

COPY

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 8647/13

In the matter between:

THE HELEN SUZMAN FOUNDATION

Applicant

and

JUDICIAL SERVICE COMMISSION

First Respondent

POLICE AND PRISONS CIVIL RIGHTS UNION

First Amicus Curiae

**NATIONAL ASSOCIATION OF DEMOCRATIC
LAWYERS**

Second Amicus Curiae

FILING NOTICE

- Documents filed herewith:
1. First Respondents answering affidavit;
 2. Notice in terms of Rule 6(5)(a)

DATED AT CAPE TOWN ON THIS 17th DAY OF FEBRUARY 2014.

STATE ATTORNEY

Per: 

L MANUEL

Attorney for Respondent

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13 February 2014
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IN THE HIGH COURT OF SOUTH AFRICA
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In the matter between:

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**NATIONAL ASSOCIATION OF DEMOCRATIC
LAWYERS**

Second Amicus Curiae

RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned

ISHMAEL ANTHONY MMAKWENA SEMENYA

do hereby make oath and say that:

1. I am an adult male practising as an advocate of the High Court of South Africa and am a member of the Johannesburg Society of Advocates. I am also a

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member of the Respondent. I am duly authorised by the Respondent to depose to this affidavit.

2. The facts set out herein fall within my personal knowledge unless the context indicates otherwise, and are to the best of my knowledge and belief true and correct.
3. In this affidavit, I respond to the Applicant's application in terms of Rule 30A of the Uniform Rules of Court (hereinafter referred to as "the Rules"), wherein the Applicant seeks to have this Honourable Court compel the Respondent to comply with Rule 53 (1)(b), by dispatching to the Registrar the full record of the proceedings sought to be reviewed in the main application, including the audio recording and any transcript of the deliberations of the Respondent after the interviews on 17 October 2012.

RELEVANT FACTS

4. Following the interviews of eight candidates for appointment as judges of this Honourable Court on 17 October 2012, the Respondent recommended to the President of the Republic of South Africa five candidates for appointment, and did not recommend the appointment of three candidates.



5. The Applicant brought this decision on review (the 'main application'). The Applicant contended in the main application that the decision was unlawful, and/or irrational, and therefore invalid.
6. After being served with the main application on 6 June 2013, the Respondent filed a notice of intention to oppose it, on 26 June 2013. The Respondent subsequently dispatched to the Registrar on 8 August 2013 the record of the proceedings of 17 October 2012, which is contained in 6 lever arch files, as it considered was required by Rule 53(1)(b) of the Rules.
7. On 25 October 2013 the Respondent was served by the Applicant with a Notice in terms of Rule 30A wherein the Applicant contended that the Respondent has not complied with the Rules by failing to dispatch the full record of the proceedings sought to be reviewed, corrected or set aside in the main application, in that the Respondent has failed and declined to dispatch the audio recording and any transcript of the post-interview deliberations of the Respondent held on 17 October 2012.

QUESTION OF LAW

8. The Respondent wishes to raise a question of law, which may well be dispositive of this application, and shall file the required notice in this regard together with this affidavit.

9. The facts and contentions germane to the aforesaid question of law are set out hereunder.
10. In paragraph 6 above, I state that the Respondent filed a record, that it considered was required by Rule 53(1)(b) of the rules. The reason for this wording is that, during the preparation of this affidavit the question arose as to whether that assumption is indeed correct, and whether Rule 53 applies to these proceedings at all.
11. Section 1 of the Promotion of Administrative Justice Act, Act No. 3 of 2000 ('PAJA') provides a definition of 'administrative action', followed by a list of exclusions. One of these is section 1(gg) which reads:

"a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law."

12. In Judicial Service Commission & Another v Cape Bar Council 2013(1) SA 170 (SCA) the Supreme Court of Appeal appeared to agree with the finding of the Court *a quo* that the impugned decisions of the JSC there at issue (the non-appointment of two candidates for judicial office) were excluded from review under PAJA by section 1(gg) but were nonetheless reviewable, in principle, under the doctrine of legality (Paragraph [20]).

