THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 818/2011

In the matter between:

THE JUDICIAL SERVICE COMMISSION	**FIRST APPELLANT**
THE CHAIRPERSON, JUDICIAL SERVICE COMMISSION	**SECOND APPELLANT**

v

THE CAPE BAR COUNCIL	**FIRST RESPONDENT**
THE CENTRE FOR CONSTITUTIONAL RIGHTS	**SECOND RESPONDENT**

Neutral citation: *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* (818/11) [2012] ZASCA 115 (14 September 2012).

Coram: **Brand, Cloete, Snyders, Mhlantla et Petse JJA**

Heard: **16 August 2012**

Delivered: **14 September 2012**

Summary: **Absence of President of the SCA from meeting of the JSC – his deputy not invited – JSC not properly constituted – decisions at meeting consequently invalid – failure by the JSC to observe obligation to give reasons for decision not to recommend any candidate for appointment to existing vacancies – *prima facie* inference that decision was irrational not rebutted.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Koen and Mokgohloa JJ sitting as a court of first instance):

1. The appeal is dismissed with costs including the costs of two counsel.
2. Paragraph 1 of the order of the High Court is amended to read:
   (a) 'That the proceedings of the first respondent (the JSC) on 12 April 2011 that resulted in the JSC not recommending candidates to fill two vacancies on the bench of this court (the WCHC) were inconsistent with the Constitution in that both the President and the Deputy President of the Supreme Court of Appeal were absent and those proceedings are accordingly declared unlawful and consequently invalid.'
3. Save for the amendment in 2 above, the orders of the High Court are confirmed.

JUDGMENT

BRAND JA (CLOETE, SNYDERS, MHLANTLA et PETSE JJA CONCURRING):

[1] The first appellant is the Judicial Service Commission, established by s 178 of the Constitution, 1996. The second appellant is the chairperson of the first appellant. Since there is no difference in the case for and against the two appellants, I propose to refer to the first appellant only and to do so by the acronym 'JSC'. The respondent is the Cape Bar Council (CBC). It is the controlling body of the Society of Advocates in the Western Cape province, generally known as the Cape Bar. In the main, the members of the Cape Bar practice their profession in the Western Cape High Court Cape Town (WCC).

[2] On 12 April 2011 the JSC interviewed candidates for judicial appointments in the WCHC. Before the meeting, three vacancies were advertised. Numerous persons applied. A subcommittee of the JSC examined the applications and prepared a short list of seven candidates, to wit Adv R A Brusser SC, Ms J I Cloete, Adv M Fitzgerald SC, Mr R C A Henney, Mr S J Koen, Adv S Olivier SC and Adv O L Rogers SC. Of the seven candidates one, Mr Henney, was black, six were white and one, Ms Cloete, was a woman. At the meeting all these candidates were interviewed. Thereafter the JSC decided to recommend only one of them, Mr Henney, for judicial appointment, with the result that the other two available positions remained vacant, at least until the next meeting of the JSC.

[3] Aggrieved by this decision not to fill the two vacancies, the CBC brought an application in the WCHC for the following order:

(1) Declaring the proceedings of the JSC on 12 April 2011 to be inconsistent with the Constitution, unlawful and consequently invalid.

(2) Declaring the failure by the JSC on 12 April 2011 to fill two judicial vacancies on the Bench of the WCHC to be unconstitutional and unlawful.

(3) Directing the JSC, properly constituted, to reconsider afresh the applications of the shortlisted candidates who were not selected on 12 April 2011 for two vacancies on the WCHC (and who persist in their applications) in the light of the judgment of that court.

[4] The application was supported by two *amici curiae*. One of them, the Centre for Constitutional Rights, a non-party political and non-profit unit of the F W de Klerk Foundation, was also allowed to appear as an *amicus curiae* on appeal. In the event, the application met with complete success in that the court a quo (Koen and Mokgohloa JJ) granted the order in the exact terms sought. The appeal against that judgment, which has since been reported as *Cape Bar Council v Judicial Service Commission (Centre for Constitutional Rights and another as amici curiae)* 2012 (4) BCLR 406 (WCC), is with the leave of the court a quo.

[5] In broad outline the CBC rested its application on two legs, which both found favour with the court a quo. First, that because neither the President nor the Deputy President of this court attended the meeting of the JSC on 12 April 2011, the JSC was not properly constituted, with the consequence that the decisions taken at the meeting were unconstitutional, unlawful and invalid. Secondly, that in all the circumstances the JSC had no reason not to recommend candidates for the two remaining vacancies, which rendered its failure to do so irrational and therefore unconstitutional.

