IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **55493/2020**

In the matter between:

OPEN SECRETS	First applicant
UNPAID BENEFITS CAMPAIGN	Second applicant

and

MINISTER OF FINANCE	First Respondent
ISMAIL MOMONIAT *N.O.*	Second Respondent
FUNDI TSHAZIBANA *N.O.*	Third Respondent
THEZI MABUZA *N.O.*	Fourth Respondent
DEON ROSSOUW *N.O.*	Fifth Respondent
SIZWE NXASANA *N.O.*	Sixth Respondent
FINANCIAL SECTOR CONDUCT AUTHORITY	Seventh Respondent

APPLICANTS' HEADS OF ARGUMENT

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A. INTRODUCTION: EXCLUDING PUBLIC PARTICIPATION IS *IPSO FACTO* UNLAWFUL

1. The central question the Court is asked to answer in these proceedings is whether a Minister, exercising his public powers, is entitled to conduct a recruitment and appointment process of a public authority falling within his remit, effectively in secret and with no meaningful public participation? [1]

2. The Constitutional Court, in a different context, has already answered this question in the negative. In *Affordable Medicines,*[2] the Court said:

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

3. In addition, in *Rail Commuters*,[3] the Constitutional Court said:

> "[78] The principle of accountability, therefore, may not always give rise to a legal duty whether in private or public law. In determining whether a

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1 SFA, p 003-8, para 15 to p 003-9, para 16.

2 *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) ("***Affordable Medicines***") at para [49].

3 *Rail Commuters Action Group and Others v Transnet Ltd* 2005 (2) SA 359 (CC) ("***Rail Commuters***").

> legal duty exists whether in private or public law, careful analysis of the relevant constitutional provisions, any relevant statutory duties and the relevant context will be required. It will be necessary too to take account of other constitutional norms, important and relevant ones being the principle of effectiveness and the need to be responsive to people's needs."

4. In the context of this case then, all the applicants have to do in order to succeed is demonstrate that, having regard to the identity of the public functionaries, and the nature of their public powers, public participation is constitutionally required.

5. If the applicants can do this then, with respect, the declaratory relief sought from this Court (namely declaring that the Regulations promulgated in terms of section 61(4) of the Financial Sector Regulation Act 9 of 2017 ("**the FSR Act**") are unlawful)[4] should be granted.

6. As the Regulations currently stand, they permit for the appointment of a Commissioner and Deputy Commissioner(s) of the Financial Sector Conduct Authority ("**FSCA**") to be conducted in secret.[5] [6]

7. This is a clear violation of the applicants' and the public's rights in terms of, *inter alia*, section 1 of the Constitution. This Court, with respect, is

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4 The Regulations were promulgated on 29 March 2018 in Government Gazette no. 41550 Government Notice R 405, and amended on 5 August 2020 in Government Gazette No. 43581 Government Notice R. 850 (collectively referred to as "the Regulations").

5 SFA, p 003-8, para 12.

6 This shall be referred to as the "**appointment process**".

required in the circumstances to exercise judicial control over the mis-application of public power.

8. To best demonstrate the secrecy shrouding the appointment process, at the behest of the Minister of Finance ("**the Minister"**), and the unlawfulness thereof, the applicants also place in issue:

8.1. the process of appointing the Shortlisting Panel;[7] and

8.2. the delegation of further powers to the Shortlisting Panel which are *ultra vires* the Minister's powers in terms of the FSR Act.

9. The overall impact of this secret regime is that by excluding public participation and oversight,[8] there is no accountability.[9] This is an affront to our constitutional dispensation.[10]

10. The applicants' case, in summary, is that the Regulations fall to be declared as unlawful and set aside on the basis that they are:[11]

10.1. unlawful to the extent that they fail to provide for openness and transparency in the appointment process;[12]

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7 SFA, p 003-8, para 13.
8 SFA, p 003-9, para 17.
9 SFA, p 003-9, para 18.
10 SFA, p 003-9, para 18.
11 SFA, p 003-9, para 19.
12 SFA, p 003-9, para 19.1.

