

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 145/2015

In the matter between:

HELEN SUZMAN FOUNDATION

Appellant

and

JUDICIAL SERVICE COMMISSION

Respondent

and

POLICE & PRISION CIVIL RIGHTS UNION

First Amicus Curiae

**NATIONAL ASSOCIATION OF
DEMOCRATIC LAWYERS**

Second Amicus Curiae

**DEMOCRATIC GOVERNANCE
& RIGHTS UNION**

Third Amicus Curiae

**THE TRUSTEES FOR THE TIME BEING
OF THE BASIC RIGHTS FOUNDATION OF SA**

Fourth Amicus Curiae

FILING NOTICE

4th AMICUS CURIAE'S PRACTICE NOTE, CERTIFICATE, HEADS OF ARGUMENT & LIST OF AUTHORITIES SERVED AND LODGED HEREWITH:

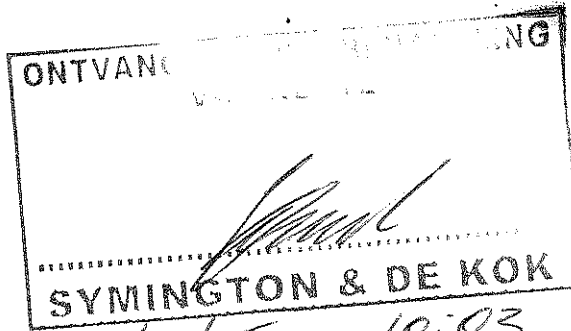
DATED at BLOEMFONTEIN on this 23rd day of SEPTEMBER 2015.



**ATTORNEY FOR 4th AMICUS
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TO:

THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN



AND TO:

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2 COPIES hereof received on this
the 23rd day of SEPTEMBER 2015.

For: APPELLANT

AND TO:

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For: RESPONDENT

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2 COPIES hereof received on this
the 23rd day of SEPTEMBER 2015.

For: FOR 1st AMICUS

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NUMBER: 145/2015

WCC CASE NUMBER: 8647/2013

In the matter between:

HELEN SUZMAN FOUNDATION ('HSF')

Appellant

(Applicant in Court a quo)

and

JUDICIAL SERVICE COMMISSION ('JSC')

Respondent

(Respondent in Court a quo)

with

POLICE AND PRISONS CIVIL RIGHTS UNION

First Amicus Curiae

NATIONAL ASSOCIATION OF DEMOCRATIC

LAWYERS ('NADEL')

Second Amicus Curiae

DEMOCRATIC GOVERNANCE AND RIGHTS UNIT

Third Amicus Curiae

THE TRUSTEES FOR THE TIME BEING OF

THE BASIC RIGHTS FOUNDATION OF SOUTH AFRICA *Fourth Amicus Curiae*

FOURTH AMICUS CURIAE'S PRACTICE NOTE IN TERMS OF RULE 10A

1. NATURE AND GROUNDS OF APPEAL

The Appellant and Respondent have adequately dealt with the nature and grounds of this appeal in their respective Practice Notes filed under SCA Rule 10A. Fourth Amicus Curiae has nothing to add to that stated there.

2. JURISDICTION OF THE SUPREME COURT OF APPEAL

For the same reasons given by the Appellant and Respondent in their Practice Notes, this Court has jurisdiction to hear this appeal.

3. ISSUE(S) ON APPEAL

This appeal raises the following issues for adjudication:

- (a) In view of the effect of the relief sought if granted, the question arises whether it was '*necessary or proper*' for Appellant to give notice of the Uniform Rule 30A application, and this appeal, to the candidates (as defined at para 3 of Appellant's heads of argument) and members of the Respondent who participated in making the disputed decision which is the subject of a pending review application in the Western Cape High Court.
- (b) Whether the Recording (as defined at para 7 of Appellant's heads of argument) forms part of the '*record of ... proceedings*' contemplated by Uniform Rule 53(1)(b) pertaining to the disputed decision taken by the Respondent that forms the subject of the pending review application.
- (c) Whether the denial to Appellant of access to the Recording is justified in law.

4. ESTIMATED DURATION OF ARGUMENT

One day for the hearing of this appeal is adequate. The Fourth Amicus Curiae will only make oral submissions if permitted to do so by the Judges of Appeal at the hearing. If so, argument will be limited to 30 minutes.

5. LANGUAGE

The entire record is in English.

6. PORTIONS OF THE RECORD NECESSARY FOR THE COURT TO DETERMINE THE APPEAL

The Appellant and Respondent have adequately dealt with this aspect in their respective Practice Notes filed under SCA Rule 10A. The Fourth Amicus Curiae has nothing to add to that stated there in this regard.

7. SUMMARY OF FOURTH AMICUS CURIA'S ARGUMENT

The following core submissions are made:

- (i) the interlocutory application in the court a quo was procedurally defective for want of compliance with Uniform Rules 6(2) and 53(1);
- (ii) the Recording sought by the Appellant is not part of the record of Respondent's proceedings for purposes of Uniform Rule 53(1)(b);
- (iii) the non-disclosure of the Recording's content is justifiable in law.

8. CORE BUNDLE

For the same reasons given by Respondent in its Practice Note filed under SCA Rule 10A, the compilation of a core bundle is regarded as unnecessary.

9. RULES 8(8) AND (9)

There has been compliance with SCA Rules 8(8) and (9).

10. RULE 10 AND 10A CERTIFICATE

A certificate in terms of SCA Rule 10 and 10A is filed herewith by the Attorney for the Fourth Amicus Curiae who is responsible for the drafting of its heads of argument on appeal.

DATED AT CAPE TOWN ON THIS 14TH DAY OF SEPTEMBER 2015.

FAREED MOOSA ATTORNEYS

Attorneys for Fourth Amicus Curiae

Per: FAREED MOOSA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NUMBER: 145/2015

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CERTIFICATE OF COMPLIANCE

It is hereby certified that Rule 10 and 10A of the Supreme Court Rules have been complied with.

DATED AT CAPE TOWN ON THIS 14TH DAY OF SEPTEMBER 2015.

FAREED MOOSA ATTORNEYS

Attorneys for Fourth Amicus Curiae

Per: **FAREED MOOSA**

10. RULE 10 AND 10A CERTIFICATE

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DATED AT CAPE TOWN ON THIS 14TH DAY OF SEPTEMBER 2015.

FAREED MOOSA ATTORNEYS

Attorneys for Fourth Amicus Curiae



Per: FAREED MOOSA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NUMBER: 145/2015

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In the matter between:

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**HEADS OF ARGUMENT ON BEHALF OF THE FOURTH AMICUS CURIAE
PREPARED BY ATTORNEY FAREED MOOSA**

A. INTRODUCTION

1. The JSC's¹ processes leading to its 'advice' under s 174(6) of the Constitution² concerning the Decision³ forming the subject of the main application,⁴ are 'proceedings' contemplated by Uniform Rule 53(1)(b).
2. The application in the court a quo under Uniform Rule 30A is dependent on three crisp legal issues being adjudicated in the Appellant's favour, namely:
 - (a) In view of the effect of the relief sought if granted, the question arises whether it was '*necessary or proper*'⁵ for Appellant to give notice of the Uniform Rule 30A application, and this appeal, to the candidates⁶ and members of the Respondent who participated in making the Decision. An affirmative answer hereto is fatal to that application and this appeal.
 - (b) Whether the Recording⁷ forms part of the '*record of ... proceedings*' contemplated by Uniform Rule 53(1)(b) pertaining to the Decision taken

¹ The primary statute regulating Respondent's powers is the Judicial Service Commission Act 9 of 1994 (hereafter '**the JSC Act**').

