**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

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

In the matter between:

**HELEN SUZMAN FOUNDATION** Applicant

and

**JUDICIAL SERVICE COMMISSION** Respondent

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# APPLICANT'S HEADS OF ARGUMENT

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**INTRODUCTION**

1. This is an appeal against the whole of the judgment and order (including the costs order) handed down by the Supreme Court of Appeal ("**SCA**") on 2 November 2016 under SCA case number 145/2015 ("**the SCA judgment and order**")[1]. The SCA found, in favour of the respondent, that certain deliberations of the respondent (described and defined below) did not form part of a record of decision under Rule 53(1)(b) of the Uniform Rules of Court and thus did not have to be furnished to the applicant.

2. The effect of the SCA's judgment is to undermine a fundamental requirement of procedural fairness and to limit the application of Rule 53 in a manner that is not consistent with our constitutional democracy and its commitment to open, transparent decision-making.

3. The SCA found that the applicant should not be given access to the full record and mandated the respondent to fillet the record and remove the deliberations on grounds of confidentiality. As will be dealt with comprehensively below, confidentiality is not an answer to the requirement of full disclosure under the Rules. At most, in proven instances of confidentiality, a confidentiality regime may be ordered by the Court, with only certain persons having access to the sequestered documents.

4. Most concerning is that the SCA's decision may encourage selective disclosure of the record, and effectively undoes years of jurisprudence regarding the importance of Rule 53 as a procedural device. It also undermines the courts' ability properly to exercise their powers of judicial review; and fails meaningfully to consider (if

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1 [Appeal Record at 152]

confidentiality is truly a concern) how to strike a constitutionally appropriate balance between confidentiality and open justice, through an appropriate confidentiality regime.

5. The matter has its origins in an interlocutory application before the High Court, Western Cape Division ("**the High Court**" or "**Court *a quo***") under rules 6(11) and 30A of the Uniform Rules of Court ("**the Rules**"), in terms of which the applicant sought an order, *inter alia*, compelling the respondent to comply with the provisions of Rule 53(1)(b) of the Rules, namely to dispatch to the Registrar of the High Court the full record of the proceedings sought to be reviewed in the main application (described and defined below) ("**the interlocutory application**"). The relief sought in the interlocutory application culminated, in the first instance, in the judgment and order of the Honourable Mr Justice Le Grange handed down on 5 September 2014 (Case No: 8647/2013) ("**the High Court judgment and order**").[2] The High Court judgment and order found in favour of the respondent, dismissing the interlocutory application with costs.

6. The applicant sought leave to appeal against the High Court order, and leave to appeal was granted by order of the SCA (per Shongwe JA and Gorven AJA) on 9 February 2015.[3] The SCA heard the matter on 5 May 2016. The SCA judgment and order again found in favour of the respondent.

7. The applicant filed a detailed application for leave to appeal with this Court on 22 November 2016 ("**the application for leave to appeal**").[4] The respondent filed an answering affidavit to the application for leave to appeal on 6 December 2016 indicating that, in its view, it is in the interests of justice and certainty that this

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2 [Appeal Record at 76-106]

3 [Appeal Record at 107]

4 [Appeal Record at 179]

Court determines definitively the question of whether and under what circumstances the respondent is required to disclose its deliberations as part of a Rule 53 record.[5] The respondent thus did not oppose the application for leave to appeal.

8. This Court issued directions on 10 May 2017, setting the hearing down and issuing directions for filing of the heads of arguments in the appeal before this Honourable Court.[6]

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

**FACTUAL BACKGROUND**

10. On 4 June 2013, the applicant instituted review proceedings against the respondent (also referred to as "**the JSC**") 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 the High Court ("**the Decision**") was unlawful and / or irrational and was thus invalid ("**the main application**").[7]

11. 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 the record of the Decision to the Registrar of the High Court, together with any reasons for the Decision it was legally obliged to give (collectively, "**the Record**"),

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5 [Appeal Record at 229]

6 [Appeal Record at 232]

7 Applicant's supporting affidavit in the interlocutory application ("**SA**") at para 3 [Appeal Record at 6, lines 4 to 10. The main application is to be found at page 113 of the Appeal 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.[8]

**The record furnished by the respondent under Rule 53**

12. After an unexplained delay of over a month, the applicant was notified that the Record had finally been lodged with the Registrar of the High Court.[9] The Record, as lodged, comprised six volumes containing copies of the following:

12.1 the reasons for the Decision ("**the Reasons**")[10], setting out "*considerations*" in respect of each of the candidates, which:

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

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

12.1.3 "*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*".

12.2 transcripts of the respondent's public interviews with each of the candidates;

12.3 each candidate's application for appointment;

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

12.5 related research, submissions and correspondence.[11]

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8 SA at para 4 [Appeal Record at 6, lines 12 to 18]

9 SA at paras 6 to 11 [Appeal Record at 6, line 21 to 7, line 23]

10 Annexed to the SA marked "MH5" [Appeal Record at 28]

**Inadequacy of the Record**

13. The "Record" as lodged did not include any minutes, transcripts, recordings 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, at the time of launching the main application, aware of the existence of the aforesaid records of the Deliberations.[12]

14. 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 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.[13]

15. The Recording is patently the most immediate and accurate record of the Decision and the process leading up to the Decision. The Recording is indispensable to any proper determination of whether there is a rational connection between the Deliberations, the Decision and the Reasons.[14]

16. Despite being relevant and a central aspect of the Record, disclosure of which is clearly required by Rule 53(1)(b), and despite the respondent confirming the

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11 SA at para 11 [Appeal Record at 7, line 23 to 8, line 15]

12 SA at para 12 [Appeal Record at 8, lines 16 to 20]

13 SA at para 13 [Appeal Record at 8, line 20 to 9, line 5]

14 SA at para 14 [Appeal Record at 14, lines 6 to 10]

existence of the Recording,[15] the respondent refused to lodge the Recording as part of the Record.

17. 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 procedurally and substantively deficient and has deprived the applicant and the reviewing Court in the main application of the procedural and substantive safeguards and tools which are the very rationale for Rule 53. Not only is this an infraction on the applicant's rights under the Rules, it is also in breach of the equality of arms required by section 34 of the Constitution.

18. The applicant is entitled to the protection that the Constitution affords it and is entitled to enforce, through the courts, the obligations owed to it under the Constitution. Section 34 of the Constitution entitles the applicant to have any dispute that can be resolved by the application of law decided in a fair public hearing before the Court. Section 165 of the Constitution provides that "*[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts*."

19. It is on these premises that the applicant launched the interlocutory application.

**THE KEY FINDINGS IN THE SCA JUDGMENT**

20. The SCA found that a decision-maker's deliberations do not automatically form part of the record of proceedings under rule 53. The extent of the record, in its view, must depend on the facts of each case. The SCA found that in certain cases the decision-maker may be required to produce a full record of proceedings, which

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[15] SA at para 16 [Appeal Record at 9, lines 15 to 19]

includes its deliberations, but in certain cases (such as this one), confidentiality considerations may warrant non-disclosure of deliberations in some circumstances and for specific reasons.

21. The SCA found that, in the circumstances under consideration, the relief sought by the applicant would undermine constitutional and legislative imperatives by, *inter alia*: stifling the rigour and candour of future Deliberations; deterring potential applicants; harming the dignity and privacy of candidates who applied with the expectation of confidentiality of the Deliberations; and generally hampering effective judicial selection.[16] The Recording was thus held to have been lawfully omitted by the respondent.

