IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: CCT159/2018

SCA CASE NO: 664/2017

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**APPELLANT**
AND	
DEMOCRATIC ALLIANCE	**FIRST RESPONDENT**
PRAVIN JAMNADAS GORDHAN	**SECOND RESPONDENT**
MCEBISI HURBERT JONAS	**THIRD RESPONDENT**
MALUSI NKANYEZI GIGABA	**FOURTH RESPONDENT**
SFISO NORBERT BUTHELEZI	**FIFTH RESPONDENT**

WRITTEN SUBMISSIONS ON BEHALF OF APPELLANT

Table of Contents

INTRODUCTION

1. This is an appeal against the order[1] of the Supreme Court of Appeal, which was issued on 31 May 2018 dismissing the appeal of the appellant, in which he had appealed against the order of *Vally J* delivered on 9 May 2017[2] in the High Court, Gauteng Division, Pretoria. The Supreme Court of Appeal dismissed the appeal on the basis that the matter had become moot.

2. This appeal arises from an interlocutory dispute regarding the production of a record in terms of rule 53 of the Uniform Rules of Court. That interlocutory dispute led to an application by the first respondent ("DA") to compel the President to furnish the record and the reasons for the decision of the then President, Jacob Gedleyihlekisa Zuma, for the reshuffling of his Cabinet, which then included the dismissal of Mr Pravin Gordhan ("Gordhan") as Minister of Finance and Mr Mcebisi Jona ("Jonas") as Deputy Minister of Finance ("the decision").

3. In the main application in the High Court, the DA sought to review and set aside the decision. However, before the main application could be considered, the DA demanded the record for the decision in terms of Rule 53 (1) (b) of the High Court Rules.

[1] Record, Vol 3, page 255; SCA Judgement
[2] Record vol 2, p 217

RELEVANT BACKGROUND

4. On 31 March 2017, the former President Jacob G Zuma reshuffled the cabinet in terms of section 91 (2) of the Constitution of the Republic of South Africa ("the Constitution").

5. On the same day, 31 March 2017, the Presidency issued a statement in respect of this cabinet reshuffle, which statement set out the reasons for the reshuffle. This statement formed part of the first respondent's founding affidavit in the review application and contained what the then President stated as his reason for the reshuffle. I attach a copy of that statement as annexure **"CMR2".**

6. The first respondent however sought '*all documents and electronic records (including correspondence, contracts, memoranda, advices, recommendations, evaluations and reports) that relate to the making of the decisions which are sought to be reviewed and set aside*' and to this end invoked rule 53 of the Rules of Court.

7. The President at the time adopted the stance that the decision to reshuffle cabinet constitutes an executive decision and as such, falls outside the scope of rule 53. Consequently, the relief sought by the first respondent was not competent.

8. The reshuffle included replacement of Mr Pravin Gordhan and Mr Mcebisi Jonas as Minister of Finance and Deputy Minister of Finance respectively ("the impugned decision"), with the fourth and fifth respondents respectively.

9. On 4 April 2017, the first respondent launched an urgent application, seeking an order reviewing and setting aside the impugned decision as unconstitutional, unlawful and invalid.

10. Before the merits of the review could be determined, the first respondent demanded the appellant to furnish it with the record in terms of Rule 53. When the record demanded was not furnished, the first respondent, on 19 April 2017, launched an application to compel the furnishing of the record.

11. The application was heard on 4 May 2017 before Vally J, who then made an order directing the President to, *inter alia*, furnish the DA with the record of all documents and electronic records (including correspondence, contracts, memoranda, advices, recommendations, evaluations and reports) that relate to the making of the decisions which are sought to be reviewed and set aside. Vally J's reason for the order were provided on 9 May 2017.

12. Vally J, held that on a literal interpretation, rule 53 does not apply to executive decisions. He however, invoked a purposive interpretation to expand the ambit of the rule and found that the provisions of rule 53 apply *mutatis mutandis* to a review and set aside of an executive order or decision.

13. That position in law was acknowledged by the court of first instance[3]. The judgment of the court *of* first instance, nonetheless, impels that 'a record' must be provided when taking executive decisions. The judgment and order of Vally J thus arose from an interlocutory application. It is this finding that was

[3] Judgment para [21] page 229, lines 8-11 "*It is true…….that rule 53 has not been amended to cater for this but to decide on its applicability to review of executive decisions, it is necessary to subject it to a purposive interpretation*"

appealed against in the SCA and what was regarded as an impermissible expansion of the ambit of rule 53.

14. The Presidency therefore applied for leave to appeal to the SCA, which application was granted by the court of first instance on 2 June 2017.

15. After the appeal was lodged, but before it could be heard, President Jacob Zuma resigned from office on 14 February 2018 was sworn on 15 February 2018. Upon his appointment, the new President effected certain changes to the Cabinet, including replacing the fourth and fifth respondents as Minister and Deputy Minister of Finance respectively.

16. On 18 April 2018 the first respondent indicated that in the light of the changed circumstances, it was inclined to abandon the review application, then still pending in the South Gauteng High Court. The first respondent further indicated that it considered the appeal then pending before the SCA to have become moot.

17. The President consented to the withdrawal of the review application on the basis that each party would bear its own costs. He remained of the view however, that the appeal had not become moot as it concerned a discreet and live matter and contended that the SCA ought to still hear the appeal in respect of the discreet issue of the applicability of Rule 53 and the furnishing of the record in executive decisions of the nature with which this matter is concerned.

18. On 31 May 2018 the SCA dismissed the appeal[4]. The SCA dismissed the appeal on the basis that the relief sought would not have any practical effect or result. It also ordered the Presidency to pay the costs of the appeal.

19. The SCA found that the purpose of the interlocutory application before *Vally J* compelling disclosure of the record was intended to enable the respondent to prosecute its review application and concluded that the review application having being withdrawn, it was unwise for the court to opine on the interpretation of a rule, in the absence of objective facts and the context within which they were raised in the review application[5].

20. The reasons for the SCA for dismissing the appeal are summarised in paragraph 17 of its judgment, wherein it held as follows:

> *"[17] The is thus no compelling reason why this Court should exercise its discretion, absent objective facts, to conclusively determine the ambit of rule 53 when the Rules Board is mandated to do so. Interesting as the debate may be, this Court should not be tempted to decide an issue that may be of academic interest and the decision sought will have no practical effect or result.*
>
> *[18] The merits of the appeal were argued in full. However, in consideration of the position I take on the mootness of this appeal, I refrain from expressing a view on the merits."*

21. This application for leave to appeal is therefore launched on the basis that it is in the interests of justice for this Court to grant leave and to consider the merits

[4] Record, vol 3, page 254, ("CMR 1")
[5] Judgment para 15

of the appeal, including the fact that the subject matter of the appeal is not moot. We consider this legal issue below.

