IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 11897/2011

In the matter between:

THE CAPE BAR COUNCIL	Applicant
and	
THE JUDICIAL SERVICE COMMISSION	First Respondent
THE CHAIRPERSON, **JUDICIAL SERVICE COMMISSION**	Second Respondent
THE CENTRE FOR CONSTITUTIONAL RIGHTS	First *Amicus Curiae*
NORTONS INC	Second *Amicus Curiae*

J U D G M E N T

<u>KOEN J</u>:

<u>Introduction</u>

[1] The applicant, the governing body of the Cape Bar, a society of duly admitted advocates, applies for the following relief, as amplified during argument[1], against the Judicial Service Commission, as the first respondent, and the chairperson of the Judicial Service Commission, as the second

1 During argument the applicant added the words '(and who persist with their applications)' to paragraph 4 of the Notice of Motion

respondent:

'1. Condoning non-compliance with the rules of court and directing that the application be heard as one of urgency in terms of rule 6(12);

2. Declaring that the proceedings of the first respondents ('the JSC') on 12 April 2011 were inconsistent with the Constitution, unlawful and consequently invalid;

3. Declaring that the failure by the JSC on 12 April 2011 to fill two judicial vacancies on the Bench of this Court ('the WCHC') is unconstitutional and unlawful;

4. Directing the JSC, properly constituted, to reconsider afresh the applications of the short listed candidates who were not selected on 12 April 2011 for two vacancies on the WCHC (and who persist with their applications) in the light of the judgment of this Court;

5. Granting further or alternative relief.'

[2] The application is supported by two amici curiae. The first amicus curia is the Centre for Constitutional Rights, a non-party political and non-profit unit of the F W de Klerk foundation, a registered charitable trust. The second amicus curiae is Nortons Inc, a specialist firm of attorneys practising primarily in competition law, specialist litigation and general regularity work, which it maintains gives it an interest in the important public interest issues at stake in the application.

The meeting of the JSC sought to be reviewed:

[3] The application concerns the validity of the proceedings and actions of the JSC at its meeting of 12 April 2011 ('the meeting') when it convened to interview and select candidates for judicial appointment in respect of three vacancies on the bench of the WCHC. One candidate, Henney J, was recommended by the JSC for appointment and was subsequently appointed by the President of the Republic of South Africa in terms of s 174(6) of the Constitution on that advice of the JSC. No candidates were recommended in respect of the other two vacancies and they thus remained vacant.

Factual background:

[4] Earlier during 2011, the JSC advertised three vacancies for judicial appointment in respect of the WCHC and invited persons to apply. Numerous persons applied. A sub-committee of the first respondent produced a short list of seven candidates for the three vacancies. The seven candidates were advocate R A Brusser SC, Ms J I Cloete, advocate N Fitzgerald SC, Mr (now Judge) RCA Henney, Mr SJ Koen, advocate S Olivier SC, and advocate O L Rogers SC.

[5] The first respondent interviewed the short listed candidates on 12 April 2011. Thereafter it took a decision to recommend one, namely Henney J, for one of the posts. No other recommendations were made.

[6] When the aforesaid shortlisted candidates were interviewed and their selection decided upon, the President of the Supreme Court of Appeal ('the SCA') was not present at the meeting. Nor was the Deputy President of the SCA present at the meeting. The 12th of April 2011 was the last day of a session of the JSC which had commenced on the 4th April 2011 and terminated on the 12th April 2011. The President of the SCA had left the meetings of the JSC on the evening of the 11th April 2011 with the permission of the Chief Justice as President of the JSC. The Deputy President of the SCA was not invited to join the meeting as an alternate to the President of the SCA. Neither the President nor Deputy President of the SCA accordingly played any part in the deliberations of the meeting on 12 April 2011.

[7] The JSC has not sought to provide any reasons for its failure to request the attendance of the Deputy President of the SCA.

[8] When accused that the failure by the JSC to fill the two judicial vacancies on the WCHC was irrational, unfairly discriminatory and unreasonable and otherwise unconstitutional and unlawful, the respondents

advanced two explanations. The first is that the 'reason' for the failure to select any of the remaining six unsuccessful candidates was that none of them received a majority of votes from the members of the JSC. The second was that it is not possible for the respondents to provide reasons, and that it is in any event not legally required to do so.

[9] Three of the unsuccessful candidates, who were supported by the applicant namely advocates Fitzgerald SC, Olivier SC, and Rogers SC, and in particular Rogers SC who is referred to by all in glowing terms, were acknowledged by the spokesman of the JSC, as 'excellent in terms of technical competence'.

[10] The answering affidavit records that 'there is no dispute that the three candidates who are referred to are fit and proper and are appropriately qualified persons.'

[11] After the private deliberations by the members of the JSC, the members present at the meeting voted on each of the candidates. Thirteen or more members[2] of the JSC voted in favour of Mr Acting Justice Henney, twelve members voted in favour of Advocate Rogers SC. The other short listed candidates did not receive a sufficient number of votes. Fitzgerald SC and Olivier SC (as with Rogers SC) subsequently consented to the number of votes cast in their favour being made public. Fitzgerald SC secured nine votes and Olivier SC secured one vote. The numbers of votes cast in favour of Brusser SC, Ms Cloete, and Mr Koen are not known.

<u>The locus standi in iudicio of the applicant</u> :

[12] Although the respondents record that they dispute that the rights or interests of members of the applicant would be adversely affected by the

2 i.e. a majority of the members of the JSC, but the actual number has not been disclosed

decision of the JSC to recommend only one candidate, the deponent states that he does not wish to take issue with the legal standing of the applicant to bring the application. That concession is correctly made as the applicant's members in the course of performing their functions as advocates and appearing in the WCHC in pursuing justice for those they represent, would clearly have an interest in any appointment of judges to this division. More specifically, they would have a legal interest in the extended sense contemplated in s 38 of the Constitution.

<u>The legal framework relevant to this judgment</u>:

[13] The Republic of South Africa is founded on the values inter alia of supremacy of the constitution and the rule of law[3]. The Constitution is the supreme law. All law including the common law derives its source from the Constitution[4].

[14] In terms of section 2 of the Constitution:

(a) the Constitution is the supreme law of the Republic; and

(b) obligations imposed by it must be fulfilled.

[15] The first respondent is an organ of state as per the definition of 'organ of state' in section 239(b)(i) of the Constitution, being a 'functionary or institution … exercising a power or performing a function in terms of the Constitution...'

[16] Accordingly, the JSC is bound by the Bill of Rights in terms of s 8(1) of the Constitution.

[17] The composition of the first respondent is regulated by s 178(1) of the Constitution, the relevant parts of which provide:

3 s1(c) of the Constitution

4 s 2 of the Constitution; Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44

‘178 Judicial Service Commission

(1) There is a Judicial Service Commission consisting of -

(a) the Chief Justice, who presides at meetings of the Commission;

(b) the President of the Supreme Court of Appeal;

(c) one Judge President designated by the Judges President;

(d) the Cabinet member responsible for the administration of justice or an alternate designated by that Cabinet member;

(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) two practising attorneys nominated from within the attorneys’ profession to represent the profession as a whole, and appointed by the President;

(g) one teacher of law designated by teachers of law at South African universities;

(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;

(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly;

(k) when considering matters relating to a specific High Court, the Judge President of that court and the Premier of the province concerned, or an alternate designated by each of them.

…

(4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.

…

(6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

(7) If the Chief Justice or the President of the Supreme Court of Appeal is

temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.

(8) The President and the persons who appoint, nominate or designate the members of the Commission in terms of subsection (1) (c), (e), (f) and (g), may, in the same manner appoint, nominate or designate an alternate for each of those members, to serve on the Commission whenever the member concerned is temporarily unable to do so by reason of his or her incapacity or absence from the Republic or for any other sufficient reason.'

[18] The JSC has determined its own procedure, referred to as 'Procedure of Commission'[5].

Paragraph 1 to the Schedule to the Procedure of Commission provides that:

'a selection made by "majority vote" is one made with the support of at least an ordinary majority of all the members of the Commission…'

Paragraph 2 deals with Judges of the Constitutional Court.

Paragraph 2(k) provides in respect of the appointment of Judges of the Constitutional Court, that '(a)fter completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates to be recommended for appointment in terms of section 174 (4) of the Constitution by consensus or, if necessary, by majority vote'.

Paragraph 2(l) provides that '(t)he chairperson and deputy chairperson of the Commission shall distil and record the Commission's reasons for recommending the candidates selected'.

Paragraph (2) (m) provides that '(t)he Commission shall advise the President of the Republic of the names of the candidates recommended for appointment and of the reasons for their recommendation'.

Paragraph 3 deals with the procedure for the selection of candidates for appointment as Judges of the High Court and reads as follows:

'3. The procedure for the selection of candidates for appointment as judges of the High Court in terms of section 174 (6) of the Constitution shall be as follows:

(a) The President of the Supreme Court of Appeal or responsible

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5 published in Government Notice R423, Government Gazette 24596 dated the 27 March 2003

Judge President shall inform the Commission when a vacancy occurs or will occur in the Supreme Court of Appeal or any provincial or local division of the High Court.

(b) The Commission shall inform the institutions of the vacancy and shall call for nominations by a specified closing date.

(c) A nomination contemplated in paragraph (b) shall consist of -

(i) a letter of nomination which identifies the person making the nomination, the candidate and the division of the High Court for which he or she is nominated;

(ii) the candidate's written acceptance of the nomination;

(iii) a detailed *curriculum vitae* of the candidate which shall disclose his or her formal qualifications for appointment as prescribed in section 174(1) of the Constitution, together with a questionnaire prepared by the Commission and completed by the candidate; and

(iv) such further pertinent information concerning the candidate as he or she or the person nominating him or her, wishes to provide.

(d) After the closing date, all the members of the Commission shall be provided with a list of the candidates nominated with an invitation to -

(i) make additional nominations should they wish to do so and such nominations shall comply with the requirements of paragraph (c) above; and

(ii) inform the screening committee of the names of the candidates, if any, who they feel strongly should be included in the short list of candidates to be interviewed.

(e) The screening committee may, in its discretion, receive and consider nominations received after the specified closing date and shall prepare a short list of candidates to be interviewed, which shall include all candidates who qualify for appointment and who -

(i) are referred to in paragraph (d) (ii); or

(ii) in the opinion of the screening committee or any of its members, have a real prospect of selection for appointment.

(f) (i) The short list of candidates proposed by the screening committee shall forthwith be submitted to the members of

the Commission.

(ii) Within 7 days of receipt of the short list any member of the Commission may request the Secretary of the Commission in writing to add to the short list the name of any candidate who was duly nominated but who was not included in the short list and who the member feels strongly should be added to the short list of candidates to be interviewed.