² The Constitution of the Republic of South Africa Act, 1996 ('**the Constitution**').

³ The terms 'the Decision' and 'the main application' are used herein as defined at para 3 (pg 3) of Appellant's Heads of Argument (hereafter '**Appellant's HOA**') filed of record in this appeal.

⁴ The main application is a judicial review arising from a decision taken by Respondent at its October 2012 meeting not to recommend two white males, i.e. both Advs. Owen L Rogers SC and Jeremy Gauntlett SC, as Judges of the Western Cape High Court, its reasoning being that '*the appointment of two white males would do violence to the provisions of section 174(2) of the Constitution.*' The Respondent only recommended the former as a Judge. That decision raises the issue as to the purpose and role of s 174(2) in the judicial appointments process. That issue, left open in *Cape Bar Council v JSC and Another* 2012 (4) BCLR 406 (WCC) para 145, is the central issue in the main review application.

⁵ Uniform Rule 6(2). It reads: 'When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the registrar and such person, otherwise it shall be addressed to the registrar only.'

⁶ The term 'candidates' bears its meaning as defined at para 3 (pg 3) of Appellant's HOA.

⁷ The term 'the Recording' is used here within the meaning defined at para 7 (pg 4) of Appellant's HOA as 'any copy or transcript of the audio recording of the Deliberations'.

by the Respondent that forms the subject of the main application. An unfavourable or negative answer hereto is fatal to this appeal.

(c) If (a) and (b) above are answered in the Appellant's favour, then the question arises whether the denial to it of access to the Recording is justified in law. If it is, then on that basis this appeal must fail.

3. In sum, the following core submissions are made herein below:

- (i) the interlocutory application in the court a quo was procedurally defective for want of compliance with Uniform Rules 6(2) and 53(1);
- (ii) the Recording is not part of the record of Respondent's proceedings;
- (iii) the non-disclosure of the Recording's content is justifiable in law.

4. The structure of these heads of argument is such that the following matters are discussed herein below in the order indicated here:

- (i) The Appellant's failure to follow procedural due process;
- (ii) The legal effect of the Appellant's failure to challenge the validity of JSC members' private deliberations;
- (iii) The purpose and public benefit of the Recording's confidentiality;
- (iv) Non-disclosure of Respondent's private deliberations does not offend the constitutional values of transparency and accountability;
- (v) The open and democratic nature of the JSC's judicial selection process as a whole;
- (vi) Constitutional interpretation of Uniform Rule 53(1);
- (vii) Whether the content of the JSC members' private deliberations have 'relevant' evidential value in a judicial review application;
- (viii) Whether the JSC members' private deliberations form part of the 'record of ... proceedings' under Uniform Rule 53(1)(b); and
- (ix) Conclusions and the appropriate order to be issued by this Court.

B. PROCEDURAL DEFICIENCY: FAILURE TO GIVE 'NOTICE'

5. The candidates and those JSC members who participated in the deliberations at its October 2012 sitting, have a direct, substantial interest in the outcome of the Uniform Rule 30A application and this appeal. Thus, they ought to have been joined⁸ or, at least, served with a copy of the interlocutory application and this appeal. It is submitted that they are all persons contemplated by Uniform Rule 6(2) and each is an 'affected' party under Uniform Rule 53(1). Thus, they are entitled to receive formal notice. Failure to do so is fatal to the interlocutory application and this appeal.⁹
6. Respondent contends in its papers, correctly so it is submitted, that the granting of the relief sought by the Appellant would impact negatively on the right to dignity of the candidates.¹⁰ The Appellant responds by contending that if the deliberations involved 'conduct or discussions which could or did result in an impairment of dignity and integrity' then this weighs heavily in favour of disclosure of the Recordings rather than against it.¹¹
7. Candidates have a right to human dignity, including the right to have their dignity respected and protected.¹² Under s 8(1) and (2) of the Bill of Rights, the Appellant and the judiciary are respectively bound by this right. Obliging the Appellant to give notice of the proceedings promotes the fulfillment of the obligations arising under s 8(1) and s 8(2).

⁸ *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21.

⁹ This submission was made in the court a quo by NADEL at paras 22-24 of its heads of argument.

¹⁰ Respondent's answering affidavit at para 38.3 [appeal record pg 57].

¹¹ See para 66 (pg 22) of Appellant's HOA.

¹² Section 10, the Constitution. The importance of dignity is evident from its inclusion as a core value in s 1(a). For the importance of dignity in SA's constitutional democracy, see *S v Makwanyane* 1995 (3) SA 391 (CC) para 329; *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) para 35; *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) paras 49-50.

8. Notice of intended legal proceedings signifies respect for the dignity of affected persons.¹³ Such notice also promotes fairness in the judicial proceedings. This is a constitutional value underpinned by the Bill of Rights. Section 34 thereof protects the fairness of judicial proceedings.¹⁴
9. By obliging Appellant to join the candidates, or at least to serve copies of the application on them, enhances respect for, and protection of, their right to human dignity as entrenched in s 10 of the Constitution. The Appellant seeks an order that would make public otherwise private information. This carries the potential for exposing the candidates, even the successful ones, to embarrassment or humiliation arising from candid but unflattering or harsh remarks from JSC members. Criticism is, unavoidably, a hallmark of a rigorous, credible judicial selection process.
10. The candidates were at all material times to their interviews in October 2012 mindful that Respondent's obligation in law was to provide reasons for its decisions,¹⁵ not providing the content of the private deliberations. Whilst the candidates consented to being interviewed publicly, at the time of being interviewed they knew the Respondent's procedure, by public notice in GG 24596 of 27 March 2003, is that deliberations are held in private, that is, behind closed doors and out of the public eye. This has also been the historical practice of Respondent since its inception in 1994.
11. The Respondent does not, and never has, made public the private deliberations of its members or the individual views of its members about candidates interviewed, some of whom are sitting Judges seeking higher judicial office. Historically, Respondent simply makes public the identity of

¹³ *Stratford and Others v Investec Bank Limited and Others* 2015 (3) BCLR 358 (CC) para 34.

¹⁴ *Lane and Fey NNO v Dabelstein* 2001 (2) SA 1187 (CC) para 4; *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) para 14.