GROUNDS OF APPEAL

22. The grounds on the basis of which it is contended that the SCA and that of *Vally J* should be set aside are the following:

22.1. The issue raised on appeal is not moot; and

22.2. The relief granted by the court of is extremely far reaching inasmuch as it entails an amendment of rule 53 and an encroachment by the court into the functions specifically assigned by Parliament to another entity with specific mandate to address, amongst others, the rules' amendments.

23. In amplification of the above, the following will be argued:

23.1. The SCA erred in failing to recognise that while the dispute between the parties had indeed ceased to exist, the effect of Vally J's judgment went far beyond the limited dispute between the parties;

23.2. It will be submitted that the finding of *Vally J* went beyond the review application brought by the first respondent. It determined that, as a principle, rule 53 apply *mutatis mutandis* to a review and set aside of an executive order or decision. It will also be argued that the judgment of *Vally J* was not confined to the first respondent's review. It determined the applicability of rule 53 to all reviews of executive decisions.

23.3. it will be argued that the SCA mischaracterised the issue on appeal and applied the wrong legal principles to the issue for determination. The SCA relied on the decision of this Court in *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8 (24 April 2018), which concerned a review of a decision of the Judicial Service Commission regarding the appointment of judges. This Court had held that rule 53 applied, and the Judicial Service Commission was ordered to provide a full record of its decision[6] The *Helen Suzman Foundation* was not concerned with an executive decision and is thus of no application to the current appeal;

23.4. It will also be argued that the judgment of Vally J constituted impermissible judicial overreach in that it failed to recognize that the Rules Board is the appropriate body to deal with the ambit of Rule 53. The SCA recognizes this point in paragraph 17 of its judgment. In essence, the SCA aligns itself with the contentions of the Presidency in this regard.

MOOTNESS AND THE EFFECT OF THE JUDGMENT ON FUTURE DECISIONS

[6] Judgment para 14

24. Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 (“the Act”), provides that a court may dismiss an appeal where the issues are of such a nature that the decision sought will have no practical effect or result.

25. The appellant concedes that in light of the withdrawal of the main proceedings, the order of *Vally J* no longer has any practical effect between the parties and has become academic.

26. The appellant contends however that in his judgment *Vally J* set out the legal basis for such order, which basis is not limited to the order itself, but extends to all executive decisions. It is common cause that the impugned decision is an executive decision. The judgment has thus raised discrete legal issues of public and legal importance that would affect a class of decisions in the future on which this court must pronounce.

Exercise of Judicial Discretion

27. From what I have been able to establish, the law recognizes 2 types of discretion:

    27.1. “true” discretion – where the court has a choice between a number of permissible options; and

    27.2. “loose” discretion – where a court does necessarily have a choice between equally permissible options.

28. The SCA's discretion we are dealing with in this appeal falls in the latter category and the Constitutional Court would be entitled to interfere with the decision.

29. Some cases show that the Constitutional Court can still interfere even if the SCA's discretion was a 'true' one. In the case of Florence vs Government of RSA, the Constitutional Court held that such interference is appropriate if it is shown that the Supreme Court of Appeal:

> *"had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."*

30. In the case of ***Trencon Construction (Pty) Ltd V Industrial Development Corporation Of South Africa Ltd And Another*** this court reasoned as follows regarding interference with the SCA's discretion.

> ***"(4) Standard of appellate courts' interference***
>
> *[82] Regardless of the merits, Trencon argues that the Supreme Court of Appeal's order should be set aside on the basis that it had no power to interfere with the High Court's order. Trencon seems to find a gripping ground for this argument in the nature of the discretion conferred by s 8(1) of PAJA, which Trencon claims to be a discretion in the 'true' sense.*

[83] In order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. [fn 66 = The distinction developed with reference to two cases, Mahomed v Kazi's Agencies (Pty) Ltd and Others 1949 (1) SA 1162 (N) at 1168 – 1169 (Mahomed); and Ex parte Neethling and Others 1951 (4) SA 331 (A) (Ex parte Neethling). In Mahomed the Natal High Court held that there may be cases where an appellate court is in as good a position as the court of first instance and thus may interfere where the appellate court considers its conclusion to be more appropriate. In Ex parte Neethling the Appellate Division, without referencing Mahomed, took the view that there were classes of decision in which an appellate court could not simply interfere because it would have reached a different outcome. The court considered cases regarding decisions on the question of costs, on a postponement and on an amendment of pleadings in the lower court. See p 335 where it established that in such cases an appellate court could only interfere where —'the court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons'. *].That distinction is now deeply rooted in the law governing the relationship between appeal courts and courts of first instance. Therefore, the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion in the true sense or whether it was a discretion in the loose sense. The importance of the distinction is that either type of*

discretion will dictate the standard of interference that an appellate court must apply."[7]

ISSUES FOR DETERMINATION

31. The judgment of the High Court raises two discrete issues:

    31.1. The interpretation and scope of rule 53; and

    31.2. Judicial overreach.

Interpretation of rule 53

32. The effect of the judgment under appeal is to extend the scope of rule 53 of the Uniform Rules of Court to executive decisions. Until this judgment, rule 53 did not require the dispatch of a record relating to an executive decision. That position in law is acknowledged by the court of first instance[8]. The judgment of the court of first instance, nonetheless, impels that 'a record' must be provided when taking executive decisions.

33. Section 93 of the Constitution of the Republic confers on the appellant the power to appoint and dismiss cabinet ministers. During his term of office, the appellant is most likely to change the constitution of his cabinet, either by reallocating ministers to different department or dismissing them and appointing others in their stead.

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[7] See also Trencon Construction (Pty) Ltd V Industrial Development Corporation Of South Africa Ltd And Another 2015 (5) SA 245 (CC); Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A); Giddey No V J C Barnard And Partners 2007 (5) SA 525 (CC); Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC)

[8] Judgment para [21] page 229, lines 8-11 "*It is true…….that rule 53 has not been amended to cater for this but too decide on its applicability to review of executive decisions, it is necessary to subject it to a purposive interpretation*"

34. The question of law therefore (whether the provisions of rule 53 apply *mutatis mutandis* to a review and set aside of an executive order or decision as held by Vally J [9]) is not confined to the reshuffle decision that was sought to be reviewed. It will arise in every instance that the appellant exercises his constitutional power in terms of section 93.

35. In the absence of an appeal, the judgment would be invoked to compel not only the appellant to file a record in respect of his executive decisions, but all executive decision-makers. The judgment thus raises a live issue which merits the attention of this Court.

36. In ***The Merak S: Sea Melody Enterprises Sa V Bulktrans (Europe) Corporation*** 2002 (4) SA 273 (SCA) this court heard the appeal on the basis that it raised important questions of law which could frequently arise[10].

