



CONSTITUTIONAL COURT OF SOUTH AFRICA

Helen Suzman Foundation v Judicial Service Commission

CCT 289/16

Date of hearing: 31 August 2017

Date of judgment: 24 April 2018

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.

Today the Constitutional Court handed down judgment in an application for leave to appeal against an interlocutory order of the High Court of South Africa, Western Cape Division, Cape Town (High Court). The dispute concerns whether the Judicial Service Commission (JSC) is obliged, under rule 53(1)(b) of the Uniform Rules of Court (rules of court), to furnish a review applicant seeking the review and setting aside of a JSC decision with a recording of the private deliberations that inform the decision.

In October 2012 the JSC decided to recommend that the President appoint certain candidates as judges of the Western Cape Division of the High Court, and not to appoint others. This decision followed private deliberations held by the JSC after the candidates had been interviewed publicly. The Helen Suzman Foundation (HSF), a non-profit organisation, approached the High Court seeking to have that decision reviewed and set aside on the grounds that it was unlawful and irrational. The application was brought in the public interest. The JSC subsequently filed a record of its proceedings as required in terms of rule 53(1)(b) of the rules court. The record included reasons prepared by the Chief Justice following the deliberations. It did not include the deliberations themselves. The HSF discovered that the JSC routinely recorded its deliberations. The HSF therefore launched an interlocutory application in the High Court for an order compelling the JSC to provide the recording as part of the full rule 53(1)(b) record. The application was denied. The HSF approached the Constitutional Court for leave to appeal after an appeal against the interlocutory order failed in the Supreme Court of Appeal.

The HSF contended that rule 53(1)(b) exists to facilitate effective review proceedings and that review applicants are entitled to the record, lest they be forced to launch their review applications in the dark. This accords with the right of access to court or fair trial right enshrined in section 34 of the Constitution. The HSF argued that the standard for what information must be disclosed in the record is whether the information is relevant to the

impugned decision. It then argued that the recording of the deliberations was clearly the most relevant evidence of what considerations were factored into the decision-making process and was thus liable to be disclosed. It also argued that the disclosure of the recording under rule 53(1)(b) is crucial to holding the JSC accountable in its performance of a vital democratic state function.

The JSC argued that it is empowered by section 178(6) of the Constitution to determine and regulate its own procedure. Pursuant to this constitutional provision, it has made regulations that provide for its deliberations to be in private. In turn, the privacy of its deliberations entitles the JSC to withhold the recording of its deliberations. Also, continued the argument, section 38 of the Judicial Service Commission Act (JSC Act), the statute governing JSC processes, permits the non-disclosure of confidential information. Further, the JSC contended that the disclosure of its deliberations would hamper its ability to perform its constitutionally assigned role by, among other things, reducing the opportunity for candour in the deliberation process, discouraging potential applicants from subjecting themselves to such a process, and by endangering the privacy and reputations of applicants.

In a majority judgment concurred in by Zondo DCJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J, and Theron J (first judgment) Madlanga J reasoned that the JSC's contention for a blanket ban on disclosure, rather than a fact-specific case for non-disclosure, is unjustifiable in an open and democratic society in which the rule of law and the values of accountability, responsiveness and openness are paramount. The first judgment also held that rule 53(1)(b) helped to promote an important fundamental right, the right to a fair trial under section 34 of the Constitution, and thus rejected the argument that deliberations, as a class of information, can be shielded from disclosure in all circumstances. It also held that the broad terms of section 178(6) of the Constitution do not empower the JSC to determine procedures that are at odds with specific rights and foundational values contained in the Constitution. On the JSC's argument founded on section 38 of the JSC Act, the first judgment concluded that what this section protects from disclosure is "confidential" information. In this matter the JSC has pleaded for blanket non-disclosure without demonstrating why the content of the recording at issue in these proceedings is confidential. For purposes of section 38, confidentiality must be proved. And the JSC has failed to do that in the instant matter.

On the point that disclosure might be a dampener on the candour of deliberations, the first judgment held that JSC members worth their salt ought not to be deterred from deliberating freely and honestly purely because of the prospect that the content of the deliberations might be disclosed. It also held that worthy candidates were not likely to be deterred from availing themselves for interviews because of this same prospect.

Lastly, the first judgment held that the JSC has failed to demonstrate why recordings of its deliberations that are truly confidential may not be adequately protected by a suitably couched confidentiality regime. Such a regime could limit access to the deliberations only to the court concerned and a few individuals like the parties' lawyers.

Consequently, this Court has upheld HSF's appeal and set aside the orders of the High Court and the Supreme Court of Appeal. These orders are substituted with an order compelling the JSC to deliver the full recording of the proceedings sought to be reviewed by the HSF.

In a dissenting judgment (second judgment) Jafta J held that rule 53(1)(b) of the rules of court was never intended to apply to proceedings before the JSC and, even if it did, it would not

entitle a party to the deliberations of the JSC, as such deliberations do not form part of the record of proceedings as contemplated in the rule. The central issue, however, in this matter was whether the High Court properly exercised its discretion in terms of rule 30A of the rules of court, when it held that there was compliance by the JSC with rule 53(1)(b). Rule 30A confers a discretion on the High Court where there is non-compliance with any rules of court to grant an order it deems fit. This discretion is in line with the powers that the Constitution confers on the High Court, the Supreme Court of Appeal and this Court to regulate their own internal processes and is further consonant with the underlying purpose of the rules of court. The second judgment holds that this discretion was judicially exercised by the High Court. The second judgment would dismiss the appeal on this basis.

In a separate dissenting judgment (third judgment), Kollapen AJ considered whether deliberations form part of the record. In answering this question, he agreed with the first judgment that the general exclusion of deliberations from the record would not pass constitutional muster. However, the third judgment held that deliberations should only form part of the record if they satisfy the test for relevance. The judgment concludes that, even if the test for relevance is satisfied, the deliberations could still be excluded if there was a justifiable reason for their exclusion. In these proceedings, the third judgment held that the deliberations of the JSC were relevant to the decision that was under review and, as such – save for a legally justifiable reason – should be included in the record.

The third judgment also addressed the question of whether a justifiable reason existed for the exclusion of the deliberations of the JSC in the matter before this and found that a justifiable reason did exist in this case. According to the third judgment, preserving the confidentiality of the JSC deliberations not only served as a justifiable reason for the exclusion of the deliberations from the record, but was also necessary to safeguard multiple constitutional values encompassed in the Bill of Rights.

In conclusion, the third judgment held that the exclusion of the private deliberations of the JSC from the record would not violate HSF's right to properly bring review proceedings nor would it breach the principles of openness and transparency enshrined in the Constitution. The third judgment would dismiss the appeal with no order as to costs.