(iii) The name of any such candidate shall thereupon be added to the short list.

(g) The short list shall be distributed to the institutions for comment by a specified closing date.

(h) After the closing date referred to in paragraph (g), the short list and all the material received on short-listed candidates shall be distributed to all the members of the Commission.

(i) The Commission shall interview all short-listed candidates.

(j) The interviews contemplated in paragraph (i) shall be open to the public and the media subject to the same rules as those ordinarily applicable in courts of law and shall not be subject to a set time limit.

(k) After completion of the interviews, the Commission shall deliberate in private and shall, if deemed appropriate, select the candidates for appointment by consensus or, if necessary, majority vote.

(l) The Commission shall advise the President of the Republic of the name of the successful candidate for each vacancy.

(m) The Commission shall announce publicly the name of the successful candidate for each vacancy.'

[19] Section 174 of the Constitution provides for the 'appointment of judicial officers in the following terms:

'(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 leader 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.

…

(6) The President must appoint the judges of all other courts on the advice of the Judicial Service commission.

…'

[20] Section 195 of the Constitution requires that public administration be governed by inter alia 'the democratic values and principles enshrined in the Constitution' including principles that it must be 'accountable'[6] and that '(t)ransparency must be fostered …'[7].

<u>The role of the JSC:</u>

6 s 195(1)(f) of the Constitution

7 s 195(1)(g) of the Constitution.

[21] The JSC serves a unique and crucial function in the South African judicial system, whether one accepts the construction that it has sole responsibility for deciding who should be appointed as judges to the various High Courts[8], or whether one inclines to the view that the President retains some limited form of discretion as the respondents contended. The latter construction is however difficult to reconcile with the imperative terms of s 174(6) of the Constitution.

[22] The role of the Judicial Service Commission in the appointment of judges under s 174 and their removal under s 177 was, not surprisingly, described as "pivotal" in the first certification judgment[9].

<u>The nature of the powers exercised by the JSC in considering appointments to the High Court and the review thereof:</u>

[23] In selecting judges for appointment to the various High Courts, the JSC exercises a public power conferred in terms of a constitutionally imposed mandate.

[24] The control of public power is always a constitutional matter[10].

[25] An incident of the Rule of Law referred to in s 1(c) of the Constitution, is the principle of legality. The principle of legality entails that a body exercising public power 'may exercise no power and perform no function beyond that conferred upon them by law'[11].

[26] A further principle of the Rule of Law is that the exercise the public

8 The obligation of the President in terms of section 174(6) is that he 'must' appoint on the advice of the JSC, as opposed to his role in the appointment of the Chief Justice and Judges of the Constitutional Court.

9 Ex Parte Chairperson of the Constitutional Assembly: In Re *Certification of the Constitution of the Republic of South Africa,* 1996 (4) SA 744 (CC); [1996]10 BCLR 1253 at para 120

10 Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte *President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 33.

11 *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte *President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 33.

power may not be arbitrary, but must be rational[12].

[27] The test for rationality is whether there is 'a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at'[13].

[28] Public administration is governed by "the democratic values and principles enshrined in the Constitution" including that of accountability and transparency[14]. It has been held referring to sections 1, 49 (1) and 195 of the Constitution that 'accountability of those exercising public power is one of the founding values of our Constitution and its importance is repeatedly asserted in the Constitution'[15].

[29] A public body created to serve the public's interest must perform its functions openly and transparently and only reach decisions which are not irrational or arbitrary[16]. That is consistent with a 'culture of justifications and a central principle of accountable governance' [17]. This culture of accountability, transparency and decisions not being irrational or arbitrary "signals a decided rejection of past odious laws, policies and practices[18]. The requirement of accountability extends to all organs of State and Public Enterprises [19].

[30] '(T)he duty to give reasons when rights or interests are affected has

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12 Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte *President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 85.
13 . *Care Phone (Pty) Limited v Marcus NO and Others* [1998] 11 BLLR 1093 (LAC) at para 37.
14 S195(1) of the Constitution.
15 *Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others* 2005 4 BCLR 301 (CC.
16 *Ekuphumleni Resort (Pty) Limited and Another v Gambling and Betting Board, Eastern Cape and Others* 2010 (1) SA 228 (E) at para. 20.
17 Mohamed DP in *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (12) BCLR 1593 (1996 (1) SA 725) (CC) para 10 quoting with approval a statement by Etienne Mureinik "A Bridge to Nowhere. Introducing the Interim Bill of Rights" 1994 (10) SALJ 31.
18 *President of RSA and Others v M&G Media Limited* 2011 (4) BCLR 363 (SCA) at para 9 where the Supreme Court of Appeal held that the Government had not provided sufficient justification for a refusal to disclose information.
19 Rail Commuters Action Group and Others v Transnet Limited t/a Metrorail and Others 2005 4 BCLR 301 (CC) para 76.

been stated to constitute 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, as in the present case, the reasons given can help to crystallize the issues should litigation arise'[20].

<u>An analysis of the applicant's relief</u>:

[31] In paragraph 2 of the Notice of Motion the applicant seeks a declaratory order to the effect that the proceedings of the first respondent on 12 April 2011 were inconsistent with the Constitution, unlawful and consequently invalid. Paragraph 4 of Notice of Motion is consequential upon that relief in that it directs the first respondent, should the relief in paragraph 2 be granted, to reconsider afresh the applications of the short listed candidates who were not selected on 12 April 2011 for the two remaining vacancies on the WCHC. The basis for this relief is the applicant's contention that the first respondent was not properly composed on that day due to the absence of the President of the Supreme Court of Appeal and his Deputy (referred to as the 'composition argument issue').

[32] In paragraph 3 of the Notice of Motion the applicant claimed a declaratory order that the failure by the first respondent on 2 April 2011 to fill the two judicial vacancies on the bench of the WCHC is unconstitutional and unlawful. Consequential upon that relief would also be the relief in paragraph 4 of the Notice of Motion directing the first respondent to reconsider afresh the

20 ' [Footnotes omitted] (per Mokgoro and Sachs JJ in their minority judgment in *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 (CC) para 159).

applications of the short listed candidates who were not selected on 12 April 2011 for the two vacancies. The basis for this relief is the applicant's contention that the first respondent had acted arbitrarily or irrationally and further possibly unreasonably in not recommending any candidate, particularly the candidates the CBC supported and then specifically Rogers SC for appointment (referred to as the 'substantive issue').

[33] The relief in paragraphs [31] and [32] will be dealt with seriatim. Before doing so it is, however, necessary to refer to two preliminary points raised by the respondents in opposition to the relief claimed.

The preliminary points raised by the respondents

[34] The respondents have raised two points which they submit should be considered first because if successful, these would result in the application either being dismissed or adjourned. They are:

(a) the failure of the applicant to demonstrate that the application is based on a valid legal cause of action (the 'cause of action' issue); and

(b) the effect of the failure of the applicant to join the unsuccessful candidates as co-respondents (the 'non-joinder' issue, which issue was extended also to include the non-joinder of the successful candidate, Henney J).

As regards the cause of action issue, the respondents have proceeded from the premise that the conduct of the JSC could potentially only be reviewable in terms of the provisions of the Promotion of Administrative Justice Act No 3 of 2000 ('PAJA'), and because decisions and the failure to take decisions regarding the appointment of judges, is specifically excluded from the definition of 'administrative action' in that Act, the conduct of the JSC did not amount to administrative action and therefore was not reviewable at all.

The scheme of this judgment:

[35] The applicant pursues two separate declaratory orders, referred to in paragraphs 2 and 3 of the Notice of Motion. The relief in paragraph 4 of the Notice of Motion is consequential to the declaratory orders being granted. The respondents' preliminary objection of lack of a valid cause of action, will first be considered in respect of both.

[36] The judgment will thereafter deal firstly with the composition issue and then the substantive issue.

[37] The non-joinder issue is inextricably linked to the nature of the claims made, the nature of the relief claimed, and the impact of the relief claimed. It is convenient to deal with that issue (notwithstanding it having been raised as a "preliminary point") after having examined the applicant's claims.

<u>The alleged lack of a valid cause of action:</u>

[38] In the founding affidavit the applicant states that it relies both on the principle of legality and PAJA, in the alternative, as the basis for reviewing the conduct of the JSC.

[39] The respondents proceed from the premise that the conduct of the JSC is only reviewable in terms of PAJA and that entertaining a review on the basis that the conduct of the JSC is inconsistent with the Constitution and is an infringement of the rule of law principle, is impermissible as it essentially treats the Constitution as instrument made up of discrete sections, s 1 being separate from and independent of s 33. The respondents submit that allowing a litigant two separate and independent causes of action based on two sections of the Constitution, is misconceived.

[40] Their argument proceeds as follows. Section 1 of the Constitution sets out the foundational values of our constitutional democracy. Section 1 (c) lays down the general principle that our Constitutional democracy is based on the

rule of law. The other sections of the Constitution, particularly, those outlined in the Bill of Rights in chapter 2, give greater content to the principle of the Rule of Law, often referred to as the legality principle[21]. They continue that it is important to bear in mind that when a litigant basis her or his cause of action on the provisions of the Constitution, especially a cause of action based on one of the sections found in the Bill of Rights, the litigant must found the cause of action on the relevant provision in the Bill of Rights and not on the general provision found in s 1 (c) of the Constitution. Section 1, they argue, is not a self-standing section that can be invoked independently of other sections when the other sections already provide a remedy. They find support for this approach in the words of the Constitutional Court stating:

'The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of Ch 2, which contains the Bill of Rights'[22].

[41] The argument is further that chapter 2 of the Constitution establishes a 'Bill of Rights', being the cornerstone of democracy in South Africa, which enshrines the rights of all people in our country (s 7 (1)) of the Constitution. In terms of s 8 (1) of the Constitution, the Bill of Rights binds inter-alia, 'all organs of State'. S 33 of the Constitution is part of the Bill of Rights and provides that everyone has a right to 'just administrative action'. It required the legislature to enact legislation to give effect to this right of 'just administrative action'. PAJA is that legislation. It is a comprehensive statute covering every legal ground of review there is in South African law. Accordingly, there is no ground of review in ss 1 (c) and 33 of the Constitution that is not included in PAJA as PAJA gives content and meaning to the provisions of s 33 of the Constitution. The respondents find support for this view in the statement by the Constitutional Court that 'PAJA is the national legislation that was passed to give effect to the rights contained in s 33. It was clearly intended to be, and in substance is, a codification of those rights. It was required to cover

21 Respondents heads para 23.

22 Minister of Home Affairs v Nicro and Others 2005 (3) SA 280 (CC) at para [21].

the field and purports to do so'[23].

