



CONSTITUTIONAL COURT OF SOUTH AFRICA

Helen Suzman Foundation v Judicial Service Commission

CCT 289/16

Date of hearing: 31 August 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 31 August 2017 at 10h00 the Constitutional Court will hear an application for leave to appeal against the decision of the Supreme Court of Appeal (SCA), handed down on 2 November 2016. The SCA upheld the decision of the High Court of South Africa, Western Cape Division, Cape Town (High Court), dismissing an interlocutory application brought by the applicant to compel the respondent to furnish the full record of its proceedings sought to be reviewed, including recordings of its deliberations. The High Court held that the deliberations of the Judicial Service Commission (JSC), in the execution of its mandate to advise the President on the appointment of judges, do not form part of the record of its proceedings for the purposes of rule 53(1)(b) of the Uniform Rules of Court.

On 4 June 2013, the Helen Suzman Foundation (HSF) instituted review proceedings against the JSC relating to a decision taken by the JSC pursuant to section 174(6) of the Constitution to advise the President on the appointment and non-appointment of Judges (main application).

The JSC was required, in terms of rule 53(1)(b) of the Uniform Rules of Court, to file “within fifteen days after receipt of the notice of motion . . . the record of such proceedings sought to be corrected or set aside, together with such reasons as [it] is by law required or desires to give or make . . .” with the registrar of the High Court. The JSC filed the record in August 2013. The record consisted of (a) the reasons for the decision by the JSC; (b) the transcripts of the JSC interviews; (c) each candidate’s application for appointment; (d) comments on each candidate by various professional bodies and individuals; and (e) related research, submissions and correspondence. The record did not include any minutes, transcripts or other contemporaneous records of the

JSC's official deliberations. HSF subsequently became aware that the JSC routinely records its deliberations. As a result, HSF launched an interlocutory application to compel the JSC to comply with rule 53(1)(b) and file a *full* record of the decision subject to the review – including the recordings.

The High Court held that, weighing HSF's interest against the JSC's need for confidentiality, the relief sought by HSF would not advance the JSC's constitutional and legislative imperatives. As a result, the High Court held that HSF is not entitled to the recordings as part of the rule 53 record.

On appeal to the SCA, that Court held that a decision-maker's deliberations do not automatically form part of the rule 53 record. The appeal was dismissed.

In this Court, HSF argues that the SCA's judgment undermines procedural fairness; limits rule 53 in a manner inconsistent with open, transparent decision-making; undermines courts' ability to exercise their power of judicial review; and encourages selective disclosure by respondents in review applications. The recordings are according to HSF "patently the most immediate and accurate record of the decision and the process leading up to the decision", and are indispensable to determining whether there is a rational connection between the deliberations, the decision and the reasons. HSF argues that without them, it is deprived of the procedural and substantive safeguards that are the very reason for rule 53. It contends that this breaches the equality of arms required by section 34 of the Constitution.

The JSC argues that there is still a distinction in our law between the record that served before a body and the deliberations of that body. It is submitted that whilst a disclosure of deliberations may be required in some circumstances, this would not be the norm. The JSC submits that there are good reasons for the confidentiality of the JSC's proceedings: promoting the rigour and candour of the deliberations; encouraging future applications; and protecting the dignity and privacy of applicants. Requiring disclosure may have the unintended consequence of discouraging the JSC from recording its deliberations in future.

The amicus curiae, the Trustees for the time being of the Basic Rights Foundation of South Africa, argue that the JSC has the power to regulate its own procedure. Clause 3(k) of the JSC rules of procedure provides that the JSC shall deliberate in private. According to the amicus curiae, there has been no challenge to the validity of this clause, or of the JSC's practice of not disclosing the deliberations. In their view, this is fatal to HSF's application.