THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No.: 145/2015

In the matter between:

THE HELEN SUZMAN FOUNDATION	**APPELLANT**
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**
THE TRUSTEE FOR THE TIME BEING OF THE BASIC RIGHTS FOUNDATION OF SA	**FOURTH AMICUS CURIAE**

Neutral citation: *The Helen Suzman Foundation v Judicial Service Commission* (145/2015) [2015] ZASCA 161 (2 November 2016)

Coram: Maya DP, Majiedt, Mbha and Dambuza JJA and Fourie AJA

Heard: 5 May 2016

Delivered: 2 November 2016

Summary: Recording of the private deliberations on judicial appointments by the Judicial Service Commission, properly conducted in terms of the Judicial Service Commission Act 9 of 1994 and regulation 3*(k)* made thereunder, does not form part of the record of its proceedings for purposes of Uniform rule 53(1)*(b)* – constitutional principles of openness and accountability are not absolute and the JSC is entitled to raise the defence of confidentiality to a rule 53 demand for the disclosure of the recordings of its private deliberations.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Le Grange J sitting as court of first instance): reported *sub nom Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC).

The appeal is dismissed with no order as to costs.

JUDGMENT

Maya DP (Majiedt, Mbha and Dambuza JJA and Fourie AJA concurring):

Background

[1] The core issue in this appeal is whether the deliberations held in a closed session by the respondent, the Judicial Service Commission (the JSC), in the execution of its mandate to advise the President of the Republic of South Africa (the President) on the appointment of judges under s 174(6) of the Constitution,[1] form part of the record of its proceedings for purposes of Uniform rule 53(1)*(b)*.[2]

[2] The appellant, the Helen Suzman Foundation (HSF),[3] appeals, with the leave of this court, against the judgment of the Western Cape Division of the High

[1] In terms of this provision, the President must appoint judges (other than judges of the Constitutional Court (s 174(4)) and the President and the Deputy President of the Supreme Court of Appeal (s 174(3)) on the advice of the JSC.

[2] Uniform rule 53 governs the procedure to be followed in review proceedings before the high court and has been quoted in relevant part in para 12 below.

[3] Founded in 1993 to honour the life work of the late Helen Suzman, HSF is a non-governmental organisation whose objectives include inter alia 'to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights,' thus litigating in this matter within the generously wide *locus standi* in *judicio* provisions of s 38 of the Constitution. For more on HSF see its website at *http://hsf.org.za/about-us.*

Court, Cape Town (Le Grange J). The court a quo dismissed HSF's interlocutory application for an order directing the JSC to deliver the full record of the proceedings sought to be reviewed, including the audio recording and any transcript of the JSC's private deliberations after the interviews of judicial candidates on 17 October 2012. HSF required the record for purposes of review proceedings it launched in the high court. In those proceedings it sought an order declaring, inter alia, that the JSC's decision, taken pursuant to the deliberations, to advise the President to appoint certain candidates and not to advise him to appoint certain other candidates as judges of the court a quo, was unlawful and irrational and thus invalid.[4] Four amici curiae, the Police and Prisons Civil Rights Union (POPCRU), the National Association of Democratic Lawyers (NADEL), the Democratic Governance and Rights Unit (DGRU) and the Trustee for the Time Being of the Basic Rights Foundation of South Africa (BRF), were also granted leave to join in the proceedings although only POPCRU and BRF participated in the appeal.

Proceedings in the court a quo

[3] The challenge, originally initiated by the former Deputy President of the Supreme Court of Appeal, Mr Justice Harms, was particularly directed at the JSC's recommendation of the appointment of Dolamo AJ instead of Mr Gauntlett SC. After the institution of the review proceedings the JSC delivered a record of its proceedings in terms of rule 53(1)*(b)*. The record contained: (a) the reasons for the JSC's decision, distilled from the deliberations, which set out its considerations in respect of each candidate; (b) the transcripts of the interview with each of the candidates; (c) each candidate's application for appointment; (d) comments on the candidates from various professional bodies and interested

[4] The President, acting on the JSC's recommendations, appointed Judges Judith Innes Cloete, Babalwa Pearl Mantame, Mokgoatji Josiah Dolamo, Owen Lloyd Rogers and Ashton Schippers as judges of the Western Cape Division of the High Court, and did not appoint Ms Nonkosi Saba and Messrs Jeremy John Gauntlett and Stephen John Koen.

individuals; and (e) related research, submissions and correspondence.

[4] HSF, having discovered in the interim that the JSC routinely keeps audio recordings of its entire proceedings, considered the record incomplete as it did not include a transcript or audio recording of the deliberations (the recording). Following the JSC's dogged refusal to furnish the recording on the ground that it does not form part of the record of its proceedings contemplated by rule 53, HSF issued a rule 30A[5] notice and thereafter launched the interlocutory application to compel the recording's production. The basis of these procedures was that the JSC had furnished an incomplete record in breach of rule 53(1)*(b)* by failing to furnish the recording, which is the most immediate and accurate record of its decision and the process leading thereto.