13. Rule 53 only finds application in the case of a review of the decision or proceedings of a tribunal, board or officer performing judicial, quasi-judicial or administrative functions (Rule 53(1)).
14. Accordingly, Rule 53 is not of application to this matter, inasmuch as the Respondent was not performing judicial, quasi-judicial or administrative functions when it took the decision sought to be impugned, and thus the provisions of the rule relating to the furnishing of a record have no application.
15. This question of law will be elaborated upon in argument. In what follows, and for the remainder of this affidavit, I deal with the matter on the basis that Rule 53 is applicable to the decision of the Respondent that is sought to be impugned in this matter.

THE RESPONDENT'S POSITION REGARDING THIS APPLICATION

16. As has been stated above, the Respondent dispatched to the Registrar of this Honourable Court 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 court, save for a transcript of the post-interview deliberations which were held by the members of the Respondent in a closed meeting.

17. The papers contained in the Record as filed by the Respondent in terms of Rule 53(1)(b) include: the reasons for the Respondent's decision to recommend the candidates it recommended, and for not recommending the candidates it did not recommend; transcripts of the candidates' interviews; the candidates' applications for judicial appointment; comments from professional bodies and individuals on the candidates; and other related submissions and correspondence.
18. In this application the Applicant now seeks to have this court compel the Respondent to furnish an audio recording of the deliberations which took place after the public interviews of the candidates, and any transcript of said deliberations. By their nature, these deliberations are and have always been held in a closed session by members of the Respondent, after which the Respondent records a decision which has been reached by way of a secret ballot voting process by its members.
19. The question of whether it is required of the Respondent to give reasons for a decision in respect of a candidate for judicial office was decided by the Supreme Court of Appeal in the Cape Bar Council case, where the court found that as a general rule the Respondent is obliged to give reasons for its decisions not to recommend a particular candidate if properly called upon to do so. The Supreme Court of Appeal specifically did not decide to what extent these reasons ought to be given. On the authority of this decision by the Court, the Applicant is entitled to request reasons from the Respondent regarding its recommendation of certain

candidates, and the non-recommendation of others, and the Respondent is obliged to furnish same.

20. Included as part of the Rule 53(1)(b) record furnished by the Respondent are reasons furnished by the Respondent in respect of each of the eight candidates who was interviewed. These reasons were compiled in addition to the reasons furnished by the Respondent on 6 November 2012 to Mr Justice Harms in relation to why the Respondent recommended Dolamo AJ (as he then was) and did not recommend Gauntlett SC. The reasons compiled for the Record contain the views which were expressed by the members of the Respondent during the course of the deliberations.

SERIATIM RESPONSE

21. AD PARAGRAPH 1

Save to deny that all of the facts in the affidavit are true and correct, the remaining contents of this paragraph are admitted.

22. AD PARAGRAPH 2

The contents of this paragraph are admitted.



23. AD PARAGRAPHS 3 TO 7

The contents of these paragraphs are admitted.

24. AD PARAGRAPHS 8 TO 10

The late lodging of the record was due to administrative difficulties in the office of the Respondent, as also the need to have the Respondent's legal representatives advise on the content of the record.

25. AD PARAGRAPH 11

The contents of this paragraph are admitted.

26. AD PARAGRAPH 12

26.1 I note the averments in this paragraph. I am somewhat puzzled as to how whoever perused the record as lodged could not have been aware that there were deliberations, and that these must have been recorded or minuted in some way.

26.2 In this regard, I point out that the reasons themselves refer to the deliberations in various places, and to the fact that such reasons primarily consist of the views of members expressed during the course of such deliberations, which views are set out in some detail. It must

have been apparent to the reader that there had to have been a recordal in some form (whether minutes or a transcript) of these views, in order for the reasons to have been compiled.

27. AD PARAGRAPH 13

27.1 I deny the contents of this paragraph. The record dispatched by the Respondent is indeed the complete record. The Applicant is not entitled to a copy or transcript of the deliberations, nor is the Respondent obliged to furnish same. There has been full compliance with Rule 53(1)(b). Insofar as the Applicant contends that the record is incomplete because the recording or transcript of the closed session deliberations is not a part thereof, this is in dispute, and an issue for the Court to determine.

27.2 In this regard, I am advised that there are conflicting decisions in this regard, including a decision in this Division, and that the question of what constitutes the record in an application of this sort, particularly where issues of relevance and confidentiality are implicated, has not yet enjoyed the attention of either the Supreme Court of Appeal or the Constitutional Court.