[6] Apart from contesting the validity of both these grounds in the court a quo, the JSC raised two points *in limine.* First, that the decisions of the JSC were expressly excluded from the ambit of review under the provisions of the Promotion of Administrative Justice Act 3 of 2000, (PAJA), and that in consequence, so the JSC contended, these decisions were not subject to judicial review at all. Secondly, that the application was fatally defective because neither Judge Henney nor the six unsuccessful shortlisted candidates had been joined as parties. Both these points *in limine* were dismissed by the court a quo. Of these two points, only the second, founded on the basis of non-joinder, was pursued by the JSC on appeal.

[7] After leave to appeal had been granted by the court a quo and in an obvious attempt to avoid the non-joinder debate, the CBC formally sought and obtained directions in terms of Rule 11(1)(b) from the Deputy President of this court. Pursuant to these directions Judge Henney and the six unsuccessful candidates were called upon to indicate whether they consented to be bound by the judgment of this court on appeal, notwithstanding the fact that they had not been joined as parties to the proceedings. Any of those who refused to consent were granted leave, in terms of the directions, to file affidavits with this court. Once such affidavit had been filed, so the directions further provided, that party would be considered to have been formally joined. If none of those called upon expressly conveyed their refusal to consent, so the directions concluded, this court would proceed to give judgment without entertaining the non-joinder issue.

[8] In response to the directions, the six unsuccessful candidates formally consented to be bound by the judgment of this court. Judge Henney, on the other hand, refused to grant his consent. In addition, it turned out that the JSC sought to oppose the request for directions, but that its opposing affidavit was only filed after the directions had already been issued. When all this came to the notice of the Deputy President, he arranged a meeting with the representatives of Judge Henney and all the parties. At the meeting it was agreed that the issue of the directions would be dealt with as part of the appeal.

[9] In the meantime, the non-joinder issue also led to an application by the JSC for this court to receive further evidence on appeal. In essence the proposed evidence concerns the matter of *J Arthur Brown v The Director of Public Prosecutions, Western Cape* in which Judge Henney gave judgment against Mr Brown. In his application for leave to appeal Mr Brown claimed that 'the Constitutional Court and the Supreme Court of Appeal have declared the proceedings of the JSC of 12 April 2011 to be unlawful and unconstitutional' which means, so Mr Brown maintained, that Judge Henney was not properly appointed to the Bench when he gave judgment against him. The JSC's declared purpose of introducing this evidence was to show that, although Mr Brown is clearly wrong about which court had pronounced upon the validity of the 12 April 2011 meeting, the judgment of the court a quo has a real impact on Judge Henney's position as a judge. Ergo, so the JSC argued, he should have been joined as a party to the proceedings from the start.

The issues

[10] Hence the issues presented for decision are:

(a) Whether the JSC's application to adduce further evidence on appeal should be granted.

(b) The validity and status of the directions issued by the Deputy President of this court.

(c) Whether Judge Henney should have been joined as a party to the proceeding in the court a quo.

(d) Whether the JSC was properly constituted when it interviewed the candidates for the vacancies in the WCHC on 12 April 2011 and, if not, whether that resulted in the invalidity of the decisions taken at the meeting.

(e) Whether, in the circumstances, the decision of the JSC not to recommend any of the candidates to fill the two remaining vacancies, was irrational and therefore unconstitutional.

I propose to deal with the third issue, concerning non-joinder, first. My reasons for doing so will hopefully become apparent in due course.

The non-joinder issue

[11] As the six unsuccessful candidates had consented to be bound by the judgment of this court before the appeal was argued, the JSC no longer contends that they should have been joined. It persists in its argument in regard to Judge Henney. After the JSC meeting of 12 April 2011, it recommended Judge Henney for judicial appointment. In the event, the President of the Republic appointed him as a judge, in terms of s 174(6) of the Constitution, on 10 May 2011. After that happened the CBC made it clear at all times that it did not challenge the validity of Judge Henney's appointment and that in consequence, no order setting aside his appointment was sought. Nonetheless, the JSC contended that the joinder of Judge Henney as a party to the proceedings, was required. In support of this contention the JSC argued that the first declaratory order sought – ie, that the proceedings of the JSC on 12 April 2011 were inconsistent with the Constitution and thus invalid – had a direct bearing on the interests and rights of Judge Henney, because if granted, it would inevitably lead to the setting aside of his appointment.

[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties

should have been joined to the proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) para 7; Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited.)