[5] As indicated above, the court a quo found in the JSC's favour and held that the record produced by the JSC met the objectives and purpose of rule 53. In the court a quo's view, due regard being had to the JSC's legislative framework and overall approach to judicial appointments, namely: (a) the JSC's publication of the objective criteria it employs in the selection of judges, (b) its public interview process, and (c) its obligation to give reasons for its recommendations to the President, which were provided here, the record satisfied the requirements of

[5] Uniform rule 30A deals with non-compliance with the Uniform rules or a request made pursuant to them and provides:
'(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.
(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.'

openness, transparency, equality of arms[6] required by s 34 of the Constitution and access to information. The court saw no reason to depart from the established approach of determining the extent of the required record for purposes of rule 53 on the facts of each case. And on that basis the court considered that HSF had been supplied with 'enough' documentation to ensure that it was not forced to launch its review in the dark. The court also found significance in the fact that such documentation included a summary of the JSC's reasons compiled by the Chief Justice, which, it pointed out, had not been impugned as incorrect. In its view, the Chief Justice could not, in any event, improperly adapt the reasons having regard to its broad composition.

[6] The court a quo considered that the JSC's unique status deriving from its constitutional powers and entitlement to determine its own process, placed its private deliberations in the realm of judicial officers' court book recordings or deliberations after a hearing, which do not form part of the record of proceedings on appeal or review. The court a quo finally held that comparative international jurisdictions did not support HSF's stance which, in turn, would not advance the constitutional and legislative imperatives of the JSC. Instead, the JSC was shown to represent international best practice and is far more transparent than the majority of comparable international bodies.

Submissions on appeal

[6] The principle of 'equality of arms' is an integral part of the rights to fair trial and access to court as well as the due process of the law in civil, criminal and administrative proceedings. Strict compliance with the principle is required at all stages of the proceedings in order to afford opposing parties (especially the weaker party) a reasonable opportunity to present their case under conditions of equality. It is a principle that was jurisprudentially developed by the European Court of Human Rights but has since been referred to with approval by the Constitutional Court in, inter alia, *Bernstein & others v Bester & others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC) fn 154; *Zondi v MEC for Traditional and Local Government Affairs & others* [2004] ZACC 19; 2005 (3) SA 589 (CC) para 63; and *Shilubana & others v Nwamitwa (National Movement of Rural Women and Commission of Gender Equality as Amici Curiae)* [2007] ZACC 14; 2007 (5) SA 650 (CC) para 21. See also Pieter van Dijk & Godefridus J H Hoof *Theory and practice of the European Convention on Human Rights* 3 ed (1998) 430. Further see Jason Brickhill & Adrian Friedman 'Access to courts' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 6, 2014) at OS 11-07, 59-73.

[7] HSF's contentions before us did not change. Relying mainly on a number of cases from the provincial divisions and one from this court,[7] it argued that constitutional democracy and the associated principles of transparency and accountability that underpin rule 53 oblige the JSC to furnish the full record of its proceedings ie any minutes, transcripts, recordings or other contemporaneous records of the JSC's official deliberations after interviewing candidates up to the time of taking the decision, including the recording. It was not for the JSC to determine the extent of relevant and disclosable material under rule 53, so it was argued. And the JSC was legally obliged to produce the recording because the deliberations bear on the lawfulness, rationality and procedural fairness of its decision and is indispensable to the determination whether there is a rational connection between the deliberations, the decision and the reasons.

[8] This was so, it was contended, because the deliberations represented the only part of the process where the JSC acts as a deliberative committee and were the most direct evidence of the reasoning behind the JSC's decision. They constituted the very basis from which that reasoning was drafted and were therefore indispensable to the exercise of review rights and clearly relevant. Disclosure would enhance the legitimacy of the JSC processes rather than compromise the dignity and integrity of candidates. HSF did however acknowledge the court's power to order limited disclosure if there were any parts of the recording which, in its view, should not be made public in order to mitigate any prejudice, preserve HSF's fair trial rights and give effect to rule 53. But it argued that the JSC had laid no basis for such a limitation of the record and that the court a quo disregarded this proposition, in any event, despite HSF's oral and written submissions in this regard. It also challenged the court a quo's comparison

[7] For example, *Comair Limited v The Minister of Public Enterprises & others* 2014 (5) SA 608 (GP); *Afrisun Mpumalanga (Pty) Ltd v Kunene NO & others* 1999 (2) SA 599 (T); *Cape Town City v South African National Roads Authority & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA).

of the deliberations to private judicial deliberations, arguing that the JSC had not performed judicial functions in this instance and that the high court had no power to determine what would be disclosable as in the case of a magistrate taken on review in a specific context.

[9] The JSC properly accepted at the outset that its processes must comply with the foundational constitutional principles of transparency, responsiveness and accountability that bind all organs of State.[8] It acknowledged its significant public and constitutional responsibility and that it wields enormous public power, which must be exercised lawfully, rationally and in a procedurally fair and unbiased manner, and, as mentioned above, that an organ of State whose decision is under review may be obliged to disclose its deliberations, or some aspects thereof, in appropriate circumstances. It was thus not in contention that the process it followed and its decision are subject to judicial review under rule 53. The point of departure, as stated, related only to the meaning and extent of the term 'record of . . . proceedings' in the rule.