¹⁵ *Judicial Service Commission & Another v Cape Bar Council* 2013 (1) SA 170 (SCA) (hereafter '*Cape Bar Council*').

the successful (and, by implication, the unsuccessful) candidates and the reasons for its decision to approve or not approve a candidate. Accordingly, the candidates had a real, reasonable, legitimate expectation of confidentiality, namely, that there would be no disclosure of the private deliberations held at the JSC's October 2012 sitting, save that the public would be informed of the result and the reasons for same.¹⁶

12. Naturally, and as a matter of logic, the same expectation referred to above applies equally to the JSC members involved in the October 2012 deliberations for filling vacancies on the Western Cape High Court bench. This is so because at the time of deliberating, the members labored with the same knowledge and belief as that of the candidates outlined above.

13. The nature of the JSC's constitutional mandate is such that its members must engage in a rigorous, intense judicial selection process. This will underscore the credibility of that process. Of course, during deliberations, adverse remarks will be made which, though not necessarily actionable at law, may yet be hurtful to a candidate or harmful to his/her professional career as it may cast such person in a bad light. This is particularly so where, for example, judicial candidates are compared to one another or consideration is given to a candidate's past political affiliations.

14. Disclosure of the Recording conducted in private exposes each JSC member concerned in his/her personal capacity to a possible actionable claim for damages arising from utterances made during deliberations which a candidate may perceive as being defamatory. Similarly, it exposes the JSC itself to such a potential civil suit.

15. No notice of the Uniform Rule 30A application was given to any JSC member nor was a copy of this appeal served on any member. Service on

¹⁶ Le Grange J made a finding to this effect in court a quo. See appeal record at pgs 108-09 (para 48).

the Respondent does not constitute as service on each JSC member in his/her personal capacity who may, in such capacity, be exposed to the risk of a civil suit and/or may expect communications in the JSC chamber to be protected under the Constitution (s 14(d)) and/or the Promotion of Access to Information Act 2 of 2000 (hereafter 'the PAIA') (s 12(d)).

16. In view of the foregoing, the candidates and JSC members have real, substantial interests in the interlocutory application and in this appeal. They have not waived the right to notice nor consented to the disclosure sought. Failure to join them or serve copies on them is a fatal procedural defect.

C. FAILURE TO CHALLENGE VALIDITY OF PRIVATE DELIBERATIONS

17. The law governing the Respondent's internal procedures and processes is set forth in the Appellant's heads of argument at paras 98-101, 113-115 read in conjunction with Respondent's heads of argument at paras 42-45.

18. The JSC's procedure was published on 27 March 2003 in GG 24596. Clause 3(k) reads: 'After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates for the appointment by consensus or, if necessary, by majority vote'. (my emphasis)

19. The Appellant has not challenged the validity of either clause 3(k) or the JSC's historical practice of conducting private deliberations, nor has it challenged the validity of the JSC's practice of not disclosing the audio and transcripts of such deliberations. This failure is fatal to its application that the Recording be disclosed. This is so because it signifies the Appellant's acquiescence that clause 3(k) and the practices referred to above serve legitimate public purposes that are not offensive to open justice and accountable public administration. If this appeal succeeds, then the JSC's private deliberations will be made public without clause 3(k) or the practices concerned being challenged as constitutionally offensive.

20. It is submitted that the Appellant cannot obtain the relief it seeks unless it simultaneously succeeds in challenging the validity of clause 3(k) and/or the customary practices referred to above related thereto. It failed to do so.

21. The Appellant cannot accept the validity of the legal framework permitting the Respondent's private deliberations whilst at the same time seek an order unsealing those discussions which it accepts are validly done in private in the execution of a lawful authority and for legitimate purposes.

22. The Appellant does not contend that the JSC's process of holding private deliberations is constitutionally wanting. Despite this omission, it submits that the court a quo's decision protecting the Recording from disclosure is incongruent with constitutional values and detracts from the public's confidence in the JSC and the judicial appointments process. For reasons given above and below, this contention lacks merit. In *Cape Bar Council supra*, this Court accepted and approved the Respondent's modus operandi of conducting meetings in private and voting by secret ballot.

D. PURPOSE AND BENEFITS OF THE JSC'S PRIVATE DELIBERATIONS

23. The Appellant contends that no legitimate purpose is served by, nor public benefit derived from, the Recording being kept 'under wraps' (as it was). This submission falls to be rejected for the following reasons:

- (i) first, protecting the deliberation's privacy serves legitimate public purposes or interests, namely, fostering the protection of the dignity and privacy of judicial candidates (as discussed above),¹⁷ the dignity of the courts to which they seek appointment¹⁸ and the dignity of the judicial appointments process itself (as discussed below);

¹⁷ Hoexter C & Olivier M *The Judiciary in South Africa* (2014) 176 contends that the right to privacy and dignity must be respected in the judicial interviewing and selection process conducted by the JSC.

¹⁸ The Constitution (s 165(4)) reads: 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality,

- (ii) secondly, protecting the deliberation's privacy status enhances the effective fulfillment of the JSC's mandate since its members are not hamstrung in discussions and are able to speak freely, frankly and candidly about candidates and how, in their estimation, a candidate vying for judicial appointment or higher judicial office is viewed on the scales of transformation and other relevant considerations. This they would be able to do without fear of, for example, being sued or causing public embarrassment (or humiliation) to a candidate outside of the JSC chamber. The performance of JSC functions without fear' is a constitutional norm.

24. The Appellant contends that protecting the confidentiality of the Recording will detrimentally affect the public's faith and confidence in the JSC and its process. This submission is unfounded. The public's trust in the JSC stems not from access to the Recording but rather from, inter alia, the diversity of its composition, the accessibility of the media and public to the JSC's hearings and interviews, and the JSC fulfilling its mandate of transforming the judiciary, all of which matters are fully canvassed below.

25. The JSC has since its inception in 1994 conducted its deliberations in private and have not disclosed the content of members' deliberations, save to declare decisions made by the JSC and the reasons for same. Accordingly, it is opportunistic for the Appellant to contend that non-disclosure of the Recording will undermine or detract from the public's faith and confidence in the judicial appointments process followed by the JSC. Except for the Appellant, SA's people have never demanded access to the recordings of the JSC's private deliberations. The Appellant is certainly not a voice for, nor representative of, SA's people.

dignity, accessibility and effectiveness of the courts.' The JSC is an organ of state as defined in the Constitution (s 239).

E. NON-DISCLOSURE OF DELIBERATIONS IN AN ERA OF OPENNESS

26. The Appellant contends that the Respondent's failure to grant access to the Recording violates the values of accountability and transparency. This is incorrect. For reasons apparent from paras 40-52 below, Respondent's judicial selection process as a whole bears the hallmarks of an open (transparent) and accountable process adhering to the values of a democratic society. It is submitted that non-disclosure of the Recording does not violate democratic principles of openness and accountability.

27. Relying on *e TV (Pty) Ltd and Others v Judicial Service Commission and Others*,¹⁹ and *Mail and Guardian Limited and Others v Judicial Service Commission and Others*,²⁰ the nub of the Appellant's argument is that non-disclosure of the Recording is inimical to the notion of open justice. These decisions are not on point. They are factually distinguishable. Both dealt with access to a 'public proceeding'. Neither dealt with the question with which this Court is seized, namely, whether a third party is entitled to access the audio recordings of an organ of state containing the private deliberations which occurred after a public hearing had been completed.