22. The applicant submits that the findings of the SCA and the Court *a quo* are legally and factually untenable.

**THE IMPORTANCE AND PURPOSE OF RULE 53**

23. In a constitutional democracy, access to the full record of proceedings is fundamental to the proper ventilation of a judicial review. Our courts have consistently held that Rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function (See for example *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) at para 501).

24. In this matter, however, the respondent has consistently contended that the record, as contemplated by Rule 53, excludes the Recording.[17] The respondent

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16 SCA judgment at para [39] [Appeal record at 176, line 20 to 177, line 10]

17 Respondent's answering affidavit in the interlocutory application ("**AA**") at para 39.1 [Appeal Record at 58]

has relied on outdated[18] and unpersuasive[19] precedent, selectively quoted in support of its contention that deliberations of this sort do not form part of the Record.

25. Although the SCA found that the cases cited by the respondent cannot be applied strictly, it nevertheless stated that a decision-maker's deliberations are not necessarily excluded, but may be omitted in appropriate circumstances.[20]

26. If this is to be accepted and the respondent is allowed, of its own volition, subjectively to determine the contents of the Record, not only will the applicant be forced to fight with one arm behind its back, the Court's ability to carry out its constitutional mandate will be severely hampered. This cannot be countenanced in a constitutional democracy. The furnishing of the full Record forms an integral part of the exercise of the Court's vital power of judicial review, which must be exercised in light of all relevant facts.

27. Relevant parts of a Rule 53 record cannot be excluded from the parties' or the court's purview, at the sole discretion of one of the parties. The SCA judgment sets a dangerous precedent as it suggests that a party that is required to file a record under Rule 53 may, in certain circumstances, and on its own determination, not disclose certain relevant portions of the record.

28. The SCA stated that the primary purpose of Rule 53 (in line with the dicta in *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) ("***Jockey Club***") and *City of Cape Town v South African National Roads Authority and others* 2015 (3)

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18 *Johannesburg City Council v The Administrator, Transvaal and Another* 1970 (2) SA 89 (T) ("***Johannesburg City Council***") at para 91H - 92A

19 *MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) ("***Intertrade***") at para 15

20 SCA judgment at para 15 [Appeal Record at 161, lines 21 to 24]

SA 386 (SCA) ("***City of Cape Town***")) is to "*facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision … access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court*."[21]

29. On this starting premise, the SCA held that it is thus only the portion of the record relevant to the decision in issue that should be made available.

30. It is, however, not for the party delivering the Record to decide how much of the relevant material is required by the other party to run its case. All relevant material must be disclosed.

31. It is trite that an applicant in review proceedings is entitled to the full record of the decision sought to be reviewed and set aside (*South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons* 2003 (3) SA 313 (SCA) at para 5).

32. Our courts have consistently held that the purpose of Rule 53 is to facilitate applications for review, chiefly by providing for access to the record of the decision. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review (See *Jockey Club* at 660 and 662 and *Lawyers for Human Rights v Rules Board for Courts of Law and Another* 2012 (7) BCLR 754 (GNP) (11 April 2012) ("***Lawyers for Human Rights***") at para 23).

33. The filing of the complete Record is also a crucial tenet of an applicant's right of access to Court, and equality of arms. In brief, as the Court in *Lawyers for Human Rights* stressed, equality of arms, as provided for in section 34 of the Constitution,

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[21] SCA judgment para [13] [Appeal Record at 159, line 27 to 160, line 4]

means that everyone who is party to proceedings must have a reasonable opportunity of presenting its case to the Court under conditions that do not place it at a substantial disadvantage *vis-à-vis* his / her opponent.[22]

34. The requirement that there be proper disclosure of the Record under Rule 53 furthers the constitutional right of access to any information held by the state[23] and the constitutional requirement that public administration be transparent and accountable, under section 197 of the Constitution.

35. Further, in placing reliance on the dictum in *Jockey Club*, the Court in *Lawyers for Human Rights* affirmed that the purpose of Rule 53 is to afford a private citizen who 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*" a mechanism whereby he may access the underlying considerations which occupied the mind of the decision maker at the time of coming to the decision in question.

36. Members of the respondent exercise an enormous public power and are vested with substantial public and constitutional responsibility, which they must discharge lawfully, rationally and in a procedurally fair, unbiased manner. This has been clearly recognised in several judgments of the High Court and of the SCA (see *Judicial Service Commission & Another v Cape Bar Council* 2013 (1) SA 170 (SCA) at 171).

37. The Decision and the process followed by the respondent leading to the Decision are subject to judicial scrutiny by way of a Rule 53 review.

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[22] See, for example, the European Court of Human Rights decision in *De Haes and Gijsels v Belgium, Merits and Just Satisfaction*, App No 19983/92, Case No 7/1996/626/809, ECHR 1997-I.

[23] See section 32 of the Constitution; *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) ("***Bridon***") at para 32.

38. The respondent's attempt to shield the Decision and / or the process it followed in reaching the Decision from review (by deliberately placing it outside the realm of judicial review *via* its subjective interpretation of the applicability of Rule 53), is constitutionally unavailing.

39. The SCA failed to consider the true purpose of Rule 53 and its place in a constitutional democracy. It is clear from the respondent's answering affidavit in the court *a quo* that the respondent considers the disclosure of the contents of the Record to be discretionary.[24] The SCA unfortunately endorsed this view. The test as to the Record's contents is, however, an objective one. Relevant material that is not privileged must be disclosed. The decision-maker has no discretion to fillet the record by omitting or removing portions of its choosing.

40. The SCA held that: the documents selected and unilaterally determined by the JSC to be appropriate for disclosure sufficiently met the purpose behind Rule 53; that the Deliberations are not required for the proper determination of the review; and that the reasons provided by the Chief Justice are sufficient for an objective determination.[25]

41. In what follows we explain why the respondent's approach – accepted by the Court *a quo* and the SCA – reflects a fundamental failure to grasp the proper purpose and importance of Rule 53.

**RELEVANCE OF THE DELIBERATIONS**

42. The SCA accepts as a general proposition that relevant material must be disclosed. It erred, however, in finding that the Deliberations were not relevant.

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[24] AA at para 27 [Appeal Record at 50 - 52].

[25] SCA judgment at paras [35] to [37] [Appeal Record at 174 to 174].

The Deliberations and the Recording are clearly relevant and essential for the exercising of the applicant's fair process rights.

43. The SCA was of the view that the reasons compiled by the Chief Justice were sufficient and that the applicant had accepted that the matter was ripe for hearing, (having received these reasons and without having received the deliberations).[26] The SCA states that the applicant's insistence on disclosure of the deliberations "*is puzzling*" and smacks of a "*fishing excursion*".[27]

44. However, as has been submitted by the applicant, the applicant was not originally aware of the existence of the Recording.[28] The applicant only became aware of the Recording two days before it was to file its supplementary affidavit and its insistence on the full record is thus not "*puzzling*" at all.[29] It is also not clear how the applicant's insistence that a specific and very relevant Recording, accurately reflecting the Deliberations, could constitute a vague "*fishing excursion*" by the applicant. As held in ***Johannesburg City Council***[30], an applicant's reliance on the record of the proceedings before it finalises its grounds of review should not be construed as a "*fishing excursion*", but as a legitimate endeavour "*to determine objectively what considerations were probably operative in the minds of the Administrator (the decision-maker).... when they passed the resolution in question*".[31]

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26 SCA judgment para [32] to [34] [Appeal Record at 173, line 10 to 174, line 13]

27 SCA judgment para [35] [Appeal Record at 174, lines 14 to 22]; applicant's supporting affidavit in leave to appeal paras 39 and 40 [Appeal Record at 194, lines 1 to 20]

28 Applicant's supporting affidavit in leave to appeal paras 41 [Appeal Record at 195, lines 1 to 4]

29 Applicant's supporting affidavit in leave to appeal paras 42 [Appeal Record at 195, lines 6 to 10]

30 *Johannesburg City Council v The Administrator, Transvaal and Another* 1970 (2) SA 89 (T) at para 93.