27.3 I further refer to the procedure of the Respondent, determined by it in terms of section 178(6) of the Constitution, and published by the

Minister of Justice ('the Minister') on 27 March 2003 in the Government Gazette.

27.4 Paragraph 3(j) of the procedure provides that the interviews of candidates for judicial office 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.

27.5 Paragraph 3(k) provides as follows:

"After the 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, a majority vote."

27.6 I respectfully aver that, were the Applicant to obtain the audio recording or transcript of the deliberations, this would make a nonsense of the Respondent's election, in the exercise of a constitutionally conferred power to determine its own procedure, to keep its deliberations confidential. At a minimum, so I am advised, the Applicant would have to challenge the exercise of such power before it can insist on the audio recording or a transcription of the deliberations being disclosed to it.

27.7 I respectfully aver that, given the nature and origin of the power to recommend the appointment of judicial offices, the need for frank,

robust and honest discussion regarding the capabilities, personalities, strengths and weaknesses of candidates, and the chilling effect that public disclosure of these discussions might have on members of the Respondent, and on the willingness of candidates to put their names forward for judicial appointment, keeping such discussions confidential is a lawful exercise of the Respondent's powers.

27.8 The above and other contentions on behalf of the Respondent will be further elaborated upon in argument at the hearing of this matter.

28. AD PARAGRAPH 14

28.1 The Respondent has provided extensive reasons and has included these in the record. These reasons were compiled by the Chief Justice from the views expressed by the commissioners during the post-interview deliberations. It is the JSC's position that the reasons given represent an accurate record of the decision and the considerations taken into account, as these considerations would have occupied the minds of the commissioners when they were called upon to vote. Therefore, the reasons are a clear indication of the connection between the deliberations and the decision.

28.2 In addition, the following should be borne in mind:

28.2.1 In the founding affidavit, at paragraph 13, the Applicant stated that *'the first and second JSC letters reflect in their totality the reasons why the JSC decided not to recommend Mr Gauntlett. They canvassed fully the factors taken into account by the JSC when exercising its powers under the Constitution to advise the President on judicial appointments.'*

28.2.2 In a letter from the Applicant's attorneys dated 4 July 2013, annexure "MH2" to the present application, and in response to a letter from the Respondent's attorney stating that more time was required to finalise the record, the aforesaid attorneys responded as follows:

"Accordingly, given your clients stated position that it has already furnished Mr Cloete with the totality of its record of and reasons for the decision that is challenged in this matter, it is unclear what record remains to be 'compiled' or 'finalised' by your client under rule 53."

28.2.3 Further, and after receiving the reasons and the record, and presumably perusing and considering it, the Applicant's attorney on 22 August 2013 wrote to the Respondent undertaking to file the Applicant's supplementary affidavit by 13 September 2013. A copy of the letter is attached as annexure "IS1".

28.3 It appears, accordingly, that the Applicant's assertions as to the centrality of the transcript of the deliberations, for the proper resolution of this matter, is an afterthought.

29. AD PARAGRAPHS 15 AND 16

The contents of these paragraphs are admitted.

30. AD PARAGRAPHS 17 AND 18

I admit the contents of these paragraphs.

31. AD PARAGRAPH 19

I deny the contents of this paragraph. I deny that there has been any procedural or substantive deficiencies as the Applicant would want the Court to believe. As I have pointed out above, there is, at best for the Applicant, judicial disagreement as to whether or not, and under what circumstances, a transcript or minutes of the deliberations of a body whose decision is brought under review, forms part of the record.

32. AD PARAGRAPH 20

The contents of this paragraph are denied. *Inter alia*, I refer to the question of law raised by the Respondents as to whether or not Rule 53 applies to these proceedings.

33. AD PARAGRAPH 21

While I note the contents of this paragraph, I deny any imputation that the Respondent, or its legal advisers, have acted improperly or with the aim of misleading the Court or the Applicant. The Respondent acted on legal advice, resulting in that portion of the transcript dealing with the deliberations and the voting by members of the Respondent being excluded from the record. The Respondent, it appears incorrectly, believed that well-informed parties such as the Applicant, would be aware that the Respondent recorded its deliberations. The Respondent accordingly considered that the omission from the record of the transcript of the deliberations would have been apparent, particularly given the reference to the deliberations in the reasons, as also the statement in that document that the views contained therein were expressed during the course of such deliberations. From this, I repeat, it must have been apparent that such views must have been recorded in some form.