28. To the extent that the above cited cases may be relevant to the JSC, they may serve as authority for access to the JSC's interviews of candidates and disciplinary hearings. They do not serve as authority for the proposition that access is permitted to the private deliberations which take place pursuant to any such interview (or disciplinary hearing), nor to the audio recordings of any such private deliberations. To this end, the JSC deliberations and the Recording ought to be protected as, for example, discussions in cabinet meetings and deliberations by judicial officers,

¹⁹ 2010 (1) SA 537 (GSJ).

²⁰ 2010 (6) BCLR 615 (GSJ).

including the recording thereof (such as, audio or visual recordings, and written notes). In review proceedings, any such recording is 'off limits'.

29. The Constitution requires transparent and accountable public administration.²¹ These democratic values do not create rights.²² They are simply interpretive guides favouring a certain way of understanding the constitutional project.²³ Thus, Appellant has no justiciable right to accountable and transparent public administration by the JSC.

30. Openness and accountability are not absolute values. They are fettered by values of equal importance (such as, human rights, human dignity, freedoms). Thus, mere failure by the JSC to provide information will per se not be a secretive act incompatible with the notion of open justice. This is recognized in *Cape Bar Council* supra where Brand JA (at para 51) was at pains to point out that 'I am 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*'. (my emphasis)

31. An indicator bolstering the submission that the JSC is not obliged to disclose all information in its possession or under its control, is its exemption from providing information when s 12(d) of the PAIA²⁴ applies.

²¹ Section 195(1)(g) reads: 'Transparency must be fostered by providing the public with timely, accessible and accurate information.'

²² *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders & Others* 2005 (3) SA 280 (CC) para 21. See also Henderson AJH 'Putting section 1 to work: some preliminary thoughts on the first of the founding provisions of the new constitution' 1998 *SALJ* 215 216.

²³ Roux T 'Democracy' in Woolman S et al (eds) *Constitutional Law of South Africa* 2 ed vol 1 (Original service 07-06) 10-26.

²⁴ The relevant extract of s 12 reads: 'This Act does not apply to a record –... (d) 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 No. 3 of 2000), regarding the nomination, selection or appointment of a Judicial officer or any other person by the Judicial Service Commission in terms of any law.' This provision has hitherto not been subjected to a constitutional challenge. The Appellant does not challenge its validity in casu.

This submission is reinforced by the prohibition against disclosure in s 38 of the JSC Act (quoted in full at pg 237 of Appellant's bundle of authorities).

32. The issue whether a non-disclosure of information is incongruent with the Constitution's values must be decided on the facts of each case. No hard and fast rules can be laid down in advance. Save to say that a balancing of competing values, interests and/or rights must occur. Relevant factors to be considered are, inter alia, the nature of the information, the circumstances and conditions under which the information came into existence, the purpose of the disclosure, the relevance of the information sought in relation to the stated purpose, whether the information is protected by law, the potential sensitivity of the information, the impact to anyone if disclosure is ordered or not ordered (as the case may be), and the evidential weight attachable to the information sought if disclosed.
33. The kernel of the Appellant's contention is that a denial of access to the Recording compromises its right of access to courts as it prejudices its review application due to a lack of 'equality of arms'. This is not so. Appellant received six lever arch files containing all the documents which served at the JSC when it took the decision under review. The Appellant is, thus, in the same position as the JSC was when the Decision was made. Consequently, it has all the relevant information to build a case for the judicial review and make submissions on the rationality of the Decision.
34. However, even if an assumption is made in the Appellant's favour as to prejudice, this is not the end of the enquiry. As stated above, disclosure must be justified upon a proper weighing of all competing values, rights and interests, having regard to an array of factors. It is submitted that, for the further reasons given below, non-disclosure of the Recording is justifiable in law and consistent with the Constitution and its values.

35. The Bill of Rights (s 8(1))²⁵ imposes a positive obligation on the JSC as an organ of state to respect and protect the fundamental rights of candidates interviewed by it. Clause 3(k) of GG 24596 of March 2003 catering for private deliberations, and the JSC's practice of not disclosing the Recording, are measures furthering the fulfillment of the JSC's obligations towards the candidates arising from s 8(1). The order sought by the Appellant unjustifiably seeks to undo the efficacy of these measures.

36. Disclosure of the Recording will inhibit candid discussion because it will, in addition to creating a 'big brother' (watchdog) scenario, expose the JSC and its members to the risk of civil suit and public scrutiny for comments made in the legitimate exercise of freedom of thought and opinion about a judicial nominee. This will promote the creation of fear in the mind of JSC members which will serve to stifle honest, frank, robust debate on a vital issue of national importance, namely, the suitability or otherwise of candidates for judicial office (or higher judicial office, as the case may be).

37. It is submitted that the disclosure sought by Appellant carries the real risk of creating a state of affairs which will undermine the JSC's efficacy as a democracy-building institution mandated to fulfil the difficult task of strengthening the judiciary through the appointment of moral judges²⁶ subscribing to the Constitution's values and whose appointment satisfy the criteria in the Constitution and the legitimate demands of transformation.

38. Accordingly, there is considerable public benefit in the JSC conducting its deliberations in private and the Recording remaining out of the public domain. A constitutional framework enforcing such a legal position is advantageous. This is so because it supports an environment affording JSC members a protected space where they can express themselves

²⁵ The Constitution (s 8(1)) reads: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

²⁶ Dugard J 'Omar: Support for Wacks's ideas on the judicial process?' (1987) 3 *SAJHR* 215 220.

freely and without hindrance or fear. Their behind closed doors communications ought, thus, to be immunized from public scrutiny. Such a course is not inimical to the notion of open justice and public accountability.

39. Judicial support for this view is evident in *Cape Bar Council* supra (at para 50) where Brand JA held that 'if the reasons of the majority cannot be distilled from the open 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*'. (emphasis added). Brand JA's reference to 'open deliberations' exemplifies the ideal that JSC members are to deliberate freely, frankly and openly with each other. Brand JS accepted as lawful the JSC's process of 'open deliberations' in private and its voting procedure by secret ballot. The provision of 'reasons anonymously' is a clear indication that the court will protect the identity of JSC members in so far as concerns their individual views or reasons in the exercise of their official functions as JSC members. In so doing, this Court recognised that openness in a constitutional democracy is not limitless and that, in the context of the JSC's processes, transparency has certain identifiable, permissible boundaries which are not to be trespassed.

F. JUDICIAL SELECTION PROCESS UNDER THE MICROSCOPE: DOES THE JUDICIAL SELECTION PROCESS FOLLOWED BY THE JSC SATISFY THE PRESCRIPTS OF 'AN OPEN AND DEMOCRATIC SOCIETY BASED ON HUMAN DIGNITY, EQUALITY AND FREEDOM'?

40. As stated above, the Appellant contends that the non-disclosure of the Recording is constitutionally offensive as it would promote secrecy in an era of open justice and public accountability. For reasons articulated above, this submission falls to be rejected. However, the shortcomings in the Appellant's submission are more evident when the judicial selection and appointments process followed by the JSC is considered as a whole.