[42] The purpose of s 33, according to the respondents, is that PAJA has now put an end to any further claims for judicial review based on the common law as it contains all the grounds of review under the Constitution, which is wider in scope than the grounds of review in the common law[24]. Support for this construction they find in the judgment of Chaskalson CJ in *Minister of Health v New Clicks SA (Pty) Ltd and Others*[25] where he held that the purpose of s 33 was 'to establish a coherent and overarching system for the review of all administrative action.' It is argued that it is on this basis that the Constitutional Court has found that delegated legislation can be reviewed in terms of the provisions of PAJA, even though the definition of "administrative action" in s 1 of PAJA does not make any mention of delegated legislation[26].

[43] The respondents refer to the judgment in New Clicks, where the Constitutional Court, per Ngcobo J held[27] that:

> 'Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on s 33 (1) of the Constitution and on the common law when PAJA which was enacted to give effect to s 33, is applicable, is, in view, inappropriate. It will encourage the development of two parallel systems of law. Yet this court has held that there are not two systems of law regulating administrative action - the common law and the Constitution. And in *Bato Star* we underscored this, holding that 'the Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself'.
>
> Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies it provides. Legislation enacted by Parliament to give

23*Minister of Health v New Clicks SA (Pty) Limited and Others* 2006 (2) SA 311 (CC) at para [95] (per Chaskalson CJ) and at para 423 (per Ngcobo J.
24 Para 27 of the respondents heads of argument.
25 At para [118]
26 Minister of Health v New Clicks SA (Pty) Limited and Others para 134 and 135.
27 At 436- 437

> effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.'

[44] They submit that the provisions of PAJA are not merely consonant with, but give effect to the principle of the rule of law (the legality principle) as spelt out in s 1 of the Constitution. Section 6 (2) of PAJA specifies the grounds of review and s 6(2)(i) provides for a review of administrative action that 'is otherwise unconstitutional and unlawful'. The respondents argue that this includes conduct which would otherwise be reviewable in accordance with the principle of legality. To ignore the provisions of PAJA and to go directly to the provisions of s 1(c) of the Constitution for relief based on the grounds of review specified in PAJA is, according to their submission, to render the provisions of PAJA nugatory, which itself would be contrary to the principle of the rule of law as it would deny Parliament the roll or status conferred upon it by the Constitution.

[45] Founding a cause of action outside the parameters of PAJA, it is submitted by the respondents, is anathema to our Constitutional democracy. As there is no cause of action that can be founded outside the provisions of PAJA, and as PAJA specifically precludes a review of any decision by the JSC relating to the nomination, selection and appointment of a judicial officer, the concluding submission is that the claim by the applicant accordingly fails to disclose a legal cause of action. As only this one category of decision is immunised from the review provisions of PAJA, they submit that this clearly indicates that the legislature took a deliberate policy decision to exclude decisions regarding the 'nomination, selection and appointment of judicial officers' from any review. Absent a constitutional challenge to the provisions of PAJA, more particularly the exclusion, which they submit is clear, crisp and unambiguous, no legal cause of action has been disclosed.

[46] I am not persuaded that the submissions by the respondent are

correct.

[47] The Constitutional Court has held that the exercise of all public power must comply with the Constitution. In *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[28] Goldstone J held:

> 'It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.'

[48] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [29] the Court held:

> "It is clear that under our new constitutional order the exercise of all public power, including the excise of the President's powers under s 84 (2), is subject to the provisions of the Constitution, which is the supreme law. If this is not done, the exercise of the power can be reviewed and set aside by the Court. That is what this Court held in *President of the Republic of South Africa and Another v Hugo.* It is clear also that s 84 (2) (f) of the Constitution confers the power to appoint commissions of enquiry upon the President alone. The Commissions Act also confers the power to declare its provisions applicable to a commission of enquiry upon the President alone. The Judge was therefore, correct in law when he held that, if the President had indeed abdicated either of these powers to another person, that abdication would have been invalid." [Footnotes omitted]

[49] In *Pharmaceutical Manufacturers Association of SA and Another: In re*

28 1999 (1) SA 374 (CC para 58
29 2000 (1) SA 1 (CC) at para [38]

ex parte President of the Republic of South Africa and Others[30], after referring to the *Fedsure* judgment and that of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others,* Chaskalson P said:

> 'One of the constitutional controls referred to is that flowing from the doctrine of legality. Although Fedsure was decided under the interim Constitution, the decision is applicable to the exercise of public power under the 1996 Constitution, which in specific terms now declares that the rule of law is one of the foundational values of the Constitution.' [Footnotes omitted]

Further on[31] he held:

> 'The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The question whether the President acted *intra vires* or *ultra vires* in bringing the Act into force when he did is, accordingly, a constitutional matter. The finding that he acted *ultra vires* is a finding that he acted in a manner that was inconsistent with the Constitution.'

[50] Significant are the following portions of that judgment:

> '[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.
>
> [86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important Constitutional principle.

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30 2000 (2) SA 674 (CC) at para 17

31 At para [20]

...

[89] ... What the Constitution requires is that public power vested in the Executive and other functionaries be exercised in an objectively rational manner. ...

[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful ...' [Footnotes omitted]

[51] In *Affordable Medicines Trust and Others v Minister of Health and Others*[32], Ngcobo J said the following:

'[48] Our Constitutional democracy is founded on, among other values, the "(s) supremacy of the Constitution and the rule of law". The very next provision of the Constitution declares that the "Constitution is the supreme law of the Republic ..."

[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.

...

[74] The exercise of all legislative power is subject to at least two constitutional constraints. The first is that there must be a rational connection between the legislation and the achievement of a legitimate government purpose. As this Court has observed, the idea of the constitutional State presupposes a system whose operation can be rationally tested. Thus when

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32 2006 (3) SA 247 (CC)

Parliament enacts legislation that differentiates between groups and individuals, it is required to act in a rational manner. In *New National Party of South Africa v Government of the Republic of South Africa and Others,* the Court held that the rational connection test is the standard for reviewing legislation holding that:

"The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in a measure being unconstitutional".

[75] The same is true of the exercise of public power by members of the Executive and other functionaries. The Constitution places "significant constraints upon the exercise of public power through the bill of rights and the founding principle enshrining the rule of law". The exercise of such power must be rationally related to the purpose for which the power was given. As this Court held in the Pharmaceutical case:

"[85] It is requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standard demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place the form above substance and undermine an important constitutional principle".

[76] The other Constitutional constraint is the Bill of Rights. Legislation must not infringe any of the fundamental rights enshrined in the Bill of Rights. The rights in the Bill of Rights may, however, be limited by a law of general application. But such a limitation is limited by the limitations contained in s 36 (1) of the Constitution or "elsewhere in the Bill [of Rights]". A limitation that

does not comply with such limitations, infringes the right in question.' [Footnotes omitted]

[52] The aforesaid dicta must be understood in the light of the provisions of paragraph (aa) of the definition of 'administrative action' in PAJA, which expressly excludes inter alia 'the executive powers or functions of the National Executive…' from constituting 'administrative action' and hence being reviewable in terms of PAJA.

[53] In *Masetlha v President of the Republic of South Africa and Another*[33], the Constitutional Court found that the decision to dismiss the Head of the National Prosecuting Authority was not reviewable under the provisions of PAJA but said as follows:

'[81] It is therefore clear that the exercise of the power to dismiss by the President is constrained by the principle of legality, which is implicit in our constitutional ordering. Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.'

[54] More recently in *Albutt v Centre For the Study of Violence and Reconciliation and Others*[34], in which the Constitutional Court set aside a decision of the President to pardon prisoners because it offended the principle of rationality, the following was said:

'[81] What must be stressed here is the point that I have already made: this case concerns applications for pardon that are brought under the special dispensation, the question being whether the victims of the crime that fall under this category of applications for pardon are entitled to a hearing. Once this question is answered in the affirmative in the light of the context - specific features of the special dispensation, it is not necessary to consider the

33 2008 (1) SA 566 (CC)
34 2010 (3) SA 293 (CC)

question whether the exercise or the power to grant pardon under s 84 (2) (j) constitutes administrative action. That broad, general question was not before the High Court, which should not have posed and answered it, and we need not answer it in this case. Nor should we reach the question whether PAJA, upon its proper construction, includes within its ambit the exercise of the power the grant pardon under s 84 (2) (j)'.

This follows after Ngcobo CJ earlier held:

'[49] It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of s 84 (2) (j), we held that, although there is no right to be pardoned, an applicant seeking pardon has a right to have his application "considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality." It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.

[50] All this flows from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims it own supremacy and defines the limits of the powers it grants. To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution.

[51] The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to

determine whether they are rationally related to the objectives sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objectives sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under s 84 (2) (j).'

[55] The JSC is enjoined in terms of provisions of s 174 of the Constitution to make recommendations regarding the appointment of Judges to the High Court. That constitutes the exercise of a public power. How that power is exercised, or not exercised, or whether it is appropriately exercised i.e. the control thereof, is always a constitutional matter. It is a principle of the rule of law which requires that the exercise of that public power may not be arbitrary but must be rational. That is the basis upon which public power may be reviewed; in accordance with the principle of legality.

[56] If the exercise of a particular constitutional power also amounts to administrative action, which is reviewable in terms of PAJA, then additional grounds of review, such as provided for in s 6 of PAJA, may also come into play. However, even where PAJA might not find application, any organ of State exercising public power will still be accountable for the exercise of any constitutionally mandated power conferred upon it.

[57] This requirement of accountability is one of the founding values of the Constitution. In exercising, or not exercising a constitutional power, the particular organ of state must be accountable and transparent as required by s 195(1)(f) and (g) of the Constitution. It does so by showing that there is a rational objective basis between the power conferred and its decision.

[58] Where a public power is to be exercised, it is thus reviewable in accordance with the principle of legality, quite apart from whether it is reviewable in terms of PAJA.

[59] Not all administrative action involves the exercise of a public power and would therefore be constitutional matter. Where the power exercised is not a public power, the only grounds of review, if it constitutes administrative action, may be in terms of PAJA. If PAJA applies, the grounds of review would be wider than would be applicable if conduct is reviewed simply on the basis of the principle of legality (which is confined to arbitrariness and rationality). Certain conduct may be excluded from the definition of administrative action in PAJA and thus not be reviewable on the wider grounds provided for in PAJA, but this does not mean, if it involves the exercise of a public power, that the same conduct, even if not reviewable in terms of PAJA for example due to it being excluded from the definition of "administrative action", it is not reviewable in accordance with the principle of legality. However if conduct falls outside the definition of administrative action for the purposes of PAJA and does not involve the exercise of a public power or constitutional power, then it might not be reviewable at all, more specifically the common law[35].

