IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NO: 145/2015
WCC CASE NO: 8647/2013

In the matter between:

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*

PRINCIPAL SUBMISSIONS: **FIRST *AMICUS CURIAE***

TABLE OF CONTENTS

A. <u>The Issue</u>

1. The determination of this case rests on the answer to two questions of law:

    1.1 Do the private deliberations among members of the Judicial Service Commission (*"the JSC"*) properly fall within the compass of **"the record of such proceedings sought to be corrected or set aside"** in the context of Rule 53 of the Uniform Rules of Court? (*"the Compass Inquiry"*)

    1.2 If not, is prejudice the inevitable result to the party seeking to have the decision of the JSC corrected or set aside on review? (*"the Prejudice Inquiry"*)

2. If the answer to the Compass Inquiry is "Yes", then the Prejudice Inquiry does not arise.

3. Our submission is that the answer to both questions is "No". We advance our reasons below.

4. As context in law is everything, we submit that the answer to the Prejudice Inquiry cannot properly be explored without taking account of the relevant facts of this case. In other words, prejudice is a fact-specific inquiry.

B. HSF's Contentions

5. In sum, HSF's principal contentions are

5.1 that disclosure of private deliberations by members of the JSC after interviewing candidates for judicial appointment (*"JSC private deliberations"*) is **"clearly required by Rule 53(1)(b)"**[1];

5.2 that the JSC private deliberations are, variously, **"the Deliberations"** and **"the Recording"**, and include **"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"** and **"any copy or transcript of the audio recording of the Deliberations . . . or any reference to it"**[2];

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1 HSF Heads, para 9
2 HSF Heads, paras 6 & 7

5.3 that the JSC private deliberations are **"indispensable to any proper determination of whether there is a rational connection between the Deliberations, the Decision and the Reasons"**[3] and failure to disclose them is **"in breach of the equality of arms required by section 34 of the Constitution"**[4];

5.4 that there is no legal basis for withholding the JSC private deliberations[5];

5.5 that the principle of open justice dictates that the JSC private deliberations must be disclosed[6];

5.6 that JSC private deliberations do not trigger the same policy considerations triggered by private judicial deliberations[7];

5.7 that the dignity and integrity of candidates is not imperilled by a disclosure of the JSC private deliberations[8] but that, on the contrary,

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3 HSF Heads, para 8
4 HSF Heads, para 12
5 HSF Heads, para 18
6 HSF Heads, paras 48 & 102
7 HSF Heads, para 63
8 HSF Heads, paras 65 to 76

the legitimacy of the JSC processes requires disclosure of its private deliberations[9]; and

5.8 that an order of limited access to the JSC private deliberations may be granted to mitigate any harm or prejudice[10].

6. None of these contentions have merit in the context of the facts in this case.

C. POPCRU's Submissions

7. It is our respectful submission that HSF seems to have taken the view that the word of the Chief Justice as regards the reasons for the decision that the JSC took to recommend the one candidate and not the other (of HSF's preference) is simply not good enough. That, with respect, is the elephant in the room here. There is, in our respectful submission, otherwise no plausible basis for seeking to go behind the Chief Justice's summary of the JSC private deliberations, and instead insisting on playing voyeur despite what is, effectively, an assurance from the highest judicial office that this is the Chief Justice's summary of **"contributions of Commissioners during the deliberations"**[11].

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9 HSF Heads, paras 103 to 112
10 HSF Heads, para 19 & 90 to 97
11 HSF Heads, para 5.1.3. See also Record of Appeal, page 90 para [15] (Justice Le Grange's judgment)

8. In these circumstances, the conclusion is inescapable that HSF has taken the view that the Chief Justice is presumed not worthy of his word until the *verbatim* audio recordings of the JSC private deliberations prove him otherwise. It is an approach by HSF that is as unfortunate as it is tragic. We elaborate on this theme when dealing with the prejudice inquiry.

(a) *The Compass Inquiry*

9. The JSC is a constitutional body charged with the difficult task of judging both potential and sitting judges. It is not a liquor board dishing out liquor licenses. Among members of the JSC is the Chief Justice (who presides at its meetings), the President of the Supreme Court of Appeal, a Judge-President, two senior members of the Bar, two senior attorneys and a law professor[12].

10. Thus eminently constituted, the JSC has the power, conferred by the Constitution, to determine its own procedure.[13] In that respect, the JSC Regulations confer on the JSC the power to **"deliberate in private"** after completing interviews with candidates for the High Court[14]. This is the

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12 The Constitution, 1996, s 178(1)(a)-(g)
13 The Constitution, 1996, s 178(6)
14 JSC Regulation 3(j)

first point we make under this rubric. HSF's suggestion that the JSC private deliberations must be disclosed – in addition to all the other record of proceedings listed in paragraph [15] of the High Court judgment[15] – whenever a decision of the JSC to recommend (or not recommend) one or other candidate for High Court berth is under attack on review, would make nonsense of the privacy of deliberation as conferred by the regulations. It cannot avail HSF to dismiss the regulation nonchalantly as merely a process rather than a substance issue.[16] The process is not and end in itself. It is a means to a more substantive end, including the dignity of the JSC processes leading up to the recommendation of candidates for judicial appointment.