31 See also *Lawyers for Human Rights v Rules Board for Courts of Law and Another* 2012 (7) BCLR 754 (GNP) (11 April 2012) at para 23).

45. The SCA goes further to find that the Deliberations (encompassing the preliminary views of the members) are not necessarily an indication of the basis on which the members of the respondent ultimately decide each matter. In its view, the reasons provided by the Chief Justice clearly allow an objective determination of the considerations that were probably operative in the minds of the members when they made their recommendations.[32]

46. This reasoning is unpersuasive. If the reasons are distilled from the Deliberations, then the Deliberations are what was, according to the reasons, actually and not just "probably", in the minds of the members. The applicant is entitled to know what this entailed. Whether the Deliberations "necessarily" or otherwise provide an indication of the basis on which the respondent ultimately decided the matter (and how that basis differed from their initial views), cannot be determined without access to the Deliberations.[33] The Deliberations may contain evidence of, *inter alia*, bias, ulterior purposes, the considerations of relevant or irrelevant factors, a failure to apply the mind and/or the drawing of irrational conclusions. These all constitute inviolable grounds of review and would serve to demonstrate the unlawfulness of the decision in question. They cannot, however, be brought to light unless the full record is disclosed. This is why disclosure under Rule 53 is an imperative process which promotes transparency and accountability.[34]

47. The provision of reasons (drafted by a member of the challenged decision-making body) cannot act as substitute for the provision of relevant parts of the Record in these proceedings. The provision of reasons and a full record are separate and cumulative requirements in law – which is why rule 53 expressly provides that an

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[32] SCA judgment para 36 [Appeal Record at 174, line 23 to 175, line 10]; applicant's supporting affidavit in leave to appeal paras 43 and 44 [Appeal Record at 195, lines 13 to 21]

[33] Applicant's supporting affidavit in leave to appeal paras 44 [Appeal Record at 196, lines 2 to 9]

[34] Applicant's supporting affidavit in leave to appeal paras 45 and 46 [Appeal Record at 196, lines 10 to 197, line 5]

applicant is entitled to both the record of the decision-making **and** the reasons. The record provides the information or documentation which the decision-maker created or considered in the course of making the decision. The reasons are *justifications* for the decision. These requirements are specifically and separately mentioned in Rule 53 itself.[35] The thinking behind this is obvious, as there must, in law, be a clear and rational link between the Decision, the Record and the reasons provided.

48. 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, merely, one of its members) 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.[36]

49. The SCA's conclusion that the deliberations are irrelevant for purposes of Rule 53 is thus, in the applicant's view, incorrect. The fact that the respondent is permitted to determine its own process, whilst an important functional consideration, cannot mean that the respondent is allowed to circumvent the requirements of the Uniform Rules or shield itself from judicial scrutiny.[37]

**THE MEANING AND EXTENT OF THE "RECORD"**

50. There can be no debate that the Recording is relevant to the Decision. It bears on the lawfulness, rationality and procedural fairness of the respondent's decisions,

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35 Applicant's supporting affidavit in leave to appeal para 48 [Appeal Record at 197, lines 16 to 198, line 4]

36 Applicant's supporting affidavit in leave to appeal para 49 [Appeal Record at 198, lines 5 to 18]

37 Applicant's supporting affidavit in leave to appeal para 51 [Appeal Record at 199, lines 9 to 13]

and reveals whether the reasons proffered by the respondent relate to the Deliberations and information before it.

51. On its own version, the respondent has admitted that it relied on the very Recording to produce its reasons which are the subject of this application.

52. The only real question is this: is the respondent permitted to fillet the record in this manner?

53. The SCA considered the case law authorities relied on by the applicant and the respondent relating to the question of whether it is determined precedent, as a general proposition, that deliberations of public bodies should be provided as part of the Rule 53 record.

54. The respondent had relied on the decision in ***Intertrade*** at para 15 which it argued had upheld the dicta in ***Johannesburg City Council*** at paras 91G - 92A, to the effect that a decision-maker's private deliberations do not form part of the Rule 53 record.[38]

55. The SCA states that the respondent had, however, correctly conceded that a disclosure of deliberations may be warranted in appropriate circumstances. There is thus, in its view, no longer a strict rule allowing for non-disclosure.[39] The SCA concludes, however, on further examination of the relevant case law, that no court has laid down a general, fixed rule that deliberations must always form part of a Rule 53 record.

56. This is, with respect, an incorrect position in law on proper examination of the above case law regarding the required content of the record.

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[38] SCA judgment para 14 [Record at 161, lines 2 to 20]

[39] SCA judgment para 15 [Record at 161, line 21]

57. As a starting premise, it is not open to the respondent or any other decision-maker to determine what precise documents it will or will not disclose as part of the record. If a document or recording is relevant it must be disclosed – it cannot be hidden from the court or the applicant by the decision-maker's assertion that it is not relevant or confidential. As was held in *Democratic Alliance v Acting National Director of Public Prosecutions*, [2013] 4 All SA 610 (GNP) (16 August 2013) at para 29, which concerned the alleged confidentiality of the so-called "spy tapes" submitted to the prosecution, in an application for a review of the decision to withdraw charges based on such submission:

> "*In my view it is not appropriate for a court exercising its powers of scrutiny and legality to have its powers limited by the* ipse dixit *of one party. A substantial prejudice will occur if reliance is placed on the value judgment of the first respondent. To permit the first respondent to be final arbiter and determine which documents must be produced is illogical. … [T]he first respondent has no right to independently edit the record. It must produce everything.*" (emphasis added)

58. Recent provincial jurisprudence, which is authoritative rather than being merely obiter, makes it clear that the Deliberations do form part of the Record. Binns-Ward J held in *City of Cape Town v South African National Roads Agency Ltd* [2013] ZAWCHC 74 ("***SANRAL***") (at paras [48] and [49]) that:

> *"I am unable, with respect, to associate myself completely with the remarks of Marais J in Johannesburg City Council. It seems to me that any record of the deliberations by the decision-maker would be relevant and susceptible to inclusion in the record. The fact that the deliberations may in a given case occur privately does not detract from their relevance as evidence of the matters considered in arriving at the impugned decision. The content of such*

*deliberations can often be the clearest indication of what the decision-maker took into account and what it left out of account. I cannot conceive of anything more relevant than the content of a written record of such deliberations, if it exists, in a review predicated on the provisions of s 6(2)(e)(iii) of PAJA, that is that impugned decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered.*

*…The provision of a record of proceedings by the decision-maker is in essence, and for all practical purposes, the equivalent of discovery in terms of rule 35(1) by a litigant in action proceedings. The decision-maker is, on the basis discussed earlier, required to include everything that is relevant in the record. The first enquiry therefore in determining whether the documentation sought by the City is to be produced in terms of rule 53 is its relevance. Once it is determined to be relevant it does not seem to me important whether its production is directed by way of a ruling directing proper compliance with the duty on a respondent in terms of rule 53(1)(b), or one in terms of rule 35(11); the substance of the direction would be the same whichever means were to be selected".*

59. *SANRAL* is directly applicable to this case as it applies to private deliberations of a decision-maker. We respectfully submit that the record of such deliberations is clearly reflective of what the decision-maker has taken into account or failed to consider.