41. The transparency and accountability of the judicial selection process cannot be viewed in isolation with reference to the non-disclosure of the JSC's deliberations. To do so would lead to a distortion of the true position since that phase is but a part of a holistic, comprehensive selection and appointment process and must be viewed within its proper context therein.
42. The JSC's processes as a whole cannot be defined, or characterized, by a single element thereof. Instead, the processes must be seen in their totality and then a determination made as to whether, all things considered, those processes pass the muster of the Constitution in the sense that they are injected with the standards and values of an open and democratic society.
43. The judicial selection and appointments process followed by the JSC is infused with the hallmarks of democracy in that it, *inter alia*, embraces fair and inclusive decision-making processes that afford all its members equal opportunity to participate in its decisions and decision-making process. Members are entitled to prior notice of a JSC meeting, have the equal right to attend, speak and vote there, are entitled to receive documents to be presented there, and are also entitled to a copy of JSC decisions made.
44. The selection and appointment process for High Court judges, and the individual parts of that process as discussed herein, must be understood within its historical context.²⁷ The pre-1994 process of selecting and appointing judges was wholly undemocratic, shrouded in secrecy and largely a political decision by the Head of State acting on the advice of the Minister of Justice.²⁸ The entire process lacked legitimacy. There was no transparency and accountability. Public participation was wholly lacking.

²⁷ For the role of history in constitutional and statutory interpretation, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18-19; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10-12.

²⁸ For a discussion of the pre-1994 judicial appointments process, see Davis DM 'Judicial appointments in South Africa' (2010) available at <http://www.sabar.co.za/law/>

45. Apart from these weaknesses, the general public's lack of faith and confidence in judicial selection and appointment was rooted in the deep-seated practice of discriminating against persons on the basis of, inter alia, race, gender, ethnicity, sexual orientation and qualification. The 1993 interim and 1996 final Constitutions completely overhauled this process and introduced a new process which, as shown below, is suffused with the democratic values of fairness, openness, accountability and efficiency.

46. The key constitutional changes that transformed the judicial selection and appointments process for High Court judges are: first, the JSC was created as a sui generis construct of the 1993 interim Constitution whose powers and functions are, for present purposes, demarcated within the 1996 final Constitution (ss 174, 178) read with the JSC Act.²⁹ Secondly, the JSC comprises 25 persons from diverse backgrounds (ss 178(1)(a)-(k)), including politicians, senior Judges (namely, the Chief Justice, President of the SCA and Judges President), legal practitioners, an academic and members of civil society (such as, NADEL and Black Lawyers Association). Thirdly, basic criteria and standards for judicial appointment are prescribed (ss 174(1), (2)).³⁰ Fourthly, High Court judges are appointed by the President on the JSC's advice (s 174(6)). Fifthly, the Bill of Rights is binding on the JSC as an 'organ of state'.³¹ Sixth, democratic principles are crafted for public administration and are enumerated in s 195(1) which is made binding on the JSC by s 195(2) of the Constitution.

journals/2010/december/2010-december-vol023-no3-pp40-43.pdf (accessed 15 August 2015); van Blerk AE 'Judicial appointments: some reflections' 1992 *THRHR* 559.

²⁹ The Constitution (s 178(4)) reads: 'The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.' The relevant statute is the JSC Act.

³⁰ The Constitution (s 174(1)) reads: 'Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. ...' Section 174(2) reads: 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'

³¹ Section 8(1), the Constitution read with para (b) of the definition of 'organ of state' in s 239.

47. The Constitution is silent on the formal process of selecting and appointing High Court judges. Section 178(6) confers on the JSC wide latitude to determine its own internal procedure, subject only to the requirement that JSC decisions must be taken by majority vote.³² Thus, the Constitution creates no express duty to deliberate nor prescribes the manner thereof.

48. By notice in GG 24596 of 27 March 2003, the Minister of Justice and Constitutional Development, acting in terms of s 5 of the JSC Act, outlined a formal procedure in clauses 3(a)-(m) for the JSC to follow in relation to the selection of candidates for appointment as High Court judges. Clause 3(k) quoted above requires the JSC to deliberate after interviewing candidates for High Court appointment. However, that procedure is not mandatory on the JSC. In accordance with the JSC's wide powers under the s 178(6) of the Constitution, clause 7 of the notice reads: 'The Commission may depart from this procedure or condone any departure from this procedure whenever, in its opinion, it is appropriate to do so.'

49. Clauses 3(a)-(m) in GG 24596 of March 2003 was adhered to by the JSC for the selection of Judges to the Western Cape High Court at its October 2012 sitting. It is submitted that, for reasons given in the succeeding paragraph, this process embodied the values which are traits of an open and democratic society based on human dignity, equality and freedom. It is further submitted that non-disclosure of the Recording, as contended for herein, does not detract from, nor erodes, this undeniable fact.

50. The JSC's process satisfied the standards of an open and democratic society based on human dignity, equality and freedom because: First, the nomination, selection and appointment process is governed by law freely

³² The Constitution (s 178(6)) reads: 'The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.'

accessible to the public.³³ Secondly, the JSC advertised the vacancies to the public and invited nominations. Thirdly, the JSC publicized the criteria for eligibility for judicial appointment. Fourthly, the JSC appointed a screening committee to review applications and short-list persons. Fifthly, the JSC advertised to the public the short-listed candidates and the date, time and venue of their interviews. Sixth, the JSC accepted comments from institutions and the public as regards the candidacy of short-listed persons. Seventh, as part of its quality control measures, the JSC instructed an independent organization to conduct a background check on each short-listed candidate. A report was then compiled for the JSC on each candidate. Eighth, each short-listed candidate was furnished with a copy of documents to be used in the selection process by the JSC. Ninth, the interviews were conducted in the presence of the public and the media. Tenth, the JSC members deliberated on the interviewees and, since no consensus was reached, candidates were selected by majority vote. This is democratic, particularly since each member can exercise 'free will' when voting and each member has an equal vote regardless of his/her status, office, profession or qualification. Eleventh, in accordance with the democratic values of open, speedy and efficient public administration, the JSC publicly announced its advice for judicial appointment within a few days from that on which it conducted the interviews.³⁴ Twelfth, in accordance with the democratic principle of accountability, the JSC provided reasons for its advice for some candidates and, on request, gave written reasons for the unfavourable decision regarding other candidates.

³³ For a detailed study on judicial appointments in SA, see Cowen S 'Judicial Selection in South Africa' (October 2010) available at <http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf> (accessed 15 August 2015).

³⁴ The Constitution (s 237) reads: 'All constitutional obligations must be performed diligently and without delay.'

