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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: Respondent's (JSC) Heads of Argument

DATED AT CAPE TOWN ON THIS 1st DAY OF AUGUST 2014.

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DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	**Third *amicus curiae***

RESPONDENT'S HEADS OF ARGUMENT

I INTRODUCTION

1. The selection of judges is a vital and sensitive constitutional function. The Constitution assigns that function to the President, acting on the advice of the Respondent ("**JSC**" or "**the Commission**").[1] The Constitution allows the JSC

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[1] Constitution s 174.

to determine the procedures it will follow in preparing that advice.[2] In exercising that power, it has decided to hold a transparent nomination process, and an interview process that is open to the public and the media.[3] It is obliged to release, on request, the full reasons for its decisions to select some nominees and reject others.[4] The two elements of its process that it keeps secret are the record of its deliberations, and the votes of the individual commissioners.

2. The Applicant contends that there is no possible basis for the JSC to maintain any secrecy in its operations. The Applicant contends that, if any person challenges a decision of the JSC – no matter the basis of the challenge, or its prospects of success – the JSC is obliged to reveal not only its reasons, but the full recording of its private deliberations.

3. This position is baseless. It is contrary to the weight of authority about the meaning of the term "*record of proceedings*" in Rule 54 of the Uniform Rules. It is contrary to the views of the legislature expressed in the Judicial Service Commission Act ("**JSC Act**")[5] and the Promotion of Access to Information Act ("**PAIA**").[6] And it conflicts with the near universal practice of similar institutions in comparable democracies.

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[2] Constitution s 178(6).

[3] 'Procedure of Commission' GN R114 in GG 16952 of 2 February 1996, as amended by GN R795 in GG 18059 of 13 June 1997 GN R402 in GG 23277 of 5 April 2002 ("**JSC Regulations**") regulations 3 and 4.

[4] *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA) at para 45.

[5] Act 9 of 1994.

[6] Act 2 of 2000.

4. But most importantly, it threatens the JSC's ability to choose judges freely and honestly. Contrary to the Applicant's assertions, disclosure of the JSC's deliberations makes it more likely that Commissioners' decisions will be influenced by concerns unrelated to a candidate's fitness for judicial office. And it makes it less likely that aspirant judges will apply to become judges.

5. The Applicant tells this Court that these consequences are necessary in the service of abstract notions of "*transparency*" and "*openness*". But the real reason the Applicant wants access to the Commission's deliberations is to satisfy a baseless attack on a decision of the JSC the Applicant does not even wish to be set aside. The deliberations are, moreover, not even necessary for the Applicant to prosecute its review.

6. These submissions are structured as follows:

   6.1. A brief summary of the relevant facts;

   6.2. The reasons the deliberations are not part of the Rule 53 Record;

   6.3. The Applicant's failure to attack the statutory prohibition on revealing the content of JSC deliberations;

   6.4. The public interest immunity that attaches to JSC deliberations;

   6.5. Alternative remedy; and

   6.6. Costs.

II FACTUAL BACKGROUND

7. The facts of this matter are largely common cause. The Applicant instituted a review of the JSC's decision to recommend the appointment of some candidates for appointment as judges of this Court, and not others ("**the Main**

Application"). It argues that the decisions were unlawful or irrational. In terms of Rule 53, it requested the JSC to file the "*record of proceedings*" for the impugned decisions.[7]

8. On 8 August 2013, the JSC filed six lever arch files containing the record of its decision. It included all the applications of the nominees, and the full transcript of the public interviews.[8] The Record also included the JSC's reasons for its decision which were compiled by the Chief Justice.

9. Shortly before it was to file its supplementary founding affidavit, the Applicant became aware that there was a recording of the JSC's deliberations.[9] The Applicant then wrote to the JSC requesting the recording.[10] The JSC confirmed the existence of the recording, but refused to disclose it.[11] A further round of correspondence followed in which the Applicant again demanded the recording, and the JSC again informed the Applicant that it already had all the information it required. The Applicant then launched this application.

III DELIBERATIONS ARE NOT PART OF THE RULE 53 RECORD

10. The Applicant wrongly assumes that deliberations of a decision-making body must automatically form part of the Rule 53 record. It argues not only that this requires the JSC to provide the recording, but that it warrants a punitive costs

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[7] In its Answering Affidavit in the interlocutory application, the JSC indicated that it would argue that Rule 53 does not apply to reviews of non-administrative decisions. Answering Affidavit at paras 8-15. The JSC no longer persists with that argument.

[8] Interlocutory Founding Affidavit at para 11; Record p 7.

[9] Interlocutory Founding Affidavit at para 13; Record pp 8-9.

[10] Interlocutory Founding Affidavit at para 15; Record p 9.

[11] Interlocutory Founding Affidavit at para 16; Record p 9.

award to censure the Commission's actions.[12] The Applicant argues that the JSC acted dishonestly, or improperly, by not providing the recording or at least informing the Applicant and the court of its existence.

11. This argument fails to acknowledge that, properly interpreted, deliberations are not part of the "*record of proceedings*". While there are High Court judgments that hold that deliberations form part of a Rule 53 record – including a recent decision of a single judge in this Court – the weight of case law favours the Respondent: deliberations are not part of the Rule 53 Record.

12. In this Part, we first discuss the case law demonstrating the correct position, and then explain why the contrary decisions are unpersuasive.

The Correct Position

13. The classic statement of what does, and does not, form part of a Rule 53 record appears in *Johannesburg City Council v The Administrator, Transvaal and Another (1)*.[13] Marais J held as follows:

> "*The words 'record of proceedings' cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I*

[12] Interlocutory Founding Affidavit at para 23; Record p 11.

[13] 1970 (2) SA 89 (T).

> *venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially.* ***A record of proceedings is analagous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it.***"[14]

14. In the more than four decades since it was made, this dictum has been repeatedly quoted with approval by our courts.[15] It is interesting to note that, 1in its written submissions, the Applicant quotes the above passage but inexplicably excludes the emphasised portion that reveals the fatal flaw in its argument.[16]

15. The Applicant also fails to deal with the fact that the Supreme Court of Appeal quoted the above passage with approval in *MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd* ("**Intertrade**").[17] The SCA was concerned with an application in terms of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") for information related to a tender that the respondent had sought to have reviewed in terms of Rule 53. The

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[14] Ibid at 91H-92A.

[15] See, for example, *Free State Steam & Electrical CC v Minister of Public Works and Others* [2008] ZAGPHC 256; *Lawyers for Human Rights v Rules Board for Courts of Law and Another* [2012] ZAGPPHC 54; [2012] 3 All SA 153 (GNP); 2012 (7) BCLR 754 (GNP) at para 22; and *Pieters v Administrateur, Suidwes-Afrika, en 'n Ander* 1972 (2) SA 220 (SWA) at 227B-C (Hoexter JA expressly endorsed the description of the record in *Johannesburg City Council*).

[16] Applicant's Heads of Argument at para 36.1.

[17] 2006 (5) SA 1 (SCA).

additional information sought included "*Minutes of all other departmental meetings and relevant committee meetings at which the tenders in relation to the contracts were considered and evaluated.*"[18] The appellant argued that it was not obliged to provide the documents under PAIA, as the respondent could in any event obtain them through Rule 53.

16. Maya JA upheld the claim for the documents under PAIA. She quoted the above passage from *Johannesburg City Council*, emphasising the same portion we have emphasised above, that expressly excludes deliberations from the ambit of a record. Although she made no firm finding, she then held that some of the items sought by the respondent "*may, conceivably, fall outside the scope of the above description.*"[19] We submit that it is clear that what Maya JA was referring to was the fact that, given the correctness of the dictum from *Johannesburg City Council*, and more especially the underlined portion thereof, the minutes of meetings did not fall within the ambit of the Rule 53 record.

17. Far from suggesting in *Intertrade* that the holding in *Johannesburg City Council* was incorrect, or needed to be re-evaluated in light of constitutional norms, the Supreme Court of Appeal endorsed it as a proper statement of the law, including the passage that excludes deliberations from the record.

18. That, we submit, is enough to end the Applicant's case. The SCA has endorsed and relied on a position that directly contradicts the position advanced by the Applicant. If the recording is not part of the "*record of proceedings*" referred to in rule 53, then it is not even necessary to determine

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[18] Ibid at para 7.

[19] Ibid at para 15.

whether the JSC is entitled to keep it confidential. It is simply not the type of document which Rule 53 entitles the Applicant to demand.

Minority view

19. Despite the longstanding and repeated adherence to the *Johannesburg City Council* dictum, and the holding by the Supreme Court of Appeal in *Intertrade*, there are High Court judgments that take a contrary position.

