



THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY

14 September 2012

STATUS: Immediate

The Judicial Service Commission and Another v The Cape Bar Council and Another (818/11) [2012] ZASCA 115 (14 September 2012)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (SCA) today dismissed an appeal against a judgment and order of the Western Cape High Court, Cape Town (High Court). The High Court upheld an application by the Cape Bar Council (Bar Council) arising from a judicial appointment recommendation made by the Judicial Service Commission (JSC).

After interviewing seven shortlisted candidates to fill three positions on the High Court Bench, the JSC filled only one. The Bar Council brought an application to the High Court for a declaration that those proceedings and the decision not to fill the two vacant positions were unconstitutional, and that the JSC be ordered to reconsider the applications of the shortlisted candidates. The relief sought rested on two legs: the JSC was not properly constituted when it met to consider the applications and, as it had no reason not to fill the two positions, its decision to that effect was **irrational and therefore** unlawful. The JSC contested the grounds of the relief sought. It also raised the points that its decisions were expressly excluded from statutory review and that the Bar Council's application was defective as, in the light of his refusal to grant consent to being bound by the judgment, the successful

candidate should have been joined. The High Court however granted the relief sought by the Bar Council.

In dealing with the threshold points raised by the JSC, the SCA found that the successful candidate was not a necessary party to the court proceedings and thus should not have been joined. Furthermore it held the JSC's power to advise the President on the appointment of judges to be the exercise of public power and subject to review on the basis of irrationality.

Turning to the judicial recommendation decision, the court upheld the High Court's finding that the JSC had been unlawfully constituted. Neither the President of the SCA nor his deputy was present and it could not be shown that both were unavailable at the time. The decisions taken were therefore, excepting the appointment of the successful candidate not before the court, not validly taken.

The SCA also upheld the High Court's findings that the JSC's decision leading to the failure to fill the two judicial vacancies was irrational and that the reasons provided were wholly inadequate in the circumstances. The JSC contended that it had no duty to provide reasons for its decisions; that it had in any event given reasons for not selecting any of the unsuccessful candidates, namely that none had received enough votes; and that because of its secret voting procedure, it was not able to provide better reasons than those given. These contentions were not accepted by the court.

The SCA did decline an invitation to declare the voting process followed by the JSC unconstitutional. However, it held that since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment it is in principle obliged to give reasons for its decision not to do so. The response that a particular candidate did not **garner** enough votes does not meet that general obligation, because it amounts to no reason at all. Where the undisputed facts give rise to an inference that the decision not to recommend candidates was irrational, the failure by the JSC to adhere to its duty to give reasons leads, so found the court, to the confirmation of the inference.