10.2. unlawful to the extent that they fail to provide public access to the interviews conducted by the Shortlisting Panel;[13]

10.3. *ultra vires,* alternatively irrational, in that the Minister unilaterally adopted the appointment process applicable to the head of one organ of State i.e. the Commissioner for the South African Revenue Service ("**SARS Commissioner**"), to another, i.e. the FSCA;[14] and

10.4. *ultra vires* to the extent that they permitted the Minister to not only delegate his obligation of appointment, but also to the extent that they give the Shortlisting Panel unfettered powers to determine its own processes, without any guidance.[15]

11. The respondents contend that all evidence presented by the applicants is unhelpful to their case.[16]

12. The respondents contend that the evidence relating to the following should be disregarded as irrelevant:

12.1. The substance of the Regulations;[17]

12.2. The Shortlisting Panel's *ultra vires* actions;[18]

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13 SFA, p 003-9, para 19.2.
14 SFA, p 003-9, para 19.3.
15 SFA, p 003-10, para 19.4.
16 SAA, p 004-7 to 004-9, paras 11 – 15.
17 SAA, 004-9, paras 16.1.
18 SAA, 004-9, paras 16.2.

12.3. The Shortlisting Panel's process in the appointment process;[19]

12.4. The adoption of the Nugent Model to the appointment process.[20]

13. But, and as demonstrated elsewhere, what the Minister cannot run away from is that, in the absence of public participation and accountability, the unlawfulness of the Regulations is simply compounded by the other factors advanced by the applicants.[21]

14. It does not matter what the Regulations look like.[22] For so long as the Regulations exclude public participation in the appointment process, they are constitutionally invalid and must be declared as such.

15. This is due to the supremacy of the Constitution and the rule of law in terms of section 1(c) of the Constitution, with conduct inconsistent with the Constitution being invalid in terms of section 2 of the Constitution.[23]

16. This is the exact declaratory relief that this Court is asked to grant.

17. As shall be demonstrated further below, any one of these grounds is sufficient to justify the applicants' relief being granted.

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19 SAA, 004-9, paras 16.3.

20 SAA, 004-10, paras 16.4.

21 Rule 53(4) provides that "[t]he applicant may within ten days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit."

22 AA, 004-9, paras 16.1.

23 FA, 003-25, para 73.

18. This is due to the fact that not only is the exclusion of public participation direct evidence that the respondents have breached their obligations in terms of the Constitution, but any of the additional grounds as relied upon by the applicants, serve to further compound that breach.

B. THE TRUE NATURE OF THE APPLICATION

19. In an attempt to straitjacket the applicants into review proceedings, the Minister contends that it must fail based on the following reasons:

    19.1. Firstly, considering the amendment in terms of rule 53, the applicants have abandoned the only prayer sought which attacked the Shortlisting Panel's conduct;[24] and

    19.2. Secondly, the Minister's reference to the Regulations that apparently require the Shortlisting Panel's processes to be fair, impartial and transparent.[25]

20. Both arguments are not only without merit, but seem to demonstrate that the Minister misunderstands the nature of the relief sought in these proceedings pursuant to the applicants' amendment.[26]

21. The Minister's submissions do not withstand scrutiny:

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24 SAA, p 004-7, para 12.
25 SAA, p 004-11, para 20.
26 SRA, p 005-52, para 9.

21.1. First, the Regulations have not been validly executed,[27] having not been re-considered by Parliament. While the Minister contends otherwise, the applicants have demonstrated that the material differences between the initial draft Regulations and those finally published triggered the obligation for Parliament to reconsider them. This was not done.[28]

21.2. Second, the Minister has unlawfully delegated his power to carry out the appointment process[29] contrary to the express obligations placed on him by sections 61(1) and (2) of the FSR Act to appoint the Commissioner and Deputy Commissioner(s) of the FSCA.[30]

21.2.1. No-one contends that the Minister cannot be assisted in the discharge of his power.

21.2.2. What is different about this matter, however, is that the Minister's conduct in truth amounts to delegating the decision-making power to the Shortlisting Panel.

21.2.3. In turn, this subjects the Minister's own power to a reverse onus of rationality in circumstances where the Minister may disagree with the Shortlisting Panel itself.

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27 SFA, p 003-25 to 003-30, paras 77 – 91.
28 SFA, p 003-27, para 82; pp 003-28 to 003-29, paras 84 – 88; p 003-24, paras 71 – 71.2.
29 SFA, p 003-32, para 101; p 003-33, para 102; p 003-33, para 104.
30 SFA, p 003-22, para 100.

21.2.4. In other words, the Minister has effectively fettered his own power and subjected it to the powers of the Shortlisting Panel in a way not permitted by the FSR Act itself.