20. First, in *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others*[20] Southwood J held that an applicant was entitled to a video recording of the deliberations of a gambling board. He held that the *Johannesburg City Council* decision should not be followed, in part as a result of the right to reasons introduced by the Constitution:

> *"The importance of reasons cannot be over-emphasised. They show how the administrative body functioned when it took the decision and in particular show whether that body acted reasonably or unreasonably, lawfully or unlawfully and/or rationally or arbitrarily."*[21]

21. Southwood J appears to argue that the right to reasons also entails a right to access all deliberations of the decision-maker through Rule 53, although this is not stated explicitly.

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[20] 1999 (2) SA 599 (T).

[21] Ibid at 630F.

22. Second, in *Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape and Others* ("**Ekuphumleni**") Leach J adopted a similar approach.[22] The matter, like *Afrisun*, concerned the review of a decision of a gambling board. The debate was whether or not the record should include the scores of the individual board members. Leach J cited *Afrisun* only for the following proposition: "*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*".[23] He went on to conclude – without further reference to *Afrisun*, and without considering *Johannesburg City Council* or *Intertrade*[24] – that the record should include the individual scores. He also rejected a variety of defences raised by the board to protect the confidentiality of its proceedings.[25]

23. Third, in *City of Cape Town v South African National Roads Agency Ltd and Others* Binns-Ward J held that, in certain types of challenges, deliberations should form part of the Rule 53 record.[26] The application in that matter concerned an application by the City of Cape Town to force the South African National Roads Agency Ltd ("**SANRAL**") to disclose deliberations of meetings related to the award of a tender.

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[22] 2010 (1) SA 228 (E)

[23] Ibid at para 9, fn 6. Emphasis supplied.

[24] Leach J does cite *Intertrade*, but not on the question of whether or not deliberations form part of a rule 53 record. Ibid at para 10, fn 10.

[25] The board advanced the following arguments: (a) That it was not necessary to know which members gave which scores, as long as the applicant knew the scores; (b) That disclosure of the scores would lead to speculation about how members voted; (c) That disclosure would result in board members being targeted and lobbied in future applications; (d) That releasing the individual scores would result in members being perceived to be biased. Ibid at paras 13-18.

[26] [2013] ZAWCHC 74.

24. Binns-Ward J quoted the above dictum in *City of Johannesburg* as a proper statement of the law,[27] but then indicated that he was not in complete agreement with it:

> *"It seems to me that any record of the deliberations by the decision-maker would be relevant and susceptible to inclusion in the record. The 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. 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 s 6(2)(e)(iii) of PAJA, that is that [the] impugned decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered."*[28]

25. He therefore concluded that minutes of a meeting where a decision was taken should be included in the record.[29]

26. Fourth, the Applicant refers to a recent, unreported decision of the North Gauteng High Court in *Comair Limited v The Minister of Public Enterprises and others*.[30] Jordaan J – after quoting (like the Applicant) the passage from *City of Johannesburg* without the portion excluding deliberations – held that

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[27] Ibid at para 47.

[28] Ibid at para 48.

[29] Ibid at para 50 ("*Those minutes may not have been before the board of directors when the impugned decision was made, but they are nevertheless germane to the decision and relevant.*")

[30] NGHC Case No: 13034/13, attached as annexure A to the Applicant's written submissions.

Rule 53 entitled an applicant to access the deliberations. It did not support this finding, other than to refer to *Afrisun*.

The Minority View is Wrong

27. This court should not follow the path taken by the four cases discussed above. There are at least five reasons.

28. First, it is clearly a minority view. As detailed above the weight of authority – including the Supreme Court of Appeal – holds that deliberations are not part of a rule 53 record. Indeed, in *Intertrade* (which was decided after *Afrisun*) the Supreme Court of Appeal did not even refer to *Afrisun*. More importantly, the learned judges in *Ekuphumleni*, *City of Cape Town* and *Comair* – which were all decided after *Intertrade* – failed to address the Supreme Court of Appeal's clear endorsement of excluding deliberations from the Rule 53 Record. As he was clearly not referred to relevant and binding authority, this Court is free to disregard the recent ruling of Binns-Ward J.

29. Second, the constitutional right to reasons was only part of the justification for Southwood J's conclusion in *Afrisun*. He also relied on the relevant empowering legislation which required the board to "*function in a transparent and open manner*" and to disclose minutes "*in terms of an order of a competent court or under any law*".[31] As he explained: "*In an open and transparent system such as contemplated by the Act the minutes should always be disclosed unless there is a legally justifiable reason for withholding*

[31] *Afrisun* (n 20 above) at 631.

disclosure."[32] As we explain below, a similar regime of transparency does not apply to the deliberations of the JSC, and there are justifiable reasons for withholding disclosure. Unlike in *Afrisun*, the statutory regime works against disclosure, not in favour of it. The same is true of the regimes in place in *Ekuphumleni* and *City of Cape Town*.

30. Third, the learned judges' reasoning does not support a conclusion that deliberations should always be provided. Where the decision-making body provides not only the documents that served before it, but also the reasons for its conclusion, there is no constitutional basis to require the disclosure of otherwise private deliberations. The constitutional right to reasons is satisfied if reasons are provided.

31. The JSC has provided its reasons in the form of the summary given by the Chief Justice.[33] There is no basis to believe that those reasons are inaccurate. The Applicant is therefore in a position to determine whether the documents that served before the JSC – which it has – supports the reasons given for the JSC's decisions – which it does not allege are inaccurate. It simply does not require the deliberations in order to assert its rights. That is precisely why Marais J's analogy with court proceedings holds good in the constitutional era: litigants are entitled to a court's reasons, not a record of its deliberations.

32. The only situation where deliberations might be necessary is where the public body has been unable or unwilling to provide reasons for its decision. That is not the case here.

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[32] Ibid at 631J-632A.

[33] Annexure MH5; Record p 28.

33. Fourth, the irrelevance of deliberations for a review is true of reviews in general, and it is even more true of the particular review brought by the Applicant. In its founding affidavit in the Main Application, the Applicant contended that the matter was already ripe for hearing without the need for a Rule 53 Record. It submitted that the reasons the JSC had publicly provided furnished the court "*with the necessary context to consider the relief sought in the Notice of Motion*".[34] It states later that the reasons provided in letters from the JSC "*reflect in their totality the reasons why the JSC decided not to recommend Mr Gauntlett. They canvass fully the factors taken into account by the JSC when exercising its powers under the Constitution to advise the President on judicial appointments.*"[35]

34. The Applicant took this approach because it sought to argue that the reasons in those letters were inadequate. But the Applicant cannot have it both ways. It cannot insist that the JSC has provided all the reasons it is entitled to provide and force the JSC to reveal its private deliberations to see if there are any additional reasons. As Justice Kriegler has said: "*Litigation ... can present a minefield of hard choices.*"[36] The Applicant was faced with such a choice, and it chose to hold the JSC to the reasons already provided. That choice has the consequence that it cannot rifle through the JSC's private deliberations for additional reasons it denies exist.

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[34] Founding Affidavit at para 7; Record p. 3 of the Founding Affidavit in the Main Application.

[35] Founding Affidavit at para 13; Record p. 5 of the Founding Affidavit in the Main Application.

[36] *S v Dlamini* [1999] ZACC 8; 1999 (4) SA 623 (CC) at para 94.

35. Fifth, the JSC deliberates amongst its members in private session, but then votes in secret.[37] Nobody except the individual commissioner knows who voted for which candidate or why. The Applicant does not suggest that secret votes are impermissible, and the Supreme Court of Appeal has implicitly approved of secret voting on the JSC.[38]

36. The reasons advanced during the deliberations will often not constitute a complete reflection of the reasons for the secret votes. A member may express a view against a candidate during the deliberations, but elect to vote in favour of that candidate when casting her secret ballot. Or the member may express no view during deliberations. The deliberations will then give no indication of why she voted as she did. It is, by design, impossible to know which Commissioner voted in favour of which candidates, or why they voted. That is why the JSC Regulations require the Chief Justice to "*distil and record the Commission's reasons for recommending*" certain candidates to the President for appointment as Constitutional Court judges.[39] (Emphasis supplied)

37. The record of the deliberations are, therefore, unhelpful in determining the reasons for the JSC's decision.[40] The Supreme Court of Appeal has expressly accepted that it may be impossible to determine the reasons a majority of the JSC recommended some candidates and rejected others

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[37] Interlocutory Answering Affidavit at para 18; Record p. 47.

[38] *Judicial Service Commission* (n 4 above) at paras 47-50.

[39] JSC Regulations s 2(f)(iii)(l).

