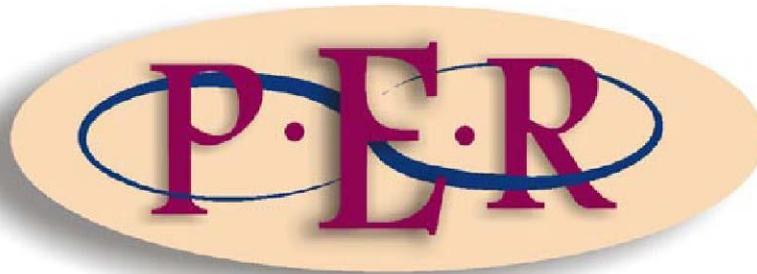


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**THE UNCONSTITUTIONAL PRACTICES OF THE JUDICIAL SERVICE
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143 (WCC)**

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**THE UNCONSTITUTIONAL PRACTICES OF THE JUDICIAL SERVICE
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MK Radebe*

1 Introduction

In early 2011 the Judicial Service Commission was attacked by the Cape Bar Council for its alleged unconstitutional practices in a matter that was heard by the Western Cape High Court. The case involved the failure by the Judicial Service Commission to fill vacancies at the Western Cape High Court despite there being highly eligible candidates available for appointment. To make matters complicated the Judicial Service Commission failed to provide reasons for its failure to make judicial recommendations, arguing that they were not legally required to give reasons. Despite the successful turnout of the judgment which highlighted the constitutional duty of the Judicial Service Commission to uphold the rule of law principle, there are still many media reports relating to the improper functioning of the Judicial Service Commission when making judicial recommendations.

The Cape Bar is argued to be the least "transformed" in South Africa and a result concerns have been raised in the media that the Judicial Service Commission's decision could have been based on affirmative action criteria. However since the Judicial Service Commission did not expressly state section 174(2) of the *Constitution of the Republic of South Africa, 1996*¹ as the reason for its failure to fill the remaining vacancies, the Court did not deem affirmative action as central to its judgment. Koen J also argued that any comments concerning section 174(2) would be obiter. Therefore emphasis will not be placed on affirmative action in this note but on the importance of the Judicial Service Commission as a public functionary

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¹ In terms of s 174(2) of the *Constitution of the Republic of South Africa, 1996*; "the need for the Judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed".

being bound by the requirements of the rule of law and the duty to give effect to principles of accountability and transparency.

This note aims to point out some valuable lessons that could be learned from the shortcomings of the Judicial Service Commission as highlighted in the *Cape Bar Council* Case. The Court strongly emphasised the duty of the Judicial Service Commission as an organ of state to observe and respect the principles of the rule of law, accountability and transparency, and also their constitutional obligation to perform public functions in a rational and non-arbitrary manner. The judgment of the case should serve as a reminder to the Judicial Service Commission that as a public functionary it is subject to the rule of law and to the constitutional principles of accountability and transparency.

2 The facts of the case

During April 2011, the Judicial Service Commission (the respondent) advertised three vacancies for judicial appointment in respect of the Western Cape High Court and invited persons to apply. Seven candidates were shortlisted by a sub-committee of the respondent from the list of the candidates who applied. Of the shortlisted candidates, Mr Henney was black, six other candidates were white and one was female. The shortlisted candidates were then interviewed and the respondent took a decision to recommend only one candidate, namely Henney J.²

The Cape Bar Council (the applicant) alleged that the failure of the respondent to fill the two remaining judicial vacancies was irrational, unfairly discriminatory and unreasonable, and therefore unconstitutional. The respondent offered two reasons for the failure to fill the vacancies. The first was that the unsuccessful candidates failed to obtain a majority of votes from members of the respondent. The second reason was that the respondent was not legally required to provide reasons for the failure to fill the remaining vacancies.³

² *Cape Bar Council v Judicial Service Commission* 2012 2 All SA 143 (WCC) para 4 (hereafter referred to as *Cape Bar Council* case).

³ *Cape Bar Council* case para 8.

