REPUBLIC OF SOUTH AFRICA

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO. 8647/2013

In the matter between:

THE 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

Counsel for the Applicant	: Adv. David Unterhalter SC Adv. Max du Plessis Adv. Tembeka Ngcukaitobi
Attorneys	: Webber Wentzel

Counsel for Respondent	:	Adv. Ismail Jamie SC Adv. Namhla Pakade
Attorneys	:	State Attorneys
Attorney for 1st Amicus Curiae	:	Mr. Clive Hendricks
Attorneys	:	Marais Müller Yekiso Inc.
Attorney for 2nd Amicus Curiae	:	Mr. Fareed Moosa
Attorneys	:	Fareed Moosa Attorneys
Counsel for 3rd Amicus Curiae	:	Adv. K Pillay
Attorneys	:	Bowman Gillfillan
Date of hearing	:	8 August 2014
Date of judgment	:	5 September 2014

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JUDGMENT DELIVERED: 5 SEPTEMBER 2014

Le Grange, J:-

[1] This is an interlocutory application under Rule 6 (11) and 30A for an order directing the Respondent ("JSC") to comply with Rule 53(1)(b) of the Uniform Rules of Court and to

deliver the full recording of the proceedings sought to be reviewed in the main application, including the audio recording and any transcript of the deliberations of the JSC after the interviews on 17 October 2012. Three amici curiae were granted leave to intervene in these proceedings. The First Amicus, POPCRU, however filed a notice to abide by the decision of this Court.

[2] The Applicant ("HSF"), in the main application, instituted review proceedings against the JSC for an order, declaring, inter alia, that the 'decision taken by the Respondent, under section 174(6) of the Constitution, to advise the President of the Republic of South Africa to appoint certain candidates, and not to advise him to appoint other candidates as judges of this Division, was unlawful and or irrational and thus invalid'.

[3] The background facts underpinning this application are largely common cause and, briefly stated, are the following. During August 2013, the JSC filed the record of its decision containing about six lever arch files. It included all the applications of the eight nominees, and the full transcript of the public interviews. The Record also contains a summary of the recorded deliberations ("the Deliberations") which were held in private by the JSC after the interviews. The summary was compiled by the Chief Justice.

[4] It appears that the unsuccessful application by Adv J Gauntlett SC is largely the underlying subject matter in the main application. As part of the Rule 53(1)(b) record, reasons

were provided in respect of the eight candidates interviewed for the vacancies in this Division. In addition, reasons were furnished by the JSC in November 2012 to Justice Harmse in relation to why Dalomo AJ (as he then was) and not Gauntlett SC was recommended to the State President for a permanent appointment.

[5] The HSF claims that it only became aware of the recording of the JSC's Deliberations shortly before it was to file its supplementary founding affidavit. The HSF wrote to the JSC requesting the Deliberations. The JSC confirmed the existence of the Deliberations, but refused to disclose them. A further round of correspondence followed between the two parties in which the HSF again demanded the recording, and in response the JSC informed the HSF that it already had all the information it required. The HSF then launched this application. The JSC adopted the view that the HSF is not entitled in law to the Deliberations of the JSC as they do not form part of the proceedings in terms of the Rule, and furthermore, the non-disclosure of the Deliberations is reasoned, justifiable and in accordance with several comparative jurisdictions.

[6] The National Association of Democratic Lawyers, the second amicus, and the Democratic Governance and Rights Unit ("the DGRU"), a unit within the public law department of the University of Cape Town, the third amicus, have adopted a similar view to that of the JSC.

[7] Advocates David Unterhalter SC, Max du Plessis and Tembeka Ngcukaitobi appeared for the HSF. Advocates Ismail Jamie SC and Namhla Pakade appeared for the JSC. The attorney Mr. Clive Hendricks appeared for the first amicus. The attorney Mr. Fareed Moosa appeared for the second amicus. Advocate Karrisha Pillay appeared for the third amicus. I would like to extend my appreciation to the legal representatives of the parties for their comprehensive heads of arguments. It was of great assistance in preparing my judgment.

