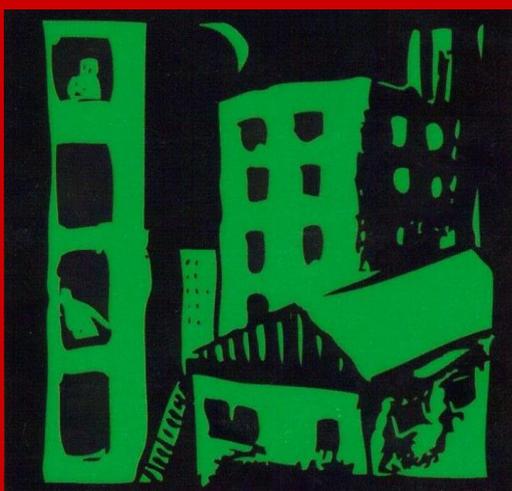


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**The implications of
the decision in
*Helen Suzman
Foundation v
Judicial Service
Commission* 2018
(7) BCLR 763 (CC) 8
on the functioning
of the South African
Judicial Service
Commission**

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ABSTRACT

*The article examines the implications of the judgment of the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission* 2018 (7) BCLR 763 (CC) 8 on the functioning of the Judicial Service Commission (JSC). The judgment has brought to the fore a new lease of life*

relating to the JSC's post-interview deliberations as a disclosable record in terms of Rule 53(1)(b) of the Uniform Rules of Court. The disclosure seeks to provide an insight into the decision-making process of the JSC in the appointment of judicial officers in South Africa. It is argued that the judgment is two-pronged: first, the disclosure of the post-interview record enhances the culture of justification for decisions taken, which advances the foundational values of the new democratic dispensation; secondly, it creates uncertainty about the future management and protection of the JSC processes in the undertaking of robust debates on the post-interview deliberations. It then questions whether the JSC members will be privileged in their engagement with the suitability of the candidates to be recommended for appointment by the President. The question is raised against the uncertainty about which decision of the JSC will be challenged that will need the disclosure of the record because the judgment does not entail the national disclosure of the record in respect of each candidate but applies only when there is an application for review of the JSC decision.

Key words: Judicial Service Commission, appointments, discretion, judiciary, independence, rule of law, discretion, accountability, transparency, human rights.

1 INTRODUCTION

The establishment of the Judicial Service Commission (JSC) in terms of section 178 of the South African Constitution (Constitution),¹ with powers to nominate and recommend candidates of outstanding merit for judicial appointment by the President,²

¹ The Constitution of the Republic of South Africa 1996.

² See s 174 of the Constitution which provides :

- “(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
- (3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
- (4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
 - (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
 - (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
 - (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.
- (5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.

bears great significance for the way in which it undertakes this process. Of particular relevance is the affirmation in section 178(6) of the Constitution which empowers the JSC to determine its own procedures. The adoption of the Judicial Service Commission Act (JSC Act),³ as amended by Act 20 of 2008, gives effect to the Constitution and requires the publication of the procedure of the Commission by the Minister in order to give content to the requisites of section 178(6) of the Constitution.⁴ The subsequent result of the latter imperative was the adoption of the Procedure of the Commission (Procedure)⁵ which entrenches the independence of the JSC in the determination of its own processes.

The autonomy of the JSC in the regulation of its own processes is linked to the provisions of Rule 53 of the Uniform Rules of Court.⁶ This Rule encapsulates the disclosure of a record which has a bearing on the way in which the JSC reaches and makes decisions in the exercise of its constitutional obligations like any other body in South Africa. The duty to disclose attaches and gives weight to the obligation of the JSC to take decisions with due regard to the fundamental principles of the dawn of the new democratic dispensation, such as, constitutionalism, the rule of law, democracy, separation of powers, transparency, and accountability.⁷

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- (6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.
 - (7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.
 - (8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.”

³ Judicial Service Commission Act 9 of 1994.

⁴ See s 5 of the Judicial Service Commission Amendment Act 20 of 2008 (JSC Amendment Act).

⁵ Published in *GG* 404 on 29 March 2018.

⁶ See particularly Rule 53(1)(b) which provides: “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: 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”.

⁷ See also s 1 of the Constitution which affirms the foundational values of the new constitutional dispensation which envisages South Africa “as one, sovereign, democratic state founded on...:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voter’s roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness”.

The intersection of the two, the duty to disclose and conformity with the principles of the new dawn of democracy, is in accordance with the foundational role of the JSC in the appointment of judicial officers as envisaged in section 174 of the Constitution. This section states the fundamental factors which must be borne in mind in the selection process wherein potential candidates are required to be properly qualified in their training and experience. This means that candidates are required to have integrity, intellectual capacity, independence, objectivity, authority, communication skills, efficiency, and the ability to understand and deal fairly with all persons and communities served by the courts.⁸ The expected qualifications are interwoven with an acknowledgement of the impact of South Africa's history which continues to manifest itself today,⁹ hence the requirement for the consideration of the racial and gender composition of the judiciary as envisaged in section 174(2).¹⁰ Ntlama,¹¹ argues that the JSC prides itself for having made great strides in giving content to its obligation of developing processes in the fulfilment of its role in selecting a crop of judicial officers that have to carry the aspirations of the new dawn of democracy.

The selection is grounded in processes that seek to ensure the appointment of candidates who possess the technical and professional expertise, including the attributes to act independently, both personally and institutionally, in the adjudication of matters brought before them. This entails the selection of candidates who will not shirk their responsibility even in the face of intimidation and threats, as evidenced by

⁸ See Part 3, s 9(1), Commonwealth Secretariat "Model law on judicial service commissions" Office of Civil and Criminal Justice Reform, Commonwealth Publisher (2018) at 11.

