ORIGINAL

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NO.

WCC CASE NO 8647/2013

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
JUDICIAL SERVICE COMMISSION	Respondent
with	
POLICE AND PRISONS CIVIL RIGHTS UNION	First *Amicus Curiae*
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Second *Amicus Curiae*
DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	*Third Amicus Curiae*

APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the applicant hereby makes application to the President of the above Honourable Court, in terms of section 20(4)(b) of the Supreme Court Act, 1959, for an order in the following terms:

1. that the applicant is granted leave to appeal to the above Honourable Court; *alternatively*, to the Full Court of the Western Cape Division of the High Court, Cape Town against the whole of the judgment and the order handed

down by his Lordship, the Honourable Mr Justice Le Grange, on 5 September 2014 (including the order as to costs) ("**judgment and order**");

2. that the judgment and order of his Lordship, the Honourable Mr Justice Le Grange, on 30 October 2014, refusing leave to appeal against the judgment and order (including the order as to costs), be set aside;

3. that the costs of the application for leave to appeal to the court *a quo* and the costs of this application will be costs in the appeal;

4. affording the applicant further and / or alternative relief.

TAKE NOTICE FURTHER THAT within one month from the date upon which this application is served, the respondent may file its answering affidavit, if any, with the Registrar of the above Honourable Court.

TAKE NOTICE FURTHER THAT the applicant has appointed the offices of Webber Wentzel Attorneys as its attorneys of record **C/O SYMINGTON & DE KOK**, as set out below, as the address at which it will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER THAT the accompanying affidavit of **MORAY HOWARD HATHORN** will be used in support of this application.

Dated at Johannesburg on 19 November 2014

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Ref: L Venter

To:
THE REGISTRAR
Supreme Court of Appeal
Bloemfontein

And to:
THE REGISTRAR
WESTERN CAPE DIVISION OF THE HIGH COURT
Cape Town

And to:
THE STATE ATTORNEY, CAPE TOWN
Respondent's Attorneys
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1593/13/P12

And to
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And to:
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And to:
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AFFIDAVIT IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

MORAY HOWARD HATHORN

do hereby make oath and say:

1. I am adult male attorney, practising at 10 Fricker Road, Illovo, Johannesburg, as a partner in Webber Wentzel, the attorneys of record for the applicant in this matter. I am duly authorised by the applicant to depose to this affidavit. The facts set forth in this affidavit fall within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.

THE PARTIES

2. The parties are the same parties which appeared before the court *a quo*.

3. The applicant is the Helen Suzman Foundation ("**HSF**" or "**applicant**"), a non-governmental organisation whose objectives are "*to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights.*"

4. The first respondent is the Judicial Service Commission ("**JSC**" or "**respondent**"), a body created by section 178 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"), vested with the powers assigned to it in the Constitution and by national legislation.

5. The first and second *amici curiae* are the Police & Prisons Civil Rights Union ("**POPCRU**") and National Association of Democratic

Lawyers ("**NADEL**") respectively and were admitted as such by order of court dated 12 September 2013.

6. The third *amicus curiae* is the Democratic Governance and Rights Unit ("**DGRU**") and was admitted as such by order of court dated 8 July 2014.

BACKGROUND TO THIS APPLICATION

Introduction

7. It is unfortunate that the applicant finds itself in the position where it has to petition this Honourable Court for leave, especially, as I set out below, in light of the line of provincial division authority, including that of the Western Cape Division, which found directly against the position propounded by the Honourable Mr Justice Le Grange in his judgment handed down on 5 September 2014 annexed marked "**MHH1**" ("**the main judgment and order**" or "**the main judgment**" as the context requires.) in which the interlocutory application was dismissed. I attach the typed order in this regard marked "**MHH2**".

8. Further, it is inexplicable that leave to appeal was denied when one has regard to the fact that the Honourable Mr Justice Le Grange, neither in the main judgment, nor in his reasons refusing leave to appeal, considered the alternative relief prayed for by the applicant, namely a limited disclosure confidentiality regime.

9. As is evident from the judgment and order dismissing leave to appeal handed down by the Western Cape Division of the High Court, Cape Town ("**the High Court**") on 30 October 2014, annexed marked "**MHH3**" ("**judgment dismissing leave to appeal**"), the learned judge *a quo* applied the incorrect test in deciding whether to grant leave to appeal to the applicant. I attach the typed order in this regard marked "**MHH4**".

The Western Cape High Court judgment dismissing the application for leave to appeal

10. Paragraph 3 of the judgment dismissing leave to appeal betrays a fundamental misconception of the test for granting leave to appeal.

11. The Honourable Mr Justice Le Grange held that he has "*carefully considered the Notice of Application for Leave to Appeal and the arguments of counsel. In my view the Applicant has not raised anything new in it's application for leave to appeal, be it on the facts or the law, that was not considered in the judgment. My views remain unchanged and I have nothing further to add to the reasons advanced in my judgment*". This, with respect, is an error of law. The test is whether a different court could reasonably come to another conclusion and not whether the learned Judge *a quo* will do

so, or whether anything "new" is advanced beyond that which was previously argued regarding the facts or the law.

12. The applicant submits that, when the correct test for the grant of leave to appeal is applied, there are undoubtedly reasonable prospects that another court will come to a different conclusion to that arrived at in the main judgment and order.

13. It is against this background that the applicant now seeks relief from the above Honourable Court.

Historical background and factual matrix

14. On 4 June 2013, the applicant instituted review proceedings against the respondent for an order, *inter alia*, declaring that the decision taken by the respondent, under section 174(6) of the Constitution, to advise the President of the Republic of South Africa to appoint certain candidates, and not to advise him to appoint certain other candidates (collectively, **"the candidates"**), as judges of this Honourable Court (**"the Decision"**) was unlawful and / or irrational and was thus invalid (**"the main application"**).

15. The main application was served on the respondent on 6 June 2013. Within 15 days thereafter, the respondent was required, under Rule 53(1)(b), to dispatch to the Registrar of this Honourable Court the record of the Decision, together with any reasons for the Decision it

was legally required or desired to give (collectively, "**the Record**"), and to notify the applicant that it had done so. That period expired on 28 June 2013, by which date the applicant had received no such notification from the respondent.

16. The applicant did, however, receive the respondent's notice of its intention to oppose the main application, on 26 June 2013.

17. On 8 August 2013, after repeated requests by the applicant for delivery of the Record and substantial delay on the part of the respondent, the Record was lodged with the Registrar of the High Court. The Record - as lodged - comprised six volumes containing copies of the following:

17.1 the reasons for the Decision, annexed marked "**MHH5**" for ease of reference ("**the Reasons**"), setting out "*considerations*" in respect of each of the candidates, which:

17.1.1 "*would have occupied the minds of Commissioners when they were called upon to vote*";

17.1.2 "*can therefore be concluded [to] constitute the reasons why they voted as they did*"; and

17.1.3 "*have been compiled by the Chief Justice from the contributions of Commissioners during the deliberations, as mandated by the Commissioners at the end of the meeting*".

17.2 transcripts of the respondent's interviews with each of the candidates;

17.3 each candidate's application for appointment;

17.4 comments on the candidates from professional bodies and individuals; and

17.5 related research, submissions and correspondence.

18. The Record did not include any minutes, transcripts or other contemporaneous records of the respondent's official deliberations after interviewing the candidates up to the time of taking the Decision ("**the Deliberations**"). The applicant was not, however, at that time, aware of the existence of the aforesaid records.

19. On 11 September 2013, and two days before it was due to file its supplementary founding affidavit, the applicant became aware that, at least at the time of taking the Decision, the respondent employed a practice of making and maintaining audio recordings and transcripts of its proceedings. It thus became clear that the Record was incomplete and not in compliance with Rule 53(1)(b), for want of inclusion of any copy or transcript of the audio recording of the Deliberations (collectively, "**the Recording**"), or any reference to it.

20. This absence is surprising, as the Recording is patently the most immediate and accurate record of the Decision and the process leading up to the Decision. The Recording will be indispensable in determining whether there is a rational connection between the Deliberations, the Decision and the Reasons.

21. Consequently, on 11 September 2013, Webber Wentzel addressed a letter to the State Attorney, a copy of which is annexed marked "**MHH6**", noting that the Recording was absent from the Record lodged, and requesting that it be provided by 18 September 2013.

22. On 18 September 2013, the State Attorney wrote a letter to Webber Wentzel, a copy of which is annexed marked "**MHH7**", confirming the existence of the Recording but requesting an extension until 10 October 2013 to enable the respondent "*to properly consider and respond to [the applicant's] request*" after "*discussion*" at a meeting to be held on 7 October 2013.

23. On 4 October 2013, Webber Wentzel wrote a letter to the State Attorney, a copy of which is annexed marked "**MHH8**", clarifying that the Recording was clearly an "*important and inseparable part*" of the record of the Decision, and thus that its dispatch was not merely "*requested*" by the applicant but required by Rule 53(1)(b).

24. On 10 October 2013, the State Attorney wrote a letter to Webber Wentzel, a copy of which is annexed marked **"MHH9"**, conveying the respondent's refusal to lodge the Recording, in the following terms:

> *"2. Our instructions are that the post interview deliberations of the JSC are done in a closed session for reasons of confidentiality. The rationale for the confidentiality of the Commission's deliberations is to enable Commissioners to have frank and robust debate around the suitability or otherwise of candidates. The other reason is to protect the integrity and dignity of the candidates without impeding or undermining the ability of the Commissioners to submit them to robust assessment.*
>
> *3. To the extent that the request draws its inspiration from the Judicial Service Commission and Another v Cape Bar Council and Another judgment, it is our understanding that the judgment stated that, as general rule, the JSC is obliged to give reasons for its decision not to recommend a particular candidate, if properly called upon to do so. The judgment did not address the question of the duty or otherwise of the JSC to make its deliberations public."*

25. As will be shown below, the respondent's refusal to dispatch the Recording to the Registrar, and thus to comply fully with Rule 53(1)(b), is characterised by serious procedural and substantive deficiencies.

The Western Cape High Court Proceedings (interlocutory proceedings and leave to appeal)

26. Based on the respondent's refusal to lodge the Recording as part of the Record as set forth above, the applicant launched proceedings in the Western Cape Division of the High Court, Cape Town ("**High Court**") under Rules 6(11) and 30(A) of the Uniform Rules for an order, *inter alia*, compelling the respondent to comply with the provisions of Rule 53(1)(b) of the Uniform Rules of Court, namely to dispatch to the Registrar of that Honourable Court the full record of the proceedings sought to be reviewed in the main application, including the Recording ("**the interlocutory proceedings**").

27. The High Court heard oral argument in the interlocutory proceedings on 8 August 2014 and handed down the main judgment and order on 5 September 2014. The interlocutory proceedings were dismissed on various grounds which I set out below.

28. The applicant then applied for leave to appeal to the High Court on 10 September 2014. A copy of the application for leave to appeal

and the applicant's heads of argument are attached marked "**MHH10**" and "**MHH11**" respectively. The Honourable Mr Justice Le Grange heard the application for leave to appeal on 29 October 2014, by agreement between the parties and delivered the judgment dismissing leave to appeal on 30 October 2014. I deal with the judgment dismissing leave to appeal further below.

GROUNDS OF APPEAL: THE JUDGMENT DISMISSING THE INTERLOCUTORY APPLICATION AND ITS FLAWS

The purpose of the delivery of the Record under Rule 53

29. As the Appellate Division held in *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A), the manifest purpose of Rule 53 is to "*confer the benefit [on the applicant] that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court…. It confers real benefits on the applicant, benefits which he may enjoy if and to the extent needed in his particular circumstances*" (at pages 660 and 662).

30. It is a fundamental requirement of procedural fairness for an applicant seeking to review and set aside an exercise of public power subject to judicial review to be afforded the mechanisms to know what the public body knows and to be afforded access to all

material (except where covered by privilege) which is germane to the decision and possible review of that decision.

The content of the Record

31. In the first place, the main judgment holds, at paragraphs 12 to 14, that the documents selected and unilaterally determined by the Judicial Service Commission sufficiently cover the purpose behind Rule 53. This is incorrect.

32. It is not open to the JSC or any other decision maker to determine what precise documents it will or will not disclose as part of the record. The correct focus should be on whether the recording and any transcription of the deliberations of the JSC – which were not produced – ought to have been disclosed as part of the Record.

33. The test for disclosure is an objective one and all documents which may have a bearing on or evidence the decision-making process or the outcome of the decision must be disclosed. This much was held by the Western Cape Division of the High Court in *City of Cape Town v South African National Roads Agency Ltd and Others* 2013 JDR 1022; [2013] ZAWCHC 74, especially para [48] ("**the *SANRAL* decision**") and is supported by other provincial division jurisprudence. In this regard, I refer to the following cases: *Afrisun Mpumalanga (Pty) Limited v Kunene NO* 1999 (2) SA 599 (T), 628-

9; and *Comair Limited v The Minister of Public Enterprises* (NGHC case no: 13034/13), 4 and 18 (the latter, unreported judgment is annexed marked **"MHH12"**). The applicant's case falls squarely within the ratio of these decisions, from which the Honourable Mr Justice Le Grange sought to deviate. The distinction that the Court *a quo* drew between the JSC and other decision-making bodies in its attempt to distinguish those cases is not supported by any statutory or judicial authority.

34. Moreover, no Court has, in a reported judgment that the applicant is aware of, sought to prescribe different standards for different decision-makers in respect of the content of the Record. In effect, the learned judge *a quo* shifted the onus onto the applicant to justify its entitlement to the documents which should have been part of the Record by which were excluded by the JSC without the sanction of the High Court. It is respectfully submitted that the court *a quo*'s approach in this regard cannot be countenanced. The applicant does not have to justify why documents which ordinarily form part of the Record should not be excluded from the Record. In any event, if the JSC wished to withhold any part of the Record, it should have applied to Court before filing the Record to seek the Court's leave to deviate from the Uniform Rules. This has never been done.

35. Based purely on the case law to date, it is clear that another Court may well come to a different conclusion in respect of the merits of this matter.

36. The main judgment further holds, at paragraph 15, that the volume of the Record already dispatched by the JSC under Rule 53 of the Uniform Rules of Court amounts to compliance with Rule 53. This overlooks the fact that the content of the record:

36.1 is the relevant factor in determining compliance with Rule 53, and not the volume thereof;

36.2 was not traversed, in any detail, in the application *a quo* or any of the affidavits and did not form the subject matter of that application. What was traversed extensively in the founding papers of the applicant was the absence of the Recording; and

36.3 was not before the Court.

37. The High Court further held, at paragraph 16, that the applicant has not been deprived of key documentation, is not "*forced to launch a review application in the dark*", and has been afforded the full benefit of Rule 53. This too is incorrect.

38. In fact, as stressed in the *SANRAL* decision supra, the most relevant documentation evidencing the decision-making of an organ of state

is the record of its deliberations. It is that record that has been withheld and which will clearly be relevant, of great value to the applicant and the Court, and may even be dispositive of the matter.

39. The court *a quo* held, at paragraph 15, that the provision of reasons (drafted by a member of the challenged decision-making body) may substitute for the provision of relevant parts of the record in these proceedings.

40. However, these two requirements are separate and cumulative requirements in law. The record provides the information or documentation which the decision-maker created or considered in the course of making the decision. The reasons are simply either contemporaneous or (ordinarily) post-hoc justification for the decision. These requirements are specifically separately mentioned in Rule 53 itself. The purpose of the record is to place the litigant and the Court in as informed a position as the JSC in relation to what the JSC considered and how it arrived at its decision. To allow the decision-maker to circumvent the requirement to produce a copy of the Recording and instead to rely on the summary or distilled reasons created by the decision-maker (or, worse, one of its members) itself is to thwart the very purpose of the delivery of the record under rule 53. This is particularly so in circumstances where the Chief Justice has expressly indicated that he collated the

reasons from the very deliberations which the JSC now seeks to withhold. If this reasoning were to prevail, then every decision-maker can subjectively determine how the decision-making process and the decision will be portrayed to the outside world, even though what actually happened may be very different.

Failure to address inconsistencies in the respondent's position

41. The learned judge *a quo*, with respect, failed completely to consider the fundamental inconsistency inherent in the respondent's stance, namely that:

41.1 should the reasons provided by the respondent to the applicant accurately reflect and encapsulate the relevant considerations and/or deliberations, then there can be no good reason to withhold the transcript and recording of deliberations. In such a circumstance, the dignity of candidates or any other person cannot possibly be undermined materially more by the disclosure of the transcripts and recording;

41.2 if the reasons provided in the Record do not, in fact, reflect the relevant considerations and/or deliberations, then this is precisely why the applicant must be afforded access to the deliberations and the failure to do so denies it the procedural and substantive safeguards provided for in Rule 53;

41.3 as neither the Court nor the applicant can be in a position to analyse whether the reasons proffered do, in fact, comport with the considerations and/or deliberations, Rule 53 represents the procedural safeguard to ensure that a decision-maker cannot amend reasons for an impugned decision, and accordingly the record of deliberations, in a transparent and open constitutional democracy, falls to be disclosed.

Further clear misdirections by the court *a quo*

42. If anything, the veil over the deliberations is a tool for protecting the JSC's members from scrutiny and has little (if anything) to do with the dignity of the candidates. This is obviously not an interest (to the extent that it is an interest at all) worthy of protection, in the context of South Africa's constitutional democracy based on openness, accountability and transparency. This is reinforced by the fact that the candidates were subjected to an intensive and necessarily scathing and intrusive public interview process.

43. The JSC was obliged to put any perceived failing of a candidate to such candidate for rebuttal and comment in the interview and could not simply leave such perceived failings for private deliberations only. Thus, if the deliberations evidence reliance on factors or alleged facts in respect of which the candidate was not given an

opportunity to respond, then this would constitute a further ground of review. This cannot be ascertained without access to the Recording. The main judgment and order fail to deal with this argument, or (as highlighted below) the fact that even if the Court disagreed with the applicant's submissions in this regard, the appropriate relief would be to impose a confidentiality regime thereby striking a balance between any interests or rights of the candidates that may be affected, and the applicant's interest in proper disclosure and the court's need to scrutinise the full record in order properly to discharge its review function. The applicant expressly contemplated the possibility of such "limited disclosure" regime in its founding papers (at paragraphs 42 to 46 of its founding affidavit: those paragraphs are annexed marked "**MHH13**").

44. In fact, the JSC itself recognised, at paragraphs 141 to 143 and 147 of its heads of argument in the interlocutory proceedings (those paragraphs are annexed marked "**MHH14**"), that "*the Court could be granted limited access to the recording subject to confidentiality undertakings*" and that if the "*Court is minded to grant limited access, the JSC will insist on ...access [being] limited to the legal representatives, not to members of the Applicant*". It is noteworthy that the judge *a quo* did not even consider the possibility or appropriateness of a limited access confidentiality regime.