[60] The conduct of the JSC in failing to fill the two vacancies is reviewable on the principle of legality and then specifically on the grounds that as a body enjoined with the constitutional function of making recommendations regarding the appointment of Judges, it must be accountable for its failure to do so in a transparent manner to demonstrate that its failure was not arbitrary or irrational. Unless what is sought to be reviewed falls within one of the exclusions in the definition of ‘administrative action’ or any other provision of PAJA, its conduct would also be reviewable in terms of the provisions of PAJA[36].

[61] I turn next specifically to the relief claimed and the basis upon which such relief was claimed.

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35 PAJA representing a codification of the rights contained in s 33, which it was required to cover and purports to do - See *Minister of Health v New Clicks SA (Pty) Limited and Others* at para [95] and [423].

36 Even where the exercise of a pubic power does not constitute administrative action to which the provisions of PAJA may apply, it is still constrained by the principle of legality, implicit in the Constitution (see *Fedsure Life Assurance Limited and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); [1998] 12 BCLR 1458 (CC) para 58.

[62] In support of the relief in paragraphs 2 and 4 of the Notice of Motion, the applicant relies on the Constitution for its cause of action.

[63] It is common cause between the parties, and undoubtedly a correct statement of the law, that all conduct of the JSC constitutes an exercise of public power[37]. Indeed, the respondents contend that the JSC 'had exercised its powers and performed it constitutional mandate in accordance with the dictates of the Constitution and the law.'

[64] The issue whether the JSC was properly constituted when it exercised its constitutional powers, concerns a constitutional issue, reviewable in accordance with the principle of legality.

[65] In any event, the Supreme Court of Appeal has held that the issue of the correct composition of the JSC has nothing to do with PAJA and is an issue of legality[38]. This court is bound by that decision unless it is distinguishable. Although that decision was sought to be distinguished from the present case on the basis that it dealt with the composition of the JSC when considering the removal and not the appointment of a judge, and with the issue whether the Premier of the Province where the judge was appointed was required to be invited to serve on the JSC, and not whether the President of the Supreme Court of Appeal and his deputy should be present when considering the appointment of a judge, the principle established by the SCA that the composition of the JSC is an issue of legality is in my view clearly correct.

[66] The applicant's claim for the relief in paragraphs 2 and 4 of the Notice of Motion is accordingly founded on a valid legal cause of action, namely the principle of legality.

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37 . An allegation to that effect in the founding affidavit was admitted in the answering affidavit - para 74 page 151.

38 *Acting Chairperson: Judicial Services Commission and Others v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA).

[67] As regards the relief claimed in paragraphs 3 and 4 of the Notice of Motion ('the substantive issue'), the respondents submit that that the applicant's complaint relates to the failure of the JSC to take decisions to fill the two vacancies. This they maintain would only be reviewable in terms of the provisions of PAJA, that it amounted to a failure to take a decision, and that such failure to take a decision related to "any aspect regarding the nomination, selection or appointment of a judicial officer by the Judicial Service Commission, as contemplated in exclusion (gg) to the definition of 'administrative action' in PAJA. Accordingly the respondents submit that as the applicant brought the application in terms of the provisions of PAJA, it has no valid cause of action available to it.

[68] In addition the respondents contend that the decision is not reviewable in terms of PAJA on the basis that the decision to recommend only one candidate for the three vacant posts does not adversely affect the rights of any person.

[69] The first point to note is that the applicant did not base its cause of action in this regard only on PAJA but also on the basis that the failure to fill the two vacancies is inconsistent with the Constitution and is an infringement of the rule of law principle as enunciated in s 1 of the Constitution. Insofar as the latter is concerned, the relief claimed is based on a valid cause of action. Although the applicant's argument focused largely on that principle as the basis for the relief claimed, it did not confine the review of the JSC's failure to fill the remaining two vacancies to an infringement of the rule of law and the principle of legality,. It therefore remains necessary to consider whether a review in terms of PAJA was also available as a valid cause of action.

[70] Regarding PAJA, the issue specifically is whether the JSC's failure to take decisions to fill the two vacancies, fall within the definition of 'administrative action'.

[71] 'administrative action' is defined in section 1 of PAJA (omitting the irrelevant parts thereof) to mean:

'..any decision taken, or any failure to take a decision, by –

a) an organ of state, when –

i) exercising a power in terms of the Constitution…

ii) ….

b) ….

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –

aa) the executive powers or functions of the National Executive…

…

gg) a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

hh) …."

[72] Although the definition of 'administrative action' initially covers both 'any decision taken, or any failure to take a decision', it is significant that the exclusion refers only to a 'decision relating to any aspect regarding the nomination, selection, or appointment of a judicial officer or any other person, by the Judicial Service Commission' and not to the failure to take such a 'decision'. The provisions of paragraph (gg) contrast with that of paragraph (hh) which covers not only 'any decision taken…' but also a '…failure to take a decision'. The omission of any reference to a 'failure to take a decision' in paragraph (gg) therefore appears to be deliberate. In accordance with the well established principle that different words in a statute connote different concepts, especially where the change occurs in immediately successive sections within the same statute[39], the exclusion in subparagraph (gg) could only have been intended to refer to a decision taken and not the failure to take a decision.

[73] Accordingly, the applicant submits that the action by the JSC on 12 April 2011 in failing to fill the two vacancies constituted a 'failure to take a decision' as contemplated in the definition of administrative action in PAJA.

[74] The respondents, no doubt mindful of the absence of any reference to

39 *Barrett NO v Macquet* 1947 (2) SA 1001 (A) at 1012 ; *Chairman, Board on Tariffs and Trade v Volkswagen of SA (Pty) Limited and Another* 2001 (2) SA 372 (SCA); [2001] 1 ALL SA 519 para 13

a 'failure to take a decision' make the submission[40] that the JSC made one decision in relation to the three vacant posts, namely, it took a decision to recommend only Judge Henney and not to recommend any of the unsuccessful candidates'. They do so with reference to the contents of paragraph 118 of the answering affidavit where the deponent states that 'the JSC took a decision not to recommend any of the unsuccessful candidates', in the sense that none of the unsuccessful candidates secured a majority. That paragraph however contrasts with the contents of paragraph 106.5 of the answering affidavit where it is recorded that 'the JSC did not take a conscious and deliberate decision not to fill the two vacancies'.

[75] The aforesaid submissions by the deponent appear to have been influenced by an attempt to mould the facts to fit the law. The true facts can only be established from a reading of the answering affidavit as a whole. A decision is taken by the JSC when the votes are cast. Although no conscious and deliberate decision not to fill the two vacancies was taken, the fact is that the JSC was faced with a decision to be made as to whether the individual unsuccessful candidates were to be appointed to the two vacancies. That is a decision in respect of Rogers SC (decided by a vote), Fitzgerald SC (decided by a vote), Olivier SC (decided by a vote) and the others. Because the required majority could not be secured in respect of the unsuccessful candidates, the 'decision' in each instance in respect of each unsuccessful candidate was not to appoint them due to not obtaining the required majority. Those were the 'decisions' of the JSC in respect of each of the individual unsuccessful candidates.

[76] It is not an instance where it can be said that there was a 'failure to take a decision'. Individual decisions were taken. Particularly, in respect of each unsuccessful candidate it was a decision 'relating to any aspect regarding the … selection or appointment of a judicial officer … by the Judicial Service Commission'. Accordingly, the failure to fill the vacancies did not amount to 'administrative action' as contemplated in section 1 of PAJA, and is not reviewable in terms of the provisions of PAJA.

40 Para 11 of the respondents heads

[77] The aforesaid construction is reinforced by the definition of 'decision' in s 1 of PAJA, which in paragraph (a) thereof includes 'making, suspending, revoking or refusing to make an order, award or determination' and subparagraph (g) which refers to 'doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take the decision must be construed accordingly ' (emphasis added). The JSC did not refuse or fail to make a determination in respect of each of the unsuccessful candidates as to whether or not they could secure the required majority.

[78] In the light of the conclusion that the failure by the JSC to fill the vacancies is not reviewable in terms of PAJA, it is not strictly necessary to consider the further argument that the decision to recommend only one candidate and not fill the other two vacancies, did not adversely affect the rights of the applicant. If that failure was otherwise reviewable in terms of PAJA, then I would certainly incline to the view that the rights of the applicant, representing its members, were affected adversely.

[79] But the JSC process culminating in the result where the vacancies were not filled, remains the exercise of a public power. It remains reviewable in accordance with the principle of legality. On that basis there is a valid legal cause of action on which the relief claimed in paragraphs 3 and 4 of the Notice of Motion may be founded. The respondents' initial objection that the founding affidavit does not disclose a valid cause of action accordingly falls to be dismissed.

The composition of the first respondent on 12 April 2011:

[80] The composition of the JSC is constitutionally mandated, reflecting a balance between members with legal training and other members appointed by the Government. Section 178 (1), set out in paragraph [17] above prescribes the composition thereof.

[81] The first respondent serves a unique and crucial function as it has sole responsibility for deciding who should be appointed as Judges to the High Courts[41].

[82] Neither s 178 prescribing the composition of the JSC nor any other provision in the Constitution provides that the first respondent may be comprised and consist of only some of the persons referred to in s 178 (1). The Constitution does not stipulate a quorum for the JSC. Nor does it provide that the JSC may determine a quorum[42]. The Procedure of Commission, determined by the first respondent, similarly makes no provision for a quorum of the JSC either. The Judicial Service Commission Act[43] also does not provide for a quorum.

[83] Section 178(7) of the Constitution provides:

> 'If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.'

[84] In making provision for alternates for certain members of the JSC, it is clearly implied that at least those positions (if not all the positions on the JSC) must be occupied either by the member named or his alternate. Indeed, in providing for alternates it is ensured that the work and the functions of the JSC would not be hamstrung by the inability of one of its members temporarily to attend a particular meeting.

[85] The Judicial Service Commission in s 2(3)(a) provides that a vacancy shall not affect the validity of the proceedings or decisions of the commission.

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41 This function under s 174 of the Constitution as well as its function of removal of Judges under s 177 was described as "pivotal" in the first certification judgment, *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); [1996] 10 BCLR 1253 (CC) para. 120.

42 This is to be contrasted with s 53 of the Constitution which prescribes a quorum for members of the National Assembly and s 75 (2) which prescribes a quorum for the National Council of Provinces when its delegates vote on ordinary bills not affecting provinces, and s 112 (1) in relation to provincial legislatures, and s 167 (2) which provides that a matter before the Constitutional Court comprised of eleven judges, must be heard by at least eight judges.