21.3. Third, the Shortlisting Panel's conduct is *ultra vires* by further delegating their own powers to recruitment agencies:[31]

21.3.1. assuming that the Minister's delegation to the Shortlisting Panel was lawful, which it is not, the appointment of a recruitment agency to assist in the appointment process was a further delegation of power, brought about through the Shortlisting Panel's adopted process.[32] At the time this was taken, neither the Regulations nor the Minister's own delegation provided for same.[33]

21.3.2. the Shortlisting Panel further decided, apparently pursuant to the Minister's delegation, and as part of its own processes, to have the Commissioner (once finally appointed) participate in the selection process for the Deputy Commissioner(s).[34] This has not been

31 SFA, p 003-35, para 112; p 003-38, para 122.
32 SFA, p 003-36, para 115.
33 SFA, p 003-36, para 116.
34 SFA, p 003-38, paras 123 – 125.

provided for by the FSR Act or the Regulations or the Minister at all.

21.4. Fourth, the absence of transparency in the appointment process by the Minister (as well as the Shortlisting Panel) altogether excluding the public from the appointment process and limiting the consideration of the shortlisted candidates to only those selected by the Shortlisting Panel violates the principle of legality.[35] This is due to the fact that the Regulations as they currently stand permit an appointment process that is more secretive than that applicable to Judges, and because as the Constitutional Court has already recognised, *ex post facto* review[36] can be inappropriate and ineffective.

21.5. Fifth, the respondents' inviting public comments on the two shortlisted candidates is contradictory to their stance of carrying out the appointment process behind closed doors.[37] The respondents apparently find such public comment desirable. This proves the applicants' point: public participation enhances

35 SFA, p 003-41, paras 136 – 137.

36 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para [247]: "... In short, an ex post facto review, rather than insisting on a structure that ab initio prevents interference has in our view serious and obvious limitations. In some cases, irreparable harm may have been caused, which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaint stage. Only adequate mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking."

37 SFA, p 003-10, para 21 read with p 003-44, para 149.

decision-making at the leave of the appointment of a functionary.[38]

21.6. Sixth and finally, the Minister's reliance on the Nugent report in the appointment of the SARS Commissioner ("**the Nugent model**") is arbitrary and capricious.[39] The application of the Nugent Model in the appointment process for the FSCA enjoys no statutory basis at all. The Minister simply took one model and unilaterally imposed it on another process where he had no authority in law to do so.[40] [41]

22. For the reasons above, the respondents' attempts to non-suit the applicants on the basis that they have attempted to broaden the nature of the dispute before the Court is wholly without merit.

C. THE RELIEF SOUGHT IS NOT MOOT

23. The starting point in this matter is section 34 of the Constitution, which entitles the applicants to approach this Court for redress provided that the dispute can be resolved through the application of law.

24. Section 34 provides as follows:

> "Everyone has the right to have <u>any dispute that can be resolved by the application of law</u> decided in a fair public hearing before a Court

38 SFA, p 003-44, para 149.
39 SFA, p 003-46, para 155.
40 SFA, p 003-46, para 156.
41 SFA, p 003-46, para 157.

> or, where appropriate, another independent and impartial tribunal or forum." (our emphasis)

25. In approaching the Court, the applicants framed the relief sought in a particular way based on the information that was available to them at the time. Part A of the application was prosecuted on this basis.

26. Once the applicants received and considered the Rule 53 record, as well as the developments in the appointment process, they amended the relief sought as they are entitled to do.[42]

27. Central to the application, both pre- and post-amendment of the notice of motion, is a dispute that can be resolved by application of law and decided before a Court.

28. The Minister is of the view that the amendment, which allegedly results in an abandonment of any "consequential" relief directed at setting aside any appointments that have been implemented at the time of hearing this application,[43] makes the matter academic and is not rooted in facts.[44]

29. That, with respect, is mistaken. The Court is enjoined by section 172(1)(*a*) of the Constitution to declare, in a constitutional matter, any

42 SFA, p 003-7, paras 5 – 8.
43 SFA, 003-7, para 9.
44 SAA, p 004-10, para 18.

conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.[45]

30. Section 172(1)(*a*) of the Constitution provides that a Court deciding a constitutional matter within its powers:

> "(a) **must** declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency." (emphasis added)

31. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd,*[46] the Constitutional Court held that the provisions of section 172(1)(*a*) are instructive to the Court to declare any law or conduct that is found to be inconsistent with the Constitution invalid.[47]

32. This application is clearly a constitutional matter. At its heart are the constitutional rights of openness, transparency, and accountability, and whether they have been infringed upon by the Minister's and Shortlisting Panel's conduct in the appointment process.