51. As shown above, the JSC's composition comprises persons from the three arms of government (that is, legislative, executive and judiciary), the legal and academic profession, as well as civil society. Owing to the diversity of its composition from various sectors of SA society, a JSC decision as regards the appointment of a High Court judge may, thus, in a sense be described as 'the will of the people'. However, the clearest indication that the process of selecting and appointing High Court judges is democratic lies in the fact that the President is obliged to appoint persons approved by the JSC and cannot overrule its decision in this regard. This is evident from the peremptory language of s 174(6).³⁵ It reads: 'The President *must* appoint the judges of all other courts on the advice of the Judicial Service Commission.' (my emphasis) This bears testimony to the JSC's institutional independence, a characteristic of SA's democratic hygiene.

52. Failure to disclose the Recording does not render the JSC's judicial selection process secretive or inimical to the Constitution's democratic values and ethos. The Appellant's contention to the contrary is misguided. Non-disclosure does not taint the selection process. Disclosure by the JSC of the Decision, the furnishing of reasons for same, and providing all documents which served at the JSC when the Decision was made, satisfy the values of an open and democratic society, accords favourably with JSC's duties under the Constitution, and is congruent with the rule of law.

³⁵ For the distinction between directory (discretionary) and peremptory provisions, see *Sutter v Scheepers* 1932 AD 163 173; *Pottie v Kotze* 1954 (3) SA 719 (A) 725-26; *Nkismane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) 433H-434E; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 13; *Weenen Transitional Local Council v Van Dyk* 2000 (3) SA 435 (N) 442-45; *Sayers v Khan* 2002 (5) SA 688 (C).

G. UNIFORM RULE 53(1) THROUGH PRISM OF THE CONSTITUTION

53. The Appellant argues that open justice demands that Uniform Rule 53(1) be construed in a manner requiring disclosure of the Recording. In so doing, Appellant seeks to circumvent or override the exclusionary effect of the PAIA (s 12(d)) and clause 3(k) of the above Ministerial regulation catering for privacy of the JSC's deliberations.

54. For reasons already explained above, the values of accountability and transparency do not require that the shield of confidentiality of the JSC's private deliberations and audio recordings thereof be pierced for purposes of giving effect to Uniform Rule 53(1). Other competing values of equal importance support non-disclosure and, thus, the preservation of confidentiality and, concomitantly, the privacy of direct communications between JSC members engaged in deliberations preceding the Decision.

55. For this appeal, the relevant extract of Uniform Rule 53(1) reads:

'Save where any law provides otherwise, all proceedings to bring under review the decision ... of any tribunal, board performing ... administrative functions shall be by notice of motion directed and delivered ... to all other parties affected - ... (b) calling upon the ... chairman or officer ... to dispatch ... the record of such proceedings sought to be corrected or set aside' (my emphasis)

56. The Constitution changed the 'context' of all legal thought and decision-making in SA.³⁶ Uniform Rule 53(1) must be construed purposively in a manner that promotes the 'spirit, purport and objects of the Bill of Rights'.³⁷

³⁶ Per Cameron J in *Holomisa v Argus Newspapers Ltd* 1996 (6) BCLR 836 (W) 863J.

³⁷ Section 39(2), the Constitution. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 21; *FNB Ltd v CSARS* 2002 (4) SA 768 (CC) 787C-F; *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25 paras 34-35 (20 August 2015).

The spirit, purport and objects of the Bill of Rights must navigate the entire process of interpretation. Mohamed J expressed this principle as follows:-

'[T]he Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.' (emphasis added)

57. The extract quoted from *Acheson* supra, and echoed in *S v Makwanyane*,³⁸ encapsulates the Constitution's primary objectives and ethos that serve as catalysts for transformation at all levels of society, including the judiciary.

58. By virtue of the Constitution (s 39(2)), the Uniform Rule 53(1)(b) must be interpreted through the prism of the Bill of Rights. Any construction thereof must promote the objectives, democratic values, ethos and principles encapsulated in the Bill and the Constitution as a whole. This encompasses its human rights 'spirit, purport and objects'. To this end, when interpreting Uniform Rule 53(1)(b) the following are relevant factors:

- (i) the shared aspirations and ideals in the Constitution's Preamble;
- (ii) the foundational values contained in ss 1, 2, and 7 of the Constitution, all of which disciplines SA's national institutions (such as, the JSC and the judiciary);
- (iii) the values and principles governing public administration (s 195(1));
- (iv) the Constitution's commitment to a comprehensive programme of social justice and transformation, including transformation of the judiciary through the appointment of persons who broadly represent SA's racial and gender demographics (s 174(2));

³⁸ 1995 (3) SA 391 (CC) para 262.

- (v) the basic premise upon which public power to appoint Judges under s 174(6) is to be exercised by the JSC and the limits imposed by the Constitution on the exercise of that power.

59. It is submitted that the considerations referred to above in the preceding paragraph favour a conclusion that Uniform Rule 53(1)(b) be construed in a manner consistent with the view postulated above in paragraph 52.

H. DOES THE JSC'S PRIVATE DELIBERATIONS HAVE 'RELEVANT' EVIDENTIAL VALUE IN A JUDICIAL REVIEW APPLICATION?

60. The Appellant contends that, for purposes of its review application under Uniform Rule 53, the Recording is a contemporaneous 'record of such proceedings sought to be corrected or set aside' so that it is entitled thereto under Uniform Rule 53(1)(b). The Respondent and the Amici dispute this.

61. The Appellant relies chiefly on the decision of Binns-Ward J in *City of Cape Town v SANRAL*³⁹ as authority for the proposition that the Recording forms part of Respondent's 'record' of proceedings at its October 2012 sitting. It is submitted that Appellant's reliance on SANRAL is misplaced. First, SANRAL is factually distinguishable because the nature of the decision-maker involved in that instance is wholly different. The JSC is a sui generis institution created by the 1993 interim Constitution whose powers and functions are ordained in, and regulated by, the 1996 final Constitution. Its deliberations take place in private in terms of a Ministerial notice and its deliberations are, by virtue of s 12(d) of the PAIA, cast outside of the public domain and shielded from public scrutiny. None of these considerations applied to the decision-maker in *SANRAL supra*.

³⁹ [2013] ZAWCHC 74. See paras 44-45 (pgs 14-15) of Appellant's HOA.

62. An applicant in a review is generally entitled to the full record of the decision under review.⁴⁰ The Appellant is in possession of the 'full record of the decision'. Hence, it uses Uniform Rule 53(1)(b) to gain access to the Recording on the basis that it is part of the 'record of such proceedings'. To this end, the guiding principle is that the whole record of the proceedings under review need not be furnished: *only that part which is relevant to the decision being reviewed need to be furnished.*⁴¹

63. In *SANRAL supra*, Binns-Ward J also emphasizes that an applicant is not entitled, as of right, to access all deliberations of a decision-maker. The learned Judge underscores that an applicant may access deliberations which are 'relevant' to a review. In other words, as a matter of law, the mere existence of audio recordings (or transcripts) of deliberations by the JSC does not in and of itself entitle the Appellant to access same for its review application. The relevance thereof must be shown to exist. For reasons given below, it is submitted that the Recording does not satisfy the test for 'relevance' at a judicial review. Hence, this appeal must fail.