60. As was recently confirmed in *Comair Limited v The Minister of Public Enterprises and others* 2014 (5) SA 608 (GP) ("***Comair***") at paragraph 39, an applicant is entitled under Rule 53 to access the full deliberations of the decision maker, which furthers the constitutional goals of open and accountable decision making.

61. Further, it is clear that the ***Johannesburg City Council*** approach from 1970 – regarding private deliberations as being free from disclosure – is one that has been overtaken by the advent of our constitutional democracy and the associated principles of transparency and accountability that now underpin Rule 53. That much is evident from the decisions in *Afrisun Mpumulanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T) ("***Afrisun***"); *SANRAL* and *Comair*.[40]

62. The applicant's position is further bolstered by the more recent decision of the Supreme Court of Appeal in *City of Cape Town v South African National Roads Authority and others* 2015 (3) SA 386 (SCA) ("***City of Cape Town***"), which found that, as a general rule, taking into account the relevant constitutional principles, court records should be open to the public and any departure from this should be the exception and must be justified. The case confirms that, in court proceedings, the emphasis is on greater disclosure of documents in the public interest under the overarching principle of open justice.

63. After brief discussion of the facts in ***Afrisun***, ***Comair*** and ***SANRAL***, the SCA judgment states that:

> "*I am not at all convinced that any of these decisions support the HSF's case in the manner claimed. What is immediately discernible is that they were mainly premised upon the particular legislative provisions pertaining to the bodies whose decisions were being reviewed. Those bodies' deliberations were not endowed with statutory confidentiality as is the case here*." [41]

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[40] In *Afrisun*, it was held that the applicant was entitled to a video recording of the deliberations of a gambling board and that the decision in *Johannesburg City Council* should not be followed

[41] SCA judgment para 18 [Appeal Record at 164]

64. The SCA thus distinguished these cases from the facts of the present case, predominantly on the basis that the relevant bodies in those cases were not endowed with "*statutory confidentiality*".

65. Confidentiality, whether statutory or otherwise, is not a reason to insulate documents from disclosure under Rule 53. As we have already submitted, it is not open to the respondent or any other decision-maker to determine what precise documents it will or will not disclose as part of the record. If a document or recording is relevant it must be disclosed, regardless of assertions of confidentiality. This is the clear and unequivocal legal position.

66. The test for disclosure is thus 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 is clear from, *inter alia*, the decision in ***SANRAL*** (especially para 48) and is supported by other provincial division jurisprudence in ***Afrisun*** and ***Comair***. The applicant's case falls squarely within the ratio of these decisions, from which the SCA sought to deviate. The distinction that the SCA sought to draw between the JSC and other decision-making bodies in its attempt to distinguish those cases is not supported by any statutory or judicial authority. Confidentiality is not, in and of itself, whether provided by statute or not, a reason for non-disclosure.[42]

67. Moreover, as stated in the applicant's application for leave to appeal, and by way of relevant example, the South African Revenue Service ("**SARS**") is often ordered to disclose documents sought for legal proceedings, despite its own statutorily-prescribed secrecy and confidentiality regime. In terms of Chapter 6 of the Tax Administration Act, 2011, SARS' confidential information and taxpayer information

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[42] Applicant's supporting affidavit in leave to appeal para 60 [Appeal Record at 202, lines 14 to 203 , line 6]

is strictly protected but may be disclosed in certain circumstances, including in terms of a court order. It is thus clearly recognised by SARS and the Courts that the usual secrecy and confidentiality prescripts attached to such information are not prohibitive in respect of disclosure, and that there may be an overriding duty to provide relevant documentation in the course of legal proceedings.[43]

68. The most striking reason why the SCA's decision is wrong in this regard flows from the statutory provision in question in this case – the JSC Act itself. Section 38 of the JSC Act itself allows disclosure by court order – a feature of the relevant statutory scheme which was pertinently drawn to the SCA's attention, [44] and which confirms why the ***Afrisun***, ***Comair*** and ***SANRAL*** decisions are indeed supportive of the HSF's case, rather than distinguishable as the SCA held.

69. 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. The SCA judgment sets a dangerous precedent as it implies that there may be reasons for complete non-disclosure that outweigh relevance.[45]

70. An applicant should not have to justify why documents, which ordinarily form part of the Record, should not be excluded from the Record. In this matter, if the respondent 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.[46]

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43 Applicant's supporting affidavit in leave to appeal para 61 [Appeal Record at 203, lines 7 to 18]

44 Applicant's supporting affidavit in leave to appeal para 62 [Appeal Record at 203, lines 19 to 22]

45 Applicant's supporting affidavit in leave to appeal para 63 [Appeal Record at 204, lines 1 to 5]

46 Applicant's supporting affidavit in leave to appeal para 64 [Appeal Record at 203, lines 6 to 11]

**CONFIDENTIALITY AND PRIVACY**

71. Confidentiality, whether statutorily protected or otherwise, is not in itself a sufficient reason for depriving an applicant of its procedural right to the record under Rule 53.

72. It is settled that the fact that documents contain information of a confidential nature does not *per se* in our law confer on them any privilege against disclosure (see *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).

73. Privilege, as a separate ground, has not been alleged and is clearly inapplicable to this case.

74. Access to the full record is a right of the applicant under Rule 53 and depriving an applicant of this should not be done unless there is an overriding justification. See *Afrisun* (at 628-9), where it was stated that:

> "*The object of the 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.*" (emphasis added)

75. Further, as we stressed earlier, it was held in *Johannesburg City Council* at 93, that an applicant's reliance on the record of the proceedings before it finalises its grounds of review should not be construed as a "*fishing excursion*", but as a legitimate endeavour "*to determine objectively what considerations were probably operative in the minds of the Administrator (the decision-maker).... when they passed the resolution in question*" (See also *Lawyers for Human Rights v Rules Board for Courts of Law and Another* 2012 (7) BCLR 754 (GNP) (11 April 2012) at para 23).

76. This general proposition is all the more so in a constitutional democracy, since access to the full record of the proceedings is fundamental to the proper ventilation of the review before the Court, for all the reasons we have already given.

77. Further, the applicant must be allowed access to available information sufficient for it to make its case. As was stated in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 486F-G, the applicant should be "*put in possession of such information as will render [its] right to make representations a real and not an illusory one*." The claim of confidentiality cannot operate in contravention of the rights of the applicant to set out its case on all the available facts.

78. In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) at 501 the SCA said as follows:

> "*It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of a 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.*"

79. In addition to this, the requirement that there be proper disclosure of the record under Rule 53 furthers the constitutional guarantee of just administrative action, as well as the right of access to any information held by the state and the constitutional requirement of public administration that is transparent and accountable.

80. The importance of transparency regarding access to information involving public administrative bodies was stressed by this Court in *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at 346:

"*Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information".*"[47]

81. The following remarks of Lord Denning in *Riddick v Thames Board Mills Ltd* (1977) 3 All ER 677 (CA) at 687, and cited as authority in *Comair* at [52], describe the public interest in disclosure of the full record in situations such as this:

"*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*

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[47] This was reaffirmed in *M & G Media Limited v President of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP) at para 60.