43 No 9 of 1994.

I am not persuaded that this provision is necessarily constitutional, but even assuming it is, it simply ensures that proceedings and decisions of the first respondent are not invalidated by the fact that a vacancy has not yet been filled. It does not deal with the position of the 'temporary absence' of members of the JSC during a meeting, as distinct from a 'vacancy' occurring.

[86] In all the provisions of the Constitution and also the Procedure of Commission, particularly paragraph 3 thereof, it is significant that the powers in each instance to interview short listed candidates and perform other functions in relation to the appointment of judges, are conferred upon 'the Commission', which could only be to the Commission, comprised as defined in s 178 of the Constitution.

[87] The definition section of the Procedure of Commission, apart from defining 'the Commission' as the 'the Judicial Service Commission' provides that 'a selection made by "majority vote" is one made with the support of at least an ordinary majority of all the members of the Commission.' (emphasis added). A selection cannot be made simply by a majority of some unspecified lesser number, but not 'all the members' of the JSC.

[88] In *Premier, Western Cape v Acting Chairperson, Judicial Services Commission*[44], Jones J with Ebrahim J concurring, found that for the first respondent to be properly constituted when considering the removal of a Judge, its full complement must be in attendance during the proceedings and the decision making process, unless there are sound reasons for the non-attendance of the member. The Court relied on the general rules stated by Innes CJ in *Schierhout v Union Government (Minister of Justice)*[45]

> 'When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can only be one adjudication, and that must be the adjudication of the entire body (*Billings vs Prinn*, 2 W. B. p., 1017). And the same rule would apply whenever a number of individuals were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of

44 2010 (5) SA 634 (WCC) para. 17 - 18

45 1919 AD 30 at 44:

> all of them (see *Cooke v Ward* 2 CPD 255; *Darcy vs Tamar Railway Co.*, LR 3 Exch, p 158, etc.), for otherwise they would not be acting in accordance with the provisions of the Statute.'

This rule was held not be absolute and that proceedings would not be regarded as a nullity if there are sound reasons for the non-attendance of a member of such a body[46]. However on an analysis of the facts, Jones J concluded that the absence of at least one member of the first respondent was not satisfactorily explained and accordingly the first respondent not properly constituted[47]. On appeal, the SCA considered it unnecessary to decide whether the first respondent had been properly constituted and left the point open[48].

[89] After *Schierhout v Union Government (Minister of Justice)* a line of cases followed. It was held that in regard to a contravention of s 6 (1) of the Commissions Act, in respect of a commission which was purely advisory, that such commission could function without all of its members being present[49] although Corbett JA in a dissenting judgment held that on the facts of that case entailing the commission of an offence before a commission, that 'commission' in that context meant all the members of the Commission sitting together[50]. Where a statutory provision determined a membership of a quasi judicial body without providing for a quorum, it was held that the inquiry or hearing had to be conducted by the full complement of members[51]. In respect of a disciplinary committee constituted to hear a complaint against a staff member, where two members were unavoidably absent, it was held that the committee was not properly composed and that a time should have been fixed for all of them to be present in order to consider what were very serious and strong allegations[52].

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46 At para. 17.
47 At para. 18.
48 Judicial Service Commission vs Premier, Western Cape supra.
49 *S v Naude* 1975 (1) SA 681 A at 697G - 701F specially at 701E – F
50 At 705A
51 *Schoultz v Voorsitter, Personneel - Advieskommittee van die Munisipale Raad van George en 'n Ander* 1983 (4) SA 689 (C) at 707 F.
52 *Yates v The University of Bophuthatswana and Others* 1994 (3) SA 815 (B) at 848 G – I.

Where a Committee is one such as a pricing Committee whose work would involve research, the gathering of information and the making of inquiries before making its recommendations, the position is different to that pertaining to Commissions concerned with the adjudication such as in the Schierhout case, and given the nature of the work of such pricing committee it has been held that it could not have been contemplated that all its members would have to attend all meetings or participate personally in all its decisions[53] As was held in New Clicks[54], '(i)n each case what will be required will depend on the interpretation of the empowering legislation and relevant regulations, prescribing how a commission should function'.

[90] The JSC is not a 'pricing' or similar committee. Nor is it a media research and information gathering body. It is engaged in a process of adjudication of the highest order. It 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, which could otherwise be defeated if it was deprived of the services of one or more of its members. It makes the recommendations and the President 'must' appoint. Accordingly, there must be full attendance and participation by all members of the first respondent[55].

[91] Although section 178(6) of the Constitution empowers the first respondent to 'determine its own procedure' it has not sought to establish a quorum either in the Procedure of Commission or elsewhere. When it decides on matters regarding the appointment of Judges, it performs a pivotal function in our constitutional dispensation. There might be instances where for sound reasons, non-attendance of a member may not invalidate the proceedings (which need not be dealt with in this judgment), but the present, where no reason was given why the President and the deputy president of the SCA were unable to attend, is not such an instance.

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53 Chaskalson CJ in *New Clicks, Minister of Health NO v New Clicks SA (Pty) Limited* (TAC as amici curiae) 2006 (2) SA 311 (CC) (2006 (1) BCLR1) (CC) paras. 147 - 181.
54 at para. 171.
55 See Baxter Administrative Law 1984 page 429).

[92] The President of the Supreme Court of Appeal is an important, if not vital member of the JSC. The position of the President of the SCA has been described as one of the thirteen 'core members' by Jones J in *Premier, Western Cape v Acting Chairperson, Judicial Services Commission*[56]*.* Providing for alternates for the Chief Justice and the president of the SCA, is unique in s 178 of the Constitution, their respective deputies being the only ex officio alternates. All other alternates have to be designated, nominated and appointed, as the case may be, by the person or body empowered by s 178 to do so. The Chief Justice and the President of the SCA and their respective deputies are also positions of special constitutional importance. They are appointed differently (in terms of s 174(3) of the Constitution) from other Judges (who are appointed in terms of s 174(4) of the Constitution). In respect of the appointment of the Chief Justice and the President of the SCA and their deputies, the President of the Republic has greater discretion than with any other judges. His obligation is to consult the JSC and the leader of parties represented in the National Assembly before making those appointments.

[93] Section 178(7) of the Constitution ensures that in the temporary absence (the term is synonymous with an inability 'to serve') of the President of the SCA, the Deputy President of the SCA is present at the meetings of the JSC.

[94] The JSC presented a number of arguments in rebuttal of the notion that the absence of the President of the SCA, or his deputy, at the meeting, was unconstitutional or irregular. It proceeds firstly from the premise that although the President of the SCA did not participate in the meeting of the 12 April 2011, he cannot be regarded as 'temporarily unable to serve on the Commission' as envisaged by s 178 (7) of the Constitution. The submission is that the meeting on the 12 April 2011 to consider candidates for appointment to the bench of the WCHC was part of a 'session' of meetings from 4 April to 12 April 2011 and since the President of the SCA was available and attended all the other meetings up to the 11 April 2011, he cannot be said to be have been 'temporarily unable to serve on the JSC' for that part of the

56 2010 (5) SA 634 (WCC)

session on 12 April 2011. Further it is argued that he cannot be regarded as temporarily unable to serve since his absence was not by reason of 'incapacity or absence from the Republic'. It is contended in the answering affidavit that it often happens that a member of the JSC must excuse himself or herself from part of a session of the JSC because of unforeseen and unavoidable circumstances which may include a sudden emergency, and that it would be unrealistic and impractical for the remaining members to have to wait idly for the absent member or his alternate to join the session. Finally, although not relied upon in argument, the point was made that the President of the SCA was absent on 12 April 2011 with the permission of the Chairperson of the JSC.

[95] These arguments cannot be sustained. The term 'session' of the JSC is not found in the Constitution, the Judicial Service Commission Act, the Procedure of Commission or any other law governing the composition of the JSC. Indeed, contrary to the submission, s 178 (1) (a) of the Constitution refers to and contemplates 'meetings' and not 'sessions'. Whether a particular meeting is properly constituted must be decided on an assessment of the membership of that particular meeting. The meeting on 12 April 2011 which dealt with the separate and distinct aspect of filling vacancies on the bench of the WCHC, was no exception.

[96] The argument that the absence of the President of the SCA or his deputy was not by reason of 'incapacity or absence from the Republic', misconstrues the provisions of s 178 (8) of the Constitution. Section 178(8), in which those words appear, applies to members of the JSC other than the Chief Justice and the President of the SCA. The temporary inability of the President of the SCA to serve on the Commission is governed by s 178 (7) which contains no reference to 'incapacity', 'absence from the Republic' or 'other sufficient reason' and therefore do not limit the circumstances in which the Deputy President of the SCA must act as the alternate to the President of the SCA to those instances.

[97] Section 178(7) refers to the President of the SCA being 'temporarily

unable to serve'. Effect must be given to the ordinary meaning of the words 'temporarily unable to serve', namely that he was unable to serve on the JSC i.e. attend for any short tempus. According to The Shorter Oxford Dictionary 'temporarily' denotes that which is 'lasting or existing only for a time; passing, temporary'. 'Unable' refers to 'not able to do something specified'. 'Serve' refers to being 'a servant; to perform the duties of a servant'. 'Temporarily unable to serve' thus refers to an inability to perform that required of you for a short period of time due to whatever reason. This seems, with respect, to be exactly what the absence of the President of the SCA entailed.

[98] There is no evidence that the absence of the President of the SCA to attend another engagement was unforeseen or necessitated by a sudden emergency. There is also no allegation that it was unrealistic or impractical to have made prior arrangements with the Deputy President of the SCA, even on short notice, to attend the proceedings on 12 April 2011, or that doing so would have caused any interruption. The JSC has simply not sought to provide any reason for the absence of the President of the SCA from the meeting, nor its failure to request the attendance of the Deputy President of the SCA.

[99] The fact that the President of the SCA was excused with the consent of the Chairperson is irrelevant. Either the President of the SCA, or if he was temporarily unable to serve on the JSC for the meetings on 12 April 2011 his deputy, was constitutionally required to attend or not.

[100] The Deputy President of the SCA was not requested to attend the proceedings on 12 April 2011 as an alternate in terms of s 178 (7) of the Constitution, and he in fact did not attend. He was accordingly not given a reasonable opportunity to participate in the meetings of the JSC on that day. Accordingly, the position is similar to that which occurred in *Premier, Western Cape v Acting Chairperson, Judicial Services Commission* where the Premier of the Western Cape was not given an opportunity to participate in the meetings of the JSC, albeit for a different purpose.