⁹ The history was contextualised in *Prinsloo v Van der Linde* 1997 (6) BCLR 759 when the Court at para 20 held that

"until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and disadvantage. While our country, unfortunately, has great experience in constitutionalising inequality, it is a newcomer when it comes to ensuring constitutional respect for equality. At the same time, South Africa shares patterns of inequality found all over the globe, so that any development of doctrine relating to section 8 would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity".

¹⁰ The continued manifestation of South Africa's history was acknowledged by the Court in the *South African Police Services v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) judgment at para 29 as it held that "[the Constitution] enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. *This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds*". (my emphasis)

¹¹ See Ntlama N "Transformation of the judiciary: a measure to weaken its capacity" presented at the International Workshop entitled "Constitutional rights, judicial independence and the transition to democracy: twenty years of South African constitutionalism" organised by the New York Law School held on 13-16 November 2014, New York, available at <http://www.nyslawreview.com/south-africa-program> (accessed 30 March 2019).

the break-in at the Office of the Chief Justice of South Africa.¹² The break-in did not deter the judiciary from upholding the gains of the new democracy in safeguarding the principles of constitutionalism, protection of human rights and respect for the rule of law which seemed to be threatened by the break-in at the office of the highest judicial authority which holds various types of information that have to be kept confidential for the security of the Republic.

Notwithstanding the progress made since 1994, the JSC has been the subject of litigation, debates, and opinions about the way in which it applies and exercises its own procedures.¹³ Various commentators have argued against the decisions of the JSC for the appointment of certain candidates which were recommended to the President. The commentators did not only argue against the recommended appointments but questioned the credibility of the JSC in the implementation of its own processes.¹⁴ It is in this regard that the record-keeping process and the disclosure of such information became the subject of litigation, resulting in the ordering of the JSC to go further and disclose its post-interview record in the *Helen Suzman Foundation v Judicial Service Commission (HSF case)*¹⁵ judgment.

With this background in mind, the purpose of this article is to examine the implications of the *HSF case* judgment on the work of the JSC relating to the disclosure of the record of its post-interview deliberations. This judgment has a long history of litigation which emanated from the Western Cape High Court, and the purpose of the article is limited to the extension of the disclosure of the record as envisaged in Rule 53(1)(b) of the Uniform Rules of Court with reference to the post-interview deliberations of the JSC on the selection of candidates for judicial appointment. It is argued that the judgment is two-pronged: first, the disclosure of the post-interview record enhances the culture of justification for decisions taken which advances the foundational values of the new democratic dispensation: secondly, it creates

¹² South Africa “Parliament disturbed by Chief Justice burglary” 19 March 2017 available at <https://allafrica.com/stories/201703200090.html> (accessed 25 May 2020).

¹³ Kriegler J “JSC decision biggest threat to the rule of law” *Legal Brief Today* 31 March 2019 available at <https://legalbrief.co.za/diary/legalbrief-today/story/jsc-decision-biggest-threat-to-rule-of-law-kriegler/print/> (accessed 31 March 2019); *Freedom under Law v Acting Chairperson: Judicial Service Commission* [2011] 3 All SA 513 (SCA); Hoffman P “Body blows to the rule of law from the President and the JSC” 31 October 2012 available at <https://worldjusticeproject.org/news/body-blows-rule-law-president-and-jsc> (accessed 31 March 2019); Siyo L & Mubangizi J “The independence of South African judges: a constitutional and legislative perspective” (2015) 18 (4) *Potchefstroom Electronic Law Journal* 817.

¹⁴ See also *Premier of the Western Cape Province v Acting Chairperson of the Judicial Service Commission* [2010] ZAWCHC] 80; Malan K “Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa” (2014) 17 (5) *Potchefstroom Electronic Law Journal* 1965; Du Preez J “Is the JSC serving the best interest of South Africa, Constitution and independent judiciary?” FW De Klerk Foundation 18 December 2013 available at <https://www.fwdeklerk.org/index.php/en/latest/news/221-article-is-the-jsc-serving-the-best-interests-of-south-africa-the-constitution-and-an-independent-judiciary> (accessed 20 May 2020).

¹⁵ *Helen Suzman Foundation v Judicial Service Commission* 2018 (7) BCLR 763 (CC) 8.

uncertainty on the future management and protection of the JSC processes in the undertaking of robust debates on the post-interview deliberations. It then raises the question whether the JSC members will be privileged in their engagement with the suitability of the candidates to be recommended for appointment by the President. The question is raised against the uncertainty about which decision of the JSC will be challenged that will need the disclosure of the record because the judgment does not entail the national disclosure of the record in respect of each candidate but applies only when there is an application for the review of the JSC decision.

