CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 289/16

In the matter between:

HELEN SUZMAN FOUNDATION Applicant

and

JUDICIAL SERVICE COMMISSION Respondent

and

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

Neutral citation:	*Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8
Coram:	Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ
Judgments:	Madlanga J (majority): [1] to [83] Jafta J (dissenting): [84] to [154] Kollapen AJ (dissenting): [155] to [214]
Heard on:	31 August 2017
Decided on:	24 April 2018

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town), the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the High Court of South Africa, Western Cape Division, Cape Town (High Court) and the Supreme Court of Appeal are set aside and substituted with the following:

   "The respondent is ordered to comply with rule 53(1)(b) of the Uniform Rules of Court and to deliver the full recording of the proceedings sought to be reviewed in the main application, including the audio recording and any transcript of the deliberations of the JSC after the interviews on 17 October 2012."
4. The respondent is to pay the applicant's costs, including the costs of two counsel, in this Court, the Supreme Court of Appeal and High Court.

JUDGMENT

MADLANGA J (Zondo DCJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J and Theron J concurring):

[1] May the private deliberations of the Judicial Service Commission (JSC), in the execution of its mandate to advise the President on the appointment of judges, be disclosed under rule 53(1)(b) of the Uniform Rules of Court as part of the record of its

proceedings?[1] The High Court of South Africa, Western Cape Division, Cape Town (High Court) answered the question in the negative.[2] On appeal, the Supreme Court of Appeal held that the JSC's deliberations are not necessarily excluded from the record, but that in the particular circumstances of this case, they should not form part of the record.[3] The Helen Suzman Foundation (HSF) now approaches this Court seeking leave to appeal against that decision.

Background

[2] In October 2012 the JSC took a decision to advise the President to appoint certain candidates as judges of the Western Cape Division of the High Court, and not to appoint others.[4] This decision followed private deliberations held by the JSC after the candidates had been interviewed. The HSF approached the High Court seeking to have that decision reviewed and set aside on the grounds that it was unlawful and irrational.

[3] In terms of rule 53(1)(b) the JSC was required to file the record of the "proceedings sought to be corrected or set aside, together with such reasons as [it] is by law required or desires to give or make" with the registrar of the High Court. The JSC

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[1] Rule 53(1) provides:

> "Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—
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> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
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> (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."

[2] *Helen Suzman Foundation v Judicial Service Commission* [2014] ZAWCHC 136; 2015 (2) SA 498 (WCC) (High Court judgment).

[3] *Helen Suzman Foundation v Judicial Service Commission* [2016] ZASCA 161; 2017 (1) SA 367 (SCA) (SCA judgment).

[4] Section 174(6) of the Constitution provides that "[t]he President must appoint the judges of all other courts on the advice of the Judicial Service Commission". This is a reference to judges other than the judges of the Constitutional Court, and the President and Deputy President of the Supreme Court of Appeal.

filed the record in August 2013. This record consisted of: (a) the reasons for the decision by the JSC; (b) the transcripts of the JSC interviews; (c) each candidate's application for appointment; (d) comments on each candidate by various professional bodies and individuals; and (e) related research, submissions and correspondence. The reasons for the decision were distilled from the deliberations by the Chief Justice.

[4] The filed record did not include any minutes, transcripts or other contemporaneous record of the JSC's official deliberations. Two days before the applicant was due to file its supplementary affidavit, it became aware that the JSC routinely recorded its deliberations and that the deliberations in question had also been recorded. It requested the JSC to file a recording of the deliberations on the basis that the recording formed part of the rule 53 record. The JSC declined. It adopted the stance that "post interview deliberations of the JSC are done in a closed session for reasons of confidentiality". This was a blanket – and not fact-specific – claim to confidentiality. The HSF launched an interlocutory application to compel the JSC to file a full record of the decision, including the recording.

[5] The High Court dismissed that application on the basis that the HSF was not entitled to the recording under rule 53. On appeal, the Supreme Court of Appeal held that a decision-maker's deliberations do not automatically form part of a rule 53 record.[5] The extent of the record depends on the facts of the case. It held that whether or not disclosure was required was—

> "a question of weighing, inter alia, the nature and relevance of the information sought, the extent of the disclosure and the circumstances under which the disclosure is sought and the potential impact upon anyone, if disclosure is ordered or refused, as the case may be, in a manner that would enable the JSC to conduct a judicial selection process that does not violate its positive obligations of accountability and transparency."[6]

[5] SCA judgment above n 3 at para 39.

[6] Id at para 27.

That Court held that, in some cases, the decision-maker may be required to produce a "full record" of proceedings, including its deliberations. However, there are cases, such as this one, where confidentiality considerations warrant non-disclosure of deliberations. The appeal was dismissed.

[6] In this Court, the HSF argues that the judgment of the Supreme Court of Appeal: undermines procedural fairness; curtails the efficacy of rule 53 in a manner inconsistent with open, transparent decision-making; undermines the ability of courts to exercise their power of judicial review; and encourages selective disclosure by respondents in review applications. According to the HSF, the recording is "patently the most immediate and accurate record of the decision and the process leading up to the decision", and is "indispensable in determining whether there is a rational connection between the deliberations, the decision and the reasons". The HSF argues that, without the recording, it is deprived of the procedural and substantive safeguards that are the very reason for the existence of rule 53. It contends that this breaches the requirement of equality of arms in section 34 of the Constitution.

[7] The JSC argues that there is a distinction in our law between the record that served before a body and the deliberations of that body. It submits that, while a disclosure of deliberations may be required in some circumstances, this cannot be the norm. The JSC submits that there are good reasons for the confidentiality of its deliberations. These are: the promotion of the rigour and candour of deliberations; the encouragement of future applications; and the protection of the dignity and privacy of applicants. Requiring disclosure may have the unintended consequence of discouraging the JSC from recording its deliberations in future.

[8] The Trustees for the Time Being of the Basic Rights Foundation of South Africa were admitted as a single *amicus curiae* (friend of the court) and granted leave to file written submissions, but not to make oral submissions at the hearing. The *amicus curiae* argued that: the JSC has the power to regulate its own procedure; in doing

so under regulation 3(k) of the JSC rules of procedure[7] (JSC procedure), it has made provision for its deliberations to take place in private; the implication is that no one is entitled to what takes place at the private deliberations; and as there has been no challenge to the validity of regulation 3(k), this is fatal to the HSF's application.

[9] This matter raises two principal issues. They are:

(a) Do we have jurisdiction and, if we do, must leave to appeal be granted?

(b) Is it legally permissible to exclude a recording of JSC deliberations from a rule 53 record?

Jurisdiction and leave to appeal

[10] The question whether JSC deliberations must be disclosed as part of the rule 53 record raises constitutional issues. It implicates the right of access to court which – in the context of civil proceedings – is often referred to as the right to a fair trial.[8] It concerns the interpretation of the JSC's constitutional power to determine its own procedure. That this Court has jurisdiction is clear.

[11] The question whether and under what circumstances the JSC must divulge a recording of its post-interview deliberations under rule 53 is of great import. There are reasonable prospects of success. Thus it is in the interests of justice that leave to appeal be granted.

The content of a rule 53 record

[12] In order to decide if it is legally permissible to exclude a recording of JSC deliberations from a rule 53 record, it is necessary first to consider what the existing state of our law is on what a rule 53 record is, and what it contains.

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[7] Procedure of Commission, GN R423 *GG* 24596, 27 March 2003.

[8] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[13] The purpose of rule 53 is to "facilitate and regulate applications for review".[9] The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark.[10] The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.[11]

[14] Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:

> "Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."[12]

[15] The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is

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[9] *Jockey Club of South Africa v Forbes* [1992] ZASCA 237; 1993 (1) SA 649 (A) (*Jockey Club*) at 661.

[10] See *Jockey Club* id where it was held at 660:

> "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."

In similar vein, the Supreme Court of Appeal held in *Bridon International GMBH v International Trade Administration Commission* [2012] ZASCA 82; 2013 (3) SA 197 (SCA) (*Bridon*) at para 31:

> "[W]ithout knowing the basis for the decision, Casar [the review applicant] will have to mount [its] challenge in the dark against an opponent with perfect night vision, in that it knows exactly what information it had considered. For example, Casar will hardly be able to contend that the decision was irrational; that irrelevant considerations were taken into account; or that the decision was taken arbitrarily or capriciously."

[11] *Jockey Club* id at 660 and 662 and *Lawyers for Human Rights v Rules Board for Courts of Law* [2012] ZAGPPHC 54; 2012 (7) BCLR 754 (GNP) at para 23.

[12] *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) at para 37.

equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage *vis-à-vis* their opponents.[13] This requires that "all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes to court".[14]

[16] In *Turnbull-Jackson* this Court held:

> "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."[15]

[17] What forms part of the rule 53 record? The current position in our law is that – with the exception of privileged information – the record contains all information relevant to the impugned decision or proceedings.[16] Information is relevant if it throws light on the decision-making process and the factors that were likely at play in the mind of the decision-maker.[17] Zeffertt and Paizes make a comment on the exclusion of evidence on the grounds of privilege. That comment must surely be of relevance even to the exclusion of privileged information from a rule 53 record. After all, the content of a rule 53 record is but evidentiary in nature. The authors say that in the case of privileged information, the exclusion is based on the recognition that the general policy

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[13] *Lawyers for Human Rights* above n 11 at para 23.

[14] *Jockey Club* above n 9 at 660G.

[15] *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 37.

[16] *Muller v The Master* 1991 (2) SA 217 (N) at 219J-220C.

[17] *City of Cape Town v South African National Roads Agency Ltd* [2013] ZAWCHC 74 (*HC SANRAL*) at para 48. Though the Supreme Court of Appeal overturned much of the Western Cape High Court's reasoning on appeal, it did not supplant the view expressed by the High Court on relevance (see *City of Cape Town v South African National Roads Agency Ltd* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) (*SCA SANRAL*)).

that justice is best served when all relevant evidence is ventilated may, in some cases, be outweighed by a particular policy that requires the suppression of that evidence.[18] The fact that documents contain information of a confidential nature "does not per se in our law confer on them any privilege against disclosure".[19]

[18] Specifically coming to a decision-maker's deliberations, historically they have not formed part of the rule 53 record. This was based on this dictum in *Johannesburg City Council*:

> "The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. A record of proceedings is analogous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. *Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it*. It does, however, include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it."[20] (Emphasis added.)

[19] Recently our courts have begun to diverge from this position. In what I consider to be a positive development, they place emphasis on the fact that deliberations are relevant to the enquiry as to what it is that informed the decision. *HC SANRAL* tells us that—

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[18] Zeffertt and Paizes *The South African Law of Evidence* 2 ed (LexisNexis, Durban 2009) at 573.

[19] *Unilever plc v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) (*Unilever*) at 339J. See also *Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 (3) SA 1093 (W) (*Crown Cork*) at 1099G-I; *S v Naicker* 1965 (2) SA 919 (N) at 934G*; Rutland v Engelbrecht* 1956 (2) SA 578 (C) at 579D-E and 579G-H; and De Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (LexisNexis Butterworths, Durban 2005) at 310.

[20] *Johannesburg City Council v The Administrator Transvaal (1)* 1970 (2) SA 89 (T) at 91G-92B.

> "any record of the deliberations by the decision-maker would be relevant and susceptible to inclusion in the record. . . . The content of such deliberations can often be the clearest indication of what the decision-maker took into account and what it left out of account. I cannot conceive of anything more relevant than the content of a written record of such deliberations, if it exists, in a review predicated on the provisions of section 6(2)(e)(iii) of [the Promotion of Administrative Justice Act], that is that impugned decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered."[21]

To state the obvious, "[t]he fact that the deliberations may in a given case occur privately does not detract from their relevance as evidence of the matters considered in arriving at the impugned decision".[22]

[20] However, the statement in *Johannesburg City Council* has recently been endorsed by the Supreme Court of Appeal in *Intertrade*.[23] But in the present matter, the Supreme Court of Appeal held that the statement in *Johannesburg City Council* that deliberations never form part of the record should be qualified. It held that deliberations are not necessarily excluded from the record but that in some circumstances considerations of confidentiality will justify their exclusion.[24]

[21] It is helpful to consider this question in two stages: first, whether deliberations in general ought to be excluded from rule 53 records; and second, whether JSC deliberations in particular ought to be excluded.

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[21] *HC SANRAL* above n 17 at para 48. See my comment in n 17 regarding *SCA SANRAL* on this holding. See also *Comair Ltd v Minister for Public Enterprises* 2014 (5) SA 608 (GP) (*Comair*); *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E) (*Ekuphumleni*); and *Afrisun Mpumalanga (Pty) Ltd v Kunene N.O.* 1999 (2) SA 599 (T) (*Afrisun*).

[22] *HC SANRAL* id.

[23] *MEC for Roads and Public Works, Eastern Cape v Intertrade Two (Pty) Ltd* [2006] ZASCA 33; 2006 (5) SA 1 (SCA) (*Intertrade*) at para 15.

[24] SCA judgment above n 3 at para 15.

[22] The general exclusion of deliberations as a class of information from rule 53 records in accordance with the *Johannesburg City Council* principle seems to be somewhat arbitrary. Irrelevance and privilege are the usual grounds for excluding information from the record. It cannot be that deliberations, as a class of information, are generally: (a) irrelevant for purposes of assisting an applicant in pleading and presenting her or his case; or (b) subject to some form of privilege. Further, I cannot conceive of any policy or public interest reasons for excluding deliberations from the record in general. In the specific example given in *Johannesburg City Council*, of a judicial officer's court book, the notes contained in it certainly do meet the test for being part of the record.[25] That is, the notes are relevant to the judicial officer's decision. Whatever the basis for exclusion may be, it is surely not because the notes are not relevant to the decision. Reasons that have been proffered for the exclusion are based on the existence of strong policy considerations that justify exclusion. They are not based on generalised notions of confidentiality. It cannot be that these strong policy considerations necessarily exist in respect of the deliberations of all decision-makers. That said, the exclusion under this example is not before us for decision. Therefore, I need not pronounce definitively on it.

[23] Surely, deliberations are relevant to the decision they precede and to which they relate. Indeed, *HC SANRAL* correctly says so.[26] They may well provide evidence of reviewable irregularities in the process, such as bias, ulterior purpose, bad faith, the consideration of irrelevant factors, a failure to consider relevant factors, and the like.[27]

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[25] For purposes of review, this part of the debate is of relevance in the context of magistrates as their decisions may be reviewed by superior courts. It cannot really be of relevance in the case of judges whose decisions are subject to appeal, not review. See *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) at paras 35 and 42 and *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (AD) at 601D-F.

[26] *HC SANRAL* above n 17 at para 48.

[27] Section 6 of the Promotion of Administrative Justice Act 3 of 2000 provides:

> "(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
>
> (2) A court or tribunal has the power to judicially review an administrative action if—
>
> (a) the administrator who took it—
>
> (i) was not authorised to do so by the empowering provision;

Absent disclosure, these irregularities would remain hidden. Deliberations are the most immediate and accurate record of the process leading up to the decision.

[24] If this is true of deliberations in general, it must surely be true of JSC deliberations as well. The JSC's own practice of distilling reasons for a decision from the deliberations is indication enough that JSC deliberations are of relevance to the decisions. They clearly bear on the lawfulness, rationality and procedural fairness of

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(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself—

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful."

Of course, legality review is not governed by section 6. But the principle being addressed here is applicable even to legality review.

the decisions. The question is whether there is some legally cognisable basis that they must nonetheless be excluded from a rule 53 record. I deal with that question later.

[25] The JSC submitted that relevance should be determined with reference to the pleaded case. I do not agree. Rule 53 envisages the possibility of a review applicant supplementing the papers, including the very cause of action, upon being furnished with the record.[28] That much is plain from the fact that an applicant may supplement not only the affidavits, but also the notice of motion. That means an applicant may add to or subtract from the grounds of review.[29] Then, if information could be excluded on the basis of being irrelevant to the pleaded case, this would negate a substantial part of the purpose of the rule 53 record.[30] What must be disclosed is information relevant to the impugned decision. Unsurprisingly, a review applicant may not have pleaded certain issues that bolster her or his challenge exactly because she or he was not aware of their existence.

[26] It is helpful to point out that the rule 53 process differs from normal discovery under rule 35 of the Uniform Rules of Court. Under rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings. So, under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition. Rule 53 reviews are different. The rule envisages the grounds of review changing later. So, relevance is assessed as it relates to the decision sought to be reviewed, not the case pleaded in the founding affidavit.