45. Moreover, candidates were well aware of the legislative carve-out provided for under section 38(1) of the Judicial Service Commission Act, 1994, which renders all confidential information of the JSC, including the deliberations of the JSC, susceptible to production pursuant to an order of Court, and participated fully in the process in this knowledge.

46. Ultimately, the record under Rule 53 is not merely for the benefit of an applicant, but for the benefit of the Court, which the court *a quo* ignored.

Irrelevant considerations of the court *a quo*

47. The court *a quo*, with respect and with reference to paragraph 17 of the judgment, erred by accepting that the JSC's public processes somehow absolved the JSC from furnishing a complete Record. The overall process undertaken by the JSC in the appointment process (such as the fact that the interviews are public) does not detract, in any way, from the JSC's obligation to conduct its business in an open, transparent and accountable manner and, further, to disclose the deliberations.

48. Moreover, whether or not these processes are comparable or, in fact, on all fours with the processes adopted in foreign jurisdictions are largely irrelevant for the purposes of this analysis. South Africa

is a unique democracy and the process of appointing judges must conform to the principles enshrined in the South African Constitution, legislation and jurisprudence.

49. The fact that the JSC is permitted to determine its own process, as the main judgment relies on at paragraph 18, whilst an important functional consideration, cannot mean that the JSC is allowed to circumvent the requirements of the Uniform Rules or shield itself from judicial scrutiny.

The uniqueness of the JSC

50. The High Court held, at paragraphs 18 to 21 of the main judgment, that because criteria for the appointment of judges have been published, coupled with the requirement for public interviews and the duty to give reasons, this amounts to satisfaction of the requirements of openness, transparency and accountability. Implicit in this is some assertion that the scope of Rule 53 was too wide and should curtailed.

51. There was, however, no challenge before the High Court as to the lawfulness of Rule 53 or the need to limit it.

52. The Court concluded that the JSC is a unique entity which derives its powers from the Constitution and, more importantly, is entitled to determine its own procedure.

53. This ignores the purpose of the delivery of the Record under rule 53, which is to afford the applicant a procedural right to be armed with the same material documentation which is in possession of the decision-maker in respect of the decision sought to be reviewed or set aside. The respondent is, in effect, contending that the JSC may operate outside the ambit of judicial review – and the court a quo through its judgment endorsed this contention. This approach is contrary to section 38 of the Act itself, which allows disclosure by Court order. In any event, section 38 relates to maintenance of confidentiality by individual officers of the JSC, and not to the JSC as a whole.

54. The Court further held, at paragraphs 22 to 28 of the main judgment that the applicant's failure to challenge the accuracy and/or completeness of the reasons is a material factor to be taken into account in determining the ambit of the record which the JSC is obliged to provide under Rule 53.

55. This, respectfully, cannot be the case, especially where:

55.1 the very fact that the Recording was not disclosed materially curtails the applicant's ability to challenge the accuracy of the reasons (and accordingly the Court placed the cart before the horse);

55.2 the applicant has not yet supplemented its founding affidavit, as it is entitled to do under Rule 53; and

55.3 a challenge as to the accuracy and/or completeness of reasons already disclosed is not a jurisdictional requirement to pursue outstanding portions of a Rule 53 record.

JSC deliberations are akin to those of a magistrate or judge

56. The Court also held at paragraph 29 of the main judgment, that the JSC's deliberations are analogous to the deliberations of a magistrate or judge and that such analogy is determinative of the content of the record in a review under Rule 53. It is not clear in what manner the JSC is comparable to a magistrate or judge. In any event, the purpose of the analogy is unclear.

57. Every decision-maker (as long as they are subject to judicial review) would have to produce reasons and the full Record of its decision-making process. In the context of the JSC, where the decision is made by a deliberative body, it is the deliberations which are critical to the decision ultimately reached (and whether that decision was reached lawfully, rationally and procedurally fairly). It must thus be disclosed. It was not before the High Court to determine what would be disclosed in the case of a judicial officer being taken on review in a specific context. The JSC did not perform any judicial functions in

this case and thus any possible policy factors about disclosing judicial deliberations are inapplicable.

58. The Court further found that the position or identity of the individual who drafted the reasons is a relevant consideration in determining the remit of the Record under Rule 53 or, indeed, the accuracy, completeness and/or sanctity of the reasons.

59. This is not so, and no authority that the applicant is aware of supports this conclusion. The duty of disclosure under Rule 53 is unaffected by the position or identity of the decision-maker.

60. The High Court found that, policy considerations, normative standards or legal requirements bar disclosure of the deliberations completely, and did not venture to consider an appropriate confidentiality regime which may be put in place to safeguard the further dissemination of one or other aspect of the record.

WHY THIS HONOURABLE COURT SHOULD GRANT LEAVE TO APPEAL

61. It is respectfully submitted that another court could reasonably arrive at a different conclusion based on:

61.1 a proper application of the *rationes* of the relevant cited provincial division case law on the content of the Rule 53 record. In any event, the divergent provincial decisions on the

content of the record (in the absence of binding SCA authority) is reason in itself for the matter to be heard by the SCA for determinative guidance;

61.2 a correct interpretation of the *SANRAL* decision (the Court held that this decision should be confined to its facts and did not reflect a statement of legal principle of more general application, as appropriate to a constitutional democracy);

61.3 a correct interpretation of *MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) ("***Intertrade Two***") (the Court held that the failure by the SCA in *Intertrade Two* to adopt the approach advocated for in the *SANRAL* decision is indicative of a lack of support for the general application of the *SANRAL* decision approach, when, in fact, the *SANRAL* decision was handed down years after Intertrade Two). The very fact that the *SANRAL* decision was decided after *Intertrade Two* should be a weighty consideration in favour of following the *SANRAL* decision;

61.4 a recognition (instead of elevating to the status of *rationes decidendi*, as the Court did) that the remarks made in paragraph 15 of the judgment in *Intertrade Two* are merely

obiter dicta. After quoting the Johannesburg City Council judgment, the SCA remarked, in passing as follows:

> "*Some of the items listed in the appellants' abovementioned 'notice' may, conceivably, fall outside the scope of the above description.*"

61.5 At paragraph 27 of the main judgment and order, the judge *a quo* upheld the argument by the JSC that "*even though no firm finding was made, by referring to the dictum of the Johannesburg City Council, the Supreme Court of Appeal indeed endorsed the principle that some documents on the grounds of privilege or relevance may not fall within the ambit of the Rule 53 Record.*"

61.5.1 I respectfully submit that the judge *a quo* erred in holding that these remarks amounted to an endorsement by the SCA of the JSC's position when, in fact, the obiter remarks, as well as the approach adopted by the SCA as a whole in *Intertrade Two*, are supportive of the applicant's position. The SCA, in *Intertrade Two*, ordered disclosure of the sought material and was extremely cautious in stating that there might "*conceivably*" be certain documents which are outwith the remit of the Record. This is very far from a

ringing endorsement of either the Johannesburg City Council decision or the JSC's case in this matter;

61.6 a proper consideration of the legal issues of confidentiality and privilege, in light of current constitutional jurisprudence, which the Court failed to do. The Court agreed with the JSC's interpretation of *Intertrade Two* that "*some documents on the grounds of privilege or relevance may not fall within the ambit of the Rule 53 record*". Privilege has never been asserted in this matter, much less argued; and further there is no basis for the proposition that the Recording is irrelevant to the proceedings sought to be set aside (ie, the Decision);

61.7 the fact that little to no weight should be accorded to foreign jurisprudence in this matter. Such jurisprudence is distinguishable from the case of the JSC and South Africa's constitutional framework. All that the jurisprudence indicates is that certain foreign jurisdictions have opted to *legislate* privilege or a certain degree of non-disclosure into their legal framework. No such legislation exists in South Africa. The very fact that certain foreign states have taken legislative steps to keep certain documents secret is a recognition and an indication that in the absence of such steps the documents would have been disclosable;

61.8 sufficient weight being given to principles of statutory interpretation and the express wording of section 38(1) of the JSC Act (the Court held that candidates have an expectation that the deliberations of the JSC would remain confidential, despite the express wording of section 38(1) of the Act and despite there being no admissible, non-hearsay evidence before the Court as to the expectations of candidates). In any event, section 38(1), read in context, refers specifically to natural persons in the service of the JSC in one or other capacity, and not the JSC itself. The section specifically refers to "*[n]o person, including any member of the Commission, Committee, or any Tribunal, or Secretariat of the Commission, or Registrar or his or her staff, may disclose any confidential information or confidential document obtained by that person in the performance of his or her functions in terms of this Act*" (emphases added). The class of persons contemplated clearly does not include the JSC itself. An interpretation which includes the JSC would also make a mockery of the criminal liability imposed under section 38(2), which contemplates imprisonment. The purposes of the provision is clearly to prevent leaks by functionaries of the JSC;

61.9 a proper application of the law regarding confidentiality and recent SCA jurisprudence which provides that confidentiality is not a bar (or, indeed, even a defence) to disclosure of information under Rule 53; that valid justification must be adduced by the party claiming confidentiality and that confidentiality regimes (such as confidentiality agreements) may be put in place to protect any sensitive information (the Court held that confidentiality, in the context of this case, provides a defence to disclosure of any part of the record under Rule 53 despite clear SCA authority to the contrary and despite the complete failure by the respondent to make out any case at all in favour of confidentiality, to justify withholding any portion of the record required under Rule 53, or to challenge the constitutionality or lawfulness of Rule 53).

62. Based on the above, the applicant respectfully submits that the applicant's prospects of success on appeal are good and it is probable, let alone reasonably possible, that another court may come to a different conclusion. Having regard to the importance of this matter for procedural and substantive justice and the vindication of fundamental human rights, as well as the seeming divergence between the judgment of Le Grange J and several other decisions in

the provincial divisions, it is respectfully submitted that this case properly deserves the attention of the Supreme Court of Appeal.

CONCLUSIONS

63. The Recording is plainly part of the record under Rule 53 and there is no basis for withholding it from the applicant, particularly where a confidentiality regime may easily be put in place. The failure to make the Recording available prejudices the applicant in its ability to pursue the review under Rule 53, and denies the review court the full record necessary for the proper discharge of its review powers.

64. The Court *a quo* failed to apply the correct legal principles in the interlocutory proceedings and the application for leave to appeal. The applicant respectfully submits that it is clear from the above, that another court may and, indeed, probably will, come to different conclusions to those reached in the main judgment and order.

65. In the circumstances, the applicant submits that it has made out a proper case for leave to appeal to be granted in this matter, in accordance with the application for leave to appeal to which this affidavit is attached.

WHEREFORE the applicant prays that this Honourable Court grant an order in terms of the notice which this affidavit supports.

DEPONENT

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at ILLOVO on this the 19th day of NOVEMBER 2014, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS
Full names:
Business address:
Designation:
Capacity:

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"MHH1"

REPUBLIC OF SOUTH AFRICA

REPORTABLE

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

CASE NO. 8647/2013

In the matter between:

THE HELEN SUZMAN FOUNDATION	Applicant
and	
JUDICIAL SERVICE COMMISSION	Respondent
with	
POLICE AND PRISONS CIVIL RIGHTS UNION	First *Amicus Curiae*
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Second *Amicus Curiae*
DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	Third *Amicus Curiae*

Counsel for the Applicant	: Adv. David Unterhalter SC Adv. Max du Plessis Adv. Tembeka Ngcukaitobi

Attorneys	: Webber Wentzel
Counsel for 2nd Defendant	: Adv. Ismail Jamie SC Adv. Namhla Pakade
Attorneys	: State Attorneys
Attorney for 1st *Amicus Curiae*	: Mr. Clive Hendricks
Attorneys	: Marais Müller Yekiso Inc.
Attorney for 2nd *Amicus Curiae*	: Mr. Fareed Moosa
Attorneys	: Fareed Moosa Attorneys
Counsel for 3rd *Amicus Curiae*	: Adv. K Pillay
Attorneys	: Bowman Gilfillan
Date of hearing	: 8 August 2014
Date of judgment	: 5 September 2014

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

REPORTABLE

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DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	Third *Amicus Curiae*

JUDGMENT DELIVERED: 5 SEPTEMBER 2014

Le Grange, J:-

[1] This is an interlocutory application under Rule 6 (11) and 30A for an order directing the Respondent ("JSC") to comply with Rule 53(1)(b) of the Uniform Rules

of Court and to deliver the full recording of the proceedings sought to be reviewed in the main application, including the audio recording and any transcript of the deliberations of the JSC after the interviews on 17 October 2012. Three amici curiae were granted leave to intervene in these proceedings. The First Amicus, POPCRU, however filed a notice to abide by the decision of this Court.

[2] The Applicant ("HSF"), in the main application, instituted review proceedings against the JSC for an order, declaring, *inter alia*, that the 'decision taken by the Respondent, under section 174(6) of the Constitution, to advise the President of the Republic of South Africa to appoint certain candidates, and not to advise him to appoint other candidates as judges of this Division, was unlawful and or irrational and thus invalid'.

[3] The background facts underpinning this application are largely common cause and, briefly stated, are the following. During August 2013, the JSC filed the record of its decision containing about six lever arch files. It included all the applications of the eight nominees, and the full transcript of the public interviews. The Record also contains a summary of the recorded deliberations ("the Deliberations") which were held in private by the JSC after the interviews. The summary was compiled by the Chief Justice.

[4] It appears that the unsuccessful application by Adv J Gauntlett SC is largely the underlying subject matter in the main application. As part of the Rule 53(1)(b) record, reasons were provided in respect of the eight candidates interviewed for the vacancies in this Division. In addition, reasons were furnished by the JSC in November 2012 to Justice Harmse in relation to why Dalomo AJ (as he then was) and not Gauntlett SC was recommended to the State President for a permanent appointment.

[5] The HSF claims that it only became aware of the recording of the JSC's Deliberations shortly before it was to file its supplementary founding affidavit. The HSF wrote to the JSC requesting the Deliberations. The JSC confirmed the existence of the Deliberations, but refused to disclose them. A further round of correspondence followed between the two parties in which the HSF again demanded the recording, and in response the JSC informed the HSF that it already had all the information it required. The HSF then launched this application. The JSC adopted the view that the HSF is not entitled in law to the Deliberations of the JSC as they do not form part of the proceedings in terms of the Rule, and furthermore, the non-disclosure of the Deliberations is reasoned, justifiable and in accordance with several comparative jurisdictions.

[6] The National Association of Democratic Lawyers, the second amicus, and the Democratic Governance and Rights Unit ("the DGRU"), a unit within the public law department of the University of Cape Town, the third amicus, have adopted a similar view to that of the JSC.

[7] Advocates David Unterhalter SC, Max du Plessis and Tembeka Ngcukaitobi appeared for the HSF. Advocates Ismail Jamie SC and Namhla Pakade appeared for the JSC. The attorney Mr. Clive Hendricks appeared for the first amicus. The attorney Mr. Fareed Moosa appeared for the second amicus. Advocate Karrisha Pillay appeared for the third amicus. I would like to extend my appreciation to the legal representatives of the parties for their comprehensive heads of arguments. It was of great assistance in preparing my judgment.

[8] The principal submissions made by Mr. Unterhalter were as follows: The Record of Proceedings that was furnished by the JSC is wholly inadequate as the Deliberations are the most immediate and accurate record of the decision and the process leading thereto. It was argued that access to the Deliberations is indispensable to any proper determination of whether there is a rational connection between the Deliberations, the Decision and any reason provided by the Respondent. Furthermore, the Deliberations are a central aspect of the Record of which the disclosure is clearly required by Rule 53(1)(b). Moreover, the HSF will be denied the benefit of the said Rule and will be forced to evaluate and argue the rationality,

lawfulness and reasonableness of the JSC's decision without the key documents. The submission was also made that the disclosure of the Deliberations will indeed further the constitutional rights of access to information held by the State, it will advance transparency and accountability and will support the crucial tenets of access to courts and equality of arms. In addition, the JSC's argument that the Deliberations as summarized by the Chief Justice and included in the reasons provided is sufficient, ignores the law and reality. The submission was made that in terms of Rule 53(1)(b) the HSF is entitled to the full record of the Deliberations and in reality the drafter of the summary of the Deliberations has the power to determine what goes into the summary and would be in a position to tailor the reflections of the Deliberations.

[9] Mr. Jamie argued that the selection of judges is a vital and sensitive constitutional function. Furthermore, the JSC has decided to hold a transparent nomination process, and an interview process that is open to the public and the media. In addition, in line with the recent decision in Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA) at para 45, the JSC has accepted that it is obliged to release, on request, the full reasons for its decisions to select certain nominees and reject others. According to Mr. Jamie, the JSC is however within its rights and justified to keep the record of its deliberations and the votes of the individual commissioner's secret. It was further argued that the contention that the JSC is obliged to reveal not only its reasons, but the full recording of its private deliberations in all circumstances, is baseless as it is not only in conflict

with the majority of decided cases on this issue, it is also in conflict with the near universal practice of similar institutions in comparable democracies. It was also contended that the HSF's challenge has nothing to do with the notions of "*transparency*" and "*openness*", but was made merely to attack a decision of the JSC the HSF does not even wish to be set aside.

[10] The second amicus curiae aligned itself with the stance adopted by the JSC. Mr. Moosa, in essence, argued that the non-disclosure of the contents of the Recording is justifiable in law. Ms. Pillay on behalf of the third amicus curiae submitted that there is no justification for the HSF's complaint. The principal argument advanced on behalf of the third amicus curiae was that if one has regard to the overall process adopted by the JSC its approach to the non-disclosure of its recorded Deliberations is reasoned, justifiable and in accordance with several comparative jurisdictions.

[11] The JSC's power to advise the State President on the appointment of Judges of the High Court is derived from the provisions of s 174(6) of the Constitution. In the Cape Bar Council matter *supra* at paragraph [45] Brand JA held that, '....*the JSC is therefore, as a general rule, obliged to give reasons for its decision not to recommend a particular candidate if properly called upon to do so. I do not express any view as to how extensive these reasons should be or who would be entitled to*

request them, or under which circumstances such a request could legitimately be made. That, I think will depend on the facts and circumstances of every case'.

[12] In answering the question whether in the circumstances of this matter the Deliberations form part of the Record as envisaged by Rule 53(1)(b), consideration must be given in my view to the objectives and purpose of the Rule, including the overall process adopted by the JSC in respect of judicial appointments, and the documents and information that had been made available as part of the Record.

