

Gymingone Nkete.

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NO: 2015/2014

WCC CASE NO: 8647/2013

In the matter between:

HELEN SUZMAN FOUNDATION

Applicant

and

JUDICIAL SERVICE COMMISSION

Respondent

with

POLICE AND PRISONS CIVIL RIGHTS UNION

First Amicus Curiae

**NATIONAL ASSOCIATION OF DEMOCRATIC
LAWYERS**

Second Amicus Curiae

**DEMOCRATIC GOVERNANCE AND RIGHTS
UNIT**

Third Amicus Curiae

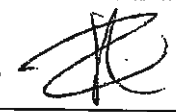
FILING NOTICE

Document filed : Respondent's Affidavit in Opposition to the
Application for Leave to Appeal.

DATED AT CAPE TOWN ON THIS 15th DAY OF JANUARY 2015

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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Appeal Case No.

Case No: 8647/13

In the matter between:

THE HELEN SUZMAN FOUNDATION

Applicant

and

JUDICIAL SERVICE COMMISSION

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with

POLICE AND PRISONS CIVIL RIGHTS UNION

First *amicus curiae*

NATIONAL ASSOCIATION OF DEMOCRATIC

LAWYERS

Second *amicus curiae*

DEMOCRATIC GOVERNANCE AND RIGHTS UNIT

Third *amicus curiae*

**RESPONDENT'S AFFIDAVIT IN OPPOSITION TO THE APPLICATION FOR
LEAVE TO APPEAL**

I, the undersigned

ISHMAEL ANTHONY MMAKWENA SEMENYA

Do hereby make oath and state that:

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



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

2. The facts set out herein fall within my personal knowledge unless the context indicates otherwise, and are to the best of my knowledge and belief true and correct.
3. In this affidavit, I respond to the Applicant's application for leave to appeal to this Honourable Court, wherein the Applicant seeks leave to appeal against the whole judgment and order handed down by his Lordship, the Honourable Mr Justice Le Grange, on 5 September 2014, and for an order that the judgment and order of his Lordship, the Honourable Mr Justice Le Grange, on 30 October 2014, refusing leave to appeal against the just-mentioned judgment and order, be set aside.

SERIATIM RESPONSE

4. AD PARAGRAPH 1

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

5. AD PARAGRAPHS 2 TO 6

The contents of these paragraphs are admitted.

6. AD PARAGRAPHS 7 TO 8

I note the content of these paragraphs.



7. AD PARAGRAPH 9

Save to deny that the incorrect test was used in deciding whether to grant leave to appeal, the content of this paragraph is noted.

8. AD PARAGRAPH 10

I deny the content of this paragraph.

9. AD PARAGRAPH 11

9.1 Save to admit the quote to the extent that it accords with paragraph 3 of the judgment, I deny the content of this paragraph.

9.2 The Applicant is cavilling here, and in fact misstates the position. In paragraph 2 of the judgment dismissing leave to appeal, the Court plainly states the test as follows:

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

9.3 There is, accordingly, simply no question of a misdirection or the application of an incorrect test.

A handwritten signature in black ink, appearing to be 'W. J. O.', is located in the bottom right corner of the page.

9.3 The Court correctly found, when dismissing the application for leave to appeal, that there was no reasonable prospect of success on appeal.

10. AD PARAGRAPHS 12 TO 13

I deny the content of these paragraphs.

11. AD PARAGRAPHS 14 TO 16

I admit the content of these paragraphs.

12. AD PARAGRAPH 17

Save to state that the delay was due to administrative difficulties within the JSC, I admit the content of this paragraph.

13. AD PARAGRAPH 18

I admit the content of the first sentence of this paragraph. I note the content of the second sentence of this paragraph.


14. AD PARAGRAPH 19

14.1. I deny the content of this paragraph. The record dispatched by the Respondent is indeed the complete record. The Applicant is not entitled to a copy or transcript of the deliberations, nor is the Respondent obliged to furnish same. There has been full compliance with Rule 53(1)(b) of the Uniform Rules of Court.