[101] There is much to be said for the submission by the applicant that the JSC's interpretation of s 178 (7) can be tested by posing the question whether it would have been permissible for the Deputy President of the SCA to have acted as the alternate of the President of the SCA on 12 April 2011 had he been present at the venue of the meeting. He could only have done so if the President of the SCA was regarded as 'temporarily unable to serve on the Commission' for that meeting. On the JSC's interpretation, notwithstanding the fact that the President of the SCA was unable to participate in the meeting, that he was absent with the permission of the chairperson and that the meeting concerned a separate and discrete issue, the Deputy President of the SCA would not have been permitted to attend the meeting of 12 April 2011. An interpretation having that result would, I agree, be untenable and unsustainable.

[102] Section 178(6) of the Constitution requires that decisions of the JSC must be 'supported by the majority of its members'. That means the majority of the members that compose the JSC and not 'merely of those who happen to attend' a meeting[57]. Such an interpretation is also consistent with the definition of 'majority vote' in the Procedure of Commission.

[103] When considering the appointment of a Judge in terms of s 174, the JSC comprises 25 members. A majority is therefore 13. This is accepted to be so by the JSC.

[104] The 'advice' of the JSC[58] to the President of the country to appoint Henney J would have resulted from 13 or more votes having been cast in his favour. Even if the President or the Deputy President of the SCA had been present and voted against his appointment, Henney J would still have obtained the requisite majority.

[105] In the case of Rogers SC, the failure by JSC to properly constitute itself could have had a material effect. He received 12 votes, one short of the

57 Per Jones J para 19, and the Supreme Court of Appeal in *Judicial Service Commission vs Premier, Western Cape* at para 20.

58 as contemplated in s 174(6) of the Constitution

requisite majority and had the President of the SCA, or his deputy, been present and voted in his favour (which on the probabilities, having regard to his eminence as described in the papers, might have happened), he would have been recommended and subsequently appointed as a judge. In his case the absence of the President of the SCA, or his deputy, assumes particular significance.

[106] In respect of Fitzgerald SC and Olivier SC the absence of the President of the SCA or his deputy would not have made any difference. The position in regard to the other three candidates, namely Brusser SC, S J Koen and J Cloete is simply unknown. They might have secured 12 votes, which if they did, would place them in the same significant position as Rogers SC.

[107] The meeting of the JSC on 12 April 2011, which proceeded in the absence of the President of the SCA and the Deputy President of the SCA is clearly not in accordance with the dictates of the Constitution and hence unlawful and constitutionally invalid. It is therefore clear that the relief in paragraph 2 of the Notice of Motion should, in the ordinary course, follow.

[108] Section 172(1)(a) of the Constitution requires a Court to declare 'conduct that is inconsistent with the Constitution', 'invalid to the extent of its inconsistency'. Section 172(1)(b) provides that a court making such an order 'may make any order that is just and equitable'.

[109] In respect of the position of Henney J, the applicant's case from inception was that it does not seek an order setting aside the President's appointment of Judge Henney. Its attack was directed only at the failure of the JSC to recommend candidates for appointment in respect of the remaining two vacancies. The applicant stated in the founding affidavit that it would not be just and equitable for Judge Henney's appointment to be set aside in circumstances where the majority of the JSC (even inadequately constituted) supported his application[59]. The President appointed him and no setting aside

59 Had the President of the SCA, or his deputy been present, the majority vote in favour of Henney J could probably only have increased.

of his appointment is sought.

[110] In respect of the unsuccessful candidates, the relief in paragraph 4 of the Notice of Motion as amended, follows necessarily, logically and consequentially as just and equitable upon the declaratory relief in paragraph 2 of the Notice of Motion.

The substantive issue:

[111] Section 174(1) of the Constitution provides that 'Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer…'

[112] According to the answering affidavit there is no dispute that the three candidates supported by the applicant namely Rogers SC, Fitzgerald SC and Olivier SC 'are fit and proper and are appropriately qualified persons[60].

[113] The answering affidavit however explains that:

> 'Meeting these requirements, however, is necessary, but not sufficient for each candidate to succeed in acquiring a recommendation from the JSC for the vacant post. The fact of the matter is, that having applied the constitutional criteria for selection and appointment, as explained above, to the facts and circumstances of each candidate, and after an interview and deliberations, a majority of members of the JSC have to arrive at the determination that the candidate is suitable to be recommended for appointment to that particular post at that time. Such a determination was not arrived at in the case of Adv Rogers SC and the other unsuccessful candidates'[61].

[114] The JSC does not say that the unsuccessful candidates were lacking in what the respondents refer to as 'supplementary criteria' published in the

60 Para 103.1 of the answering affidavit.
61 Para 103.1 of the answering affidavit.

'Summary of the Criteria Used by the Judicial Service Commission when considering Candidates for Judicial Appointments',[62] such as integrity, energy and motivation, competence, experience, appropriate potential and symbolism (what message is given to the community at large by a particular appointment). Nor are they stated to be deficient in any other respects such as judicial temperament, or humility.

[115] It is no doubt for this reason that the applicant maintains that the JSC's failure to fill the remaining two vacancies from these candidates for no reason other than that the required majority of 13 was not received, remains inexplicable. The irresistible conclusion, it maintains, is that the decision of the JSC therefore appears to be arbitrary, 'irrational, and unfairly discriminatory, unreasonable and otherwise unconstitutional and unlawful'.

[116] There is much force in this submission of the applicant.

[117] It is thus incumbent upon the JSC to account for its failure to have appointed at least those considered to be appropriately qualified and fit and proper candidates.

[118] According to the respondents 'the fact of the matter is that no other candidate was able to muster the necessary majority'[63]. No decision was taken to keep the two vacancies open. The consequence of no other candidate securing the required majority had the consequence of the other two vacancies remaining open.

[119] The question thus arising is whether the process whereby the JSC arrives at a conclusion as to whether to recommend a candidate for appointment or not, which in the absence of consensus entails a voting process adopted by it to determine whether a candidate secured a 'majority of votes' of all members on the JSC, is a sufficiently transparent and accountable process, such as to demonstrate that the process of selection, or

62 Published in September 2010
63 Answering affidavit paragraph 106.5.

non selection, is not arbitrary or irrational, but indeed consistent with the principle of legality.

[120] In answering that charge, the respondents affectively advance two explanations. First, they say that the reason for the JSC's failure to select any of the unsuccessful candidates is that none of them received a majority of votes from the members of the JSC. This it claims is an adequate reason. The second justification, which it claims is allied to the first, is that it is not possible for the JSC to provide reasons and that it is not legally required to do so.

[121] These are not really two explanations but part and parcel of one explanation as to why none of the unsuccessful candidates was selected. In essence the JSC is saying that it cannot give reasons why a particular candidate does not secure the required majority, because members of the JSC vote by secret ballot. Accordingly in whose favour a particular member of the JSC might vote and his or her reasons for voting thus, are unknown.

[122] However, notwithstanding the claim of ignorance as to how individual members may vote and their motivation for voting in the manner they do, the deponent to the answering affidavit nevertheless maintains that in exercising their vote, members of the JSC take cognisance of their constitutional mandate. He explains that a candidate who is qualified in terms of technical skills and knowledge, may be found to be wanting in other important and relevant qualities and criteria, such as for example judicial temperament, patience and humility, which may render a particular candidate not suitable for appointment. None of these were, however, raised by the respondent as having specifically disqualified any of the members of the applicant. That is not surprising as on the respondents' version it does not know why individual members of the JSC voted or did not vote for particular candidates.

[123] Nevertheless, the deponent to the answering affidavit further explains that 'during this process the factors referred to in sections 174 (1) and 174 (2) of the Constitution and in the supplementary criteria were taken into account

by each member'. It is difficult to follow how that statement can be made. The deponent clearly would not know what the individual members of the JSC took into account, nor does he refer to the deliberations that took place or indicate the source of his knowledge, such as that members of the JSC informed him of their reasoning. No other member of the JSC has deposed to an affidavit confirming this account insofar as it concerns them, as being correct, that is unless the reasons for the required majority not being secured can be distilled from the deliberations that took place, a point to which I shall return below.

[124] While there are other considerations which members of the JSC indeed might have to consider and which might render an otherwise competent and suitable candidate unsuitable, the applicant correctly points out that at issue in this application is what considerations were in fact taken into account on 12 April 2011 to justify the actions of the JSC on that day.

[125] There seems to be no reason why the JSC cannot provide reasons. In relation to the nomination of Judges for the Constitutional Court, para 2 (l) of the Procedure of Commission requires that:

> "The chairperson and deputy chairperson of the Commission shall distil and record the Commission's reasons for recommending the candidates selected."

It is therefore possible for the JSC to distill and record its reasons and deliberations. The question that irresistibly presents itself is why, if the JSC's reasons for recommending a Constitutional court judge can be distilled, can the JSC not distil its reasons for something as constitutionally important as recommending or not recommending any other judge for appointment?

[126] Clearly, there are differences in the process leading to the appointment of Judges of the High Court on the one hand and judges of the Constitutional Court on the other, but in both cases the proceedings before the JSC are seemingly similar in that the JSC interviews the candidates in public, deliberates in private and selects the candidates to be recommended by consensus or by majority vote. It is then difficult to see why, if the

Chairperson and Deputy Chairperson of the Commission must distil and record the Commission's reasons for recommending candidates selected for the Constitutional Court, why, in logic, they cannot do so in respect of Judges of the High Court. If reasons for recommending a candidate can be distilled and recorded, then why not reasons for not recommending a candidate. In the absence of such reasons, the process is not transparent and appears arbitrary and irrational.

[127] If the procedure which the JSC has adopted under s 178 (6) does not prescribe that such reasons be distilled or be provided, then it is the procedure which the JSC adopted which is at fault. It is enjoined in terms of the Constitution to adopt procedures, but these must be lawful and such as to enable it to comply with all of its legal obligations. It cannot adopt a procedure which falls short of its constitutional duties by making it impossible for it to provide reasons for its decisions, and then rely on that as justification for its inability to account for a constitutionally transparent process.

[128] However, even if I am wrong in that regard, the justification proffered by the JSC for its failure to fill the two remaining vacancies, namely that the unsuccessful candidates did not achieve the required majority of votes, itself necessitates a closer examination of the voting procedure adopted to see whether it is rational and not arbitrary.

[129] In an introductory part of the answering affidavit the deponent states that:

> 'At the conclusion of this discussion, if there is no unanimous support for a candidate, each member of the JSC votes on whether the candidate should be recommended for appointment. Each member has one vote per candidate. Hence each member has an equal say on which candidate should be recommended'[64].

[130] According to this allegation each member of the JSC has one vote per candidate i.e. in the context of this case a total of seven votes. The

64 Para 21 of the Answering affidavit

obvious difficulty with this voting procedure is that it may result in more candidates achieving a majority support than there are vacancies. It has not been explained as to what might happen in such a situation. One might in the ordinary course expect that the candidates who garnered the highest number of votes constituting a majority of the members of the JSC, would be recommended, but the papers appear to be silent on this issue. No adverse conclusion has, however, been drawn from the failure to explain what is to happen in such a situation, as the deponent to the answering affidavit might not have dealt with it as it was not the factual position that confronted the JSC.