[40] A similar problem faces courts that try to determine whether a legislature was motivated by an illicit motive. See M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 1 at 14.

merely from the open deliberations.[41] Put differently, the reasons given for a decision of the JSC will never be the "true" reasons as those could only be provided by requiring each Commissioner to explain their reasons for each vote, and then assembling those reasons.

38. It is precisely because it is not possible to know the votes, or determine the motivations of each member of the JSC, that it is necessary for the Chief Justice to compile the joint reasons of the JSC as a body. Those reasons, not the content of the deliberations, reflect the reasons advanced by the JSC as a body. That was the requirement imposed by the Supreme Court of Appeal, in part because of the difficulty in determining the reasons of the group as a whole.[42] The Applicant has those reasons and is therefore in a position to challenge the decision.

39. Accordingly, there is no reason for this Court to follow the minority view. It should adopt the same position taken by the SCA and hold that deliberations (or at least the JSC's deliberations) are not part of the Rule 53 Record.

IV THE APPLICANT HAS NOT CHALLENGED THE CONFIDENTIALITY PROVISIONS

40. The JSC Act recognises the need for confidentiality. Section 38(1) provides that:

> *"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*

[41] *Judicial Service Commission* (n 4 above) at para 50.

[42] Ibid.

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."

41. Breaching the confidentiality is an offence.[43] In recognition of the need for secrecy, every member of the Commission is required to take an oath of secrecy when he or she assumes her position.[44]

42. The regulations published in terms of the Act that govern the procedure of the Commission,[45] require that the JSC deliberate on the shortlisted candidates confidentially. Regulation 3(j), which deals with the appointment of High Court judges, provides: "*After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidate for appointment by consensus or, if necessary, majority vote.*"[46] Accordingly, the

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[43] JSC Act s 38(2). Indeed, s 38(4) makes it an offence for someone who received information in violation of s 38(1) to herself disclose that information.

[44] JSC Act s 38(3).

[45] GN R114 in GG 16952 of 2 February 1996, as amended by GN R795 in GG 18059 of 13 June 1997 GN R402 in GG 23277 of 5 April 2002.

[46] Regulation 2(j), which concerns the appointment of Constitutional Court judges is substantially similar. It reads: "*After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates to be recommended for appointment in terms of section 99(5) of the Constitution by consensus or, if necessary, by majority vote.*"

deliberations of the Commission are confidential and are covered by section 38.

43. If the Applicant wants access to deliberations that the regulations deem to be private, it must challenge the regulations that make them private. The regulations are good law until they are repealed or set aside. Yet the Applicant has launched no attack on regulation 3(j). As long as that regulation exists, the Applicant cannot access the deliberations.

44. It is no answer to say that the JSC cannot regulate its process in conflict with the rules of court.[47] The JSC denies that keeping its deliberations private is contrary to the rules. But even if they were, there is no reason the rules would triumph over regulations passed in terms of the JSC Act and in fulfilment of the JSC's constitutional power to regulate its own process.

45. If there is a basis to challenge the confidentiality of JSC deliberations, it should be mounted as an attack on the relevant regulations. Not via the backdoor of rule 53.

V THE JSC DELIBERATIONS ARE CONFIDENTIAL

46. Even if deliberations should ordinarily form part of the Rule 53 Record, and even if the Applicant need not challenge the validity of the JSC Regulations, deliberations of the JSC are entitled to confidentiality, either under an expanded public interest immunity, or in terms of the JSC Act. We expand on this argument in four sections:

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[47] Applicant's Heads of Argument at paras 45 and 66.

46.1. First, we discuss whether the recording should be protected as public interest immunity, or in terms of the JSC Act;

46.2. Second, we set out the cogent reasons why it is in the public interest for the JSC's deliberations to remain private;

46.3. Third, we demonstrate that those reasons are supported by comparative practice; and

46.4. Fourth, we explain why those reasons outweigh any minimal prejudice to the Applicant.

Public interest immunity or JSC Act

47. If this court concludes that the recording of deliberations do form part of the Record, then the JSC contends that the court is entitled to exclude the recording from the public record by a public interest immunity, or in terms of the JSC Act.

48. The public interest immunity was first recognised in *Van der Linde v Calitz* and ordinarily applies to information that impacts on national security.[48] However, it can properly be extended to other contexts where the public interest in confidentiality outweighs the ordinary interest in the openness of judicial proceedings.

49. The Supreme Court of Appeal came close to recognising an extended public interest immunity in *Bridon International GMBH v International Trade Administration Commission and Others.*[49] The applicant argued that

[48] 1967 (2) SA 239 (A).

[49] [2012] ZASCA 82; [2012] 4 All SA 121 (SCA); 2013 (3) SA 197 (SCA).

confidential commercial information before the International Trade and Administration Commission ("**ITAC**") should be excluded from the Rule 53 Record because it was subject to public interest immunity. It contended that immunity should extend to confidential information before ITAC because ITAC is "*vitally dependant in its investigations into anti-dumping, on receiving commercially sensitive evidence supplied by third parties who may refuse to cooperate if the confidentiality of their information is not ensured.*"[50]

50. Brand JA summarised the public interest immunity as developed in the United Kingdom and Canada as follows:

> "*the approach to the recognition of public interest privilege on the facts of a particular case ... depends 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.*"[51]

51. The Court ultimately found it unnecessary to extend the public interest immunity to these types of situations, as the question of confidentiality could adequately be dealt with in terms of the governing statute.[52] It was also doubtful that a third party – Bridon – could claim the immunity that attached to ITAC.[53]

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[50] Ibid at para 22.

[51] Ibid.

[52] Ibid at para 23. The relevant statute was the International Trade Administration Act 71 of 2002.

[53] Ibid at para 24.

52. However, the test it used was virtually identical to the one it identified as governing the public interest immunity in comparable jurisdictions. Indeed, it concluded that the source of the power to keep the documents confidential would make no difference to the result as all parties agreed that the outcome depended "*on a weighing up of their conflicting interests.*"[54]

53. The relevant provision – section 35(3) of the ITAC Act – provided that, if an attempt to mediate an agreement about confidentiality failed, a party could bring an application to the High Court and:

> "*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.'*

54. The equivalent provision of the JSC Act – s 38 – requires a similar balancing of interests. It, like the ITAC Act, permits confidential information to be disclosed by order of court. For a court to determine whether disclosure is warranted, it must, as the SCA found in *Bridon* balance the interests involved.

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[54] Ibid at para 24.

55. In short, deliberations are protected either under an expanded public interest immunity, or in terms of section 38. Whichever is the correct route, the test is the same: when the conflicting interests of the JSC are weighed against those of the applicant, should the recording be disclosed? The next section explains the interests of the JSC.

The JSC's Interest in Confidentiality

56. The privilege attaching to the deliberations of the JSC is already recognised in legislation. First, as noted above, the confidentiality of JSC proceedings is protected by the JSC Act read with the JSC Regulations.

57. Second, the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") exempts deliberations of the JSC. Section 12(d) provides: "*This Act does not apply to a record relating to a decision referred to in paragraph (gg) of the definition of 'administrative action' in section 1 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law.*"[55]

58. The Supreme Court of Appeal and the High Court, too, have recognised the need for at least some confidentiality in JSC proceedings. In *Judicial Service Commission v Cape Bar Council*, Brand JA accepted that the JSC: (a) was entitled to disclose its reasons as a summary of its deliberations; and (b) was entitled to vote in secret. He went so far as to suggest that, if the

[55] In terms of paragraph (gg) of the definition of "*administrative action*" in PAJA excludes "*a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law*" from review under PAJA.

deliberations were insufficient for the Chief Justice to compile the reasons of the JSC, the commissioners could "*be asked to provide their reasons anonymously*."[56] There would be no reason for anonymity if there was no value in secret voting.

59. Similarly, in *Mail & Guardian v Judicial Service Commission* Malan J recognised the need for confidentiality. Although he upheld an application by the media applicants for access to the disciplinary hearing of Judge President Hlophe,[57] the main justification was that the proceedings had already been completely open, and no explanation was furthered for closing them. While generally emphasising the importance of openness by the JSC, Malan J accepted the need for confidentiality at the early stage of disciplinary proceedings:

> "*Confidentiality would encourage the filing of complaints but also protect judges from unwarranted and vexatious complaints and maintain confidence in the judiciary by avoiding premature announcements of groundless complaints. Moreover, it would facilitate the work of the disciplinary authority by giving it flexibility to accomplish its functions through voluntary retirement or resignation. Confidentiality is required to protect a judge from frivolous and unfounded complaints; to allow a judge to recognise and correct his or her own mistakes; to resolve the complaint prior to formal proceedings and to protect the privacy of the judge.*"[58]

60. The High Court has accordingly already accepted that some confidentiality in JSC proceedings is justified. There is clearly no absolute requirement for

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[56] *Judicial Service Commission* (n 4 above) at para 50.