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[28] In *Jockey Club* above n 9 at 661G-H the Court held:

> "More important in the present context is subrule (4), which enables the applicant, as of right and without the expense and delay of an interlocutory application, to 'amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit'."

[29] *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA) at para 32:

> "The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available."

[30] Requesting the full record in a bona fide attempt to determine what factors were probably operative in the decision-maker's mind does not amount to a "fishing excursion". See *Johannesburg City Council* above n 20 at 93C-D.

[27] In sum, I can think of no reason why deliberations as a class of information ought generally to be excluded from a rule 53 record. For me, the question is whether deliberations are relevant, which they are, and whether – despite their relevance – there is some legally cognisable basis for excluding them from the record. This approach to what a record for purposes of rule 53 should be better advances a review applicant's right of access to court under section 34 of the Constitution. It thus respects the injunction in section 39(2) of the Constitution that courts must interpret statutes in a manner that promotes the spirit, purport and objects of the Bill of Rights.[31] Whilst doing so, it also heeds the caution expressed in *Hyundai* that, in seeking to adhere to the section 39(2) injunction, courts must not strain the language of a statutory instrument. Here is how Langa DP expressed the caution:

> "Limits must, however, be placed on the application of this principle. On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[32]

[28] I have had the pleasure of reading the judgment prepared by my colleague, Jafta J (second judgment). The second judgment takes the view that the word "record" in rule 53 must have the same meaning regardless of the type of proceedings sought to be reviewed. It instances the notes of a judicial officer in court proceedings. It then says

[31] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[32] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 24.

because these notes do not form part of the record, deliberations in administrative proceedings should likewise also not form part of the record; the word "record" should not be assigned different meanings depending on the function performed. I understand the reasoning to be grounded on the fact that what the second judgment is comparing is information of a particular type.

[29] To my mind this begs the question. One must first establish the reason for the exclusion of a judicial officer's notes from the record for one to be able appropriately to use this as a basis for the exclusion of all comparable information in administrative proceedings. That reason may not necessarily apply to other instances. As to what that reason is and – for that matter – whether a judicial officer's notes should form part of a rule 53 record is not before us for decision.

[30] Also, reasoning backwards from this example does not provide a principled basis for ascribing a meaning to "record" and excluding all deliberations from a rule 53 record. A simple illustration will help. Let us consider correspondence as a class of information. If relevant, it ordinarily forms part of the record. However, some correspondence – such as attorney-client communications – may be privileged and thus exempt from inclusion in a rule 53 record. It does not then follow that, because there is privilege in respect of this type of correspondence, all correspondence is exempt from inclusion in a rule 53 record. In each instance any claim to exemption must be founded on some legally cognisable basis. So, within the class "correspondence", some correspondence would be included in the rule 53 record, and some excluded.

Exclusion of JSC deliberations from a rule 53 record

[31] The JSC has argued that its deliberations must be excluded on the basis of its confidentiality concerns. One cannot make light of this argument. If it has merit, it has huge constitutional implications. That is so because it relates to the very make-up of an important and constitutionally created arm of state – the judiciary – which is the final arbiter on compliance with the Constitution. The JSC's confidentiality concerns relate to the selection of members of this arm of state. If there is something in the fears

expressed by the JSC, disclosure may well seriously hamper this selection process. And that may redound to the detriment of the judiciary.

[32] The importance of the judiciary in our constitutional democratic project cannot be overemphasised:

> "The judiciary is essential to the maintenance of constitutional democracy. By exercising judicial control over governmental power and keeping it within its constitutional bounds, the judiciary is able to hold the legislature and executive to account in the courts and thus secure the rule of law and the protection of human rights."[33]

[33] For the judiciary to continue to fulfil these important functions, it is of pivotal importance that it continues to be a strong institution which carries public confidence and support:

> "Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship.

[33] Hoexter and Olivier *The Judiciary in South Africa* (Juta & Co Ltd, Cape Town 2014) at xxvii. As former Chief Justice Ngcobo has remarked, the role played by the judiciary is of far-reaching importance:

> "The judicial branch is responsible not only for resolving disputes between private parties, but also for resolving disputes between government and private parties and even disputes between different branches or sectors of government. It has the responsibility to protect individuals from government overreaching, and it plays an important role in our country's constitutional balance of powers." (Ngcobo "Sustaining Public Confidence in the Judiciary: An Essential Condition for Realising the Judicial Role" (2011) 128 *SALJ* 5 at 9).

> Its ultimate power must therefore rest on the esteem in which the judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity."[34]

[34] This strength relies, in no small measure, on ensuring that our judicial appointment processes are able to attract and result in the selection of the best possible candidates to serve as judges. If we are to have a strong judiciary which enjoys public confidence and is capable of fulfilling its constitutionally mandated role, of course judges who – in accordance with the provisions of section 174(1) and (2) of the Constitution – are best placed to fulfil this mandate must be appointed. The JSC argues that disclosure of its deliberations would impede the selection process. If there is merit in this claim, this would have serious consequences for the judiciary and, consequently, our constitutional democracy as a whole. The question is whether disclosure would indeed weaken the selection process. Put differently, is there merit in the JSC's confidentiality concerns?

[35] The JSC contends that the need for confidentiality has two aspects. The first concerns members of the JSC themselves. The confidentiality of JSC deliberations promotes effective judicial selection by ensuring the candour and robustness of future deliberations. The second aspect concerns the interests of candidates. If the content of deliberations and thus the views held by commissioners about candidates could be divulged, that might be a dampener to future applications. Confidentiality of the content

[34] Mahomed "The Role of the Judiciary in a Constitutional State - Address at the First Orientation Course for New Judges" (1998) 115 *SALJ* 111 at 112. See also the words of Kriegler J in *S v Mamobolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 16:

> "In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the State."

of deliberations promotes the privacy and dignity of candidates. Thus this implicates fundamental rights.

[36] In order to assess the impact of the disclosure of deliberations on the selection process properly, it is worth having a close look at who make up the JSC. Some become members of the JSC by virtue of the office they hold. These are the Chief Justice,[35] the President of the Supreme Court of Appeal,[36] the Cabinet member responsible for the administration of justice,[37] and – when the JSC is considering matters relating to a specific division of the High Court – the Judge President of that division and the Premier of the province concerned.[38] The remaining members are nominated, designated or elected by a variety of bodies and the President. They are: one Judge President designated by the Judges President;[39] two practising advocates nominated from within the advocates' profession;[40] two practising attorneys nominated from within the attorneys' profession;[41] one teacher of law designated by teachers of law at South African universities;[42] six persons designated by the National Assembly from amongst its members;[43] four permanent delegates to the National Council of Provinces with a supporting vote of at least six provinces;[44] four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly.[45] All those who are nominated – and not designated or elected – are appointed by the President.

[35] Section 178(1)(a) of the Constitution.

[36] Section 178(1)(b).

[37] Section 178(1)(d).

[38] Section 178(1)(k).

[39] Section 178(1)(c).

[40] Section 178(1)(e).

[41] Section 178(1)(f).

[42] Section 178(1)(g).

[43] Section 178(1)(h).

[44] Section 178(1)(i).

[45] Section 178(1)(j).

[37] Since courts play a crucial role in our constitutional democracy, without doubt the JSC's function of recommending appointments to the senior judiciary is of singular importance. Bearing in mind the importance of this function, I do not think it unreasonable to expect that those that bear the responsibility of nominating, designating or electing individuals for membership of the JSC will take their responsibility seriously and identify people who are suitably qualified for the position. Of course, we cannot be blind to some bad appointments to a variety of senior positions that we have witnessed in litigation that has come before the courts. But that is not reason enough to make an assumption that the JSC may well be saddled with bad appointments. As for those whom the Constitution has identified for membership by virtue of their office, I cannot second-guess the framers of the Constitution in selecting the relevant offices. If anything and barring individual shortcomings which – from time to time – do manifest themselves even in the highest and most respected of offices, these offices are eminently qualified for membership of the JSC.

[38] Now, looking at the composition of the JSC, it seems to me that the JSC's concerns regarding the impact of disclosure of deliberations are overstated. I do not think it is expecting too much to adopt the stance that JSC members worth their salt ought to be in a position to stand publicly by views they have expressed in private deliberations. I would find it odd that JSC members would be such "timorous fainthearts"[46] that they would clam up at the prospect that views they express during deliberations could be divulged. I readily conceive of members being apprehensive at the prospect of disclosure if – during deliberations – they make inappropriate comments. Is that worthy of shielding? I think not. Debating with candour and robustness does not equate to the expression of impropriety. It escapes me why the prospect of disclosure of deliberations should necessarily take away candour and robustness from the debate.

[46] This phrase is borrowed from Van den Heever JA in *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490F.

[39] Another aspect of the JSC's confidentiality argument relates to the privacy and dignity concerns of candidates themselves. The argument is that divulging the content of deliberations may bring into the public domain matter that impugns the dignity and privacy of candidates and that this may be a dampener to future applications. One assumes that, in asserting their points during deliberations, JSC members will not – as they shouldn't – make unfair or improper assertions that impugn the dignity or privacy of candidates. By unfair or improper assertions I mean assertions that have no basis on the material canvassed, questions asked or answers given during the interview. I have already concluded that the JSC cannot appropriately expect unfair or improper assertions made during deliberations to be shielded from disclosure.

[40] Generally the most embarrassing issues that could impugn the dignity or privacy of candidates are raised during interviews. And the interviews take place in public and are often widely publicised. It is this stage that should fill candidates with dread. These are applicants who have put themselves forward for an important public office, and who must expect, and do submit to, gruelling scrutiny at the public interview. What follows after the public interview can hardly be as distressing. And most observers, who care to, will most likely draw their own conclusions on embarrassing issues at the stage of the public interview. If anything has the potential of being a dampener to future applications, it must be the prospect of the gruelling public scrutiny. That is not what the JSC's concerns relate to. How, if it were known by potential candidates that the ensuing arguments by JSC members at their deliberations are normally divulged, that could – to a *sufficiently significant* extent – be a dampener to future applications is difficult to comprehend.

[41] It should be borne in mind that the gruelling public interviews take place all the time. That should be contrasted with the few times when JSC decisions are taken on review, giving rise to the need to divulge deliberations. I do not think that the prospect that the deliberations might be divulged would be to so significant an extent as to be a dampener to worthy candidates. I use "worthy" advisedly. Candidates who are aware of issues that may seriously impugn their candidacy are more likely to fear the exposure

of those issues and the interrogation on them that would most likely ensue at the public interview than the later expression of views on those issues by JSC members in deliberations.

[42] I am led to the conclusion that the fears expressed by the JSC do not entitle it to refuse to disclose recordings of its deliberations. The second judgment reaches the opposite conclusion. This it does mainly on two bases. One basis is grounded on exemptions on disclosure contained in the Promotion of Access to Information Act[47] (PAIA). The other relates to what the second judgment holds was at the centre of the High Court's judgment: that is the exercise of discretion in terms of rule 30A of the Uniform Rules of Court.[48] I have also had the honour of reading a judgment penned by my colleague, Kollapen AJ (third judgment). It too disagrees with my conclusion based on, amongst others, some provisions of PAIA. I must next deal with this PAIA point.

The impact of PAIA provisions

[43] The second judgment draws attention to the fact that some sections in PAIA deny the public access to certain types of information. One example is section 12(d) of PAIA which denies access to information relating to the JSC's selection process.[49] The second judgment then makes the point that it would be a subversion of the provisions of PAIA to afford a litigant under rule 53 that which PAIA does not allow. I disagree.

[44] PAIA and rule 53 serve different purposes. Rule 53 helps a review applicant in the exercise of her or his right of access to court under section 34 of the Constitution.

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[47] 2 of 2000.

[48] I deal with this basis towards the end of the judgment.

[49] Section 12(d) provides:

> "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 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."

On the other hand, in one instance PAIA affords any person the right of access to any information held by the state.[50] The person seeking the information need not give any explanation whatsoever as to why she or he requires the information. The person could be the classic busybody who wants access to information held by the state for the sake of it.

[45] In the myriad areas of its operation, the state often comes across, or enjoins persons to furnish it with, private information. I expand on this shortly. The knowledge that the state will not unhesitatingly give that information to others – including busybodies who want it for no particular reason – serves as an incentive to persons readily to cooperate and provide their information.[51] That facilitates the exercise of powers and performance of functions by state functionaries. Surely then, if under PAIA information – including information truly belonging to other *private* persons – can be had merely for the asking, it makes sense that there should be stricter controls on access than in the case where – as is the position under rule 53 – information is required for the furtherance of a right. Of course, those controls should not be such that the right of access to information is denuded of its essential content.

[46] The difference in the nature of, and purposes served by, the right of access to information in terms of PAIA, on the one hand, and the right to a record under rule 53, on the other, underscore the reality that it is inapt simply to transpose PAIA proscriptions on access to information to the rule 53 scenario. There is a principled basis for drawing a distinction.

[50] Section 9(a)(i) of PAIA. The other instance is where – in terms of section 9(a)(ii) – any person may access any information that is held by another person and that is required for the exercise or protection of any rights. On the issue I am discussing now, I need not say anything further on this second instance.

[51] *Bridon* above n 10 at para 23.

[47] Take the example of section 36 of PAIA.[52] This section exempts from disclosure confidential commercial information.[53] This type of information is routinely disclosed in civil proceedings where that is necessary. It would be an oddity for it to be suggested that this should not be so. Indeed, confidential commercial information has been divulged under rule 53. The modern regulatory state, which collects and holds vast amounts of information – including confidential commercial information – about private businesses for a variety of purposes "has an interest in the protection of confidential information submitted to it, because third parties may otherwise be unwilling to co-operate".[54]

[48] In *Bridon* confidential commercial information belonging to Bridon International GMBH (Bridon) had been divulged to an organ of state, the International

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[52] Section 36 provides:

> "(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains—
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or
>
> (c) information supplied in confidence by a third party the disclosure of which could reasonably be expected—
>
> (i) to put that third party at a disadvantage in contractual or other negotiations; or
>
> (ii) to prejudice that third party in commercial competition.
>
> (2) A record may not be refused in terms of subsection (1) insofar as it consists of information—
>
> (a) already publicly available;
>
> (b) about a third party who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned; or
>
> (c) about the results of any product or environmental testing or other investigation supplied by a third party or the result of any such testing or investigation carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.
>
> (3) For the purposes of subsection (2)(c), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation."

[53] I have inserted "confidential" because from a reading of paragraphs (a)-(c) of section 36(1), it is plain that the information referred to is confidential in nature.

[54] *Bridon* above n 10 at para 25.

Trade Administration Commission (Commission), to enable it to exercise its "anti-dumping" investigative powers in terms of the International Trade Administration Act.[55] Relying on this information, the Commission made a recommendation that the relevant Minister should take a decision that would adversely affect Casar Drahtseiwerk Saar GMBH (Casar), Bridon's competitor. The Minister decided in accordance with the recommendation. Casar instituted proceedings in which it sought the review of both the Commission's recommendation and the Minister's decision. In complying with rule 53, the Commission refused to disclose Bridon's confidential commercial information. This was on the basis that, in terms of Part D of Chapter 4 of the International Trade Administration Act, the Commission could divulge the information only with the consent of Bridon. This stance led to an interlocutory application by Casar that the Commission be compelled to furnish the information in terms of rule 53. The High Court granted that application subject to a strict confidentiality regime. An appeal by Bridon to the Supreme Court of Appeal was unsuccessful.

[49] Crucially for present purposes, the effect of what the Supreme Court of Appeal held – correctly so – was that Bridon's confidential commercial information was subject to disclosure under rule 53. This it did despite the existence of section 36 of PAIA. Of course, the Supreme Court of Appeal upheld the High Court's strict confidentiality regime.

[50] Does the fact that *Bridon* turned on the provisions of section 35 of the International Trade Administration Act make a difference? No. In terms of this section a court that has found the information in issue to be confidential has a discretion to make an order concerning access to it.[56] But in the end in *Bridon* the information was required

[55] 71 of 2002.

[56] Here is what section 35 which is headed "Proceedings in contested claims" provides in full:

> "(1) A claimant affected by a determination of the Commission in terms of section 34(3) may appeal against that determination to a High Court, subject to its rules, in the prescribed manner and form.

in terms of rule 53. That is what the order by the High Court, which was confirmed by the Supreme Court of Appeal, sanctioned.