[131] However, later in the answering affidavit the deponent described a different voting procedure. He states:

'46.3 Given the nature and structure of the JSC it can only perform its constitutional mandate by utilising the time honoured process of voting. Each member is accorded a single vote. The decision to recommend or not recommend a particular candidate is based on whether the said candidate is able to muster a majority of votes. Should a candidate fail to muster a majority of votes then they will not be recommended to fill the vacancy. Should no candidates succeed in requiring majority of votes then no candidate will be recommended to fill the vacancy.
46.4 It is perhaps necessary to clarify that if, for example, there are three vacancies, each member of the JSC is entitled to vote for up to three candidates. If he or she so wishes, they may vote for less.'

[132] The voting procedure adopted cannot be both a system of one vote per candidate and one vote per vacancy. The apparent confusion as to which of the two systems in fact applies is itself suspect and suggestive that the voting procedure followed from time to time might fluctuate between a vote per candidate and a vote per vacancy. It is simply not clear and transparent. If indeed there is this fluctuation then the voting process would be arbitrary and possibly irrational. Certainty and transparency demands that a known, clearly defined uniform system of voting should apply to the selection of all candidates. The deponent to the answering affidavit is a respected senior

counsel. The conflict between the voting procedure he describes at the commencement of the answering affidavit, and the voting procedure, the application of which he seeks to illustrate with reference to a practical example later in the affidavit, is difficult to understand. Indeed, it has left me puzzled as I have endeavoured to fathom how the voting procedure which the JSC held out as justification for it reaching the conclusions it did in respect of the unsuccessful candidates, indeed works.

[133] In view of the deponent taking trouble and considering it 'necessary to clarify' the voting procedure, it seems that the procedure described in paragraph 46.4 is the one actually employed. If it was not then he would immediately in setting out his practical example have realized that what he was describing was not in accordance with what takes place when the JSC votes on vacancies. If my assumption is correct, then each member of the JSC has one vote per vacancy, not per candidate i.e. in the context of this case, each member of the JSC had three votes in total to cast in respect of the selection of candidates for the WCHC.

[134] If each member has one vote per vacancy, then the prospect of two theoretically identical or similarly suitable candidates in two different divisions of the High court securing a majority of votes, will depend on the number of candidates short listed in each division. The greater the number of candidates competing for the vote each member of the JSC would have per vacancy, the more the value of votes will be diffused. The fact that a shortlisted candidate's prospects of securing a majority of votes may depend on something as arbitrary as the number of candidates shortlisted with him or her for interview and possible appointment, is arbitrary and irrational. Furthermore the inevitable result and effect of adopting such a voting process is that a single candidate's prospects of securing a majority vote might vary from one division to the next depending on the number of candidates shortlisted in respect of separate divisions[65]. Within a specific division, a particular candidate's prospects of securing a majority of votes, assuming he or she had been

65 It apparently happens that a particular candidate at times applies for and is shortlisted in more than one division of the High Court.

unsuccessful in the first round of interviews by the JSC, but was shortlisted again for the next round of interviews later in the year or in the next year, may vary from the first meeting of the JSC to the next, due to a consideration as arbitrary as the number of candidates who happen to have been shortlisted by the short-listing committee. That would also render the voting procedure adopted arbitrary and irrational.

[135] The answering affidavit does not state, in fact does not suggest, that in the circumstances which prevailed at the meeting of 12 April 2011, the voting procedure adopted involved anything other than one round of voting. If that is so, then it would effectively prevent the transfer of a vote by an individual member of the JSC from a candidate for whom he had voted and who it turned out had secured the least votes (his or her vote thus really being wasted), to another candidate who had secured more votes and who was more likely to secure the necessary majority[66].

[136] It is conceivable that if the voting procedure allowed for the candidate with the lowest number of votes to be eliminated after the first round and the member or members of the JSC who had voted for such unsuccessful candidate thereafter being able to transfer their vote to another candidate who had secured a greater number of votes, in a second or further round of voting until one is left with a candidate who has secured a majority vote (assuming that to be possible and that not more than twelve of the members of the JSC abstain), that a candidate, like for example Rogers SC, might have obtained the requisite majority.

[137] However, even such a voting system might pose its own problems where there is more than one vacancy. Should there, for example, be second and further rounds of voting until one ends up with a number of candidates with the highest voting scores, corresponding to the number of vacancies, even if none of them might have secured a majority of all the members, or should there be further rounds until the vote comes down for each member to

66 As, it is commonly known, occurs with the procedure of Papal enclaves for the selection of the Pope.

a choice between two candidates, where only one or both might then secure the requisite majority, which inevitably will have the result that, in the context of this case, for example, one vacancy will be filled but not the others? Whatever the voting system may be, it should be clear and defined in advance to deal with any kind of situation which might present itself. To deal with possible scenarios which might arise, as and when they arise, on an ad hoc basis will itself not be consistent with the requirements of rationality and transparency and would be arbitrary.

[138] Whatever the voting procedure is supposed to be, it should be clear and not left to the kind of vagaries on which I am now speculating. It might be that the deponent has been mistaken and that the process is indeed one of one vote per member per candidate, with the candidates who may secure the most number of votes, assuming them all to be more than 13 votes, corresponding to the number of vacancies, then being recommended for appointment. That would seem to be a much simpler and rational process not lending itself to any possible arbitrariness, but that is for the JSC to decide, and is not the only procedure outlined in the answering affidavit.

[139] A voting procedure of one vote per vacancy[67], as opposed to one vote per candidate, is irrational in that it does not ensure that decisions are taken by the majority of members.

[140] It was illustrated during argument that if there are six candidates for one vacancy, three candidates may each receive four votes, two may each receive five votes and one only three votes. No decision to recommend would then be taken if there is only one round of voting. However, if the candidate with the lowest number of votes was eliminated and successive rounds held to eliminate the candidate with the least number of votes, until one candidate remained, should that candidate receive thirteen or more votes, he or she would truly have been elected by a majority of the members. If there are six candidates for two positions, then the candidate with the lowest number of

67 Unless there is specific provision for further rounds for voting where wasted votes could be directed to more deserving candidates who had already secured a greater number of votes.

votes should be eliminated until there are two candidates who may receive 13 or more votes. If there are six candidates for three positions, then the candidate with the lowest number of votes should be eliminated until three candidates[68], who may receive 13 or more votes.

[141] Simply advancing as justification that the remaining two vacancies were not filled because none of the unsuccessful candidates were able to achieve the required majority, where the voting procedure adopted resulted in the failure to obtain such majority because votes per vacancy were spread over more candidates than the number of vacancies for which they compete, was irrational and failed to provide the opportunity to the majority of the members of the JSC to make a decision.

[142] The resultant failure of the JSC to fill the two vacancies was thus unconstitutional and unlawful and falls to be set aside. It follows that an order in terms of paragraph 3 and consequential thereto, as just and equitable relief, the relief provided for in paragraph 4 (as amended) of the Notice of Motion falls to be granted.

Some of the further arguments by the amicus curiae:

[143] The first amicus curiae has also advanced an argument that if there are candidates who are appropriately qualified and fit and proper persons as contemplated in s 174 (1), that they must be appointed and that s 174 (2) does not constitute a qualifying requirement for appointment, but rather simply a factor to be considered when performing a selective function between otherwise qualifying candidates[69]. The first amicus curiae finds support for that argument inter-alia in the 'looseness' of language and the lack of definition contained in s 174 (2) of the Constitution. In addition, it submitted that the qualification provision for judicial officers contained in the Constitution

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68 Subject to what I referred to in paragraph 137 above.
69 The first amicus curiae compared the process to the position in tender/employment law where it sometimes happens that there is a comparative balancing criterion (scoring) and not a threshold or acceptability criterion.

determine who may be appointed as judicial officers. Thereafter the role of the JSC is a selective and not a determining one, consistent with the drafters of the Constitution having sought a model for appointing Judges which attempted to 'objectivise' the qualifications for appointment and to render the process by which qualified candidates were actually selected less open to criticism of political favouritism or personal influence.

[144] The argument continues that if the shortlisted candidates considered to be appropriately qualified and a fit and proper persons do not include persons to give effect to the provisions of s 174 (2), then the members of the JSC should use the right they have to themselves make additional nominations as contemplated in paragraph 3 (b) of the Procedure of Commission, which candidates will then be interviewed and can be recommended for appointment. Short of any such additional nominations, the factors in s 174(2) of the Constitution would not be qualifying criteria.

[145] In view of the conclusion which I have reached earlier, it is not necessary to consider this argument any further. It is not an argument advanced by the applicant. The applicant seems to accept that the JSC may rely on the provisions of s 174 (2) to not make a specific appointment, but if that is the reason for failing to do so, then this should be stated. In the answering affidavit the JSC did not seek to rely on s 174 (2) as their reason for not filling the vacancies. The only justification advanced was that the unsuccessful candidates had not secured the required majority. The JSC also said it could not give reasons why the unsuccessful candidates were not selected, other than that they did not secure the required majority vote. I have commented on what I consider to be the fallacy of the latter and the arbitrariness and irrationality of the voting process. I do not know, and the papers do not disclose, that the unsuccessful candidates were not selected merely because they did not satisfy or advance the objectives in s 174 (2). There are suggestions in the papers referring to press releases and statements of a 'balance' which need to be struck between potential candidates, which would suggest the inter play of s 174 (2), but it was never expressly stated to have been the reason why the unsuccessful candidates

were not selected. Indeed, Ms Cloete would at least partially advance the objectives relating to gender representation. The present matter is not, in my view, an appropriate instance to decide whether the requirements in s 174 (2) constitute a threshold requirement or merely a balancing criterion amongst otherwise suitable candidates. Any comment in that regard, interesting as the argument may be, would be obiter.

[146] The heads of argument of the first amicus curiae also raised the unsuccessful candidates' rights to dignity and access to courts. In regard to the right to dignity, the submission is that the JSC is not permitted to extend an open invitation to members of the legal fraternity to make themselves available for nomination as a Judge, if some of its members have adopted a policy in terms of which non-black members will not be appointed[70]. As indicated earlier, the JSC does not seek to rely on s 174 (2) as the reason for not filling the vacancies. Had it done so, this argument would be entertained, but at present, the submission that a policy has been adopted in terms of which non-black members would not be appointed, is speculative and without an evidential basis.