[13] Despite the limitations imposed by these authorities, the point *in limine* would clearly be good if the JSC was right in its contention that the first declaratory order inevitably gave rise to the setting aside of Judge Henney's appointment. As I see it, the short answer to this contention is, however, that this is not so. The mere fact that an administrative decision was unlawful does not visit all its consequences with automatic invalidity. Unless and until an administrative decision is challenged and set aside by a competent court, the substantive validity of its consequences must be accepted as a fact (see eg *Camp's Bay Ratepayers and Residents' Association v Harrison* 2011 (4) SA 42 (CC) para 62). Moreover, even if an administrative decision is challenged and found wanting, courts still have a residual discretion to refuse to set that decision aside (see eg *Seale v Van Rooyen NO* 2008 (4) SA 42 (SCA) para 13). In a sense, the 'invalid' administrative decision is then, in the exercise of the court's discretion, clothed with validity (see eg *Chairperson, Standing Tender Committee v J F E Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) paras 28-29; *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9). The underlying reason for this common law principle, which is confirmed in effect by s 172(1) of our Constitution, was succinctly formulated thus in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36:

'. . . [A] court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'

[14] The result is therefore that the first declaration sought, would not in itself affect the validity of Judge Henney's appointment. Furthermore, as I see it, anyone who seeks the setting aside of Judge Henney's appointment would have to persuade the court not only that the recommendation of the JSC was invalid, but also that the dire consequences of the setting aside of his appointment more than a year after the event, would be justified. Finally I believe that, if the appeal were to be unsuccessful, the relevant paragraph of the order in the court a quo could be trimmed down so as to avoid any impact on the validity of Judge Henney's appointment.

[15] Having said all that, it must be accepted, in my view, that Judge Henney's appointment would, to some extent, be tainted by the first declarator. Any doubt that this would be so is removed by what happened in the *Brown* case. But the court a quo found that the casting of this potential shadow over Judge Henney's appointment, in itself, is not enough to render him a necessary party. It found support for this finding in the judgment of this court in *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA). What happened in *Gordon* was that the appellant, Mr Gordon, applied for a promotion post in the department which was the respondent in that case. Though the selection committee found him the most suitable candidate, the department appointed a Mr M to the post. Aggrieved by his non-appointment, Mr Gordon instituted a claim against the department in the Labour Court for so-called protective promotion. As explained in the judgment of this court (para 4) this essentially amounted to a claim for all the benefits of the promotion post without an actual appointment to that post. In consequence, the appointment of Mr M to the post would remain intact. The Labour Court found against Mr Gordon on the merits. On appeal to the Labour Appeal Court, that court *mero motu* raised the non-joinder of Mr M as a reason why the matter should not be entertained. Eventually the point of non-joinder thus raised, was upheld by the LAC on the basis that, if Mr Gordon's claim were to succeed, Mr M would be confronted with the finding that, as an objective fact, he was not suitable for the post to which he was appointed.

[16] But in upholding Gordon's appeal against that decision of the LAC, this court said inter alia (para 10):

'The . . . appointee [who was found to be unsuitable] has no legal interest in the matter if the order will be directed at the employer (the author of the unsuitable appointment) to compensate the 'suitable' but unsuccessful applicant. Of course the successful but 'unsuitable' appointee will always have an interest in the order to confirm his/her suitability for the job but this is not a direct and substantial interest necessary to found a basis for him or her to be joined in the proceedings. . . . The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests.'

[17] For the sake of argument I accept that the first declarator may serve to motivate disgruntled litigants like Mr Brown to query the validity of Judge Henney's appointment. I do not believe, however, that that prospect in itself would leave Judge Henney in a worse position than the appointee in *Gordon* who was found to be unsuitable. On the contrary, unlike the position of the apppointee in *Gordon*, there is nothing in the first declarator that reflects on Judge Henney's suitability for appointment as a judge. If Judge Henney wanted a say in the decision which could leave him with a tainted appointment, he had ample opportunity, both in this court and in the court a quo, to become involved in the proceedings. And he will still have the opportunity, if this appeal is dismissed and an application is made to set aside his appointment, to advance whatever argument he deems fit because the judgment of this court, although persuasive, will not be binding on the court that hears that applicaiton. But be that as it may. That is not the issue. The issue is whether Judge Henney was a necessary party. And for the reasons given I agree with the court a quo's finding that he was not. It follows that, in my view, the non-joinder point taken by the JSC was rightly dismissed.

[18] For purposes of the non-joinder issue, I have assumed that both the JSC's application to introduce new evidence on appeal as well as its attempt to avoid the directions issued by the Deputy President, should succeed. However, it is apparent

in my view that neither of these took the consideration of that issue any further. Nor would they have any impact on the remaining issues in this case. In addition, neither the JSC nor the CBC sought any special costs order with regard to these matters. In the circumstances they may, in my view, be safely passed over without any further consideration.

Are the impugned decisions of the JSC reviewable?

[19] In the court a quo the JSC raised the further preliminary issue that the impugned decisions were not reviewable under PAJA. In support of that contention it relied on the provisions of s 1(gg) of PAJA which is one of the nine pertinent exclusions from the ambit of what would otherwise be 'administrative action' and which are thus rendered immune from judicial review under the Act. That section refers 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 in terms of any law'.

[20] The court a quo agreed with the contention that the impugned decisions of the JSC are excluded from review under PAJA by s 1(gg). Nonetheless it found these decisions reviewable, in principle, under the doctrine of legality. The correctness of this finding is not challenged by the JSC on appeal. As a result, the doctrine of legality can, for present purposes, be stated without elaboration and purely as the underlying substructure for this court's consideration of the remaining issues.