2 BRIEF FACTS

Without engaging with the litigious history of this case, it is worth mentioning that the bone of contention was the disclosure of the post-interview deliberations of the JSC as a Rule 53(1)(b) record of the Uniform Rules of Court. An application was made for the disclosure of all other relevant documentation relating to each of the candidates who were recommended for the Western Cape High Court Division. The information was delivered in six lever-arch files containing the reasons for the decision by the JSC; the transcripts of the JSC interviews; each candidate's application for appointment; comments on each candidate by various professional bodies and individuals; and related research, submissions and correspondence.¹⁶

However, it turned out that the disclosed information was short of the "distilled record" of the post-interview record that was prepared by the Chief Justice which the applicants were not aware of. It was this record that was the subject of contention. Both the High Court and the Supreme Court of Appeal (SCA) held that private deliberations of the JSC were not part of the Rule 53(1)(b) record, with the SCA qualifying that they are not necessarily excluded but do not form part of the record.¹⁷

The applicant challenged the decision of the SCA and argued that it "undermined procedural fairness, curtails the efficacy of rule 53 in a manner inconsistent with open, transparent decision-making, undermines the ability of the courts to exercise their power of judicial review and encourages selective disclosure by respondents in review application[s] and the non-disclosure of the record breaches section 34 of the Constitution".¹⁸ On the other hand, the respondent argued against the disclosure and contended that "there is a distinction between the record served before the body and the deliberations of that body. While disclosure may be necessary, that cannot be the norm. It also argued for the confidentiality of its deliberations in order to promote rigour and candour, encourage future applications and protection of the dignity and privacy of the candidates and may also discourage the JSC from recording its deliberations in the future".¹⁹

¹⁶ *HSF* case (2018) at para 3.

¹⁷ *HSF* case (2018) at para 5.

¹⁸ *HSF* case (2018) at para 6.

¹⁹ *HSF* case (2018) at para 7.

With the arguments made, the first question was whether the Court had jurisdiction to determine the matter, with a further qualification that if it does, whether leave to appeal must be granted? The second question was dissected into two to determine whether deliberations in general ought to be excluded from Rule 53 and whether the JSC deliberations, in particular, ought to be excluded?²⁰

The question of jurisdiction was answered in the affirmative by the Court because it raised a constitutional issue of the right of access to the equality of the arms of State as envisaged in section 34 of the Constitution.²¹ The Court undertook a strenuous exercise in responding to the second question whether the private deliberations may be included as a Rule 53(1)(b) record. In this regard, it first took into account the importance of the provision of the record within the context of the right of access to court as envisaged in section 34 of the Constitution and the interpretation of all law and conduct within the framework of section 39(2) of the Constitution.²²

The Court reasoned that the provision of the record enables the interrogation of the reasonableness of the decision-making process which may result in the assessment of the lawfulness of its outcome.²³ The Court contextualised the significance of Rule 53 and cited the *Jockey Club of South Africa v Forbes (Jockey Club case)*²⁴ judgment with approval, that it is meant to “facilitate and regulate the applications for review”.²⁵ The Court adopted the “relevance test” which entails the “assessment of the decision sought to be reviewed and not the case to be pleaded in the affidavit”.²⁶ It then drew a distinction between Rule 35 and Rule 53 with the former relating to the discovery of documents which are relevant to the pleaded case whilst the latter relates to grounds of review changing later.²⁷

The Court acknowledged that the JSC’s confidentiality concerns cannot be taken lightly but argued that the disclosure has huge constitutional implications because it relates to the very “make-up” of an important and constitutionally created arm of State, namely, the judiciary, which is the final arbiter in ensuring constitutional compliance.²⁸ For the judiciary to carry out its mandate, it is important for it to continue to enjoy public confidence. The appointment process must be able to attract the best candidates

²⁰ *HSF case* (2018) at paras 9 and 21.

²¹ Section 34 of the Constitution provides: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

²² Section 39(2) reads as follows: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

²³ *HSF case* (2018) at paras 13-15.

²⁴ *Jockey Club of South Africa v Forbes* [1992] ZASCA 237; 1993 (1) SA 649 (A) at 661.

²⁵ *Jockey Club case* in *HSF case* at para 13.

²⁶ *HSF case* (2018) at para 26.

²⁷ *HSF case* (2018 at) para 26.

²⁸ *HSF case* (2018) at para 31.

as judges in order to have a strong judiciary in accordance with the requirements of sections 174(1) and (2).²⁹ The Court also dismissed the concerns relating to the JSC members and of the interests of the candidates, including the latter's privacy and dignity rights arguments. It then considered the composition of the JSC and held that it will be difficult to comprehend that members would be "timorous faint hearts"³⁰ to debate with candour and robustness without impropriety.³¹ The Court found it hypocritical of the JSC to argue against the disclosure on the basis of "confidentiality" because the interviews are held in public and any other view that Commissioners might have against a candidate should be raised in that arena in order to enable the candidate to respond thereto. This means that the embarrassing moment is both for the members and candidates during the public interviews as the former would have to refrain from making inappropriate comments. The latter would have an opportunity at the stage of public interviews to respond to any question and not at the post-interview deliberations which are less stressful than the dreadful public interviews which are widely publicised.³²

The Court also linked the disclosure of the record to the evolution of the principles of transparency which "are of singular importance in South Africa coming – as we do – from a past where governance and administration were shrouded in secrecy. If we are truly to emancipate ourselves from that past, all our democratic constitutional institutions must espouse, promote and respect these values. The blanket secrecy that the JSC is advocating is at odds with this imperative. And this is especially so, regard being had to the fact that the JSC's claim to secrecy does not bear scrutiny".³³ The "secrecy ... might result in negative public perceptions not only about the JSC itself, but also about the very senior judiciary in respect of whose appointment it plays an important role".³⁴

There are only exceptional circumstances that may justify the non-disclosure of the record, as the Court held that "the fact that a number of other relevant documents and reasons distilled from the deliberations have been provided does not detract from the unfairness of withholding other relevant information".³⁵ Overall, the JSC is required to engage in robust discussions around the potential and suitability of the candidate and not in some form where the candidate will not be in a position to respond to issues raised against him.