[8] The principal submissions made by Mr. Unterhalter were as follows: The Record of Proceedings that was furnished by the JSC is wholly inadequate as the Deliberations are the most immediate and accurate record of the decision and the process leading thereto. It was argued that access to the Deliberations is indispensable to any proper determination of whether there is a rational connection between the Deliberations, the Decision and any reason provided by the Respondent. Furthermore, the Deliberations are a central aspect of the Record of which the disclosure is clearly required by Rule 53(1)(b). Moreover, the HSF will be denied the benefit of the said Rule and will be forced to evaluate and argue the rationality, lawfulness and reasonableness of the JSC's decision without the key documents. The submission was also made that the disclosure of the Deliberations will indeed further the constitutional rights of access to information held by the State, it will advance transparency and accountability and will support the crucial tenets of access to courts and equality of arms. In addition, the JSC's argument that the Deliberations as summarized by the Chief Justice and included in the reasons provided is sufficient, ignores the law and reality. The submission was made that in terms of Rule 53(1)(b) the HSF is entitled to the full record of the Deliberations

and in reality the drafter of the summary of the Deliberations has the power to determine what goes into the summary and would be in a position to tailor the reflections of the Deliberations.

[9] Mr. Jamie argued that the selection of judges is a vital and sensitive constitutional function. Furthermore, the JSC has decided to hold a transparent nomination process, and an interview process that is open to the public and the media. In addition, in line with the recent decision in Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA) at para 45, the JSC has accepted that it is obliged to release, on request, the full reasons for its decisions to select certain nominees and reject others. According to Mr. Jamie, the JSC is however within its rights and justified to keep the record of its deliberations and the votes of the individual commissioner's secret. It was further argued that the contention that the JSC is obliged to reveal not only its reasons, but the full recording of its private deliberations in all circumstances, is baseless as it is not only in conflict with the majority of decided cases on this issue, it is also in conflict with the near universal practice of similar institutions in comparable democracies. It was also contended that the HSF's challenge has nothing to do with the notions of "transparency" and "openness", but was made merely to attack a decision of the JSC the HSF does not even wish to be set aside.

[10] The second amicus curiae aligned itself with the stance adopted by the JSC. Mr. Moosa, in essence, argued that the non-disclosure of the contents of the Recording is justifiable in law. Ms. Pillay on behalf of the third amicus curiae submitted that there is no justification for the HSF's complaint. The principal argument advanced on behalf of the third amicus curiae was that if one has regard to the overall process adopted by the JSC its

approach to the non-disclosure of its recorded Deliberations is reasoned, justifiable and in accordance with several comparative jurisdictions.

[11] The JSC's power to advise the State President on the appointment of Judges of the High Court is derived from the provisions of s 174(6) of the Constitution. In the Cape Bar Council matter supra at paragraph [45] Brand JA held that, '….the JSC is therefore, as a general rule, obliged to give reasons for its decision not to recommend a particular candidate if properly called upon to do so. I do not express any view as to how extensive these reasons should be or who would be entitled to request them, or under which circumstances such a request could legitimately be made. That, I think will depend on the facts and circumstances of every case'.

[12] In answering the question whether in the circumstances of this matter the Deliberations form part of the Record as envisaged by Rule 53(1)(b), consideration must be given in my view to the objectives and purpose of the Rule, including the overall process adopted by the JSC in respect of judicial appointments, and the documents and information that had been made available as part of the Record.

[13] The Rule provides as follows:

"53 Reviews

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

[14] It is settled law that the Rule is primarily intended to operate in favour of and to the benefit of an applicant in review proceedings and to avoid review proceedings being launched in the dark. The Rule essentially confers the benefit that 'all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court'. In this regard see Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A) at 660 F -G; Motaung V Mukubela & Anor NNO; Motaung v Mothiba NO 1975 (1) SA 618 (O) at 625E. Moreover, an applicant should

not be deprived of the benefit of this procedural right unless there is clear justification therefor. See Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999 (2) SA 599 (T) at 628-9. The purpose of giving reasons was also properly articulated by Schultz JA in his judgment at para 5 in Transnet Limited v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA), quoting Baxter, "Administrative Law (1989) at 228:

> "In the first place, a duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conductive to public confidence in the administrative decision-making process. Thirdly — and probably a major reason for the reluctance to give reasons — rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.'