[21] As Ngcobo CJ said in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49, it has by now become axiomatic that the doctrine or principle of legality is an aspect of the rule of law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only. The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful (see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1)

SA 374 (CC) para 56). By way of example it was held in *Fedsure,* on the basis of the legality principle, that a body exercising public power has to act within the powers lawfully conferred upon it. And in *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of South Africa* 2000 (2) SA 674 (CC) (para 20) it was held that the principle of legality also requires that the exercise of public power should not be arbitrary or irrational (see also *Albutt supra* para 49 and the cases cited in footnote 43).

[22] The JSC's power to advise the President on the appointment of judges of the High Court is derived from s 174(6) of the Constitution. Hence it is undoubtedly a public power. In the event, this court has recently held that the proper composition of the JSC is a matter for review under the doctrine of legality (see *Acting Chairperson: Judicial Services Commission v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA)). Moreover, in accordance with legal principle that became well settled in many cases since *Pharmaceutical Manufacturers*, the decisions of the JSC that are challenged by the CBC are, in principle, subject to review on the basis of irrationality. This brings me to the first challenge based on the alleged improper composition of the JSC when the decisions not to recommend any of the unsuccessful candidates were taken.

Composition of the JSC

[23] The composition of the JSC is regulated by s 178(1) of the Constitution. The relevant part of this section provides:

'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; and

(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.

(5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1) *(h)* and *(i)*.

(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.'

[24] With particular reliance on subsecs 178(1)(b) and 178(7), the CBC contended that because both the President of this court and his deputy were

absent from the meeting on 12 April 2011, when the shortlisted candidates were interviewed and their selection decided upon, the meeting and the decisions taken were unconstitutional. For its factual basis the contention rested on what was common cause, namely that neither the President, Mpati P, nor his deputy, Harms DP, were present at that meeting. As to how this happened, the JSC explained in its answering affidavit, that it met for just over a week, from 4 April to 12 April 2011. Mpati P was present from 4 April to 11 April 2011. He left the meeting at the end of the proceedings on 11 April 2011 for an important engagement after being excused by the Chief Justice as the chairperson. Harms DP was not invited to attend on the 12th because it was thought unnecessary to do so.

[25] The CBC's contention that the meeting of 12 April 2011 and, in consequence, the decisions taken at that meeting was unconstitutional, was upheld by the court a quo. The JSC's appeal against that finding is based on two arguments: (a) that the JSC held a single meeting from 4 to 12 April 2011 and that, because Mpati P was present for most of the time during that period, it cannot be said that he was 'temporarily unable to serve on the Commission', as contemplated in s 178(7) of the Constitution; and (b) that, in any event, the full compliment of the JSC is not necessary for its proceedings and decisions to be valid.

[26] The court a quo found the first argument to be without merit. I agree. As I see it, there is simply no basis for the argument that there was a single meeting which lasted from 4 April to 12 April 2011. Over that period the JSC obviously had different meetings. At some of those meetings it was differently constituted. That follows from the provisions of subsecs 178(1)(k) and 178(5). When it considered any matter relating to a specific High Court, the Judge President of that court and the Premier of that province became constituent members in terms of s 178(1)(k). On the other hand, s 178(5) dictates that when the JSC considered matters not concerning appointment of judges, it had to sit without the members designated in terms of subsecs (1)(h) and (1)(i). It follows that the determination of whether or not a meeting of the JSC was properly constituted must be made with regard to who was present at that meeting and the purpose for which it was held. Moreover,

the argument that a member must be regarded as present for the whole week if he or she was there at the start of the first day, could clearly lead to absurd consequences.

[27] With regard to the JSC's contention that it is impractical to insist that every meeting must be attended by every member or his/her alternate, I believe that s 178(7) requires a distinction to be drawn between the Chief Justice and the President of the SCA, on the one hand, and the rest of the members on the other. Barring situations which would warrant invocation of the principle expressed by the maxim *lex non cogit ad impossibilia*, s 178(1)(b) read with s 178(7) requires the presence of the Chief Justice and the President of this court, or their designated alternates, for the valid composition of the JSC. The position may be different with regard to the persons appointed in terms of subsecs (1) (c), (e), (f) and (g) for whom alternates 'may' be appointed. But it is no different from the position of the Premier and the Judge President of a specific High Court provided for in subsec (1)(k). In *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA) this court held that, in circumstances contemplated in s 178(1)(k), a meeting of the JSC was not properly constituted in the absence of the Premier or her designated alternate. As I see it, the conclusion can be no different in this case. Lastly, I can see no answer to the further consideration that swayed the court a quo. It is this. On the JSC's interpretation of s 178(7), the Deputy President of this court would not have been permitted to attend the meeting of 12 April 2011, even if he happened to be present at the venue, because the President was not 'unable to serve' for purposes of s 178(7), though he could not be present. This inevitable conclusion of the interpretation contended for by the JSC is, in my view, self-evidently unsustainable.