37. In ***Centre For Child Law v Hoëskool Fochville*** 2016 (2) SA 121 (SCA) is on all fours with this appeal. ***Hoëskool Fochville*** this court drew a distinction between those where a discrete legal issues arose that would affect matters in the future, and those which do not raise such legal issues, and concluded that in light of the interpretation the court of first instance had given to rule 35(12) *"absent an appeal its judgment will in all probability continue to influence how litigants approach such an inquiry"*[11].

38. This case raises a discrete legal issue which concerns the application of rule 53 to executive decisions, and absent an appeal on this point, litigants would,

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[9] Judgment para [30], page 232line 4 -8
[10] At para [4]
[11] At para [14]

in reliance on the judgment of *Vally J*, seek to compel the dispatch of a record relating to executive decisions.

39. The appellant 'has an interest in an existing, future and contingent right or obligation that will be determined by the decision of this court that will be binding on all other interested parties'[12].

Judicial overreach

40. The appellant contends, for the reasons fully set out below, that the relief granted by the Court is extremely far reaching inasmuch as it entails an amendment of rule 53 and an encroachment by the court into the functions specifically assigned by Parliament to another entity with specific mandate to address, amongst others, the rules amendments.

41. The Constitution has allocated law-making function to Parliament in contrast to the Executive or the Judiciary[13];

42. Exercising that law-making function, Parliament enacted the Rules Board For Courts of Law Act 107 1985 ("the Rules Board Act"). Section 2 thereof establishes the Rules Board for Courts of Law[14] ("the Rules Board");

43. In section 6 of the Rules Board Act, the Rules Board is assigned the obligation, on a regular basis, to review the existing rules of court, and subject to the

[12] *Rumdel Cape v SA National Roads Agency* (234/2015) [2016] ZASCA 23 (18 March 2016) at [15]
[13] Section 44(1)(a)(ii) of the Constitution *"The national executive authority as vested in Parliament – (a) confers on the National Assembly the power- (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5"*
[14] Section 2 – Establishment of Rules Board for Courts of Law – *"There is hereby established a board called the Rules Board for Court of Law and having the powers and duties conferred or imposed upon it by this Act or any other law".*

approval of the Minister, to make, amend or repeal rules for the Supreme Court of Appeal, the High Court of South Africa and the lower courts.[15]

44. The Constitution and the Legislature having allocated the law-making power on Parliament and the latter having exercised its law-making power to pass into law the Rules Board Act distinctly made the making, amending and repealing of the rules of the High Court of South Africa the function and power of the Rules Board.

45. By holding that Rule 53 must *"purposively interpreted"* to include executive action, the High Court erred in law as it arrogated unto itself the rule-making function specifically assigned by Parliament to the Rules Board This we submit amounts judicial overreach and that another court would come to a conclusion different to the one the SCA and the court of first instance have come to. This we submit amounts to a breach of the separation of powers doctrine, which is part of the rule of law – a foundational value in the Constitution[16].

Proper interpretation of rule 53

[15] Section 6 – Power of the Board *"(1) The Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Court of South Africa and the lower courts, from time to time, on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court of Appeal, the High Court of South Africa and the lower courts regulating:*

(a) the practice and procedure in connection with litigation, including the time within which and the manner in which appeals shall be noted
(b) the form, contents and the use of process
(c) ……"

[16] Section 1 *"The Republic of South Africa is one, sovereign, democratic state founded on the following values: (c)Supremacy of the Constitution and the rule of law";* Section 2 - Supremacy of the Constitution *"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".*

46. In its language, the Rule reads:

> *"Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all parties affected –*
>
> *(a) ….*
> *(b) Calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."*

47. The *judgment* is bad in law: this is so since –

47.1. The impugned executive decision does not arise in any proceedings contemplated in rule 53.

47.2. Further, the decision is not one made in proceedings of an inferior court or of any tribunal, board or officer performing a judicial, quasi-judicial or administrative functions.

47.3. None of these entities ever make executive decisions.

47.4. It is common cause that the impugned decision is an executive decision.

48. Whereas the court correctly found "*it is true rule 53 has not been amended to cater for this [review of executive decisions], but to decide on its applicability to a review of executive decision, it is necessary to subject it to a purposive interpretation***"**, in substance, the court created a substantive right entitling anyone challenging an executive to a record. In this regard, the court misconceived the purpose of the rule and in particular the purpose and ambit of rule 53.

49. The purpose of the rule was enunciated by Corbett J, as he then was, in ***Boshoff Investments v. Cape Town Municipality***[17] and confirmed that the purpose of the rule was to review decision or proceedings of specific entities, namely, inferior courts, tribunal, board or officer exercising judicial, quasi-judicial or administrative function.

50. Significantly, the court in *Boshoff* held that -

> **"***All these provisions indicate that this Rule was intended to apply where a decision has been arrived at by, inter alios, a board, presided over by a chairman, after something in the nature of proceedings (of which a record is kept) have taken place before it*"[18].

51. The power of the Rules Board to make amend or repeal rules however is limited by section 6 to matters regulating procedure. In ***Karpakis V Mutual & Federal Insurance Co Ltd***[19] the court confirming that the power of the Rules Board conferred by section 6 is limited to procedural law aspects, stated that the provisions of section 6 only relate to matters regulating procedure, and not

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[17] 1969 (2) SA 256 (C) at 274D-F

[18] At 273

[19] 1991 (3) SA 489 (O)

to matters relating to substantive law[20]. It drew the distinction between procedural and substantive law[21].

52. In including, within the remit of rule 53, a record in respect of an executive decision, the court of first instance did not only provide a procedural remedy, it in fact inserted a new category of decision-makers. It would be no different than inserting decisions of superior courts, to illustrate the error of the judgment.

53. The judgment in the ***Helen Suzman Foundation and Others v Judicial Services Commission***[22], is no authority for the proposition that in its ambit the rule contemplates a review of executive decisions as well.

54. By its order, the Court of first instance created a right and/or entitlement for the respondent to a record of an executive decision. Such entitlement is matter of substantive law and cannot be conferred by a court, more so through a procedural mechanism such as Rule 53. ***Oosthuizen V Road Accident Fund***[23] the SCA stated that "*A High Court may not use its inherent jurisdiction to create a right.*"[24]

[20] See too the Full Bench decision in Ex Parte Christodolides 1953(2)SA 192 (T) at 195A-D
[21] "*The law of procedure is adjectival law in that it is accessory to substantive law, which latter law defines legal rights, duties and remedies, whereas adjectival or procedural law deals with the proof and enforcement of such rights, duties and remedies. This, then, is the law of procedure in the widest sense of the term procedural law. Proof of rights, duties and remedies falls within the realm of the law of evidence, but the body of rules regulating the general conduct of civil litigation and relating, therefore, to the enforcement of rights, duties and remedies, is the law of procedure in the narrow sense".* At 492B-C
[22] 2017 (1) SA 367 (SCA), para 13, 35, 376, 37, 38 and 39; See also President of the RSA v South African Rugby Football Union and Others 1999 (4) SA 147 (CC); See also Jockey Club of South Africa v Forbes1993 (1) SA 649 (A) at 661E; Cape Town City v South African National Roads Authority 2015 (3) SA 386 (SCA) at 415F
[23] 2011 (6) SA 31 (SCA)
[24] At [26]

Purposive Interpretation

55. In interpreting rule 53, the court of first instance sought to read in "a purposive interpretation" ostensibly because rule 53 was passed in 1965, that is in the pre-constitution era, and that executive decisions are now subject to judicial review under the grounds of legality or rationality. The two reasons are, with respect, unhelpful. All judgments of the courts relating to purposive interpretation admonish, in lucid terms that *"[W]e must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination"*[25]. In coming to its conclusion and order the court of first instance failed to consider this cardinal principle of interpretation.