[15] In the present instance it is common cause that the JSC has dispatched to the Registrar 6 lever arch files, which contain all the documentation and transcripts of the proceedings which took place and resulted in the judicial appointment of five candidates to this Division, as the record of proceedings sought by the HSF to be set aside or corrected. This record of proceedings included the following: each of the eight candidate's individual applications for judicial appointment; comments on the candidates from professional bodies and certain individuals; other related submissions and correspondence; transcripts of the eight

candidates' interviews; and reasons for the JSC's decision to recommend certain candidates and not to recommend others. In addition reasons were furnished by the JSC in November 2012 in relation to a complaint why Dalomo AJ (as he then was), and not Gauntlett SC, was recommended to the State President for a permanent appointment. The drafter of the distilled reasons of the Deliberations was in fact the Chief Justice.

[16] Absent the full record of the Deliberations, has the JSC complied with the objective and purpose of the Rule? In my view the question must be answered in the affirmative. In view of what had been dispatched to the Registrar, the HSF is not forced to launch a review application in the dark. Moreover, the contention that the HSF will be required to evaluate and argue the rationality, lawfulness and reasonableness of the impugned decision without key documents and be denied the benefit of the Rule is unfounded. The HSF is not being deprived of the procedural and substantive safeguards which are the underlying rationale for the Rule.

[17] This brings me to the question, whether there is merit to the HSF's complaints in respect of openness, transparency, equality of arms and access to information, taking into account the JSC's legislative framework and its overall approach in respect of judicial appointments.

[18] The JSC derives its powers from section 178 (4) of the Constitution. It is indeed a sui generis entity mandated with the task of the appointment and removal of judges. It may also advise the national government on any matter relating to the judiciary or the administration of justice. Furthermore, in terms of s 178(6) of the Constitution the JSC is given a certain degree

of latitude in respect of its processes. In terms thereof, the JSC may determine its own procedure but its decisions must be supported by a majority of its members. The Judicial Service Commission Act 9 of 1994 provides in section 5 that the Minister must, by notice in the Gazette, make known the particulars of the procedure which the JSC has determined in terms of section 178 (6) of the Constitution. In terms of such provision, the procedure of the JSC was published in the Government Gazette on 27 March 2003 ("the Procedure"). Significantly, Clause 3 (k) of the prescribed procedure, in respect of the appointment of Judges to the High Court, provides that after the 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, majority vote."

[19] The JSC has followed the procedure for the selection of candidates for appointment as Judges as clearly set out in Regulation 3. It appears that the nomination forms of each of the eight relevant candidates form part of the furnished Record. After the closing date of nominations, a short list was compiled. All the material received with regard to the short-listed candidates was then distributed to all the members of the JSC as prescribed in Regulation 3(g). Thereafter, the JSC interviewed all the short-listed candidates. The interviews were open to the public and the media and subject to the same rules as those ordinarily applicable in courts of law and there was no set time limit. After completion of the interviews, in terms of Regulation 3(k), the JSC deliberated in private and thereafter advised the President of the names of the successful candidates which was made public.

[20] In addition to these regulatory procedures the JSC has adopted a summary of the criteria to be used when considering candidates for judicial appointments. This has been attached as "FA8" to the founding affidavit in the main application. The Preamble to that document states as follows:

> "At its Special Sitting held, in Johannesburg on 10 September 2010, the Judicial Service Commission resolved, after a lengthy debate and review of the Guidelines that had been adopted in 1998, to publish criteria used when considering candidates for judicial appointments. This decision is in line with the JSC's principle that the process of judicial appointments should be open and transparent to the public so as to enhance public trust in the judiciary.
>
> The following criteria are used in the interview of candidates, and in the evaluation exercise during the deliberations by the members of the Commission: …."

[21] Viewed cumulatively, it is evident that transparency and openness of the JSC is ensured by the publication of objective criteria to be used in the selection of judges; the existence of a public interview process; and an obligation falling upon the JSC to give reasons. This process adopted by JSC in respect of judicial appointments in my view does not justify the complaint by the HSF regarding the lack of openness, transparency, equality of arms and access to information.

[22] I now turn to the issue whether the JSC is legally and constitutionally obliged in the present circumstances to reveal not only its distilled reasons but the full recording of its private deliberations, as part of the Rule 53 record.