[28] This brings me to the JSC's alternative contention, that a full compliment of the JSC is not necessary for the validity of its decisions. As support for this contention the JSC sought to rely on *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC). This judgment is to be understood against the background

of the general principle thus formulated by Innes CJ in *Schierhout v Union Government* 1919 AD 30 at 44:

'[W]henever 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 all of them . . . for otherwise they would not be acting in accordance with the provisions of the Statute.'

[29] What Chaskalson CJ pointed out in *New Clicks* (para 171) was that this is not an immutable rule and that the question whether the legislature intended to visit the decisions of a body established by a particular statute with invalidity, unless it was taken by all the members of the body jointly, is always dependent on an interpretation of the particular empowering statute. In *New Clicks* Chaskalson CJ concluded that a proper interpretation of the empowering legislation in that case did not warrant the inference of invalidity.

[30] With regard to the interpretation of s 178(1) of the Constitution, on the other hand, this court decided in *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA) paras 9-18, that in the circumstances contemplated by subsec 178(1)(k), the JSC can take no valid decision in the absence of both the Premier and her designated alternate. Counsel for the JSC did not contend that, in the present context, there is a difference between the provisions of s 178(1)(k), on the one hand, and subsecs 178(1)(b) and 178(7) on the other. I can see no difference either. It follows that, if the JSC cannot take a valid decision in the absence of either the Premier or her alternate, the position can be no different with regard to the absence of both the President of this court and his deputy. This means that we are bound by the decision in *Premier of the Western Cape*.

[31] Counsel for the JSC was thus compelled to submit, albeit reluctantly, that *Premier of the Western Cape* was wrongly decided. Their first argument in support of this submission was that no reference was made in that case to the provisions of subsecs 2(1) and (2) of the Judicial Service Commission Act 9 of 1994. These

sections, which were introduced by the Judicial Service Commission Amendment Act 20 of 2008, read as follows:

'2 Acting Chairperson and vacancies

(1) When the Chairperson is for any reason unavailable to serve on the Commission or perform any function or exercise any power, the Deputy Chief Justice, as his or her alternate, shall act as chairperson.

(2) If neither the Chief Justice nor the Deputy Chief Justice is available to preside at a meeting of the Commission, the members present at the meeting must designate one of the members holding office in terms of section 178 (1) *(b)* or *(c)* of the Constitution as acting chairperson for the duration of the absence.'

[32] Section 2(2), so counsel's argument went, is an acknowledgement by the legislature that meetings of the JSC can be validly held and decisions validly taken in the absence of both the Chief Justice and his deputy. The correctness of that conclusion cannot be gainsaid. It obviously presupposes that where both the Chief Justice and his deputy are unavailable, the meeting of the JSC must go on. Furthermore, I have no difficulty with the next logical step in counsel's argument, that the same must hold true for the President of this court and his deputy. If both of them are unavailable, the JSC can still validly meet. But the question whether the argument assists the case of the JSC depends on the meaning ascribed to 'unavailable' in the section. It will be remembered that Harms DP was not invited to attend the meeting of 12 April. There is no indication that if he were so invited he would have been unable to attend. Counsel for the JSC was therefore constrained to argue that in the context of s 2(2) of the JSC Act, the concept 'unavailable' includes absence for any reason, or, for that matter, without any legitimate reason at all. It would also mean, so counsel for the JSC fairly conceded, that even if the Chief Justice and his deputy were absent simply because they were not invited, they must be looked upon as 'unavailable' for purposes of s 2(2). I find this interpretation of the section unsustainable. I do not accept that the proper composition of a body as important as the JSC can depend on the whim of whomever is responsible for the administrative task of sending invitations.

[33] As I see it, unavailability must broadly bear the same meaning as 'temporarily unable to serve' in s 178(7) of the Constitution. If both the Chief Justice and his deputy are unavailable – in the sense that they are unable to attend – the meeting must go on. Thus understood, I believe s 2(2) amounts to little more than an invocation of the principles expressed by the maxim *lex non cogit ad impossibilia*. As I see it, this interpretation is supported by the fact that the primary aim of s 2(2) is clearly not to determine the composition of the JSC. That is governed by s 178 of the Constitution. What s 2(2) of the JSC Act is aimed at is merely to determine who should be the chairperson of the JSC when the Chief Justice is 'unavailable' or 'temporarily unable to serve' – as contemplated in s 178(7) of the Constitution – and his deputy is similarly unavailable. So interpreted, I do not believe that the reference to s 2(1) and s 2(2) of the Judicial Service Commission Act has any impact on the correctness of the decision of this court in *Premier of the Western Cape*.