33. The presence of an unlawful delegation of powers by the Minister to the Shortlisting Panel, and the Shortlisting Panel's further delegation of its powers to recruitment agencies, simply adds further credence to the

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45 SFA, 003-25, para 74.

46 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ("***Buffalo City***").

47 *Buffalo City* at para [63]; *State Information Technology Agency CC SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at para [52].

contention that the Court "must" declare the Regulations as being inconsistent with the Constitution.

34. The extent of such inconsistency is that this conduct fails to uphold the principles of openness, transparency and accountability in the recruitment process.

35. Consequently, the effect of an academic exercise, or mootness as labelled by our Courts, cannot excuse the Court from declaring invalid what the Constitution enjoins the Court to declare invalid.

36. In *Mohamed & Another v President of the Republic of South Africa & Others*,[48] the Constitutional Court held:

> "… to pronounce on the illegality of the governmental conduct in issue in this case. In the first instance, quite apart from the particular interest of the applicants, in this case, there are important issues of legality and policy involved, and it is necessary that we say plainly what our conclusions as to those issues are. And as far as the particular interest of Mohamed are concerned, we are satisfied that it is desirable that our views be conveyed to the trial Court."[49]

37. Additionally, in the event that we are mistaken and the application is indeed moot, we contend that such mootness does not make the

48 *Mohamed & Another v President of the Republic of South Africa & Others ("**Mohamed**")* 2001 (3) SA 893 (CC) at para [70].

49 *Mohamed* at para [70].

applicants non-suited. It is axiomatic that mootness is not an absolute bar to deciding an issue.[50]

38. The question to be answered is whether the interests of justice require that the issue be decided, with one consideration being whether the Court's order will have any practical effect on either of the parties or others.[51]

39. The Shortlisting Panel has identified two shortlisted candidates for the position of the Commissioner of the FSCA,[52] and are still embarking on the process of shortlisting and recommending candidates for the position of Deputy Commissioner(s) of the FSCA.

40. Whilst the applicants do not wish to set aside the current appointment process embarked upon, it is imperative that future appointment processes be carried out in a lawful and constitutionally compliant way.

41. The applicants' election in this round of the application process does not render an otherwise unlawful process lawful. The applicants are perfectly entitled to choose what to do in these circumstances without fear of contradiction.[53]

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50 *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) ("***Sebola***") at para [32]. Also see *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) at paras [19]-[25].

51 *Sebola* at para [32].

52 SFA, 003-11, para 22.3.

53 Compare and contrast, for example, *Montesse Township and Investment Corporation (Pty) Ltd v Gouws N.O.* 1965 (4) SA 373 (A) at 380; *Dabner v SAR&H* 1920 A 583;

42. It is for this reason that it remains relevant for the Court to issue the declarator sought, setting aside the Regulations to the extent that public participation is not factored therein.[54]

43. This will in turn ensure that Parliament reconsiders the Regulations prior to the commencement of the appointment process for the next candidates, and is given a meaningful opportunity as the representatives of the people to exercise appropriate oversight which the people themselves have been denied.

44. Practically, and flowing from this Court's Order, in declaring the appointment process unlawful the Order will prevent such unlawfulness from being repeated in future.

45. The Minister's attempt at shadow-boxing in respect of mootness may have made sense had the applicants been prosecuting review relief. They are not. Therefore, and to the extent that a question of "consequential relief" arises, attention should be drawn to section 172(1)(*b*) of the Constitution.

46. That section provides:

> "(b) may make an order that is just and equitable, including –
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and

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Genticuro AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 600A-B; *Samancor Group Pension Fund v Samancor Chrome and Others* 2010 (4) SA 540 (SCA) at para [26].

54 SFA, 003-44, para 148.

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

47. It is common that what started out as a review application under Rule 53 has now shifted, as a result of the relief sought in prayer one, to an application for declaratory relief in terms of section 172 of the Constitution.

48. The applicants no longer ask the Court to exercise its review powers, but instead ask the Court to exercise its declaratory powers. In any case, even if they were, this Court would still have a discretion to grant the applicants consequential relief if the applicants asked therefor.

49. That they do not, with respect, makes this Court's decision even easier.

50. In sum, the abandonment of the "consequential relief" does not make this application moot and/or academic.

51. The Court's obligation is that it must declare the conduct invalid to the extent of its inconsistency as it is invited to do.

D. PART A JUDGMENT

52. Related to the respondents' arguments about mootness, it is seemingly necessary to address the judgment when part A of this matter was heard and determined.