²⁹ *HSF* case (2018) at para 34.

³⁰ *HSF* case (2018) at para 38 extracted from *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490F.

³¹ *HSF* case (2018) at paras 38-39.

³² *HSF* case (2018) at para 40.

³³ *HSF* case (2018) at para 65.

³⁴ *HSF* case (2018) at para 66.

³⁵ *HSF* case (2018) at para 77.

3 THE HOLISTIC APPROACH ON THE DISCLOSURE OF RECORDS

3.1 The constitutional imperatives and the functioning of the JSC

The premise upon which this case was decided was the JSC's constitutionalised discretionary powers that are bestowed on its independence to determine its own procedures, with reference to the disclosure of post-interview deliberations as a Rule 53(1)(b) record. I must first pause to mention, as noted above, that section 178(6) of the Constitution places a broader authority on the JSC to determine and control its own processes.³⁶ Regulations 3(j) and (k) of the Procedure³⁷ are of fundamental importance in guiding the manner in which the JSC adheres to the prescripts of the new dawn of democracy. The Regulations entrench the discretion of the JSC to deliberate privately and then vote in a secret ballot to obtain a majority for the appointable candidate. The determination of procedures is directly linked to the prohibition on the disclosure of confidential information as envisaged in section 38(1) of the JSC Act except:

- “(a) to the extent to which it may be necessary for the proper administration of any provision of this Act;
- (b) to any person who of necessity requires it for the performance of any function in terms of this Act;
- (c) when required to do so by order of a court of law; or
- (d) with the written permission of the Chief Justice”.

The JSC, without the authority envisaged in Regulation 3 of the Procedure and section 38(1) of the JSC Act will be constrained in its ability to put in place measures that are designed for conducting its business in an effective manner within the framework of the ideals of the new democratic dispensation.³⁸ The significance of these provisions is to entrench the powers of the JSC to determine its own procedures to be “necessarily broad and a framework of good governance”.³⁹

However, the powers are also subject to constitutional scrutiny, as envisaged in section 2 of the Constitution which invalidates any law or conduct that is inconsistent with it. The supremacy of the Constitution was concretised in *De Lille v Speaker of the National Assembly (De Lille case)*⁴⁰ when the Court held:

“[I]t is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning,

³⁶ See the “Procedure”.

³⁷ The regulation provides: “(j) After completion of the interviews for a specific Court, the Commission shall deliberate in private and shall after deliberation, decide upon the candidates to be recommended for appointment by a majority vote. The voting process shall be conducted by way of secret ballot. (k) The Commission shall announce publicly the name of the recommended candidate for each vacancy.”

³⁸ See Senatle SJ “Review procedure – extent of record on review” (2018) *De Rebus* 42.

³⁹ *Motata v Minister of Justice and Correctional Services* [2017] 1 All SA 924 (GP) at para 44.

⁴⁰ *De Lille v Speaker of the National Assembly* [1999] 4 All SA 241.

can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances.”⁴¹

It is deduced from *De Lille case* that no institution, including the JSC, is immune from constitutional scrutiny because “all law [and/or conduct] derives its force and authority from the Constitution and is thus subject to its control”.⁴² In this way, the functioning of all the institutions is examined through the lens and scheme of the Constitution which is also traced in the context of South Africa’s history. This history was affirmed in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd (Hyundai case)*⁴³ when the Court held:

“... the Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.”⁴⁴

Without a focus on the impact of this history, it is clear that the Constitution is designed as foundational to the reinforcement of the rule of law in the regulation of authority by all bodies, branches and organs of the State. The rule of law underpins the regulatory framework of the new constitutional order as envisaged in section 1 of the Constitution. This was also expressed by the Court in the *Economic Freedom Fighters v Speaker of the National Assembly (EFF case)*⁴⁵ judgment:

“...the rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by

⁴¹ *De Lille case* (1999) at para 14.

⁴² See *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at para 35.

⁴³ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2000 (10) BCLR 1079.

⁴⁴ *Hyundai case* at para 21.

⁴⁵ *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (5) BCLR 618 (CC).

those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.”⁴⁶

It is evident, as noted above, that the functioning of the JSC is equally grounded on the principle of the rule of law which “fits seamlessly into our constitutional order ... as a good governance-facilitating and abuse of power-negating weapon in our constitutional armoury.”⁴⁷ The rule of law is the cornerstone and lies at the heart of the new constitutional order. It provides a framework for testing the rationality of the decision taken in the exercise of public power.⁴⁸ It is a yardstick that recognises the need for discretionary decision-making, thus, within strictly defined rules and principles. These principles are designed to ensure “certainty in the reinforcement of the legally-based outcome that guard against arbitrary and unpredictable decisions that go beyond the limits of the law.”⁴⁹

The importance of the rule of law touches on the definition of an organ of State as envisaged in section 239 of the Constitution. The section defines an organ of State as:

- “(a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution:
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, *but does not include a court or a judicial officer* (my emphasis).”

Gleaning from the definition in section 239, the JSC is also an organ of State because it exercises authority of a public nature and is required to act within the clearly defined and lawful powers that are conferred on it.⁵⁰ These powers reinforce the establishment of the system of governance that, in the context of the JSC, seeks to regulate the appointment of judicial officers in a fair and just manner that is consistent with the structural safeguards that ensure accountable, responsive and open governance.⁵¹ The powers, as noted above, are not immune from constitutional scrutiny as correctly captured in the *Mail & Guardian v Judicial Service Commission (Mail & Garden case)*⁵² judgment. In this case, the Court had to review the discretionary powers of the JSC as a public body that exercises authority within the clearly and well-defined restrictions of

⁴⁶ *EFF* case (2016) at paras 74-75.