[34] The further argument by counsel for the JSC as to why *Premier of the Western Cape* was wrongly decided, relied on s 178(6) of the Constitution. That section, so it was pointed out by counsel, requires only that decisions of the JSC be supported by a majority of its members which in this case would be 13 out of 25. This means, so the argument went, that a valid decision can be taken as long as there is a quorum of thirteen members who all vote the same way. I am not persuaded on this argument that *Premier of the Western Cape* was wrongly decided. On the contrary, as I see it, s 178(6) has nothing to do with the proper composition of the JSC. It determines no more and no less than what would happen in the event of a disagreement between members.

[35] Acceptance of counsel's argument would mean, for instance, that matters relating to a specific High Court could be determined in the absence of the Judge President of that court and the Premier of the province concerned or an alternate designated by both of them, which would be in direct conflict with the provisions of s 178(1)(k). What is more, I believe it is clear from s 178 of the Constitution that the JSC has been created in a structured and careful manner. Its composition

obviously sought to ensure that persons from diverse political, social and cultural backgrounds, representing varying interest groups, would participate in its deliberations. Any interpretation of s 178 which would allow decisions of the JSC to be validly taken with the unjustified exclusion of one or more of these interest groups, would therefore negate the very essence of the constitutional design.

[36] I therefore agree with the court a quo's finding that, in the absence of the President of this court, and his deputy without justification, the JSC was not properly constituted at its meeting of 12 April 2011 and that its decisions at that meeting with regard to the unsuccessful six candidates were therefore not validly taken. Save for one reservation, the declarator in terms of paragraph 1 of the court's order can therefore not be faulted. The reservation relates to the position of Judge Henney. Since he was not a party to the proceedings and no relief was sought against him, I think it would be prudent to limit the declarator of invalidity so as to make it clear that the decision has no effect on him. As I see it, it also follows that in so far as paragraph 3 of the court a quo's order is consequent upon the declarator in paragraph 1, the former must likewise be confirmed.

The JSC's failure to fill the two vacancies

[37] This brings me to the CBC's further contention that, in all the circumstances, the JSC's failure to recommend any of the unsuccessful candidates for appointment to the two remaining vacancies, was irrational and therefore invalid. Underlying this contention are the provisions of s 174(1) and (2) of the Constitution. Section 174(1) provides that '[a]ny appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer.' In terms of s 174(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.'

[38] Three of the shortlisted candidates, namely Rogers SC, Fitzgerald SC and Olivier SC, were supported by the CBC on the basis that they met the requirements in s 174(1). Rogers, in particular, was strongly recommended as

eminently suitable for judicial appointment. In this light the CBC asked the JSC for reasons why it decided to leave two vacancies instead of recommending any one of these candidates. The JSC's only response was that none of these candidates received a majority vote. In its founding papers the CBC contended that this amounted to no reason at all which, in the circumstances, warranted the inference that the decision not to recommend any candidate to fill the two vacancies, was irrational and thus unlawful. Moreover, so the CBC maintained, not recommending any of the unsuccessful candidates would not be warranted by the considerations contemplated in s 174(2).

[39] In its answering affidavit the JSC did not deny that the three candidates proposed by the CBC were appropriately qualified persons who were fit and proper for judicial appointment as contemplated by s 174(1), or even that Rogers SC was eminently suitable for judicial appointment. Nor did it profess to have been influenced by considerations of racial and gender representivity contemplated in s 174(2) when it decided not to recommend any of the unsuccessful candidates. The only reason it gave why these candidates were nonetheless not recommended to fill the two vacancies, was that they did not secure sufficient votes for recommendation. In this regard the JSC referred to s 178(6) of the Constitution which requires its decisions to be supported by a majority of all its members, as opposed to a majority of those present at the meeting. This means, so the deponent on behalf of the JSC explained, that because it comprised 25 persons for purposes of recommendation proceedings, a candidate was required to secure at least thirteen votes in order to be recommended. Since Rogers SC gained twelve votes only and the other candidates even less, none of them received a majority vote and that is the reason why they were not selected.

[40] In any event, so the JSC contended in its answering affidavit, it was neither obliged to give any reason why a candidate was not recommended, nor able to do so save for stating that the candidate did not secure enough votes. Its explanation why it was unable to do so went along the following lines. After the interviews regarding vacancies in a particular court are completed, the members of the JSC

deliberate on the candidates in private. During these deliberations the members are encouraged to, and do, freely voice their views and their concerns with regard to the individual candidates. Thereafter members are called upon to exercise their vote. No one is asked to vote against a particular candidate, but a candidate who fails to secure a majority vote in his or her favour is not recommended.