[10] But the JSC argued that the confidentiality of its deliberations, which protects the dignity and integrity of the candidates and the process itself, does not conflict with the constitutional norms, domestic case law, international jurisprudence and the rules of court. This was so, given the sound reasons therefor, the fact that it is recognised in relevant legislation and the extent of the openness and transparency within which the JSC generally operates. Thus, it asserted, there is no absolute requirement for the disclosure of its deliberations, which are not relevant to HSF's review proceedings, and the record it provided sufficed to

[8] Within the meaning of s 239*(b)* read with s 195(1) and (2)*(b)* and also s 41 of the Constitution which require the administration of organs of State including within all spheres of government to be governed by certain democratic values and principles enshrined in the Constitution which include, inter alia, to be transparent and accountable. See also *South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others* [2015] ZASCA 156; 2016 (2) SA 522 (SCA) paras 2 and 44; *Judicial Service Commission & another v Cape Bar Council & another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) paras 46-47.

enable HSF to challenge it in the review on an equal footing.

[11] The amici supported the JSC's position. POPCRU also took issue with HSF's insistence on accessing the verbatim recording despite the summary of the deliberations which was prepared and submitted by the Chief Justice on the mandate of the JSC's members. In POPCRU's view, HSF's stance challenged the veracity of the summary and indicated its lack of faith in the word of the Chief Justice. BRF reiterated that the recording bears no relevance for the review proceedings as it does not form part of the objective information evidence before the JSC. Its initial objection to the non-joinder of the candidates in issue and the JSC members who partook in the deliberations, on the contention that they have a direct, substantial interest in the outcome of the review proceedings, was correctly abandoned in argument before us.

The purpose and applicability of rule 53

[12] Rule 53 reads in relevant part:

'(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 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 dispatch 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.'

[13] The primary purpose of the rule is to facilitate and regulate applications for

review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or State organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court.[9] It is established in our law that the rule, which is intended to operate to the benefit of the applicant,[10] is an important tool in determining objectively what considerations were probably operative in the mind of the decision-maker when he or she made the decision sought to be reviewed. The applicant must be given access to the available information sufficient for it to make its case and to place the parties on equal footing in the assessment of the lawfulness and rationality of such decision.[11] By facilitating access to the record of the proceedings under review, the rule enables the courts to perform their inherent review function to scrutinise the exercise of public power for compliance with constitutional prescripts. This, in turn, gives effect to 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 properly ventilated.[12] Needless to say, it is unnecessary to furnish the whole record irrespective of whether or not it is relevant to the review. It is those portions of a record relevant to the decision in issue that should be made available.[13] A key enquiry in determining whether the recording should be furnished is therefore its relevance to

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[9] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 661H-I and 662G-H; *Cape Town City v South African National Roads Authority & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) para 36. See also D E van Loggerenberg & E Bertelsmann *Erasmus: Superior Court practice* (Original Service, 2015) at D1-700; Derek Harms *Civil Procedure in the Superior Courts* (2016) para B53.8; Andries Charl Cilliers, Cheryl Loots & Hendrick Christoffel Nel *Herbstein and Van Winsen: Civil Practice of the High Court and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 40-1291.

[10] *Jockey Club of SA v Forbes* (above) at 660D-F; *SACCAWU & others v President Industrial Tribunal & another* [2000] ZASCA 74; 2001 (2) SA 277 (SCA) para 7.

[11] See for example, *Johannesburg City Council v The Administrator Transvaal & another* (1) 1970 (2) SA 89 (T); *Jockey Club of SA v Forbes* (above) at 660E fn 7; *Lawyers for Human Rights v Rules Board for Courts of Law & another* [2012] 3 All SA 153 (GNP) para 23; *Heatherdale Farms (Pty) Ltd & others v Deputy Minister of Agriculture & another* 1980 (3) SA 476 (T) at 480B-C.

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

[13] *Jockey Club of SA v Forbes* (above) at 660F; *Muller & another v The Master & others* 1991 (2) SA 217 (N) at 220E; *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E) para 9. See also *Comair Ltd v Minister for Public Enterprises & others* 2014 (5) SA 608 (GP).

the decision sought to be reviewed.

[14] The JSC relied, inter alia, on *Johannesburg City Council v The Administrator Transvaal & another*,[14] and a decision of this court which cited the former case with approval in *MEC for Roads and Public Works, Eastern Cape & another Intertrade Two (Pty) Ltd*,[15] to the effect that a decision-maker's private deliberations do not form part of the rule 53 record. In the former decision, Marais J interpreted the words 'record of proceedings' as follows (at 91G-92A):

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

[15] Whilst our courts have consistently followed this dictum over decades, well into the post-constitutional era, it is clear from recent constitutional jurisprudence that it needs qualification in so far as it excluded all and any deliberations of a decision-maker from the ambit of rule 53. The qualification of the dictum would apply with equal force to this court's obiter remarks in *Intertrade*, which endorsed

[14] *Johannesburg City Council v The Administrator Transvaal* (above).
[15] *MEC for Roads and Public Works, Eastern Cape & another Intertrade Two (Pty) Ltd* [2006] ZASCA 33; 2006 (5) SA 1 (SCA) para 15.

it, albeit tentatively. The JSC itself properly conceded that a disclosure of its deliberations, or at least some aspects thereof, may be warranted in appropriate circumstances. Indeed, there can be no contention that disclosure of its deliberations to establish the identity of participating members would be necessary to refute a challenge that its composition did not meet the requirements of s 178(1) of the Constitution when it made a particular decision in those proceedings. Disclosure to show the number of members who voted in support of a particular decision would be similarly vital to controvert an allegation that a majority of members had not supported the decision as is required by s 178(6) of the Constitution. The list is not closed.