64. The Appellant states that it seeks to ascertain from the deliberations whether 'relevant considerations' were ignored and 'irrelevant considerations' taken into account. In other words, it seeks to establish a positive and a negative. On the one hand, as regards the successful candidates (such as, Dolamo et Rogers JJ), it seeks to ascertain whether the Recording has discussions indicating that relevant factors were ignored and irrelevant ones canvassed. On the other hand, in relation to the unsuccessful candidates (such as, Adv Gauntlett SC), it seeks to determine whether the Recording contains discussions indicating that irrelevant factors were considered and relevant ones ignored.

⁴⁰ *Democratic Alliance and Others v Acting NDPP and Others* 2012 (3) SA 486 (SCA) 501 refers to a 'record of a decision'.

⁴¹ *Muller v The Master* 1991 (2) SA 217 (N) 220D-F; *Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board, Eastern Cape* 2010 (1) SA 228 (E) 233D. See also Erasmus *Superior Court Practice Service* 45, 2014 at BI-386.

65. It is submitted that the Appellant is engaged in a fishing expedition geared to second-guessing the JSC members' legitimate exercise of 'free will' in the sense of the freedom to vote in a manner consistent with their individual conscience and preference, without fear, favour or prejudice. An order granting access to the Recording undermines the integrity of the judicial appointments process which will tarnish the judiciary in the eyes of the general public. At the same time, a real risk is created of reputational damage being caused to the successful candidates appointed as Judges.

66. Even if access to the Recording is assumed not to be a fishing expedition, it must still pass the muster of the 'relevance' test. This necessitates that consideration be given to whether its content has evidential value in a judicial review. To answer this question requires an interpretation of 'the Commission shall deliberate in private' as used in clause 3(k) of GG 24596 dated 27 March 2003 quoted above in para 18.

67. It is trite law that, unless words in a statutory provision bear a technical meaning, they carry their ordinary, grammatical, dictionary meaning.⁴² However, purposive interpretation requires a meaning to be consistent with both textual and contextual considerations. Wallis JA, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁴³ explained the shift from purely textual interpretation to contextual interpretation as follows:

[18] ... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to

⁴² *Van Heerden and Another v Joubert NO and Others* 1994 (4) SA 793 (A) 796.

⁴³ 2012 (4) SA 593 (SCA) paras 18-19.

which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. ... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. [19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation ... the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and Another*, namely that from the outset one considers the context and the language together, with neither predominating over the other.' (footnotes omitted)

68. The starting point is, thus, consideration of the background and objective of GG 24596 dated 27 March 2003. It is a Ministerial Regulation issued pursuant to the JSC Act (s 5), a national statute with its roots in s 178(4) of the Constitution. The Regulation's purpose is to outline procedural steps to be followed by the JSC in the selection and appointment of judicial officers. Although clause 3(k) thereof provides for deliberation, no guidelines are given as to the manner, form, duration and content of the deliberation, or the location where and time when same must occur. Thus, these are matters to be determined by the JSC exercising its wide powers conferred in the Constitution under s 178(6). Since clause 3(k) refers to 'the Commission', it envisages deliberation by JSC members as a collective group of 25 persons. However, the Regulation (clause 7) empowers the JSC to 'depart from this procedure or condone any departure from this procedure whenever, in its opinion, it is appropriate to do so'. Thus, there is no legal impediment precluding JSC members from deliberating on their

own or in private, one-on-one, discussion with one or more JSC members. Indeed, in practice, such private deliberation also takes place over and above JSC members deliberating together as a complete group of persons.

69. As regards the language used in clause 3(k), the meaning of 'deliberate' is important. In context, this word is used as a verb. The Oxford Dictionary⁴⁴ defines 'deliberate' as verb to mean 'engage in long and careful consideration or discussion'. As a noun, that Dictionary defines 'deliberation' as 'long and careful consideration or discussion' and 'slow and careful movement or thought'. Viewed in this light, 'deliberate' in clause 3(k) is not a single, once off act or event but a thought-provoking, lengthy process of debate and reflection ('consideration or discussion') on the suitability or not of candidates competing for judicial appointment.

70. Accordingly, 'the Commission shall deliberate in private' as used in clause 3(k) entails the JSC members analysing, evaluating and assessing, for e.g., documents in their possession and performance of candidates. Clause 3(k) envisages JSC members to discuss the suitability or otherwise of judicial candidates and apply their minds ('consideration') on whether a candidate(s) may be selected by consensus through compromise. JSC members are required to be open-minded so as to be open to persuasion ('slow and careful movement or thought'). If there is no consensus or meeting of minds, then voting by secret ballot occurs as it did at the October 2012 sitting. As shown below, this creates an insurmountable hurdle for establishing 'relevance' of the Recording.

71. The Constitution (s 178(6)) provides that 'decisions of the Commission must be supported by a majority of its members'. This means that a JSC 'decision' exists if at least 13 members support it. This creates an inherent conundrum in any judicial review of a JSC 'decision'. This is so because:

⁴⁴ See <http://www.oxforddictionaries.com/definition/english> (accessed 19 August 2015).

Does a reviewer focus on the rationality of the decision with reference to the views of the majority who voted in its favour or with reference to the views of the minority members who voted against it, or on the rationality of the views or positions taken by both sides of the divide? Or, does the reviewer simply consider all the objective facts emanating from the documentation and information which served before the JSC when a 'decision' was taken and then adjudicate whether that result by majority vote passes the rationality test? It is submitted that the latter applies.

72. The personal thoughts and perceptions of JSC members are irrelevant for a judicial review. A member's personal stance is not binding on the JSC or its membership as a whole. Hence, the Recording is irrelevant for the main review application. It contains non-binding, personal views of JSC members when they 'deliberated' on the candidates. In any event, views expressed in that process is preliminary and subject to change at any time before, or at the time of, voting.

73. Opinions held by JSC members are not static. Since members are required to be open-minded during the deliberation phase, their thoughts are susceptible to movement (or change) as they think fit in the exercise of their discretion. This is part of freedom and the advancement of freedoms, a founding value in the Constitution (s 1(a)). In *R v Big M Drug Mart Ltd*⁴⁵ the Canadian Supreme court held that a freedom must be understood purposively 'in the light of the interests it was meant to protect'. In relation to the JSC, freedom in the judicial selection and appointments process is designed to serve and protect judicial transformation, a constitutional aim.

74. In accordance with the Constitution's democratic ethos, when exercising their equal voting rights, JSC members vote as individuals and exercise a freedom of choice of candidate, without fear, favour or prejudice, subject

⁴⁵ [1985] 1 SCR 295 para 116.

only to a member being satisfied that his vote accords favourably with his/her conscience, the Constitution and its criteria for judicial appointment.

75. Voting is purely a subjective exercise in which JSC members exercise 'free will'. It is strictly a member's personal choice. The reason a member votes for or against a candidate is based exclusively on factors he/she considered at the critical moment of casting a vote. In other words, voting by secret ballot logically entails each member engaging in some degree or form of own deliberation to reflect on how to exercise the right to vote.