*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.*" (emphasis added)

82. More recently, as discussed above, the SCA in *City of Cape Town* confirmed that, in accordance with the principle of open justice and the Constitution, all court records should, by default, be open to the public. There can thus be no excuse for not delivering the whole of the record in this instance. In its discussion on the principle of open justice the SCA, in *City of Cape Town*, refers (at [16]) to the case of *Independent Newspapers (Pty) Ltd v Minister of for Intelligence Service and Another, In Re Masetlha v President of the Republic of South Africa and another* 2008 (5) SA 31 (CC), where this Court dealt with an application for access to classified documents which formed part of an appeal record. In that case, there was an assertion from the Minister that National Security required that certain documents not be made available to the media and the public. The importance of openness was emphasised by the Court and despite claims of national security the vast majority of the record was made publicly available.

83. It is thus in the public interest that the whole record be disclosed. Nothing in this case permits a departure from that generally and well-established principle.

84. As comprehensively dealt with above, confidentiality is not a reason for non-disclosure. The SCA, however, held that, it needed to be decided in this case whether the confidentiality of the respondent's deliberations means that they need not be disclosed.[48]

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[48] SCA judgment para [21] [Record at 165, lines 14 to 15]

85. As has been done in other cases where confidentiality has been claimed, it was always open to the High Court and the SCA to consider the option of an appropriate confidentiality regime that may be put in place to safeguard the dissemination of one or other aspect of the Record.

86. To the extent that there was any merit in the respondent's apparent concerns about confidentiality and its ostensible concern for the dignity of the judicial candidates, an order of limited access to the Recording could be made to limit the disclosure of the Recording to the Court, the applicant and its legal representatives, thus mitigating any alleged harm or prejudice.[49]

87. The appropriate process, to the extent that any parts of a record were established by the respondent to require confidential treatment (none of which have been so established), would have been to seek 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, and if necessary subject to a confidentiality undertaking.

88. The approach would be available to achieve a fair balance between the applicant's right of access to documentation necessary for prosecuting its case, on the one hand, and any right to confidentiality established by the respondent on the other.

89. The applicant's officers and legal representatives have been 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. An order of limited access may, in the circumstances be used to protect aspects of the Record

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[49] As precedent for this approach, the applicant refers 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); *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W); *Competition Commission v Unilever plc and other*s 2004 (3) SA 23 (CAC) and *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA)

that are shown to be truly confidential whilst allowing the applicant and its legal representatives an opportunity to interrogate its contents, thus avoiding a situation where the applicant and its legal representatives are required to argue the application behind a "*veil of ignorance*" (See *Comair* at [68]; *Competition Commission v Unilever plc* 2004 (3) SA 23 (CAC) at 30; and *Bridon* at para 31).

90. In any event, 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 is agreeable to this approach being adopted in respect of any parts of the Record which are established to be so confidential as to be withheld from the public. This would be the correct position on the relevant case law.[50]

91. The correct legal position aside, even if we assume that the SCA's application of the case law is correct, its reasoning for non-disclosure based on confidentiality is flawed.[51]

92. On the basis of the Constitution (section 178), various sections of the Judicial Service Commission Act, 1994 ("**the JSC Act**") (sections 38(1) and 35), the regulations to the JSC Act (including regulation 3(k)) and section 32(2) of the Promotion of Access to Information Act, 2000 ("**PAIA**"), the SCA finds that the confidentiality of deliberations enjoys recognition in legislation and gives effect to the right to access information enshrined in the Constitution. Apparently, this permits the respondent, in the circumstances, to withhold the Recording.[52]

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[50] Applicant's supporting affidavit in leave to appeal para 67 [Appeal Record at 205, lines 5 to 8]

[51] Applicant's supporting affidavit in leave to appeal para 68 [Appeal Record at 205, lines 9 to 11]

[52] SCA judgment paras 24 and 25 [Record at 167, line 15 to 168, line 13]

93. In further support of this, the SCA finds that the courts, which retain the power to order disclosure of confidential material where appropriate, have endorsed the need for confidentiality in the respondent's processes.[53] The power of the courts not to require disclosure of the Deliberations is, in its view, further supported by the fact that the respondent is a unique entity which derives its powers from the Constitution and, more importantly, is entitled to determine its own procedure.

94. With respect, 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 information which is in possession of the decision-maker in respect of the decision sought to be reviewed or set aside. The respondent is in this matter, in effect, contending that the JSC may operate, in certain respects, outside the ambit of judicial review – and the SCA through its judgment has effectively endorsed this contention. This approach is contrary to section 38 of the Act itself, which allows disclosure by Court order. Section 38 also does not seek to limit the applicability of the Uniform Rules in any way. In any event, section 38 relates to maintenance of confidentiality by individual officers of the JSC, and not to the JSC as a whole. The SCA's reliance on statutory confidentiality as a factor distinguishing this case from cases cited by the applicant is thus misplaced.[54]

95. The SCA's reliance on other dicta is also incorrect. The SCA refers to the decision in *Judicial Service Commission v Cape Bar Council & another* 2013 (1) SA 170 (SCA) ("***Cape Bar Council***") where the SCA accepted the legitimacy of the respondent's procedure of merely distilling its reasons as a summary of its deliberations.[55] This is, however, clearly a separate question from the question as

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53 SCA judgment para 25 [Record at 168, lines 13 to 15]

54 Applicant's supporting affidavit in leave to appeal para 71 [Appeal Record at 206, lines 9 to 21]

55 SCA judgment at para 25 [Record at 168, line 15 to 169, line 5]

to whether the deliberations themselves must be disclosed. The fact that the reasons are distilled from the deliberations simply reinforces the relevance of the deliberations. No challenge has been made by the applicant to the process of drafting the reasons in this manner, in line with ***Cape Bar Council***.[56]

96. The SCA also refers to *Mail & Guardian v Judicial Service Commission* [2010] 1 All SA 148 (GSJ) ("***Mail & Guardian***") at para 20, where the South Gauteng High Court, dealing with access to the respondent's "*public proceedings*" acknowledged the need for confidentiality, but did not deal with issues relating to a rule 53 record. In support of its reasoning, the SCA cites this case as an example of expressed importance of confidentiality within the JSC process, even in cases not dealing with confidentiality by statute, as is the case here.[57] This reasoning is thus also not applicable to the questions in this matter.[58]

97. The SCA, with respect, erred by accepting that the respondent's processes somehow absolved the respondent from furnishing a complete record. The overall process undertaken by the respondent in the appointment process (such as the fact that the interviews are public) also does not detract, in any way, from the respondent's obligation to conduct its business in an open, transparent and accountable manner; and, further, to disclose the deliberations, when its decisions are tested by judicial review before the courts.[59]

**THE RELEVANT TEST IN THE SCA'S OPINION AND PUBLIC INTEREST**

98. The SCA finds that the case law shows there is no absolute requirement of disclosure of the respondent's proceedings.