[147] The access to court argument relies on s 34 of the Constitution and proceeds on the premise that because the WCHC is inundated with matters to be allocated trial dates with inevitable long delays, continued vacancies on the bench will affect the time period before matters are heard. Failing to fill the vacancies and in particular to appoint eminently qualified short listed candidates amounts, in the submission of the First Amicus Curiae, to the public being denied the best judicial resources at the country's disposal. Accordingly, the duty of the JSC is to fill those vacancies unless no suitable candidates can be found. The reality of course is that acting judges can be and are appointed to assist with the case work load. Although there are problems of continuity and the like with acting judges, making the appointment of permanent judges eminently preferable, it has not been established on the papers that the failure to fill the two vacancies amounts to an actionable infringement of the rights of s 34. In any event, in the light of the conclusion I

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70 Para 45 of the heads of argument of the first amicus curiae.

have reached, it is not necessary to decide this issue further and it is best left unanswered and for debate on another day on more appropriate circumstances, should they arise. Section 175 of the Constitution provides for the appointment of Acting Judges. It has been remarked that:

> 'The appointment of Acting Judges is a well established feature of the judicial system in South Africa. Such appointments are made to fill temporary vacancies which occur between meeting of the JSC or when Judges go on long leave, or are appointed to preside over a Commission. These appointments are necessary to ensure that the work of the courts is not disrupted by temporary vacancies or temporary absence or disability of particular judges'[71].

[148] The second amicus curiae in the main supported the relief claimed by the applicant. No new submissions were raised requiring any comment.

<u>The non-joinder of Henney J and the unsuccessful candidates:</u>

[149] The respondents contend that Judge Henney and the other short listed candidates have a direct and substantial interest in the application as the relief sought has a direct bearing on their interests and rights; and that they should have been joined as parties to the application. They accordingly pray that the application be stayed pending such joinder, or alternatively that the application be dismissed.

[150] As the basis for their contention, the respondents maintain that if the proceedings of the JSC on 12 April 2011 were declared unconstitutional, unlawful and consequently invalid, the interview of Henney J would either have to be declared null and void and his subsequent appointment set aside, or his appointment would remain tainted forever, as to leave his appointment intact in these circumstances is to require him to accept that his appointment is tainted without giving him an opportunity to protect his interest by affording

71 ' Ex parte Chairperson of the Constitutional Assembly : in re certification of the Constitution of the RSA 1996 (4) SA 744 (CC) at para [127].

him a hearing to which he would be entitled[72].

[151] In respect of the six unsuccessful candidates it is argued that they would have to subject themselves to fresh interviews, accordingly that the relief claimed has a direct bearing on their interests and their rights to choose or not to choose to subject themselves to a fresh interview. The respondents also point out that of the unsuccessful candidates Ms J I Cloete, Mr S J Koen, and advocate Rogers SC have been shortlisted and will be re-interviewed at a meeting of the JSC scheduled to be held in Cape Town from 9 to 19 October 2011. These candidates will be required to attend another interview specially set up for them, when they may not want to subject themselves to this second interview under those circumstances, that they might be prejudiced by an order having the effect that they will be required to attend another interview specially set up for them when they may not at all want to subject themselves to this second interview under those circumstances, or may not wish to be treated differently from the new candidates who have applied and have been shortlisted for interviews, or that they may consider such special treatment an affront to their dignity, or that candidates who have not reapplied may not wish to be re-interviewed at all and may not wish to refuse to be interviewed for fear that it may at some later stage prejudice their chances for future appointment[73].

[152] Some of the aforesaid alleged prejudice contended for by the respondents is difficult to understand and cannot be said to be the kind of prejudice a court of law should entertain in considering whether a party should have been joined. However, insofar as there may be any such potential prejudice to the unsuccessful candidates arising from the original relief in paragraph 4 of the Notice of Motion, the applicant proposed the amendment to paragraph 4 of the Notice of Motion to include the words '(and who persist

72 The respondents rely on *Selbourne Furniture Store (Pty) Limited v Steyn NO* 1970 (3) SA 774 (A) at 780 H.

73 The possibility that had the President of the SCA or his deputy been present, his contribution during debate might have influenced the voting which followed, was not raised by any party as possible prejudice. It would be extremely speculative and a very remote consequence in my view, sufficiently so as to be disregarded. In the absence of such argument I have proceeded on the basis of only considering the prejudice referred to by the respondents.

with their applications)' after 'WCHC'[74].

[153] The applicant maintains that the application should be adjudicated and the alleged non-joinder assessed on the basis that the setting aside of Judge Henney's appointment as a Judge was never sought.

[154] Whether a party should be joined to proceedings, or not, is determined not on '…the nature of the subject-matter of the suit… but… on the manner in which, and the extent to which, the Court's order may affect the interests of third parties' [75].

[155] The applicant argues that the test for non-joinder is not whether the persons not joined have a general interest in the proceedings, but whether such persons are necessary parties in the sense that they have a legal interest in the subject matter which may be affected prejudicially by the judgment of the court. In casu, they maintain the short listed candidates did not have such interest and that the judgment granting the relief sought will not prejudicially affect them. It will also not affect Judge Henney's appointment as he was appointed by the President and that appointment is not sought to be set aside. The fact that there may be further interviews and a reconsideration afresh of the applications of the unsuccessful candidates, particularly where that obligation will be only in respect of those who elect to persist with their applications, does not, the applicant submits, prejudice the unsuccessful candidates, thus necessitating their joinder.

[156] In *Gordon v Department of Health, KwaZulu-Natal* [76] the appellant was granted an order declaring the appointment of a Mr Mkongwa to be an unfair labour practice and amounting to unfair discrimination. Mr Mkongwa had been appointed to the post of Deputy Director: Administration at Greys

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74 The applicant suggested the addition of the words 'and who persists with their applications' after the words "the WCHC" in paragraph 4 of the Notice of Motion, during argument. I did not understand this to be done because the applicant conceded to the correctness of the stance adopted by the respondents, but rather to address any concerns there may be.
75 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657.
76 2008 (6) SA 522 (SCA) at paragraphs 9 to11

Hospital in Pietermaritzburg and the appellant was an unsuccessful applicant amongst others. The appellant had not joined the successful applicant and the unsuccessful applicants as respondents. The Labour Appeal Court having raised the non-joinder of the successful applicant and the unsuccessful applicants, the Supreme Court of Appeal rejected the argument that the successful applicant Mr Mkongwa had a direct and substantial interest requiring him to be joined.

[157] The applicant submits that the relief sought in the *Gordon* case, as in the present case, was not directed against the setting aside and reversal of the appointment of the successful candidate; accordingly, the same principle and outcome should apply to the present case. While the successful appointee will always have an interest in the relief sought, he does not have a direct and substantial interest requiring his joinder.

[158] The Gordon case might be sought to be distinguished on the basis that the relief claimed was monetary. However, the significance of the judgment lies in the fact that inherent in that award was a finding of a declaratory nature, namely that the appointment of the successful candidate discriminated unfairly against Mr Gordon and amounted to an unfair labour practice. Similarly in casu, it is the declaratory relief in paragraphs 2 and 3 of the Notice of Motion which is the basis for the consequential relief in paragraph 4 of the Notice of Motion.

[159] The principle in the Gordon case applies in respect of the appointment of Henney J. His position as successful appointee is even more assured than the successful candidate in that case, as his actual appointment flowed from an act of the President of the country, and not simply from the decision taken by the JSC, although the decision by the JSC was the impetus for his appointment. It is one step removed from the proceedings sought to be declared unconstitutional. His validity of his appointment has not been 'directly implicated'.

[160] In respect of the unsuccessful candidates, the alleged possible

consequences that might follow upon the grant of the relief sought where they are not joined, being the alleged prejudice they may suffer according to the respondents, is no different to the position they would have found themselves in and with the consequences that would have followed, had they been joined in the first place. It is not the kind of direct and substantial interest which renders their non-joinder fatal. Had they been joined, they likewise, as allegedly now when presented with the order, would have had to take a stance and decide whether they were going to abide by the relief claimed, oppose it, or support it.

[161] The unsuccessful candidates are persons who have agreed to be nominated for appointment as judges. As such they should be prepared for a milieu where they would be required to take a stance on matters of conviction regardless of the consequences. It is difficult to see how they may now wish to refuse to be interviewed for fear that it may at some later stage prejudice their chances for future appointment. It can hardly be a genuine fear unless it was to be seriously contended that such refusal or unwillingness on the part of a candidate might indeed be a consideration the JSC may take into account in a subsequent round of interviews in deciding on the suitability of a particular candidate. I certainly did not understand that to be the case at all and would be extremely surprised if it was to be seriously advanced as a proposition, as that would make the decision irrational. It perhaps illustrates all the more why the JSC should be required to provide reasons for its failure to appoint a particular candidate, so as to remove any of these concerns which would arise where the process is not sufficiently transparent.

[162] If any of the unsuccessful candidates supported the relief claimed in paragraphs 2 and 4 of the Notice of Motion, they could suffer no prejudice due to their non joinder, as the relief claimed accords with their own desires. The potential prejudice complained of in paragraph [151] would not concern them and would not affect their rights. They would want to persist with their application and be re-interviewed.

[163] If any of the unsuccessful candidates opposed the relief in paragraph 2

of the Notice of Motion, then they would also oppose the consequential relief in paragraph 4 of the Notice of Motion. Had they been joined, they would have been required to formally indicate their opposition to the relief claimed, which is no different from them now having to exercise an election not to persist with their application and presenting themselves to be re-interviewed, for whatever reason. They are indeed now given the choice in terms of paragraph 4 of the Notice of Motion not to re-interviewed by default, and without having to even explain themselves. In terms of the amended paragraph 4 relief sought, if they want to be re-interviewed they have to actually 'persist with their applications'. They do not have to attend another interview specially set up for them when they may not want to subject themselves to this second interview under those circumstances, or may not wish to be treated differently from the new candidates that have applied and have been shortlisted for interviews, or should they consider such special treatment an affront to their dignity, or should they not wish to be re-interviewed. The order (as amended) does not require of them to refuse to be interviewed. Accordingly, any fears that such refusal may at some later stage prejudice their chances for future appointment, are unfounded. In fact, if they had been joined and that was their concern, they would have been required to oppose the application stating that 'fear' under oath. Now they can achieve that result simply by doing nothing, which default will have the effect of them not 'persisting with their applications'. Similar considerations would have applied if in response to their joinder they simply did nothing or abided the decision of the court.

[164] The non-joinder of Henney J and the unsuccessful candidates does not constitute a fatal non-joinder.

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Costs:

[165] As regards costs, the applicant has been successful. The applicant does not seek costs. No order as to costs is accordingly made.

Order:

[166] An order is granted in terms of paragraphs 2, 3 and 4 (as amended) of the Notice of Motion.

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MOKGOHLOA J: I agree.

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