[13] The Rule provides as follows:

"53 Reviews

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

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

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

[14] It is settled law that the Rule is primarily intended to operate in favour of and to the benefit of an applicant in review proceedings and to avoid review proceedings being launched in the dark. The Rule essentially confers the benefit that 'all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court'. In this regard see Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 660 F -G; Motaung V Mukubela & Anor NNO; Motaung v Mothiba NO 1975 (1) SA 618 (O) at 625E. Moreover, an applicant should not be deprived of the benefit of this procedural right unless there is clear justification therefor. See Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999 (2) SA 599 (T) at 628-9. The purpose of giving reasons was also properly articulated by Schultz JA in his judgment at para 5 in Transnet Limited v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA), quoting Baxter, "Administrative Law (1989) at 228:

"In the first place, a duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conductive to public confidence in the administrative decision-making process. Thirdly — and probably a major reason for the reluctance to give reasons — rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.'

[15] In the present instance it is common cause that the JSC has dispatched to the Registrar 6 lever arch files, which contain all the documentation and transcripts of the proceedings which took place and resulted in the judicial appointment of five candidates to this Division, as the record of proceedings sought by the HSF to be set aside or corrected. This record of proceedings included the following: each of the eight candidate's individual applications for judicial appointment; comments on the candidates from professional bodies and certain individuals; other related submissions and correspondence; transcripts of the eight candidates' interviews; and reasons for the JSC's decision to recommend certain candidates and not to recommend others. In addition reasons were furnished by the JSC in November 2012 in relation to a complaint why Dalomo AJ (as he then was), and not Gauntlett SC,

was recommended to the State President for a permanent appointment. The drafter of the distilled reasons of the Deliberations was in fact the Chief Justice.

[16] Absent the full record of the Deliberations, has the JSC complied with the objective and purpose of the Rule? In my view the question must be answered in the affirmative. In view of what had been dispatched to the Registrar, the HSF is not forced to launch a review application in the dark. Moreover, the contention that the HSF will be required to evaluate and argue the rationality, lawfulness and reasonableness of the impugned decision without key documents and be denied the benefit of the Rule is unfounded. The HSF is not being deprived of the procedural and substantive safeguards which are the underlying rationale for the Rule.

[17] This brings me to the question, whether there is merit to the HSF's complaints in respect of openness, transparency, equality of arms and access to information, taking into account the JSC's legislative framework and its overall approach in respect of judicial appointments.

[18] The JSC derives its powers from section 178 (4) of the Constitution. It is indeed a sui generis entity mandated with the task of the appointment and removal of judges. It may also advise the national government on any matter relating to the judiciary or the administration of justice. Furthermore, in terms of s 178(6) of the Constitution the JSC is given a certain degree of latitude in respect of its processes.

In terms thereof, the JSC may determine its own procedure but its decisions must be supported by a majority of its members. The Judicial Service Commission Act 9 of 1994 provides in section 5 that the Minister must, by notice in the Gazette, make known the particulars of the procedure which the JSC has determined in terms of section 178 (6) of the Constitution. In terms of such provision, the procedure of the JSC was published in the Government Gazette on 27 March 2003 ("the Procedure"). Significantly, Clause 3 (k) of the prescribed procedure, in respect of the appointment of Judges to the High Court, provides that after the completion of the interviews, the Commission "shall deliberate in private and shall, if deemed appropriate, select the candidates for the appointment by consensus or, if necessary, majority vote."

[19] The JSC has followed the procedure for the selection of candidates for appointment as Judges as clearly set out in Regulation 3. It appears that the nomination forms of each of the eight relevant candidates form part of the furnished Record. After the closing date of nominations, a short list was compiled. All the material received with regard to the short-listed candidates was then distributed to all the members of the JSC as prescribed in Regulation 3(g). Thereafter, the JSC interviewed all the short-listed candidates. The interviews were open to the public and the media and subject to the same rules as those ordinarily applicable in courts of law and there was no set time limit. After completion of the interviews, in terms of Regulation 3(k), the JSC deliberated in private and thereafter advised the President of the names of the successful candidates which was made public.

[20] In addition to these regulatory procedures the JSC has adopted a summary of the criteria to be used when considering candidates for judicial appointments. This has been attached as "FA8" to the founding affidavit in the main application. The Preamble to that document states as follows:

> *"At its Special Sitting held, in Johannesburg on 10 September 2010, the Judicial Service Commission resolved, after a lengthy debate and review of the Guidelines that had been adopted in 1998, to publish criteria used when considering candidates for judicial appointments. This decision is in line with the JSC's principle that the process of judicial appointments should be open and transparent to the public so as to enhance public trust in the judiciary.*
>
> *The following criteria are used in the interview of candidates, and in the evaluation exercise during the deliberations by the members of the Commission: ...."*

[21] Viewed cumulatively, it is evident that transparency and openness of the JSC is ensured by the publication of objective criteria to be used in the selection of judges; the existence of a public interview process; and an obligation falling upon the JSC to give reasons. This process adopted by JSC in respect of judicial appointments in my view does not justify the complaint by the HSF regarding the lack of openness, transparency, equality of arms and access to information.

[22] I now turn to the issue whether the JSC is legally and constitutionally obliged in the present circumstances to reveal not only its distilled reasons but the full recording of its private deliberations, as part of the Rule 53 record.

[23] The long-standing approach of our Courts regarding the interpretation of the Rule can be characterized as follows: *'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.'* In this regard see Johannesburg City Council v The Administrator, Transvaal and Another (1) 1970 (2) SA 89 (T) at 91H-92A; Free State Steam & Electrical CC v The Minister of Public Works and Others [2008] ZAGPHC 256; Lawyers for Human Rights v Rules Board for Courts of Law and Another [2012] ZAGPPH 54; [2012] 3 All SA 153 (GNP); 2012 (7) BCLR 754 (GNP) at para 22.

[24] Recently however certain Courts have adopted a different approach. In Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999 (2) SA 599 (T) it was held that the content and extent of the record of proceedings will depend upon the facts of each case. This matter involved an application for a record of proceedings by a

bidder for a gambling license from the Mpumalanga Gambling Board. The Court after considering the relevant empowering legislation of the Mpumalanga Gaming Act 5 of 1995, which required the board to "*function in a transparent and open manner... unless there is a legally justifiable reason for withholding disclosure",* held that the applicant was entitled to a video recording of the deliberations of a gambling board. Furthermore, it was 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. A similar approach was adopted in Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape and Others 2010 (1) SA 228 (E).

[25] In City of Cape Town v South African National Roads Agency Ltd ("SANRAL") and Others [2013] ZAWCHC 74, it was held that, in certain types of challenges, deliberations should form part of the Rule 53 record. At para [48] the following remark was made by the Court:' *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..,"* In a recent unreported decision of the North Gauteng High

Court in Comair Limited v The Minister of Public Enterprises and Others NGHC Case No: 13034/13, it was also held that Rule 53 entitles an applicant to access to the deliberations.

[26] Is the new approach as developed in the above cases and as reflected in the remarks made in the SANRAL matter persuasive and appropriate, in all requests for the record in terms of Rule 53. In my view the question must answered in the negative. The general approach has always been that the extent of the record of proceedings is dependent upon the facts of each case. (Cape Bar Council at 187C, supra). There is no justifiable reason to depart from this approach in the present instance. The JSC is indeed a unique entity. It not only derives its powers from the Constitution but is also entitled to determine its own procedure. The procedure determined by the JSC in terms of the Constitution has been promulgated and Gazetted in the Government Notice dated 27 March 2003. According to Regulation 3(k), *"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 174(4) of the Constitution by consensus, if necessary, by majority vote."* There is no legal challenge against these regulations and are they valid until they are repealed or set aside.

[27] Furthermore, the new approach as adopted in the SANRAL case has not universally been accepted by our Higher Courts. In MEC for Roads and Public Works,

Eastern Cape and Another v Intertrade Two (Pty) Ltd 2006 (5) SA 1 (SCA), the issue at hand was an application in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") for access to information related to a tender that the respondent had sought to have reviewed in terms of Rule 53. The 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.*" 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. The Supreme Court of Appeal did uphold the claim for the documents under PAIA but in its reasoning referred to the same passage the JSC relies upon in the Johannesburg City Council matter, to the effect that deliberations are excluded from the ambit of a record. The argument advanced by counsel for the JSC is that even though no firm finding was made, by referring to the dictum of the Johannesburg City Council, the Supreme Court of Appeal indeed endorsed the principle that some documents on the grounds of privilege or relevance may not fall within the ambit of the Rule 53 record. Such argument is in my view not without merit.

[28] In the present instance the JSC indeed provided its reasons in the form of the summary compiled by the Chief Justice. Despite the vague assertion by the HSF that a drafter of the summary has the power to determine what goes into the summary and would be in a position to tailor the reflections of the Deliberations, there is no suggestion that the reasons compiled by the Chief Justice are inaccurate. In any

event it is inconceivable that the Chief Justice would have tailored the reflections of the Deliberations of the JSC having regard to its composition regulated by s 178(1) of the Constitution. The relevant part of this section provides:

"178 Judicial Service Commission

(1) There is a Judicial Service Commission consisting of –

(a) the Chief Justice, who presides at meeting of the Commission;

(b) the President of the Supreme Court of Appeal;

(c) one Judge President designated by the Judges President;

(d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;

(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

(g) one teacher of law designated by teachers of law at South African universities;

(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;

(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

(k) when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them."

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

[30] It was also argued by the JSC and the DGRU, that there are valid and cogent reasons supported by international comparative practice why in the public interest deliberations of the JSC should remain private and confidential. The HSF has

expressed the opposite view and argued that public interest demands that the whole record be disclosed and that nothing in this matter permits a departure from that generally established principle. It was further contended by the HSF that the continued concealment of the most immediate and accurate record of the Deliberations can only fuel speculation, suspicion and erode the public confidence in the processes of the JSC.

[31] The HSF stance is not supported by comparative international jurisdictions namely the USA; Canada; United Kingdom; Australia; the Commonwealth; Malaysia; Tanzania and Zambia amongst others.

[32] The following foreign jurisdictions will be highlighted: In the USA, judicial selection occurs at two levels; federal and state. At the federal level, judges are nominated by the President and approved by the Senate. Regularly the Department of Justice seeks advice from the Standing Committee on the Federal Judiciary of the American Bar Association (the ABA), which would prepare a report on a suitable candidate having considered a wide range of information. Such report is not binding but is extremely persuasive. In the matter of *Public Citizen v Department of Justice* 491 US 440 (1989), pursuant to a request by a public interest body , under freedom of information legislation known as FACA (Federal Advisory Committee Act 86 Stat.770), it was concluded by the District Court (691 F. Supp. 483 (1988)) that the legislation could not be interpreted to require disclosure of the ABA materials for the

reason that any need for applying FACA to the ABA Committee is outweighed by the President's interest in preserving confidentiality and the freedom of consultation in the selection of judicial nominees. Such decision was confirmed by the Supreme Court of Appeal. In the concurring judgment of such court it was stressed by Justice Kennedy that applying FACA to the ABA Committee could potentially inhibit the President's freedom to investigate, to be informed, to evaluate and consult during the consultation process.

[33] At state level, a variety of methods are used to select judges. Some states use selection commissions, others elect their judges. The American Judicature Society ("AJS") – an organisation that monitors and advocates on issues of judicial selection – conducted an analysis of all states that have judicial selection commissions (See American Judicature Society *Judicial Merit Selection: Current Status* (2011). It appears that of the 33 states, only five do not have a provision requiring that deliberations are confidential. 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."* (M Greenstein, rev. K Sampson *Handbook for Judicial Nominating Commissioners* (2004) at 24)

[34] The AJS has published a document called "*Model Judicial Selection Provisions*" as an aid to states adopting merit selection. Open meetings for discussing procedures and selection requirements are recommended, but it is left to the state to determine whether interviews should take place in public. The position as far as deliberations is very clear: "*All final deliberations of the judicial nominating commission shall be secret and confidential.*" The AJS explains its reasoning behind its position as follows:

> "*Finding the appropriate balance between preserving the privacy of judicial applicants and providing transparency in the screening process is one of the greatest challenges that nominating commission's 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.*"

[35] American courts have repeatedly upheld the confidentiality of the proceedings of judicial nominating commissions (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). In *Guy v Judicial Nominating Commission* 659 A.2d 777 (Del. Super. 1995), the Superior Court of Delaware rejected a request in terms of a freedom of information statute for records of the Delaware commission holding that providing access to such records 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 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.*"

[36] Support for the need for confidentiality can be found in American academia. Joseph Colquitt has emphasised the need for a balance to be struck between openness and secrecy, in order to ensure 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." (2007) 34* Fordham Urban LJ *73 at 110*

[37] At present, comparing the position advocated by both Colquitt and the AJS, the JSC provides a greater degree of transparency in its nomination and selection procedures, given that all the nomination documents, and the interviews, are public. It is only the Deliberations and the votes of its members that are confidential.

[38] 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, while at the lower level federal judges and provincial judges are generally selected or recommended by a committee. The application and deliberation procedures in respect of the above process are almost entirely confidential

[39] The code of ethics for the commissioners of the Federal Judicial Appointments Advisory Committee, the body which recommends the appointment of judges in lower federal and superior provincial courts, provides 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."*

[40] The Guidelines for Committee Members further provide that "*[a]ll Committee discussions and proceedings must be treated as strictly confidential, and must not be disclosed to persons outside the Committee*", and also requires confidentiality in respect of all documents submitted as part of the application, and in respect of information obtained from references or sources.

[41] Provincial committees appear to follow a similar approach to the issue of confidentiality. For example, the course adopted by the Ontario Judicial Appointments Advisory Committee, is one of complete confidentiality of all applicants. The Ontario Judicial Appointments Advisory Committee in *Annual Report* (2012) at 9 described the position as follows: "*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.*"

[42] The Judicial Appointments Committee ("JAC") is responsible for the selection of judges in England and Wales. In terms of the JAC's empowering statute all information that pertains to a particular person, and is obtained during the appointment process, is confidential (Constitutional Reform Act, 2005, s 132). However, disclosure is permitted if "*required, under rules of court or a court order, for the purposes of legal proceedings of any description.*" Section1 32(4)(c). 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 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.*"

[43] Although there were at least two decisions arising out of requests for documents of the JAC, which did not deal with the same issues, as in the present instance, they at least highlight the fact that in the UK access to the JAC's documents is not automatic. In *Guardian News and Media Ltd v Information Commissioner*, the

Information Tribunal held that the Ministry of Justice was justified in its refusal to disclose information about serious disciplinary actions against judges (*Guardian News and Media Limited v IC (Freedom of Information Act 2000)* [2009] UKIT EA_2008_0084 (10 June 2009)). Furthermore, in *Judicial Appointments Commission (Decision Notice)* [2009] UKICO FS50242843 (24 August 2009) the Information Commissioner upheld a decision by the JAC to refuse access to information about candidates for selection.

[44] Australia does not have a judicial appointments commission. There is however academic support for the establishment of one. The academics making such recommendations have stressed the need for confidentiality not only of the new commission's deliberations, but also of applications and shortlists. See 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.

[45] Simon Evans and John Williams in their article, 'Appointing Australian Judges: A New Model' (2008), appearing in 30 *Sydney Law Review* 294, in which they set out their vision of the reform of the Australian judicial selection process, affirm their acceptance of the importance of transparency in judicial selection, yet 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." (Ibid at 303-304)*

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

[47] In 2013, the Commonwealth Lawyers Association, the Commonwealth Legal Education Association and the Commonwealth Magistrates' and Judges' Association, on advice received from their members, developed a model constitutional clause for judicial appointment commissions (J Brewer, J Dingemans & P Slinn *Judicial Appointments Commissions: A Model Clause for Constitutions* (2013)). The model contains the following 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."*

[48] When comparing the JSC to these other systems, it leaves two distinct impressions: 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 in other international jurisdictions. Whilst it is accepted that transparency in judicial selection should obviously be welcomed, the continuing entrenchment of some degree of secrecy in all comparable systems demonstrates that the JSC's claim that it should deliberate in private is well-founded. In fact, certain of these international courts and academic writers have recognized the justification for confidential deliberations similar to what has been advanced by the JSC. They have held that confidentiality breeds candor, that it is vital for effective judicial selection, that too much transparency discourages applicants, and will have an effect on the dignity and privacy of the applicants who applied with the expectation of confidentiality. With respect to the arguments that disclosure of

deliberations could potentially impact on the candidates' dignity, the HSF raises a point that one who is willing to endure public interviews could hardly be affected by the disclosure of Deliberations. It goes without saying that the right to human dignity extends to all South African Citizens, it is important to be mindful that the candidates in the present matter had an expectation that the Deliberations would be confidential. Furthermore, the HSF underscores a key consideration. The knowledge that the full record of the Deliberations might include extremely frank remarks and opinions of senior members of the Judiciary and Executive as to the candidate's competence or otherwise would be made public, could deter potential candidates from accepting nominations for appointment. The very efficiency of the judicial selection process could therefore be compromised.

[49] Properly considered in weighing up the HSF's interest against the JSC's need for confidentiality, the relief sought would in my view not advance the constitutional and legislative imperatives of the JSC.

[50] In conclusion, absent the Deliberations of the JSC, the HSF is not being deprived of the procedural and substantive safeguard which is the underlying rational for the Rule.

[51] For these reasons it follows that the HSF is not entitled to the full recording of the Deliberations of the JSC as part of the Rule 53 Record.

[52] The JSC in this instance does not seek an order of costs.

[53] In the result the following order is made

The application is dismissed with no order as to costs.

LE GRANGE, J

CASE N0. 8647/2013

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
CAPE TOWN: Friday 05 September 2014
Before the Honourable Mr Justice Le Grange

"MHH2"

In the matter between:

THE HELEN SUZMAN FOUNDATION	Applicant
and	
THE JUDICIAL SERVICE COMMISSION	Respondent
With	
POLICE AND PRISONS CIVIL RIGHTS UNION	First Amicus Curiae
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Second Amicus Curiae
DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	Third Amicus Curiae

Having heard the Legal Representative for the Applicant and having read the documents filed of record;

IT IS ORDERED:

That the application is dismissed with no order as to costs.

BY ORDER OF THE COURT

WESTERN CAPE HIGH COURT
2014 -11- 18
CAPE TOWN/KAAPSTAD
WES-KAAP HOF

COURT REGISTRAR

Keshia Mariatta Dharmaratne
Commissioner of Oaths
Ex Officio - Practising Attorney R.S.A.
First Floor, 17 Fricker Road
Illovo Boulevard
Illovo Johannesburg

154 Webber Wentzel, CAPE TOWN

/ec

Certified a true copy of the original

"MHH3"

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

Case number: 8647/2013

In the matter between:

THE HELEN SUZMAN FOUNDATION	**Applicant**
and	
THE JUDICAL SERVICE COMMISSION	**Respondent**
with	
POLICE AND PRISONS CIVIL RIGHTS UNION	**First Amicus Curiae**
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	**Second Amicus Curiae**
DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	**Third Amicus Curiae**

APPLICATION FOR LEAVE TO APPEAL: 30 OCTOBER 2014

LE GRANGE, J:

[1] This is an application for leave to appeal to the Supreme Court of Appeal, alternatively to the Full Bench of this Division against the whole judgment and order of this Court dated 5 September 2014. The Third Amicus Curiae has by way of letter dated 23 October 2014 informed this Court it has no interest in the application for leave to appeal and it does not intend making further submissions in these proceedings. As a result the Third Amicus Curiae was excused from these proceedings. The First and Second Amici did not participate in these proceedings.