The unsuccessful candidates who were supported by the applicant were acknowledged by the respondent's spokesman as "excellent in terms of technical experience". The answering affidavit records that "there is no dispute that the candidates represented by the applicant are fit and proper and appropriately qualified persons".⁴

The applicant alleged that there are suggestions in the respondent's papers referring to press releases and statements of a "balance" which needed to be struck between potential candidates. That, according to the applicants, suggests that section 174(2) of the *Constitution*⁵ could have influenced the respondents' recommendation criteria.⁶ In terms of the abovementioned section, the Judicial Service Commission has to take into account the need for the judiciary to reflect broadly the racial and gender composition of South Africa when judicial officers are appointed.

The Court held that the failure of the respondents to fill the two remaining vacancies was unconstitutional and unlawful and fell to be set aside. Court further held that there was no reason why the respondent could not provide reasons for its failure to fill the remaining two vacancies. The matter went on appeal to the Supreme Court of Appeal, which also held that the failure to fill the remaining two vacancies was irrational and unlawful.

3 Analysis of the Supreme Court of Appeal's judgment

In its reasoning the Court made emphasis on the fact that in recommending candidates for judicial appointment the Judicial Service Commission is acting in terms of the *Constitution* and therefore exercising a public function. The exercise of a public function in this case is regulated by sections 1(c), 8 (1), 195, 33(1) and 33(2) of the *Constitution*, which are discussed below:

Section 1 (c) of the *Constitution* provides that the South African State is founded on the values of the supremacy of the *Constitution* and the principle of the rule of law.

⁴ *Cape Bar Council* case para 10.

⁵ S 174(2) of the *Constitution of the Republic of South Africa*, 1996.

⁶ *Cape Bar Council* case para 145.

This encompasses the legality principle, which is applicable in cases dealing with the exercise of public functions.

According to section 8(1) of the *Constitution* the Judicial Service Commission is bound by the Bill of Rights.

Section 195 of the *Constitution* requires that public administration be governed by the democratic values and principles enshrined in the *Constitution*, including principles that it must be "accountable" and that "transparency must be fostered".

Section 33(1) of the *Constitution* provides for the right to just administrative action that is lawful and procedurally fair. Section 33(2) states that everyone whose rights have been affected by administrative action has the right to be given written reasons for the action.

It can be identified from the Supreme Court of Appeal's arguments that when exercising public functions, organs of state must at all times comply with the values and principles of the *Constitution*. The Court identified that the exercise of public functions can be restricted in the following ways:

(a) Applicability of the rule of law principle

One of the aspects of the rule of law is the principle of legality, which expresses the fundamental idea that the exercise of public power is legitimate only when lawful.⁷ In this context the Court first stated that the body exercising the public power must not exercise any power that is beyond that conferred upon it by the law.⁸ Secondly, the Court held that the exercise of public power must not be arbitrary, but rational. The authority found in the case of *Pharmaceutical Manufacturers Association*⁹ was relied on where it was held that it is a requirement of the rule of law that the exercise of public power by public functionaries should not be arbitrary. A decision is rational if it is rationally

⁷ Hoexter *Administrative Law* 117.

⁸ *Cape Bar Council* case para 25; *Fedsure Life Assurance Ltd v Greater Johannesburg Transnational Metropolitan Council* 1999 1 SA 374 (CC) para 58.

⁹ *Cape Bar Council* case para 26; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 33.

related to the purpose for which power was given.¹⁰ In testing whether a decision is rational or not, the reasons for taking such a decision should be submitted in order for affected parties to establish if their matter can be reviewed.¹¹ Such prevention by the principle of the rule of law of the arbitrary and irrational exercise of public power goes hand in hand with transparency, which contributes towards a culture of justification.¹² The case of the *President of the Republic of South African v SA Rugby Union*¹³ emphasised the need for the rational and non-arbitrary exercise of public power by showing that the principle of legality requires holders of public power to act in good faith.

(b) Transparency and accountability as requirements for just administrative action

In order to assess whether a public functionary has exercised public functions in a rational and non-arbitrary manner, it is required of such a functionary to exercise such functions in an open and accountable manner.