[16] As mentioned above, the provincial divisions of the High Court have, in the cases relied upon by HSF, emphasised the constitutional goals of open and accountable decision-making and disagreed with Marais J's dictum in so far as it advocated wholesale non-disclosure of decision-makers' deliberations. In *Afrisun Mpumalanga (Pty) Ltd v Kunene NO & others*,[16] the court held that in an open and transparent system such as contemplated by the Mpumalanga Gaming Act 5 of 1995, the applicant was entitled to the minutes of deliberations and a video recording of the deliberations of a gambling board since it was the manner in which the board reached its decision that was at issue. *Comair Ltd v Minister for Public Enterprises & others* approved this decision and held that rule 53 entitles an applicant to access the full deliberations of a decision-maker.[17] There, a decision of the Minister of Public Enterprises was sought to be reviewed. Heavily redacted minutes of meetings held between him and other relevant State functionaries were produced under rule 53 on the basis that the full minutes contained sensitive and confidential financial information that was privileged. The

[16] *Afrisun Mpumalanga (Pty) Ltd v Kunene NO & others* 1999 (2) SA 599 (T) at 631J-632C . See also *Ekuphumleni (Pty) Ltd v Resort Gambling and Betting Board, Eastern Cape* (above).
[17] *Comair Ltd v Minister for Public Enterprises* (above) para 39.

court reiterated the trite principle that confidentiality does not by itself confer privilege against disclosure[18] as that would defeat the purpose of rule 53, and ordered delivery of the full minutes.

[17] *Cape Town City v South African National Roads Agency* (*SANRAL*)[19] bears a closer resemblance to the instant case as it concerned somewhat similar issues in a dispute between the parties as to exactly what constituted the rule 53 record. The City sought information pertaining to the selection, by SANRAL's board of directors, of a preferred bidder in a tender process undertaken for the award of a contract for the upgrade, construction, maintenance and operation of parts of the N1 and N2 national roads in the vicinity of Cape Town as toll roads, which the City had brought under review. Questions arose regarding whether the information was confidential and whether its disclosure would not only harm SANRAL, but also the bidders and that such harm provided a basis for secrecy. In an appeal against the decision of the Western Cape Division, Cape Town (Binns-Ward J) (which expressly dissociated itself with the dictum in *Johannesburg City Council*) in the City's favour, this court reiterated the importance of the time honoured principle of open justice which is now constitutionally entrenched.[20] The court endorsed the view that as a general rule court records should be open to the public and that any departure from this position should be the exception and must be justified.

[18] I am not at all convinced that any of these decisions support HSF's case in

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[18] *Comair Ltd v Minister for Public Enterprises* (above) paras 43-61 and 109. See also *S v Naicker & another* 1965 (2) SA 919 (N); *Van der Linde v Calitz* 1967 (2) SA 239 (A) at 260; *Crown Cork & Seal Co Inc & another v Rheem South Africa (Pty) Ltd & others* 1980 (3) SA 1093 (W) at 1099B-1091C.

[19] *Cape Town City v South African National Roads Authority & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) paras 2, 35-38 and 45-47.

[20] *Cape Town City v SANRAL* (above) para 13. See *Shinga v The State & another (Society of Advocates, Pietermaritzburg Bar as Amicus Curiae); O'Connell & others v The State* [2007] ZACC 3; 2007 (4) SA 611 (CC) para 26; *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa & another* [2008] ZACC 6; 2008 (5) SA 31 (CC); *South African Broadcasting Corp Ltd v National Director of Public Prosecutions & others* [2006] ZACC 15; 2007 (1) SA 523 (CC).

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. Both *Afrisun* and *Ekuphumleni Resort* involved the review of decisions of gambling boards which were enjoined by legislation to conduct their affairs in an open and transparent manner. In *Comair,* it weighed heavily with the court that the relevance of the redacted minutes was not disputed and that an undertaking had been given to protect the confidentiality of the minutes, which the court found made nonsense of the fear that their disclosure would likely cause prejudice. *SANRAL* acknowledged the possibility of a public body's claim to keep its documents confidential arising from 'interests such as security or perhaps even the privacy rights of persons mentioned in the documents'.[21] No court has laid down a general, fixed rule that deliberations must always form part of a review record under rule 53.