[51] Lastly, the second judgment points to absurdities that may arise if everything relevant to the impugned proceedings were to form part of the rule 53 record. It gives the example of "a party that seeks access to information held in confidence under an international agreement or information whose disclosure could reasonably cause harm to the defence or security of the Republic".[57] The judgment then makes the point that in terms of section 41 of PAIA the information officer of a public body may refuse access to information of this nature.

[52] Information that bears no relevance to the subject of review need not form part of the record. At the same time, not all information that is relevant must necessarily form part of the record. There may be one or other basis of exclusion. As we know, privileged information, for example, communications between clients and their legal representatives, is routinely excluded from disclosure under rule 53. The question is: is there some legally cognisable basis for excluding the relevant information from the record? A basis of excluding the information referred to by the second judgment could, for example, be "public interest privilege".[58] Based on the learning that *Bridon* deals

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(2) A person who seeks access to information which the Commission has determined is, by nature, confidential, or should be recognised as otherwise confidential, may—

(a) first, request that the Commission mediate between the owner of the information and that person; and

(b) failing mediation in terms of paragraph (a), apply to a High Court for—

(i) an order setting aside the determination of the Commission; or

(ii) any appropriate order concerning access to that information.

(3) Upon appeal in terms of subsection (1), or an application in terms of subsection (2)(b), the High Court may—

(a) determine whether the information—

(i) is, by nature, confidential; or

(ii) should be recognised as being otherwise confidential; and

(b) if it determines that it is confidential, make any appropriate order concerning access to that confidential information."

[57] See [137].

[58] *Bridon* above n 10 at paras 18-22.

with extensively, there is no closed list of what may constitute privilege.[59] The test is based—

> "on a judicial evaluation of the balance between two conflicting public interests. On the one hand there is the public interest in finding the truth in court proceedings. This is to be weighed up against the countervailing public interest which sometimes requires that the confidentiality of information be maintained."[60]

[53] Happily I need not decide the question whether the type of information instanced by the second judgment does indeed qualify for public interest privilege. The simple point I make is this: the fact that information that – in terms of section 41 of PAIA – cannot be accessed by a requester is relevant for purposes of rule 53 does not of necessity lead to its disclosure under this rule. Thus I do not see the absurdity which – according to the second judgment – follows inexorably whenever the information in issue is relevant.

[54] The third judgment too relies on some PAIA exclusions to bolster the view that the JSC is entitled not to disclose its deliberations. I think my response to the second judgment in this regard has sufficiently dealt with what the third judgment says.

[55] To summarise, the denial of access to information – whether under sections 12(d), 36, 41 or any other section of PAIA – does not necessarily lead to the type of information covered by those sections being exempt from disclosure under rule 53.

Is there a legislative or constitutional bar to disclosure?

[56] The JSC also argued that – read together – section 178(6) of the Constitution, section 38 of the Judicial Service Commission Act[61] (JSC Act) and regulation 3(k) of

[59] Id.

[60] Id at para 22.

[61] 9 of 1994.

the JSC procedure determined by the JSC, create a bar to disclosure. The JSC is established in terms of section 178 of the Constitution. Section 178(6) empowers the JSC to determine its own procedure.[62] Under this power, the JSC has determined rules of procedure.[63] The rules have been promulgated as regulations in terms of section 35 of the JSC Act. These regulations are what I defined as the JSC procedure above. Regulation 3(k) provides that "[a]fter completion of the interviews, the Judicial Service Commission shall deliberate in private and shall, if deemed appropriate, select the candidate for appointment by consensus or, if necessary, majority vote".

[57] Section 38(1) of the JSC Act provides:

> "No person, including any member of the Commission, Committee, or any Tribunal, or Secretariat of the Commission, or Registrar or his or her staff, may disclose any confidential information or confidential document obtained by that person in the performance of his or her functions in terms of this Act, except—
>
> (a) to the extent to which it may be necessary for the proper administration of any provision of this Act;
>
> (b) to any person who of necessity requires it for the performance of any function in terms of this Act;
>
> (c) when required to do so by order of a court of law; or
>
> (d) with the written permission of the Chief Justice."

[58] The power in section 178(6) – which is couched in broad terms – does not mean the JSC may determine procedures that are at odds with the Constitution. It cannot be otherwise because a determination of procedure by the JSC that is at variance with any constitutional provision would be an infringement of the supremacy clause which prescribes that "law or conduct inconsistent with [the Constitution] is invalid".[64] Of relevance for present purposes is the right of access to court contained in section 34 of the Constitution. It is axiomatic that this is the right sought to be advanced by rule 53.

[62] This section provides: "The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members."

[63] Procedure of Commission above n 7.

[64] Section 2 of the Constitution.

As we have seen from *Democratic Alliance*, without a record, a court cannot perform its review function properly.[65] And that constitutes an infringement of the right of access to court. This must also be true of a truncated record; the JSC record from which a recording of the deliberations has been excised answers that description.

[59] In addition, there is a real risk of a review applicant's right under section 34 being infringed when she or he has been denied access to material that might have assisted her or his case. The unfairness lies in the fact that the applicant may have been hampered in the formulation and prosecution of her or his case. Put differently, she or he may have been prevented from making the best possible case. It matters not that – in the end – the recording of the deliberations may have proved to be useless to the applicant's case. The pronouncement by Brand JA in *Bridon* is apt:

> "The Commission expressly stated that it had relied on Bridon's confidential information in arriving at the decision which Casar seeks to challenge in the main application. It follows that, without knowing the basis for the decision, Casar will have to mount that challenge in the dark against an opponent with perfect night vision, in that it knows exactly what information it had considered. For example, Casar will hardly be able to contend that the decision was irrational; that irrelevant considerations were taken into account; or that the decision was taken arbitrarily or capriciously. These, of course, would all constitute legitimate grounds for review under section 6 of the Promotion of Administrative Justice Act 3 of 2000. What is more, it is not only the confidential information actually relied upon by the Commission that may potentially be material. Disclosure of Bridon's confidential information that was available to the

[65] *Democratic Alliance* above n 12 at para 37. The role of discovery in general in ensuring fair trial rights was recognised in the pre-Constitutional era. In *Crown Cork* above n 19, the High Court, in determining that it is permissible for the Court to impose measures to safeguard, noted at 1100B-C:

> "But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part. I trust that by holding what I have I have not opened a new door to interlocutory litigation or to a flood of ill-founded objections on grounds of confidentiality. Practitioners would do well to remember that the normal rule is full inspection."

In the specific context of rule 53, this dictum was quoted with approval by the Supreme Court of Appeal in *Unilever* above n 19 at 341G-H.

> Commission may show that it had failed to have regard to relevant considerations, which is another review ground contemplated in section 6(2)(e) of PAJA."[66]

[60] Coming to regulation 3(k) of the JSC procedure, if it is to be read to mean that a recording of the deliberations of the JSC is not subject to production under rule 53, that would make the regulation inconsistent with the right of access to court and invalid. In *Hyundai* Langa DP said:

> "[J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."[67]

[61] And he then expressed the word of caution against straining language that I referred to above.

[62] Therefore, if possible, the procedure that has been determined by the JSC in terms of section 178(6) of the Constitution must be read in conformity with the Constitution. This accords with section 39(2) of the Constitution. A reading that keeps regulation 3(k) within constitutional bounds is quite possible here. If the constitutional right of access to court requires disclosure, I do not see how a procedure determined by the JSC can alter that. After all what section 178(6) authorises is the determination by the JSC of its procedure, not that of courts.

[63] Do the provisions of section 38 of the JSC Act alter the position? I think not. The section itself actually envisages disclosure, but only under the exceptions itemised in (a) to (d). There is thus no general bar to disclosure. Crucially, it is not all information or documents obtained in the performance of functions in terms of the JSC Act that may not be disclosed. The operative word is "confidential"; only confidential information or documents are hit by the prohibition. This is a far cry from

[66] *Bridon* above n 10 at para 31.

[67] *Hyundai* above n 32 at para 23.

the blanket refusal of disclosure that the JSC is contending for. Surely, confidentiality must relate to the nature of the information. Information cannot be confidential just because the person who would like it to be regarded as such says it is.[68] Therefore, an *a priori* declaration by the JSC that its deliberations are to be held in private cannot automatically transform even the most innocuous, non-sensitive content of deliberations to confidential information. Confidentiality has everything to do with the nature of the information or document concerned.[69] That is why – in my view – section 38 applies even in instances outside of JSC deliberations. Thus if the JSC claims that divulging the content of its deliberations will be hit by the prohibition in section 38, it must first demonstrate that the information is of a confidential nature. It has not done that. It has rather relied on a blanket non-disclosure. Section 38 cannot be a basis for that stance.

Balancing the competing interests

[64] The JSC's appeal to secrecy in the face of the possible infringement of a litigant's fundamental right to a fair trial raises rule of law concerns. This Court has held that the foundational values of accountability, responsiveness and openness find application even outside their original setting of regular elections found in section 1 of the Constitution.[70] This is what it said addressing the need for the openness and transparency of the processes of courts themselves:

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[68] Compare *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (*Masetlha*) at paras 54-5 where this Court held:

> "A mere classification of a document within a court record as 'confidential' or 'secret' or even 'top secret' under the operative intelligence legislation or the mere *ipse dixit* [say-so] of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access."

[69] *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* [2012] ZASCA 111; 2013 (1) SACR 323 (SCA) at para 15.

[70] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

> "Courts should in principle welcome public exposure of their work in the court room, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (i.e. the principle of open court rooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness."[71]

[65] These values are of singular importance in South Africa coming – as we do – from a past where governance and administration were shrouded in secrecy.[72] If we are truly to emancipate ourselves from that past, all our democratic constitutional institutions must espouse, promote and respect these values. The blanket secrecy that the JSC is advocating is at odds with this imperative. And this is especially so, regard being had to the fact that the JSC's claim to secrecy does not bear scrutiny.

[66] The secrecy that the JSC is clamouring for might result in negative public perceptions not only about the JSC itself, but also about the very senior judiciary in respect of whose appointment it plays a vital role.

[67] Where a claim to blanket non-disclosure is asserted, the court must engage in a balancing exercise. An important factor in weighing-up the JSC's interest against that of review applicants in general is that the JSC is engaged in a particularly important

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[71] *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) (*SABC*) at para 32.

[72] Compare *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at para 17 where Mahomed DP says:

> "Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. . . . Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history."

exercise of public power, which must be done lawfully and rationally. Generally the only way to test the legality of the exercise of this power completely and thoroughly is to afford an applicant for review access to *all* material relevant to that exercise of power. If a public functionary can withhold information relevant to the decision, there is always a risk that possible illegalities remain uncovered and are thus insulated from scrutiny and review. That is at variance with the rule of law and our paramount values of accountability, responsiveness and openness. This affects not only the individual litigant, but also the public interest in the exercise of public power in accordance with the Constitution. It must, therefore, be in truly deserving and exceptional cases that absolute non-disclosure should be sanctioned.

[68] Unsurprisingly, in *Masetlha* Moseneke DCJ writes that ordinarily courts incline towards disclosure rather than the opposite. Of course, he says this in a different context, but it is relevant. His words are:

> "Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial."[73]

[69] It is worth noting that the third judgment accepts that ordinarily the deliberations of the JSC should form part of a rule 53 record. But it holds that considerations of confidentiality justify their exclusion. Based on my conclusion that it is only in truly deserving and exceptional cases that there must be absolute non-disclosure, I do not agree. Although I cannot make light of the concerns raised by the JSC, I do not think they reach the level of being exceptional.

[73] *Masetlha* above n 68 at para 25.

[70] Where absolute non-disclosure is not justified, the information at issue may – in the court's exercise of discretion – be disclosed, not disclosed or disclosed subject to a confidentiality regime. The court will weigh up the interests that favour disclosure against the asserted confidentiality interests. The outcome of that exercise of discretion will depend on the circumstances of each case.

[71] In this case, it is not possible to order non-disclosure because no fact-specific basis for non-disclosure has been pleaded. May disclosure then be ordered under a confidentiality regime?

Confidentiality regime

[72] I do not quite comprehend why the JSC's concerns cannot be adequately addressed by a suitably framed confidentiality regime. The *only* reason given by the third judgment against a confidentiality regime is that confidentiality regimes are not foolproof. The judgment says:

> "Even if access to the deliberations of the JSC are limited to the parties and their lawyers, the material in the deliberations is *likely* to find its way into affidavits and oral submissions made by the parties."[74] (Emphasis added.)

[73] This is not true of all confidentiality regimes. Some can and do impose very stringent conditions with the result that it becomes *unlikely* that the confidential material may be divulged beyond the category of people who should rightly have it. An example is the one that was formulated in *Bridon*. It limited—

> "access to the confidential part of the Commission's record to legal representatives of the parties in the main application and one independent expert appointed by each party to assist in that application. In addition, these persons w[ould] only have access after they ha[d] signed a confidentiality undertaking in the form dictated by the order. In terms of that undertaking the signatory pledge[d] not to divulge the information that he or she obtained from the record to anybody outside the stipulated group of persons,

[74] See [210].

> which group *d[id] not include the parties themselves or any of their employees*. *The order further require[d] that any pleading, affidavit or argument filed in the main application be made up in two parts – a confidential version and a non-confidential version; that all references to confidential information be expunged from the non-confidential version; and that access to the confidential version be reserved to permitted persons and the judge presiding in the main application*."[75] (Emphasis added.)

[74] For all we know the likely fears of, and potential harm to, JSC members and candidates appearing before them may be sufficiently dealt with by a similarly strict confidentiality regime. The *Bridon* example does not only deny access to the public, it also denies it to the parties themselves. The few individuals who do have access sign a confidentially undertaking not to divulge the information even to their clients.[76] To the extent that the third judgment says the information could be divulged even in parties' submissions, it is a matter of relative ease for the regime to address that as well. The fact that – as was done in *Bridon* – something can workably be done with the content of affidavits illustrates this. Under these or similar circumstances, it would be grabbing at straws for one to continue to suggest that the JSC could still nurse realistic fears. At best, the likelihood of disclosure is minuscule and certainly not warranting the non-disclosure that the JSC is contending for. In each instance, all that would have to be done is to craft a regime with conditions that are suited to it.

[75] Although the third judgment makes a strong case for the JSC's claim, I remain unpersuaded that the required protection cannot be sufficiently provided by a suitable confidentiality regime.

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[75] *Bridon* above n 10 at para 9.

[76] Criticism of these stringent regimes that I am aware of relates to their unfairness – real or perceived – to the litigant seeking disclosure who is denied access in the sense that only her or his legal representatives are allowed access, and not to them not being sufficiently foolproof. See *Bridon* id at para 36.

[76] In this case must we then order disclosure subject to a confidentiality regime? Since no fact-specific claim of confidentiality was raised, I do not think it necessary to pronounce on a possible confidentiality regime.

Refusal of disclosure based on the facts

[77] At a factual level, the third judgment says that the HSF will not suffer any significant harm as it already has a substantial record; it will thus not be forced to launch its review in the dark. It is worth noting that the third judgment acknowledges that the JSC's deliberations are relevant for purposes of a rule 53 record and that relevance must be considered in respect of their connection to the impugned decision rather than the pleaded case. The unfairness suffered by a review applicant denied access to deliberations lies in the fact that she or he may have been prevented from making the best possible case. The fact that a number of other relevant documents and reasons distilled from the deliberations have been provided does not detract from the unfairness of withholding other relevant information. The information that has been withheld may provide evidence of reviewable irregularities that are not revealed by the other documentation. That is why the rule requires that *all* relevant documentation must be provided, unless there is some legally cognisable basis for withholding it.

[78] Finally, I next deal with the second basis for the second judgment's conclusion.

High Court's exercise of discretion

[79] The second judgment reasons that the High Court's decision to deny the HSF the recording of the JSC's deliberations was based on that Court's exercise of discretion in terms of rule 30A of the Uniform Rules of Court.[77] The second judgment says, because

[77] Rule 30A headed "non-compliance with rules" provides:

> "(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.
>
> (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."

the High Court's decision was based on the exercise of discretion in the true sense, on appeal its decision should be liable to be set aside only on the narrowest of grounds. I have no quarrel with the fact that in terms of rule 30A(2) there is an exercise of discretion as to what an appropriate order should be once a court has held – under rule 30A(1) – that there has been non-compliance with the rules. As to the antecedent question arising from rule 30A(1) whether there has, in fact, been non-compliance with the rules, there is no question of an exercise of discretion. The court must determine – as an objective question of fact or law – whether there has been non-compliance. On that question, therefore, a court of appeal makes the simple determination whether the lower court was right or wrong in its conclusion on compliance. The discretion under rule 30A(2) does not feature at all. The second judgment does not draw this distinction between what is required of the court first under rule 30A(1) and then under rule 30A(2).

