality. To suggest that it is in the public interest for a public body, comprised of members performing a public function, not to disclose information that they are obligated in law to provide, on the grounds that this would open them up to scrutiny or civil suit, flies in the face of the relevant constitutional jurisprudence comprehensively cited by the HSF in its main heads of argument.

14. As a matter of principle, things said by public officials in performing their public functions should be open to public scrutiny. It is in the public interest that this

occurs - outweighing any personal interests which may be held by the decision-makers in question.

15. Fourth, the BRF's reliance on *Cape Bar Council* (at para 20 of the BRF's heads of argument, referring to para 50 of that case) for the proposition that the Supreme Court of Appeal recognised that openness is not limitless (an argument derived from the phrase "*reasons anonymously*") and that the Court will protect the identity of JSC members as far as it concerns their individual views or reasons, is not correct.

16. The passage from *Cape Bar Council* has the opposite meaning from the one contended for by the BRF. 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 face of it, why the members cannot be asked to provide their reasons anonymously*" (emphasis added). The Court said nothing about protecting the identity of JSC commissioners or insulating them from all form of legal challenge or oversight. This would, in any event, be contrary to the principles underpinning our Constitution. Indeed, the "first prize" scenario contemplated in the judgment was that the deliberations would be recorded and the JSC commissioners would be individually identified. It is thus precisely, in the aftermath of *Cape Bar Council*, in order to record the open deliberations that the Recording was made in this case by the JSC, and such Recording was then utilised to formulate reasons.

BRF's submissions relating to relevant constitutional values and the nature of the JSC's processes

17. In assessing the impact of constitutional considerations, one must first begin with what Rule 53 requires. Rule 53 requires that all relevant information must be

disclosed as part of the Record. Confidentiality is in itself not a reason to prevent or resist disclosure of relevant information.

18. The assessment should begin with whether the Recordings are relevant. If they are relevant then they must ordinarily be disclosed. It is not the HSF's case that the JSC's privacy or confidentiality should be undermined. The HSF's case is that, where relevant, and *despite* the privacy or confidentiality considerations, the JSC is required to make the Recordings available under Rule 53. This argument accords with our constitutional jurisprudence and the principles of openness and accountability. Any case that the JSC or the BRF seeks to make regarding the *effect* of these constitutional provisions should properly be based on the contention that there must be a limitation of Rule 53.

19. The reasons provided by the BRF for why the deliberations should not be disclosed, based on confidentiality, are unsustainable.

20. The BRF argues that the confidentiality of the JSC's deliberations serves important public purposes, such as:

20.1 protecting the dignity and privacy of judicial candidates and the Courts; and

20.2 enhancing the effective fulfilment of the JSC's mandate as the members will be able to speak freely, frankly and candidly about candidates.

21. These contentions are dealt with in the HSF's main heads of argument from para 104. For the reasons advanced there, it is clear that the JSC's interest in placing a veil over the deliberations is an impermissible attempt to protect the JSC's members from scrutiny.

22. The BRF also states at para 23 of its heads of argument that the HSF "*wrongly contends that the [JSC's] failure to grant access to the Recording violates the values of accountability and transparency*".

23. The BRF goes on to state that the "*Constitution requires transparency and accountable public administration*", but states that these values do not create rights and are simply interpretive guides favouring a certain way of understanding the constitutional project. It concludes (alarmingly) that the HSF has no justifiable *right* to accountable and transparent public administration by the JSC.

24. With respect, the BRF misunderstands the HSF's case. The HSF's case is that it is entitled to the Recordings by virtue of Rule 53. Rule 53 is to be interpreted in light of, and having regard to, the jurisprudence involving the principles of accountability and transparency. The constitutional principles bolster and give proper context to the HSF's case, as they must do.[4]

25. The HSF is well aware that constitutional values should not be seen in isolation and must be weighed against other applicable rights and values. As has been set out in paras 71-97 of the HSF's main heads of argument, arguments purportedly supporting privacy and dignity of candidates and members are unconvincing.