⁴⁷ *Electronic Media Network Limited & others v e.tv (Pty) Limited & others* [2017] ZACC 17 para 6.

⁴⁸ See Ngcobo CJ as he then was, in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (5) BCLR 391 (CC) at para 49.

⁴⁹ See Malan K “The rule of law versus decisionism in the South African constitutional discourse” (2012) *De Jure* 272 at 275.

⁵⁰ See especially s 239 (b)(ii), which excludes a judicial function.

⁵¹ Govender K “Power and constraints in the Constitution of the Republic of South Africa 1996” (2013) 13 *African Human Rights Law Journal* 82 at 83.

⁵² *Mail & Guardian v Judicial Service Commission* 2010 (6) BCLR 615 (GSJ).

administrative action,⁵³ as envisaged in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The case concerned the decision of the JSC as to whether the barring of the members of the media at its hearing was lawful. It held that the JSC decisions are of an administrative and public nature and fall to be reviewed in terms of the PAJA.⁵⁴ This is of great relevance for the scrutiny of the discretionary powers of the JSC, to ensure their alignment with the interpretation which is in conformity with the requisites of section 39(2) because the JSC's role is critical in ensuring its credibility in following the letter of the law in the exercise of its procedures. This, in turn, gives credence to the integrity of the judiciary.⁵⁵

The public status of the JSC is further endorsed in section 195 of the Constitution, which entrenches the basic values and principles that govern public administration. The establishment of the JSC, with a constitutionalised-oriented focus to be regulated and governed by, amongst others, the substantive features of the rule of law, is rooted in the principle of legality. This is directly linked to the decision-making process of the JSC which envisages rationality in its outcomes.⁵⁶ Simply put, in fairness, the JSC's conduct is grounded in the principle of legality to ensure adherence to its constitutionalised functions. The JSC is required to undertake this particular role in a transparent manner that further demonstrates the impartiality in the outcomes of the decisions made. As stated by the Court in the *HSF case*:

“Generally, the only way to test the legality of the exercise of this power completely and thoroughly is to afford an applicant for review access to *all* material relevant to that exercise of power. If a public functionary can withhold information relevant to the decision, there is always a risk that possible illegalities remain uncovered and are thus insulated from scrutiny and review. That is at variance with the rule of law and our paramount values of accountability, responsiveness and openness. This affects not only the individual litigant, but also the public interest in the exercise of public power in accordance with the Constitution. It must, therefore, be in truly deserving and exceptional cases that absolute non-disclosure should be sanctioned.”⁵⁷

Adherence to compliance with the law is the central tenet in the regulation and exercise of the discretionary powers of the JSC in its processes of appointing judicial officers. Thus, with a sharply focused orientation on adherence to the constitutionalised principles on the disclosure of the post-interview deliberations, the question is raised on the future implications of the *HSF case* judgment on the

⁵³ *Mail & Guardian case* (2010) at para 15.

⁵⁴ *Mail & Guardian case* (2010) at para 15.

⁵⁵ Background paper: Judiciary: twenty year review, South Africa 1994-2014 available at <https://www.dpme.gov.za/publications/20%20Years%20Review/20%20Year%20Review%20Documents/20YR%20Judiciary.pdf> (accessed 15 May 2020).

⁵⁶ See *Pharmaceuticals Manufacturers Association of South Africa: in re Ex Parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) at para 20.

⁵⁷ *HSF case* (2018) at para 67.

functioning of the JSC. Was the quest for disclosure an ideal goal for the processes of the JSC? Does it also mean the blanket disclosure of all the “supposedly needed information”?

3.2 Confidentiality “knocked out” in favour of transparency

Considering South Africa’s history and impact of litigation on litigants, it is essential for all citizens in need of information from various bodies to be provided therewith in order to claim their rights. The disclosure of records by all bodies is crucial for the enforcement of constitutional rights, such as, the right of access to courts and access to information, amongst others, coupled with the remedies to be provided. It is not denied that access to justice for an average person in South Africa is expensive, is characterised by its complexity, and is also slow.⁵⁸ The disclosure of the full record in this regard seeks to ameliorate these challenges in the enforcement of the many fundamental rights that are entrenched in the Constitution.

The *HSF case* judgment has serious consequences for the functioning of the JSC. The consequence of the judgment is, first, derived from the lessons which require the JSC to adopt a “holistic approach” in the disclosure of records. In other words, the JSC need not be selective in the disclosure of the requested records. Though the disclosure has to be taken on a case by case basis and according to the merits of each case, it involves the provision of the requested record in its totality. It is prudent to note that the JSC need not simply pay lip service to the requirements of Rule 53(1)(b). This Rule creates standards that seek to balance the weighing up of competing interests upon the exercise of the discretion in the disclosure of the record. In this way, the Rule provides an opportunity for the JSC to strive towards the elimination of criticisms about the legitimacy of its own processes.⁵⁹ Fombad⁶⁰ identifies constraints that are placed on the JSC by the requirements of section 174(2) of the Constitution which requires the selection process to be reflective of race and gender representation in the judiciary. He argues that:

“the biggest challenge that the South African JSC faces today is that of rationally translating and reflecting the overarching national agenda of transformation through the appointment of judges in a manner that ‘broadly’ reflects the ‘racial and gender composition of the country’. This, it must be said, does not necessarily mean that a court, such as the Constitutional Court, must exactly reflect the racial

⁵⁸ Naidoo C (ed) “Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society” Final Report (Constitutional Justice Report) Prepared for The Department of Justice and Constitutional Development by the Democracy, Governance and Service Delivery Research Programme of the Human Sciences Research Council in partnership with the Nelson R Mandela School of Law of the University of Fort Hare, November 2015 available at <http://www.justice.gov.za/reportfiles/2017-cjpreport-nov2015.pdf> (accessed 23 April 2019).