[80] To conclude on this aspect, the High Court first had to determine whether the JSC's refusal to furnish the HSF with a copy of the recording of the deliberations amounted to non-compliance with rule 53. This did not involve any exercise of discretion. On this the High Court held against the HSF. That remains the issue that we too must determine. On whether the High Court's conclusion falls to be upheld, we cannot be subject to the strictures applicable to appeals on matters concerning the exercise of a discretion in the true sense. The question is a simple one: was the High Court right or wrong in its conclusion?

Conclusion

[81] The appeal must succeed with costs, including the costs of two counsel.

Condonation

[82] The *amicus curiae* applied for condonation for the late filing of its written submissions. The written submissions were served electronically on the HSF and the JSC and emailed to the Registrar's office on the last day for filing. On the following

day the correspondent attorneys attempted to file hard copies of the submissions. These were not accepted as they were late and not accompanied by a condonation application. The written submissions were ultimately filed, together with the condonation application, two days later. The delay is minimal. Given that electronic service was effected on time, there is no prejudice to the other parties. It is in the interests of justice that condonation be granted, and it is granted.

Order

[83] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the High Court of South Africa, Western Cape Division, Cape Town (High Court) and the Supreme Court of Appeal are set aside and substituted with the following:

   "The respondent is ordered to comply with rule 53(1)(b) of the Uniform Rules of Court and to deliver the full recording of the proceedings sought to be reviewed in the main application, including the audio recording and any transcript of the deliberations of the JSC after the interviews on 17 October 2012."
4. The respondent is to pay the applicant's costs, including the costs of two counsel, in this Court, the Supreme Court of Appeal and High Court.

JAFTA J:

[84] I have had the benefit of reading the judgment prepared by my colleague Madlanga J (first judgment). While I agree that leave to appeal must be granted, I am unable to support the proposed outcome. I think the appeal should fail.

[85] The conclusion I reach is informed by the approach I take which differs from the one followed in the first judgment. Shorn of frills, this case concerns enforcement of the Uniform Rules of Court. The dispute relates to whether, after receiving review papers, the JSC had complied with rule 53(1)(b) of the Uniform Rules of Court. The Western Cape Division, a division of the High Court to which rule 53 applies, held that there was compliance with it. An appeal to the Supreme Court of Appeal was dismissed, hence this application for leave to appeal.

[86] Although the appeal lies against the order of the Supreme Court of Appeal, for the appeal to succeed, this Court is required to examine the judgment of the High Court and reverse its order as well. That is why the first judgment overturns not only the order of the Supreme Court of Appeal but also the order of the High Court. But we can only set aside the order of the High Court, if on the application of the correct test to such decisions, we are convinced that its conclusion on whether there was compliance with rule 53 constituted an improper exercise of discretion.[78] The rules themselves recognise that the High Court has discretion to determine whether there was compliance and if there was non-compliance, to make an order deemed necessary. Therefore, with regard to the High Court, the real issue is whether that Court exercised its power under rule 30A judicially.

[87] It cannot be gainsaid that our courts adopt a flexible approach in construing and applying the rules. A mechanical application of the rules is not encouraged.[79] This approach is buttressed by the inherent power each of the courts listed in section 173 of

[78] Rule 30A of the Uniform Rules of Court provides:

> "(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.
>
> (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."

See also *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at 571E.

[79] *PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC) at para 31.

the Constitution enjoys.[80] This provision affirms that the High Court, like this Court and the Supreme Court of Appeal, has the inherent power to protect and regulate its own process. This is the context in which the appeal must be adjudicated.

Background

[88] During October 2012, the JSC as is customary, conducted interviews of prospective candidates for appointment as Judges. These interviews were done in order to enable the JSC to fulfil its constitutional function of recommending to the President, candidates to be appointed by him as Judges. During that session of interviews, eight candidates were interviewed for vacancies in the Western Cape Division of the High Court. Certain candidates were recommended for appointment and others were not. Shortly after the recommendation was made public, Justice Harms demanded reasons for recommending one candidate, who was identified by name, instead of another candidate, who was also identified by name.[81] Reasons were furnished by the JSC in November 2012.

[89] Dissatisfied with those reasons, the HSF instituted a review application in the High Court, impugning the JSC's recommendation on the grounds of unlawfulness and irrationality. The review was launched in terms of rule 53 of the Uniform Rules of Court. Upon service of the application papers on the JSC, the rule triggered a duty on the JSC to deliver to the registrar of the High Court, within 15 days after receipt of the papers, the record of "proceedings sought to be corrected or set aside".

[90] In August 2013 the JSC delivered to the registrar a record comprising six lever-arch files.[82] These files contained full reasons for the impugned recommendation in respect of each candidate, an application for appointment by each candidate,

[80] Section 173 provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[81] High Court judgment above n 2 at para 4.

[82] Id at para 3.

comments of professional bodies and individuals, related research, submissions, correspondence and transcripts of an interview of each candidate by the JSC.

[91] Reasons for the recommendation were compiled by the Chief Justice and they revealed something that was not known to the HSF. This was that members of the JSC had private deliberations during which various views were expressed on each candidate. These deliberations were recorded and the Chief Justice distilled the reasons for the impugned decision from the recording. However, a copy of the deliberations was excluded from the record delivered to the registrar.

[92] Unhappy with this exclusion, the HSF addressed a letter to the JSC's attorneys, demanding that a copy of the deliberations be delivered. The JSC's attorneys responded by letter, informing the HSF that the JSC declined the request for a correct copy of the deliberations on the ground that such deliberations were confidential. This was so, the JSC reasoned, to enable its members to have frank and robust discussions and "to protect the integrity and dignity of the candidates without impeding or undermining the ability of the commissioners to submit them to robust assessment". This response forms part of the record in this Court.

[93] The HSF took the view that those deliberations formed part of the record which the JSC was obliged to lodge with the registrar and that its refusal constituted non-compliance with rule 53(1)(b).

High Court proceedings

[94] In January 2014 the HSF instituted an interlocutory application in terms of rules 6(11)[83] and 30A[84] of the rules. Rule 30A is crucial to the determination of this

[83] Rule 6(11) of the Uniform Rules of Court provides:

> "Notwithstanding the aforegoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge."

[84] Uniform Rules of Court above n 77.

appeal. It is the rule in terms of which the HSF sought relief. Consequently, if the appeal must succeed, this Court should grant an order which the High Court ought to have given. The rule provides a general remedy for non-compliance with the Uniform Rules. But more importantly, the rule confers a wide discretion on the court to which a rule 30A application is made. If that court finds that non-compliance has been established, it is free to make any order it deems fit. Notably, the rule does not oblige the court to order compliance. This rule was introduced in June 1998.[85]

[95] The HSF sought a specific order that directed the JSC "to comply with the provisions of rule 53(1)(b) of the Uniform Rules of Court, namely to dispatch to the registrar, and to notify the applicant that it has done so . . . the full record of the proceedings sought to be reviewed . . . including the audio recording and any transcript of the deliberations of the respondent, after the interviews on 17 October 2012". In its founding affidavit, the HSF addressed reasons furnished by the JSC for its refusal to deliver a copy of deliberations. In disputing that deliberations were confidential, the HSF averred:

> "The respondent's disclosure of these 'considerations' in the Reasons does not in any way impair the 'integrity and dignity of the candidates', nor in any way impede or undermine the ability of the respondent's members to 'submit them to robust assessment'. The respondent cannot contend that disclosure of the Recording could cause such impairment or impediment, any more than disclosure of the Reasons, without conceding that the Reasons inaccurately or incompletely capture the contents of the Deliberations and thus the record of the Decision.
>
> The unavoidable conclusion, therefore, is that the 'rationale' provided for the confidentiality of the Recording is factually unfounded and that the refusal to lodge the Recording with the Registrar is likewise factually unfounded."

[96] The HSF continued to allege:

[85] Rule 30A of the Uniform Rules of Court was introduced by GN R881, *GG* 6217, 26 June 1998.

> "In the first place, as a matter of principle, confidentiality is not a valid ground for refusing to produce documents under Rule 53. It is settled that the fact that documents contain information of a confidential nature does not per se in our law confer on them any privilege against disclosure. That is all the more so in a constitutional democracy, since access to the full record of the proceedings is fundamental to the proper ventilation of the review before the court. The requirement that there be proper disclosure of the record under Rule 53 furthers the constitutional guarantee of just administrative action, as well the right of access to any information held by the state and the constitutional requirement of public administration that is transparent and accountable.
>
> Secondly, nothing in this case permits a departure from that generally established principle. Section 178(6) of the Constitution empowers the respondent to determine its own procedure. Section 5 of the Judicial Service Commission Act 9 of 1994 provides for such procedure, once determined, to be promulgated by the Minister of Justice. It is notable that neither provision empowers the respondent to impose an impenetrable regime of secrecy over its procedure."

[97] The HSF concluded on the first reason that was advanced in support of confidentiality:

> "The SCA states that the primary purpose of rule 53 (in line with the dicta in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A)('*Jockey Club*') and *Cape Town City v South African National Roads Authority and others* 2015 (3) SA 386 (SCA) ('SANRAL')) is to 'facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision . . . access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court.'"

[98] With regard to non-compliance with rule 53, the HSF stated:

> "The [JSC] has plainly and deliberately not complied with Rule 53(1)(b), its non-compliance suffers from serious procedural and substantive deficiencies, and there is no basis for such non-compliance to be countenanced by this Honourable Court."

The HSF added that the JSC's conduct "is deserving of severe censure by [the High Court] and a punitive costs order".

[99] The matter was opposed by the JSC. In responding to the allegation that disclosure of deliberations will not impede a robust assessment of candidates, the JSC contended:

> "Confidentiality is important so that the commissioners can have frank discussions about each candidate amongst themselves, and also in order to protect the integrity of the persons who are subject to the scrutiny of the commissioners. Allowing for deliberations to be made public, albeit only in court papers, might lead to a situation where possible candidates will be wary of subjecting themselves to a process where adverse comments about them might become public. On the other hand, the commissioners themselves may be stifled and may not express their views on candidates as robustly as they would otherwise have done, especially if those views are negative."

[100] With regard to the averment that keeping deliberations confidential would protect "the integrity and dignity of candidates", the JSC said:

> "All candidates for judicial offices who have thus far put their names forward for consideration by the Respondent have done so in the knowledge, and with the comfort, that the deliberations in respect of their applications will be undertaken in confidence. It would be unfair, and potentially damaging to their dignity, for those deliberations to now be made public.
>
> With regard to what is stated in paragraph 38, the Applicant misses the point. It is not being suggested that members of the Respondent would have ridiculed or humiliated candidates or otherwise impaired their dignity or integrity. What is being said is that the making known of the frank and honest assessment by members of candidates could well affect the professional and personal standing of the latter, especially where such views relate to aspects like personality, temperament, diligence and other personal attributes."

[101] I have rendered this detailed factual background because, as I see it, the facts provide a proper context within which the appropriate remedy under rule 30A must be

determined. It will be recalled that under the rule the High Court was free to make whatever order it deemed necessary, if non-compliance was established.

[102] Having outlined the parties' submissions, the High Court construed rule 53(1) to determine its purpose. With reference to decisions of the High Court and the Supreme Court of Appeal, that Court concluded that "the rule is primarily intended to operate in favour of and to the benefit of an applicant in review proceedings and to avoid review proceedings being launched in the dark".[86]

[103] With reference to the purpose of the rule and the information in the six lever-arch files, the High Court concluded that there was compliance with rule 53(1)(b). It reasoned thus:

> "In the present instance it is common cause that the JSC has dispatched to the Registrar 6 lever-arch files, which contain all the documentation and transcripts of the proceedings which took place and resulted in the judicial appointment of five candidates to this Division, as the record of proceedings sought by the HSF to be set aside or corrected. This record of proceedings included the following: each of the eight candidate's individual applications for judicial appointment; comments on the candidates from professional bodies and certain individuals; other related submissions and correspondence; transcripts of the eight candidates' interviews; and reasons for the JSC's decision to recommend certain candidates and not to recommend others. In addition reasons were furnished by the JSC in November 2012 in relation to a complaint why Dalomo AJ (as he then was), and not Gauntlett SC, was recommended to the State President for a permanent appointment. The drafter of the distilled reasons of the Deliberations was in fact the Chief Justice.
>
> Absent the full record of the Deliberations, has the JSC complied with the objective and purpose of the Rule? In my view the question must be answered in the affirmative. In view of what had been dispatched to the Registrar, the HSF is not forced to launch a review application in the dark. Moreover, the contention that the HSF will be required to evaluate and argue the rationality, lawfulness and reasonableness of the impugned decision without key documents and be denied the benefit of the Rule is unfounded.

[86] High Court judgment above n 2 at para 14.

> The HSF is not being deprived of the procedural and substantive safeguards which are the underlying rationale for the Rule."[87]

[104] With regard to the question whether, in spite of the purpose of the rule having been satisfied, the JSC was still required to include a copy of the deliberations in the record it had delivered, the High Court considered a number of decisions by other divisions of the High Court[88] and *Intertrade*[89], a decision of the Supreme Court of Appeal. Some of those decisions define "record of proceedings to be corrected or set aside" to include deliberations whilst others define it as excluding deliberations. The original interpretation which excludes deliberations was adopted in 1970 in *Johannesburg City Council*.

[105] Preferring the *Johannesburg City Council* interpretation, the High Court here held:

> "Having regard to the overall process adopted by the JSC the view expressed in the *Johannesburg City Council* matter supra at 91H-92A is indeed apposite in the present instance. *The JSC's deliberations are in my view no different to those of a magistrate or those of a judge as reflected in his or her court-book or deliberations which do not form part of the record of proceedings on appeal or review*. Accordingly, the non-disclosure of the JSC's deliberations cannot taint the entire review proceedings."[90]

[106] In motivation of this conclusion, the High Court made reference to other democratic jurisdictions with comparable systems of selecting candidates for appointment as Judges.[91] Two observations were made at the conclusion of this analysis. These were that the JSC represents the best practice for selection of Judges

[87] Id at paras 15-6.

[88] *Comair* above n 21; *South African National Roads Agency Limited v City of Cape Town; In Re: Protea Parkway Consortium v City of Cape Town* [2014] ZAWCHC 125; [2014] 4 All SA 497 (WCC); *Lawyers for Human Rights* above n 11; *Ekuphumleni* above n 21; and *Johannesburg City Council* above n 20.

[89] *Intertrade* above n 23.

[90] High Court judgment above n 2 at para 29.

[91] These included the United States, Canada, Australia, Malaysia, Tanzania and Zambia.

and that it is already "far more transparent than the majority of comparable bodies in other jurisdictions". The High Court accepted that the JSC's deliberations were confidential and opined that the disclosure of deliberations might "deter potential candidates from accepting nominations for appointment" and that the "efficiency of the judicial selection process could therefore be compromised".[92]

[107] A close reading of the High Court's judgment reveals that its order rested on three pillars. The first was that the JSC had complied with rule 53(1)(b). The second was that the JSC's deliberations did not constitute part of the record of the proceedings to be reviewed. And the third was that when the HSF's interests were weighed up against the JSC's need for confidentiality, the High Court deemed it necessary to decline granting the relief sought, as in its view, such relief would not advance "the constitutional and legislative imperatives of the JSC".[93]

SCA appeal

[108] The Supreme Court of Appeal did not approach the matter on the footing that the HSF had sought relief under rule 30A and that the High Court had exercised a discretion in deciding the matter. Instead, that Court focused on two of the three pillars on which the High Court's order rested. The Supreme Court of Appeal considered the question whether the JSC deliberations formed part of the record envisaged in rule 53(1)(b). This issue was determined with reference to *Johannesburg City Council* and *Intertrade*, on one hand and *Afrisun*,[94] *Comair* and *SCA SANRAL*,[95] on the other.

[109] Whilst accepting that in some cases the deliberations may, depending on the circumstances form part of the record, the Supreme Court of Appeal held:

[92] High Court judgment above n 2 at para 48.

[93] Id at para 49.

[94] *Afrisun* above n 21.

[95] *SCA SANRAL* above n 17.