[2] It is trite that in order for leave to appeal to be granted, an applicant must show that there is a reasonable prospect of success on appeal and that another court may come to a different conclusion. The test postulates a dispassionate decision based on the facts and the law that another court may reasonably come to a different conclusion.

[3] I have carefully considered the Notice of Application for Leave to Appeal and the arguments of counsel. In my view the Applicant has not raised anything new in it's application for leave to appeal, be it on the facts or the law, that was not considered in the judgment. My views remain unchanged and I have nothing further to add to the reasons advanced in my judgment.

[4] I am satisfied that the Applicant has no reasonable prospect of success on appeal and that another court may come to a different conclusion in this instance.

M

RV

[5] It follows the Application for Leave to Appeal cannot succeed.

[6] In the result, I would make the following order.

The application for leave to appeal is dismissed with no order as to costs.

LE GRANGE, J

JUDGE OF THE HIGH COURT

CASE NO. 8647/2013

"MHH4"

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
CAPE TOWN: Thursday 30 October 2014
Before the Honourable Mr Justice Le Grange

In the matter between:

THE HELEN SUZMAN FOUNDATION	Applicant
and	
THE JUDICIAL SERVICE COMMISSION	Respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	First Amicus Curiae
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Second Amicus Curiae
DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	Third Amicus Curiae

Having heard the Legal Representative for the Applicant and having read the documents filed of record;

IT IS ORDERED:

That the application for leave to appeal is dismissed with no order as to costs.

BY ORDER OF THE COURT

COURT REGISTRAR

154 Webber Wentzel, CAPE TOWN
/ec

CERTIFIED A TRUE COPY
OF THE ORIGINAL

SURAIYA LAMBAT
COMMISSIONER OF OATHS
RAMSAY WEBBER INC
269 OXFORD ROAD
CNR HARRIES ROAD
ILLOVO, JOHANNESBURG
REF NO: 24/11/2012

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

CASE NO.: 8647/13

In the matter between:

HELEN SUZMAN FOUNDATION Applicant

and

JUDICIAL SERVICE COMMISSION Respondent

REASONS FURNISHED IN TERMS OF RULE 53(1)(b)

1. At the commencement of its deliberations on 17 October 2012, after having interviewed the short-listed candidates for appointment to the Western Cape High Court, the Judicial Service Commission ('JSC') decided, by secret ballot, that it would advise on the filling of up to five vacancies on the Court.

2. During the course of the deliberations of the JSC the following views were expressed as to the respective candidates:

2.1 Ms Cloete

She interviewed very well and answered all questions satisfactorily. This was in contrast to her previous interview which had not gone well. She had been exposed to more judicial experience since her previous

interview and had matured as a judge. Her appointment would help improve the female representation on the Western Cape Bench.

2.2 Mr Dolamo

Mr Dolamo's disciplinary complaints were raised during the Commission's deliberations. However, most of the complaints were considered to be relatively "old" and were decided in his favour. Furthermore the Commissioners took into account a letter from the Law Society of the Northern Provinces attesting to the fact that Mr Dolamo was a member in good standing with them. He could therefore not be disqualified in the face of such a letter.

The long delay in delivering a reserved judgment in an application for leave to appeal was viewed against the background that then he was acting and still learning. He was however described by some Commissioners as popular with fellow Judges and generally a good Judge.

2.3 Adv. Gauntlett SC

Adv Gauntlett SC's excellence and experience as a lawyer were acknowledged. A concern was raised, however, that he has a 'short thread' and that he can be acerbic at times. Some Commissioners

accepted his assurance that as a judge one is removed from the immediate combative situation that counsel usually find themselves in, but strong reservations were also expressed as to whether, as part of his attributes, he has the humility and the appropriate temperament that a judicial officer should display.

Another very important consideration was the demographic composition of the Western Cape High Court. It was argued that the number of white males in that Court as compared to other races was such that were two white males to be appointed (at that stage the focus was on Advocates Gauntlett SC and Rodgers SC) the Commission would be doing violence to the provisions of section 174(2) of the Constitution. Of course to some Commissioners those provisions were no obstacle to the appointment of two white males.

Mr Koen

Mr Koen was considered a good candidate and a person of integrity, although there were some concerns raised about his commitment to transformation of the legal profession. However, given the demographics of the Court, it was generally felt that his appointment could not be recommended ahead of those of a number of the other candidates.

2.4 Ms Mantame

It was felt that she had interviewed well, that she had a friendly disposition and got on well with her colleagues. The general view was that she had enormous potential and that, given that there was only one African female on the Bench, her appointment would assist with both the racial and gender representation of the Bench.

2.5 Adv. Rogers SC

The Commissioners without exception acknowledged his excellence as a lawyer, as also his humility and even temperament. The overwhelming view was that he should be appointed.

2.6 Ms Saba

It was generally felt that she had not interviewed well, and that she lacked both humility and judicial temperament. The view was also expressed that she had not performed well during her acting appointments. It was generally felt that she would not be a suitable appointment.

2.7 Adv. Schippers SC

It was generally felt that he had interviewed well and that he was a lawyer of great ability, who, despite suffering skewed briefing patterns based on race during the course of his practice, had developed a successful practice. The general view was that he was deeply committed to transformation. The view was also expressed that he had acquitted himself well as an acting judge, and that his appointment would contribute much to the transformation of the Cape Bench.

3. After a secret ballot the JSC decided to advise the President to appoint the following candidates:

3.1 Ms J.I. Cloete;

3.2 Mr M.J. Dolamo;

3.3 Ms B.P. Mantame;

3.4 Adv. O.L. Rogers SC; and

3.5 Adv. A. Schippers SC.

4. These considerations would have occupied the minds of Commissioners when they were called upon to vote, and it can therefore be concluded that they also constitute the reasons why they voted as they did.

5. These reasons, as also those previously furnished by the JSC on 6 November 2012, and which should be read together with these reasons, have been compiled by the Chief Justice from the contributions of Commissioners during the deliberations, as mandated by the Commissioners at the end of the meeting.

:"MHH6"

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Mr Leon Manuel
The State Attorney
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22 Long Street
Cape Town 8001

By fax: 021 421 9364

Your reference	Our reference	Date
L Manuel	M Hathorn / V Movshovich / P Dela / B Winks / L Wessels 2380365	11 September 2013

Dear Sir

The Helen Suzman Foundation ("our client:") // The Judicial Service Commission ("JSC") (WCC case no 8647/13)

1. We refer to the Rule 53 Record ("**Record**") filed on 8 August 2013 in the above matter.

2. It has come to our attention - today - that an audio recording was made of the post-interview deliberations of the JSC ("**Recording**") from which it appears to have gleaned its reasons furnished in terms of Rule 53(1)(b) of the Uniform Rules of Court and which appears as item one of the Record ("**Reasons**"). We draw your attention specifically to paragraph 5 of the Reasons which states that "*[t]hese reasons...have been compiled by the Chief Justice from the contributions of the Commissioners during the deliberations*".

3. Surprisingly, the Recording does not form part of the Record. There is, in fact, no record of any deliberations of your client.

4. Our client is obviously entitled to a copy of this Recording, *alternatively*, a transcript thereof and we hereby call upon you to furnish our client with the same immediately, but in any event, by no later than Wednesday, 18 September 2013. Moreover, please furnish

our client with any other record of the post-interview deliberations or decisions made by your client by Wednesday, 18 September 2013.

5. Naturally, our client cannot file any supplementary founding affidavit until such time that your client provides us with the Recording (and any further documents) and our client has had reasonable time to consider such Recording and documents.

6. Should your client fail to produce as set out above by Wednesday, 18 September 2013, our client will launch the necessary court proceedings to compel you to do so.

7. Please acknowledge receipt of this letter.

Yours faithfully

WEBBER WENTZEL
V Movshovich
Direct tel: +27 11 530 5867
Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

"MHH7"

The State Attorney
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(021) 421-9364

My Ref./My Verw./ Isalathiso sam: 1598/13/P12

Your Ref./ U Verw./ Isalathiso sakho:

18 September 2013

WEBBER WENTZEL
Telefax (011) 530-5111

Attention: **Messes M Hathorn / V Movshovich**

Dear Sirs

RE: THE HELEN SUZMAN FOUNDATION / JUDICIAL SERVICE COMMISSION (WCC CASE NO.: 8647/13)

We refer to the above and to your letter dated 11 September 2013.

We are instructed to request an extension until 10 October 2013 to enable our client to properly consider and respond to your client's request for a copy of the recording/ transcription of the deliberations relevant to the interviews of 17 October 2012.

We are instructed that a meeting of all the members JSC will take place on 7 October 2013 at which meeting your client's above letter has been placed on the agenda for discussion and for the members to reach a decision on your client's request that the deliberations be made available.

In light of the composition of the members of the JSC it is not possible to convene the meeting earlier than 7 October 2013 and in the circumstances our client will respond to your client's request by no later than 10 October 2013.

Yours faithfully

STATE ATTORNEY

Per: L Manuel

"MHH8"

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Your reference	Our reference	Date
L Manuel 1598/13/P12	M Hathorn / V Movshovich / P Dela / B Winks / L Wessels / 2380365	4 October 2013

Dear Sir

Helen Suzman Foundation // Judicial Service Commission (WCC Case No 8647/13)

1. We refer to your letter dated 18 September 2013 ("**your letter**"), in which you informed us that your client would convene on 7 October 2013 and "*reach a decision*" on our client's "*request*" for a copy of the recording or a transcription of the deliberations relevant to the proceedings under review in this matter ("**the recording**") or a transcription of it, and thus requires an extension until 10 October 2013 to "*consider and respond to*" such "*request*".

2. We note that, according to your instructions as recorded in your letter, your client confirms both the existence and relevance of the recording, to which we referred in our letter dated 11 September 2013 ("**our letter**").

3. As you are aware, under Rule 53 of the Uniform Rules of Court, your client was required, within 15 days of receiving our client's application, to provide the Registrar with the record of the proceedings under review and to notify our client that it had done so. The recording clearly forms part - indeed, an important and inseparable part - of the record referred to in Rule 53.

4. We are accordingly constrained to record that your client is required by law - not merely requested by our client - to provide the recording to the Court. It is thus not for our client to grant your request for an extension, but rather it is for the Court to condone your client's non-compliance with Rule 53.

5. In light of your letter, we anticipate that you will serve, by no later than 10 October 2013, your notice that the full recording and any transcription of it have been filed with the Registrar, together with an appropriate condonation application.

6. Our client's rights, in this respect, are reserved.

Yours faithfully

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Direct fax: +27 11 530 6867
Email: vlad.movshovich@webberwentzel.com

A

P. 1

* * * COMMUNICATION RESULT REPORT (4. OCT. 2013 9:25) * * *

FAX HEADER: WEBBER WENTZEL BOWENS

TRANSMITTED/STORED : 4. OCT. 2013 9:22 FILE MODE	OPTION	ADDRESS	RESULT	PAGE
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E-2) BUSY
E-3) NO ANSWER
E-4) NO FACSIMILE CONNECTION

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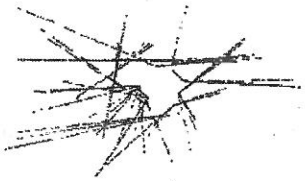

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Mr Leon Manuel
The State Attorney
4th Floor Liberty Life Centre
22 Long Street
Cape Town 8001

By fax: 021 421 9364

Your reference	Our reference	Date
L Manuel 1598/13/P12	M Hathorn / V Movshovich / P Dela / B Winks / L Wessels / 2380365	4 October 2013

Dear Sir

Helen Suzman Foundation // Judicial Service Commission (WCC Case No 8647/13)

1. We refer to your letter dated 18 September 2013 ("**your letter**"), in which you informed us that your client would convene on 7 October 2013 and "*reach a decision*" on our client's "*request*" for a copy of the recording or a transcription of the deliberations relevant to the proceedings under review in this matter ("**the recording**") or a transcription of it, and thus requires an extension until 10 October 2013 to "*consider and respond to*" such "*request*".

2. We note that, according to your instructions as recorded in your letter, your client confirms both the existence and relevance of the recording, to which we referred in our letter dated 11 September 2013 ("**our letter**").

3. As you are aware, under Rule 53 of the Uniform Rules of Court, your client was required, within 15 days of receiving our client's application, to provide the Registrar with the record of the proceedings under review and to notify our client that it had done so. The recording clearly forms part - indeed, an important and inseparable part - of the record referred to in Rule 53.

"MHH9"

The State Attorney
Die Staatsprokureur
iGqweta likaRhulumente

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My Ref./My Verw./ Isalathiso sam: 1598/13/P12

Your Ref./ U Verw./ Isalathiso sakho: M Hathorn/ V Movshovich/ 2380365

10 October 2013

WEBBER WENTZEL
Telefax (011) 530-5111

Attention: **Messes M Hathorn / V Movshovich**

Dear Sirs

RE: THE HELEN SUZMAN FOUNDATION / JUDICIAL SERVICE COMMISSION (WCC CASE NO.: 8647/13)

1. Your letter dated 11 September 2013 requiring that we include in the record the audio recordings or the transcript of the post interview deliberations of the JSC in terms of Rule 53 of the Uniform Rules of Court, in the above matter, has received the attention of the Judicial Service Commission.

2. Our instructions are that the post interview deliberations of the JSC are done in a closed session for reasons of confidentiality. The rationale for the confidentiality of the Commission's deliberations is to enable Commissioners to have frank and robust debate around the suitability or otherwise of candidates. The other reason is to protect the integrity and dignity of the candidates without impeding or undermining the ability of the Commissioners to submit them to robust assessment.

3. To the extent that the request draws its inspiration from the *Judicial Service Commission and Another v Cape Bar Council and Another* judgment, it is our understanding that the judgment stated that, as general rule, the JSC is obliged to give reasons for its decision not to recommend a particular candidate, if properly called upon to do so. The judgment did not address the question of the duty or otherwise of the JSC to make its deliberations public.

4. In the circumstances, our instructions are not to accede to the request to include (in addition to the reasons given) that part of the record embodying the audio recording or transcript of the Commissioners' post-interview deliberations.

Yours faithfully

STATE ATTORNEY

Per: L Manuel

BW M

"MHH10"

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

CASE NO: 8647/2013

In the matter between:	
THE HELEN SUZMAN FOUNDATION	Applicant
and	
THE JUDICIAL SERVICE COMMISSION	Respondent
with	
POLICE AND PRISONS CIVIL RIGHTS UNION	First *Amicus Curiae*
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Second *Amicus Curiae*
DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	Third *Amicus Curiae*

APPLICANT'S NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT, on a date and at a time to be determined, the applicant will apply for leave to appeal against the whole of the judgment and order handed down by His Lordship Mr Justice Le Grange on 5 September 2014 (**"the judgment"**), to the Supreme Court of Appeal; *alternatively* to a Full Court of this Honourable Court.

TAKE NOTICE FURTHER THAT the aforementioned application for leave to appeal is made on the basis that the learned Judge erred in the following respects:

1. by incorrectly identifying the relevant issues at stake in the case, asking the wrong question and applying an incorrect test:

1.1 the learned judge focussed the scope of the entire enquiry to the sole question as to whether the documents selected and produced by the Judicial Service Commission ("**the JSC**") sufficiently cover the purpose behind Rule 53. The correct focus should have been whether the recording and any transcription of the deliberations of the JSC – which were not produced – were relevant and material for the review application and hence part of the record;

1.2 by approaching the matter in this fashion, the learned judge shifted the onus to an applicant to justify its entitlement to the documents which should have been part of the record but were excluded by one party, namely the JSC;

1.3 the argument of the applicant is that the recording and any transcription of the deliberations should have been produced because they are part of the record. If the JSC wished to withhold any part of the record, it should have put up substantial and compelling reasons to substantiate its decision;

1.4 no such compelling and substantial reasons were given by the JSC in this case. As such, the recording and any transcription of the deliberations of the JSC should have been disclosed;

2. by attaching any weight or import to the volume of the record already dispatched by the JSC under Rule 53 of the Uniform Rules of Court, and interpreting the provision of such documents to amount to compliance with Rule 53;

3. by attaching any weight or import to the contents of the record already dispatched by the JSC under Rule 53, and interpreting the provision of such documents to amount to compliance with Rule 53, particularly when the content of the record:

3.1 was not traversed, in any detail, in this application or any of the affidavits and did not form the subject matter of this application; and

3.2 was not before Court in this application;

4. by holding that, in fact, the applicant has not been deprived of key documentation, is not "*forced to launch a review application in the dark*" and has been afforded the full benefit of Rule 53, when in fact arguably the most relevant documentation has been withheld;

5. by holding that the provision of an incomplete record, which record allegedly does not force the applicant to litigate wholly in the dark, amounts to compliance with Rule 53, when the missing portions of the record may be relevant, of great value to the applicant and the Court and may even be dispositive of the matter;

6. by holding that the provision of reasons may substitute for the provision of relevant parts of the record in these proceedings, when the two are separate and cumulative requirements in law;

7. by failing, completely, to address:

7.1 the fundamental inconsistency inherent in the respondent's stance, namely that:

7.1.1 should the reasons provided by the respondent to the applicant accurately reflect and encapsulate the relevant considerations and/or deliberations, then there can be no good reason to withhold the transcript and recording of deliberations. In such a circumstance, the dignity of candidates or any other person cannot possibly be undermined materially more by the disclosure of the transcripts and recording;

7.1.2 if the reasons provided in the record do not, in fact, reflect the relevant considerations and/or deliberations, then this is precisely why the applicant must be afforded access to the deliberations and the failure to do so denies it the procedural and substantive safeguards provided for in Rule 53;

7.1.3 as neither the Court nor the applicant can be in a position to analyse whether the reasons proffered do, in fact, comport with the considerations and/or deliberations,

Rule 53 represents the procedural safeguard to ensure that a decision-maker cannot amend reasons for an impugned decision, and accordingly the record of deliberations must, in a transparent and open constitutional democracy, fall to be disclosed;

7.2 the fact that the candidates were subjected to an intensive and necessarily scathing and intrusive public interview process;