56. The court of first instance erred in law, while interpreting a rule that admits of no ambiguity and whose purpose is clear and plain, sought by way of interpretation to introduce a substantive right to a record of an executive decision. This, as we show below, is an error of law.

Nature of executive decisions

57. Any cursory reading of section 84 of the Constitution dealing with the executive powers immediately reveals that there cannot be '*a record'* - when

    57.1. appointing a commission of enquiry (usually this would be a power invoked to probe a matter of great public concern without having to hear anybody or have reference to any record);

[25] S V Zuma And Others 1995 (2) SA 642 (CC) at [18]
Democratic Alliance V Speaker, National Assembly And Others 2016 (3) SA 487 (CC) at [48]

57.2. assenting to and assigning bills (similarly, there would be no record apart from the Bill to be signed); and

57.3. appointing ambassadors, plenipotentiaries and diplomatic and consular representatives (these two require no record of proceedings underpinning the decision).

58. The judgment of the court of first instance, undisturbed, impels that ‘a record’ must be provided when taking executive decisions. It is also for this reason that we argue that the SCA erred in concluding that the matter was moot.

59. The court of first instance relied on a body of cases which reiterated the purpose of rule 53. We take no issue with the notion that rule 53 is a useful tool in determining review function of the court. There is also no dispute that executive action has in some of the cases been declared as reviewable under the doctrine of legality. It is of no moment to repeat this trite principle. The cases restate the purpose of the rule, but in no way consider specifically its applicability to executive action.

60. The court *of* first instance appears to reason that since its review powers are the same in respect of executive decisions as they are in respect of administrative decisions, there is therefore no reason not to extend rule 53 to cover executive decisions. This reasoning is, with respect, wrong. The Rules Board has deemed it fitting to limit the ambit of entities whose decisions and proceedings the rule covers. This ambit cannot be amplified by way of interpretation.

61. It is plain that there is absolutely no authority for the proposition that rule 53 applies to executive action. This contention is inferred from cases which only resolved reviewability under the doctrine of legality. It is impermissible to amend the rule in the manner in which the order does.

Cases relied upon by the High Court

62. The court of first instance relied on various judgments. We deal with each one of them to show that they are no authority for the proposition that the decision-maker must dispatch a record in respect of a decision that is clearly executive, and where no proceedings are undertaken.

63. The judgment in the ***Democratic Alliance and Others v The Acting Director of Public Prosecutions and Others***[26] was a matter not involving an executive decision. The judgment concerned a decision that is plainly administrative - the decision by the then NDPP to discontinue charges against the President.

64. The judgment in the ***Helen Suzman Foundation*** is also a probe into an administrative decision and is no authority for the proposition sought to be advanced in respect of an executive decision. The judgment concerned the application to access the record of deliberations in the proceedings of the Judicial Services Commission. The case is clearly distinguishable and concerned the confidentiality of the deliberations, whether those constitute part of the record.

[26] 2012 (3) SA 486 (SCA) at [37]

65. The judgment in ***Turnbull-Jackson v Hibiscus Coast Municipality***[27] is also no authority that rule 53 applies even to executive decisions. The decision under scrutiny related to an administrative decision taken by a municipality.

66. ***Safcor Forwarding Johannesburg Pty Ltd v National Transport Commission***[28] was a judgment concerning the jurisdiction of the court regarding a decision of a board – a classical administrative decision case, and therefore no authority that rule 53 would apply to executive decisions and beyond entities described in the rule.

67. The ***Cape Town City Council v South African National Roads Authority and Others***[29] cited in paragraph 22 of the *judgment* makes it plain that the court concerned itself with the rights of a *"private citizen when faced with an administrative or quasi-judicial decision adversely affecting his rights……."*.

68. The SCA erred in law in placing an onus on the appellant that he would have had to demonstrate that the application of rule 53 to an executive decision would result in a failure of justice[30]

69. The Constitutional Court[31] has finally determined that the appealability of interim orders in terms of the common law depends on whether they are final in effect. Further, that that test for appealability has since been corrected of its somewhat inflexible nature; the supremacy of the Constitution now requires the

[27] 2014 (6) SA 592 (CC) at [37]
[28] 1982 (3) SA 660 (A) at 667F – 670A
[29] 2015 (3) SA 386 (SCA) at [36]
[30] Record Vol 2, page 232, judgment at [31]
[31] ***Tshwane City v Afriforum and Another*** 2016 (6) SA (279 (CC) at [39] & [40]

'interest of justice' as the only requirement to be met for the grant of leave to appeal.

70. In this matter the judgment and order of the court of first instance, if undisturbed, defines the law irreversibly. It is for that reason that the order be considered by this Court. To do otherwise, would mean that the interlocutory order remains binding not only in relation to courts in the Gauteng Division, including the lower courts, with no possibility of judicial correction of an order clearly wrong in law.

71. It constitutes an impermissible judicial overreach to provide a procedural remedy and thereby amend the Rules of Court when the legislature has made specific legislative provision that the Rules of Court are to be amended by a specific statutory body.

72. It is also impermissible to use tools of interpretation such as *"purposive interpretation"* to introduce different categories of entities covered by the rule, despite the clear meaning of the language of the rule. The rule mentions inferior courts which the President is not; a tribunal which the President is not; a board, which the President is not or an officer performing a judicial, quasi-judicial or administrative functions which the President does not do when he reshuffles cabinet.

73. The *judgment* and order of the SCA and the court of first instance stand to be set aside; the appeal to be upheld and the first respondent be ordered to pay the costs including the costs consequent upon the employment of two counsel.

IAM SEMENYA SC

M SIKHAKHANE SC

M SELLO

Appellant's Counsel

Chambers

Sandton/JHB

15 October 2018

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 159 /2018

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Appellant (First Respondent *a quo*)
and	
DEMOCRATIC ALLIANCE	First Respondent (Applicant *a quo*)
PRAVIN JAMNADAS GORDHAN	Second Respondent
MCEBISI HURBERT JONAS	Third Respondent
MALUSI NKANYEZI GIGABA	Fourth Respondent
SIFISO NORBERT BUTHELEZI	Fifth Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1 This appeal concerns an interlocutory order granted by the Gauteng Provincial Division of the High Court on 4 May 2017.[1]

2 That order compelled then President Zuma to furnish the record of decision and reasons for his decisions to dismiss Pravin Gordhan as the Minister of Finance and Mcebisi Jonas as the Deputy Minister of Finance. We refer to these as "*the dismissal decisions*". The record and reasons were required to be furnished for purposes of a review application which was then pending in respect of the dismissal decisions.