> "To sum up: 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 may be cases, such as this one, where confidentiality considerations may warrant non-disclosure of deliberations for the reasons set out above. I agree with the court a quo that the JSC is set apart from other administrative bodies by its unique features which provide sufficient safeguards against arbitrary and irrational decisions. The relief sought by HSF would undermine its constitutional and legislative imperatives by, inter alia, stifling the rigour and candour of the deliberations, deterring potential applicants, harming the dignity and privacy of candidates who applied with the expectation of confidentiality of the deliberations and generally hamper effective judicial selection."[96]

[110] It is apparent from this statement that the Court did not conclude only on the issue whether deliberations formed part of the record but also determined the question whether the High Court was correct in holding that the balancing exercise favoured refusal of the HSF's request. The Supreme Court of Appeal endorsed the High Court's reasoning that a disclosure would undermine the JSC's "constitutional and legislative imperatives". The appeal was dismissed on account of these two conclusions.

In this Court

[111] It is evident from the judgment of the High Court and the Supreme Court of Appeal that the issues arising in the context of rule 30A are those on which the High Court relied in dismissing the application. These are: the JSC has complied with rule 53(1)(b); JSC deliberations do not form part of the record; and the balancing of interests favoured the dismissal of the application. But the antecedent question is whether there are grounds warranting interference with the exercise of discretion by the High Court.

[96] SCA judgment above n 3 at para 39.

Approach to exercise of discretion

[112] It cannot be disputed that rule 30A, in terms of which this application was instituted, confers a discretion on the High Court. The rule empowers the court where there has been non-compliance with any of the rules to grant whatever order it deems fit. Nor can it be gainsaid that rule 53 is part of the Uniform Rules.

[113] The wide discretion conferred by the relevant rule is consonant with the underlying purpose of court rules, namely, the promotion of the administration of justice by facilitating the adjudication of cases. In *PFE International (BVI)* this Court held:

> "Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules."[97]

[114] What this statement tells us is that rules are not the law of the Medes and Persians to be followed slavishly in every case. Since the rules are made for the courts and not the courts for the rules, a superior court has an inherent power to condone not only non-compliance with its rules but also to authorise a deviation from them. That is why rule 30A permits the court to determine whatever order it deems necessary in the event of non-compliance. The inherent power of courts to regulate their own process allows for flexibility in the application or enforcement of the rules. Rule 53 forms part of the process and is subject to regulation by the High Court.

[115] This means that the power to intervene with the exercise of that inherent power on appeal is circumscribed. An appeal court may not intervene purely on the basis that, had it been the court of first instance, it could have exercised the power differently. For

[97] *PFE International Inc (BVI)* above n 79 at para 30.

if this were to be so, the High Court's power to protect and regulate its own process would be seriously undermined.

[116] The power that has received constitutional recognition in the form of section 173 of the Constitution does not authorise one superior court to regulate the processes of another superior court. It explicitly recognises that each of the superior courts has the power to regulate its own process. In order to preserve this special power, in matters relating to enforcement of rules, other courts must defer to the court whose rules have been breached and which has been approached for exacting compliance.

[117] Accordingly, a decision on non-compliance with the rules of a particular court should be liable to be set aside on appeal on the narrowest grounds – like where such court has improperly exercised its rule 30A power. This may occur where the Court's decision was influenced by wrong principles of law.[98] In *Giddey* this Court affirmed the following reasoning pertaining to a decision in terms of which an amount of security under section 13 of the Companies Act[99] was determined:

> "(2) When section 13 is combined with the provisions of Rule 47, as it must be to give it practical effect, the Court is regulating its own procedure by deciding not only whether a litigant should be ordered to provide security for costs – a decision which may be made, in terms of the section 'at any stage' of proceedings (and therefore in *medias res*) – but also, where it grants such an order, whether the litigant should be allowed to proceed until such security has been provided. *The regulation by a Court of its own procedure is also a matter usually held to involve a discretion in the narrow sense*.
>
> (3) The discretion requires in essence the exercise of a value judgment and there may well be a legitimate difference of opinion as to the appropriate conclusion."[100]

[98] *SABC* above n 71 at paras 39-41 and *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 20.

[99] 61 of 1973.

[100] *Giddey N.O. v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at para 20 quoting *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* [1999] 4 SA 799 (W) at 807H-808C.

[118] As mentioned, when a court is called upon to adjudicate a rule 30A application, it is concerned with the exercise of discretion in the narrow sense. This is because rule 30A(2) affords the court an unlimited range of choices. In *SABC* this Court reaffirmed the principle:

> "Where the discretion is a discretion in the strict sense, in that the Court had a range of legal choices open to it, an Appellate Court will ordinarily interfere with the exercise of that discretion only in narrow circumstances."[101]

[119] Yet in *Mabaso* this Court held that the question whether there is a failure to comply with court rules and whether non-compliance should be condoned, involves the exercise of a discretion which may not be interfered with on appeal—

> "merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."[102]

[120] It is now convenient to examine each of three conclusions reached by the High Court in support of its order.

Meaning of rule 53

[121] Rule 53(1) provides:

> "(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to

[101] *SABC* above n 71 at para 39.

[102] *Mabaso* above n 98 at para 20.

> review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—
>
> (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
>
> (b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

[122] The rule preceded the Constitution and its purpose has been defined in numerous cases as an important tool for adjudicating disputes about the validity of administrative decisions which are normally taken in the absence of the applicant for review.[103] In *Jockey Club* Kriegler AJA declared:

> "The purpose of Rule 53 is not to protect the decision-maker but to facilitate applications for review and to ensure their speedy and orderly presentation. Such benefits as it may confer on a respondent, in contradiction to those ordinarily enjoyed by a respondent under Rule 6, are incidental and minor. It confers real benefits on the applicant, benefits which he may enjoy if and to the extent needed in his particular circumstances."[104]

[123] The delivery of the record to the reviewing court served a dual purpose of furnishing the applicant, who otherwise had no knowledge of reasons for the impugned decision, information or facts on which the decision was based. Hence the rights conferred on the applicant by subrules (3) and (4) which entitle the applicant to peruse the delivered record and make copies as well as to "amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit". In this way the rule

[103] *Jockey Club* above n 9; *Comair* above n 21; *SCA SANRAL* above n 17; *Lawyers for Human Rights* above n 11; *Ekuphumleni* above n 21; and *Johannesburg City Council* above n 20.

[104] *Jockey Club* above n 9 at 662.

avoids the launching of review proceedings in the dark and enables courts to adjudicate the real decision or ruling.

[124] However, the advent of the constitutional dispensation in 1994 changed all of this. The interim Constitution obliged state officials to grant access to information held by the state and conferred on persons the right of access to reasons for an administrative decision taken in their absence where their rights are adversely affected by it. This is also the position under the Constitution. This extensively reduces the risk of launching a review application in the dark, if not altogether eliminates such a possibility. This development has a bearing on the purpose for which the rule was enacted and the purpose it currently serves.

Meaning of record

[125] It goes without saying that the constitutional developments referred to are relevant to the interpretation of what "record" now must mean. Indeed in *Ekuphumleni* Leach J observed:

> "As is apparent from this, while there may be no merit in the premise that the whole record of proceedings has to be furnished is respective of whether or not it is relevant to the review, in order for the Rule to fulfil its purpose ensuring that all relevant evidential material is placed before court, it is self-evident that all portions of a record relevant to the decision in question should be made available. And in considering the question of relevance, it is important to bear in mind that there is now a constitutional obligation for reasons to be given for administrative decisions which must be justified as rational and reasonably sustainable. If there is no rational link between the decision and the reasons, it leads to the conclusion that the decision was taken unreasonably, irrationally or arbitrarily, and that it should therefore be set aside."[105]

[126] Reasons for a decision are a crucial indicator to why a particular decision was taken. The light they illuminate on the decision far exceeds any light flowing from the record, which may merely be reflective of the information that was placed before the

[105] *Ekuphumleni* above n 21 at para 9.

decision-maker. The record, in contradistinction to the reasons, does not show why, on the facts, a particular decision was taken. Unless of course, a record incorporates reasons. The significance of reasons may be underscored with reference to a judicial process pertaining to leave to appeal. Ordinarily an application for leave to appeal is not required to include the entire record of the proceedings but a copy of the judgment appealed against must be incorporated. This is because such judgment must contain the full reasons for the court's decision. And the validity of that decision is evaluated with reference to the judgment only. Usually it is not permissible for a judicial officer to augment the reasons in the judgment by pointing to a separate document.

[127] The record, which rule 53(1)(b) requires delivery of to the registrar, is the one relating to the proceedings referred to in the opening part of the rule which states—

> "all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative function."

[128] A proper reading of this text reveals that "proceedings" connotes a formal process. The phrase "all proceedings to bring under review" refers to the review application itself. And the words "proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions" refer to proceedings sought to be reviewed. But in both instances "proceedings" mean a formal process. This is buttressed by the distinction the rule draws between a decision and proceedings. The rule makes it plain that a review lies against a decision or proceedings and does not say a record of a decision must be delivered. To this extent the drafters of the rule were aware of the fact that an application for review may be pursued against a decision where no record exists.

[129] Rule 53(1) requires the applicant for a review to deliver a notice of motion to "the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer", calling upon them to show cause why "such decision or proceedings should not be reviewed and corrected or set aside". Notably, the rule identifies and lists persons

on whom the notice of motion should be served. Not surprisingly, none of those persons include the JSC and its chairperson, the Chief Justice. This is because the rule precedes the Constitution and when it was adopted, a review of a body like the JSC was not envisaged. However, the scope of the rule is not limited only by reference to bodies whose decisions and proceedings may be reviewed but also by the functions performed by such bodies. These are judicial, quasi-judicial and administrative functions. The selection of candidates suitable for appointment as Judges does not fit neatly under any of these functions. The Promotion of Administrative Justice Act[106] which was enacted to cover the entire field of administrative action, excludes the function of the JSC from the definition of administrative action.

[130] But since the parties and the other courts approached the matter on the assumption that rule 53 applies to the review of decisions of the JSC, I am also willing to decide the matter on that assumption.

[131] In terms of rule 53(1)(b), the notice of motion served on the magistrate, presiding officer, chairman or officer must call upon them to deliver, within 15 days of receipt of the notice of motion, "the record of such proceedings sought to be corrected or set aside". The words "such proceedings" refer back to "proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions". It is the record of those proceedings which must be delivered to the registrar within 15 days and depending on the requirements of the relevant law or the wishes of the person on whom the notice is served, the record may be accompanied by reasons.

[132] It is apparent from the rule that "record" carries the same meaning regardless of whether the proceedings sought to be reviewed are judicial, quasi-judicial or administrative. This is what influenced the High Court here to prefer the meaning that was assigned to "record" in *Johannesburg City Council.* It will be recalled that in this matter the High Court pronounced:

[106] 3 of 2000.

> "The JSC's deliberations are, in my view, no different to those of a magistrate or those of a judge as reflected in his or her court book or deliberations which do not form part of the record of proceeding on appeal or review."[107]

[133] It is not controversial that the notes taken by a presiding judicial officer during a hearing before her, do not form part of the record of the proceedings if a review is instituted or an appeal is lodged. With the rule using the word "record" with reference to both judicial and administrative functions, I can think of no reason in principle or logic that warrants that this word be assigned differing meanings, depending on the function that was performed. Consequently, if "record" in respect of judicial proceedings excludes the presiding judicial officer's notes and where applicable, discussions of those who formed the panel of presiding officers, equally with reference to administrative proceedings "record" must include deliberations.

[134] This is because a word used in a statutory provision or subordinate legislation cannot be assigned different meanings. Rule 53(1) employs "record" in respect of judicial proceedings of a magistrate's court and administrative proceedings. With regard to judicial proceedings, the notes of the presiding magistrate do not form part of the record and so are the deliberations between the magistrate and assessors. Yet where the record is lost, those notes may be used to reconstruct a record for purposes of an appeal.[108]

[135] The same approach is followed with regard to arbitration proceedings conducted in terms of the Labour Relations Act.[109] If a record of arbitration proceedings before the Commission for Conciliation Mediation and Arbitration (CCMA) is lost, the notes of the arbitrator are used to reconstruct the record. Just like the notes of a magistrate taken during a trial, notes of the arbitrator do not form part of the formal record. Yet

[107] High Court judgment above n 2 at para 29.

[108] *JMYK Investments CC v 600 SA Holdings (Pty) Ltd* 2003 (3) SA 470 (W) and *S v Van Wyngaardt* 1965 (2) SA 319 (O).

[109] 66 of 1995.

the proceedings before the arbitrator constitutes administrative proceedings of the kind envisaged in rule 53(1). In *Sidumo* this Court held:

> "Compulsory arbitrations in terms of the [Labour Relations Act] are different from private arbitrations. CCMA commissioners exercise public power which impacts on the parties before them. In the language of the pre-constitutional administrative law order, it would have been described as an administrative body exercising a quasi-judicial function. I conclude that a commissioner conducting a CCMA arbitration is performing an administrative function."[110]

These examples illustrate the point made earlier to the effect that the words "the record of such proceedings" in rule 53(1)(b) refer to all record of formal proceedings. It is that record which must be dispatched to the registrar. The notes and deliberations are excluded because they are not part of it. They are not excluded, as the first judgment suggests, on some other ground similar to privilege.[111] Where the formal record of the proceedings is furnished, the application for review may not demand that the notes of a magistrate or an arbitrator must also be furnished.

[136] Consequently, I conclude that properly construed "record" in rule 53(1)(b) does not incorporate deliberations. Accordingly the High Court applied the right law in adjudicating the HSF's rule 30A application.

[137] To conclude that anything relevant to the impugned proceedings should form part of the record to be delivered to the registrar may have absurd consequences. Take for example, a case of a party that seeks access to information held in confidence under an international agreement or information whose disclosure could reasonably cause harm to the defence or security of the Republic. In terms of section 41 of PAIA, the state may refuse access to such information. The requester of that information may bypass this refusal by simply lodging an application for review and serving upon the state the relevant papers, for rule 53(1)(b) to be triggered. Once served, the state would

[110] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 88.

[111] See [29] to [30].

be obliged to deliver to the registrar the full record, including deliberations on why the information should not be disclosed. And the applicant would be entitled to have access to it purely on the basis that it forms part of the record and is relevant to his claim of access to information.

[138] Rule 53(1) may not be used to subvert PAIA. If it is accepted, as it must be, that section 41 of PAIA may not be circumvented by employing rule 53 to achieve what could not be attained under the section, then by parity of reasoning, the rule should not be used to achieve what PAIA excludes from its scope giving effect to the right of access to information, and promoting the values of openness and transparency.

High Court's conclusion on compliance

[139] In light of the view I take on the meaning of record, it is not necessary to set out a detailed analysis of the other points which formed the foundation of the High Court's decision. With regard to compliance with rule 53(1)(b), the High Court took the view that the proceedings which the HSF sought to be corrected or set aside, were those that led to the selection of candidates for appointment to the Western Cape Division.[112] It will be recalled that the rule itself limits the delivery of the record to the proceedings to be reviewed. The High Court took account of the fact that six lever-arch files were delivered to the registrar. These files contained, said the High Court, "all the documentation and transcripts of the proceedings which took place and resulted in the judicial appointment of five candidates to [that division], as the record of proceedings sought by the HSF to be set aside or corrected".[113]

[140] The Court paid attention to the nature of information contained in those files. It stated that the record that was submitted to the registrar contained—

> "each of the eight candidates' individual applications for judicial appointment, comments on the candidates from professional bodies and certain individuals; other

[112] High Court judgment above n 2 at para 15.

[113] Id.

> related submissions and correspondence; transcripts of the eight candidates' interviews, and reasons for the JSC's decision to recommend others. In addition reasons were furnished by the JSC in November 2012 in relation to the complaint why Dalomo AJ (as he then was), and not Gauntlett SC, was recommended to the State President for permanent appointment."[114]

[141] The Court assessed the sufficiency of this information against the purpose of rule 53 and the procedural benefits the rule affords applicants for review. It reminded itself that reasons furnished were distilled from deliberations by the Chief Justice himself. Having taken all this into consideration, the Court made two important findings, namely, the HSF could not launch its review application in the dark and that the contention that the HSF would be required to argue the rationality, lawfulness and reasonableness grounds of review without key documents was unfounded. It was for these reasons that the High Court concluded that there was compliance with rule 53(1)(b).