[41] In order to protect members from undue pressure, so the deponent for the JSC said, votes are exercised by secret ballot. In the result, nobody knows how another member has voted, or why he or she has voted one way or the other. Moreover, as the vote is secret, a member is not required to explain to anyone how or why he or she voted in a particular way. In the result it is not possible for the JSC to furnish reasons to any candidate, or to anybody else, why he or she failed to secure a recommendation for appointment. In order to furnish the reasons, each member would have to explain why they voted in a particular way. That would, by its very nature, so the deponent for the JSC contended, render nugatory the process of keeping their votes secret.

[42] In sum, the JSC thus answered the charge that it had failed in its duty to provide reasons for not recommending any of the unsuccessful candidates at three levels: (a) that there is no duty imposed upon it, either by the Constitution or by any other legislative enactment, to give reasons for that decision; (b) that it has in any event given a reason for not selecting any of the unsuccessful candidates, namely that none of them received enough votes; and (c) that because of its secret voting procedure it was not possible to provide better reasons than the one it gave. I propose to deal with each of these three levels in turn.

[43] I think it is true to say that there is no express constitutional or other legal enactment that obliges the JSC to give reasons for not recommending a candidate for judicial appointment. That of course does not exclude an implied obligation to do so. In contending for the existence of such an implied obligation, the CBC relied on two premises. First, that the JSC is under a constitutional duty to exercise its powers in a way that is not irrational or arbitrary. Secondly, that because the JSC is

an organ of State (as contemplated by s 239(b) of the Constitution) it is bound (by s 195 of the Constitution) to the values of transparency and accountability. I do not think that the validity of these premises can be denied and I did not understand the JSC to do so.

[44] But once these premises are accepted as valid, I cannot see how the inference of an obligation to give reasons can be avoided. It is difficult to think of a way to account for one's decisions other than to give reasons (see eg *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 12). As to rationality, I think it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision but you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defence by the decision-maker: 'Trust me, I have good reasons, but I am not prepared to provide them'? Exemption from giving reasons will therefore almost invariably result in immunity from an irrationality challenge. I believe the same sentiment to have been expressed by Mokgoro and Sachs JJ when they said in *Bell Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 159:

'The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a 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.'

[45] As I see it, the JSC is therefore, as a general rule, obliged to give reasons for its decision not to recommend a particular candidate if properly called upon to do so. I do not express any view as to how extensive these reasons should be or who would be entitled to request them, or under what circumstances such a request could legitimately be made. That, I think, will depend on the facts and circumstances of every case. This really leads me to the further enquiry as to whether the only 'reason' given by the JSC, namely that the unsuccessful candidates failed to secure enough votes, must be regarded as sufficient. The short answer to this question, I think, is that it was not. The CBC submitted that it amounted to no reason at all. I agree. It just changed the question from 'why were

they not recommended' to 'why did they not secure enough votes', without providing an answer.

[46] The reply by the JSC does not serve any of the purposes for which reasons should be given. These purposes were articulated with admirable clarity by Lawrence Baxter *Administrative Law* (1984) at 228 in the following statement, which was endorsed by Schutz JA in *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) para 5:

'In the first place, a duty to give reasons entails a duty to *rationalise* the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining *why* a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conductive to public confidence in the administrative decision-making process. Thirdly – and probably a major reason for the reluctance to give reasons – rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.'

[47] This brings me to the third level of the JSC's response, namely, that it was not able to give reasons why the majority did not recommend the unsuccessful candidates because of its procedure of voting by secret ballot. I think there are two answers to this contention. The first, which derives from principle, is this. Although s 178(6) of the Constitution allows the JSC a wide discretion to determine its own procedure, that procedure must, as a matter of principle, enable the JSC to comply with its constitutional and legal obligations. If it does not, the procedure must be changed. The JSC's answer seems to turn this principle on its head. What it amounts to is that once the JSC has adopted a procedure which does not allow it to give reasons, it is not legally required to do so. This, I believe, simply renders its approach untenable.

[48] The second answer to the JSC's reliance on its inability to give reasons is the one given by the court a quo (in para 125 of its judgment). It is founded on s 2(f)(iii)(l) of the JSC's rules of procedure that were adopted by it and published in the Government Gazette of 27 March 2003. The section deals with recommendations by the JSC of candidates for appointment to the Constitutional Court. It provides:

'The Chairperson and Deputy Chairperson of the Commission shall distil and record the Commission's reasons for recommending the candidates selected.'

[49] Proceeding from this section, the court a quo posed the rhetorical question as to why, if the JSC's reasons for recommending a Constitutional Court judge can be distilled, the JSC would not also be able to distil its reasons for recommending or not recommending any other judge for appointment. Before us the JSC sought to answer this question by reference to s 174(4)(a) of the Constitution which requires the JSC to prepare a list of nominees with three names more than the number of appointments to be made for submission to the President. This, so the JSC pointed out, is not the position with regard to appointment to the High Court where s 174(6) only requires the JSC to recommend one nominee for each vacancy. Hence, so the JSC's argument went, the analogy relied upon by the court a quo is not a valid one.