[19] HSF also relied on the judgment of the Constitutional Court in *Swartbooi & others v Brink & others*.[22] In that matter, the Court considered whether the conduct of elected municipal councillors during deliberations which culminated in the making of a decision affecting the respondents' rights was 'integral to deliberations at a full council meeting and to the legitimate business of that meeting'. It held that the 'evidence of conduct in the proceedings of the full council is admissible for the purpose of deciding whether the conduct falls within the bounds of s 28 [of the Local Government: Municipal Structures Act 117 of 1998] protected conduct, or to prove the requirements of civil liability for conduct within the council that is not protected by s 28.'[23]

[21] Paragraph 37.
[22] *Swartbooi & others v Brink & others* [2003] ZACC 25; 2006 (1) SA 203 (CC) para 12.
[23] Paragraph 21.

[20] *Swartbooi* is clearly distinguished by its own facts. The Constitutional Court was engaged in a wholly different enquiry. It was concerned with whether the councillors' liability for costs arising from litigation challenging council decisions, which they had supported, constituted liability to civil proceedings. If so, they would be entitled to the immunity provided in s 28 of the Municipal Structures Act, from personal liability for conduct amounting to the performance of their council functions. What the Court sought to decide, therefore, was whether s 28 covered the conduct of municipal councillors that constituted participation in the deliberations of the full council in the course of the legitimate business of that council. Importantly, those deliberations were not clothed with confidentiality at all and their relevance was determined in an entirely different context.[24]

Confidentiality of the JSC's deliberations

[21] Against that background, it must be decided whether the confidentiality of the JSC's deliberations insulates it from disclosure under rule 53. The starting point is the fount of the JSC's existence – s 178 of the Constitution. These

[24] The law-making deliberative process by elected members of legislative bodies is a uniquely placed one in that it entails the public's democratic right to direct public involvement and participation and indirect participation through the elected members which necessitates the greatest public access. See ss 59, 72, 118 and 160(7) of the Constitution. See also *Primedia Broadcasting (a division of Primedia (Pty) Ltd) & others v Speaker of the National Assembly & other* [2016] ZASCA 142. Compare also, in this regard, the open deliberative process of the National Assembly and public broadcasting thereof in nominating and recommending candidates for appointment as Public Protector (and see *SABC v DA* [2015] ZASCA 156; 2016 (2) SA 522 (SCA) para 30).

provisions, inter alia, determine its composition.[25] In ss (4), provision is made for the JSC's powers and functions as are assigned to it by the Constitution (in s 174) and national legislation. And in subsection (6), it is given a wide power to determine its own procedure with only one rider that its decisions must be supported by its majority.[26]

[22] The confidentiality of the JSC's processes is recognised, first, in s 38(1) of the Judicial Service Commission Act 9 of 1994 (the JSC Act), which provides:

'No person, including and 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

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[25] In s 178 of the Constitution which reads in relevant part:

'**Judicial Service Commission**

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

(a) the Chief Justice, who presides at meetings 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 Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.'

[26] The JSC is one of three constitutionally created and empowered organs of State which especially have the power to determine their own procedures. The others are courts with inherent jurisdiction (s 173) and the legislatures in different spheres of government (ss 57, 70, 116 and 160(6)).

(d) with the written permission of the Chief Justice.'

[23] More pertinently, the process which the JSC must employ in respect of the recommendation of candidates for judicial appointment is governed by regulations promulgated for that purpose in terms of s 35 the JSC Act.[27] Regulation 3*(a) – (m)* sets out the formal procedure which the JSC employs in the selection of candidates for appointment as superior court judges, save for appointment to the Constitutional Court.[28] Regulation 3*(k)* provides that:

'After completion of the interviews, the [JSC] shall deliberate *in private* and shall, if deemed appropriate, select the candidate for appointment by consensus or, if necessary, majority vote.' (My emphasis.)

Interestingly, this procedure is not peremptory as regulation 7 allows the JSC to 'depart from this procedure or condone any departure from [the] procedure whenever, in its opinion, it is appropriate to do so'. This is in line with its constitutionally conferred powers to regulate its own procedure in terms of s 178(6).[29]

[24] Significantly, the Promotion of Access to Information Act 2 of 2000 (PAIA), which imposes transparency in relation to documents held by the State to give effect to the constitutional right to access information under s 32(2) in accordance with s 32 of the Constitution,[30] also exempts the JSC's processes relating to the judicial appointments from its operation. In terms of s 12(*d*) thereof,

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[27] Procedure of Commission GN R114 published in *GG* 16952 of 2 February 1996, as amended by GN R795 of *GG* 18059 of 13 June 1997, GN R402 of *GG* 23277 of 5 April 2002 and *GG* 24596 of 27 March 2003.

[28] Section 174(4) and (6) of the Constitution as well as regs 2 and 3 respectively set out distinct procedures for the appointment of Constitutional Court judges as opposed to the appointment of other judges of the superior courts.

[29] See, with regard to powers sourced directly from the Constitution and complemented through further subsidiary powers in national legislation, *SABC v DA* (above) paras 42-43. See also *Trustco Group International (Pty) Ltd v Vodacom (Pty) Ltd & another* [2016] ZASCA 56 para 14.

[30] Section 32(1)(*a*) of the Constitution affords everyone 'the right of access to information held by the state'. Section 32(2) of the Constitution provides that national legislation must be enacted to give effect to the right to everyone's right to access information and the long title of PAIA provides that that Act's purpose is: 'To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.' See also s 9 of PAIA setting out the objectives of that Act.