[142] It must be stressed that rule 53(1)(b) does not require delivery of the whole record. Consistent with this, courts have considered that delivery of a portion relevant to proceedings sought to be reviewed would suffice for purposes of compliance with the rule.[115] In *Muller* the applicant for review had sought to set aside the Master's ruling in terms of which he was refused legal representation at an insolvency inquiry that was held under the Insolvency Act[116]. The applicant had indicated that he would like to be represented by a particular attorney and asked for a postponement of the inquiry for the purposes of securing legal representation.[117] The Master's ruling on the issue was:

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[114] Id.

[115] *SACCAWU v President of the Industrial Tribunal* [2000] ZASCA 74; 2001 (2) SA 277 (SCA) at para 7 and *Muller* above n 16.

[116] 24 of 1936.

[117] *Muller* above n 16 at 218F-H.

> "I think that in view of the fact that the purpose of this interrogation is to find facts, that very little sense would serve to adhere to the current practice of permitting legal assistance."[118]

[143] In response to the application for review of this decision, the Master delivered to the registrar a transcript of what the applicant had said pertaining to the request for legal representation only, as the record required by rule 53(1)(b). The Master did not include a copy of the evidence given during the interrogation that followed the impugned ruling. In view of this, the applicant argued that there was no compliance with the rule which required the Master to deliver the full record. On sufficiency of the record furnished Galgut J said:

> "In all of the circumstances, I therefore, hold that, as far as the record is concerned, the Master was not obliged in terms of Rule 53 to furnish more than he has done."[119]

[144] The learned Judge reached this conclusion in spite of the applicant's contention to the effect that the omitted portion might show that the Master was influenced by his aggressive, high-handed and bullying conduct when he refused him legal representation. This conduct was said to have occurred during the subsequent interrogation. What happened in that case confirms the fact that rule 53(1)(b) does not require delivery of the whole record of proceedings. And that the court to which a complaint of non-compliance is made may determine that there was compliance, despite the fact that only a portion of the record was filed. What is crucial is whether, based on what was filed, the applicant would be able to effectively prosecute her review challenge.

Balancing the parties' interests

[145] On this aspect of the case, the High Court weighed the HSF's interest to procedural benefits afforded to it by rule 53 against the JSC's interest to confidentiality.

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[118] Id at 219A-C.

[119] Id at 221H-I.

In this exercise the Court considered comparable foreign jurisdictions as well. It noted that "international courts and academic writers" accepted that keeping deliberations of bodies like the JSC confidential was justified. With regard to these institutions and commentators, the High Court recorded:

> "They have held that confidentiality breeds candour, that is vital for effective judicial selection, that too much transparency discourages applicants, and will have an effect on the dignity and privacy of the applicants who applied with the expectation of confidentiality."[120]

[146] The position in other jurisdictions appears to be consonant with the legislative regime put in place by Parliament, for purposes of regulating the functioning of the JSC. The JSC Act and the relevant regulations make this plain. The regulations, it will be remembered, require that deliberations of the JSC be held in private. The need for confidentiality is also underscored by the deliberate omission of the information about the functioning of the JSC from the scope of PAIA, the legislation that was enacted to advance openness and transparency.

[147] The outcome of the balancing of the competing interests by the High Court was that the HSF was not entitled to have access to deliberations of the JSC, as part of the record.[121] I am unable to conclude that the High Court has improperly exercised its discretion under rule 30A, with reference to compliance with rule 53(1)(b) and the balancing of the parties' interests.

[148] The first judgment holds that the determination of the question whether there was non-compliance with the rules does not involve an exercise of discretion.[122] I disagree. The High Court perused the record comprising six lever-arch files in order to determine compliance with the relevant rule. It assessed the adequacy of the

[120] High Court judgment above n 2 at para 48.

[121] Id at para 51.

[122] See [32].

information in that record against the purpose of rule 53 and concluded that there was compliance. In doing so the High Court was exercising its inherent power to regulate its own process. A power referred to in section 173 of the Constitution.[123]

[149] In *SABC* this Court accepted that section 173 confers a discretion on each superior court to protect and regulate its own process. Acknowledging that another court could arrive at a decision different to the one reached by the court below, this Court declined to intervene and reasoned:

> "Given that a court has a primary obligation to ensure that the proceedings before it are fair, that obligation will always figure large in the exercise of discretion under section 173. We cannot agree that the Supreme Court of Appeal erred in recognising this in the particular circumstances of this case. *We repeat that it may well be that another court might have perceived the interests of justice differently in relation to proceedings before it, but that is not the test on appeal here. The question is whether the Supreme Court of Appeal committed a 'demonstrable blunder' in adopting the test it did.*"[124]

[150] Here the High Court was best placed to determine not only whether its own rules were met but also to regulate how the case before it was to be prosecuted to finality. This forms part of the section 173 power which enables a superior court to protect and regulate its own process. Thus in *Giddey* this Court quoted with approval the principle that regulation by a court of its own procedure involves a discretion in the narrow sense.[125] The effect of the dismissal of the interlocutory application here was that the HSF had to pursue to finality its review application which is pending before the High Court.

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[123] Section 173 of the Constitution Provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[124] *SABC* above n 71 at para 55.

[125] *Giddey* above n 100 at para 20.

[151] Rule 30A may not, as suggested in the first judgment, be read disjunctively. It is a rule in terms of which non-compliance with the Uniform Rules of Court is investigated by the High Court itself. The difficulty with separating rule 30A(1) from (2) is that under the rule only one application is envisaged and a single enquiry is conducted. There is no separate application to which rule 30A(2) applies. The application made to the court in terms of this subrule is the same application that was referred to in the notice previously issued in terms of rule 30A(1). In other words, rule 30A(1) authorises only the issuance of notice to a defaulting party. If that notice is not complied with, then rule 30(A)(2) is triggered and an application may be made to the court.[126]

[152] As mentioned in paragraph 20, in determining whether there was compliance with rule 53(1)(b) the High Court first determined the object of the rule and with reference to it, examined the record that was dispatched to the registrar in six lever-arch files. That Court concluded that the purpose of the rule was achieved and as a result there was compliance. This accords with the test for compliance as laid down in *Maharaj*[127] and endorsed by this Court in *Intervalve*[128].

[153] In *Maharaj*, Van Winsen AJA formulated the test in these terms:

> "The enquiry, I suggest, is not so much whether there has been 'exact' 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the

[126] *Centre for Child Law v The Governing Body of Höerskool Fochville* [2015] ZASCA 155; 2016 (2) SA 121 (SCA) at para 16.

[127] *Maharaj v Rampersad* 1964 (4) SA 638 (A); [1964] 4 All SA 466 (A) at 646C-E.

[128] *National Union of Metal Workers of South Africa v Intervalve (Pty) Ltd* [2014] ZACC 35; 2015 (2) BCLR 182 (CC); (2015) 36 ILJ 363 (CC) (*Intervalve*) at para 44.

injunction and the question of whether this object has been achieved are of importance."[129]

[154] For all these reasons, I would dismiss the appeal.

KOLLAPEN AJ (Zondi AJ concurring)

Introduction

[155] This is an application which, in the narrow sense, involves a determination of whether the private deliberations of the Judicial Service Commission form part of the record of its proceedings for the purposes of rule 53(1)(b) of the Uniform Rules of Court.[130] In the wide sense, it is a matter which may have relevance for the judiciary – its independence, integrity, efficacy and, in particular, the calibre of those who constitute it.

[156] I have read the lucid and comprehensive judgment of my colleague Madlanga J (first judgment) and I agree with him that the question of the JSC's power to determine its own procedure, as well as the issue of whether its deliberations form part of the rule

[129] *Maharaj* above n 127 at 646C-F.

[130] Rule 53 provides:

"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—

. . .

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

53 record, raise important constitutional matters justifying the granting of leave.[131] I disagree, however, with his conclusion that the appeal must succeed.[132] I have also read the clear and extensive judgment of my colleague Jafta J (second judgment) and, while I agree with him that the appeal must fail, I do so for different reasons.

Parties and the litigation history

[157] The parties and history of litigation between them have been fully set out in both the first and second judgments. I agree with the overview provided and have nothing further to add.

Openness and transparency

[158] While the legal issue for determination is the scope of the obligation to produce a record in terms of rule 53(1)(b), its resolution is also located within the principles of openness and transparency. The principles of openness, accountability and responsiveness, which stand at the gateway to the Constitution,[133] continue to encapsulate the kind of society we seek to build and the values that must permeate its people and its institutions. However, they do not stand separately and apart from the processes they must regulate. Their meaning and value also arise in the context in which they are deployed and to the extent they advance the broader values of the Constitution. Simply put, we do not hold them up because they exist but rather because beyond their intrinsic value, they shape and inform the practical realisation of our Constitution and by so doing they endure.

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[131] See [10].

[132] See [81].

[133] Section 1 of the Constitution reads:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[159] To the extent that this application harnesses the value of openness, it is worth recalling that openness is not absolute or without limitation. The right to open justice is moderated to protect the dignity and the privacy of children and others who come before our courts,[134] just as the right of the media to report on court proceedings is moderated to protect the privacy interests of families.[135] This is not a negation of openness or of the principle of open justice, but rather, its fruition and the proper meaning it must come to have, in a complex society where competing interests often require delicate balancing.

[160] Openness is also double-sided. It is imperative that what is constitutionally necessary is seen and heard. However, in order to ventilate what must be seen and heard and to preserve certain core constitutional values, there also has to be an environment in which open and uncensored debate flourishes. In some instances, confidentiality is necessary to ensure such an environment exists, so that what must be shown and said is brought into the light, to factor into constitutionally necessary debates.

[161] This application has relevance for the judiciary, which is the repository of the judicial authority in our country. The independence and authority of the judiciary is comprehensively set out in the Constitution,[136] but outside of the legal guarantees that exist to secure its independence, the best possible guarantor of its independence and integrity lies in those individuals who are required to discharge judicial authority.

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[134] This moderation occurs when a court grants an anonymisation order to protect a child's or an otherwise vulnerable individual's rights. See *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC); 2017 (12) BCLR 1528 (CC) at fn 1.

[135] This protection occurs where a court issues a publication ban on proceedings involving intimate family interests. See for example the ban on publishing information "to the proceedings of a children's court which reveals or may reveal the name or identity of a child who is a party or a witness in the proceedings" without a court's consent in section 74 of the Children's Act 38 of 2005. See also section 11(2)(a) of the Domestic Violence Act 116 of 1998 which states that "no person shall publish in any manner any information which might, directly or indirectly, reveal the identity of any party to the proceedings".

[136] Section 165 of the Constitution reads:

> "(1) The judicial authority of the Republic is vested in the courts.
>
> . . .
>
> (4) 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."

Issues

[162] Two substantial issues are raised:

(a) Do the deliberations of the JSC form part of its record for the purposes of rule 53?

(b) If so, is it legally permissible to exclude it from the record?

Do deliberations form part of the record?

[163] The first judgment provides a comprehensive overview of the development of the law on this issue commencing from *Johannesburg City Council*, which took the position that deliberations were not a part of the record, to *HC SANRAL*, where the Western Cape High Court expressed the view that they were likely to be relevant and susceptible to inclusion in the record.[137] In these proceedings, the Supreme Court of Appeal's stance was that deliberations were not necessarily excluded from the record but that in some circumstances, considerations of confidentiality will justify their exclusion.[138]

[164] I agree with the approach taken in the first judgment that the general exclusion of deliberations from the record as a class of information appears arbitrary and cannot pass constitutional muster.[139] At the same time, I can think of no constitutional imperative that justifies its automatic inclusion in the record either. In each instance, the matter should turn on the relevance of the deliberations and if they pass the test of relevance, then they should, ordinarily, be included as part of the record unless there is a proper justification for their exclusion.[140]

[137] See [18] to [19]. See also *HC SANRAL* above n 17 at para 48 and *Johannesburg City Council* above n 20 at 91G-92B.

[138] See [20]. See also SCA judgment above n 3 at para 39.

[139] See [22].

[140] See *Comair* above n 21 at 618F-619D; *Ekuphumleni* above n 21 at para 9; and *Muller* above n 16 at 220D-F.

[165] I am also of the view that relevance then falls to be considered, not in relation to the pleaded case, but rather in respect of its connection to the impugned decision. That this should be so in rule 53 proceedings is self-evident, as an aggrieved party institutes proceedings without the benefit of a record and is entitled to supplement its case upon the record being furnished.[141] Under those circumstances, relevance cannot be gauged by reference to what has been pleaded given the inherent limitation of the pleading exercise in the absence of a record.

[166] In the context of this application, the recommendations made by the JSC followed the private deliberations it conducted. The Chief Justice used a record of those deliberations to distil the reasons of the JSC for the purpose of providing reasons for the decision in terms of rule 53(1)(b). It would under these circumstances be futile to argue that those private deliberations are not, broadly speaking, relevant to the reasons furnished given what must be the inextricable link between those deliberations and the decision ultimately taken.

[167] I am mindful of the provisions of section 178(6) of the Constitution which allow the JSC to regulate its own processes,[142] section 38(1) of the JSC Act which prohibits the disclosure of confidential information,[143] and regulation 3(k) of the JSC Procedure,

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[141] See *Fizik Investments (Pty) Ltd t/a Umkhombe Security Services v Nelson Mandela Metropolitan University* 2009 (5) SA 441 (SE) at para 7.1 and *Pieters v Administrateur, Suidwes-Afrika* 1972 (2) SA 220 (SWA) at 225G.

[142] Section 178(6) of the Constitution reads "[t]he [JSC] may determine its own procedure, but decisions of the Commission must be supported by a majority of its members".

[143] Section 38(1) of the JSC Act provides:

> "No person, including any member of the Commission, Committee, or any Tribunal, or Secretariat of the Commission, or Registrar or his or her staff, may disclose any confidential information or confidential document obtained by that person in the performance of his or her functions in terms of this Act, except—
>
> (a) to the extent to which it may be necessary for the proper administration of any provision of this Act;
>
> (b) to any person who of necessity requires it for the performance of any function in terms of this Act;
>
> (c) when required to do so by order of a court of law; or
>
> (d) with the written permission of the Chief Justice."

which provides that the JSC shall deliberate in private.[144] These provisions must all be interpreted in the "spirit, purport and objects" of the Constitution and the values it enhances.[145] They all must live and be given meaning in the context of the Constitution as a living document,[146] and they cannot on their own stand in the way and trump the relevance argument for the inclusion of deliberations as part of the record. It cannot be that a claim to confidentiality can succeed simply because the decision-maker says it is confidential. That would negate the spirit of the Constitution. I do not suggest that this is the approach of the JSC in these proceedings, but raise it simply to demonstrate the point that a claim to confidentiality must be properly made out by reference to constitutional values as opposed to it being simply asserted on the back of some legal provision that purports to cloak it with confidentiality.

[168] For these reasons, I conclude that the deliberations of the JSC are relevant to the decision under review, and on account of that they should be included in the record, unless there is some legal justification for their exclusion.

Is there a legal justification for excluding the deliberations?

[169] As a general principle the exclusion of deliberations from the public record of proceedings is neither unusual nor exceptional and does not in itself undermine the principle of transparency or the commitment to open justice as demonstrated in the following areas; court deliberations, judicial disciplinary proceedings, cabinet deliberations, and evaluative material governed by PAIA.[147] These examples are

[144] Procedure of Commission above n 7. Regulation 3(k) of the JSC Procedure provides that "[a]fter completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates for appointment by consensus or, if necessary, majority vote".

[145] Section 39(2) of the Constitution provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

[146] Constitutional interpretation should reflect the dynamic and evolving nature of the constitutional ethos which is "rooted in an understanding of the context and purpose of the Constitution". See *Ferguson v Rhodes University* [2017] ZACC 39; 2018 (1) BCLR 1 (CC) at para 18 and fn 15.