[57] [2009] ZAGPJHC 29; [2010] 1 All SA 148 (GSJ); 2010 (6) BCLR 615 (GSJ).

[58] Ibid at para 20.

disclosure of JSC proceedings. It is a question of what degree of disclosure best serves the public interest in the JSC performing its constitutional functions to the best of its ability.

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

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

61.2. It will deter future applicants;

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

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

Candour

62. It is vital that the members of the Commission are able to engage in frank and robust discussions about the capabilities, personalities, strengths and weaknesses of the candidates.[59] Allowing the disclosure of the JSC's deliberations whenever a person takes a decision of the JSC on review would seriously undermine the need for candour in selecting the nation's judges.

63. Courts the world over have recognised the need to ensure confidentiality of government discussions in order to preserve the ability to talk with candour. In *Babcock v. Canada (Attorney General)* the Court affirmed the long-

[59] Answering Affidavit at para 27.7; Record pp. 51 – 52.

recognised need for confidentiality of cabinet minutes.[60] "*The reasons*", McLachlin CJ explained, "*are obvious.*"

> "*Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: ... If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. ... The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.*"[61]

64. The House of Lords and the High Court of Australia have reached similar conclusions regarding cabinet minutes. In *Conway v Rimmer*, Lord Reid expressed some doubt that the possibility of disclosure would decrease cabinet ministers' candour, but nonetheless identified a strong justification for non-disclosure:

> "*To my mind the most important reason is that such disclosure would create or fan ill informed or capricious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all*

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[60] 2002 SCC 57, [2002] 3 SCR 3.

[61] Ibid at para 18. See also *Carey v Ontario Carey v Ontario* [1986] 2 SCR 637 (closely examines the validity of the candour rationale, and ultimately upholds it, at least for high level government documents);

> *documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition."*[62]

65. Gibbs ACJ, of the High Court of Australia, by contrast, accepted that candour was a legitimate basis for protecting the confidentiality of government documents:

> *"One reason that is traditionally given for the protection of documents of this class it that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them. Some judges now regard this reason as unconvincing, but I do not think it altogether unreal to suppose that in some matters at least communications between Ministers and servants of the Crown may be more frank and candid if those concerned believe that they are protected from disclosure. For instance, not all Crown servants can be expected to be made of such stern stuff that they would not be to some extent inhibited in furnishing a report on the suitability of one of their fellows for appointment to high office, if the report was likely to be read by the officer concerned."*[63]

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[62] [1968] AC 910 at 952, quoted with approval by the Supreme Court of Canada in *Carey* (n 61 above) at paras 50-51.

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

66. None of these courts adopt an absolute immunity for cabinet minutes or other similar government documents; they all accept however that there are situations where the need for candour and protection from improper public and political influence requires that state documents remain private.

67. The JSC is exactly the type of body that all these courts have recognised require candour. It makes constitutionally important and socially sensitive decisions. Although including politicians, it is designed to take decisions not based on purely political concerns, but on the basis of the constitutional suitability of the candidates. In order to perform that task, its members must be able to deliberate candidly, and they must be immune from undue public speculation.

Encouraging applicants

68. There is an additional reason that JSC meetings must be confidential. The JSC depends on people being willing to come forward to accept nominations, attend public interviews, and have their character and abilities discussed by the Commission. Knowing that the commissioners' views on their suitability will be public will deter people from making themselves available for appointment.[64] In order for the JSC to perform its function, it needs to attract high quality candidates. The more likely that the process will result in embarrassment, the less likely people will apply.

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[64] Answering Affidavit at paras 27.7 and 38.3; Record pp. 51 – 52 and p. 57.

69. This is not merely speculation by the commissioners: widespread international experience confirms that some degree of confidentiality in the process of judicial appointments is absolutely vital to the process of judicial appointments. We address this experience in the next section.

70. Importantly, the JSC does not believe that applicants must be insulated from any public scrutiny. It holds an open nomination process and open interviews. This is already unusual in comparative practice. The JSC asks only that its commissioners be allowed to deliberate in private after having publicly questioned the candidates, and made the sum total of their written applications open for public consideration.

Dignity and privacy of applicants

71. Those candidates who were considered in the round under review applied with the legitimate expectation that the deliberations of the JSC about their applications would be confidential. They had been assured of confidentiality by the JSC Act and Regulations. It would be a serious infringement of their privacy and their dignity to reveal the opinions of the commissioners.

72. The JSC does not make this argument because of anything particular contained in the recording. It makes it to support the principle that candidates who are assured confidentiality are entitled to expect that confidentiality to be maintained. If an embarrassing fact is revealed during the public interviews, that is acceptable, as the candidates accepted that that part of the process would be open.

Unintended consequences

73. Lastly, making the JSC's deliberations subject to disclosure in review proceedings is likely to result in the JSC ceasing to record its deliberations. The JSC has a clear interest in keeping its deliberations secret. If the only way to achieve that is to stop recording those deliberations, the JSC may take that course. That would be unfortunate.

74. While there is no basis to reveal the deliberations in every review proceedings, there are good reasons for the JSC to record its meetings. It assists them in keeping track of their discussions internally, and in compiling the reasons it is required to provide to the public. In addition, there may be instances that justify breaching the ordinary confidentiality; for example where there is clear evidence that the reasons given by the JSC are not the true reasons. Lastly, the recordings are of real historical significance. While it may reduce candour and deter applicants to reveal the deliberations shortly after the interviews, 25 years down the line the recordings can be revealed without those consequences.

75. The need for confidentiality of the proceedings is not merely an invention of the JSC; it is a near universal practice of similar bodies across the globe. The next section sets out that comparative experience.

Comparative Practice of Judicial Selection

76. The use of judicial selection commissions is somewhat unusual in the commonwealth world. Many countries – such as Australia and New Zealand – afford the executive a free hand in selecting judges, while in the USA

federal judges are nominated by the President and approved by the Senate. Other countries, such as India, allow judges of the Supreme Court to select replacements. These selection processes are either mostly or entirely secret.

77. However, there is a growing recognition that judicial selection committees represent the best way to select judges. The United Kingdom recently reformed their laws to establish a Judicial Appointments Commission[65] which now appoints all judges in the United Kingdom (except the Supreme Court). Many states in the USA and provinces in Canada also use selection commissions to appoint their judges.

78. When the JSC is compared to these systems, two facts emerge. First, employing a body such as the JSC represents international best practice for the selection of judges. Second, the JSC is already far more transparent than the majority of comparable bodies across the globe. While transparency in judicial selection should obviously be welcomed, the continuing entrenchment of some degree of secrecy in all comparable systems demonstrates that a claim of public interest immunity is well-founded.

79. In addition, courts and academics in all these states have recognised the justifications for confidential deliberations the JSC has advanced. They have held that confidentiality breeds candour, that candour is vital for effective judicial selection, and that too much transparency discourages applicants. The Applicant's position flies in the face of all this international experience.

80. We discuss the following jurisdictions:

80.1. USA;

80.2. Canada;

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[65] Established by the Constitutional Reform Act (CRA) 2005.

80.3. United Kingdom;

80.4. Australia; and

80.5. The Commonwealth.

USA

81. There are two tiers of judicial selection in the United States. At the federal level, the President nominates people whose appointment must be confirmed by the Senate. The United States Supreme Court has recognised the importance of confidentiality in that process. In order to assist the President in his task of nominating judges, the Department of Justice regularly seeks advice from the Standing Committee on Federal Judiciary of the American Bar Association ("**ABA**"). The ABA considers a wide range of information and prepares a report on whether the candidate is suitable for judicial office. The President is not bound by this report, but it is extremely persuasive. The ABA does not release its reports to the public, unless the candidate is in fact nominated, in which case only the ranking is released.

82. In *Public Citizen v Department of Justice*,[66] a public interest body requested access to the reports and minutes of meetings of the ABA, under freedom of information legislation known as FACA.[67] The Department of Justice refused, and the body approached the courts. The District Court concluded that the legislation could not be interpreted to require disclosure of the ABA materials as "*any need for applying FACA to the ABA Committee is outweighed by the*

[66] 491 US 440 (1989).

[67] Federal Advisory Committee Act 86 Stat. 770.