7.3 the fact that the JSC was obliged to put any perceived failing of a candidate to such candidate for rebuttal and comment in the interview and could not simply leave such perceived failings for private deliberations only;

7.4 the fact that candidates were well aware of the legislative carve-out provided for under section 38(1) of the Judicial Service Commission Act, 1994, which renders all confidential information of the JSC, including the deliberations of the JSC, susceptible to production pursuant to an order of Court, and participated fully in the process in this knowledge;

7.5 the fact that a record under Rule 53 is not merely for the benefit of an applicant, but for the benefit of the Court;

8. by affording insufficient, alternatively no, weight to the applicant's contentions in respect of openness, transparency, equality of arms and access to information, taking into account the JSC's legislative framework and the Constitution;

9. by considering, alternatively giving undue weight to, the following:

9.1 whether the JSC's previous actions, viewed cumulatively, afforded the applicant sufficient material with which to institute a review application;

9.2 whether the JSC's process in respect of judicial appointments justified a complaint pertaining to lack of openness, transparency, equality of arms and access to information;

9.3 whether the JSC's overall process detracts from the obligation or necessity to disclose the deliberations;

9.4 whether the JSC's process in respect of judicial appointments was comparable to largely irrelevant international authorities; and/or

9.5 the fact that the JSC is empowered to determine its own processes;

10. by holding that the fact that criteria for the appointment of judges have been published, coupled with the requirement for public interviews and the duty to give reasons, amounts to:

10.1 satisfaction with the requirements of openness, transparency and accountability; and

10.2 factors which can and did, in the present case, restrict the remit of the record to be furnished;

11. by failing to recognise the development of jurisprudence:

11.1 as to what constitutes the record under Rule 53, particularly with regard to the clear pronouncements as to the necessity for the inclusion of private contemporaneous deliberations; and

11.2 which clearly furthers the constitutional imperatives of openness, accountability and transparency, and militates against the non-disclosure of relevant information;

12. by failing to apply the *ratios* of any of the relevant cited case law to the facts of this matter to identify any reasons which support a proposition that the deliberations fall to be excluded from the Rule 53 record;

13. by interpreting that the case of *City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74 ("**the SANRAL decision**") should be confined to its facts and did not reflect a statement of legal principle of more general application, as appropriate to a constitutional democracy;

14. by holding that the failure of the Supreme Court of Appeal ("**the SCA**"), in 2006 (in *MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA)) to adopt the approach advocated for in the SANRAL decision is indicative of a lack of support for the general application of the SANRAL decision approach, when, in fact, the SANRAL decision was handed down years after *MEC v Intertrade Two*;

15. by elevating the *obiter dicta* remarks in paragraph 15 of *MEC v Intertrade Two* as amounting to an endorsement by the SCA of the JSC's position when, in fact, the *obiter* remarks, as well as the approach adopted by the SCA as a whole, are supportive of the applicant's position;

16. by making common cause with the JSC's interpretation of *MEC v Intertrade Two* that *"some documents on the grounds of privilege or relevance may not fall within the ambit of the Rule 53 record"*, yet failing to apply this interpretation to this matter, as:

16.1 privilege has never been asserted, much less argued; and

16.2 there is no basis for the proposition that either the recording or transcript is irrelevant to the proceedings;

17. by disregarding or giving insufficient regard to the evolution of jurisprudence through numerous provincial decisions subsequent to *MEC v Intertrade Two*, which are supportive of the applicant's position;

18. by characterising the applicant's assertions that the drafter of the reasons, being a member of the impugned decision-making body, "*has the power to determine what goes into the summary and would be in a position to tailor the reflections of the Deliberations*", as being vague in nature (and affording such assertion no, alternatively insufficient, weight);

19. by suggesting that the applicant's failure to challenge the accuracy and/or completeness of the reasons is a material factor to be taken into account in determining the ambit of the record which the JSC is obliged to provide under Rule 53, especially where:

19.1 the very fact that the recording and transcript were not disclosed materially curtails the applicant's ability to challenge the accuracy of the reasons;

19.2 the applicant has not yet supplemented its founding affidavit, as it is entitled to do under Rule 53; and

19.3 there is no legal requirement that any challenge as to the accuracy and/or completeness of reasons already disclosed is a jurisdictional requirement to pursue outstanding portions of a Rule 53 record;

20. by holding, without any authority, that the JSC's deliberations are analogous to the deliberations of a magistrate or judge or that any such analogy is determinative of the content of the record in a review under Rule 53;

21. by holding that the position or identity of the individual who drafted the reasons is a relevant consideration in determining the remit of the record under Rule 53 or, indeed, the accuracy, completeness and/or sanctity of the reasons;

22. by affording any, let alone significant, weight to foreign jurisprudence, which is distinguishable from the case of the JSC and South Africa's constitutional framework;

23. even when addressing foreign jurisprudence, by failing properly to interrogate the jurisdictions relied upon by the JSC and the Democratic Governance and Rights Unit;

24. by disregarding or not giving sufficient weight to principles of statutory interpretation in holding that candidates have an expectation that the deliberations of the JSC would remain confidential, despite the express wording of section 38(1) of the Act and despite there being no admissible, non-hearsay evidence before the Court as to the expectations of candidates;

25. by holding that confidentiality, in the context of this case, provides a defence to disclosure of any part of the record under Rule 53 despite clear SCA authority to the contrary;

26. by finding that the JSC had, in fact, complied with the requirements of Rule 53;

27. by finding that any policy considerations, normative standards or legal requirements militate against disclosure of the deliberations, even where an appropriate confidentiality regime may be put in place to safeguard the dissemination of one or other aspect of the record;

28. by failing to deal with the applicant's proposed alternative of disclosure subject to a confidentiality regime;

29. by not granting the relief sought in the application by the applicant; and

30. by holding that the applicant was not entitled to costs of the application as prayed.

DATED AT CAPE TOWN ON THIS 10th **DAY OF SEPTEMBER 2014**

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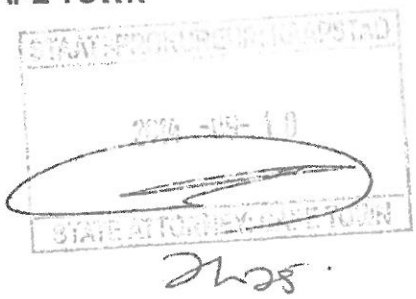

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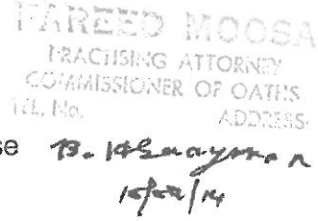

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"MHH11"

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

CASE NO: 8647/2013

In the matter between:

THE HELEN SUZMAN FOUNDATION	Applicant
and	
THE JUDICIAL SERVICE COMMISSION	Respondent
with	
POLICE AND PRISONS CIVIL RIGHTS UNION	First *Amicus Curiae*
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Second *Amicus Curiae*
DEMOCRATIC GOVERNANCE AND RIGHTS UNIT	Third *Amicus Curiae*

APPLICANT'S NOTE ON APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

1. This is an application for leave to appeal against the whole of the judgment and order (including the costs order) handed down by the Honourable Mr Justice Le Grange on 5 September 2014 ("**the judgment**"), to the Supreme Court of Appeal.

2. The applicant has filed a detailed application for leave to appeal with this Honourable Court.

3. Based on the grounds of appeal set forth in the application for leave to appeal, the applicant makes the following central submissions.

THE CASE FOR GRANTING LEAVE TO APPEAL

4. There are a variety of grounds upon which leave to appeal ought to be granted. We deal with each in turn, in each case making our submissions with due respect to the learned Judge.

5. In the first place, the judgment holds that the documents selected and unilaterally determined by the Judicial Service Commission ("**the JSC**") sufficiently cover the purpose behind Rule 53. That is incorrect:

5.1 It is not open to the JSC or any other decision maker to determine what precise documents it will or will not disclose as part of the record. The correct focus should be on whether the recording and any transcription of the deliberations of the JSC ("the Recording and Transcript") – which were not produced – ought to have been disclosed as part of the record. The test for disclosure is an objective one and all documents which may have a bearing on or evidence the decision-making process or the outcome of the decision must be disclosed. This much was held by the Western Cape Division of the High Court in *City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74 ("the SANRAL

decision") and is supported by other provincial division jurisprudence.[1] The distinction that the Court drew between the JSC and other decision-making bodies is not supported by any statutory or judicial authority. Moreover, no Court has, in a reported judgment that we are aware of, sought to prescribe different standards for different decision-makers in respect of the content of the record. Based purely on the case law to date, it is clear that another court may well come to a different conclusion in respect of the merits of this matter.

6. The judgment further holds that the volume of the record already dispatched by the JSC under Rule 53 of the Uniform Rules of Court amounts to compliance with Rule 53. This overlooks the fact that the content of the record:

6.1 is the relevant factor in determining compliance with Rule 53, and not the volume thereof;

6.2 was not traversed, in any detail, in the application *a quo* or any of the affidavits and did not form the subject matter of that application. What was traversed extensively in the founding papers of the applicant was the absence of the Recording and Transcript; and

6.3 was not before the Court.

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[1] *Afrisun Mpumalanga (Pty) Limited v Kunene NO* 1999 (2) SA 599 (T) and *Comair Limited v The Minister of Public Enterprises* (NGHC case no: 13034/13).

7. The Court further held that the applicant has not been deprived of key documentation, is not "*forced to launch a review application in the dark*" and has been afforded the full benefit of Rule 53. This too is incorrect.

7.1 In fact, arguably the most relevant documentation has been withheld which will clearly be relevant, of great value to the applicant and the Court and may even be dispositive of the matter.

8. The Court held that the provision of reasons (drafted by a member of the challenged decision-making body) may substitute for the provision of relevant parts of the record in these proceedings.

8.1 In reality, however, these two requirements are separate and cumulative requirements in law. The record provides the information or documentation which the decision-maker created or considered in the course of making the decision. The reasons are simply either contemporaneous or (ordinarily) *post-hoc* justification for the decision. These requirements are specifically separately mentioned in Rule 53 itself. The purpose of the record is to place the litigant and the Court in as informed a position as the JSC in relation to what the JSC considered and how it arrived at its decision. To allow the decision-maker to circumvent the requirement to produce a copy of the Recording and Transcripts and instead to rely on the summary or distilled reasons created by the decision-

maker (or, worse, one of its members) itself is to thwart the very purpose of the delivery of the record under rule 53. This is particularly so in circumstances where the Chief Justice has expressly indicated that he collated the reasons from the very deliberations which the JSC now seeks to withhold. If this reasoning were to prevail, then every decision-maker can subjectively determine how the decision-making process and the decision will be portrayed to the outside world, even though what actually happened may be very different.

9. The Court held that because criteria for the appointment of judges have been published, coupled with the requirement for public interviews and the duty to give reasons, this amounts to satisfaction of the requirements of openness, transparency and accountability (which, it is implied, allows for a limitation of the Record under Rule 53).

9.1 There was, however, no challenge before this Court in relation to the limitation of Rule 53.

10. The Court concluded that the JSC is a unique entity which derives its powers from the Constitution and, more importantly, is entitled to determine its own procedure.

10.1 With respect, this ignores the legislative imperative in section 38 of the JSC Act (disclosure is permissible by means of a court order) and, in effect, would allow for the JSC to operate outside the ambit of judicial review.

11. The Court further held that the applicant's failure to challenge the accuracy and/or completeness of the reasons is a material factor to be taken into account in determining the ambit of the record which the JSC is obliged to provide under Rule 53.

11.1 This, respectfully, cannot be the case, especially where:

11.1.1 the very fact that the recording and transcript were not disclosed materially curtails the applicant's ability to challenge the accuracy of the reasons (and accordingly the Court placed the cart before the horse);

11.1.2 the applicant has not yet supplemented its founding affidavit, as it is entitled to do under Rule 53; and

11.1.3 there is no legal requirement that any challenge as to the accuracy and/or completeness of reasons already disclosed is a jurisdictional requirement to pursue outstanding portions of a Rule 53 record.

12. The Court also held that the JSC's deliberations are analogous to the deliberations of a magistrate or judge or that any such analogy is determinative of the content of the record in a review under Rule 53.

12.1 It is unclear why the analogy is drawn with judges or magistrates in particular. Every decision-maker (as long as they are subject to judicial review) would have to produce reasons and the full record of its decision-making process. In

the context of the JSC, where the decision is made by a deliberative body, it is the deliberations which are critical to the decision ultimately reached (and whether that decision was reached lawfully, rationally and procedurally fairly). It must thus be disclosed. It is not for this Court to determine what would be disclosable in the case of a judicial officer being taken on review in a specific context. The JSC did not perform any judicial functions in this case and thus any possible policy factors about disclosing judicial deliberations are inapplicable.

13. The Court further found that the position or identity of the individual who drafted the reasons is a relevant consideration in determining the remit of the record under Rule 53 or, indeed, the accuracy, completeness and/or sanctity of the reasons.

13.1 This is not so, and no authority that we are aware of supports this conclusion. The duty of disclosure under Rule 53 is entirely unaffected by the position or status of the decision-maker.

14. To the Court, policy considerations, normative standards or legal requirements militate (or allow) against disclosure of the deliberations, even where an appropriate confidentiality regime may be put in place to safeguard the dissemination of one or other aspect of the record. We deal with this aspect below.

15. It is respectfully submitted that another court could reasonably arrive at a different conclusion based on:

15.1 a proper application of the *ratios* of the relevant cited provincial division case law on the content of the Rule 53 record. In any event, the divergent provincial decisions on the content of the record (in the absence of binding SCA authority) is reason in itself to refer the matter to the SCA for determinative guidance;

15.2 a correct interpretation of the *SANRAL* decision (the Court held that this decision should be confined to its facts and did not reflect a statement of legal principle of more general application, as appropriate to a constitutional democracy);

15.3 a correct interpretation of *MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) ("*Intertrade Two*") (the Court held that the failure by the SCA in *Intertrade Two* to adopt the approach advocated for in the *SANRAL* decision is indicative of a lack of support for the general application of the SANRAL decision approach, when, in fact, the SANRAL decision was handed down years after *Intertrade Two*). The very fact that *SANRAL* was decided after *Intertrade Two* should be a weighty consideration in favour of following *SANRAL*;

15.4 by recognising (instead of elevating to the status of *rationes decidendi*, as the Court did) that the remarks made in paragraph 15 of the judgment in *Intertrade Two* are merely *obiter dicta* (the judgment instead held that these remarks amounted to an endorsement by the SCA of the JSC's position

when, in fact, the *obiter* remarks, as well as the approach adopted by the SCA as a whole, are supportive of the applicant's position. The SCA, in that case, ordered disclosure of the sought material and was extremely cautious in stating that there might "*conceivably*" be certain documents which are outwith the remit of the record. This is very far from a ringing endorsement of either the *Johannesburg City Council* decision[2] or the JSC's case in this matter);

15.5 by properly considering the legal issues of confidentiality and privilege, in light of current constitutional jurisprudence, which the Court failed to do. The Court agreed with the JSC's interpretation of *Intertrade Two* that "*some documents on the grounds of privilege or relevance may not fall within the ambit of the Rule 53 record*". Privilege has never been asserted in this matter, much less argued; and further there is no basis for the proposition that either the recording or transcript is irrelevant to the proceedings sought to be set aside (ie, the decision of the JSC in this matter);

15.6 by affording far less weight, if any, to foreign jurisprudence. In any event, such jurisprudence is distinguishable from the case of the JSC and South Africa's constitutional framework. All that the jurisprudence indicates is that certain foreign jurisdictions have opted to legislate privilege or a certain

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[2] *Johannesburg City Council v The Administrator, Transvaal (1)* 1970 (2) SA 89 (T).

degree of non-disclosure into their legal framework. No such legislation exists in South Africa. The very fact that certain foreign states have taken legislative steps to keep certain documents secret is a recognition and an indication that in the absence of such steps the documents would have been disclosable;

15.7 by having proper regard and giving sufficient weight to principles of statutory interpretation and the express wording of section 38(1) of the JSC Act (the Court held that candidates have an expectation that the deliberations of the JSC would remain confidential, despite the express wording of section 38(1) of the Act and despite there being no admissible, non-hearsay evidence before the Court as to the expectations of candidates). In any event, section 38(1), read in context, refers specifically to natural persons in the service of the JSC in one or other capacity, and not the JSC itself. The section specifically refers to "*[n]o person, including any member of the Commission, Committee, or any Tribunal, or Secretariat of the Commission, or Registrar or his or her staff, may disclose any confidential information or confidential document obtained by that person in the performance of his or her functions in terms of this Act*" (emphases added). The class of persons contemplated clearly does not include the JSC itself. An interpretation which includes the JSC would also make a mockery of the criminal liability imposed under section 38(2),

which contemplates imprisonment. The purposes of the provision is clearly to prevent leaks by functionaries of the JSC;

15.8 by properly applying the test for confidentiality in our law and recent SCA jurisprudence which provides that confidentiality is not a bar (or, indeed, even a defence) to disclosure of information under Rule 53; that valid justification must be adduced by the party claiming confidentiality and that confidentiality regimes (such as confidentiality agreements) may be put in place to protect any sensitive information (the Court held that confidentiality, in the context of this case, provides a defence to disclosure of any part of the record under Rule 53 despite clear SCA authority to the contrary[3] and despite the complete failure by the respondent to make out any case at all in favour of confidentiality, to justify withholding any portion of the record required under Rule 53 or to challenge the constitutionality or lawfulness of Rule 53).

CONCLUSION

16. Based on the above, we respectfully submit that the applicant's prospects of success on appeal are good and it is, in addition, probable that another court may come to a different conclusion. Having regard to the importance of this matter for procedural and

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[3] *Bridon International Gmbh v International Trade Administration Commission* 2013 (3) SA 197 (SCA); and *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA).

substantive justice and the vindication of fundamental human rights, as well as the seeming divergence between the judgment of Le Grange J and several other decisions in the provincial divisions, it is respectfully submitted that this case properly deserves the attention of the Supreme Court of Appeal.

17. The applicant therefore prays for an order granting leave to appeal to the Supreme Court of Appeal.

DAVID UNTERHALTER SC
MAX DU PLESSIS
TEMBEKA NGCUKAITOBI
Chambers
28 October 2014

"A"

"MHH12"

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO.: 13034/13

In the matter between:

COMAIR LIMITED Applicant

and

THE MINISTER OF PUBLIC ENTERPRISES First Respondent

THE MINISTER OF FINANCE Second Respondent

THE MINISTER OF TRANSPORT Third Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Fourth Respondent

SOUTH AFRICAN AIRWAYS SOC LIMITED Fifth Respondent

JUDGEMENT

Jordaan J:

The Applicant, Comair Limited, brings a Rule 30A application ("interlocutory application") to compel the First Respondent, the Minister of Public Enterprises, to furnish its legal representatives and independent experts with complete and un-redacted copies of the minutes of the Fifth Respondent's (South African Airways) Monitoring Committee Meetings held between the Fifth Respondent, the Department of Public Enterprises and the National Treasury on 18 April 2012, 10 May 2012, 6 June 2012, 11 July 2012, 8 August 2012 and 11 September 2012 (hereinafter collectively referred to as "the Minutes").