⁵⁹ See Jara M & Msimang S “JSC interview raises concerns about the judicial appointment process” available at <https://section27.org.za/2011/09/jsc-interview-raises-concerns-about-judicial-appointment-process/> (accessed 23 May 2020).

⁶⁰ Fombad CM “Appointment of constitutional adjudicators in Africa: some perspectives on how different systems yield similar outcomes” (2014) 46(2) *The Journal of Legal Pluralism and Unofficial Law* 249.

composition of the country. *Nevertheless, the JSC has been unable to develop a clear, coherent and transparent agenda on how to deal with judicial appointments that reflect these vague criteria. Some of the recent appointments have been controversial and have given rise to criticisms that political considerations and the heavy hand of the executive are as strong and decisive in South Africa as they are in most other African countries.*⁶¹(my emphasis)

In a way, the JSC's holistic approach should be informed by the "wholeness" in the disclosure of records in order to curb some of the challenges identified by Fombad. It is essential for the JSC to lay bare its own processes that will be reflective of the manner in which it undertakes the transformative ideals envisaged in section 174(2) of the Constitution. This has the potential to diffuse suspicions about the "womanhood and race-based" approaches in the selection process of judicial officers.

Secondly, the voting process as envisaged in Regulation 3(k), which has not been contextualised by the main judgment, is flouted by uncertainty on its potential in the decision-making process of the JSC. The Regulation affirms the privacy of the JSC which may be endorsed by a secret vote with the successful candidates garnering the majority votes. I must pause to mention that the voting procedure of the JSC has caused some serious concerns for the judiciary. The legitimacy of the voting process has not been confirmed other than being classified as "shrouded in obscurity".⁶² Koen J in the *Cape Bar Council v Judicial Service Commission*⁶³ judgment declared the voting process as "irrational [because] it fails to provide an opportunity for members of the JSC to make a decision".⁶⁴ However, the SCA, on appeal, in *Judicial Service Commission v Cape Bar Council* refrained from confirming the unconstitutionality of the voting procedure because it was not invited to pronounce on the findings.⁶⁵

In essence, the SCA adopted what I would term a "stepping back approach" from the main thrust of commitment to the Constitution in the exercise of the adjudication process without fear or bias. Considering the "front and back line defence" that is played by the JSC in the selection of candidates of high integrity to the bench,⁶⁶ the Court cannot remain cautious in upholding a set of clearly established norms and standards in determining the principles involved in the process of constitutional adjudication. This is of particular importance since the norms do not exist in a vacuum, because they are created and nurtured by the legal profession at large where written reasons have to be provided for reaching a particular conclusion.⁶⁷

⁶¹ See Fombad (2014) at 263.

⁶² *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) at para 53.

⁶³ *Cape Bar Council v Judicial Service Commission* 2012 (4) BCLR 406 (WCC).

⁶⁴ *Cape Bar Council v Judicial Service Commission* 2012 (4) BCLR 406 (WCC) at para 141.

⁶⁵ *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) at para 53.

⁶⁶ See *HSF* case (2018) at para 37.

⁶⁷ Sharma S "The myth of judicial overreach" (2008) 43(10) *Economic and Political Weekly* 15 at 16; Kawadza H "Attacks on the judiciary: undercurrents of a political v legal constitutionalism dilemma?" (2018) 21 *Potchefstroom Electronic Law Journal* 1.

The confirmation of the irrationality of the voting process of the JSC could have provided insight on the crux of the post-interview deliberations. The Constitutional Court did not consider the implications of the *HSF case* judgment relating to the disclosure of the record on the future management of the voting process. This process is preceded by post-interview deliberations, and the question remains whether each of the JSC members would have to equally justify their choice of candidates for appointment to ensure a consolidation of a “distilled record” by the Chief Justice? The further question raised is whether the JSC would have to develop a set of guidelines regulating the voting process other than limiting it to secrecy? The voting procedure, if necessary, is a conclusive and final decision-making procedure of the JSC. On the other hand, the procedure makes it difficult to comprehend how each of the members would have to vote for each of the respective candidates in the light of this judgment. The deliberations might be frank, robust and carried out with candour, but it is the ‘voting’ that is the final determinant of the decision of the JSC. Hence there is a cloud of darkness over the simplicity of the voting process because even the ballot papers do not justify the garnering of votes by a particular candidate. As much as deliberations are foundational to the decision for the recommendation of a candidate, the bearing of the voting process on the rationality, lawfulness and fairness of the decisions made remains unclear.⁶⁸

Thirdly, the disclosure of the post-interview deliberations which are endorsed by the voting process fosters the principles of accountability and transparency in the execution of the JSC’s obligations. This is consistent with a culture of justification which should be distinct from South Africa’s past where laws, policies and practices were enforced with the distinct disadvantage of perpetrating subordination, especially by the judiciary.⁶⁹ Madala highlights the impact of the past on the functioning of the judiciary by pointing out:

“The judiciary tended to shy away from commenting critically on apartheid and its legal consequences in their judgments although there were many opportunities for them to do so. Perhaps they were not going to rock the boat; perhaps they considered it inappropriate; perhaps they considered themselves bound to apply the law as they found it. But on occasion, they went so far as to sanction discrimination in their courthouses even in the absence of laws compelling them to do so...”⁷⁰

He went on to highlight that ‘judicial officers often regarded these apartheid laws and practices as ‘normal law’. Those who did regard the laws as unacceptable did not consider it their place to comment on the laws’ character. The absence of compassion

⁶⁸ See an acknowledgement of the difficulty as expressed by Kollapen J in his dissent in the *HSF case* judgment as he argued for the retention of the confidentiality regime, at paras 211-212.