3 Following the High Court order, the review application was overtaken by events. President Ramaphosa replaced President Zuma and he in turn appointed a new Minister of Finance and Deputy of Minister of Finance.

4 In light of these developments, the review application was withdrawn, with the consent of the appellant.[2] Despite this, the President has persisted with his appeal against this interlocutory order.

5 This appeal does <u>not</u> concern the merits or the lawfulness of the dismissal decisions. It concerns only the question of whether the High Court was correct to direct President Zuma to provide the record and reasons for the dismissal decisions, so that the review could proceed.

6 The appeal is plainly moot in the strict sense – it can have no practical effect on the review. The question is whether this Court should nevertheless exercise its

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1 High Court order, v 1 p 216

2 Founding affidavit in Constitutional Court, v 3 p 280 para 19; President's heads of argument para 17

discretion to decide the merits of the appeal. We submit that it should not do so.

7 Alternatively, if this Court decides to reach the merits of the appeal, the appeal should be dismissed. This is because the President's contentions before this Court suffer from a fatal flaw, as was the case before the High Court and SCA.

7.1 The President conceded before the High Court and SCA that the dismissal decisions were subject to review in terms of the principle of legality, which applies to all exercises of public power.[3] He does not retreat from this concession before this Court. Instead, he says that *"it is of no moment to repeat this trite principle"* that executive action is reviewable under the principle of legality.[4]

7.2 Yet, despite this concession, he insists that there is no obligation on him to file a record or provide reasons for his decisions.

7.3 We submit that this stance is simply untenable. Repeated decisions of this Court and the SCA make clear that a record and reasons are essential elements of any judicial review process. Having conceded that the decisions are subject to judicial review, the President cannot then resist providing the record and reasons.

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[3] High Court judgment, v 3 p 227 paras 18-19

[4] President's heads of argument at para 59

FACTUAL BACKGROUND

8 On 31 March 2017 at 12:14 am, President Zuma announced a cabinet reshuffle. This included the dismissal of Mr Gordhan and Mr Jonas.[5]

9 The dismissal decisions had extraordinarily serious consequences for the country and the economy. Yet, despite the drastic nature of the dismissal decisions and their consequences, President Zuma offered no public explanation for the decisions.[6]

10 Instead, the only explanations that emerged were from other people within the ANC and its alliance partner.

10.1 These officials, including then Deputy President Ramaphosa, stated publicly that the explanation offered internally by the President for his decision was a so-called "intelligence report" which suggested that Mr Gordhan and Mr Jonas were working against the interests of the country.

10.2 Every one of those persons simultaneously rubbished the so-called "intelligence report" and stated that it did not provide a proper basis for the dismissals.[7]

11 In those circumstances, on 4 April 2017, the DA launched an urgent review application to set aside and declare as unlawful, unconstitutional and invalid the

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5 Founding affidavit in compelling application, v 1 p 7 para 5

6 Founding affidavit in review, v 2, p 110, para 16

7 Founding affidavit in review, v 2, p 110, para 17. See also founding affidavit in review, v 2, pp 127-132, paras 58-62

dismissal decisions of the President.[8] It squarely contended that the dismissal decisions were irrational.[9]

12 The application was brought in terms of Rule 53 and sought the urgent provision of the records and reasons for the decisions.[10]

13 The stance of the President Zuma on the record and reasons shifted during this litigation.

13.1 After the review application had been launched, the initial stance of President Zuma, via the State Attorney, was that the records would be filed but that further time was necessary to do so. This was his stance from 6 April 2017 to 21 April 2017, including after the compelling application had been launched.[11]

13.2 However, on 21 April 2017, President Zuma's stance changed. That was the day on which he had undertaken to file the record and the day on which his answering affidavit in the compelling application was due.[12]

14 As a result of President Zuma's refusal to furnish the record and reasons, the review application was frozen in time. The DA accordingly brought an urgent compelling application.

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8 Notice of Motion in review application, v 2 pp 99–101

9 Founding affidavit, v 2, p 111, para 19

10 Notice of Motion in review application, v 2 pp 99–101

11 Annexure FA4, vol 1 p 51; Annexure FA6, vol 1 pp 54-55

12 Annexure IC1, v 1 pp 72 – 73; Answering affidavit in compelling application, v 1 p 70 para 19

15 On 4 May 2017, the High Court granted the interlocutory order sought compelling the President to furnish the record and reasons.[13] It later granted leave to appeal to the SCA.

16 The SCA heard the matter but ultimately concluded that the matter was moot and would have no practical effect or result.[14] The President's appeal was therefore dismissed.

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[13] High Court order, v1 p 216

[14] SCA judgment, v3 p 262 para 19

MOOTNESS

17 It is clear that the appeal is entirely moot insofar as it concerns the record and reasons for the decisions that were impugned in the review application.

17.1 That review application has been withdrawn and will not proceed.

17.2 Moreover, the DA accepts that, in light of this withdrawal, the interlocutory order made by the High Court, cannot be enforced and ceases to have any effect.[15] Similarly, the President *"concedes that in light of the withdrawal of the main proceedings, the order of Vally J no longer has any practical effect between the parties and has become academic."*[16]

18 There is thus no dispute between the parties that the matter is plainly moot and has no practical effect insofar as it concerns the decisions which were impugned in the review application.

19 The only question then is whether this Court should nevertheless, for the benefit of <u>future</u> cases, decide the appeal. This Court has a discretion whether to do so, as it has repeatedly recognized.[17] That discretion must be exercised according to what the interests of justice require.[18]

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[15] Answering affidavit in Constitutional Court, v 3 p 299 para 14.2

[16] President's heads of argument para 25

[17] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at para 11*; MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 32; *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others* 2018 (9) BCLR 1067 (CC) at para 74 – 78.

[18] *Langeberg Municipality* at para 11.

20 We submit that for two reasons this Court should decline to exercise its discretion in favour of determining the appeal.

20.1 First, the President's contentions on why this Court should reach the merits of the appeal relate to what he contends is the novel and precedent-setting nature of the High Court order. That is simply incorrect.

20.2 Second, it would not be in the interests of justice for this Court to reach the merits of this moot appeal. This is especially so given that the matter is interlocutory in nature and that the President has failed to show why this Court should interfere with the discretion exercised by the SCA in declining to reach the merits of the appeal.