- 14.2. The procedure of the Respondent, specifically paragraph 3(k) thereof, determined by it in terms of section 178(6) of the Constitution of the Republic of South Africa, 1998 ("the Constitution") and published by the Minister of Justice on 27 March 2003 in the Government Gazette, specifically provides for deliberations to be held in private.
- 14.3. The Applicant has not challenged the Respondent's exercise of power to determine its own procedure and therefore cannot insist on the audio recording or a transcript of the deliberations being disclosed to it.
- 14.4. Given the nature and origin of the power to recommend the appointment of judges, the need for frank, robust and honest discussion regarding the capabilities, personalities, strengths and weaknesses of candidates, and the chilling effect that public disclosure of these discussions might have on members of the Respondent, and on the willingness of candidates to put their names forward for judicial appointment, keeping such discussions confidential is a lawful and reasonable exercise of the Respondent's powers.
15. AD PARAGRAPH 20

I deny the content of this paragraph. The Respondent has provided extensive reasons and has included these in the record. These reasons were compiled by the Chief Justice from the views expressed by the commissioners during the post-interview deliberations. It is the JSC's position that the reasons given represent an accurate record of the decision and the considerations taken into account, as these considerations would have occupied the minds of the commissioners



when they were called upon to vote. Therefore, the reasons are a clear and accurate recordal of the decision.

16. AD PARAGRAPHS 21 TO 24

I admit the content of these paragraphs.

17. AD PARAGRAPH 25

I deny the content of this paragraph. I deny that there have been any procedural or substantive deficiencies as the Applicant would want this Honourable Court to believe.

18. AD PARAGRAPHS 26 TO 28

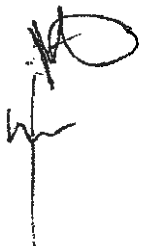
I admit the content of these paragraphs.

19. AD PARAGRAPHS 29 TO 30

I admit the content of these paragraphs but add that, properly construed, the recordal of a body's deliberations does not form part of the record of its decision, alternatively it should not do so in the case of the JSC. The basis for these contentions is set out in the JSC's heads of argument in the interlocutory matter, a copy whereof is attached hereto as annexure "IAMS1"

20. AD PARAGRAPH 31

I deny the content of this paragraph. Paragraphs 12 to 14 of the judgment deal with the purpose of Rule 53, and do not include a holding as alleged.



21. AD PARAGRAPHS 32 TO 35

21.1. I deny the content of these paragraphs. Decisions relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person by the JSC in terms of any law are excluded from the definition of 'administrative action', in terms of section 1(gg) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). This Honourable Court in *Judicial Service Commission & Another v Cape Bar Council* 2013 (1) SA 170 (SCA) held that such decisions by the JSC were excluded from review under PAJA but were nonetheless reviewable under the doctrine of legality.

21.2. The Court *a quo* has not prescribed a different standard for different decision-makers as alleged by the Applicant. The Court *a quo* correctly found in paragraph 26 of the main judgment that the general approach has always been that the extent of the record of proceedings is dependent on the facts of each case. The Court *a quo* found that there is no justifiable reason to depart from this general approach and did not prescribe different standards for different decision-makers.

22. AD PARAGRAPH 36

The content of this paragraph is denied. The full record, comprising six volumes, was furnished to the Court and was, accordingly, available at the hearing.



23. AD PARAGRAPHS 37 TO 40

23.1. I deny the content of these paragraphs. The correct position is found in *Johannesburg City Council v The Administrator, Transvaal and Another (1) 1970 (2) SA 89 (T)* in which the Court found that the record of proceedings is analagous to the record of proceedings in a court of law which would quite clearly not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. The Court *a quo* in paragraph 16 of the main judgment held that the record dispatched by the respondent would enable the applicant to launch its review application and evaluate and argue the rationality, lawfulness and reasonableness of the impugned decision without the deliberations forming part of the record.