President's interest in preserving confidentiality and freedom of consultation in selecting judicial nominees."[68] (Emphasis supplied)

83. The Supreme Court of Appeal confirmed this conclusion. The majority of the Court (per Brennan J), relied primarily on the legislative history of FACA to conclude that it was not intended to apply to bodies such as the ABA. However, Justice Kennedy wrote a concurring judgment (joined by Rehnquist CJ and O'Connor J) which endorsed the District Court's findings that: "*at minimum, ... the application of FACA to the ABA Committee would potentially inhibit the President's freedom to investigate, to be informed, to evaluate, and to consult during the nomination process*".[69] This recognises the importance of confidentiality in the nomination and appointment of judges, even where the process is not managed by a judicial selection tribunal.

84. The position at the state level even more clearly favours the exclusion of deliberations from consideration. The fifty states adopt a variety of methods to select judges – some use selection commissions, others elect their judges. However, there is clear support in the literature for selection by commission; what the Americans call "merit selection".

85. In those states that use selection commissions, there is virtually universal support for confidentiality in the selection process, and especially for keeping the deliberations private. The American Judicature Society ("**AJS**") – an organisation that monitors and advocates on issues of judicial selection –

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[68] 691 F.Supp. 483 (1988) at 496 (emphasis added).

[69] *Public Citizen* (n 66 above) at 488, quoting *Washington Legal Foundation* (citation not known) at 493.

conducted an analysis of all states that have judicial selection commissions.[70] Of the 33 states, only five do not have a provision requiring that deliberations are confidential.[71] As the AJS explains in its handbook for judicial selection commissions:

> *With few exceptions, nearly every jurisdiction conducts confidential deliberations. Even in jurisdictions that provide little or no confidentiality protections for applicants, commission deliberations are afforded extensive confidentiality. Confidentiality of deliberations is intended to encourage frank discussion of the applicants and their qualifications by the commissioners."*[72]

86. The AJS also publishes a document called "*Model Judicial Selection Provisions*" as an aid to states adopting merit selection. The Provisions recommend open meetings for discussing procedures and selection requirements, and leaves it to the state to determine whether interviews should be public. But it is clear about deliberations: "*All final deliberations of the judicial nominating commission shall be secret and confidential.*"[73] The AJS explains this nuanced position as follows:

> "*Finding the appropriate balance between preserving the privacy of judicial applicants and providing transparency in the screening process*

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[70] American Judicature Society *Judicial Merit Selection: Current Status* (2011) available at www.judicialselection.us/.../Judicial_Merit_Charts_0FC20225EC6C2.pdf.

[71] Ibid at Table 4. Some of the states have different rules in different counties. The five states that do not keep their deliberations confidential include any state where even one county does not require confidentiality. See also J Goldschmidt 'Merit Selection: Current Status, Procedures, and Issues' (1994) 49 *University of Miami Law Review* 1 at 33.

[72] M Greenstein, rev. K Sampson *Handbook for Judicial Nominating Commissioners* (2004) at 24.

[73] Ibid at 7.

is one of the greatest challenges that nominating commissions face. Applicants should be protected from public scrutiny regarding their private lives and from public embarrassment that could result from failure to receive a nomination. At the same time, the public should have sufficient knowledge of the nominating process to maintain confidence in that process. Commission proceedings should be as open as possible. However, the final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates' qualifications."[74] (Emphasis supplied)

87. This is precisely the position adopted by the JSC.

88. The confidentiality of judicial nominating commission proceedings, and particularly deliberations, is not only endorsed by state legislatures and the AJS, it has been repeatedly upheld by the courts.[75] In *Guy v Judicial Nominating Commission*,[76] the Superior Court of Delaware was confronted with a request for records of the Delaware commission in terms of a freedom of information statute. It rejected the claim, holding that it would impede the Governor's search for judges:

"*The effectiveness of that search ... would be compromised if the source and substance of the advice and information provided to the*

[74] Ibid at 7-8 (emphasis added).

[75] See, for example, *Lambert v Barsky* N.Y.Supr. 91 Misc.2d 443, 398 N.Y.S.2d 84 (1977) ("public interest" or "executive" privilege protects confidential questionnaire submitted to Judicial Nominating Committee created by executive order of the Governor); *Justice Coalition v First District Court of Appeal Judicial Nominating Commission* 823 So. 2d 185 (Fla. Dist. Ct. App. 2002) (the District Court of Appeal of Florida upheld a refusal to provide records of a commission's deliberations under a freedom of information act claim).

[76] 659 A.2d 777 (Del. Super. 1995).

> *governor by the commission were not protected. It is unlikely that persons with knowledge of the qualifications of candidates would be as frank in their comments if they knew their statements would not be confidential."*[77] (Emphasis supplied)

89. American academics have also endorsed the need for confidentiality. Joseph Colquitt, writing in the *Fordham Urban Law Journal*, has supported this balance between openness and secrecy, vital for an effective selection process:

> *"The commissioners ... must be able to candidly discuss the nominees, and in so doing, be free from the general public's emotional appeals and pressure from interested political actors. At the same time, sufficient openness must exist to demonstrate that the commission is free from the cronyism and commission-captures that threaten its independence. Such transparency catalyzes public confidence about the fairness of the process.*
>
> *Thus, a carefully constructed balance must be struck between the two diametrically opposed objectives of openness and confidentiality. This can be accomplished by allowing for public hearings followed by confidential interviews of the prospective nominees and commission deliberations."*[78]

90. Of course, the JSC provides even greater transparency than Colquitt and the AJS require as all the nomination documents, and the interviews, are public.

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[77] Ibid at 784.

[78] (2007) 34 *Fordham Urban LJ* 73 at 110.

The only vestige of confidentiality that remains is its deliberations and the votes of members.

Canada

91. Canada has several levels of courts with different appointment processes. Supreme Court Judges are appointed by the Governor-General on the recommendation of the Prime Minister. But lower federal judges and provincial judges are generally selected or recommended by some form of committee. Confidentiality of the application and deliberation process are virtually absolute in all these systems.

92. The Federal Judicial Appointments Advisory Committee's – which recommends the appointment of judges in lower federal and superior provincial courts – code of ethics for its commissioners includes the following:

> *"All Committee discussions and proceedings shall be treated as strictly confidential and must not be disclosed outside the Committee, except to the Minister of Justice, except that a Committee Chair may inform the Chief Justice of the names of the candidates who have been recommended by the committee. A member shall not communicate to a candidate or to any other person, during his or her term or thereafter, the substance or details of any interviews held, of discussions within the Committee nor of recommendations made."*[79] (Emphasis supplied)

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

93. The Guidelines for Committee Members expands on the obligations of confidentiality. It too states that "*[a]ll Committee discussions and proceedings must be treated as strictly confidential, and must not be disclosed to persons outside the Committee.*"[80] It also requires that all documents submitted as part of the application are confidential, as is information obtained from references or sources and that confidentiality endures after a member leaves the committee.[81]

94. Provincial committees have similar requirements. The Ontario Judicial Appointments Advisory Committee, for example, has extreme measures designed to protect the complete confidentiality of all applicants.[82] Similarly, the guidelines for the Nova Scotia standing Advisory Committee on Provincial Judicial Appointments explain why it sets an extremely high standard of confidentiality that prevents even the names of candidates being revealed:

> "*To ensure that the Government is given full and frank advice, the information provided by the Committee including the list of recommended applicants, will not be disclosed except to members of the Executive Council or persons preparing material for consideration by the Executive Council. All information received from the Committee will be kept strictly confidential. The Committee will develop guidelines or processes to ensure that during that process, the names of the*

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

[81] Ibid.

[82] See Ontario Judicial Appointments Advisory Committee *Annual Report* (2012) at 9 ("*The Judicial Appointments Advisory Committee has developed two fundamental principles on the issue of confidentiality of committee information. These are: (a) information about committee process is completely open to any person whomsoever, (b) information about particular candidates is completely confidential unless released by candidates themselves.*" The report is available at http://www.ontariocourts.ca/ocj/files/annualreport/jaac/2012-EN.pdf.

candidate and, in particular, the names of the recommended applicants, remain confidential except as may be necessary to complete the selection process."[83]

95. The need for candour, to encourage applicants, and to protect candidates reputations clearly animate these provisions, which all impose far more secrecy than the JSC requires.

United Kingdom

96. The United Kingdom recently established the Judicial Appointments Committee ("**JAC**"). The JAC's empowering statute makes all information that pertains to a particular person, and is obtained during the appointment process, confidential.[84] The JAC explains its publication policy as follows:

"One of the key principles of good administration is to be open and accountable. We are committed to publishing a wide range of information about our activities and on subjects in which there is known to be a public interest. Under the terms of the Constitutional Reform Act 2005, our processes must be undertaken confidentially and any information that we gather for the purposes of making selections for judicial appointments can only be disclosed in very specific

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[83] Available at http://www.gov.ns.ca/just/Court_Services/_docs/Guidelines%20Provincial%20Judicial%20Appts%2009%20%2003%2017.pdf.