The High Court's order is not novel or precedent-setting

21 The application of Rule 53 to decisions that are executive in nature has, in the decisions of this Court, been accepted without issue.

21.1 In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[19] a matter which this Court described as being "*in the heartland of executive-government function and domain*"[20] and which concerned "*policy-laden and polycentric decision-making*"[21], Moseneke DCJ expressly contemplated that the future review of the matter would

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[19] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) ("OUTA").

[20] OUTA at para 67.

[21] OUTA at para 68.

invoke Rule 53 and entail the production of a record.[22] Moreover, Moseneke DCJ stated in a footnote that:

> *"Rule 53 of the Uniform Rules of Court provide that in all applications for review an applicant shall call upon the decision-maker to show cause why a decision or proceedings should not be reviewed and corrected or set aside, and to despatch the record of the proceedings sought to be reviewed together with its reasons. Once such record is made available to the applicant he may make copies and within ten days bring an application to amend, add to or vary the terms of his review application and supplement the supporting affidavit."*[23]

21.2 The review of the President's decision in *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others,*[24] which this Court found was executive in nature, was also brought under Rule 53 without any adverse comment from this Court.[25]

21.3 Similarly, in *Van Zyl*[26] a decision concerning diplomatic protection an aspect of foreign policy that is essentially the function of the executive,[27] the SCA held that the appellants had been required to follow Rule 53 in reviewing the executive decision.[28]

21.4 There is nothing precedent-setting about the order of the High Court. The High Court order does not "bind" any other court. It is an order

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[22] OUTA at para 31 where Moseneke DCJ stated that "*I have kept in mind that the Rule 53 procedure might result in the lodging of a supplemented case record which would not be before an appellate court and which may entail new matters or disputes of fact which will best be dealt with by the review court itself.*"

[23] OUTA footnote 20 (emphasis added)

[24] 2013 (7) BCLR 762 (CC).

[25] *Association of Regional Magistrates of South Africa* at para 46.

[26] *Van Zyl and Others v Government of Republic of South Africa and Others* 2008 (3) SA 294 (SCA).

[27] *Van Zyl* at para 77.

[28] *Van Zyl* at paras 36 and 54

made by a single judge of one division of the High Court. In future cases, it will at most be of persuasive value. Even another single judge sitting in the Pretoria High Court would not be "bound" by the judgment in the present matter – he or she would be able to depart from that judgment if satisfied it was wrong. If this Court declines to deal with the appeal, no "*binding precedent*" will be created at all.

22 The assertion by the President that the order of the High Court *"breached the separation of powers"* is also without merit.

22.1 The High Court did no more than interpret Rule 53 purposively and generously.

22.2 As we demonstrate in what follows, this precisely what this Court has held is required when it comes to interpreting Rules of Court. It did so, for example, in *PFE International*[29] and, more recently, in *Helen Suzman Foundation*.[30]

Not in the interests of justice

23 We accept that this Court could, in its discretion, decide to determine an appeal against an interlocutory order even when the appeal was technically moot. However, what is clear is that this Court has to exercise its discretion in favour of the President in a series of respects to reach the merits of the appeal.

24 First, this Court would have to, unusually, agree to pronounce on the merits of an appeal even where it is moot between the parties.

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[29] *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at paras 25-27

[30] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 27

25 Second, this Court would have to, very unusually, agree to pronounce on the merits of an appeal even where the appeal is against an order that is self-evidently interlocutory and would ordinarily not be appealable at all. As this Court has explained, "*generally, it is not in the interests of justice for interlocutory relief to be subject to appeal as this would defeat the very purpose of that relief.*"[31]

26 Third, the President has sought leave to appeal against the judgment and order of the SCA.[32] Granting leave to appeal would therefore require this Court to interfere with the discretion exercised by the SCA regarding whether to reach the merits of the appeal.

26.1 The SCA did not decide the merits of the appeal. Rather it exercised its discretion in deciding not to do so.

26.2 It held that "*there is thus no compelling reason why this Court should exercise its discretion, absent objective facts, to conclusively to determine the ambit of Rule 53…*"[33]

26.3 To interfere with the exercise of the SCA discretion, this Court would have to find that the heightened test set out in *Trencon*[34] for interfering

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[31] *Mathale v Linda and Another* 2016 (2) SA 461 (CC) at para 25

[32] Application for leave to appeal to Constitutional Court, v 3, p 273, prayer 1

[33] SCA judgment, v 3, p 261, para 17

[34] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at para 88:

> *"When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised-*
>
> > *'…. judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'"*

with the SCA's discretion has been met. This despite the fact that no such allegation was made by the President.

27 We therefore submit that it is not in the interests of justice for leave to appeal to be granted.

THE MERITS OF THE APPEAL

Every executive decision is subject to legality review

28 The President's power to take the dismissal decisions derives from sections 91(2) and 93(1) of the Constitution.

28.1 Section 91(1) provides: "*The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.*"

28.2 Section 93(1) provides: "*The President may appoint … any number of Deputy Ministers … to assist the members of the Cabinet, and may dismiss them.*"

29 While the dismissal decisions are not subject to review in terms of the Promotion of Administrative Justice Act,[35] they are certainly subject to review in terms of the principle of legality.

30 This is because it is now beyond question that the exercise of <u>every</u> public power is subject to the principle of legality and the principle of rationality which forms part thereof. This is so even when the public power being exercised involves an executive decision, meaning (as here) that PAJA is not applicable.

30.1 For example, in *Albutt,* a case dealing with the exercise of the President's pardon powers under section 84(2)(j) of the Constitution, this Court held that:

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[35] Act 3 of 2000

> *"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."*[36]

30.2 Similarly, in *Motau*, the Court held:

> *"The principle of legality requires that every exercise of public power, including every executive act, be rational…."*[37]

31 The principle of legality thus constrains the exercise of all public power and this includes the exercise by the President of his executive powers.

32 Indeed, as we have indicated, this does not appear to be in dispute. It certainly was not in dispute before the High Court. In this Court too, the fact that executive decisions are reviewable under the principle of legality is apparently accepted as a "*trite*" by the President.[38]

The duty to provide the record

33 Once it is so that the President's dismissal decisions are subject to judicial review under the principle of legality, it must follow that the DA is entitled to be provided with the record in judicial review proceedings challenging those very decisions.

34 The procedure by which a record is ordinarily provided is Rule 53 of the High Court Rules.[39]

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[36] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 49

[37] *Minister of Military Veterans v Motau* 2014 (5) SA 69 (CC) at para 69

[38] President's heads of argument, para 59.

[39] Rule 53(1) of the High Court Rules states:

> "*Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of*

35 This Court has repeatedly emphasised that the provision of the Rule 53 record is simply essential for judicial proceedings to take place.

35.1 In *Turnbull-Jackson* this Court held:

> *"Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give a lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function."*[40]

35.2 In *Helen Suzman Foundation*, this Court reiterated and expanded upon this position:

> *"The purpose of rule 53 is to "facilitate and regulate applications for review". The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.*
>
> *Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:*
>
> > *'Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair*

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motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."