23.2. The Court *a quo*, in paragraph 15 of the main judgment, goes into detail as to what comprises the record of proceedings, and the applicant is incorrect to state that this paragraph alludes to the fact that the provision of reasons may substitute for the provision of relevant parts of the record in these proceedings.

24. AD PARAGRAPH 41

I deny the content of this paragraph. I have already submitted that the deliberations are not required for production in terms of the said rule. There are also no inconsistencies in the approach adopted by the Respondent. Ordinarily, a court will not go beyond the reasons furnished in order to determine whether these reasons are borne out by a transcript of the



deliberations, if there is one. The Court *a quo* correctly found that the reasons were sufficient disclosure. The Court *a quo* correctly found in paragraph 16 of the main judgment that the applicant is not being deprived of the procedural and substantive safeguards which are the underlying rationale for the Rule.

25. AD PARAGRAPH 42 TO 43

I deny the content of these paragraphs. The Court *a quo*, in paragraph 48 of the main judgment, recorded with approval the view that "*confidentiality breeds candor, that it is vital for effective judicial selection, that too much transparency discourages applicants, and will have an effect on the dignity and privacy of the applicants who applied with the expectation of confidentiality.*" The court further held that "*[i]t goes without saying that the right to human dignity extends to all South African Citizens, it is important to be mindful that the candidates in the present matter had an expectation that the Deliberations would be confidential. Furthermore, the HSF underscores a key consideration. The knowledge that the full record of the Deliberations which might include extremely frank remarks and opinions of senior members of the Judiciary and Executive as to the candidate's competence or otherwise would be made public, could deter potential candidates from accepting nominations for appointment. The very efficiency of the judicial selection process could therefore be compromised.*"

26. It is respectfully submitted that the aforementioned conclusion lies at the heart of what this case is about. Unlike the Applicant, which seeks to interpret Rule 53 without regard for the constitutional and legislative imperatives at issue



when the JSC comes to perform its function, the Court a quo, it is submitted, correctly, approached the matter in terms of a weighing-up of the respective, and potentially opposing, interests of the parties. This is clear from paragraph 49 where the Court states the following:

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

27. AD PARAGRAPH 44

I admit that this submission is made in the heads of argument filed on behalf of the JSC. The context in which the submission is made appears from the extract attached to the application. In those submissions it was contended that even a limited disclosure would be inappropriate as this would militate against the proper exercise by the JSC of its constitutional and statutory function. The Court, clearly, accepted this argument, and hence it is not correct to say that it did not even consider the possibility or appropriateness of such a limited disclosure order.

28. AD PARAGRAPHS 45 TO 46

The content of these paragraphs is noted

29. AD PARAGRAPH 47

I deny the content of this paragraph. The Court a quo addressed the complaint raised by the Applicant in respect of openness, transparency,



equality of arms and access to information in paragraph 17 of the main judgment. The Court *a quo* did not find that the public process absolved the Respondent from disclosing the deliberations.

30. AD PARAGRAPHS 48 TO 49

I deny the content of these paragraphs. The Respondent has not circumvented the requirements of the Uniform Rules of Court. The Respondent, in fulfilling its constitutional mandate, determined its procedure, to ensure openness, transparency and accountability in the nomination and selection process of the judiciary. However, from as early as 2003, the public was informed of the fact that deliberations would be held in private and would not be open to the public. This exercise of its constitutional mandate was not challenged in the review application nor can it be challenged in the interlocutory application by the applicant.

31. AD PARAGRAPHS 50 TO 52

I admit the content of these paragraphs. I deny however the assertion that the Court found that the scope of Rule 53 was too wide and should be curtailed. Instead, the Court considered the purpose of Rule 53, as also the constitutional and legislative function of the JSC, in construing the ambit of the record.