[84] Constitutional Reform Act, 2005, s 132. The statute does, however, permit disclosure if it is *"required, under rules of court or a court order, for the purposes of legal proceedings of any description."* Section1 32(4)(c). Read in context, this is not permission to disclose all information no matter what the nature of the legal proceedings.

circumstances. We must also balance our wish to operate openly and transparently with our duty to protect the personal and confidential information we hold. Therefore the information that we can place in the public domain about our work is limited."[85]

97. There have been at least two requests for the JAC's documents. In *Guardian News and Media Ltd v Information Commissioner*, the Information Tribunal held that the Ministry of Justice had been justified in refusing to disclose information about serious disciplinary actions against judges.[86] And the Information Commissioner, has upheld a decision by the JAC to refuse access to information about candidates for selection.[87] Although these decisions were not based on the same concerns now raised by the JSC, they demonstrate that there is no automatic access to the JAC's documents.

Australia

98. Australia does not have a judicial appointments commission. However, several academics in that country have recommended that its laws should be reformed to establish one. In making their recommendations, they have expressly recommended confidentiality not only of the new commission's deliberations, but also of applications and shortlists. Rachel Davis and George Williams write that one of the "*central features of an Australian judicial*

[85] Judicial Appointments Commission's website, available at http://jac.judiciary.gov.uk/about-jac/freedom-of-information.htm.

[86] *Guardian News and Media Limited v IC (Freedom of Information Act 2000)* [2009] UKIT EA_2008_0084 (10 June 2009).

[87] *Judicial Appointments Commission (Decision Notice)* [2009] UKICO FS50242843 (24 August 2009).

appointments commission should be [that] ... [e]xpressions of interest in judicial appointment, the deliberations of the commission and its short list and accompanying statement must be confidential".[88]

99. In a separate article proposing reform of the Australian selection process, Evans and Williams accept the importance of transparency in judicial selection.[89] But they also identify the need for the confidentiality of judicial selection committee proceedings:

> "*There are powerful institutional and pragmatic reasons for preserving strict confidentiality of aspects of the process. For example, if names of potential appointees, especially in small jurisdictions, were made public it may adversely affect relationships with clients. The upshot may be to discourage meritorious individuals from seeking appointment. Even in larger jurisdictions, breaches of confidentiality would undermine the operation of the system. This is not special pleading for judicial appointments. Confidentiality is a common feature of appointments processes generally. It ensures that meritorious candidates are not deterred by the prospect of disclosure of a candidacy that might be perceived as overreaching or that might (wrongly) be perceived as reflecting badly on the candidate if it was ultimately unsuccessful. Equally, confidentiality of references ensures that referees are not deterred from being fully candid about the evidence that supports (or undermines) the candidate's application.*"[90]

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[88] R Davis and G Williams 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819 at 863.

[89] Simon Evans and John Williams 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 294.

[90] Ibid at 303-304.

100. They too conclude that, while accountability is important, "*applications, references, interviews and assessments, as well of the Commission's deliberations*" should be confidential.[91]

Commonwealth

101. In 2013, the Commonwealth Lawyers Association, the Commonwealth Legal Education Association and the Commonwealth Magistrates' and Judges' Association developed a model constitutional clause for judicial appointment commissions.[92] It was based in part on advice received from the organisations' members. The model clause does not expressly deal with the confidentiality of deliberations. However, it does contain this observation in the clause recommending that the appointment commission should be able to determine its own procedure:

> "*It is important that the selection process is seen to be transparent in the processes it uses to assess the qualifications of candidates for appointments. In some countries, such as South Africa the deliberations are through public hearings. We do not recommend that, because reports have shown that although candidates are prepared to put themselves through an open and fair process, they are less willing to share their candidature, and any lack of success, with the public at large. Whatever the method, there should be an established, public system for the assessment of qualifications of candidates.*"[93]

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[91] Ibid at 327.

[92] J Brewer, J Dingemans & P Slinn *Judicial Appointments Commissions: A Model Clause for Constitutions* (2013) available at www.cmja.org/.../Judicial%20Appointments%20Commissions-%20CLA-...

[93] Ibid at 12-13.

102. While the JSC fully supports public interviews, this observation demonstrates again: (a) the wide consensus that confidentiality is needed in judicial appointments; and (b) that the JSC is already far more transparent than most comparable bodies.

Weighing the Interests

103. In the previous sections, we have laid out the concerns that motivate the JSC's need for confidentiality, and the comparative experience supporting those claims.

104. On the other hand, the Applicant advances a range of interests that it alleges will be affected if the recording is not disclosed, including:

104.1. Its right to lawful administrative justice;

104.2. The constitutional principle of open justice; and

104.3. The need for rationality and accountability.

105. These are legitimate constitutional concerns. But for the reasons advanced below, they do not outweigh the JSC's interest in confidentiality.

106. Importantly, the Applicant seems to contend that it has an absolute right to see the recording. It does not suggest that competing interests must be balanced, but that openness and transparency trumps all other interests. The Applicant complains that the JSC should not be "*permitted to hide behind bald statements of confidentiality*".[94] But the Applicant cannot force the disclosure of confidential documents through blunt and repeated references to trite principles. This court should weigh the competing concerns, and conclude

[94] Applicant's Heads of Argument at para 44.

whether, when all interests are taken into account, the public interest is better served by transparency or confidentiality.

107. We first discuss the rights and principles the Applicant asserts, then address some of the arguments directed at the JSC's position, then weigh the competing interests.

The Applicant's Contentions

108. The Applicant emphasises the importance of transparency and openness in the JSC's proceedings. It notes, correctly, that the High Court has endorsed the importance of these principles in the context of disciplinary hearings by the JSC.[95] It also relies on the constitutional principle of open justice,[96] which has been endorsed by the Constitutional Court,[97] and generally requires documents in court proceedings to be publicly available.

109. It is questionable whether open justice applies at all in this context. In *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* the Constitutional Court was sceptical about whether the principle applied to the proceedings of the Refugee Appeals Board.[98] It is true that the High Courts

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[95] See *eTV (Pty) Ltd and Others v Judicial Service Commission and Others* [2009] ZAGPJHC 12; 2010 (1) SA 537 (GSJ); *Mail and Guardian Limited and Others v Judicial Service Commission and Others* [2009] ZAGPJHC 29; [2010] 1 All SA 148 (GSJ); 2010 (6) BCLR 615 (GSJ).

[96] See, for example, Applicant's Heads of Argument at para 67.

[97] See *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC); *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); [2006] JOL 18339 (CC).

[98] [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC) at para 53.

referred to it when considering media access to the JSC's disciplinary proceedings,[99] but deliberations about applications for judicial office are not the same as a disciplinary hearing. It is not necessary to ensure that the process or conduct of deliberations are fair in the same way that openness is necessary to ensure the fairness of a trial or disciplinary proceedings. The JSC therefore denies that open justice is directly applicable to its deliberations about applicants.

110. However, even if the principle is relevant, it, like the protection of confidentiality on which the JSC relies, "*has never been absolute.*"[100] As the Constitutional Court held in *Independent Newspapers*, the correct approach: "*is to recognise that the cluster of rights that enjoins open justice derives from the Bill of Rights and that important as these rights are individually and collectively, like all entrenched rights, they are not absolute. They may be limited by a law of general application provided the limitation is reasonable and justifiable.*"[101] (Emphasis supplied)

111. The limits of open justice are apparent in two of the cases where the Constitutional Court has considered it. In *SABC*, the Court held that concerns about the right to a fair trial justified a limitation on the principle, and in *Independent Newspapers* national security concerns justified limiting public access to documents before the Constitutional Court.

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[99] *eTV* (n 95 above) and *M&G* (n 95 above).

[100] *SABC* (n 97 above) at para 50.

[101] *Independent Newspapers* (n 97 above) at para 44.

112. Moreover, in both *SABC* and *Independent Newspapers* the Court concluded that there was no onus on the party seeking to restrict access to court documents. As Moseneke DCJ put it in *Independent Newspapers*:

> *"Lastly, it was argued that a party that seeks to restrict open justice must bear an onus. It is so that a party that contends for a restriction of a right protected in the Bill of Rights must place before the court material which justifies the limitation sought. This does not, however, mean that that party carries an evidentiary burden or an onus in the strict sense of the word. At the end of the day, a court is obliged to have regard to all factual matter and factors before it in order to decide whether the limitation on the right to open courtrooms passes constitutional muster."*[102]

113. The JSC is not required to prove a justification for departure from open proceedings. The court must weigh all the relevant factors and conclude whether a departure is justified.