[147] See *SCA SANRAL* above n 17 at para 12:

> "The learned Chief Justice began by saying that the 'open court principle was rightly venerated as a key component of the rule of law'. She elaborated – the open court principle meant in practice that: (a) court proceedings including the evidence and documents disclosed in

offered in advance of the argument that even where deliberative material may pass the test of relevance, which would be the case in all of the instances mentioned hereunder, their exclusion from the public record of proceedings may nevertheless be justified on some legal or constitutional basis. To that extent they provide support for the principle of confidentiality but they cannot and do not in themselves provide the necessary justification for confidentiality in respect of the JSC deliberations.[148]

The deliberations of courts

[170] Courts often deliberate after hearings and before a judgment. Those deliberations are relevant in the ultimate formulation of the judgment of that court and simply on the test of relevance would fall to be included as part of the record in the event of a review (assuming of course that there was a record of those deliberations which is not without possibility). Yet, those deliberations would be ordinarily justifiably excluded from any record in terms of rule 53(1)(b) on a number of grounds, which would include the integrity of the adjudication process and the independence of the judiciary. Those deliberations would ordinarily reflect the views, comments, impressions, and instinctive responses of members of the court in relation to the various issues that arise for determination including the credibility, reliability, the demeanour of witnesses, the adequacy of the legal arguments, and the extent to which counsel was of assistance and a host of other issues.

[171] Those initial views may significantly change during the course of the deliberations, be modified, or remain unchanged. The views of other members of the court may be persuasive in changing a prima facie view and all of this happens in the ebb and flow of the deliberative process. It is often in the intensity of exchanges in the deliberative process that views may be tested and critiqued with a view to arriving at a

proceedings should be open to public scrutiny; and (b) juries and judges should give their decisions in public. (It did not require every aspect of the judicial process to be open, so that for example judges' deliberations could remain private, and some evidence might be protected by privilege)."

[148] See [55].

just outcome and the confidentiality of that process must be a significant factor in the freedom to express views, have them critiqued and change them, if need be.

[172] At other times, views may be expressed in a manner that may depart from the decorum and the language of the court. This is not unusual nor is it a negation of justice as judicial officers are entitled to, and perhaps even enjoined to, act robustly and with candour and vigour in the deliberative process. It is in many respects that the confidentiality that the deliberative process offers creates the enabling environment for vigour, robustness, the right to be wrong, as well as the right to persuade and be persuaded, which are all important in enhancing the quality of the adjudication process. I cannot imagine that any claim to absolute openness in that setting can have, as its consequence, qualitatively better adjudication. On the contrary, the loss of confidentiality may have a chilling effect on the ability to speak and debate openly.

[173] Courts in both Canada and the United States of America (United States) have found judicial privilege in the deliberative materials of judges. In *Criminal Lawyers' Association*, the Supreme Court of Canada held:

> "It may also be that a particular government function is incompatible with access to certain documents. For example, it might be argued that while the open court principle requires that court hearings and judgments be open and available for public scrutiny and comment, memos and notes leading to a judicial decision are not subject to public access. This would impair the proper functioning of the court by preventing full and frank deliberation and discussion at the pre-judgment stage."[149]

[174] The Massachusetts Supreme Judicial Court has also found that judicial privilege protects a judge's "internal thought processes and deliberative communications, memoriali[s]ed in notes, diaries, or otherwise".[150] There, the notions of "finality",

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[149] *Ontario (Public Safety and Security) v Criminal Lawyers' Association* 2010 SCC 23; [2010] 1 SCR 815 (*Criminal Lawyers' Association*) at para 40. See also *Mackeigan v Hickman* [1989] 2 SCR 796 at 842-3.

[150] *In re Enforcement of a Subpoena* 463 Mass 162 (2012) (*Enforcement of a Subpoena*) at 178. The Massachusetts Supreme Judicial Court, the apex court in that state, appeared to rely on the United States Supreme Court in *United States v Morgan* 313 U.S. 409 (1941) at 422 where it held that the "mental processes" of a judge, like that of a

"quality and integrity of decision-making", and "independence and impartiality" were at play.[151] I cannot imagine why the same rationale behind these decisions to protect deliberative judicial materials should not apply with similar force in South Africa.

Judicial Disciplinary Proceedings

[175] There is also requisite confidentiality in judicial disciplinary proceedings. The High Court, in *Mail and Guardian*, found that there was a need for "caution and confidentiality during the early period of any investigation."[152] The Court expressed the view that:

> "Confidentiality would encourage the filing of complaints but also protect judges from unwarranted and vexatious complaints and maintain confidence in the judiciary by avoiding premature announcements of groundless complaints. Moreover, it would facilitate the work of the disciplinary authority by giving it flexibility to accomplish its functions through voluntary retirement or resignation. . . . Confidentiality is required to protect a judge from frivolous and unfounded complaints; to allow a judge to recognise and correct his or her own mistakes; to resolve the complaint prior to formal proceedings and to protect the privacy of the judge."[153]

[176] The fact that confidentiality regimes protect the early deliberative processes in judgment-making and in judicial disciplinary proceedings provide useful parallels for the judicial appointment process in terms of the nature of the interests at stake that may require protection.

Cabinet deliberations

[177] There can hardly be an area of decision-making that has greater impact on the lives of citizens than the deliberations of Cabinet. While the requirements of openness

member of the executive, "cannot be subjected to such a scrutiny" as "such examination of a judge would be destructive of judicial responsibility".

[151] *Enforcement of a Subpoena* id at paras 3, 6 and 9.

[152] *Mail and Guardian Ltd v Judicial Service Commission* [2009] ZAGPJHC 29 (*Mail and Guardian*) at para 20.

[153] Id.

dictate that those decisions and the reasons for them be made public, they do not extend to what may be termed Cabinet deliberations that precede a decision.[154] The need for private deliberations of Cabinet was expressed in this Court's decision in *SARFU*, where this Court acknowledged the need for Cabinet deliberations to take place in a "robust" and "unhindered" manner. The Court held:

> "[T]here is the public interest in ensuring . . . that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed."[155]

In *Babcock*, the Supreme Court of Canada held:

> "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

[154] See Malan "To what extent should the Convention of Cabinet Secrecy still be recognised in South African constitutional law?" (2016) 1 *De Jure* 117:

> "The basis of the convention of cabinet secrecy is the principle of the collective accountability of the national executive (cabinet) to the national legislature (and to the public). In terms of this principle, all members of cabinet assume collective responsibility for the policies adopted by cabinet, thus preventing an individual member from distancing himself/herself from a decision on the grounds that he/she is not in agreement with it and has expressed such disagreement during cabinet deliberations. In this way:
>
> - cabinet solidarity is maintained and promoted; and
> - cabinet maintains a united front to the national legislature (and the public).
>
> By the same token, coherent and stable government is maintained.
>
> This coherence has the effect of barring public access to the content of cabinet deliberations, which is the primary subject matter of the convention of cabinet secrecy. At the same time, it also precludes any individual member from escaping collective accountability by relying on the content of such deliberations to show that he/she has expressed disagreement with the cabinet decision in question."

[155] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*) at para 243.

> when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly."[156]

[178] Again, the requirements of openness and transparency do not extend as far as requiring Cabinet deliberations to be ordinarily subject to disclosure. This is largely consistent with ensuring efficacy in government and in striking the appropriate balance between openness and confidentiality.

The approach in the Promotion of Access to Information Act

[179] PAIA is the national legislation that gives effect to the right of access to information provided for in section 32 of the Constitution.[157] Thus, it is the definitive legislative framework regulating access to both publicly and privately held information. Mindful that the processes of the JSC are exempt from PAIA disclosure,[158] the manner in which PAIA deals with the disclosure of evaluative material is instructive in these proceedings.

[180] Section 44(2)(b) of PAIA allows an information officer to refuse access to a record should it contain evaluative material.[159] Evaluative material is defined in PAIA as—

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[156] *Babcock v Canada (Attorney General)* 2002 SCC 57; [2002] 3 SCR at para 18. See also *Criminal Lawyers' Association* above n 149 at para 40.

[157] Section 32 of the Constitution reads:

> "Access to information
>
> (1) Everyone has the right of access to—
>
> (a) any information held by the state; and
>
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

[158] See [43] for reference to section 12 which excludes the JSC from the effects of PAIA. If PAIA were to include the JSC that might contradict the JSC's constitutional power to control its own processes under section 178(6) of the Constitution and raise a question regarding PAIA's constitutional validity to regulate access to the JSC's information.

[159] Section 44 of PAIA reads:

> "(2) Subject to subsection (4), the information officer of a public body may refuse a request for access to a record of the body if—

"an evaluation or opinion prepared for the purpose of determining—

(a) the suitability, eligibility or qualifications of the person to whom or which the evaluation or opinion relates—

(i) for employment or for appointment to office."[160]

[181] This limited carve-out in PAIA does not apply to evaluative material other than in the circumstances of employment or appointment to office. Thus, a record in relation to evaluative material that traversed the ability to provide a service such as building a road or the provision of textbooks would not fall within the exclusion of section 44(2). This distinction properly recognises the deeply different processes that play themselves out in the evaluation of personal and professional attributes which relate to employment or appointment to office as opposed to the technical and capacity attributes that may relate to the provision of a service. Personal attributes are distinctly different from functional attributes and it is a distinction that PAIA expressly recognises in section 44(2).

[182] The intensely personal nature of the former and the capacity and ability of the evaluating panel to have the necessary freedom is also enhanced by the confidentiality that attaches to the record of that process. An evaluative process that examines personal attributes such as diligence, reliability, honesty, and commitment, even when based on objective facts that emerged from the interview, can be diversely subjective. These comments and the views expressed there, if made public, can be potentially damaging to both the person who is the subject of the evaluation as well as the person making such an evaluation. This is a long way from the proposition that candidates who seek

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. . .

(b) the record contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the material would breach an express or implied promise which was—

(i) made to the person who supplied the material; and

(ii) to the effect that the material or the identity of the person who supplied it, or both, would be held in confidence."

[160] Section 1 of PAIA.

to hold office must accept a rigorous scrutiny of their credentials. Evaluative material that contains comments that reflect negatively on the personal attributes of an individual and which are generated in private can have significant consequences when made public. It is accordingly understandable why the legislature elected to provide some measure of confidentiality to such evaluative material which as I will demonstrate would be largely similar to the areas of comment that the private deliberations of the JSC would evoke in respect of candidates who come before them.

[183] The High Court in *Belwana* has recently upheld the denial of an information request pursuant to an appeal of an employment decision, seeking evaluative material where panellists evaluating suitability, eligibility, or qualifications for a post had signed a confidentiality clause.[161]

[184] Thus, even in a jurisdiction such as ours, that places a high premium on openness and transparency, policy and the law recognise that in given situations, even deliberations that meet the threshold of relevance may well be justifiably excluded from a record, either in terms of PAIA or in terms of rule 53(1)(b) for a variety of reasons, including the dignity and privacy interests of individuals, the integrity of the administration of justice, and the independence of the judiciary.

The deliberations of the JSC

[185] Before dealing with whether a constitutionally sound justification exists for the exclusion of the record of deliberations, it may be useful to provide an overview of the JSC process in relation to judicial appointments and the location of private deliberations in that process.

[186] The JSC Procedure, promulgated in terms of section 5 of the JSC Act, sets out the processes to be followed when a judicial appointment is to be made to the

[161] *Belwana v Eastern Cape MEC for Education* 2017 (6) SA 182 (ECB) at paras 68-9.

High Court in regulation 3.[162] There is opportunity for public participation in the nomination process, the names and profiles of the shortlisted candidates are made public

[162] Regulation 3 of the JSC Procedure reads:

> "The procedure for the selection of candidates for appointment as judges of the High Court in terms of section 174(6) of the Constitution shall be as follows:
>
> (a) The President of the Supreme Court of Appeal or responsible Judge President shall inform the Commission when a vacancy occurs or will occur in the Supreme Court of Appeal or any provincial or local division of the High Court.
>
> (b) The Commission shall inform the institutions of the vacancy and shall call for nominations by a specified closing date.
>
> (c) A nomination contemplated in paragraph (b) shall consist of—
>
> (i) a letter of nomination which identifies the person making the nomination, the candidate and the division of the High Court for which he or she is nominated;
>
> (ii) the candidate's written acceptance of the nomination;
>
> (iii) a detailed *curriculum vitae* of the candidate which shall disclose his or her formal qualifications for appointment as prescribed in section 174(1) of the Constitution, together with a questionnaire prepared by the Commission and completed by the candidate; and
>
> (iv) such further pertinent information concerning the candidate as he or she or the person nominating him or her, wishes to provide.
>
> . . .
>
> (e) The screening committee may, in its discretion, receive and consider nominations received after the specified closing date and shall prepare a short list of candidates to be interviewed, which shall include all candidates who qualify for appointment.
>
> . . .
>
> (f)
>
> (i) The short list of candidates proposed by the screening committee shall forthwith be submitted to the members of the Commission.
>
> . . .
>
> (g) The short list shall be distributed to the institutions for comment by a specified closing date.
>
> (h) After the closing date referred to in paragraph (g), the short list and all the material received on short-listed candidates shall be distributed to all the members of the Commission.
>
> (i) The Commission shall interview all short-listed candidates.
>
> (j) The interviews contemplated in paragraph (i) shall be open to the public and the media subject to the same rules as those ordinarily applicable in courts of law and shall not be subject to a set time limit.
>
> (k) After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates for appointment by consensus or, if necessary, majority vote.
>
> (l) The Commission shall advise the President of the Republic of the name of the successful candidate for each vacancy.
>
> (m) The Commission shall announce publicly the name of the successful candidate for each vacancy."

and are also distributed to various legal institutions for comment and the interviews of candidates are generally open to the public and media.[163]

[187] What emerges from this framework is what can be described as a substantially transparent process that is open to public and institutional scrutiny and that seeks the active input and involvement of the public in the judicial appointment process. It is probably one of the most open and transparent processes that exist internationally for the appointment of judicial officers.[164] The fact that one or more of the JSC's processes may be private does not render the process, as a whole, secretive or lacking in transparency. The process must be viewed in its totality, rather than in segments thereof without relating them to the whole. I make the point not in justification of confidentiality, but rather, as a general proposition that this application is not a contest between secrecy and openness. This Court is tasked with determining what, if any, are

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See also section 5 of the JSC Act which reads "[t]he Minister of Justice shall by notice in the Gazette, make the particulars of the procedure which the Commission has determined in terms of section 105(4) of the Constitution".

[163] The institutions are defined in regulation 1 of the JSC Procedure and include—

> "the Law Society of South Africa, the Black Lawyers Association, the Department of Justice and Constitutional Development, the General Council of the Bar of South Africa, the Magistrates Association of South Africa, the National Association of Democratic Lawyers, the Society of Teachers of Law and the Association of Regional Magistrates of South Africa, and such other institutions with an interest in the work of the Commission as the Commission may identify from time to time."

[164] In comparison to international law, South Africa's system of judicial appointments is largely open and transparent. For instance, in Canada, the judicial appointment of judges was reviewed in 2016 to enhance the objectives relating to openness and transparency. The Independent Advisory Board for Supreme Court Appointments (Advisory Board) was established as an independent and non-partisan body whose primary mandate was to provide recommendations to the Prime Minister on the appointment of judges for the Supreme Court of Canada. The Advisory Board's primary mandate is to provide a shortlist of three to five candidates, after consultation with the Chief Justice of the Supreme Court of Canada and other key stakeholders, for consideration by the Prime Minister, who will be tasked with choosing the preferred candidate. Thereafter, the Minister and the Chair of the Advisory Board will appear in Parliament to engage with Members of Parliament and Senators before the appointment is finalised. Although the Canadian process has improved in its efforts to achieve transparency and openness, when compared with the South African process of judicial appointments, ours appears to be leaps ahead of theirs. See Justin Trudeau, Prime Minister of Canada "New process for judicial appointments to the Supreme Court of Canada" (2 August 2016), available at https://pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada.

In the United States, judges at the federal level are nominated by the President, on the advice and consent of Senate. The Department of Justice may, through the Standing Committee of Federal Judiciary of the American Bar Association, advice the President in his task of nominating judges. At the state level, there are various methods used to select judges. Some states use selection commissions, while others make use of elections when appointing judges. American courts and academics have, on numerous occasions, affirmed the existence of confidentiality of the proceedings relating to judicial appointments. When comparing the system of appointing judges in the United States with that of South Africa, ours appears to achieve greater transparency and openness. See High Court judgment above n 2 at paras 32-7.

the justifiable limits to openness in the context of a record of proceedings in terms of rule 53.

[188] This matter is unlike those where litigants have to grapple in the dark in the absence of a full record. Such a situation would impose a severe disadvantage on a litigant in formulating a coherent case where relief of judicial review is sought. Here, the record provided by the JSC is substantial and includes the announcement for the vacancy, the written application of each candidate, the institutional and other responses to the candidacy, the transcript of the public interview and the reasons for the recommendations. Again, without suggesting that this in itself disentitles the applicant to the deliberations as part of the record, there is, in my view, a substantial record made available on which the applicant was willing to proceed to the final hearing until of course it discovered that the deliberations were recorded. These observations are relevant in providing a complete picture and in locating the dispute in its proper context.