26. The BRF further argues that non-disclosure is bolstered by section 12(d) of PAIA and section 38(1) of the JSC Act. As has been dealt with in the HSF's main heads of argument, these provisions are not applicable to this matter and do not limit the HSF's rights under Rule 53.

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[4] See, for example, *S v Makwanyane* 1995 (3) SA 391; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice* 1999 (1) SA 6; *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) at para 1; and *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC).

27. The BRF states at para 32 that the kernel of the HSF's contention is that the denial of access to the Recording compromises its rights of access to courts, as it prejudices its main review application. BRFT goes on to state that, this is not so, as HSF received six lever arch files which contained all the documents which served before the JSC. This again misconstrues the HSF's case. The HSF is entitled to a full record by virtue of Rule 53. The test for what must be provided is "*relevance*". The quantity of documentation or the JSC's subjective view of what it should provide is not relevant to the enquiry. The prejudice stems from the fact that a full record (of relevant information) has not yet been provided to the HSF. It should also be noted that, at the time the Rule 53 record and the aforementioned files were received by the HSF, it was not aware of the existence of the Recording or the fact that it has been omitted.

28. The BRF, at para 37, states that the *eTV* and *Mail & Guardian* judgments "*are not on point*" as they are distinguishable on the facts as neither judgment dealt with "*access to audio recordings of an organ of state containing the private deliberations which occurred after a public hearing*". The principle of open justice and, more particularly, how the courts have dealt with the principle, are relevant to all matters dealing with access to information or recordings – such as this case.

29. The BRF, from para 39, provides a lengthy exposition on why the JSC's selection process satisfies the prescripts of "*an open and democratic society based on human dignity, equality and freedom*". Here again the BRF misconstrues the HSF's case. Whether the JSC's processes satisfy these prescripts is irrelevant to this matter. The relevant questions are: whether the Recordings form part of the record under Rule 53; and, if they do, is there any reason to limit the HSF's rights to disclosure of these documents under Rule 53. The JSC's processes themselves are not being challenged.

BRF's submissions relating to relevance of the deliberations

30. The crux of the BRF's argument is that deliberations do not pass the test of relevance in these proceedings, as their content has no evidential value (para 52). Alternatively, any relevance which the Recording may have is tenuous and outweighed by the public interest and benefit in retaining confidentiality. We have already dealt with why these public interest arguments are legally untenable.

31. First, the BRF submits (at para 60) that the HSF is engaged in a fishing expedition under Rule 53, geared to second-guessing the JSC members' legitimate exercise of "*free will*".

32. The HSF has approached the Courts under Rule 53 seeking, in this interlocutory application, the entire record of proceedings relevant to the main review application. That is the relief sought and to which it is entitled. The record is (as with any other review) required in order for an assessment to be made as to whether the impugned decision was a "*legitimate exercise*" of power, or whether that decision was made in an unlawful manner. As such, the BRF again misses the legal point involved in this matter and, unfortunately, attempts to suggest sinister motivations to the HSF. As the HSF stressed in its main heads (and which passage was misconstrued by the SCA): in *Johannesburg City Council v Administrator, Transvaal and Another* 1970 (2) SA 79 (T) at 93, an applicant's reliance on the record of the proceedings, before it finalises its grounds of review should not be construed as a "*fishing excursion*", but as a legitimate endeavour "*to determine objectively what considerations were probably operative in the minds of the Administrator (the decision-maker) ... when they passed the resolution in question*" (See also *Lawyers for Human Rights v Rules Board for Courts of Law and Another* 2012 (7) BCLR 754 (GNP) (11 April 2012) at para 23). In fact, the very purpose of Rule 53 is to provide the requestor with an opportunity to access

all relevant information and documents so that it may supplement its papers if necessary, on any grounds which become apparent in respect of the record so delivered, and may amend its notice of motion.

33. Much of the BRF's argument relating to relevance of the deliberations concerns the interpretation of the phrase "*shall deliberate in private*" as used in clause 3(k). Again, the HSF submits that an interpretation of this phrase, which relates to privacy (or at most confidentiality), does not preclude disclosure under Rule 53 and is irrelevant to the primary legal questions in this matter.