⁶⁹ See Madala TH “Rule under apartheid and the fledgling democracy in post-apartheid South Africa: The role of the judiciary” (2001) 26(3) *North Carolina Journal of International Law and Commercial Regulation* 743.

⁷⁰ See Madala (2001) at 750.

from these judgements drew very clearly the disjuncture between justice and humanity and the law and justice.”⁷¹

It is in this vein of South Africa’s history and its negation of the judiciary⁷² that the selection process, including its post-interview process, has to be devoid of irregularities that will taint the image of the judiciary. The contention is borne out by the fact that the JSC, as noted above, carries the “first and last line of defence” status in upholding the integrity of the judiciary. The JSC is an important institution in providing assistance to, and protection of, the independence, impartiality, dignity, accessibility and effectiveness of the courts because of the centrality of its role in the execution of the judicial mandate.⁷³ Chaskalson P in the *South African Association of Personal Injury Lawyers v Heath (Heath case)*⁷⁴ judgment shared the same sentiments and held that “the functions of the JSC are not inconsistent with the role of the judiciary in a democratic society. The appointment of judges is crucial to the functioning of independent courts.”⁷⁵ Hence the Code of Judicial Conduct adopted in terms of section 12⁷⁶ of the JSC Act entrenches adherence to the upholding of the independence of the judiciary as envisaged in article 4 of the Code which requires a judge to:

- “(a) uphold the independence and integrity of the judiciary and authority of the courts;
- (b) maintain an independence in the performance of judicial duties;
- (c) take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts; and
- (d) not ask for nor accept any favour or dispensation from the executive or interest group.”

Despite the affirmation of the independence of the judiciary in the Code and section 165 of the Constitution, it is the individual appointed candidates that have to uphold the institutional and personal independence of the judiciary. This means that judges have to decide cases independently, without fear or bias within the framework of the law including the influence from other judges themselves.⁷⁷ The lingering case of the Judge President of the Western Cape which has to date not yet been finalised by the JSC causes uncertainty on the application of this principle. The Judge President’s case goes years

⁷¹ See Madala (2001) at 752.

⁷² See also Du Toit L “Performance of the judiciary” in Institute for Democracy and Electoral Assistance Report *Assessing the performance of South Africa’s Constitution* (2016) South African Institute for Advanced Constitutional, Public, Human Rights and International Law, University of Johannesburg 1.

⁷³ See Malan (2014) at 1968.

⁷⁴ *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC).

⁷⁵ *Heath case* (2001) at para 32.

⁷⁶ Section 12(1) reads as follows: “The Chief Justice, acting in consultation with the Minister, must compile a Code of Judicial Conduct, which must be tabled by the Minister in Parliament for approval.”

⁷⁷ See Sillen J “The concept of ‘internal judicial independence’ in the case law of the European Court of Human Rights” (2019) 15(1) *European Constitutional Law Review* 104.

back when he was accused by Justices of the Constitutional Court of, allegedly, attempting to improperly influence the then two junior Justices of the Court. This case has been the subject of litigation which is beyond the scope of this article⁷⁸ other than noting that the principle of “gross misconduct”⁷⁹ which would have given effect to the individual autonomy of judges has not yet been determined by the Court.⁸⁰ The other principle is the institutional independence which protects the judiciary from other branches of government in order to ensure the safeguarding of the judicial process and protection of the individual independence of the judiciary. Section 165(3) of the Constitution shields the judiciary from interference by requiring the other two branches, the legislature and the executive, to ensure independence of the judiciary.⁸¹

The independence is intertwined with the principles of accountability and transparency which “knocked out” the “confidentiality” principle as “unreasonable” because it does not equate with the culture of justification relating to the disclosure of records on the decision made. Also, the affirmation of the principles of accountability legitimises the JSC processes and those of the judiciary itself as the Court in *HSF case* held that:

“These values are of singular importance in South Africa coming – as we do – from a past where governance and administration were shrouded in secrecy. If we are truly to emancipate ourselves from that past, all our democratic constitutional institutions must espouse, promote and respect these values. The blanket secrecy that the JSC is advocating is at odds with this imperative. And this is especially so, regard being had to the fact that the JSC’s claim to secrecy does not bear scrutiny.”⁸²

Fourthly, confidentiality is inconsistent with the JSC’s own procedure of providing a “distilled record” of the recommendations made.⁸³ It is evident that the JSC had always been conscious of its own obligations to provide reasons for the decision made, but fell short of including the record that would enable determination of the way in which the decision was reached.⁸⁴ Kollapen J endorsed the significance of the distilled record because it is “inextricably linked to the deliberations and the decision taken”.⁸⁵ The

⁷⁸ See *Hlophe v Constitutional Court of South Africa* (08/22932) [2008] ZAGPHC 289.