76. Deliberation, whether as the JSC or individually or in small groups, enables members to 'think aloud' and use each other as 'sound boards' for sharing of ideas about candidates. In this way they can reflect on their own observations and assessments of candidates. In so doing, they can decide whether their initial view is merited or requires reconsideration so that they are able to cast a more informed or balanced vote. This is consonant with the 'slow and careful thought' process envisaged in the Oxford Dictionary meaning of 'deliberation' stated herein above.

77. The content of a JSC member's own (private) deliberation plays a pivotal role to inform how he/she votes. Thus, when voting by ballot occurred at the JSC's October 2012 sitting, there is no indication as to what impact, if any, the JSC's group deliberations under clause 3(k) had on a member's ultimate vote for or against candidates jockeying for position on the Western Cape High Court Bench. Accordingly, there is no justifiable basis upon which the Appellant can plausibly contend that the Recording is relevant for purposes of the rationality test in the main review application.

78. As stated above, voting at the JSC for or against a judicial candidate is, strictly speaking, a subjective exercise. A member's vote is influenced by an array of factors, some objective and others not. For example, there is no

uniform definition of 'transformation' or of the qualities needed for a person to be a good, moral judge. Hence, votes are cast for or against a candidate based on a JSC member's own understanding of transformation as well as his/her own belief as to the personal qualities or attributes that are to be exhibited by a candidate to justify a judicial appointment (or higher judicial office). In addition, a JSC member's personal vote is also influenced by his/her own perception as to whether a candidate has sufficient own life experience (including, community involvement) and practical legal training to justify judicial appointment. This was, after all, the rationale which motivated the Constitution's drafters to make the JSC a diverse group.

79. The subjective factors alluded to above are irrelevant for purposes of a rationality test at a judicial review. Therefore, the JSC's deliberations and the content thereof as per the Recording have no evidential value in the Appellant's main (review) application. They do not constitute a legitimate yardstick (or barometer) for assessing the rationality of the Decision.

80. Even if a factor was mentioned during the JSC deliberations which may be classified as 'irrelevant', that does not assist in the judicial review process because there is no indication as to what weight, if any at all, any JSC member placed on such factor at the crucial time of casting his/her vote. The only way of determining the influence any such 'irrelevant' factor may have had on the Decision under review is by polling every JSC member so as to ascertain the factors or considerations he/she actually took into account in deciding to cast his/her vote for (or against) a judicial candidate. This is a course which ought to be avoided as it would entail piercing the veil of anonymity behind a JSC's member's vote by secret ballot.

81. As stated above, the rationality of the Decision must be determined with reference to whether a rational connection exists between the documents which served at the JSC and the information at its members' disposal when the Decision was taken, having regard also to the various constitutional

requirements and values, as well as other legally relevant considerations. In this regard, the Recording is irrelevant and has no evidential value.

82. In other words, the nature of the Recording's content is such that it cannot assist a reviewing court to establish the existence or absence of a rational relationship between, on the one hand, the objective factual material which served before the JSC at its October 2012 sitting in relation to the candidates and, on the other, the JSC's decision to advise the President to appoint the successful candidates and, by implication, not to appoint the unsuccessful candidates. Hence, this appeal ought to be dismissed.

I. DOES THE JSC'S PRIVATE DELIBERATIONS FORM PART OF THE 'RECORD OF PROCEEDINGS' UNDER UNIFORM RULE 53(1)?

83. The success of this appeal hinges on whether the Recording forms a constituent part of the 'record of ... proceedings' within the meaning of this expression in Uniform Rule 53(1)(b). If not, then this appeal must fail.

84. In *Johannesburg City Council v Administrator, Transvaal and Another*,⁴⁶ the court interpreted 'record' to mean the objective 'documents, evidence, arguments and other information before the tribunal relating to the matter under review'. (my emphasis) The court specifically lists 'formal record and dossier' and 'every scrap of paper throwing light' as examples of what the 'record' may entail. The JSC's audio recordings (including transcript thereof) do not qualify as being part of the 'record'.

85. It is submitted that audio recordings do not form part of the JSC's 'record' because they do not qualify as objective, factual matter (information) which serve '*before the tribunal*' when the decision under review is considered and taken.

⁴⁶ 1970 (2) SA 79 (T) 91.

86. Consequently, the Recording sought by the Appellant does not form part of the 'record' of Respondent's proceedings and the court a quo correctly that the Recording is not part of the 'record of proceedings'.

J. CONCLUSIONS AND APPROPRIATE ORDER

87. The order sought by the Appellant will, if granted, undo the protection accorded to JSC members by the JSC's internal confidential processes as upheld and endorsed by this Honourable Court in *Cape Bar Council supra*.

88. The Appellant's success will set a dangerous precedent potentially opening the floodgates to a plethora of similar applications under the guise of Uniform Rule 53(1)(b) for access to audio recordings or transcripts of the JSC's deliberations covering, possibly, more than a decade. Importantly, such applications will not be limited to the JSC but any other organ of state or other body deliberating in private and whose decisions are subject to judicial review. Such an eventuality must be avoided.

89. The Appellant is on an expedition to extract the Recording (or a transcript) in the hope that it contains a smoking gun for its review application. On this basis alone, its reliance on Uniform Rule 53(1)(b) ought to be dismissed. The Appellant's recourse is to seek reasons from each of the JSC members anonymously as stated in *Cape Bar Council supra* (at para 50).

90. The Constitution (s 1(a)) entrenches the founding values of human dignity and the advancement of human rights and freedoms. The legal position contended for by the Amicus herein is consonant with these values and the rule of law contained in s 1(c) of the Constitution.

91. The decision of the court a quo strikes a fair balance between, on the one hand, the Appellant's right of access to certain information and, on the other, the Respondent's duty to maintain and preserve the integrity of the judicial selection and appointments process and the dignity of the candidates. In so doing, the decision of Le Grange J promotes the 'spirit, purport and objects of the Bill of Rights' in which human dignity is a core value and a right.

92. Consequently, it is submitted that this appeal ought to be dismissed.

DATED AT CAPE TOWN ON THIS 17TH DAY OF SEPTEMBER 2015.

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IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NUMBER: 145/2015

WCC CASE NUMBER: 8647/2013

In the matter between:

HELEN SUZMAN FOUNDATION ('HSF')

Appellant

(Applicant in Court a quo)

and

JUDICIAL SERVICE COMMISSION ('JSC')

Respondent

(Respondent in Court a quo)

with

POLICE AND PRISONS CIVIL RIGHTS UNION

First Amicus Curiae

NATIONAL ASSOCIATION OF DEMOCRATIC

LAWYERS ('NADEL')

Second Amicus Curiae

DEMOCRATIC GOVERNANCE AND RIGHTS UNIT

Third Amicus Curiae

THE TRUSTEES FOR THE TIME BEING OF

THE BASIC RIGHTS FOUNDATION OF SOUTH AFRICA *Fourth Amicus Curiae*

FOURTH AMICUS CURIAE'S LIST OF AUTHORITIES

1. Statutes

Constitution of the Republic of South Africa, 1996

Judicial Service Commission Act 9 of 1994

2. Books, Journals, Reports and Online (internet) material

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- *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)
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