[23] The long-standing approach of our Courts regarding the interpretation of the Rule can be characterized as follows: 'A record of proceedings is analagous to the record of proceedings in a court of law which quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision. Thus the deliberations of the Executive Committee are as little part of the record of proceedings as the private deliberations of the jury or of the Court in a case before it.' In this regard see Johannesburg City Council v The Administrator, Transvaal and Another (1) 1970 (2) SA 89 (T) at 91H-92A; Free State Steam & Electrical CC v The Minister of Public Works and Others [2008] ZAGPHC 256; Lawyers for Human Rights v Rules Board for Courts of Law and Another [2012] ZAGPPH 54; [2012] 3 All SA 153 (GNP); 2012 (7) BCLR 754 (GNP) at para 22.

[24] Recently however certain Courts have adopted a different approach. In Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999 (2) SA 599 (T) it was held that the content and extent of the record of proceedings will depend upon the facts of each case. This matter involved an application for a record of proceedings by a bidder for a gambling license from the Mpumalanga Gambling Board. The Court after considering the relevant empowering legislation of the Mpumalanga Gaming Act 5 of 1995, which required the board to "function in a transparent and open manner… unless there is a legally justifiable reason for withholding disclosure", held that the applicant was entitled to a video recording of the deliberations of a gambling board. Furthermore, it was held that the Johannesburg City Council decision should

not be followed, in part as a result of the right to reasons introduced by the Constitution. A similar approach was adopted in Ekuphumleni Resort (Pty) Ltd and Another v Gambling and Betting Board, Eastern Cape and Others 2010 (1) SA 228 (E).

[25] In City of Cape Town v South African National Roads Agency Ltd ("SANRAL") and Others [2013] ZAWCHC 74, it was held that, in certain types of challenges, deliberations should form part of the Rule 53 record. At para [48] the following remark was made by the Court:' It seems to me that any record of the deliberations by the decision-maker would be relevant and susceptible to inclusion in the record. The fact that the deliberations may in a given case occur privately does not detract from their relevance as evidence of the matters considered in arriving at the impugned decision. The content of such deliberations can often be the clearest indication of what the decision-maker took into account and what it left out of account. I cannot conceive of anything more relevant than the content of a written record of such deliberations, if it exists, in a review predicated on the provisions of s 6 (2) (e) (iii) of PAJA..," In a recent unreported decision of the North Gauteng High Court in Comair Limited v The Minister of Public Enterprises and Others NGHC Case No: 13034/13, it was also held that Rule 53 entitles an applicant to access to the deliberations.

[26] Is the new approach as developed in the above cases and as reflected in the remarks made in the SANRAL matter persuasive and appropriate, in all requests for the record in terms of Rule 53. In my view the question must answered in the negative. The general approach has always been that the extent of the record of proceedings is dependent upon the facts of each case. (Cape Bar Council at 187C, supra). There is no justifiable reason to depart

from this approach in the present instance. The JSC is indeed a unique entity. It not only derives its powers from the Constitution but is also entitled to determine its own procedure. The procedure determined by the JSC in terms of the Constitution has been promulgated and Gazetted in the Government Notice dated 27 March 2003. According to Regulation 3(k), "After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates to be recommended for appointment in terms of section 174(4) of the Constitution by consensus, if necessary, by majority vote." There is no legal challenge against these regulations and are they valid until they are repealed or set aside.

[27] Furthermore, the new approach as adopted in the SANRAL case has not universally been accepted by our Higher Courts. In MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd 2006 (5) SA 1 (SCA), the issue at hand was an application in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") for access to information related to a tender that the respondent had sought to have reviewed in terms of Rule 53. The additional information sought included "Minutes of all other departmental meetings and relevant committee meetings at which the tenders in relation to the contracts were considered and evaluated." The appellant argued that it was not obliged to provide the documents under PAIA, as the respondent could in any event obtain them through Rule 53. The Supreme Court of Appeal did uphold the claim for the documents under PAIA but in its reasoning referred to the same passage the JSC relies upon in the Johannesburg City Council matter, to the effect that deliberations are excluded from the ambit of a record. The argument advanced by counsel for the JSC is that even though no firm finding was made, by referring to the dictum of the Johannesburg City Council, the Supreme Court of Appeal

indeed endorsed the principle that some documents on the grounds of privilege or relevance may not fall within the ambit of the Rule 53 record. Such argument is in my view not without merit.