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56 Applicant's supporting affidavit in leave to appeal para 72 [Appeal Record at 207, lines 9 to 21]

57 SCA judgment at para 26 [Record at 169, lines 14 to 20]

58 Applicant's supporting affidavit in leave to appeal para 73 [Appeal Record at 207, line 15 to 208, line 2]

59 Applicant's supporting affidavit in leave to appeal para 74 [Appeal Record at 208, lines 3 to 10]

99. The SCA finds that, rather, it is:

> "*a question of weighing, inter alia, the nature and relevance of the information sought, the extent of the disclosure and the circumstances under which the disclosure is sought and the potential impact upon anyone, if disclosure is ordered or refused, as the case may be, in a manner that would enable the JSC to conduct a judicial selection process that does not violate its positive obligations of accountability and transparency.*"[60]

100. The paragraph goes on to state that:

> **"***It should be borne in mind in that exercise, however, that these constitutional values do not establish discrete and enforceable rights. They serve merely as interpretive guides that may have to be balanced against and fettered by competing values, interests and rights of equal importance, such as rights to dignity and privacy of parties who would be affected by the disclosure. And as rules of court must, like all other legislation, be construed and applied in the manner enjoined by s 39(2) of the Constitution, there can be no objection to a limitation of the record if that is reasonable and justifiable in the sense contemplated by s 36(1) of the Constitution.*"[61]

101. The SCA thus thought it correct to determine if there are any reasons, consistent with the Constitution and the law, justifying non-disclosure of the deliberations.[62] The SCA reasoning is, with respect, fundamentally flawed.

102. The position adopted by the SCA redefines the scope of Rule 53 by effectively finding that Rule 53 should be limited in remit. There was, however, no challenge

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60 SCA judgment at para 27 [Record at 169, lines 23 to 170, line 4]

61 SCA judgment at para [27] [Record at 170, lines 4 to 13]

62 SCA judgment at para [28] [Record at 170, lines 14 to 15]

in this matter as to the lawfulness of Rule 53 or the need to limit it. In any event, the reason that the SCA gives for its conclusion, that the requirements of openness and accountability have been satisfied, is not correct, for the reasons already given earlier.

103. What loomed large in the SCA's reasoning was its view that the nature of the respondent's mandate requires it to engage in a rigorous, intense judicial selection process. But this does not mean that the applicant should be deprived of its right to a full record, including if necessary under a confidentiality regime.[63]

104. Furthermore, the SCA seemed particularly concerned that adverse comments will be made in the Deliberations that may be hurtful to candidates and the respondent and its members may be exposed to claims for delictual damages for defamatory comments. But again, it is unclear why members of a public body should be shielded from the consequences of any unlawful remarks that the JSC may make while fulfilling its duties. The members should necessarily act in a professional and lawful manner when undertaking such a public function. In any event, they may have defences under defamation law that would render any otherwise defamatory remarks not unlawful.[64]

105. Even if defamation or the need for frankness were relevant considerations, again, the proper approach is to set up a confidentiality regime in order both to protect confidentiality and to ensure that the applicant's rights are not infringed. An approach that would not have adversely affected the applicant's rights was thus available and pertinently drawn to the SCA's attention, including with reference to the relevant case law and accepted practices in this regard of our courts (including

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63 Applicant's supporting affidavit in leave to appeal para 81 [Appeal Record at 210, lines 9 to 13]

64 Applicant's supporting affidavit in leave to appeal para 82 [Appeal Record at 210, line 14 to 211, line 2]

those endorsed and adopted by the SCA itself). In this respect, the respondent's mandate is no different from dozens of other deliberative bodies where frank, robust discussion is required and encouraged, including tender committees and appointment bodies, and yet these entities have been held by the Courts to high disclosure standards under Rule 53. As demonstrated above, the same is true in respect of SARS, which is subject to a statutorily-prescribed secrecy regime. And section 38 of the JSC Act expressly permits disclosure by court order.[65] There is thus no reason why the respondent's deliberations should be secreted away while the deliberations of other decision-makers are made public record and subject to Rule 53.

106. The SCA states that members of the respondent may also come before the appointed judge, who may harbour ill-feelings towards members of the respondent who had expressed adverse views against his/her appointment.[66] This reasoning ignores, again, the confidentiality regime that would have avoided such adverse views being made needlessly public. But the reasoning too makes assumptions about judges (and officers of the Court) that are contrary to them properly undertaking their duties. It should surely be assumed rather that judges will operate in a manner commensurate with their position and will not be swayed by their personal feelings about any specific person. If a judge feels that he/she is unable to do this for whatever reason then the judge must recuse him/herself. It cannot be correct, as the SCA suggests, that the opposite must or could reasonably be expected from a judge. In any event, presumably adverse

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65 Applicant's supporting affidavit in leave to appeal para 83 [Appeal Record at 211, lines 3 to 18]

66 SCA judgment para [28] [Appeal Record at 171, lines 10 to 13]

comments will have been passed in respect of persons not appointed to the WCC.[67]

107. Secrecy, in the SCA's view, serves legitimate public interests. The privacy and dignity of candidates, who have been assured that the Deliberations are private, must in the Court's opinion be protected in the interviewing and selection process.[68]

108. Non-disclosure of Deliberations, in the SCA's view, is supported by the following:

108.1 non-disclosure is likely to encourage applicants who might otherwise not make themselves available for judicial appointment for fear of embarrassment were the respondent's members' opinions on their competence made public (this would apparently compromise the efficiency of the selection process);[69]

108.2 confidentiality enhances the judicial appointment process by allowing the members robustly and candidly to state facts and exchange views in discussing the suitability or otherwise of the candidates based on their skills, characters, weaknesses and strengths;[70]

108.3 the SCA notes that courts in various foreign jurisdictions have acknowledged the need to protect confidentiality in state bodies' deliberations to preserve their ability to speak frankly, free from improper scrutiny and influence;[71]

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67 Applicant's supporting affidavit in leave to appeal para 84 [Appeal Record at 211, line 19 to 212, line 10]

68 Applicant's supporting affidavit in leave to appeal para 85 [Appeal Record at 212, lines 11 to 14]

69 SCA judgment para [29] [Appeal Record at 171, lines 21 to 25]

70 SCA judgment para [29] [Appeal Record at 172, lines 1 to 4]

71 SCA judgment para [30] [Appeal Record at 172, lines 5 to 8]

108.4 the public's confidence of the respondent, which has conducted its deliberations privately without question since 1994, in the Court's opinion, does not arise from the public access to deliberations.[72]

109. The SCA is of the opinion that these factors satisfy the requirements of transparency and accountability of the respondent and permit the exclusion of the Recording.[73]

110. The respondent had submitted that findings in favour of the applicant would inhibit the openness of the respondent's deliberations, and may curtail the respondent's members from saying what they really thought about the candidate.[74] This argument was extended by claiming that the candidates' dignity and integrity would be impaired by revealing precisely what the commissioners said about them.[75]

111. It is plain that if any of the respondent's members spoke about any candidate in terms or tones which amounted to undue or unfounded criticism, or which did or would impair the dignity and integrity of such candidate, then this could have a bearing on the procedural fairness, lawfulness and rationality of the Decision. The respondent's stated implication that the Deliberations entailed conduct or discussions which could or did result in an impairment of dignity and integrity, in fact, clearly weighs overwhelmingly in favour of disclosure rather than against it.

112. If anything, however, the veil over the deliberations is a tool for protecting the *respondent's members from scrutiny* and has little (if anything) to do with the

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72 SCA judgment para [31] [Appeal Record at 172, lines 23 to 25]; Applicant's supporting affidavit in leave to appeal para 86 [Appeal Record at 212, line 15 to 213, line 15]

73 SCA judgment para [30] [Appeal Record at 173, lines 5 to 8]

74 AA at para 38.3 [Appeal Record at 57]

75 AA at para 39.2 [Appeal Record at 58]

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, scathing and intrusive *public* interview process.[76] The censorship exercised in respect of the Recording is thus difficult to understand.