[50] Though I appreciate the obvious difference relied upon in the JSC's argument, I fail to understand how that answers the question posed by the court a quo. The question originates from the JSC's obligation to distil reasons. It has nothing to do with the purpose for which it may be required to do so. Thus understood, the question remains: if the JSC is able, despite its procedure of voting by secret ballot, to distil reasons for one decision, why can it not do so for another? The further distinction between recommending and not recommending a candidate, which the JSC also sought to rely on in argument, again appears, in the present context, to be a distinction without a difference. If there are five candidates, logic appears to dictate that the reasons for recommending four must include some motivation for not recommending the unfortunate number five. What is more, if the

reasons of the majority cannot be distilled from the open deliberations which precede the voting procedure, there appears to be no reason, on the face of it, why the members cannot be asked to provide their reasons anonymously. I appreciate that several disparate reasons may emerge, but again, on the face of it, I can see no problem in regarding all of them as the reasons for the decision of the JSC.

[51] To recapitulate and lest I am misunderstood: I am not suggesting that the JSC is under an obligation to give reasons under all circumstances for each and every one of the myriad of potential decisions it has to take. Suffice it for present purposes to say that: (a) since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment, it follows that, as a matter of general principle, it is obliged to give reasons for its decision not to do so; (b) the response that the particular candidate did not garner enough votes, does not meet that general obligation, because it amounts to no reason at all; (c) in a case such as this, where the undisputed facts gave rise to a *prima facie* inference that the decision not to recommend any of the suitable candidates was irrational, the failure by the JSC to adhere to its general duty to give reasons inevitably leads to confirmation of that *prima facie* inference. In the event, I agree with the finding by the court a quo that the failure by the JSC on 12 April 2011 not to fill any of the two vacancies on the bench of the WCHC was irrational and unlawful.

<u>Constitutionality of the JSC's voting procedure</u>

[52] Having arrived at that conclusion, the court a quo further held that, in any event, the voting procedure adopted by the JSC was in itself unconstitutional. The reasons for this finding are thus summarised in paragraphs 139 and 141 of the judgment:

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

And:

> '. . . [W]here the voting procedure adopted resulted in the failure to obtain [the required] 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.'

[53] Counsel for the respondent did not invite us to confirm these findings, but counsel for the *amicus curiae* did. Yet I think we must decline that invitation. Apart from the fact that the finding would be redundant, the actual voting procedure of the JSC is shrouded in obscurity. This is so because the deponent to the answering affidavit on behalf of the JSC gave two directly conflicting versions in this regard. At one stage he stated that each member has one vote per vacancy. Later on he said that each member has one vote per candidate. The latter version he underscored by the statement that '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.' The court a quo accepted the latter version as correct, precisely because it was underscored. But, in argument before us, counsel for the JSC submitted with surprising certainty that 'each member is accorded one vote per candidate' and that the version underscored by their client and accepted by the court a quo was a 'patent error'. The *amicus curiae*'s answer to this argument was that it is not open to the JSC to rely on its self-created uncertainty to challenge the findings of the court a quo. That may very well be so. Nonetheless, I remain unconvinced that there is any point in considering a finding of constitutional validity which would be both redundant and based on uncertain facts.

Costs

[54] Although the CBC was represented by four counsel it only asked for the costs of two. In addition we were informed that counsel were not charging any fees. In consequence the costs order sought in favour of the CBC would only pertain to the costs of its attorneys and the expenses incurred by two counsel. On that basis the costs order sought shall be made.

Order

[55] The following order is made:

1. The appeal is dismissed with costs including the costs of two counsel.
2. Paragraph 1 of the order of the High Court is amended to read:
   (a) 'That the proceedings of the first respondent (the JSC) on 12 April 2011 that resulted in the JSC not recommending candidates to fill two vacancies on the bench of this court (the WCHC) were inconsistent with the Constitution in that both the President and the Deputy President of the Supreme Court of Appeal were absent and those proceedings are accordingly declared unlawful and consequently invalid.'
3. Save for the amendment in 2 above, the orders of the High Court are confirmed.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	M T K MOERANE SC T L SIBEKO SC
Instructed by:	THE STATE ATTORNEY CAPE TOWN
Correspondents:	THE STATE ATTORNEY BLOEMFONTEIN
For Respondent:	L ROSE-INNES SC S ROSENBERG SC R PASCHKE N MAYOSI
Instructed by:	HEROLD GIE CAPE TOWN
Correspondents:	McINTYRE & VAN DER POST BLOEMFONTEIN
AMICUS CURIAE:	D IRISH SC J DE WAAL
Instructed by:	CLIFFE DEKKER HOFMEYR INC CAPE TOWN
Correspondents:	CLAUDE REID INC BLOEMFONTEIN