PAIA 'does not apply to a record relating to a decision referred to in paragraph (*gg*) of the definition of "administrative action" in section 1 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), regarding the nomination, selection or appointment of a judicial officer or any other person by the [JSC] in terms of any law'.[31]

[25] The confidentiality of the deliberations therefore enjoys recognition in legislation enacted to give effect to the very right to access information enshrined in the Constitution, which was rightly not challenged as being unconstitutional. (All that HSF argued was that the confidentiality of the deliberations is no basis for withholding disclosure under rule 53, and that it could at best 'lead to the setting up of a confidentiality regime in respect of disclosure where properly established' and that the regulations relate only to the process to be employed by the JSC in performing its functions.) Furthermore, our courts, which ultimately retain the power to order disclosure of confidential material where appropriate, have endorsed the need for confidentiality in JSC processes.[32] Recently, in *Judicial Service Commission v Cape Bar Council & another*,[33] this court dealt with the JSC's obligation to give reasons for its decision not to recommend a particular candidate if properly called upon to do so. In concluding that the JSC is indeed enjoined by law to provide such reasons, the court accepted the legitimacy of the JSC's procedure of merely distilling its reasons as a summary of its deliberations (as was done in this case) and voting for candidates by secret ballot. The court stated that 'if the reasons of the majority cannot be distilled from the . . .

[31] Section 1(*gg*) of PAJA defines 'administrative action' and excludes 'a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law' from review under that Act.

[32] See *Cape Town City v SANRAL* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) para 46, in the comparable context of the numerous limits imposed on the dissemination of material discovered, where this court pointed out that for the question of disclosure of such material it is impermissible to lay blanket rules, but instead that every case must be determined on its own merits and that the court exercises a discretion in the careful evaluation of what is at stake on both sides.

[33] *JSC v Cape Bar Council* [2012] ZASCA 115; 2013 (1) SA 170 (SCA).

deliberations which precede the voting procedure, there appears to be no reason, on the face of it, why the members cannot be asked to provide their reasons *anonymously*.'[34] The court also pointed out that it was not 'suggesting that the JSC is under an obligation to give reasons under all circumstances for each and every one of the myriad of potential decisions it has to take.'[35]

[26] Likewise in *Mail & Guardian v Judicial Service Commission*,[36] the South Gauteng High Court, dealing with access to the JSC's 'public proceedings' (and not process endowed with confidentiality by statute as here), nonetheless acknowledged the need for confidentiality. It allowed the media applicants access to a judge's disciplinary proceedings largely because the proceedings had already been fully open and no justification had been advanced for closing them. Although the court emphasised the importance of openness, it recognised the necessity of confidentiality at the early stages of the proceedings as follows (para 20):

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

[27] What may be gleaned from these decisions, in my view, which HSF's counsel did not challenge, is that there is no absolute requirement of disclosure of the JSC's proceedings. Rather, it is a question of weighing, inter alia, the nature and relevance of the information sought, the extent of the disclosure and the

[34] Paragraph 50.
[35] Paragraph 51.
[36] *Mail & Guardian v Judicial Service Commission* [2010] 1 All SA 148; 2010 (6) BCLR 615 (GSJ). See also *eTV (Pty) Ltd & others v Judicial Service Commission & others* 2010 (1) SA 537 (GSJ).

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. It should be borne in mind in that exercise, however, that these constitutional values do not establish discrete and enforceable rights.[37] 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 the rules of court must, like all other legislation, be construed and applied in the manner enjoined by s 39(2) of the Constitution,[38] 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.[39]

[28] It must then be determined if there are any reasons, consistent with the Constitution and the law, justifying the non-disclosure of the deliberations. I have difficulty with HSF's contentions that non-disclosure of the recording is inimical to the notions of open justice and public accountability and that protecting the confidentiality of the deliberations would undermine the public's trust in the JSC and its processes. The nature of the JSC's constitutional mandate requires it to

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[37] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & others* [2004] ZACC 10; 2005 (3) SA 280 (CC) para 21. See also, *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 (1) SA 442 (CC) para 49; *Bernstein & others v Bester & others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC) para 85.

[38] Which enjoins the interpretation of legislation that promotes the spirit, purport and objects of the Bill of Rights.

[39] The provisions read:

'**36 Limitation of rights**

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including–

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.'

engage in a rigorous, intense judicial selection process. To that end, it must be accepted that during the course of the deliberations adverse remarks will be made, which although not necessarily actionable in law, may yet be hurtful to a candidate and cause reputational damage harmful to his or her professional career. This would apply with greater force to a sitting judge who applies for a higher position on the Bench with the potential of eroding public esteem in the judiciary upon which the ultimate power of the courts rests.[40] The JSC and its members may also be exposed to possible actionable claims for delictual damages arising from utterances made during the deliberations which a candidate may consider defamatory. It should not be overlooked too that the legal practitioners in the JSC will, in future, appear before the appointed judge who may harbour ill feelings against them if they expressed adverse views against her or his appointment in the deliberations. This may potentially inhibit the practitioners and even the judges sitting on the JSC from freely and frankly expressing themselves on the suitability of the candidates.