113. 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 SCA judgment fails to deal with this argument, or the fact that even if the Court disagreed with the applicant's submissions in this regard, the appropriate relief would be to impose a limited confidentiality regime, allowing disclosure, but limiting access only to the Courts and litigants. This would strike a balance between any perceived confidentiality on the one hand and the applicant's rights and court's need to discharge its review function on the other.[77] The applicant expressly contemplated the possibility of a "*limited disclosure*" regime in its founding papers.[78]

114. In fact, the respondent itself recognised, that "*the Court could be granted limited access to the recording subject to confidentiality undertakings*"[79] and that if the

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76 Applicant's supporting affidavit in leave to appeal para 88 [Appeal Record at 213, line 18 to 214, line 4]

77 Applicant's supporting affidavit in leave to appeal para 89 [Appeal Record at 214, lines 5 to 22]

78 SA paras 42 to 46 [Appeal Record at 17, line 4 to 18, line 3]

79 See "MHH10" to the applicant's supporting affidavit in leave to appeal at para 141 [Appeal Record 226, lines 6 to 7]

"*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*".[80] It is a fundamental failing of both the High Court and the SCA not even to consider the possibility or appropriateness of a limited access confidentiality regime.[81]

115. Moreover, candidates were well aware of the legislative carve-out provided for under section 38(1) of the JSC 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 hence – on notice – participated fully in the process in this knowledge. The candidates would also have been aware of the requirements of Rule 53.[82]

116. As to the sensitivity of the candidates, we note that there is not a single piece of evidence from any of the candidates that their dignity would be impaired by disclosure of the Recording in the litigation. Indeed, it would be most peculiar if any of them raised any issues. After all, they all applied for appointment to a seat of profound public power and prestige, to which an appropriately high standard of public scrutiny and accountability is attached. For this very reason, each candidate was rightly required to endure, in full view of the public, interviews in which the respondent's members could, would and did ask difficult and potentially very embarrassing questions, ranging from disciplinary indiscretions to personality flaws. Each candidate accepted this public scrutiny, as an appropriate democratic safeguard against the risk of unsuitable individuals being vested with judicial authority.

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80 See "MHH10" to the applicant's supporting affidavit in leave to appeal at para 147 [Appeal Record 227, lines 20 to 23]

81 Applicant's supporting affidavit in leave to appeal para 90 [Appeal Record at 215, lines 1 to 10]

82 Applicant's supporting affidavit in leave to appeal para 91 [Appeal Record at 215, lines 11 to 17]

117. As a matter of logic the SCA's reasoning conflicts irreconcilably with what the respondent has previously placed on record. In the Reasons, the respondent informed the Court that the concise "*considerations*" set out therein had 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*".[83]

118. The respondent's disclosure of these "*considerations*" in the Reasons did not in any way impair the "*integrity and dignity of the candidates*", nor in any way impede or undermine the ability of the respondent's members to "*submit them to robust assessment*". The respondent cannot now opportunistically contend that disclosure of the Recording could cause such impairment or impediment, any more than disclosure of the Reasons, without conceding that the Reasons inaccurately or incompletely capture the contents of the Deliberations and thus the record of the Decision (which in itself would then be confirmation of why the Deliberations ought to be disclosed).

119. The unavoidable conclusion is thus that the "*rationale*" provided for the confidentiality of the Recording is factually unfounded and that the refusal to lodge the Recording with the Registrar is likewise factually unfounded.

120. The ostensible rationale of the respondent thus cannot be correct for the above reasons. On a proper analysis, the true reason for limiting disclosure is the sensitivity of the respondent and its commissioners, not the candidates. It is the commissioners who wish to extend a blanket of secrecy over what <u>they</u> did and what <u>they</u> said. In a society based on the rule of law and powers of judicial review, such a rationale is not a basis for keeping secret the work of the respondent in deciding on the appointment of candidates to the bench.

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[83] The Reasons are annexed to the SA marked "**MH5**" [Appeal Record at 28]

121. The applicant submits that no weight should be accorded to foreign jurisprudence in this matter. Such jurisprudence is distinguishable from this case and South Africa's constitutional framework. All that the referenced foreign jurisprudence indicates is that certain foreign jurisdictions have opted to *legislate* privilege or a certain degree of non-disclosure into their legal framework. These are different considerations to the confidentiality provisions in the JSC Act, but in any event, our legislative regime specifically allows, under section 38, for disclosure to be made by court order.[84]

122. Ultimately, the record under Rule 53 is not merely for the benefit of an applicant, but essential for the Court, which the High Court and SCA ignored.[85]

**THE RESPONDENT'S MANDATE, THE JSC ACT AND THE PRINCIPLE OF JUSTICE**

123. As far as reliance is placed on the fact that the JSC Act empowers the respondent to regulate its own procedure, and that this allows it to throw a cloak of secrecy over its deliberations, the following is relevant.

124. Section 178(6) of the Constitution indeed empowers the respondent to determine its own procedure. Section 5 of the JSC Act provides for such procedure, once determined, to be promulgated by the Minister of Justice. It is notable that neither provision empowers the respondent to impose an impenetrable regime of secrecy over its procedure.

125. Although the Regulations: Procedure of the Commission, determined by the respondent and promulgated by the Minister of Justice in February 1996, do

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[84] Applicant's supporting affidavit in leave to appeal para 92 [Appeal Record at 215, line 18 to 216, line 4]

[85] Applicant's supporting affidavit in leave to appeal para 92 [Appeal Record at 216, lines 5 to 7]

provide that interviews of candidates "*shall be open to the public and the media*" (regulation 2(i)) but that the respondent thereafter "*shall deliberate in private*" (regulation 2(j)), this does not denote any regime of secrecy. More importantly, for present purposes, these regulations concern only the process to be followed by the respondent in performing its functions: they in no way provide a basis for the refusal of the production of records of its decisions when they have been challenged before a Court under Rule 53.

126. Any reliance on the fact that the respondent is allowed to regulate its own process is thus as misplaced as it is inconsequential.[86] Any attempts at self-regulation must be within the existing Rules of Court, and with due regard for the constitutional principles binding on the respondent. It is not open to the respondent to regulate its decisions and decision-making process out of the spotlight of judicial review nor is it open to the respondent to shield its decisions and decision-making process from judicial scrutiny through reliance on an incorrect interpretation of the requirements of confidentiality.

127. In any event, as discussed above, the respondent is constitutionally bound to the principles of transparency, accountability and rationality, which plainly require disclosure of the Deliberations. This is consistent with the constitutional principle of open justice, which has been endorsed by this Court on several occasions (see *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (2) BCLR 167 (CC) and by the SCA in *City of Cape Town*). The implication of this principle is that disclosure ensures transparency and accountability, thereby enhancing public confidence in an institution and ensuring that it is fully and fairly dedicated to its constitutional purpose. Openness

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[86] See paragraphs 27.3 to 27.7 of the AA [Appeal Record at 50 to 52]

thus acts as an inherent safeguard against bias, arbitrariness and other risks attendant upon the exercise of public power. Accordingly, far from impeding the respondent's members from submitting judicial candidates to "*robust assessment*", revealing its deliberations in appropriate circumstances (in this case, through mandatory disclosure of the Recording under Rule 53 in a judicial review challenge), would rather - and much more effectively - ensure that they do exactly that.