34. AD PARAGRAPH 22

In the circumstances, I deny the contents of this paragraph.

35. AD PARAGRAPH 23

I note the contents of this paragraph but deny, in the circumstances, that a punitive costs order would be justified, or that the Respondent's conduct in any respect warrants censure.

36. AD PARAGRAPH 24

I deny the contents of this paragraph.

37. AD PARAGRAPH 25

I admit the contents of this paragraph.

38. AD PARAGRAPHS 26 TO 29

38.1 I deny the Applicant's contentions in these paragraphs. By their very nature, reasons given in any review proceedings, are a summation of the views and considerations expressed by the person(s) who were deliberating. The reasons given are informed by the views expressed. They are not a word-for-word account of what each commissioner said

in respect of each candidate. They are however an accurate account of the pertinent issues raised and discussed by the commissioners.

38.2 Ordinarily, a Court will not go beyond the reasons in order to determine whether these reasons are borne out by a transcript of the deliberations, if there is one. This would only be warranted if there were some basis to believe that the reasons are not accurate.

38.3 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.

39. AD PARAGRAPHS 30 TO 31

39.1 I have already submitted that the deliberations are not required for production in terms of the said rule. This is, however, ultimately a matter for the Court to decide, given the divergent judicial views already

referred to. In fact, as already referred to, neither the Supreme Court of Appeal or the Constitutional Court have expressed a view as to whether the deliberations of a body, let alone of the Respondent, forms part of the record that has to be disclosed when such body's decisions are challenged.

39.2 With particular regard to paragraphs 26 and 37, I say that these contentions are unfounded. All candidates for judicial offices who have thusfar 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.

39.3 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.

40. AD PARAGRAPHS 32 AND 33

I am in agreement with the Applicant that the Respondent determines its own procedure as empowered by the Constitution. Such procedure provides in paragraph 3(k) thereof that deliberations shall be done in private. No mention is made that at any point these deliberations must be publicly available to any person. This by implication indicates that deliberations are and remain of a confidential nature. I repeat, such procedure is not challenged in these proceedings.

41. AD PARAGRAPHS 34 TO 41

41.1 I deny the Applicant's contention that the Supreme Court of Appeal's view as stated in this paragraph plainly requires the disclosure of the deliberations.

41.2 The remaining submissions in these paragraphs are legal submissions which will be appropriately addressed at the hearing of this application.

42. AD PARAGRAPH 42

I firmly deny the allegation that the Respondent is concealing the recording from the court.

43. AD PARAGRAPHS 43 TO 46

I note the contents of these paragraphs. Whether the furnishing of confidentiality undertakings in this matter will suffice is a matter for the Court to determine, in light of section 178(6) of the Constitution, the determination by the Respondent that its deliberative proceedings would be confidential, and the public interest in accountability and transparency when weighed up against the interests of aspirant judicial officers and the members of the Respondent in being able to keep the latter's deliberations confidential. Only once the balancing of these factors has been determined by a court, can the question of the furnishing of confidentiality undertakings be considered.

44. AD PARAGRAPHS 47 TO 49

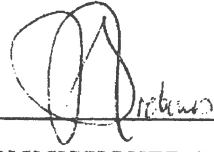
For the reasons set out above, the contents of these paragraphs are denied and I respectfully ask that the application be dismissed with costs.



ISHMAEL ANTHONY MMAKWENA SEMENYA

I certify that the deponent acknowledged to me that he knows and understands the contents of this declaration, that he has no objection to taking the prescribed oath and considers it to be binding on his conscience.