The Minutes form part of the record, contemplated in Rule 53 (1) (b), and filed by the First Respondent in the main review application ("the main application"). At present, these Minutes appear in heavily redacted form in the First Respondent's record and are, according to the applicant, particularly relevant to the decision that is the subject of the review proceedings in the main application. It is submitted their production in redacted form constitutes a breach of Rule 53 (1) (b).

On behalf of the applicants it was submitted that the key question that this Court is called upon to determine, is:

1 whether the full, un-redacted, Minutes which already form part of the record (albeit in a redacted form) and are relevant to the main application, should be disclosed on a limited basis only to the Applicant's legal representatives and independent experts, so that they and this Court can properly deal with the review proceedings with due regard to all the

relevant documentation; or,

2 whether, the First Respondent's claim to confidentiality should be allowed to act as an absolute bar to the disclosure of relevant documentation, thus frustrating not only the Applicant's ability to properly prosecute its review application, but also this Court's ability to determine the review on the basis of all the relevant documentation, notwithstanding the proposal of a confidentiality regime that would protect the claimed confidentiality while ensuring limited, yet necessary, access to the relevant documents.

The background to this interlocutory application is as follows.

The Applicant is a fierce competitor of SAA in the domestic airline transport market. On 27 February 2013, the Applicant launched the main application in this Court in terms of Rule 53. The following relief is, *inter alia*, sought in the main application:

1 the review of the decision of the First Respondent, made with the concurrence of the Second Respondent, the Minister of Finance, on or about 26 September 2012, to provide SAA with a R5 billion guarantee ("the Guarantee decision"). This guarantee binds the Fourth Respondent, the government, for 2 years from 1 September 2012;

2 a declaration that the Guarantee decision is unconstitutional and unlawful; and

3 an order setting aside the Guarantee decision and suspending the setting

aside of the Guarantee decision for six months from the date of the order.

In terms of Rule 53 (1) (b), the First Respondent was required to dispatch to the Registrar the record of all documents and all electronic records that relate to the making of the Guarantee decision within fifteen days of receipt of the notice of motion. The notice of motion expressly required the respondents to provide, *inter alia*, any:

1 "minutes, submissions, memoranda and other documentation in relation to all meetings between the First and Second Respondents in relation to the Guarantee decision"; and

2 "minutes, submissions, memoranda and other documentation in relation to all meetings between the Fifth Respondent and/or the Department of Public Enterprises and/or the National Treasury and/or the Guarantee Certification Committee, and/or the Department of Transport, and/or the Competition Commission, in relation to the Guarantee decision..., and all requests for funding by the Fifth Respondent leading up to the Guarantee decision".

The First Respondent furnished his record on 10 April 2013 in three parts:

1 a table, which specifically responds to the various documents that were explicitly requested as part of the record in the notice of motion filed by the Applicant;

2 "Bundle A", a bundle of documents that the First Respondent accepted was not confidential, although certain portions of the documents provided were redacted; and

3 "Bundle B", a bundle of documents that the First Respondent claims are confidential. The State Attorney, on behalf of the First Respondent, explicitly indicated to the Applicant's attorneys that the documents in the bundle should not be divulged to the Applicant or any of its employees and could only be shown to the Applicant's legal representatives, subject to the State Attorney consenting to additional persons (such as independent experts) being entitled to see the documents. Notwithstanding that this was a confidential bundle that could not be seen by the Applicant, large portions of the documents were redacted such that not even the Applicant's legal representatives or independent experts could see what was set out in the documents.

The Minutes, which are the subject of this interlocutory application, were provided on a confidential basis in Bundle B. The applicant correctly indicates that they are redacted to such an extent that it is impossible to ascertain what was discussed in the meetings they seek to record. In all but a few instances only the headings have survived the First Respondent's redaction. The applicant contends that this is notwithstanding the fact that certain headings, which have not been redacted, suggest that the content was clearly relevant to the Guarantee decision.

As an illustration the applicant refers to the minutes of the meeting held on 8 August 2013 contain the following un-redacted headings: "**3. Going Concern**

report", "**8. SAA funding position**", "**Strategic business case**", "**7. New route launches**", "**2. FINANCIAL STATUS UPDATE**" and "**fleet planning**". The First Respondent confirms in his answering affidavit in this application that "[t]he full and complete set of Minutes contains information relating to the financial and operational information of the Fifth Respondent."

The applicant submits that the Guarantee decision required a proper consideration of SAA's past, present, and future financial position. Thus, what the First Respondent knew about the financial position of SAA, and what information he had before him in this regard, at the time of taking the Guarantee decision, is highly relevant to the main application because it provides the proper basis for assessing the rationality, reasonableness and lawfulness of his decision.

The applicant correctly contend that the Minutes were evidently included in the record provided by the First Respondent because they constituted, "minutes... in relation to...meetings between the Fifth Respondent and/or the Department of Public Enterprises and/or the National Treasury ... in relation to the Guarantee decision", as specified in the Applicant's notice of motion in the main application.

The Applicant's attorneys wrote to the State Attorney on 18 April 2013 urging the First Respondent to reconsider his approach to the record. The Applicant's attorneys noted that confidentiality was not a basis for a claim of privilege and therefore did not justify a refusal to disclose documents, or the redaction of portions thereof.

The Applicant contend that First Respondent's approach violated his obligation to file a proper record in terms of Rule 53, and the Applicant's attorneys noted that, failing a

reconsideration by the First Respondent of his approach to the redaction of the record, the Applicant would make application to the Court for an order compelling the proper filing of a complete Rule 53 record.

When no response was received to the letter, the Applicant, on 6 May 2013, served a notice in terms of Rule 30A on the Respondents on the basis of the First Respondent's failure to comply with the requirements of Rule 53 (1) (b). The Rule 30A notice requested that the First Respondent furnish the Applicant with, *inter alia*, complete and un-redacted versions of the Minutes, making it clear that redacted versions would not suffice.

On 16 May 2013, the First Respondent filed a response to the Rule 30A notice, which included an amended index to Bundle A and two further documents were added to the Bundle:

1 an economic report by Oxford Economics entitled "South African Airways: Its impact on South Africa's Economy", dated June 2012; and

2 an email from the Department of Public Enterprises to the National Treasury, dated 17 October 2012.

The First Respondent did not provide any of the other documents requested in the Rule 30A notice.

In particular, according to the First Respondent, the Minutes (which were called for in the Rule 30A (1) notice) and the Diagnostic Review of SAA, dated August 2012,

(another document provided in the confidential bundle in a heavily redacted form which was also called for in the notice) "contain commercially sensitive information that is of a confidential nature, and which therefore is not subject to production of the kind sought by the Applicant".

Despite the fact that the filed record, according to the Applicant, was wholly inadequate and failed to comply with the duty of the First Respondent under the Rules of this Court, the Applicant decided to proceed with filing its supplementary founding papers in order to, so it alleges, expeditiously deal with this main application. The Applicant says it was thought that a protracted fight over the record would not be in the interests of justice.

On behalf of the First Respondent it was argued that this decision to proceed with

the filing of these papers now bars the Applicant to seek the relief now sought in the

present application. However, in a letter from the Applicant's attorney's on 23 May 2013 communicating the Applicant's decision to the State Attorney, it was made clear that this decision was taken on the basis that the First Respondent could not "rely [in the main application] on any documents not included in the incomplete record (including the redacted portions of the documents produced)". It was reiterated that, despite this decision, the Applicant remained "firmly of the view that [the First Respondent's] refusal to produce the full non-redacted record on the grounds of confidentiality is not only entirely at odds with the provisions of Rule 53(1)(b) of the Uniform Rules of Court but also with the High Court's current position on the interpretation of this rule".

This condition was again reiterated in the Applicant's supplementary founding affidavit in the main application, filed on 10 June 2013. After describing the history relating to the Rule 30A notice, at paragraph 31 the Applicant notes that "in opposing [its] review, (the First and Second Respondent's) cannot rely on new documents that they did not include in the record, nor can either (The First or Second Respondent) rely on portions of the record that the First Respondent has chosen to redact".

On 30 July 2013, the First Respondent filed his answering affidavit in the main application. It was argued by the Applicants that notwithstanding his failure to disclose complete and un-redacted versions of the Diagnostic Review and the Minutes in providing his Rule 53 Record, and despite the Applicant's indication that it would not be permissible for the First Respondent to rely on redacted portions thereof without first disclosing them, the First Respondent relies on and seeks to press certain conclusions arising from the full content of both of these documents in his answering affidavit, but without providing un-redacted versions thereof to the Applicant or this Court. In particular, the First Respondent relies on:

1 the Diagnostic Review in paragraphs 43; 44; 72.3; 95.3; 95.4; 95.8; 153.6; and 200.5. With the exception of paragraph 153.6, the First Respondent relies on the whole document in these paragraphs and not merely the un-redacted portions made available to the Applicant's legal representatives and independent experts in the confidential part of his record; and

2 the Minutes in paragraphs 95.7 and 95.8. Again, the First Respondent does not confine himself to the un-redacted portions of the Minutes, but relies on them

in their entirety.

Due to the First Respondent's reliance on the un-redacted portions of the Minutes and the Diagnostic Review the Applicant's attorneys sent letters to the State Attorney requesting that the First Respondent produce un-redacted copies of the Diagnostic Review (on 2 September 2013) and the Minutes (on 9 September 2013). In both letters it was made clear that, without access to the whole content of these documents, the Applicant would be unable to adequately reply to the First Respondent's answering affidavit.

In both letters it was emphasised that the Applicant is happy to receive the documents on a confidential basis such that the documents will only be disclosed to the Applicant's legal representatives and independent experts, thus meeting any concerns in relation to the disclosure of what the First Respondent claims is commercially sensitive information.

Thereafter, under cover of a letter dated 11 September 2013, the State Attorney provided the Applicant's attorneys with an un-redacted copy of the Diagnostic Review on the understanding that it would only be disclosed, on a confidential basis, to the Applicant's legal representatives and independent experts.

In the same letter, however the State Attorney refused to provide the Applicant's legal representatives and independent experts with the Minutes, which were requested on the same basis as the Diagnostic Review. The State Attorney stated the Applicant was "not entitled to the minutes".

After a further letter to the State Attorney on 13 September 2013 again requesting the First Respondent to provide the Minutes and threatening an application to compel their production, and a telephone call to the State Attorney on 19 September 2013, the First Respondent persisted in his refusal to provide the Applicant with the Minutes. The Applicant alleges that given this position adopted by the First Respondent, on 23 September 2013 it was left no choice but to serve its notice of motion and founding affidavit in this interlocutory application presently before me on the First Respondent and the other respondents in the main application.

The above history of the events that led to the present application is but a repetition of what was set out in the heads of argument provided to me at this application. I made liberal use of the contents of the applicant's heads, not only because it provides a crisp summary of the events that led to this application, but also because the history is by and large common cause.

The Applicant contends that there can be no doubt that the Minutes form part of the record and that their whole content is relevant to the Guarantee decision taken by the First and Second Respondents. They argue:

1 the un-redacted headings clearly indicate the relevance of the Minutes to the Guarantee decision; and

2 the First Respondent, in his own affidavit, relies on the whole content of the

Minutes (being the minutes of the Fifth Respondent's Monitoring Committee

meetings and the information presented at these meetings, even though the minutes of these meetings have been almost completely redacted), and not merely the un-redacted portions thereof, as part of the basis for the Guarantee Decision. They say this demonstrates that the whole content of the Minutes is relevant to the review proceedings in the main application and was before the First Respondent when he made the Guarantee decision, and is thus properly part of the record.

They rely on the following portions of the First Respondent's answering affidavit:

> "95.7. From the monthly meetings held with SAA (recorded in the Minutes) **and the quarterly review of its operations that were submitted in terms of the provisions of the PFMA, I was acutely aware that there was a real likelihood that SAA's funds would be exhausted by the end of the 2011/12 financial years. In the circumstances, I knew that the auditors would not be in a position to sign off on the companies' financial statements.**
>
> **95.8. In considering the request for a guarantee, the material before me included information on the socio-economic role of SAA; the contents of the Going Concern Review; the information at my disposal consequent on the monthly engagements the Department had with SAA** (that is the Minutes and information recorded in the Minutes), **and the contents of the**

Diagnostic Review of SAA." (emphasis added. The portions in brackets are added by the Applicant.)

(I will come to the version of the version of the First Respondent hereunder but state that the attendance registers of the meetings concerned are attached to the relevant reducted minutes. At none the First Respondant is recorded as being present. Insofar as he had regard to the meetings his only source of information must have been the minutes.)

It is argued by the Applicant that, in the light of what was stated in the above mentioned paragraphs, it is hardly surprising that the First Respondent, when called upon in the notice of motion in the main application to ensure that the minutes of meetings in relation to the Guarantee decision were included in the record, elected to include the Minutes in the Rule 53 Record (albeit in a redacted form and on a confidential basis). The inclusion of the Minutes in the record clearly presupposes that the First Respondent accepted that these documents were relevant to the review, and thus properly part of the record.

The Applicant furthermore contends that there can be no defensible claim to confidentiality in respect of the Minutes on the part of the First Respondent, not only because this is not a sound basis for non-disclosure of a portion of the record, but more so as the Applicant was willing to accept the documents on the basis that they would only be disclosed to its legal representatives and independent experts. The Applicant itself would have no access to the redacted Minutes.

The Applicant contends that with regard to it's decision to not proceed with the application immediately after the lapsing of the 10 days, this was, as was noted in the Applicant's attorneys' letter to the State Attorney on 23 May 2013, and again emphasised in the supplementary founding affidavit in the main application, premised on the understanding that the First Respondent would not rely on any redacted portions of the record at the time it filed its answering affidavit. By nevertheless relying on the Minutes in his answering affidavit, and by refusing to disclose these Minutes in an un-redacted form, the First Respondent did not abide by this understanding.

The primary ground upon which the First Respondent seeks to oppose the interlocutory application is that the redacted portions of the Minutes contain confidential information. The First Respondent avers that their contents are of a commercially sensitive nature in that they relate to the financial and operational information of SAA.

The First Respondent also oppose the application on two other grounds:

1 the redacted portions of the Minutes are not relevant to the main application; and

2 the Applicant elected to not institute its application to compel, and is bound by this election.

The Applicant argues that none of these grounds have any merit.

On behalf of the Applicant the legal principles that relate to Rule 53 records are summarised as follows:

An applicant in review proceedings is entitled to the full record of the proceedings sought to be reviewed and set aside. (See Rule 53 (1) (b) and *South African Football Association v Stanton Woodrush (Pty) Limited t/a Stan Smidt & Sons* 2003 (3) SA 313 (SCA) at paragraph 5.

The Applicant argues, correctly so, that purpose of the record is to enable the applicant and the court fully to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend his or her notice of motion and supplement his or her grounds of review under Rule 53(4). The Applicant refers to the remarks of Kriegler AJA in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660.

> *"Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights, but has no access to the record of the relevant proceedings or any knowledge of the reasons founding the decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s), he could then apply to amend his notice of motion and to supplement his founding papers. Manifestly the procedure created by the Rule is to his advantage in that it obviates the delay and expense of an application to amend and provides him with access to the record".*

The Applicant submits that filing of the record also introduces equality-of-arms between the parties to the review proceedings since it means that *"all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court". Jockey Club v Forbes* at 660.

The Applicant argues that access to the full record of the proceedings is thus fundamental to the proper ventilation of the review before the court. Without the full record the court cannot perform its constitutionally entrenched review function. In this regard they refer to *Democratic Alliance And Others v Acting National Director Of Public Prosecutions and Others* 2012 (3) SA 486 (SCA).

> *"It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."*

The Applicant argues that the requirement that there be proper disclosure of the record under Rule 53 furthers the constitutional guarantee of just administrative action, (see Section 33 of the Constitution) as well the right of access to any

information held by the state (See Section 32 of the Constitution and *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at para 32) and the constitutional requirement of public administration that is transparent and accountable. (See Section 195 of the Constitution.)

The extent of the record to which the applicant is entitled under Rule 53 is described as follows in *Johannesburg City Council v Administrator Transvaal and Another*, 1970 (2) SA 89 (T) at 91-2.

> *"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 happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially.... It does ... include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it."*

It is correctly argued that the applicant is also entitled under Rule 53 to access to the deliberations of the decision-maker, which entitlement furthers the constitutional goals of open and accountable decision-making. In this regard reference is made to

Afrisun Mpumalanga (Pty) Limited v Kunene NO and Others 1999 (2) SA 599 (T) at 631-2.

The main ground on which the First Respondent opposes the interlocutory application is that the Minutes contain "financial and operational information of the Fifth Respondent" which is "commercially sensitive", and therefore confidential. The Applicant submits that the First Respondent's reliance on confidentiality is misplaced. It is argued that confidentiality is not a ground for refusing to produce documents.

It is argued that even if the redacted portions of the Minutes are confidential, this would in any event not entitle the First Respondent to refuse to furnish the Minutes (or redact portions thereof) as part of the Rule 53 record.

The Applicant is entitled to the full record of the proceedings, save only for documents that are privileged. In this regard I was referred to *Afrisun Mpumalanga (Pty) Limited v Kunene NO and Others*, 1999 (2) SA 599 (T) at 631-2.

> *"The object of review proceedings in terms of Rule 53 is to enable an aggrieved party to get quick relief where his rights or interests are prejudiced by wrongful administrative action and the furnishing of the record of the proceedings is an important element in the review proceedings: see Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 660D-I; S v Baleka and Others 1986 (1) SA 361 (T) at 397I-398A. The applicant should not be deprived of the benefit of this procedural right unless there is clear justification therefor: see Crown*

Cork & Seal Co Inc. and Another v Rheem South Africa (Pty) Ltd and Others 1980 (3) SA 1093 (W) at 1095F-H."

It is argued that confidentiality *per se* is not a ground for objecting to the disclosure of documents in our law. In this regard I was referred to *Rutland v Engelbrecht* 1956 (2) SA 578 (C) at 579; *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260; *S v Naicker and Another* 1965 (2) SA 919 (N); *Crown Cork and Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W) at 1099 and De Ville *Judicial Review of Administrative Action in South Africa* (2005) revised first ed. at 310. The fact that documents contain information of a confidential nature *"does not per se in our law confer on them any privilege against disclosure"*. See *Unilever plc v Polagric (Pty) Ltd* 2001 2 SA 329 (C) at 340A.