**LEGITIMACY OF THE JSC PROCESSES ALSO REQUIRES DISCLOSURE**

128. The JSC's contentions around protection of dignity and integrity have already been firmly rejected in previous judgments concerning public access to the respondent's proceedings, where it was dealing with a complaint by several Constitutional Court judges against the Honourable Mr Justice Hlophe.

129. In *eTV (Pty) Ltd and Others v Judicial Service Commission and Others* 2010 (1) SA 537 (GSJ), the respondent had refused to open the proceedings to the public as the respondent "*consider[ed] it imperative to protect the dignity and stature of the office of the Chief Justice and the Deputy Chief Justice, and that of the Judge President*", and that public proceedings "*would damage the dignity and stature of the office of the said judicial officers, and in turn that of the entire judiciary*"(at 542).

130. The Court disagreed, holding that "*ultimately the dignity and stature of the office of the Chief Justice, the Deputy Chief Justice, the Judge President of the Cape and indeed of the entire judiciary will be enhanced rather than diminished by there being an open and public hearing*" (page 546). Indeed, it found that, if the proceedings were closed, "*there will be all sorts of undue and unfortunate speculations regardless of the outcome. There will be suspicion. There will be an erosion of public confidence in the judiciary, all of which I would consider to be most unfortunate. It seems to me that the dignity of our entire bench will be done*

*a favour by these proceedings being public, and by the public having access thereto. … Of course, protecting the dignity of the judiciary is an important consideration but we have all been left in the dark as to why the holding of this particular hearing behind closed doors will protect the dignity the persons sought to be protected. Mere say-so, a vague and laconic statement to this effect, is not good enough.*"(pages 546-7)

131. The applicant submits that the above reasoning disposes of the respondent's professed concern for the protection of the candidates' integrity and dignity and that of the JSC itself.

132. Further, and in any event, the SCA recently quoted, in support of its judgment in *City of Cape Town*, the Canadian Supreme Court in *Attorney General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175 at 185, where it was observed that "*[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings*."

133. The applicant further submits that the assertion that disclosure would impede the respondent from submitting the candidates to "*robust assessment*" is also refuted by the reasoning of the *eTV* judgment discussed above. The Court cited the constitutional principle of open justice, captured as follows by the House of Lords in *Scott v Scott* [1913] AC 417 (HL), which the Court quoted with approval: "*Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.*"(page 546).

134. In *Mail and Guardian Limited and Others v Judicial Service Commission and Others* 2010 (6) BCLR 615 (GSJ), the Court made several further pronouncements which, we respectfully submit, are instructive in the present

proceedings as well, even though they were made in the context of disciplinary hearings rather than appointment deliberations:

> "*[20] Confidentiality is required to protect a judge from frivolous and unfounded complaints; to allow a judge to recognise and correct his or her own mistakes; to resolve the complaint prior to formal proceedings and to protect the privacy of the judge.*
>
> *[21] However, none of these considerations apply in this matter. … The identity of the judge involved is known as are the names of the complainants. Some of them have already testified in open public hearings… The details of the complaint and counter-complaint are in the public domain: not only in the media but also in the form of affidavits in the various court proceedings. … The public deserves access to the further proceedings.*
>
> *[22] The reasons advanced by the JSC do not justify the closed nature of the proposed proceedings. Any benefit that may or might have been be gained by a hearing 'outside the intrusive glare of publicity' will be discounted by negative perceptions of the judiciary and the administration of justice in general. This matter has attracted immense public interest and has been the subject of a debate in the media. There is every need to ensure the public's continued access to the issues.*

135. Applying the above reasoning to the present proceedings, it is clear that there is no legitimate interest to be served by secrecy when the identities of the candidates and the reasons advanced against their suitability for office have already been aired in the public interviews and the Reasons compiled by the Chief Justice. On the contrary, the continued concealment of the most immediate and accurate record of the Deliberations, despite disclosure of the remainder of the Record, can

only fuel speculation and suspicion, and thereby erode public confidence in the processes of the respondent, which itself is an important pillar of public confidence in the judiciary as a whole.

136. The Court also addressed the contention that opening details of the proceedings would impede the persons involved from speaking frankly (echoed in this matter as the second leg of the respondent's rationale). The Court firmly rejected "*the contention that the closed nature of the investigation will allow the parties to speak 'freely without the pressures of a witness in a public hearing'*", as some of the judges involved had already testified in public: "*There is no suggestion, and there can be none, that the Justices or the Judge President [Hlophe] will be intimidated and not speak 'freely'.*"(at para 23)

137. Similarly, the applicant submits, there can be no credible suggestion that the prospect of publicity would cause any member of the respondent to be intimidated and not to speak freely. The respondent's members exercise an enormous public power and are vested with substantial public and constitutional responsibility which they must discharge lawfully, rationally and in a procedurally fair, unbiased manner. Such members must be accountable for the exercise of power and fulfilment of responsibility and the public must have mechanisms for holding them accountable. If such members did or said something which they could not properly or lawfully do or say, then this is again a reason for, not against, disclosure. It would undermine the entire purpose of the respondent and its constitutional role if its actions could be shielded not only from public view, but also judicial scrutiny.

**SECTION 38 OF THE JSC ACT**

138. The proper application of section 38(1) of the JSC Act also requires explanation. Section 38(1) states:

> "*(1) No person, including any member of the Commission, Committee, or any Tribunal, or Secretariat of the Commission, or Registrar or his or her staff, may disclose any confidential information or confidential document obtained by that person in the performance of his or her functions in terms of this Act, except-*
>
> *(a) to the extent to which it may be necessary for the proper administration of any provision of this Act;*
>
> *(b) to any person who of necessity requires it for the performance of any function in terms of this Act;*
>
> *(c) when required to do so by order of a court of law; or*
>
> *(d) with the written permission of the Chief Justice.*"

139. The Court *a quo* held that candidates have an expectation that the deliberations of the JSC would remain confidential and that section 38(1) bound the JSC and all officials of the JSC to secrecy.[87] This was despite the express wording of section 38(1) of the JSC Act and despite there being no admissible, non-hearsay evidence before the Court as to the expectations of candidates.

140. Section 38(1) read in context, refers specifically to natural persons in the service of the JSC in one or other capacity and not to the JSC itself. The section states that

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[87] High Court judgment at [48] [appeal record at 103, line 10 to 104, line 11]

*"[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 the Act"* (emphasis added).

141. 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. Similarly section 38(3) contemplates signature of an oath of secrecy in relation to such information by the persons contemplated in section 38(1), again emphasising that section 38(1) was intended to operate against natural persons. The purpose of the provision is clearly to prevent leaks by functionaries of the JSC. Moreover, section 38(1) expressly recognises that such functionaries may disclose the information "*when required to do so by order of a court of law*". There is thus nothing standing in the way of this Court ordering disclosure.

**CONCLUSIONS AND RELIEF**

142. 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 designed and 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 judicial functions.

143. The SCA failed to apply the correct legal principles in the interlocutory application.

144. In the circumstances, the applicant submits that it has made out a proper case for leave to appeal to be granted in this matter. For the same reasons, we submit that

it is in the interests of justice that the appeal must succeed, with the costs of two counsel.

**DAVID UNTERHALTER SC**

**MAX DU PLESSIS**

**NZWISISAI DYIRAKUMUNDA**

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**23 June 2017**