⁷⁹ See s 177(1)(a) of the Constitution.

⁸⁰ See Ntlama N “The Hlophe saga: a question for the institutional integrity of the judiciary” (2011) 8(8) *US-China Law Review* 758.

⁸¹ See *S v Van Rooyen* 2002 (8) BCLR 810 (CC) at paras 17-22.

⁸² *HSF case* (2018) at para 65, footnotes omitted. See also O’Regan J in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC). The Justice gave content to the significance of the principle of accountability and held (at paras 75-76) that “it is thus expressly mentioned in a range of provisions in the Constitution ... [and is] asserted not only for the state, but also for all organs of state and public enterprises [which] are accountable for their conducts [and it serves as] an important principle that bears on the construction of constitutional and statutory obligations.”

⁸³ *HSF case* (2018) at para 26.

⁸⁴ *HSF case* (2018) at para 24.

⁸⁵ *HSF case* (2018) at para 166.

importance of keeping the distilled record is essential as the Court in the *Cape Bar Council case* judgment held:

“[It] [c]onstitutes an indispensable part of the sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than 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 be forced to evaluate all the relevant considerations correctly and carefully. Moreover, ... the reasons given can help to crystallize the issues should litigation arise.”⁸⁶

This brings to the fore again the voting process, as noted above, which disables the JSC in determining how each of the members have voted for a particular candidate. The determination of the validity of the decision of the JSC through secret ballot does not give content to the rationale for the decision made because the members do not justify the reasons for voting for a particular candidate other than the deliberations before voting. These deliberations are not reflective of the outcome of the JSC decision because there are many possibilities for the members to vote for different candidates. The judgment is reflective that it is time for the JSC to conduct a self-evaluation and introspection of its own processes in order to generate public confidence in its decisions.

Fifthly, confidentiality, which may provide an opportunity for harshly criticising candidates in private deliberations, undermines the calibre of the members of the JSC themselves. Kollapen AJ in his dissenting view in the *HSF case* judgment appears to second-guess the calibre of the members and held that:

“ ... the loss of confidentiality in the deliberative process may result in deliberations that are not open, frank or robust but rather a carefully choreographed dialogue that is heavily influenced by the knowledge that every part of it is part of a disclosable record.”⁸⁷ (my emphasis)

The composition of the JSC is reflective of the high regard for the office which the members represent in the JSC. It will be scandalous of them to use the position and authority bestowed on them by their respective bodies to compromise the values of the new dispensation. The calibre of the JSC members and the status of the office they hold was articulated in the *Cape Bar Council case* judgment when the Court held:

“The JSC is not a ‘pricing’ or similar committee. Nor is it a media research or information gathering body. It is engaged in a process of the highest order. It

⁸⁶ *Cape Bar Council v Judicial Service Commission* 2012(4) BCLR 406 (WCC) at para 30.

⁸⁷ *HSF case* (2018) at para 199.

carries out a very important constitutional function in relation to the appointment of judges. The qualifications and number of members of the JSC have been selected for a particularly constitutionally significant purpose ...”⁸⁸

Deducing from the status of the JSC, Nkhata points out that:

- it stands a better chance of appointing candidates on merit by providing a stronger form of scrutiny of prospective candidates;
- has potential to reduce political patronage by utilising open and transparent appointment mechanisms;
- can lend an apolitical appearance to the selection process;
- places the selection authority in a position where it can best champion representativeness and transparency in the selection of judges. Transparency relates to the methods actually employed by the selection committee in identifying candidates for judicial office; and
- offers better prospects for creating an independent judiciary whose members do not owe debts of patronage to those who appointed them.⁸⁹

Sixthly, the disclosure seeks to deal with perceptions that deliberations are conducted with malice where robustness, vigour, honesty, truthfulness and absence of bias or prejudice are compromised. On the whole, it is clear that the JSC processes are subject to a constitutionalised framework that is required to infuse the principles of the new dawn of democracy. The holding of high office by members of the JSC requires objectivity in undertaking the power that is conferred upon them. Though not canvassed in this article the issue of transforming the judiciary, the bone of contention in the challenges facing the JSC, has always been the manner in which it carries out the transformative ideals in the selection process for the judicial officers.⁹⁰

4 CONCLUSION

The establishment and conferring of public power on the JSC has put the rationality test in the forefront of its decision-making scheme. This test is grounded in constitutional controls which are rooted in the foundational principles of the new dawn of democracy. The constitutional make-up of the JSC gives credence to the eligibility of the members because of the offices they hold in the respective bodies and institutions that elected them to serve in the body. Hence, the disclosure of the record in its entirety should not be seen as compromising the principle of confidentiality. The disclosure of a record is meant to ensure that litigants are not subject to decisions which are preceded by flawed processes which in turn may result in irregularities. The JSC, in the exercise of its discretion, is required to be frank and owes a duty of candour to give a true and comprehensive account of its decision-making process, which includes the private

⁸⁸ *Cape Bar Council case* (2012) at para 90.

⁸⁹ Nkhata JM “Safeguarding the integrity of judicial appointments in Malawi: a proposed reform agenda” (2018) 63 (2) *Journal of African Law* 377 at 384.

⁹⁰ See Malan K *There is no supreme constitution: a critique of statist-individualist constitutionalism* Stellenbosch: African Sun Media, Sun Press (2019).

deliberations. These deliberations have been included as a Rule 53 record, which reinforces self-regulation and ethical standards in the disclosure of information. The disclosure of a Rule 53(1)(b) record ensures the validation of the integrity of the JSC processes.

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