[29] Protecting the confidentiality of the deliberations clearly serves legitimate public interests in the circumstances. Whilst the JSC itself cannot lay claim to a general right to privacy as it discharges a public duty, the privacy and dignity of judicial candidates, who are assured by the JSC Act and its regulations that the deliberations concerning their suitability will be confidential, must be protected in the judicial interviewing and selection process.[41] Non-disclosure of the deliberations therefore fosters this obligation. It likely encourages applicants who might otherwise not make themselves available for judicial appointment for fear of embarrassment were the JSC members' frank opinions on their competence or otherwise be made open to the public. This would compromise the efficacy of the

[40] Hon Chief Justice I Mohamed '*The role of the judiciary in a constitutional State'* (1998) 115 SALJ 111 at 112.
[41] Morné Olivier & Cora Hoexter 'The Judicial Service Commission' in Cora Hoexter & Morné Olivier (contributing eds) *The Judiciary in South Africa* (2014) at 176.

judicial selection process. The cloak of confidentiality also enhances the judicial appointments process by allowing the members to robustly and candidly state facts and exchange views in discussing the suitability or otherwise of the candidates based on their skills, characters, weaknesses and strengths.

[30] It is worth noting in this regard that courts in various foreign jurisdictions have acknowledged the need to protect the confidentiality of State functionaries' deliberations in proper cases so as to preserve their ability to speak frankly, free from improper public scrutiny and influence. In *Babcock v Canada (Attorney General),*[42] the court explained the need to protect the confidentiality of cabinet minutes thus:

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

These sentiments have been echoed by the House of Lords and the High Court of Australia.[43] I cannot think of any reason why they would not apply to the deliberations of the JSC, which also makes politically sensitive decisions of great constitutional import.

[31] The public's confidence in the JSC, which has incidentally conducted its deliberations privately without question since its inception in 1994, plainly does not arise from public access to the deliberations. Rather, it stems from, inter alia (a) the diversity of the JSC's uniquely broad composition which comprises senior

[42] *Babcock v Canada (Attorney General)* 2002 SCC 57; [2002] 3 SCR 3 para 40.
[43] *Conway v Rimmer* [1968] AC 910 at 952. See also *Carey v Ontario* [1986] 2 SCR 637 paras 50-51.

members from each of the three arms of government, the legal and academic professions and civil society; (b) the publication of the criteria for eligibility and the appointment of judges; (c) public and media access to the selection process from the time when the vacancies are advertised until the interviews; and (d) the JSC's duty to furnish reasons for its recommendations. These factors satisfy the requirements of transparency and accountability, as evinced in the criticisms against the JSC, which are to be expected and welcomed in an open and democratic society.[44]

Relevance of the Deliberations?

[32] As mentioned above, the reasons compiled by the Chief Justice 'from the contributions of Commissioners during the deliberations, as mandated by the Commissioners at the end of the meeting' in terms of Uniform rule 53(1)*(b)*, contained a concise summary of the views expressed by the JSC members in respect of each candidate. Based on those reasons HSF stated the following in its founding affidavit in the main application:

'The HSF submits that this matter is now ripe for determination by this Honourable Court. The reasons provided by the JSC, as delineated below, together with certain recent public statements by, inter alios, the Chief Justice . . . and the spokesperson for the JSC . . . provide this Honourable Court with the necessary context to consider the relief sought in the Notice of Motion accompanying this affidavit.'

[33] Further on in this affidavit, HSF set out its grounds of review which amounted to that the JSC: (a) elevated the consideration in s 174(2) of the Constitution, which obliges the JSC to consider 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa . . . when

[44] Olivier & Hoexter op cit at 174-188. See also Tabeth Masengu '*Gender transformation as a means of enhancing perceptions of impartiality on the bench*' (2016) 133 *SALJ* 475 at 485-490; Mateenah Hunter, Tim Fish Hodgson & Catharine Thorpe '*Women are not a proxy: Why the Constitution requires feminist judges*' (2015) 31 *SAJHR* 579 at 596-604.

judicial officers are appointed', above other relevant factors; (b) failed to take other material considerations into account; and (c) failed to engage in a meaningful, comprehensive and comparative analysis of the respective strengths and weaknesses of the various candidates.

[34] Prior to the launch of the interlocutory application, the JSC's instructing attorneys requested more time 'to finalize the record'. HSF's response to that request was:

'In the closing paragraph of [your client's letter dated 16 November 2013] your client indicated to Mr Cloete [retired Justice Harms DP's legal representative] that "this letter as well as the previous one . . . has given you all the necessary information". Accordingly, given your client's stated position that it has already furnished Mr Cloete with the totality of its record of and reasons for the decision that is challenged in this matter, it is unclear what record remains to be "compiled" or "finalised" by your client under Rule 53.'

[35] HSF's insistence on the disclosure of the deliberations is puzzling in light of this unequivocal position, which took no issue with the adequacy or accuracy of the reasons furnished by the Chief Justice, that all the material necessary for the adjudication of the matter it described as 'ripe for determination' was before the court a quo. It seems nothing like a legitimate endeavour to obtain knowledge of the reasons founding the impugned recommendations and smacks of the 'fishing excursion' against which the court cautioned in *Johannesburg City Council.* HSF's own stance makes clear that the deliberations are not required for the proper determination of the review.