[28] In the present instance the JSC indeed provided its reasons in the form of the summary compiled by the Chief Justice. 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 s 178(1) of the Constitution. The relevant part of this section provides:

> "178 Judicial Service Commission
>
> (1) There is a Judicial Service Commission consisting of –
>
> (a) the Chief Justice, who presides at meeting of the Commission;
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> (b) the President of the Supreme Court of Appeal;
>
> (c) one Judge President designated by the Judges President;
>
> (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
>
> (e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

(g) one teacher of law designated by teachers of law at South African universities;

(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;

(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

(k) when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them."

[29] Having regard to the overall process adopted by the JSC the view expressed in the Johannesburg City Council matter supra at 91H-92A is indeed apposite in the present instance. 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.

[30] It was also argued by the JSC and the DGRU, that there are valid and cogent reasons supported by international comparative practice why in the public interest deliberations of the JSC should remain private and confidential. The HSF has expressed the opposite view and argued that public interest demands that the whole record be disclosed and that nothing in this matter permits a departure from that generally established principle. It was further contended by the HSF that the continued concealment of the most immediate and accurate record of the Deliberations can only fuel speculation, suspicion and erode the public confidence in the processes of the JSC.

[31] The HSF stance is not supported by comparative international jurisdictions namely the USA; Canada; United Kingdom; Australia; the Commonwealth; Malaysia; Tanzania and Zambia amongst others.

[32] The following foreign jurisdictions will be highlighted: In the USA, judicial selection occurs at two levels; federal and state. At the federal level, judges are nominated by the President and approved by the Senate. Regularly the Department of Justice seeks advice from the Standing Committee on the Federal Judiciary of the American Bar Association (the ABA), which would prepare a report on a suitable candidate having considered a wide range of information. Such report is not binding but is extremely persuasive. In the matter of Public Citizen v Department of Justice 491 US 440 (1989), pursuant to a request by a public interest body , under freedom of information legislation known as FACA (Federal Advisory Committee Act 86 Stat.770), it was concluded by the District Court (691 F. Supp. 483 (1988)) that the legislation could not be interpreted to require disclosure of the ABA materials for the

reason that any need for applying FACA to the ABA Committee is outweighed by the President's interest in preserving confidentiality and the freedom of consultation in the selection of judicial nominees. Such decision was confirmed by the Supreme Court of Appeal. In the concurring judgment of such court it was stressed by Justice Kennedy that applying FACA to the ABA Committee could potentially inhibit the President's freedom to investigate, to be informed, to evaluate and consult during the consultation process.

[33] At state level, a variety of methods are used to select judges. Some states use selection commissions, others elect their judges. The American Judicature Society ("AJS") – an organisation that monitors and advocates on issues of judicial selection – conducted an analysis of all states that have judicial selection commissions (See American Judicature Society Judicial Merit Selection: Current Status (2011). It appears that of the 33 states, only five do not have a provision requiring that deliberations are confidential. As the AJS explains in its handbook for judicial selection commissions:

> "With few exceptions, nearly every jurisdiction conducts confidential deliberations. Even in jurisdictions that provide little or no confidentiality protections for applicants, commission deliberations are afforded extensive confidentiality. Confidentiality of deliberations is intended to encourage frank discussion of the applicants and their qualifications by the commissioners." (M Greenstein, rev. K Sampson Handbook for Judicial Nominating Commissioners (2004) at 24)

[34] The AJS has published a document called "Model Judicial Selection Provisions" as an aid to states adopting merit selection. Open meetings for discussing procedures and selection

requirements are recommended, but it is left to the state to determine whether interviews should take place in public. The position as far as deliberations is very clear: "All final deliberations of the judicial nominating commission shall be secret and confidential." The AJS explains its reasoning behind its position as follows:

> "Finding the appropriate balance between preserving the privacy of judicial applicants and providing transparency in the screening process is one of the greatest challenges that nominating commission's face. Applicants should be protected from public scrutiny regarding their private lives and from public embarrassment that could result from failure to receive a nomination. At the same time, the public should have sufficient knowledge of the nominating process to maintain confidence in that process. Commission proceedings should be as open as possible. However, the final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates' qualifications."