114. The Applicant also seeks to rely on its right to administrative justice and/or its right of access to courts. It argues, for example, that *'[t]he claim of confidentiality cannot operate in contravention of the rights of the applicant to set out its case on all the available facts."*[103] The JSC has two responses to this contention. First, non-disclosure would not inhibit the Applicant's exercise of its rights as it has already been given the reasons for the JSC's decision, and all the documents that served before it. The deliberations, for the reasons already advanced, are irrelevant.

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[102] Ibid at para 46. See also *SABC* (n 97 above) paras 44-46 (the majority accepted and applied the approach adopted by the Supreme Court of Appeal which did not place an onus on either party).

[103] Applicant's Heads of Argument at para 58.

115. Second, the Applicant's right to prosecute its case is no more absolute than the principle of open justice. While the underlying principle is that parties should have access to all relevant material, this can be limited in appropriate circumstances.

116. In *Independent Newspapers* a media company approached the Constitutional Court for access to classified documents in the record in a case before the Court. The Minister of intelligence resisted disclosure. Independent Newspapers brought an interlocutory application for its legal representatives to gain access to the classified documents in order to prosecute the main application for access. The Court refused the interlocutory application.

117. It noted the dire consequences that would follow if the application were granted:

> *"the release of the restricted materials at the interlocutory stage would have created the untenable rule that when a member of the public questions the confidentiality of information kept by the state, she or he would in effect gain the right to receive the information in order to decide whether to prepare a court challenge. If that were to be so, the very purpose of classifying and protecting information for purposes of national security would be rendered nugatory, even were no challenge to be made to the authority to classify and withhold the documents or its exercise."*[104]

118. The same is true here. If the Applicant is correct, and confidentiality is never a defence to the rights of a review applicant, then the JSC's confidentiality

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[104] *Independent Newspapers* (n 97 above) at para 30.

would be rendered pointless. Any person with an interest in a decision of the JSC – which given the nature of its task, is almost any South African – could bring a review of the JSC's decision to appoint or not appoint a judge and force disclosure of the deliberations without regard for the merits of the claim, or the consequences of disclosure. That is "*untenable*".

119. The JSC does not contend that the confidentiality of its deliberations may never be pierced. But there must be good reasons to do so. If the Applicant had evidence of some irregularity during the JSC's deliberations, there may be a reason to break the current confidentiality, in order to determine that allegation. But there is no such evidence, and no reason to destroy the confidence.[105]

The Applicant's Response to the JSC's Claim of Confidentiality

120. In this section we consider the Applicant's various attempts to undermine the JSC's claim for confidentiality.

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[105] See *Independent Newspapers* (n 97 above) at para 32 (Moseneke DCJ noted that there would be "*There will be instances where a party will point to what appears to be a lack of authority or to an improper exercise of authority or to some other unjustifiable conduct on the part of a public official claiming confidentiality of information. In that event, it may well be in the interests of justice to permit the party concerned and her or his legal representatives, subject to appropriate conditions, to gain access to the sealed part of the record or information for purposes of posing an informed challenge to the confidentiality claim of the public official concerned. At the very least, the claimant will have to demonstrate that it cannot adequately prepare its case without the early disclosure of the protected materials.*" The context there was different: the issue was access to confidential documents in order to prosecute a claim that the documents should be public. But the observations are relevant because here the Applicant claims it needs the recording in order to prosecute its review. *Independent Newspapers* demonstrates that there needs to be more than a bare assertion of right to justify a disclosure for that purpose.)

121. The Applicant contends that the JSC's rationale for confidentiality was rejected by the High Court in cases where it required that the media have access to the JSC's disciplinary hearing into Hlophe JP.[106] There is little basis for this assertion in the judgments. It is true that the judgments of both Willis J[107] and Malan J[108] held that transparency was important to ensure the legitimacy of the JSC's disciplinary proceedings. However, neither judgment is particularly helpful in deciding this application. Most obviously, they concern disciplinary proceedings, not deliberations about appointments, where different concerns clearly apply. In addition, a careful reading shows that the judges' reasons do not support the bold claim the Applicant seeks to draw from the judgments.

122. Willis J, in *eTV* accepted that there would be circumstances where it would be justifiable to hold the proceedings behind closed doors.[109] The reasons he determined it was not justifiable in the particular circumstances of the Hlophe hearing do not apply here. Willis J was impressed by submissions that demonstrated, based on case law from around the globe, that important matters should be decided in public.[110] But as we have already demonstrated, the weight of global judicial opinion with regard to deliberations about judicial appointments is that they should be confidential. The general reliance on the importance of openness simply does not translate to the

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[106] Interlocutory Founding Affidavit at para 35; Record p 15; and Applicant's Heads of Argument at paras 71-77.

[107] *eTV* (n 95 above).

[108] *M&G* (n 95 above).

[109] *eTV* (n 95 above) at 542G.

[110] Ibid at 541F-H.

appointment of judges where long and common experience have identified the need for limited privacy.

123. In addition, Willis J held that the JSC was required to justify excluding the media from the inquiry.[111] It failed to place the necessary information before Willis J to meet that onus.[112] For the reasons we have already given, that is not the correct way to approach this matter. There is no onus on the JSC; the Court is required to consider all the conflicting interests and determine whether or not to uphold the claim of confidentiality. There is no onus on either party.

124. Third, Willis J stressed that it was "the extraordinary nature of the hearing" – involving a complaint by the Justice of the Constitutional Court against a Judge President – which made it "*imperative that the public has an informed sense, not only of what actually happened, but also that, consequent upon its findings as to the facts, the JSC makes a decision that is both fair and appropriate.*"[113]

125. Lastly, the reasons advanced by the JSC to justify closing the hearing in *eTV* – "*protecting the dignity of the judiciary*"[114] – are very different from the reasons advanced here. In this matter, the JSC has made clear that confidentiality is vital to a successful process of judicial appointments. Its views are supported by authorities in democracies throughout the world. The reference to dignity refers to the individual candidates who have applied with the expectation of confidentiality, not to the judiciary as a whole.

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[111] Ibid at 545H.

[112] Ibid at 547B.

[113] Ibid at 547F-G.

[114] Ibid at 547D.

126. In the *Mail and Guardian* matter, Malan J recognised the importance of confidentiality in judicial disciplinary inquiries:

> *"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."*[115]

127. It was only because the inquiry was already public and had progressed to an advanced stage, that the learned judge granted the media access to the hearing.[116]

128. The Applicant suggests that Malan J rejected the notion that closed proceedings would better allow commissioners to express themselves frankly.[117] But that remark was made in the context of judges as witnesses in disciplinary proceedings. Malan J was correct to accept that judges would tell the truth about the events leading to the disciplinary proceedings whether or not they were publicised. Deliberations about appointments are entirely different. The commissioners are not there to relate facts, but to express their

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[115] *M&G* (n 95 above) at para 20.

[116] Ibid at para 21.

[117] Applicant's Heads of Argument at para 78, referring to *Mail & Guardian* (n 95 above) at para 23.

opinions. They are not questioned and there is no obligation on commissioners to speak at all. Commissioners may well elect not to express controversial or potentially harmful views if they believe those views will become public. The fact that commissioners "*exercise an enormous public power*"[118] does not render them less human, and less susceptible to discretion when they know their words will pass into the public domain.

129. The Applicant advances the strange contention that opening deliberations would better serve the purpose of "*robust assessment*" than confidentiality, because open proceedings are "*an inherent safeguard against bias, arbitrariness and other risks attendant upon the exercise of public power.*"[119] They also argue that, if anything was said during the deliberations that would impair the dignity of candidates, that would favour disclosure because it would reveal irrationality or unlawfulness.[120]

130. This contention fails to understand the JSC's argument. The JSC contends that commissioners may make honest, fair and reasonable assessments of a candidate's suitability that would still be damaging to the candidate's dignity because they are frankly expressed. The existence of honest assessments is an indication of full and proper consideration of candidates' merits, not irrationality or procedural unfairness. Commissioners may be unwilling to express an honest assessment, not because it is irrational, but because they do not want to offend a candidate when the deliberations become public. This

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[118] Applicant's Heads of Argument at para 79.

[119] Interlocutory Founding Affidavit at para 34; Record p 14. See also Applicant's Heads of Argument at para 75.

[120] Interlocutory Replying Affidavit at para 28; Record p. 73.

rationale is supported throughout the Anglo-American world. Many jurisdictions allow far less transparency than the JSC in order to advance it.