32. AD PARAGRAPH 53

I deny the content of this paragraph. This Honourable Court has accepted that a challenge to the decisions of the Respondent is based on the principle of



legality as PAJA is excluded. Coupled to this is the confidentiality clause as contained in section 38 of the Judicial Service Commission Act, 1994 ("the Act"), which relates to the maintenance of confidentiality by members of the Respondent. The Court *a quo* considered comparative jurisdictions regarding the confidentiality of entities similar to that of the Respondent and correctly found, in paragraph 48, that "*whilst it is accepted that transparency in judicial selection should obviously be welcomed, the continuing entrenchment of some degree of secrecy in all comparable systems demonstrates that the JSC's claim that it should deliberate in private is well-founded.*"

33. AD PARAGRAPHS 54 TO 55

I deny the content of these paragraphs. The point being made by the Court, in response to an argument by the JSC, was that, in the absence of any basis to believe that the reasons were inaccurate, there being none such in the present case, there was no need to extend the ambit of the record beyond its traditional scope, so as to include a recordal of the deliberations. Conceivably, so the JSC's argument went, were there cause to believe that the reasons furnished were not accurate, there might be a basis for asserting a claim to have access to a recordal of the deliberations.

34. AD PARAGRAPHS 56 TO 57

I deny the content of these paragraphs. The Court *a quo*, in reliance upon the reasoning in *Johannesburg City Council*, found, in paragraph 29 of the main judgment, that "*the JSC's deliberations are in my view no different to those of a magistrate or those of a judge as reflected in his or her court book or*



deliberations which do not form part of the record of proceedings on appeal or review. Accordingly, the non-disclosure of the JSC's deliberations cannot taint the entire review proceedings." The Court in the Johannesburg City Council case found that the record of proceedings is analogous to the record of proceedings in a court of law which clearly does not include the record of deliberations. It is in this context that the analogy of the Learned Judge should be understood.

35. AD PARAGRAPHS 58 TO 60

I deny the content of these paragraphs. The Applicant is incorrect in stating that the identity of the individual drafting the reasons is a relevant consideration in determining the remit of the record, or that the Court *a quo* so held.

The Court *a quo* held in paragraph 28 of the main judgment that "*despite the vague assertion by the HSF that a drafter of the summary has the power to determine what goes into the summary and would be in a position to tailor the reflections of the Deliberations, there is no suggestion that the reasons compiled by the Chief Justice are inaccurate. In any event it is inconceivable that the Chief Justice would have tailored the reflections of the Deliberations of the JSC having regard to its composition regulated by s178(1) of the Constitution.*"

The court *a quo* was, accordingly, responding to a particular submission, and indicating why, in the circumstances, it was highly unlikely.

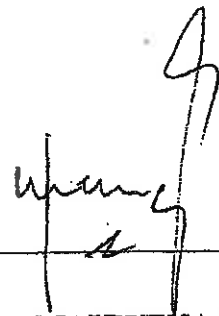
36. AD PARAGRAPHS 61 TO 62

I deny the content of these paragraphs.

37. AD PARAGRAPHS 63 TO 65

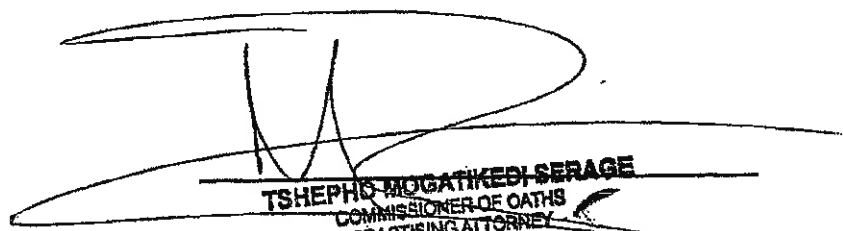
I deny the content of these paragraphs.

Wherefore the Respondent prays that the application for leave to appeal be dismissed with costs.



ISHMAEL ANTHONY MMAKWENA SEMENYA

I certify that the above Affidavit was signed and sworn to before me at ~~JOHANNESBURG~~ this 14th day of JANUARY.....2015 by the Deponent after he/she declared that he/she knew and understood the contents of this Affidavit, that he/she had no objection to taking the prescribed oath which he/she regarded as binding on his/her conscience, and after he/she had uttered the words: "I swear that the contents of this Affidavit are true, so help me God".



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