[189] While this application is not concerned with the furnishing of reasons, it may nevertheless, in this context, be important to pause and reflect on the importance of those reasons. This must be done in the context of the record provided and against the backdrop of a litigant's ability to meaningfully engage with the rationalisation of a decision and the ability to assess any basis for challenge. The issue arose in *Cape Bar Council*:

> "The reply by the JSC does not serve any of the purposes for which reasons should be given. These purposes were articulated with admirable clarity by Lawrence Baxter Administrative Law (1984) at 228 in the following statement, which was endorsed by Schutz JA in *Transnet Limited v Goodman Brothers (Pty) Ltd* [2000] ZASCA 151; 2001 (1) SA 853 (SCA) paragraph 5:
>
> > 'In the first place, a duty to give reasons entails a duty to *rationalise* the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining *why* a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies

> an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conductive to public confidence in the administrative decision-making process. Thirdly – and probably a major reason for the reluctance to give reasons – rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.'"[165]

[190] There has been no suggestion that the reasons provided by the JSC fall short of being both sufficient and comprehensive.

Is the claim for confidentiality sustainable?

[191] I am convinced that maintaining the confidentiality of JSC deliberations is not only constitutionally sustainable but also necessary to protect multiple constitutional values housed in the Bill of Rights.[166] In coming to this conclusion, it is necessary to consider three distinct but interrelated interests. They are those of the candidates that come before the JSC and whose candidature is the subject of deliberations, those of the commissioners who undertake the deliberations, and finally those of the JSC institutionally, including the integrity of its processes in discharging its constitutional mandate.

The candidates

[192] In the interview process the candidate's physical presence entitles them to respond to questions and answer concerns that may be raised. In general, a candidate would be entitled to respond to and correct, to the extent possible, any negative views or impressions that emerged about their candidacy.

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[165] *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) (*Cape Bar Council*) at para 46.

[166] Section 7(1) of the Constitution.

[193] The deliberative process is different, in that it occurs in the absence of the candidate and provides space for the consideration of the material that emerged in the interview and from other sources.[167] Members have the opportunity to openly express their views, impressions, and understanding of a candidate's qualifications and their suitability.[168] These may differ quite radically from member to member as they undertake a rigorous scrutiny of the material that emerged during the interview and from other sources. The same material canvassed in the interview may lead to different conclusions and lend itself to different interpretations by members. The material may, in some instances, lead to complimentary and supportive remarks, while in others, it may evoke various concerns which could be deeply damaging by calling into question the professional, moral, and ethical qualities of a candidate. Such a view, while it may be based on what emerged from the public interview, may be no more than just a view or an impression that is subjectively held and may well fall short of being a proven fact. The view or impression will nevertheless be articulated in the deliberative process.

[194] Members of the JSC have an obligation to ventilate concerns, where those concerns cast doubt on a candidate's capability to exercise the necessary fidelity, integrity, and commitment to the constitutional ethos demanded of the judiciary. Even if concerns raised do not necessarily feature in the final reasons for determination of a candidacy, they will, however, remain part of the record and, if disclosed, enter the public domain. This could potentially tar a candidate's future applications or general reputation.

[195] They could be deeply damaging or possibly destructive of a reputation and there is little that can be done to dispute any concerns raised in the record. The rules of natural justice do not apply during the deliberative process and negative views, opinions, or

[167] Regulation 3(k) of the JSC Regulations above n 7. The reference to "other sources" refers to professional / legal bodies and members of the public that make representation prior to the interview process regarding the suitability of each candidate. These representations are considered by the members of the JSC in their deliberations.

[168] *Cape Bar Council* above n 165 at para 40.

impressions will forever remain part of the record and in a real way attach to a candidate.[169] I am not convinced that our considerable commitment to the constitutional values of human dignity and privacy should countenance such a consequence. This is not about being over-sensitive to the candidates; it is about protecting the dignity and privacy of candidates during a part of a process where they have no voice or avenue for response.

[196] There is a real risk that legal and judicial careers could face unwarranted and unjustified risk by the disclosure of untested views, opinions, and impressions that may instinctively emerge from a free-flowing and robust deliberative process. The need for openness, transparency, and accountability cannot be ignored; however, on balance, concern around the dignity and privacy implications of disclosure of the JSC's deliberative process is a strong factor in favour of maintaining the existing confidentiality regime. Confidentiality of the deliberations justifiably protects the dignity and privacy interests of the candidates that come before the JSC.[170] In *SCA SANRAL*, the Supreme Court of Appeal held that public bodies can have a claim to confidentiality "[b]ut any claim of confidentiality arises from other interests such as security or perhaps even the privacy rights of persons mentioned in the documents, but not from [a public body's] right to privacy".[171]

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[169] Namely the *audi alterem partem* (right to be heard) principle of natural justice would not be engaged given the inability to respond to the newly publicised allegations. In connection to the right to respond and natural justice, see *Psychological Society of South Africa v Qwelane* [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) at para 33.

[170] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 49:

> "Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally."

See also *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391(CC); 1995 (6) BCLR 665 (CC) at para 328:

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3."

[171] *SCA SANRAL* above n 17 at para 37.

Members of the JSC

[197] The members of the JSC carry a significant constitutional obligation to recommend fit and proper candidates for judicial office. They are required to act with integrity and show the highest standard of professionalism in the discharge of those duties. Consistent with those obligations, one would expect nothing less than rigour, robustness, and candour when examining candidates' credentials in an application for judicial office. The public interview process is thus as much a test of the candidates' suitability as it is about the members of the JSC's commitment to the process.

[198] However, the deliberative process also allows members the necessary legal and constitutional space for debate, discussion, a testing of views, the articulation of impressions, persuasion, and correction.[172] It is in this process that members may express a view that may ultimately not be sustainable, but is nevertheless justifiably and properly expressed at the time. That view may be damaging to a candidate and ultimately the member who expressed it will remain the source of that damage with all the attendant consequences that go with it.[173] Should the cloak of confidentiality be lifted, through public disclosure, JSC members could face the very real threat of delictual liability for defamation.[174] Expressing concerns about a candidate's potential discriminatory beliefs or susceptibility to corruption, among other concerns, is vitally important to ensure that the judiciary's independence, integrity, and fidelity to the constitutional ethos are maintained.[175] The risk of appointing a judge out of sync with the necessary constitutional values is so serious that it warrants the confidentiality protections to ensure no chilling effect stifles members raising concerns.

[199] An important additional consideration is that in deliberations, if they are to be effective and meaningful, the disposition to change one's mind and be convinced must

[172] *Cape Bar Council* above n 165 at para 40.

[173] SCA judgment above n 3 at para 28.

[174] Id.

[175] Particularly when one considers the general lack of these virtues exhibited by courts in the apartheid era. See the Truth and Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report* (Volume 4, October 1998).

be a feature of that process. It reflects the true nature of evaluative discussions where one participant's force of argument and clarity in reasoning, may persuade another participant to change or even totally abandon a previously held view. It is this ability to persuade and be persuaded that distinguishes the deliberations of the JSC from the public interview process. Without confidentiality being attached to those deliberations, there is a real danger that this possible shift in discourse about candidates' suitability may never happen. A member of the JSC in the knowledge that a view, even a provisional one, is cemented into a disclosable record, may either not offer it or if offered may be unwilling to change or abandon it on the record even if there was a compelling case to do so. There must be a substantial risk that the loss of confidentiality in the deliberative process may result in deliberations that are not open, frank or robust but rather a carefully choreographed dialogue that is heavily influenced by the knowledge that every part of it is part of a disclosable record.[176] Such an outcome can hardly be consistent with the objective of choosing the best men and women to serve the judiciary of South Africa.

The JSC as an institution

[200] When an institution can enhance the process by which it selects and recommends candidates for judicial appointment, it contributes positively to the independence of the judiciary and enables it to discharge its constitutional obligations diligently. In *De Lange*, Ackermann J held—

> "judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed, protected and promoted by . . . section 165 of the Constitution in the following manner:
>
> > '(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

[176] SCA judgment above n 3 at para 28.

> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other means, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.'"[177]

[201] The JSC is one of the state organs at the front line to protect the courts and ensure their "independence, impartiality, dignity, accessibility, and effectiveness".[178] For the reasons already given, private deliberations promote these constitutional values.[179] They allow the institution the space and the latitude to undertake, with the necessary degree of rigour, the evaluation of competing candidates. It allows all views to emerge and through a process of debate and discussion, there is the advancement of some candidates and the elimination of others. While, the reasons that the JSC ultimately provides should be consistent with the deliberations, equally not everything that is the subject of the deliberations will be relevant to the reasons given.[180]

[202] The confidentiality of the deliberations also bolster the ability of the JSC as an institution to, in the overall scheme of things, make recommendations for judicial office that arise from a transparent process and are properly motivated. The fact that its deliberations are private does not detract from this but serves to advance the dignity and privacy of the process and those of the candidates who come before it and the members who participate in it.[181]

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[177] *De Lange v Smuts N.O*. [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 59.

[178] Section 165(4) of the Constitution.

[179] Though section 39(2) only refers to promoting the spirit, purport and objects of the Bill of Rights, this Court has found that other constitutional provisions and the values they promote also require an interpretive injunction to read legislation subject to the Constitution, see *Harksen v President of the Republic of South Africa* [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (5) BCLR 478 (CC) at para 18. Judicial independence is undoubtedly one such value worthy of the injunction's effect.

[180] The rationale for the JSC providing reasons is articulated in *Cape Bar Council* above n 165 at paras 50-1. The Supreme Court of Appeal noted that the JSC is not "under an obligation to give reasons under all circumstances for each and every one of the myriad of potential decisions it has to take".

[181] SCA judgment above n 3 at para 29.

[203] Finally, all of this happens in a manner that is constitutionally permissible. There was certainly no suggestion in these proceedings that the confidentiality provisions in the JSC Act and JSC Procedure are constitutionally suspect.

[204] I would, accordingly, conclude that even though the deliberations of the JSC are relevant and should ordinarily be part of the record in terms of rule 53, considerations of confidentiality justify their exclusion for the reasons I have given relating to the interests of the candidates, the JSC members, and the JSC institutionally.

Exclusion results in an inequality of arms

[205] There would certainly be a live and real concern if a litigant was expected to litigate without the relevant record or where there was a disparity in what was available to the respective parties. That situation does not arise in these proceedings, nor will it in proceedings where the claim of confidentiality in private deliberations is successfully invoked. In practice, where a proceeding includes a record, that excludes the private deliberations, but includes the reasons for any recommendations, that record will be filed. The parties to the proceedings will be confined to the four corners of that record in advancing their respective cases.

[206] It is inconceivable that one party may somehow have access to private deliberations which are not part of the record to bolster its case. Even if such access was possible, notwithstanding that it may be unprofessional, unethical and trigger a fair trial challenge, it is not clear how such information could be used to advance a litigant's case, when it remains outside of the record. Deliberation transcripts may provide a connection to the reasons that are furnished but at the same time they may contain material that is disconnected from the final decision. Even if the applicant were granted the relief sought, it would not be better off toward obtaining equality of arms, due to the

fragmented nature of the deliberative information and its possible disconnection from the final vote tally due to the imposition of a secret ballot.[182]

Concerns of impropriety and reputational damage to the JSC

[207] Can the private deliberations create the enabling environment for impropriety and, with that, bring reputational damage to an institution such as the JSC? These must remain valid concerns in a society where impropriety has become notorious. I do not, however, think that confidentiality carries any real risk of shielding impropriety in the JSC process.

[208] The first judgment deals with the composition of the JSC and then concludes that those that make up its membership are eminently qualified for membership of the JSC.[183] I fully associate myself with this conclusion and would argue that the JSC's very composition provides not an absolute, but a constitutionally sound guarantee against impropriety. It is difficult to imagine that a body such as the JSC, comprising as it does a wide diversity in its membership across political, ideological, and legal persuasions, will somehow collectively contrive to shield any impropriety in the institution.

[209] I am also not convinced that non-disclosure of the private deliberations will lead to reputational damage for the JSC. As pointed out in this judgment, the JSC process is a substantially transparent one and the deliberative process, which is private, is simply one segment in that process.[184] The growing constitutional maturity of the South African public will see and understand this dispute in its proper context as part of an important balancing exercise, weighing openness, accountability, and transparency, as well as access to courts, against judicial independence, dignity, and privacy. The necessary balancing of constitutional values to guide the interpretation of rule 53

[182] *Cape Bar Council* above n 165 at para 41.

[183] See [36] to [37].

[184] See [187].

motivates towards the finding that disclosure of the JSC deliberations record would not be in line with the "spirit, purport and objects" of the Constitution.[185] In any event, private deliberations have been a part of the JSC process for a considerable time now,[186] and there is no evidence advanced before this Court that they have negatively impacted upon the standing, independence, and integrity of the JSC as a constitutional body.

Attaching a confidentiality regime to the record

[210] The applicant in its written submissions in this Court, and without conceding that a proper case for confidentiality was advanced, invited the Court, if necessary and if it was so inclined, to attach a confidentiality regime to the record of private deliberations which would make it available only to the applicant and its legal representatives. While in principle this mechanism may appear workable, in practice such a regime is unlikely to achieve the confidentiality it contemplates. Even if access to the deliberations of the JSC are limited to the parties and their lawyers, the material in the deliberations is likely to find its way into affidavits and oral submissions made by the parties. Even if reference to commissioners and candidates were capable of being anonymised in these affidavits and submissions, it is unlikely to protect the confidentiality of the material. This is largely due to the nature and knowledge within the relatively small and well connected legal community in South Africa, which would make it relatively easy for the public to identify commissioners and candidates even from an anonymised record, simply by reference to the content of the remarks made and the nature of the deliberations evidenced from the record. Thus, such an option would fall considerably short in practice of achieving the limited level of confidentiality it contemplates.

Disclosure of deliberations and the secret ballot

[211] Members of the JSC vote in secret and while the secrecy of the ballot within the JSC is not the subject of the relief sought in these proceedings, it must follow that if the

[185] See section 39(2) of the Constitution.

[186] The SCA judgment above n 3 at para 31 states that private deliberations have been conducted since the JSC's inception in 1994.

deliberations of the JSC become part of a disclosable record, then there exists the distinct possibility that those deliberations will indicate the preference of members of the JSC in respect of the candidates before them and will by so doing effectively undermine the secrecy of the ballot.[187]

[212] Members of the JSC are often called upon to express opinions and vote in respect of candidates who, in many instances, will be known to them either as colleagues or acquaintances. In this regard, the judges, lawyers, academics and politicians who serve on the JSC are called upon to express views and cast votes in relation to these candidates with honesty and integrity. The secrecy of the ballot goes a long way to ensuring that they are able to do so without compromising friendships and relationships that exist and indeed to separate the personal from the professional.[188] If the deliberations of the JSC become part of a disclosable record, then the voting preferences of its members become public with all the attendant consequences. In this way the secrecy of the ballot which goes a long way towards enhancing the integrity of the selection process runs the real risk of being laid bare.[189] This is another reason for the retention of the confidentiality which attaches to those deliberations.

Conclusion

[213] I have sought to demonstrate that excluding the private deliberations of the JSC from the record, in terms of rule 53, does not injure the applicant's right to properly prosecute its review application, nor does it impermissibly breach the principles of openness and transparency. Disclosure of those deliberations, however, carries the real risk of causing substantial harm to the dignity, privacy, and reputational interests of

[187] See *Cape Bar Council* above n 165 at para 41:

> "In order to protect members from undue pressure, so the deponent for the JSC said, votes are exercised by secret ballot. In the result, nobody knows how another member has voted, or why he or she has voted one way or the other. Moreover, as the vote is secret, a member is not required to explain to anyone how or why he or she voted in a particular way."

[188] *United Democratic Movement v Speaker of the National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at para 74.

[189] *Cape Bar Council* above n 165 at para 41.

many. At the same time it may also undermine the effective functioning of the JSC in the discharge of its constitutional mandate to promote judicial independence.

[214] I would, for these reasons, dismiss the appeal and make no order as to costs.

For the Applicant:	D Unterhalter SC, M Du Plessis and N Dyirakumunda instructed by Webber Wentzel.
For the Respondent:	I Jamie SC and A Platt SC instructed by the State Attorney.