The Court stated that section 195 of the *Constitution* requires that public administration be governed *inter alia* by "the democratic values and principles enshrined in the Constitution," including the principles that public functionaries must be "accountable" and that "transparency must be fostered".¹⁴

It was stressed that the Judicial Service Commission as a public body created to serve the public's interest must perform its functions openly and transparently. Such a requirement is consistent with a culture of justification which signals a decided rejection of past odious laws, policies and practices.¹⁵

The transparent exercise of public functions goes hand in hand with the constitutional right of access to information. In terms of section 23 of the *Constitution* everyone has the right of access to all of the information held by

¹⁰ *Cape Bar Council* case para 27.

¹¹ *Cape Bar Council* case para 30.

¹² *Cape Bar Council* case para 30.

¹³ *Cape Bar Council* case para 49; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 17.

¹⁴ *Cape Bar Council* case para 20,57.

¹⁵ *Cape Bar Council* case para 29; *President of RSA v M & G Media Limited* 2011 4 BCLR 363 (SCA) para 9.

the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.¹⁶ The purpose of section 23 according to the case of *Phato v Attorney General*¹⁷ is to create a system which holds government accountable and therefore creates public confidence in the administration of public affairs.

The Court also relied on the case of *Rail Commuters Action Group*,¹⁸ wherein it was stated that the giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision makers know that they can be called upon to explain their decisions and thus are forced to evaluate all the relevant considerations correctly and carefully.¹⁹

4 Consequences and criticism of the Judicial Service Commission's conduct

The failure of the Judicial Service Commission to provide reasons damages the culture of justification, accountability and transparency, which culture is essential for accountability in governance. The continuous failure to perform public functions lawfully could eventually lead us back to the odious laws, policies and practices of the past. The Judicial Service Commission's failure to fill the remaining vacancies affects the right of members of the community to access the courts, as it depletes the capacity of the courts, which are already inundated with matters to be allocated trial dates, resulting inevitably in long delays. The continuous failure to fill the vacancies and appoint qualified short-listed candidates amounts to the public being denied the best judicial resources at the country's disposal. The lack of transparency in the Judicial Service Commission's recommendation criteria leads to the creation of

¹⁶ Hoexter *Administrative Law* 92.

¹⁷ *Phato v Attorney-General, Eastern Cape* 1995 1 SA 799 (E) para 1.

¹⁸ *Cape Bar Council* (note 2 above) para 29; *Rail Commuters Action Group v Transnet Limited t/a Metrorail* 2005 4 BCLR 301 (CC) para 76.

¹⁹ Wesson and Du Plessis 2008 *SAJHR* 187.

speculation that perhaps only executive-minded candidates will be recommended for judicial appointment.²⁰

5 Lessons to be learned

No public functionary is immune to the *Constitution* and most importantly to the principle of the rule of law. Every organ of state exercises its powers in terms of the *Constitution*, and is therefore automatically bound by the Bill of Rights and in this case, the duty to render just administrative action. The applicant's right to administrative justice was infringed in this case as it were not provided with reasons. Such reasons would have enabled the applicant to evaluate whether or not its application had been carefully considered by the Judicial Service Commission.

Openness is an essential element that is required when state organs render public functions. In this case the Judicial Service Commission had to clearly indicate the criteria that it had followed when making its recommendations.

The Judicial Service Commission's main function is to make recommendations of appropriate and qualified candidates for judicial appointment. That is the power that it has been granted in terms of the *Constitution*. Its failure to make further recommendations when qualified candidates were available raises the question as to whether their decision was rational. What was the Judicial Service Commission seeking to achieve when it failed to make the recommendations? The failure of the Judicial Service Commission to provide reasons for its conduct created a reasonable impression that their decision not to make any judicial recommendations was indeed irrational. The important lesson to be learned is that applicants will have the right to have the Judicial Service Commission's conduct reviewed if such conduct is thought to be irrational and thus against constitutional principles.

6 Conclusions

The ruling of the Cape Bar Council case serves as a good example that illustrates how any public functionary is subject to constitutional control when rendering public services. Such control is essential in order to ensure that the abuse of power does not take place and that the community benefits from public services.

The Judicial Service Commission should take into account that its conduct when performing its constitutionally mandated tasks should at all times comply with the principle of the rule of law, as well as the principles of openness and accountability.

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LIST OF ABBREVIATIONS

SAJHR

South African Journal on Human Rights