Signed and sworn to before me at Centurion on this 13 day of February **2014**



Suzette Pironas

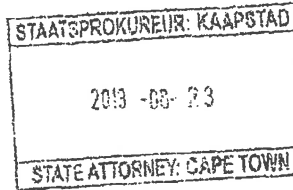
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Your reference
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Our reference
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2280365

Date
22 August 2013

Dear Sir

The Helen Suzman Foundation // The Judicial Service Commission (Western Cape High Court Case No 8647/13)

1. We refer to your notice dated 8 August 2013 filed together with the Rule 53 Record ("Record") in the above matter.
2. As you are aware, the notice of motion and founding affidavit were served on the respondent on 6 June 2013. Rule 53(1)(b) dictates that the Record was required to be filed within 15 days of receipt of the notice of motion. That period expired on 28 June 2013. The respondent, however, only filed the Record on 8 August 2013.
3. Both counsel and the attorneys representing the applicants are scheduled to be away on other matters during the period within which the applicant is required to supplement the founding papers under Rule 53(4), which expires on Friday, 23 August 2013. This eventuality was not foreseeable based on the expected timeline for compliance by the respondent with Rule 53(1)(b). Moreover, the Record is voluminous and spans 6 lever arch files consisting of approximately 2000 pages.

WW The State Attorney 19082013 (2)

Senior Partner: DM Lancaster Partners: SM Adcock RB Africa NG Alp RL Appelbaum B Aronoff BA Baillie JM Bellow A Bennett IO Bester
 DHL Booysse AR Bowley PG Bradshaw JL Buckland MS Burger-van der Walt RS Coetsee KL Calhaz KM Cooman KE Coster X Courzyn Z Osooo
 JH Davies PM Davs JHB de Lange BBC Dickenson MA Diamond DA Dingier NF Dlamini WZ Dlothi HJ du Preez CP du Toit M Ebrahim SK Edmundson
 JC Els AE Esterhuizen MR Evans GA Fichardt JB Forman CP Gbul CI Gouws JP Gouws SD Greshy SN Gumede NG Gwanawa VW Harrison
 JM Harrow MN Hathorn JS Hendry WA Hopper KR Hills MA Hirschway XHC Hlatshwaye S Kookey CM Halford PH Holloway MGH Khabisi
 SJ Hutshin R Ismail AR James KA Jarvis PB Jarvis CM Jonker S Jacobs B Jordaan LA Kahn M Kennedy A Keyser JB King J Lomo JEE Lase
 DE le Roux L Marais T Madopi S McCallery MC McIntosh SI Meltzer SM Mkhulu CS Meyer AJ Mills JA Milner D Mpe NP Mngomezulu VSB Neodaley
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 AJ Simpson J Simpson N Singh MF Spalding L Stein PS Stein LJ Swaine ER Swaneepoel Z Swaneepoel A Thaker CK Theodosiou A Tsofy O Vaitah
 PE Vardan JP van der Paal BE van der Meulen BD van der Vyver H van der Walt N van Dyk MM van Schaardenburgh JE Venter D Venter HM Venter
 B Vorster MG Versfeld TA Versfeld DM Visagie JWL Westgate KL Williams RH Wisen M Yudofsky Chief Operating Officer SA Boyd

Webber Wentzel is associated with: ALN

WEBBER WENTZEL

in affiliation with J. Linklaters

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4. As such, due to the substantially late filing of the Record and the amount of paper, the applicant requires more time to peruse the Record, and to file a supplementary founding affidavit, if any, in due course.
5. In the circumstances, it requests until Friday, 13 September 2013 to consider the Record and deliver any supplementary founding papers.
6. Please let us have your client's response as soon as possible.

Yours faithfully

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POLICE AND PRISONS CIVIL RIGHTS UNION

First *Amicus Curiae*

**NATIONAL ASSOCIATION OF DEMOCRATIC
LAWYERS**

Second *Amicus Curiae*

NOTICE IN TERMS OF RULE 6(5)(d)

BE PLEASED TO TAKE NOTICE THAT, at the hearing of this matter, the Respondent will raise the following question of law:

“Whether Rule 53 of the Uniform Rules of Court is of application in this matter given that the decision of the Respondent that is challenged by the Applicant in the main proceedings is one which

*is excluded from the definition of 'administrative action' in the
Promotion of Administrative Justice Act, Act No. 3 of 2000."*

DATED AT CAPE TOWN ON THIS THE ^{14th} DAY OF FEBRUARY 2014.

STATE ATTORNEY

Per:



MR L. MANUEL

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