[35] American courts have repeatedly upheld the confidentiality of the proceedings of judicial nominating commissions (See, for example, Lambert v Barsky N.Y.Supr. 91 Misc.2d 443, 398 N.Y.S.2d 84 (1977) ("public interest" or "executive" privilege protects confidential questionnaire submitted to Judicial Nominating Committee created by executive order of the Governor); Justice Coalition v First District Court of Appeal Judicial Nominating Commission 823 So. 2d 185 (Fla. Dist. Ct. App. 2002) (the District Court of Appeal of Florida upheld a refusal to provide records of a commission's deliberations under a freedom of information act claim). In Guy v Judicial Nominating Commission 659 A.2d 777 (Del. Super. 1995), the Superior Court of Delaware rejected a request in terms of a freedom of

information statute for records of the Delaware commission holding that providing access to such records would impede the Governor's search for judges:

> "The effectiveness of that search … would be compromised if the source and substance of the advice and information provided to the governor by the commission were not protected. It is unlikely that persons with knowledge of the qualifications of candidates would be as frank in their comments if they knew their statements would not be confidential."

[36] Support for the need for confidentiality can be found in American academia. Joseph Colquitt has emphasised the need for a balance to be struck between openness and secrecy, in order to ensure an effective selection process:

> "The commissioners … must be able to candidly discuss the nominees, and in so doing, be free from the general public's emotional appeals and pressure from interested political actors. At the same time, sufficient openness must exist to demonstrate that the commission is free from the cronyism and commission-captures that threaten its independence. Such transparency catalyzes public confidence about the fairness of the process.
>
> Thus, a carefully constructed balance must be struck between the two diametrically opposed objectives of openness and confidentiality. This can be accomplished by allowing for public hearings followed by confidential interviews of the prospective nominees and commission deliberations." (2007) 34 Fordham Urban LJ 73 at 110

[37] At present, comparing the position advocated by both Colquitt and the AJS, the JSC provides a greater degree of transparency in its nomination and selection procedures, given

that all the nomination documents, and the interviews, are public. It is only the Deliberations and the votes of its members that are confidential.

[38] Canada has several levels of courts with different appointment processes. Supreme Court Judges are appointed by the Governor-General on the recommendation of the Prime Minister, while at the lower level federal judges and provincial judges are generally selected or recommended by a committee. The application and deliberation procedures in respect of the above process are almost entirely confidential

[39] The code of ethics for the commissioners of the Federal Judicial Appointments Advisory Committee, the body which recommends the appointment of judges in lower federal and superior provincial courts, provides the following:

> "All Committee discussions and proceedings shall be treated as strictly confidential and must not be disclosed outside the Committee, except to the Minister of Justice, except that a Committee Chair may inform the Chief Justice of the names of the candidates who have been recommended by the committee. A member shall not communicate to a candidate or to any other person, during his or her term or thereafter, the substance or details of any interviews held, of discussions within the Committee nor of recommendations made."

[40] The Guidelines for Committee Members further provide that "[a]ll Committee discussions and proceedings must be treated as strictly confidential, and must not be disclosed to persons outside the Committee", and also requires confidentiality in respect of all

documents submitted as part of the application, and in respect of information obtained from references or sources.

[41] Provincial committees appear to follow a similar approach to the issue of confidentiality. For example, the course adopted by the Ontario Judicial Appointments Advisory Committee, is one of complete confidentiality of all applicants. The Ontario Judicial Appointments Advisory Committee in Annual Report (2012) at 9 described the position as follows: "The Judicial Appointments Advisory Committee has developed two fundamental principles on the issue of confidentiality of committee information. These are: (a) information about committee process is completely open to any person whomsoever, (b) information about particular candidates is completely confidential unless released by candidates themselves."

[42] The Judicial Appointments Committee ("JAC") is responsible for the selection of judges in England and Wales. In terms of the JAC's empowering statute all information that pertains to a particular person, and is obtained during the appointment process, is confidential (Constitutional Reform Act, 2005, s 132). However, disclosure is permitted if "required, under rules of court or a court order, for the purposes of legal proceedings of any description." Section1 32(4)(c). The JAC explains its publication policy as follows:

> "One of the key principles of good administration is to be open and accountable. We are committed to publishing a wide range of information about our activities and on subjects in which there is known to be a public interest. Under the terms of the Constitutional Reform Act 2005, our processes

> must be undertaken confidentially and any information that we gather for the purposes of making selections for judicial appointments can only be disclosed in very specific circumstances. We must also balance our wish to operate openly and transparently with our duty to protect the personal and confidential information we hold. Therefore the information that we can place in the public domain about our work is limited."