34. As set out in the HSF's main heads, it is clear that the deliberations are the most direct evidence of the reasoning behind the decisions and are clearly relevant to this matter.

35. Second, the BRF contends that, to the extent that the deliberations show the personal attitudes of the individual members, these factors are not relevant to any "*rationality*" test in respect of the decision-making, as any process of election by way of vote is a purely subjective exercise in which members are entitled to exercise their "*free will*". In addition, it argues that, to the extent that any factor mentioned in the deliberations can be classified as "*irrelevant*", such a finding would not assist the judicial process, as there is no indication as to the weight any specific member had placed on that factor when casting his/her vote.

36. Votes are apparently "*cast for or against a candidate based on the 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*".

37. It argues further (at para 81) that, to the extent that any factor mentioned in the deliberations can be classified as "*irrelevant*", such a finding would not assist the

judicial process as there is no indication as to the weight that any specific member had placed on that factor when casting his/her vote.

38. The point seemingly being made by the BRF is that deliberations cannot meaningfully (or possibly) be objectively assessed. The argument is extended to assert that even if it were possible to ascertain such intention, what the commissioners state in the deliberations is not an indication of the basis on which the commissioners ultimately decide each matter.

39. These contentions fail both at the level of legal principle and the facts of this matter. Indeed, no case law at all was provided by the BRF to support its theory, not surprisingly as the theory would effectively immunise decisions taken by decision-making from review, which would undermine the very basis of our constitutional democracy. The argument is, moreover, unhinged from the authority which does exist and which is directly on point against the BRF.

40. First, this argument flies directly in the face of what the Supreme Court of Appeal held in *Cape Bar Council*. The JSC must, constitutionally, account for its actions, is susceptible to review and its deliberations must be open to scrutiny in a review process, by the review court and the applicant.

41. Secondly, on the BRF's thesis, the JSC's deliberations, which are specifically contemplated as an important part of the judicial selection process, are of no consequence and no relevance in the process. Yet, this is the only part of the process where the JSC acts, as it is enjoined statutorily to do, as a deliberative committee. A contemporaneous recording of deliberations is possibly the most accurate record of the decision-making process – as Binns-Ward J has held in *SANRAL*, quoted in the HSF's main heads of argument.

42. Thirdly, these very deliberations were, according to the JSC itself, used as a basis for drafting the reasons in this matter. The reasons and reasoning behind a decision are indispensable to the exercise of review rights, as held by the Courts in *Cape Bar Council* and *Afrisun*. The JSC itself considered the Recording of the deliberations as the best record of the considerations which underlay the decisions of the JSC in this matter and will also provide indispensable insight into how the JSC itself perceived its mandate. On the BRF's argument, the reasons and reasoning in deliberations are not relevant as they cannot be considered as objective material. This argument is plainly unsustainable.

43. Fourthly, there is clear case authority holding that recordings of deliberations or minutes of meetings are relevant for assessing whether the eventual decision taking by a body was lawful or rational.

44. The case of *Swartbooi and Others v Brink and Another* 2006 (1) SA 203 (CC) involved elected councillors of the Nala Local Municipality (the appellants) who took part in deliberations which culminated in a decision being taken affecting the rights of the respondents (para 1). In assessing the conduct of the appellants (in order to determine whether the conduct was "*protected conduct*" for the purposes of section 28 of the Local Government: Municipal Structures Act, 1998), this Court had regard to the report by the speaker, the statements made by various members in support of the resolution and their eventual votes in favour of it. This conduct was considered "*integral to deliberations*" of the council (para 12). Yacoob J directly relied on conduct during the deliberations in making the eventual finding, clearly finding it relevant to the eventual decision, stating: "*evidence of conduct in the proceedings of the full council is admissible for the purpose of deciding whether the conduct falls within the bounds of section 28 protected conduct, or to*

prove the requirements of civil liability for conduct within the council that is not protected by section 28" (para 21).