In respect of confidential commercial information, Colman J held as follows in *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd*: 1968 (3) SA 381 (W).

> *"It was pointed out, on behalf of the respondent, that the applicant is its trade competitor, and that disclosure of what is relevant to the action may also involve disclosure of confidential information, which the respondent does not want its competitor to see. The respondent would, I was told, rather abandon part of its claim than make such information available to the applicant. I have some sympathy for the respondent in that regard, but I am unable to assist it. <u>It need disclose nothing that is not material; but what is material, in the wide sense that</u>*

that word bears in relation to the duty to make discovery, must be disclosed, whatever the commercial consequences may be ...".

The Applicant points out that the First Respondent does not claim, nor could it claim, any privilege over the Minutes. It relies on the professed confidentiality of the Minutes, on commercial grounds belonging to SAA. (It should be noted that SAA does not oppose this application.)

The Applicant argues that as is clear from the above, this is no basis for refusing to disclose documents under Rule 53. The Applicant argues that it follows that, even if the First Respondent is correct in his averment that the Minutes are confidential, this would not entitle him to refuse to produce the Minutes as part of the Rule 53 record. It is argued that this appears to have been recognised by the First Respondent himself when he provided the Applicant with the Diagnostic Review, which had initially been refused on the same basis of commercial confidentiality. There is no basis for disclosing the Diagnostic Review whilst simultaneously refusing disclosure of the Minutes. It is argued this distinction is itself arbitrary and violates the duty of accountability and transparency.

The Applicant also points out that the Applicant seeks disclosure of the Minutes in terms of a confidentiality regime that will ensure that only the Applicant's legal representatives and independent experts have access to the documents.

The Applicant argues that disclosure is in the public interest. It submits that this Court does not have a discretion to refuse to compel the First Respondent to

produce an un-redacted version of the Minutes as part of the Rule 53 record, alternatively if this Court does have such a discretion, such discretion should be exercised against the First Respondent.

It is argued that the fact that information has been communicated by one party to another in confidence is not, in itself, a sufficient ground to refuse an application for discovery or production if the information would assist the Court to ascertain facts which are relevant to a matter in issue. The confidentiality must yield to the general public interest that, in the administration of justice, the truth will out.

The Applicant submits that the First Respondent's reliance on confidentiality should only be upheld in circumstances where the public interest in favour of non-disclosure clearly outweighs the public interest in disclosure. It is argued this is not the case in the present proceedings for two reasons:

First: the main application concerns matters of compelling public interest, including just administrative action and accountable public administration in relation to government's conduct in the domestic airline industry.

> There is a manifest need to ensure that matters are properly ventilated in the review proceedings in order for the Court to scrutinise whether the First and Second Respondents acted rationally, reasonably, and lawfully in the process of issuing the guarantee to SAA. The public interest demands that the truth be discovered. In this regard I was referred to the following remarks of Lord Denning MR in *Riddick v Thames Board Mills Ltd*, (1977) 3 All ER 677 (CA) at 687.

"The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e. in making full disclosure".

It is argued only with a complete record before it will the Court be able to assess whether the First Respondent has acted lawfully. The First Respondent's claim of confidentiality in relation to the Minutes thus frustrates the very purpose of Rule 53 and denies the Court and the Applicant an opportunity to properly assess the decision-making process of the First Respondent.

It was submitted that the public interest favours disclosure of the documents sought. Without sight of such documents, the Applicant (through the services of its legal representatives and independent experts) and the Court cannot properly assess the manner in which the First Respondent made the Guarantee decision.

Second: the confidentiality asserted by the First Respondent is confined to commercial information and is not of such a nature as to justify overriding the manifest public interest in the proper ventilation of the review.

Reliance was placed on the quoted extract of Coleman J in *Claude Neon Lights* above. Confidentiality with respect to commercial information is not justification for refusing to disclose documents. The First Respondent *"need disclose nothing that is not material; but what is material, in the wide sense that that word*

bears in relation to the duty to make discovery, must be disclosed, whatever the commercial consequences may be ..." (emphasis added by the Applicant), at 385A-C.

The Applicant also points out, as I have stated above, SAA itself, to which the purportedly confidential information relates, has not sought to oppose this interlocutory application.

The Applicant also argues that the First Respondent has failed to show what harm or prejudice, if any, will eventuate should the Minutes be disclosed for purposes of this litigation. It is argued that the First Respondent has rather resorted to general and unsubstantiated assertions of confidentiality without any factual evidence to explain why the resort to confidentiality is necessary. It was submitted that a Court should be slow to find that information in the record is "confidential" on the basis of bald statements by a party that the information is "commercially sensitive". See *Afrisun Mpumulanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T) at 628H-629B.

The Applicant further only claims limited access to the Minutes which would remove (or at the very least, significantly reduce) the risk of the Fifth Respondent suffering any apprehended harm or prejudice, since only the Applicant's legal representatives and independent experts will have access to the Minutes.

Third: the First Respondent has seen fit to disclose, on the same limited basis as now sought in relation to the Minutes (that only the Applicant's legal representatives and independent experts have access), the Diagnostic Review, which disclosure was

initially refused on the same basis of commercial confidentiality as the Minutes. This indicates an acceptance by the First Respondent that the limited basis on which the Diagnostic Review was disclosed will ensure that its disclosure occasions no harm or prejudice to SAA. It is argued that there is thus no reason why providing the Minutes to the Applicant's legal representatives and independent experts on a similar basis, would not avoid any harm or prejudice to SAA.

It was accordingly submitted that, if the Court decides that it has any discretion in the matter, it should exercise its discretion in favour of compelling the First Respondent to furnish the Minutes as part of the Rule 53 record in that the claims of confidentiality by the First Respondent do not dislodge the interest that the public has in rational and lawful decision-making and in an accountable review process by which unlawful decisions may be challenged.

The Applicant has undertaken limited access to mitigate any alleged harm or prejudice.

To mitigate any alleged prejudice that could be suffered by any of the respondents in the main application, particularly SAA, the order sought in the notice of motion would limit the disclosure of the Minutes to the Applicant's legal representatives and independent experts.

As precedent for this approach, I was referred to the orders made in *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others*, 1980 (3) SA 1093 (W). Per Schutz AJ (as he then was) at 1103: "*... although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of*

the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access".

Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another, 1979 (2) SA 457 (W). Per Botha J (as he then was) at 465: *"It seems to me that the position is as reflected in [Horner Lambert Co v Elaxo Laboratories 1975 RPC 354], that the Court should endeavour to impose suitable conditions relative to the inspection of documents and machinery in the possession of the respondents, so as to protect the respondents as far as may be practicable, whilst at the same time affording the applicant a reasonable opportunity of achieving its purpose"*

Competition Commission v Unilever plc and others, 2004 3 SA 23 (CAC). The order of the Competition Appeal Court may be found at 26H-27C.

Tetra Mobile Radio (Pty) Ltd v MEC, Department Of Works. 2008 (1) SA 438 (SCA), at para 17 (see order 3.2). The order granted by the SCA *inter alia* provided that:

"3.1 On the copy of each document referred to in para 1 above, the respondents shall mark or record that part of the document which it considers to be confidential.
3.2 Save for purposes of consulting with counsel or an independent expert, the applicant's attorney shall not disclose to any other party, including the applicant, any

part of a document in E respect of which the respondents claim confidentiality.

3.3. Should the applicant dispute any claim to confidentiality and should the parties be unable to resolve such dispute, the applicant shall on notice to the respondents and any person having an F interest therein, have the right to apply to a judge of the Pietermaritzburg High Court in chambers for a ruling on the issue."

In *Moulded Components, supra,* at 466E it was held that *"[i]t does not follow … that, because the respondents require protection* (in regard to purportedly confidential documentation), *the applicant is to be denied relief*".

In *Tetra Mobile, supra,* (Par [14]) the Supreme Court of Appeal granted an order allowing for a confidentiality regime in relation any portion of the documents that were claimed to be confidential that were relevant to the one party's appeal against a tender award that lay to the Appeal Tribunal. This order was granted consequent upon the SCA holding, in acceptance of the argument advanced by the appellant, that:

> *"if there was any apprehension on the part of the respondent regarding [the confidentiality of] any specific document, that concern could be met by making an order similar to the one granted by Schwartzman J in ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd, where the parts of the documents in respect of which disclosure might result in breach of confidence were to be identified and marked as confidential and the applicant's attorney was prohibited from disclosing such parts to any other party, including the applicant, save for the purpose of consulting with counsel or an independent*

expert. In that way a fair balance could be achieved between the appellant's right of access to documentation necessary for prosecuting its appeal, on the one hand, and the third respondent's right to confidentiality, on the other."

I was also referred to *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA), which involved an appeal arising from an interlocutory application for access to confidential information pursuant to a review of the International Trade Administration Commission's recommendations in relation to certain anti-dumping duties and the Minister of Trade and Industries' acceptance and implementation thereof. The appeal specifically dealt with the High Court's imposition of a particular confidentiality regime in relation to certain documents. It was submitted that while the legal position in this case was, *inter alia*, governed by specific provisions in relation to confidential documents in the International Trade Administration Act 71 of 2002, the SCA's comments about the rights protected are of equal force in the present matter, and the judgment also demonstrates our courts' willingness to balance competing interests, where there is alleged confidential information involved, by way of a confidentiality regime. The SCA in upholding the confidentiality regime ordered in the High Court – which *"order limit[ed] access to the confidential part of the Commission's record to legal representatives of the parties in the main application and one independent expert appointed by each party to assist in that application" – inter alia*, opined that:

"The Commission expressly stated that it had relied on Bridon's confidential information in arriving at the decision which Casar seeks to challenge in the main application. It follows that, without knowing the basis for the decision, Casar will have to mount that challenge in the dark against an opponent with

perfect night vision, in that it knows exactly what information it had considered. For example, Casar will hardly be able to contend that the decision was irrational; that irrelevant considerations were taken into account; or that the decision was taken arbitrarily or capriciously. These, of course, would all constitute legitimate grounds for review under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). What is more, it is not only the confidential information actually relied upon by the Commission that may potentially be material. Disclosure of Bridon's confidential information that was available to the Commission may show that it had failed to have regard to relevant considerations, which is another review ground contemplated in s 6(2)(e) of PAJA.

[32] In short, I agree with the sentiment expressed by Preller J in the court a quo, that a ban on disclosure of Bridon's confidential information will effectively deprive Casar of a fair hearing in the main application. As I see it, Casar's interest in disclosure therefore enjoys constitutional protection, not only under s 32, which guarantees everyone's right of access to any information held by the state, but also under s 34, which guarantees the right to a fair public hearing before a court."

It was submitted on behalf of the Applicant that an order of limited access such as is sought in this interlocutory application would protect the confidentiality of the Minutes (to the extent that the Minutes are, in fact, confidential) whilst allowing the Applicant's legal representatives and independent experts to interrogate their content.

This avoids a situation where the Applicant's legal representatives are required to

argue the main application behind a *"veil of ignorance"* (or are forced *"to mount [their] challenge in the dark against an opponent with perfect night vision"*) by virtue of their being denied access to the Minutes that were before the First Respondent and which he relied on in making the Guarantee decision. See *Competition Commission v Unilever plc* 2004 3 SA 23 (CAC) at 30H, and *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) at para 31, respectively.

It was argued that in these circumstances, the First Respondent cannot be heard to claim that the disclosure of the Minutes – on the limited basis envisaged in the notice of motion – will occasion any harm or prejudice to the SAA – particularly where none is claimed by SAA itself.

It was submitted that the First Respondent's reliance on confidentiality is misplaced, and that the Applicant is entitled to be furnished with an un-redacted version of the Minutes, particularly as the Applicant has undertaken to limit access to the Minutes in order to mitigate any apprehended harm or prejudice SAA might suffer as a result of their disclosure.

With regard to the relevance of the Minutes the First Respondent contends at numerous places in his answering affidavit in this interlocutory application that "the redacted portions (of the Minutes) are not relevant to the case of (the Applicant)" and that "the record in its current form including the un-redacted portions of the record suffice". The Applicant argues that the First Respondent is clearly wrong – the Minutes are relevant. Furthermore, the First Respondent contradicts this assertion in other parts of his answering affidavit, rendering it internally inconsistent.

The Applicant's claim to the relevance of the Minutes to the Guarantee decision and the review proceedings in the main application rests on two primary bases:

1 the un-redacted headings which clearly indicate the relevance of the Minutes to the Guarantee decision; and

2 the First Respondent, in his own answering affidavit in the main application, relies on the whole content of the Minutes, and not merely the un-redacted portions thereof, as part of the basis for the Guarantee decision.

The Applicant submits that the bald assertions of the First Respondent that the Minutes are not relevant to the main application meet neither of these challenges.

With regard to the un-redacted headings in the Minutes the following arguments were advanced on behalf of the Applicant:

The Applicant contends in paragraph 17 of it's founding affidavit in this interlocutory application that the un-redacted headings in the Minutes demonstrate that the redacted content was "clearly relevant" to the Guarantee decision. The First Respondent fails to properly dispute this contention, but rather states that he "stand[s] by [his] contention that the Minutes are confidential and aver[s] that the headings were sufficient as they indicated the subject matter under discussion without divulging the content thereof". The Applicant submits that the First Respondent therefore effectively admits that the redacted portions of the Minutes are relevant to the review in the main application.

As indicated above, the Applicant argues that confidentiality is no basis for refusing disclosure under Rule 53(1)(b).

The Applicant also makes this averment in paragraph 43.2 of its founding affidavit. The Applicant points out that the First Respondent's response to the paragraph is perplexing. He first states, at paragraph 35.1, "that he admits that the Minutes form part of the record" – and not merely the redacted portions thereof – again thereby admitting that the full content of the Minutes is relevant to the review proceedings in the main application. However, he then proceeds, at paragraph 35.3, to state that "[t]he redacted Minutes as they stand suffice" as "the headings indicate the subject matter of the discussion, and the detail is not relevant to the review application".

The Applicant argues that this self-justifying contention provides no basis for the First Respondent's assertion that the redacted portions are not relevant to the review proceedings in the main application, and does nothing to refute the Applicant's compelling contentions to the contrary. I agree. How can the relevance thereof be ascertained without seeing the contents thereof.

Rather, so the applicant contends, the headings stand as telling indications of the content of the redacted parts of the Minutes that they preface. It is argued not only is it highly improbable that this content bears no relation to these headings and is not relevant to the review proceedings, but neither the Applicant nor the Court can properly test the First Respondent's bald assertion that "the detail is not relevant" without having sight of it. Rather, the Applicant and the Court are forced to rely on the headings which do, as is suggested above and in the founding papers for this application, cogently indicate the relevance of the content.

The Applicant argues that in any event, the First Respondent's own averments in his answering affidavit put the relevance of the redacted portions of the minutes to the review beyond doubt. He states that:

> "The full and complete set of Minutes contains information relating to the financial and operational information of the Fifth Respondent."

The Applicant submits that the First Respondent has failed to counter the Applicant's contention that the headings that remain un-redacted in the Minutes demonstrate the relevance of the redacted content, has provided no support for his contention that the content is not relevant, and has, by his own averments, confirmed the relevance of the redacted portions of the minutes.

The applicant further submits that the First Respondent's reliance on the Minutes indicates the relevance thereof.

The Applicant argues that the First Respondent again does nothing to properly counter the Applicant's second contention with regard to the relevance of the Minutes. In relation to paragraph 31.2, where the Applicant first makes this contention, the First Respondent does little more than to state that the Minutes are relied on to respond to certain allegations made by the Applicant (paragraphs 29.3-29.5) – which is trite. He also quotes the paragraphs of his answering affidavit in the main application which rely on the Minutes (paragraph 29.6). From this, the First Respondent then concludes that "[b]oth paragraphs make reference to more than one source of information regarding the financial status and the socio-economic role of SAA" and that, accordingly, the Applicant's "proposition that [he] should not have

mentioned the SAA's monthly performance as being information that was at [his] disposal when [he] made the decision to issue the guarantee is misconceived".

The Applicant points out that the First Respondent "should not have mentioned the SAA's monthly performance" is manifestly not the Applicant's "proposition" – and appears nowhere in the Applicant's founding affidavit in this application. The Applicant's proposition is rather that the First Respondent's reliance on the full content of the Minutes in his answering affidavit demonstrates their relevance and that they properly form part of the Rule 53 record. The Applicant argues that the First Respondent's averments indicate that he accepted that the Minutes provided information about "SAA's monthly performance" and constituted "information that was at [his] disposal when [he] made the decision to issue the guarantee." Since, the financial position and "performance" of SAA is at the very heart of the review of the decision to grant it a government guarantee (the subject of the main application), the Minutes (in un-redacted form) are clearly relevant.

The Applicant furthermore contends that the First Respondent cannot so rely on the Minutes while failing to disclose them. The fact that the First Respondent states that it relies on "more than one source of information" is of no consequence, and does not detract from the fact that the Minutes are one of these sources relied upon and are, thus, relevant to the main application. As indicated above none of the relevant Minutes indicates the First Respondent being present at any of them. The Minutes thus had to be one of his sources of information. Without the limited disclosure of the Minutes sought in this application, the Applicant (through its legal representatives and/or independent experts) would have no ability to properly interrogate and challenge the reasonableness, rationality and lawfulness of the alleged reliance by

the First Respondent on the Minutes as one of the sources of information that he considered in making the Guarantee decision. It is argued that it would further preclude the Applicant from properly interrogating his allegation that this information led him to believe that "there was a real likelihood that SAA's funds would be exhausted by the end of the 2011/12 financial years", which in turn led him to conclude that "the auditors would not be in a position to sign off on the companies' financial statements."

The Applicant points out that the First Respondent also claims that the averments in his answering affidavit in the main application in relation to the Minutes were "a mere disclosure of the information that was before [him] at the time the impugned Guarantee decision was made". Rather than disputing the relevance of the Minutes, and that they properly form part of the Rule 53 record, the First Respondent's assertion, without more, appears to confirm this. The Applicant argues as held in *Bridon "it is not only the confidential information actually relied upon by the [decision maker] that may potentially be material. Disclosure of ...confidential information that was available to the [the decision maker] may show that it had failed to have regard to relevant considerations, which is another review ground contemplated in s 6(2)(e) of PAJA."*

The First Respondent also appears to rely on the fact that the "averments were general in nature and do not refer to any specific portion of the minutes". The Applicant argues this is, again, no answer to it's argument as to the Minutes' relevance. It confirms the Applicant's point that the First Respondent relied on the full content of the Minutes in his answering papers, and not merely specific un-redacted portions thereof.