11. The second point is that this Court has acknowledged the importance of the JSC deliberating in private. It said members may **"provide their reasons anonymously"[17]**. That is precisely what the Chief Justice has done in providing a summary of the **"contributions of Commissioners during deliberation, as mandated by the Commissioners at the end of the meeting"[18]**. But HSF demands the entire movie, with sound effects to boot, despite the Chief Justice – eminently supported by the President of

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15 Record of Appeal, page 89 para [15]
16 HSF Heads, para 100
17 *JSC and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para [50]
18 HSF Heads, para 5.1.3

this Court, a Judge-President, senior legal practitioners and a law academic – giving his assurance that what he has given HSF is an accurate summary of the script. An **"audio recording of the deliberations"** and **"minutes, transcripts, recordings and contemporaneous records"** of the JSC private deliberations goes farther than this Court has allowed.[19] It is also an unfortunate demonstration of unwarranted distrust for the highest judicial office.

12. Thirdly, HSF's invocation of the **"principle of open justice"** is misplaced. To the question **"what is the open court principle"** Chief Justice McLaghlin of Canada described it as

> **"[reducible] to two fundamental proposition. First, court proceedings, including the evidence and documents tendered, are open to the public. Second, juries give their verdicts and judges deliver their judgments in public or in published form."**[20]

13. Having defined what it is, the Chief Justice of Canada then proceeded to define what it is not:

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19 HSF Heads, paras 6 & 7

20 Rt Hon B McLaghlin, PC: Openness and the Rule of Law, Annual International Rule of Law Lecture, 8 January 2014, page 3 (Attached at the end of these submissions)

> **"It is also important to note what the common law open court principle *is not*. It does not require all aspects of the judicial process be open to the public. For example, a judge's private deliberations remain private and evidence may be protected by privileges, such as informer's privilege, that allow some facts to remain private."[21]**
>
> (emphasis in original text)

14. There is no compelling reason why private deliberations of members of the JSC on the hugely burdensome task of judging whom, among a coterie of judicial candidates, to recommend to the President, should be treated any differently from the private deliberations of Judges in deciding, say, a defamation case. The matters on which the JSC deliberates in private on the recommendation of judicial candidates are just as weighty as (if not weightier than) the subject-matter of judicial private deliberations. People's lives are turned inside out and, by extension, those of their families.

15. The harmful effect on the lives of judicial candidates and their families cannot be better illustrated than by the response given by Justice Jafta on

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[21] Op. cit. page 4

the occasion of his interview for a Constitutional Court berth when asked about the complaint by Justices of the Constitutional Court against the Judge President of the Western Cape High Court in which Justice Jafta featured. He said:

> **"Yes [the matter of Judges of the Constitutional Court v Judge President Hlophe] has been [painful to me], Mr Moerane. Well, it didn't really end there, the matter was also hurtful to also our families."**[22]

16. On that same occasion, Justice Jafta also said on the same subject:

> **"I think the matter has done so much damage to the judiciary and to this Commission, as an institution, as well and I think even if one doesn't agree with the outcome, one has to bear in mind that dragging it causes more damage to the institutions, leaving aside the individuals involved. Individuals may come and go but doing damage to the institutions is something that I find unfortunate."**

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22 Attached at the end of these submissions

17. The JSC private deliberations were not on that occasion provided and did not form part of the numerous court challenges. One can only imagine how much more hurtful to candidates and their families on the one hand, and damaging to the institution of the judiciary, on the other, the uncensored remarks of JSC members about judicial candidates could have been in what everybody believed to be private deliberations.

18. For these reasons the principle of open justice does not extend to the private deliberations of the JSC tasked with the weighty task of judging judges, in the same way that it does not extend to private judicial deliberations. HSF seeks to distinguish the JSC private deliberations from those of a Judge on the basis that the JSC does not perform a judicial function[23]. This misses the point, with respect. The proper test cannot in this context be the label one attaches to the function. It must rather be the <u>effect</u> that an open season to what is otherwise private deliberations on people's lives will have on the functioning of the JSC. Chilling effect springs readily to mind, particularly when one considers that HSF has been given six lever arch files of the JSC's record of proceedings including the Chief Justice's summary of the JSC private deliberations and does not really require these uncensored private deliberation for its review application.