[40] *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC) at para 37

> *public hearing before a court with all the issues being ventilated, would be infringed.'*
>
> *"The filing of the full record furthers an applicant's right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent. This requires that "all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes to court."*[41]

35.3 Notably, this Court was unanimous on these points in *Helen Suzman Foundation.* The only divergence between the different judgments in that case was whether the record included the deliberations of the JSC. But on the question of the importance of the Rule 53 record, there was no demure.

36 The provision of the record, therefore, fulfils a series of critical purposes:

36.1 It ensures that the applicant is not required to conduct the review application in the dark, without knowing what was before the decision-maker;

36.2 It ensures fairness in the proceedings by providing all parties with copies of the relevant documents for them to make out their case; and

36.3 It ensures that the reviewing court is able to properly perform its function to "*scrutinise the exercise of public power for compliance with Constitutional prescripts".*[42]

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[41] *Helen Suzman Foundation* at paras 13-15 (emphasis added)

[42] *Helen Suzman Foundation* at para 13

37 We submit that the High Court was thus quite correct to direct that the President provide the record of the dismissal decisions. As we explain in what follows, it was entitled to do so both in terms of Rule 53 and in terms of section 173 of the Constitution.

The duty to provide the reasons

38 In addition to seeking access to the record, the DA sought access to the reasons for the decision. President Zuma resisted both providing the record and providing reasons. The High Court ordered that these reasons be provided.[43]

39 Once it is conceded, as it has been, that the dismissal decisions are subject to challenge under legality review, including on grounds of irrationality, it is difficult to see how it can seriously be contended that reasons need not be provided by the President. How else are the litigants and courts able to assess the rationality of the decisions concerned?

40 As the SCA has explained:

> *"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.*
>
> *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*

[43] High Court order, v 3 p 216 para 2.1

> *to think of a way to account for one's decisions other than to give reasons … 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…."*[44]

41 The same two premises relied on by the SCA are plainly present here.

41.1 First, it is common cause that the President is under a constitutional duty to exercise his powers in a way that is not irrational or arbitrary.

41.2 Second, the President is bound (by section 195 of the Constitution) to the values of transparency and accountability.

41.3 It follows that the President is required to provide the reasons for his dismissal decisions.

42 Once this is so, then the DA was entitled to an order compelling the President to provide the reasons for the dismissal decisions.

43 Again as we explain in what follows, the High Court was entitled to direct the President to provide his reasons either in terms of Rule 53 (which specifically refers to the reasons for the decision) or in terms of section 173 of the Constitution.

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[44] *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at paras 43-44 (emphasis added).

The proper interpretation of Rule 53

44 The President contends that because Rule 53 does not expressly mention executive decisions, it is not applicable to a review of an executive decision.[45] He contends that the High Court erred when it adopted a "*purposive interpretation*" of the rule.[46]

45 We submit that the President's stance is incorrect. It involves the "*blinkered peering at an isolated provision*" that this Court has warned against.[47]

46 The proper approach is that provisions must now always be interpreted contextually and that from the outset one considers the context and the language together, with neither predominating over the other. The Constitution plays a critical role in this interpretative process. The need for purposive, contextual, constitutional interpretation of all statutes has been repeatedly explained by this Court.[48]

47 While this purposive and contextual approach is applicable in respect of all enactments, it is of particular force when it comes to interpreting Rules of Court as stated in *PFE International.*[49]

47.1 In dealing with the reach of the rule at issue in that case, this Court held:

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[45] President's heads of argument, para 47.2

[46] Founding affidavit in Constitutional Court, v 3 para 23.1 – 23.3 p 281; President's heads of argument para 55 - 56

[47] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) at para 28, quoting *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at para 12

[48] See, for example: *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28

[49] *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC)

> *"If the literal approach to construing rule 38(1) were correct, the argument advanced by the applicants would have merit. But the rule must be generously and purposively interpreted so as to give the holders of the right the fullest protection they need."*[50]

47.2 This Court rejected the narrow literal interpretation of Rule 38 and "*opted for a construction that promotes wider access to information*". It explained:

> *"This construction is also in line with the purpose for the exclusion of PAIA in cases where access to information is regulated by the rules of court. Even before the adoption of the Constitution in 1994, our courts construed the rules in a manner that advanced the process of litigation if the literal reading would hamper its progress."*[51]

47.3 The decision in *PFE International* makes clear that court rules must be generously and purposively interpreted to give parties the fullest procedural protection they need. A meaning that advances the process of litigation must be adopted.

48 Even more on point, this was precisely the approach that this Court recently adopted to Rule 53 in the *Helen Suzman Foundation* matter.

48.1 That case concerned a review of a decision of the Judicial Service Commission. Such a decision does not fit comfortably within the literal wording of Rule 53. It is not a "*decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions*".

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[50] *PFE International* at para 25

[51] *PFE International* at para 27

48.2 Yet, this Court rightly had no hesitation in finding that Rule 53 applied to reviews of JSC appointment decisions.

48.3 Moreover, in determining the reach of the procedural entitlement to a record, this Court adopted the interpretation that better promoted access to court:

> *"This approach to what a record for purposes of rule 53 should be better advances a review applicant's right of access to court under section 34 of the Constitution. It thus respects the injunction in section 39(2) of the Constitution that courts must interpret statutes in a manner that promotes the spirit, purport and objects of the Bill of Rights.*"[52]

49 We submit that precisely the same applies here. The President seeks to read Rule 53 in an overly literal sense. This is impermissible.

49.1 Rule 53 was enacted in 1965. It laid down "*a standard procedure for all types of review*".[53]

49.2 Since then, of course, the category of decisions which may be subjected to review has been considerably broadened, mainly due to the effect of the Constitution. The rule must be given an interpretation that takes account of these developments and that allows for a proper review of all decisions that in law are subject to review. This includes executive decisions.

49.3 This interpretation will ensure that when a decision is subject to review, the decision-maker must provide the record of decision. As the frequent

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[52] *Helen Suzman Foundation* at para 27

[53] *Safcor Forwarding (Jhb) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 669B-C

statements by this Court on the value of a record demonstrate, it is this interpretation which will give effect to the Constitution and which will advance the process of litigation.

50 There is a further reason why the President's interpretation of Rule 53 is untenable.

50.1 The categorisation of a decision is often a contentious issue which is resolved at a later stage by the appellate courts. Examples of this are this Court's decisions in *Masetlha*[54], *Motau*[55], *Association of Regional Magistrates of Southern Africa*[56] and the SCA's decision in *Scalabrini*.[57] Moreover, in *Motau* and *Scalabrini*, this Court and the SCA respectively categorised the decisions as executive in nature when the High Court concluded that they were administrative in nature.