[36] It is not in any event clear what value would be added by the preliminary views of members. What they state during the deliberations is not necessarily an indication of the basis on which they ultimately decide each matter, as their initial views may well have changed from persuasion by the others by the time of voting.

Moreover, the voting process itself poses another hurdle as its secrecy would make it impossible to attach any views expressed in the deliberations to a particular member. The reasons provided by the Chief Justice clearly allow an objective determination of the considerations that were probably operative in the minds of the JSC members when they made the recommendations. There is no conflict between the JSC's procedures and rule 53. If the reasons were considered inadequate, which was not HSF's case, as already stated, nothing would preclude HSF from seeking reasons from each of the JSC members anonymously in the manner suggested by this court in *Cape Bar Council.* The recording of the actual deliberations is therefore irrelevant for purposes of rule 53.

[37] This finding is strongly supported by comparative international practice of various jurisdictions including the USA, Australia (which has no judicial appointments commission at all), Canada, the United Kingdom and other Commonwealth jurisdictions, which is comprehensively discussed in the court a quo's judgment. Even in jurisdictions that provide little or no confidentiality protections for applicants in deference to open justice and accountability, the courts and academic writers have recognized the justification for confidential deliberations similar to what has been advanced by the JSC.[45] Final deliberations and votes of the commissioners are afforded extensive confidentiality and the universal purpose therefor is to encourage free and frank discussion of the applicants' qualifications by the commissioners and the other reasons given by the

[45] See, for example, *Public Citizen v Department of Justice* 491 US 440 (1989); *Lambert v Barsky* N.Y. Supr., 91 Misc.2d 443; 398 N.Y.S.2d 84 (1977); *Justice Coalition v First District Court of Appeal Judicial Nominating Commission* 823 So. 2d; 823 So.2d 185 (Fla. Dist. Ct. App. 2002); *Guy v Judicial Nominating Commission* 659 A.2d 777 (Del. Super. 1995); *Guardian News and Media Limited v IC (Freedom of Information Act 2000*) [2009] UKIT EA_2008_0084 (10 June 2009); *Judicial Appointments Commission (Decision Notice*) [2009] UKICO FS50242843 (24 August 2009); Ontario Judicial Appointments Advisory Committee *Annual Report for 2012* (2013) at 9, available at *www.ontariocourts.ca/ocj/files/open/JAAC-2012-Ann-Rep.pdf*, accessed 23 October 2016; Marla N Greenstein & Kathleen M Sampson *Handbook for judicial nominating commissioners* 2 ed (2004) at 24; Rachel Davis & George Williams 'Reform of the judicial appointments process: Gender and the bench of the High Court of Australia' (2003) 27 *Melbourne University LR* 819 at 863; Simon Evans & John Williams 'Appointing Australian judges: A new model' (2008) 30 *Sydney LR* 295.

JSC.

[38] As the court a quo correctly observed, employing a body such as the JSC to conduct judicial selection in itself represents international best practice. Interestingly, the JSC's processes are by far more open than those of its international counterparts, to the extent that its openness has sometimes been slated. In 2013, the Commonwealth Lawyers Association, the Commonwealth Legal Education Association and the Commonwealth Magistrates' and Judges' Association, in a paper titled 'Judicial appointments commissions: A model clause for constitutions', developed a model constitutional clause for judicial appointment commissions.[46] The paper contains the following observation on the clause in recommending that judicial appointment commissions should be able to determine their own procedure (at 12-13):[47]

'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.'

[39] To sum up: A decision-maker's deliberations do not automatically form part of the record of the proceedings as contemplated in rule 53. The extent of the record must depend upon the facts of each case. In certain cases the decision-maker may be required to produce a full record of proceedings which includes its

[46] Karen Brewer, James Dingemans & Peter Slinn *Judicial appointments commissions: A model clause for constitutions* (2013), available for download on the CMJA website at *http://www.cmja.org/archivednews2013-2014.htm*, accessed 23 October 2016.

[47] The recommended clause provides the following:
'(15) The Commission shall be responsible for the establishment of its own procedural rules and regulations which should include provision for the conduct of meetings, where necessary, by video or other teleconferencing means and for the transparency of selection processes.'

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

[40] The appeal must therefore fail. The JSC did not seek a costs order in the event of its success and my view is that this stance is correct in light of the *Biowatch* principle.[48]

[41] The appeal is accordingly dismissed with no order as to costs.

M M L Maya

Deputy President

[48] *Biowatch Trust v Registrar, Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

APPEARANCES:

For the Appellant:	D Unterhalter SC (with M du Plessis and ML Dandadzi) Instructed by: Webber Wentzel, Johannesburg Symington & De Kok, Bloemfontein
For the Respondent:	AL Platt SC (with N Pakoe) Instructed by: State Attorney, Cape Town
For First *Amicus Curiae*:	V Ngalwana SC (with N Ali) Instructed by: Marais Muller Hendricks Inc, Cape Town
For Fourth *Amicus Curiae*	F Moosa Instructed by: Fareed Moosa Attorneys, Cape Town Webbers, Bloemfontein