131. The Applicants are dismissive of the JSC's reliance on the impact of disclosure on the dignity of the candidates.[121] Applicants who are willing to endure public interviews, it argues, could hardly be affected by the disclosure of deliberations. But those applicants agreed to apply on the understanding that the deliberations would be confidential. It may be that some candidates will be unaffected by the release of deliberations. But it would violate the basis on which they agreed to put their names forward and would discourage future possible nominees from agreeing to being interviewed. In addition, while questions put to candidate during the interview may well be embarrassing, the frank opinions of senior members of the judiciary and the executive as to their competence will be even more so.

132. Moreover, the reasons given by the Chief Justice and the questions asked at interviews will not compare candidates in the same way as deliberations. The selection clearly indicates which candidates the JSC preferred; the deliberations potentially will reveal how the Commission as a whole, and potentially individual commissioners, ranked each candidate. It is one thing to know that some candidates were preferred for selection over you, it is another to have it publicly known that you were ranked last of all the unsuccessful candidates.

133. The Applicant argues that the recording is not in fact confidential because the Reasons compiled by the Chief Justice were released without impairing the integrity of the candidates, or the commissioners' ability to have candid

[121] Ibid at paras 36-37.

discussions.[122] This is simply false. It is not the specific considerations expressed at the meeting that concern the JSC; those have been accurately captured by the Chief Justice. The JSC is concerned about the principle that its deliberations should be confidential.

134. In addition, it is certainly possible that the Chief Justice's reasons could be an accurate recording of the deliberations, yet that disclosing the contents of the deliberations would affect: the dignity of the candidates (who had an expectation of privacy); the candour of future JSC meetings; and the JSC's ability to attract applicants in the future.

135. In addition, the Chief Justice's reasons do not reveal which commissioners who spoke held views for or against particular candidates. The deliberations do. It is one thing for the reasons of the JSC as a collective to be released. It is another for each commissioner's (or each who spoke) views to be known. Commissioners will not be dissuaded from candour because the distilled reasons will be released. They will be chilled if they know their personal views will become known.

136. The Applicant's last contention is that "*continued concealment of the immediate and accurate record of the Deliberations ... can only fuel speculation and suspicion, and thereby erode public confidence in the processes of the [JSC]*".[123] There is no basis for this contention. Before people were even nominated for the five positions, the JSC had announced that its deliberations would be private. It cannot reduce public confidence for the JSC to adhere to the process it said it would adopt. Public suspicion – as

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[122] Interlocutory Founding Affidavit at para 28; Record pp 12-13.

[123] Interlocutory Application at para 39; Record p 16.

opposed to the unreasonable suspicion of the Applicant – is not fuelled merely because the JSC refuses to comply with the Applicant's demand for the recording. The public have confidence in the JSC because it has an open nomination process, a public interview process, and releases, on request, the reasons for its decisions. Public confidence will not be affected by keeping the deliberations secret. Even if keeping the deliberations confidential would have some impact on public confidence, this is easily outweighed by the negative impacts of open deliberations.

Weighing the competing interests

137. When the competing interests are weighed, the scale must come down on the side of the JSC. Confidentiality is necessary to protect the functioning of a vital constitutional institution. Keeping the deliberations confidential is in line with international best practice designed to attract applicants for judicial office, and to allow them to be fully vetted.

138. On the other hand, the Applicant does not require the deliberations to assert its rights. And while openness and transparency are important, they are limited. Transparency is not an absolute good that should be pursued without regard to the consequences. In this instance, the consequences are serious for the JSC and for South Africa's judiciary.

139. The claim for confidentiality should be upheld and the deliberations excluded from the Rule 53 Record.

VI REMEDY

140. The Applicant suggests that, even if the recording is found to be confidential, it should not be concealed from the Court.[124] The recording, they argue, should be marked confidential and be available to the court, the Applicant's legal representatives and the applicant, subject to a confidentiality undertaking.

141. The JSC does not exclude the possibility that the court could be granted limited access to the recording subject to confidentiality undertakings.[125] This is a decision for the Court to make after considering all the relevant factors.

142. In *Bridon*, for example, the High Court granted such an order, and the Supreme Court of Appeal confirmed it. The order limited access to the confidential documents to the legal representatives and one expert. Those parties had to sign a confidentiality agreement before being given access to the documents. In addition, all further pleadings had to be divided into confidential and non-confidential sections.[126]

143. If the Court determines that the recording is not part of the Rule 53 Record, or that the Applicant has failed to challenge the relevant confidentiality provisions, then there is no basis for such a confidentiality order; the deliberations will simply be excluded. However, if the Court holds that it falls within the purview of rule 53, that the Applicant can demand access in the absence of a challenge to s 38 and regulation 3(j), but that the JSC has a

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[124] Interlocutory Founding Affidavit at para 42; Record p.17.

[125] Interlocutory Answering Affidavit at para 43; Record p. 60

[126] *Bridon* (n 49 above) at para 9.

legitimate claim to confidentiality, it may be appropriate to grant such an order.

144. The JSC submits that such an order would still be inappropriate. For the reasons already given, the record of deliberations is not necessary for the Applicant to prosecute its claim. The reasons are contained in the Reasons produced by the Chief Justice. The deliberations will be no more accurate an account of the JSC's reasons than the reasons already provided.

145. In addition, the precedent set will still have the negative effects the JSC seeks to avoid. Although it is not true of the Applicant, the most likely person to challenge a decision of the JSC is an unsuccessful applicant. If he or she (together with his or her lawyers and the judges deciding the matter) is routinely entitled to access the deliberations in litigation, commissioners may well censor their thoughts to avoid them being revealed to candidates.

146. Even limited release will deter potential candidates from accepting nominations. They will know that the unfiltered views of commissioners will potentially be shared with other candidates who applied for the position, with their lawyers – who may well be known to the candidate – and with at least one High Court judge. There is no doubt that lawyers will consider this possibility when they are deciding whether to accept a nomination.

147. However, if the Court is minded to grant limited access, the JSC will insist on two elements of such an order:

147.1. Access must be limited to the legal representatives, not to members of the Applicant. While this approach will place the Applicant and its legal

representatives in a difficult position,[127] it has been approved by the courts,[128] including by the SCA in *Bridon*; and

147.2. That confidentiality is maintained in any future pleadings by dividing them into confidential and non-confidential portions.

VII COSTS

148. The Applicant seeks a punitive costs award against the JSC on the basis that it should have disclosed the existence of the recording.[129] There is no ground for this submission. As pointed out above, the law on whether the recording formed part of the Rule 53 Record is, at best for the Applicant, unclear. There was no duty on the JSC to inform the Applicant about documents that according to SCA precedent need not be disclosed under Rule 53. Nor was it necessary to seek leave of the Court to exclude a document that is not part of the Record. The JSC plainly, and rightly, regarded the deliberations as excluded from the Record.

149. Moreover, the JSC has never sought to hide the existence of the recording from the Applicant. Its existence appears plainly from the Record, particularly the Chief Justice's reasons which could only have been compiled from a record of the deliberations (whether minutes or a recording).[130] And the JSC

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[127] See, for example, *Unilever Plc v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 341C-F.

[128] *Competition Commission v Unilever Plc* 2004 (3) SA 23 (CAC) at 30F-I; *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W); and *Crown Cork & Seal Co Inc v Rheem SA (Pty) Ltd* 1980 (3) SA 1093 (W).

[129] Interlocutory Founding Affidavit at para 23; Record p 11; Applicant's Heads of Argument at para 89.

[130] Answering Affidavit at para 26; Record pp. 49 - 50.

made no attempt to hide the existence of the recording when the Applicant inquired about it.[131]

150. This is not the conduct of a dishonest or vexatious litigant. It is the conduct of a constitutional body acting within the bounds of the law, and in line with its rules of process and its empowering statute. No punitive costs award is warranted.

151. The JSC submits that, if the Applicant is successful, costs should be awarded on the ordinary scale. If the application fails, there should be no order as to costs.[132]

VIII CONCLUSION

152. In sum, the Applicant is not entitled to the recording as part of the Rule 53 Record. In addition, the Applicant has failed to challenge the statute and regulation that establish the confidentiality of the JSC's deliberations. There are strong reasons for protecting the confidentiality of the JSC's deliberations. It will ensure candid deliberations, protect the privacy and dignity of applicants, and encourage future applications. On the other side of the scales, there are only vague claims for open justice and transparency without a demonstration of real prejudice if the recording remains confidential.

153. The application should, accordingly, be dismissed.

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[131] Interlocutory Founding Affidavit at para 16.

[132] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

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