The Applicant argues that documents relevant to review proceedings must be disclosed as part of the record.

The law applicable to Rule 53 records underscores that the record includes all documents that were before the decision-maker when he or she made the decision subject to the review proceedings and which informed the decision. In other words, all documents which are relevant to the decision must be disclosed. In this regard reference is made to *Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape and Others*, 2010 (1) SA 228 (E). Leach J (as he then was) held as follows:

> *"it is self-evident that all portions of a record relevant to the decision in question should be made available. And, in considering the question of relevance, it is important to bear in mind that there is now a constitutional obligation for reasons to be given for administrative decisions, which must be justifiable as rational and reasonably sustainable".*

The Applicant submits that the full content of the Minutes is clearly relevant to the Guarantee decision and the review in the main application for the reasons provided in the Applicant's founding affidavit, which have not properly been countered by the First Respondent. The applicant submits that the full content of the Minutes properly form part of the record of the decision and, for this reason, ought to be disclosed in their entirety. Any remaining concerns around commercial confidentiality, are fully met by the order sought by the Applicant, which would ensure that the un-redacted Minutes are only made available to its legal representatives and independent

experts, and not to the Applicant itself.

The First Respondent heavily relies on the Applicants initial decision not to institute an application to compel. The First Respondent contends that as the Applicant elected not to proceed with its compelling application in respect of the Minutes before filing its supplementary founding affidavit, it is bound by this election and cannot now proceed with the application.

At paragraph 182.2.4 of his answering affidavit in the main application the First Respondent notes that "[the Applicant] elected no longer to pursue its contention that the record and the supplementary record that were produced were incomplete" and that "it proceeded to formulate and file its supplementary affidavit, with reference to the record" as it existed at that stage. It appears to be on this basis that the First Respondent then concludes, at paragraph 182.3, that "it is no longer open to [the Applicant] to claim that the record of proceedings so produced was incomplete".

The Applicant contends that this contention is inconsistent with other parts of the First Respondent's answering affidavit in the compelling application, which bear no explicit mention of such an argument and in fact appear to accept that the Applicant is within its rights to now institute the interlocutory application.

1 The First Respondent, at paragraph 37 of his answering affidavit in this application, fails to deny, and must thus be taken to admit, the Applicant's assertion at paragraph 45 of the founding affidavit in the interlocutory application that the Applicant's decision not to proceed with the interlocutory application immediately before filing its supplementary

founding affidavit was "premised on the understanding that the First Respondent would not rely on any redacted portions of the record".

2 The First Respondent also does not contest the Applicant's assertion in this paragraph that, by relying on the Minutes in his answering affidavit in the main application, and by refusing to disclose the Minutes, the First Respondent has not abided by this understanding.

The Applicant alleges that the First Respondent failed to abide by the Applicant's understanding. In the Applicant's correspondence with the First Respondent on 23 May 2013 which communicated its decision not to proceed with its compelling application before filing its supplementary affidavit, it was made clear that this decision was made on the understanding that the First Respondent would not be permitted to rely on redacted portions of the record in his defence of the application. The Applicant argues that this is an unsurprising approach for the Applicant to adopt given that it is not able to respond to allegations regarding documents or portions of which it has not had sight. This is also a common sense approach given that the Court would also not be able to test the veracity of these allegations.

The correspondence also made it clear that the Applicant still adopted the position that the First Respondent's approach to the record was a breach of Rule 53.

The understanding on which the Applicant elected not to proceed with its compelling application immediately was also communicated to the First Respondent in the supplementary founding affidavit in the main application.

The applicant points out that the First Respondent nowhere denies that this was the basis upon which the Applicant decided not to proceed with the compelling application before filing its supplementary founding affidavit. This is evidence of his recognition of the fact that this would, in any event, be an unsustainable position to adopt in the face of the clear enunciation of the approach adopted by the Applicant in the letter of 23 May 2013, and reiterated in its supplementary founding affidavit.

The Applicant submits, correctly in my view, that It is also clear from the above that the First Respondent has relied on the full content of the Minutes in his answering affidavit in the main application. The decision to rely on the Minutes is thus clearly at variance with the Applicant's understanding, and thus entitles the Applicant to proceed with its compelling application.

The Applicant has only proceeded with its compelling application in respect of the Minutes and has not claimed any other documents listed in its Rule 30A notice. This is consistent with the basis upon which the Applicant elected not to proceed with its compelling application before filing its supplementary founding affidavit.

The Applicant argues that the First Respondent cannot now claim, in the face of his conduct to the contrary of the Applicant's understanding, that the Applicant cannot proceed with the interlocutory application in respect of the Minutes.

Moreover, the approach adopted by the Applicant, which the First Respondent now takes issue with, was identical to that adopted in relation to the Diagnostic Review. When the First Respondent relied, in his answering affidavit, on the whole Diagnostic Review, which he had previously provided only in a heavily redacted form, the

Applicant wrote to the First Respondent and requested the production of an un-redacted copy of the Diagnostic Review (on a confidential basis), since without access to the whole content thereof, the Applicant would be unable to adequately reply to the First Respondent's answering affidavit. Pursuant to that request, the First Respondent duly provided an un-redacted copy of the Diagnostic Review on a confidential basis – and certainly did not contend that the Applicant was disentitled thereto by virtue of its "election".

It is argued there can be no proper basis for the First Respondent to persist in seeking to frustrate the attempt by the Applicant's legal representatives and independent experts to obtain access to un-redacted copies of the Minutes, which are sought on the same basis, and subject to the same conditions, as applicable to the Diagnostic Review.

The Applicant submits that given the above the Applicant is not constrained from proceeding with this interlocutory application in respect of the Minutes by an election it previously made not to proceed with such application. This decision was premised on an understanding by which the First Respondent did not abide.

The applicant correctly argues that the law on waiver is well established. The onus is upon a party asserting waiver to show that the other party, with full knowledge of his right, has decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. It is an onus not easily discharged. It has to be specifically alleged by the party relying on it, and proved.

It can hardly be said that the Applicant has expressly or by conduct plainly

inconsistent with the intention to enforce it, abandoned its right to seek production of the un-redacted Minutes.

The Applicant concludes its argument that none of the First Respondent's grounds for opposition to the Applicant's interlocutory application have any merit and prays for the relief set out in its notice of motion in this interlocutory application.

On behalf of the First Respondent it is argued it has the right to protect confidential information. The un-redacted portion of the minutes reveal that what was discussed at the meetings of the Monitoring Committee are matters relating to financial affairs of the fifth respondent, its strategic operational activities, including fleet planning on international, domestic and routes; withdrawal of certain of its routes, more particularly the withdrawal of the Cape Town to London route; the launch of new routes; key performance indicators of its operations as well as discussion of monthly management accounts.

It is argued that the discussions reflect matters of a confidential nature relating to the operations of the fifth respondent. However, as indicated above the Applicant merely asks for limited disclosure thereof, in the sense that only the legal advisors and independent experts will have access thereto. It will be remembered that the First respondent had the identical view regarding the Diagnostic Review and later disclosed it on the very basis the Applicant now seeks access to the Minutes. By making the Minutes part of the Rule 53 record, in my view, conceded the relevance thereof. On behalf of the Applicant an undertaking was made that the contents of the Minutes, as in the case of the Diagnostic Review, will not be shown to the Applicant.

The fear that confidential information will be disclosed is therefore unfounded. Furthermore the Minutes in its present redacted form will be of no use to the court hearing the matter. As correctly argued by the Applicant it will be at an unfair disadvantage. It need further be noted that this application is not opposed by SAA.

As indicated above the First Respondent takes tha stance that the Applicant waived its right now to apply for access to the Minutes.

It is argued that the Applicant did not immediately proceed to bring any application to compel disclosure of the un-redacted version of the minutes immediately after ten days of the first respondent's reply to the initial Rule 30A notice issued by the applicant on 6 May 2013.

Instead of bringing its application to compel, in the light of the first respondent's response, the applicant "*elected*" to prepare and deliver its supplementary affidavits, on 10 June 2013 as well as its replying affidavit on 4 November 2013, notwithstanding the claim of non-compliance. However, as indicated above, it is clear from the correspondence that there was most certainly not an unconditional waiver on behalf of the Applicant. The First Respondent has now breached the condition on which the election was made by relying on the redacted part of the minutes in his answering affidavit as shown above.

It is argued that the applicant does not claim at all that it was not able to formulate the supplementary and replying affidavits because of lack of access to the un-redacted version of the minutes, and that it has been materially prejudiced in that regard. On the contrary, it has prepared and delivered its supplementary and replying affidavits, without access to the un-redacted version of the minutes. In my view this does not detract from the disadvantage the Applicant and the court will be in not seeing material information the First Respondent had before him when the decision was made. As indicated the First Respondent did not attend the meetings concerned and must have had reliance to the Minutes.

It is argued that the provisions of Rule 53(1) relating to the production of the record are made to provide procedural benefits to the applicant, and it may elect the extent to which it wishes to enjoy the extent of the procedural benefits conferred upon it in terms of that Rule. In this case, the applicant has elected the extent to which it wishes to enjoy the benefits of Rule 53. It is an election which was made fully conscious of the alleged non-compliance by the first respondent. It must be held bound to that election. This argument does not take account of the fact that the Applicant "waived" its right under the condition that no-one will make use of the Minutes in the Rule 53 proceedings as the First Respondent clearly did.

It is argued that the paragraphs referred to by the Applicant on which it relies to indicate that the Minutes formed part of the information the First Respondent relied upon do not refer at all to the Minutes. They merely refer to monthly meetings which the First Respondent held with the officials of the fifth respondent about its financial

affairs. This argument is disingenuous. Not only did the First respondent not attend the meetings but I am at a loss to see what else the minutes would reflect other than what was discussed at the meetings.

I am not persuaded that the Applicant has waived its right to obtain access to the un-redacted version of the minutes.

The first respondent maintains that the redacted portion of the minutes was not relevant to enable the applicant to file its replying affidavit.

In motion proceedings such as the main application, affidavits constitute both pleadings, setting out the parties' causes of action and defences, as well as evidence tendered by them or on their behalf to support the causes of action or defences so pleaded. In the main application, the applicant has described its grounds of review, in both the founding and supplementary affidavits. It has tendered its evidence to support the grounds of review, without the need to rely or refer to the un-redacted version of minutes. In my view this argument does not address the fact that the Applicant does not have access to all the information the First respondent had at its disposal when making its decision. They will have to argue its case at a disadvantage. It is a matter of great public interest. R 5 Billion of tax payers money is at stake. Clearly all aspects of this case must be ventelated before the court without any of the parties being at a disadvantage.

I am not persuaded that the un-redacted version of the minutes is not relevant. It is submitted that there is no reason for the expert advisors of the applicant to gain access to the un-redacted version of minutes. There is no suggestion that they might file further expert testimony in the light of those minutes, once they have gained access. This question can only be answered once the Minutes are produced as its contents are at this stage only known by the Respondents.

It was argued on behalf of the First Respondent that in *Bridon International GMBH v International Trade Administration Commission and Others,* supra, paras 26 and 27 the SCA made it clear that where there are conflicting interests arising from the protection of confidential information, on the one hand, and the need to promote fairness in litigation, a Court is required to exercise its discretion to bring about a fair outcome, taking into account circumstances of each case.

It was submitted that the following considerations weigh heavily against disclosure of the un-redacted version of the minutes:

The applicant has already elected not to pursue legal remedies which were available to it to press for access to the un-redacted version of the minutes, it at time when that version of the minutes could have been necessary, in the interest of fair litigation. It elected not to do so. Instead it proceeded to prepare and file its subsequent affidavits, without any complaint of material prejudice. This case is fundamentally distinguishable from many others considered by the Courts, where

access was sought to the complete record before further affidavits were filed. I think this aspect has been fully dealt with above.

It is argued that the basis on which the applicant now wants to go back to the election it has previously made is simply unfounded as a matter of fact. This has also been dealt with above.

It is further argued that the purpose for which the applicant wishes to gain confidential access to the un-redacted version of the minutes is not to promote fair litigation. I cannot agree with this submission. Fair litigation presupposes a level playing field.

It is argued that the confidential basis on which the applicant wishes its legal representatives and expert advisors to gain access is not sufficient to protect the confidentiality of the minutes for two reasons:

The applicant's legal representatives and expert advisors have not executed written undertakings of confidentiality to afford the first respondent a reasonable comfort that they will maintain confidentiality of the minutes and the consequences of breach of the undertakings;

Secondly, the applicant has not undertaken that submissions which are sought to be made, will be made in a manner that protects confidentiality of the minutes concerned.

At this stage of the proceedings, those submissions will be made in documents which will be part of the public record, and are likely to be repeated in open Court where the applicant's employees and other interested members of the public will be entitled to be present.

As stated above it has been undertaken (in open court) that SAA's confidentiality will be maintained. I have no fear that respected members of the legal profession will not abide thereto. In any event, if the order prayed for in the notice of motion is granted they will be prevented by a court order to disclose information at variance thereto. The same applies to the Diagnostic Review which the First Respondent in the meantime disclosed on the exact basis the Applicant now seeks the Minutes to be disclosed.

I am satisfied that the applicant has made out a case for the relief claimed.

The following order is made:

1. The First Respondent is ordered to comply with the provisions of Rule 53 (1) (b) of the Uniform Rules of Court namely to dispatch to the Registrar and to

notify the Applicant that it had done so, within 5 (five) days of the date of the order, un-redacted copies of the Minutes that were the subject matter of this application;

2. That save for purposes of consulting with counsel or any independent experts, the Applicant's attorneys shall not disclose to any other party, including the Applicant, any part of the aforesaid documents.
3. The First respondent is ordered to pay the costs of the application including the costs consequent upon the employment of two counsel.

"MHH13"

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

CASE NO: 8647/13

In the matter between:

HELEN SUZMAN FOUNDATION — Applicant

and

JUDICIAL SERVICE COMMISSION — Respondent

with

POLICE AND PRISONS CIVIL RIGHTS UNION — First *Amicus Curiae*

NATIONAL ASSOCIATION
OF DEMOCRATIC LAWYERS — Second *Amicus Curiae*

NOTICE OF APPLICATION UNDER RULES 6(11) AND 30A

PLEASE TAKE NOTICE THAT the applicant intends to make application to this Honourable Court on a date to be determined for an order in the following terms:

1. ordering the respondent to comply with the provisions of Rule 53(1)(b) of the Uniform Rules of Court, namely to dispatch to the Registrar, and to notify the applicant that it has done so, within five days of the date of this order, the full record of the proceedings sought to be reviewed in this application, including the audio recording and any transcript of the deliberations of the respondent, after the interviews on 17 October 2012; and

2. ordering the respondent to pay the costs of this application on the scale as between attorney and own client, including the costs of two counsel;

3. granting the applicant further and / or alternative relief.

PLEASE TAKE NOTICE FURTHER THAT the accompanying supporting affidavit of **MORAY HOWARD HATHORN**, and the annexes thereto, will be used in support of this application.

PLEASE TAKE NOTICE FURTHER THAT if the respondent intends opposing this application, it is required:

a. to notify the applicant's attorneys of such intention within 5 days of the service of this notice of application; and

b. to file its answering affidavit(s), if any, within 20 days of the service of this notice of application.

DATED at Cape Town on this 6TH day of **JANUARY 2014**

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AND TO: **THE STATE ATTORNEY**
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AND TO: **XULU LIVERSAGE ATTORNEYS**
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By email: info@mramagaga.co.za

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

CASE NO: 8647/13

In the matter between:

HELEN SUZMAN FOUNDATION	Applicant
and	
JUDICIAL SERVICE COMMISSION	Respondent
with	
POLICE AND PRISONS CIVIL RIGHTS UNION	First *Amicus Curiae*
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Second *Amicus Curiae*

AFFIDAVIT IN SUPPORT OF APPLICATION UNDER RULES 6(11) AND 30A

I, the undersigned,

MORAY HOWARD HATHORN

do hereby make oath and state as follows:

1. I am adult male attorney, practising at 10 Fricker Road, Illovo, Johannesburg, as a partner in Webber Wentzel, the attorneys of record for the applicant in this matter. I am duly authorised by the applicant to depose to this affidavit. The facts set forth in this affidavit fall within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.

constitutional role if its actions could be shielded not only from public view, but also judicial scrutiny.

41. Full argument will be advanced in this respect at the hearing of this matter.

Even if the Recording is confidential, it cannot be concealed from the Court

42. Even if there was any substance to the respondent's claims of confidentiality, which the applicant firmly denies, the respondent would still not be entitled to conceal the Recording from the Court, and it would certainly never be entitled to conceal the very existence of the Recording from the Court.

43. The appropriate process, to the extent that any parts of a record are established by the respondent to require confidential treatment, is to seek the leave of the Court to identify and mark such parts as confidential, so that they may be viewed only by the Court and certain persons, including the applicant's legal representatives and the applicant, possibly subject to a confidentiality undertaking. This has been affirmed by the courts on numerous occasions as the appropriate mechanism to balance confidentiality concerns with the rights of access to information and access to courts.

44. The applicant's officers and legal representatives have been to date and remain, of course, prepared to furnish any requisite confidentiality undertakings in respect of any parts of the record which are established to be confidential.

45. Accordingly, and without conceding that confidentiality is a valid basis for refusing full disclosure under Rule 53, to ensure the full ventilation of the issues involved in this matter the applicant invites the respondent to indicate

in answer which aspects of the record are considered to be confidential so that appropriate confidentiality undertakings might be prepared.

46. Full argument will be advanced in this respect at the hearing of this matter.

CONCLUSION

47. For all of the above reasons, the applicant contends that the respondent's position is untenable and highly prejudicial to the applicant and the rule of law. The respondent has plainly and deliberately not complied with Rule 53(1)(b), its non-compliance suffers from serious procedural and substantive deficiencies, and there is no basis for such non-compliance to be countenanced by this Honourable Court.

48. The respondent's conduct is deserving of severe censure by this Court and a punitive costs order.

49. The applicant accordingly prays for the relief set out in the notice of motion to which this affidavit is attached.

COPY

"MHH14"

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.

STATE ATTORNEY

Per:
L MANUEL
Attorney for Respondent
4th Floor
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CAPE TOWN
(Ref: 1598/13/P12)

STATE ATTORNEY
L Manuel
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TO : **THE REGISTRAR**
High Court
CAPE TOWN

AND TO : **WEBBER WENTZEL ATTORNEYS**
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01 AUG 2014
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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 8647/13

in the matter between:

THE HELEN SUZMAN FOUNDATION	Applicant
and	
JUDICIAL SERVICE COMMISSION	Respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	First *amicus curiae*
NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS	Second *amicus curiae*
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

[1] Constitution s 174.

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.

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.

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