50.2 To hold that the type of decision determines whether Rule 53 is applicable would put litigants in a difficult position and in turn, organs of state facing a review application would only have to adopt the view that their application is executive in nature to avoid having to furnish the record. In fact, that is what the President did in this case, the President states in his affidavit that:

> *"The President at the time adopted the stance that the decision to reshuffle cabinet constitutes an executive decision and as*

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[54] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC)

[55] *Motau* at note 37 above.

[56] *Association of Regional Magistrates of Southern Africa* at note 24 above.

[57] *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA)

> *such, falls outside the scope of rule 53. Consequently, the relief sought by the first respondent was not competent."*[58]

50.3 On the President's approach, all that a decision-maker has to do is to argue that its decision is executive in nature. A litigant would then be faced with the unenviable position of having to proceed with its review litigating in the dark with none of the procedural benefits of Rule 53 or to bring a compelling application, the determination of which, together with any subsequent appeals could stultify the review for months and even year as seen in this case. This is untenable and directly at odds with the right of access to court.

51 We therefore submit that, properly interpreted, Rule 53 does applies to all executive decisions that are subject to review on the grounds of the principle of legality or PAJA. An application seeking to review such a decision is therefore entitled to call for the record and reasons for that decision.

The effect of section 173 of the Constitution

52 Even if we were wrong on the breadth of Rule 53, this would still not assist the President.

53 This is because even if Rule 53 were regarded as being too narrow to encompass the President's dismissal decisions, the DA was still entitled to a compelling order in terms of the High Court's inherent powers under section 173 of the Constitution.

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[58] Founding affidavit in Constitutional Court, v 3 p 278 para 9

54 This is made clear by the decision of the SCA in the matter concerning the decision of the Acting NDPP to discontinue the prosecution of President Zuma.[59]

54.1 There, the SCA considered whether Rule 53 applied to the review decision by the Acting NDPP to discontinue prosecutions and therefore whether the record of the decision was compellable.

54.2 The SCA noted that the express wording of Rule 53 appeared "*to be confined to dealing with decisions of particular institutions and officials performing certain categorised functions, namely, judicial, quasi-judicial or administrative functions*."[60]

54.3 However, having considered the history and role of judicial review, it ultimately concluded that the record of decision had to be provided:

> *"In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescripts. That much is clear from the Constitutional Court judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision-related to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process.*[61] *Without the record, a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."*[62]

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59 *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA)

60 *Democratic Alliance v Acting NDPP* at para 35.

61 The Court quoted section 173 of the Constitution: *"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."*

62 *Democratic Alliance v Acting NDPP* at para 37 (emphasis added)

55 The same approach applies here. Thus even if Rule 53 were somehow to be read as not applying to the dismissal decisions, an order compelling production of the record was still necessary and appropriate – but then in terms of section 173 of the Constitution.

The belated suggestion that there may be "no record"

56 In the President's heads of argument, he raises a different argument, not foreshadowed on the papers. He contends that:

> *"Any cursory reading of section 84 of the Constitution dealing with executive powers immediately reveals that there cannot be 'a record'."*[63]

57 However, this argument is not sustainable. For a start, it is necessary to bear in mind the core meaning that our courts have for decades given to the word "*record*".

> *"The words "record of proceedings" cannot be otherwise construed, in my view, than as a loose description of the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question. It may be a formal record and dossier of what has happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially…."*[64]

58 Once this is so, it is clear that there will indeed be a "*record*" in existence for all or most decisions taken by the President in terms of section 84 of the Constitution. For example:

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[63] President's heads of argument, para 57 - 61

[64] *Johannesburg City Council v The Administrator Transvaal & another (1)* 1970 (2) SA 89 (T) at 91G-92A. Of course, the courts have now interpreted "*record*" more broadly in cases such as *Helen Suzman Foundation*.

58.1 When the President appoints a commission of enquiry in terms of section 84(2)(f) of the Constitution, there would surely be at least a document in existence explaining the need for the Commission, particularly when the Commission is to be established in terms of the Commissions Act.[65]

58.2 When the President decides to pardon an offender in terms of section 84(2)(j) of the Constitution, there would surely be at least a document in existence setting out why the pardon should be granted and, very possibly, what the representations by victims of the crimes concerned were.[66]

58.3 When the President confers an honour in terms of section 84(2)(k) of the Constitution, there would surely be a document in existence setting out why the honour should be conferred on the person concerned.[67]

58.4 When the President makes an appointment in terms of section 84(2)(e) of the Constitution, there would surely be a document in existence explaining why the person to be appointed was qualified for the position

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[65] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 176:

"*The requirement that a commission should be investigating a matter of "public concern" before the provisions of the Commissions Act may be vested in it is, therefore, a significant limitation on the President's power to vest commissions with powers of coercion. It is an objective check, justiciable by the courts.*"

[66] See: *Albutt v CSVR* at para 70:

"Before the President decides whether to grant pardon, he must establish the facts in accordance with the criteria set out in the special dispensation process, namely, whether the offence was committed with a political motive. To establish the facts the President must hear both the perpetrators and the victims of the crimes in respect of which a pardon is sought."

[67] See: *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) at para 32:

"[B]eing appointed silk serves as recognition by the President of the esteem in which the recipients are held "by reason of their integrity and of their experience and excellence in advocacy."

concerned.[68]

59 We do not discount the possibility that there may be some exceptional decision taken by the President in which no record exists. But if that were the case, then the President would have to say so on oath, in answer to any compelling application.

60 In the present case, the President did not do so. On the contrary, the President deposed to no affidavit at all in the compelling application and the affidavit deposed to by the State Attorney on his behalf does not contain any suggestion that the record does not exist.[69]

61 The belated argument that no record exists therefore cannot be sustained.

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[68] See: *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at para 47:

"The President relied on Mr Simelane's curriculum vitae, which indicated broadly that he had been the Competition Commissioner for a period of a little more than 5 years and that he had been Director-General for a period of a little more than 4 years. He also relied on his personal knowledge of Mr Simelane's personal and professional qualities, though we do not have much detail about the precise contours of this knowledge. The President also relied on the advice of the Minister to the effect that from the Minister's personal knowledge of Mr Simelane he was a fit and proper person to be appointed National Director. The Minister, who was familiar with both the Ginwala Commission and the Public Service Commission recommendations, advised the President, in effect, that there was no need for him to interrogate these documents and that he would advise that Mr Simelane be appointed, despite the recommendations made by the Ginwala Commission and the Public Service Commission"

[69] Answering affidavit in compelling application, v 1 pp 65 - 71

CONCLUSION

62 In all the circumstances we submit that:

62.1 The application for leave to appeal should be dismissed;

62.2 Alternatively, the appeal itself should be dismissed.

63 In either event, the President should be directed to bear the costs, including the costs of two counsel.

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Chambers, Sandton
29 October 2018

TABLE OF AUTHORITIES

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