[43] Although there were at least two decisions arising out of requests for documents of the JAC, which did not deal with the same issues, as in the present instance, they at least highlight the fact that in the UK access to the JAC's documents is not automatic. In Guardian News and Media Ltd v Information Commissioner, the Information Tribunal held that the Ministry of Justice was justified in its refusal to disclose information about serious disciplinary actions against judges (Guardian News and Media Limited v IC (Freedom of Information Act 2000) [2009] UKIT EA_2008_0084 (10 June 2009)). Furthermore, in Judicial Appointments Commission (Decision Notice) [2009] UKICO FS50242843 (24 August 2009) the Information Commissioner upheld a decision by the JAC to refuse access to information about candidates for selection.

[44] Australia does not have a judicial appointments commission. There is however academic support for the establishment of one. The academics making such recommendations have stressed the need for confidentiality not only of the new commission's deliberations, but also of applications and shortlists. See R Davis and G Williams 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 Melbourne University Law Review 819 at 863.

[45] Simon Evans and John Williams in their article, 'Appointing Australian Judges: A New Model' (2008), appearing in 30 Sydney Law Review 294, in which they set out their vision of the reform of the Australian judicial selection process, affirm their acceptance of the importance of transparency in judicial selection, yet also identify the need for the confidentiality of judicial selection committee proceedings:

> "There are powerful institutional and pragmatic reasons for preserving strict confidentiality of aspects of the process. For example, if names of potential appointees, especially in small jurisdictions, were made public it may adversely affect relationships with clients. The upshot may be to discourage meritorious individuals from seeking appointment. Even in larger jurisdictions, breaches of confidentiality would undermine the operation of the system. This is not special pleading for judicial appointments. Confidentiality is a common feature of appointments processes generally. It ensures that meritorious candidates are not deterred by the prospect of disclosure of a candidacy that might be perceived as overreaching or that might (wrongly) be perceived as reflecting badly on the candidate if it was ultimately unsuccessful. Equally, confidentiality of references ensures that referees are not deterred from being fully candid about the evidence that supports (or undermines) the candidate's application." (Ibid at 303-304)

[46] They too conclude, while accepting the importance of accountability, that "applications, references, interviews and assessments, as well of the Commission's deliberations" should be confidential.

[47] In 2013, the Commonwealth Lawyers Association, the Commonwealth Legal Education Association and the Commonwealth Magistrates' and Judges' Association, on

advice received from their members, developed a model constitutional clause for judicial appointment commissions (J Brewer, J Dingemans & P Slinn Judicial Appointments Commissions: A Model Clause for Constitutions (2013)). The model contains the following observation in the clause recommending that the appointment commission should be able to determine its own procedure:

> "It is important that the selection process is seen to be transparent in the processes it uses to assess the qualifications of candidates for appointments. In some countries, such as South Africa the deliberations are through public hearings. We do not recommend that, because reports have shown that although candidates are prepared to put themselves through an open and fair process, they are less willing to share their candidature, and any lack of success, with the public at large. Whatever the method, there should be an established, public system for the assessment of qualifications of candidates."

[48] When comparing the JSC to these other systems, it leaves two distinct impressions: First, employing a body such as the JSC represents international best practice for the selection of judges. Second, the JSC is already far more transparent than the majority of comparable bodies in other international jurisdictions. 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. In fact, certain of these international courts and academic writers have recognized the justification for confidential deliberations similar to what has been advanced by the JSC. They have held 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. With respect to the arguments that disclosure of deliberations could potentially impact on the candidates' dignity, the HSF raises a point that one who is willing to endure public interviews could hardly be affected by the disclosure of Deliberations. It 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 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.

[49] 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.

[50] In conclusion, absent the Deliberations of the JSC, the HSF is not being deprived of the procedural and substantive safeguard which is the underlying rationale for the Rule.

[51] For these reasons it follows that the HSF is not entitled to the full recording of the Deliberations of the JSC as part of the Rule 53 Record.

[52] The JSC in this instance does not seek an order of costs.

[53] In the result the following order is made

The application is dismissed with no order as to costs.

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LE GRANGE, J