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[23] HSF Heads, para 63

19. The fourth point is related to the third and it has to do with the dignity of candidates that appear before the JSC. HSF says the dignity and integrity of candidates will not be imperilled by a disclosure of the JSC private deliberations on candidates' ability and suitability for judicial appointment or elevation[24]. Rather, says HSF, disclosure will lend legitimacy to the JSC process[25]. Clearly, a widely respected Constitutional Court Justice (in the form and shape of Justice Jafta) holds a contrary view as demonstrated above. And on that occasion the JSC private deliberations had not even been disclosed!

20. HSF loses sight of numerous constitutional truths. Human dignity is not only a right, it is also a value that is foundational to our Constitution. Section 10 of the Constitution provides:

> **"Everyone has inherent dignity and the right to have their dignity respected and protected."**

21. It is one of the values upon which the post-apartheid South Africa is founded[26].

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[24] HSF Heads, paras 65 to 76
[25] HSF Heads, paras 103 to 112
[26] See Constitution, 1996, s 1(a)

22. It is also one of only three democratic values (the other two are equality and freedom) that are foundational to the Bill of Rights Chapter[27].

23. Dignity is also a central feature in the interpretation of the Bill of Rights Chapter. Section 39(1) provides as follows in this regard:

> **"When interpreting the Bill of Rights, a court, tribunal or forum -**
>
> **(a) must promote the values that underlie an open and democratic society based on <u>human dignity</u>, equality and freedom;**
>
> **(b) . . ."**
>
> (emphasis supplied)

24. Thus, the value of human dignity in our constitutional framework is not open to doubt. The Constitutional Court has itself said so:

> **"The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South**

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[27] See Constitution, 1996, s 7(1)

Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected."[28]

25. In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para [329] the Constitutional Court reinforced the central place that human dignity occupies in our constitutional framework in these words:

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[28] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para [35]

> **"Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."**

26. This reinforcement has been repeated by the Constitutional Court in equally poignant terms as follows:

> **"A constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom. . . If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected . . . "[29]**

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29 *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) at paras [49]-[50]

27. For these reasons, HSF is with respect quite wrong in paying lip-service to this most important of constitutional values. It is quite clear that disclosure of the JSC private deliberations – which are understood to be private both by JSC members and the candidates who appear before them for what is effectively an intense inquiry not only into the candidate's suitability and ability for judicial appointment but also into the candidate's private life in order to determine fitness and propriety – would most likely imperil the dignity and integrity of candidates who put themselves up for judicial appointment and, by extension, perhaps even that of their families. That is no way to attract talent to the bench.

28. Fifthly, and finally, the **"limited disclosure regime"** for which HSF contends[30] is an Aunt Sally argument. On its own version no basis has been laid for it[31]. In any event, there is no basis in law for such a regime. On the facts of this case, HSF has been given all the relevant record of proceedings, including a summary by the Chief Justice of the JSC private deliberations. The private deliberations of the JSC members on other candidates' suitability for judicial appointment are not indispensable to HSF's review cause. They will simply provide it with fodder for gossip

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30 HSF Heads, paras 19 & 90 to 97
31 HSF Heads, paras 19 & 96

about serving judges and unsuccessful candidates who may be in private practice. We ask this Court not to facilitate such crass voyeurism.

(b) *The Prejudice Inquiry*

29. On its own version, HSF has been given the full record of proceedings[32] relating to the final decision that the JSC made and which is now the subject of HSF's attack on review. In fact, that record (as the High Court put it) includes: (1) each of the 8 candidate's individual applications for judicial appointment; (2) comments on the candidates from professional bodies and individuals; (3) other related submissions and correspondence; (4) transcripts of the 8 candidates' interviews; (5) reasons for the JSC's decision to recommend certain candidates and not others; (6) reasons why the JSC recommended another candidate and not the candidate of HSF's preference.[33]

30. These reasons were compiled by the Chief Justice **"from the contributions of Commissioners during the deliberations, as mandated by the Commissioners at the end of the meeting"[34]**.

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32 HSF Heads, para 5
33 Record of Appeal, page 89 para [15]
34 HSF Heads, para 5.1.3. see also Record of Appeal, page 90 para [15]

31. Armed with all these reasons, and the Chief Justice's summary of member's deliberations to boot, there can be no prejudice to HSF in bringing its review application against the JSC's decision not to recommend its preferred candidate.

32. HSF does not have one hand tied behind its back in the dark. It has tied itself in knots in broad daylight by invoking inapposite principle for access to private deliberations it does not need. In the process, it has shown scant regard (whether by design or by accident) for the authority and integrity of the highest judicial office. That is the tragedy with which HSF must come to terms.

D. <u>Appropriate Relief</u>

33. For all these reasons, we submit that the appropriate relief is dismissal of the appeal.

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N Ali

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20 August 2015