45. Generally, the courts have also considered that the minutes of discussions and/or minutes of meetings of decision-makers as relevant for determining whether decisions made by decision-makers are lawful or rational in review proceedings. See *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) at paras 32 to 40. In relation to the granting of tenders - see for example *CFIT (Pty) Ltd v The Minister of Defence and others* (22496/2013) [2015] ZAGPPHC 2 (12 January 2015).

46. Minutes of meetings have also been seen as relevant to the determination of whether a council had applied its mind to a resolution. Indeed, determinations that councillors have not applied their minds have been made primarily on the "*content and brevity of [a] council meeting*" (see *Heyneke v Umhlatuze Municipality* (2010) 31 ILJ 2608 (LC) at paras 77 to 81). The deliberations relating to a review of a decision of a parole board were considered relevant to the question of whether adequate reasons were given for that decision in *Masil v Minister of Correctional Services and Others* (38752/05) [2007] ZAGPPHC 209 (14 September 2007) at para 17.

47. Minutes of meetings have also been considered relevant to the question of whether a decision was in fact taken or resolution in fact passed at the meeting for the purposes of reviewing and setting aside the decision. See *Mlokoti v Amathole District Municipality* 2009 (6) SA 354 (E) page 27 and 35, "*it seems to me that on any rational reading of the minutes it is clear that no voting did in fact take place"… "[t]he decision of first respondent's council therefore falls to be set aside on the basis that no vote was taken and that the resolution to appoint second respondent was therefore unlawful and a nullity*".

48. It has also been accepted that the actions of a single party to a meeting, even if their vote is not determinative of the decision, may vitiate the eventual decision. This is so because his/her influence over proceedings may have led - objectively - to an irrational or unlawful decision being taken or there may be facts or statements which give rise to a reasonable apprehension of bias. This would depend on the facts, which can only be assessed, in many cases, by considering a recordal of the content of the proceedings. See the reasoning in *Crouwcamp v Civic Independent and Other* (416/2013) [2014] ZASCA 98 (31 July 2014) at para 18 relying on *Grundling v Beyers & others* 1967 (2) SA 131 (W) at 152D-E.

49. For all these reasons – and upon a conspectus of the case law which BRF has apparently overlooked in favour of its theory – what one or more members said in relation to a decision is materially relevant to the question of whether the ultimate decision made by way of vote was lawful, rational and procedurally fair. It is also clear from the case law that voting is not a purely subjective exercise and that decisions taken by vote are reviewable. The decision taken in this case is thus reviewable and the recordings of deliberations are clearly relevant to the review.

BRF's submissions relating to the "record of proceedings"

50. Much of the BRF's heads of argument allege that the deliberations are confidential and should not be disclosed to the JSC or the public. These arguments do not deal with the central legal question in this application: whether the deliberations form part of the Rule 53 record and thus must be disclosed under that Rule.

51. In the last few paragraphs of its heads the BRF finally deals with the relevant issue. The BRF states (at para 90) that "*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 [SCA] are tenable in our constitutional order".

52. It states (at para 91) that the court *a quo*'s decision ought to be upheld having regard to Rule 53, its history, purpose and context and its interplay with the Constitution.

53. The BRF then goes on to state that Rule 53 is part of subordinate legislation (at para 92) and that it must be interpreted in context and through the prism of the Bill of Rights. It refers to the *Safcor*, *Jockey Club* and *Turnbull-Jackson* cases and para 13 of the SCA judgment, which set out the purposes and importance of the Rule 53 record.

54. With respect, however, the "history, purpose and context" of Rule 53 as well as its place in the broader legislative and constitutional matrix clearly support the relief sought by the HSF. Access to the record of decision under Rule 53 undeniably serves an important constitutional function and is vital for the purposes of ensuring the usefulness of judicial review.

Conclusion

55. The submissions of the BRF are thus reiterations or variations of arguments already raised by the JSC, and are in any event clearly incorrect for the reasons discussed above and should be rejected in their entirety.

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25 August 2017