53. Judgment in respect of Part A was handed down by Her Ladyship The Hon. Van der Schyff J on 17 November 2020.[55]

54. Contrary to what the Minister argues, namely that a number of findings were made in the Part A judgment that are relevant to Part B,[56] the only relevance is that Part A was dismissed due to lack of urgency.[57]

55. This is resultant from the Minister placing reliance on *obiter* remarks by the Learned Judge and not on her *ratio*.[58] The *ratio* under Part A is limited to the urgency of the application, which was decidedly adversely against the applicants.[59]

56. It is trite law that:

56.1. only the *ratio* binds this Court, not the *obiter*; and

56.2. when a Court makes a finding in respect of Part A proceedings, those findings do not ordinarily bind the Court in Part B.[60]

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55 SFA, 003-7, para 10.
56 SAA, 004-13, paras 27 – 28.
57 SFA, 003-24, para 70.
58 SRA, 005-12, paras 35 & 37.
59 SRA, 005-13, para 38.
60 *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45B-47C, particularly at 46C-E. Also see *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para [25]; *Tony Rahme Marketing Agencies SA (Pty) Ltd and Another v Greater Johannesburg Transitional Metropolitan Council* 1997 (4) SA 213 (W) at 216A-D; *Geyser v Nedbank Limited and Others: In re: Nedbank v Geyser* 2006 (5) SA 355 (W) at paras [8]-[9]; *Scalabrini Centre and Others v Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC) at para [66].

57. Therefore, even if the judgment given in respect of Part A of this matter was directly relevant, the Court hearing Part B is nonetheless entitled to revisit most, if not all, of those issues when giving final judgment.

E. DECLARATORY ORDERS

E1. THE TEST FOR DECLARATORY ORDERS

58. Declaratory orders are regulated by section 21(1) of the Superior Courts Act 10 of 2013 ("**the Superior Courts Act**"), and are granted where an applicant meets the requirements thereof.

59. The provision insofar as is relevant provides:

> "(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –
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> …
>
> (c) in its discretion, and at the instance of an interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

60. The test for declaratory relief was discussed in *Concordiant Trading*,[61] where the Supreme Court of Appeal considered the provisions of the old section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959.

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61 *Concordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) (''***Concordiant***"). The Court adopted this rationale from the decision in *Durban City Council v Association of Building Societies* 1942 AD 27 at para 32.

61. The old Act contained the same wording as section 21(1) of the Superior Courts Act.

62. The Supreme Court of Appeal confirmed the two-stage approach for declaratory relief, namely:

62.1. A pre-existing dispute is not necessary for the relief to be granted, but there must be interested parties upon whom the declaratory order would be binding.[62] This requires an applicant to show that he/she/it is a person interested in an existing, future or contingent right or obligation;[63] and

62.2. Once satisfied, the Court has to exercise its discretion by deciding to either grant or refuse the order sought with respect to all the facts and circumstances before it.[64]

E2. FIRST LEG OF THE TEST : THE EXISTING DISPUTE BETWEEN THE PARTIES

63. The first leg of the test is to merely establish that there are interested parties to whom the declaratory order, if granted, will apply and upon whom it will be binding.

62 *Concordiant* at para [16] and [18].

63 *Concordiant* at para [16] and [18]; *Minister of Finance v Oakbay Investments (Pty) Ltd and Others* 2018 (3) SA 515 (GP) ("***Oakbay Investments***") at para [53].

64 *Concordiant* at para [17].

64. The applicants, who act in their own and in the public interest, have an interest in ensuring that the appointment process is carried out in a transparent manner.

65. The shortlisted candidates, the criteria used to shortlist them,[65] and the Shortlisting Panel's process set out in annexure "M1" are not in the public domain.[66]

66. This information has only been disclosed pursuant to this litigation. In any event, the current appointment process goes against the principles of transparency and openness.[67]

67. Furthermore, and more importantly, the appointment process is still underway, with the Shortlisting Panel having only identified two candidates for recommendation to the Minister for the position of Commissioner of the FSCA.

68. Similar actions will have to be undertaken in respect of candidates for the position(s) of Deputy Commissioner(s) of the FSCA.

69. At the very least, the applicants can claim that there is an existing right for appointments to public office (like the position(s) of Commissioner and Deputy Commissioner(s) of the FSCA) to be in a transparent manner, which they seek to vindicate.

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65 FA, p 001-44, para 114.
66 SFA, p 005-9, para 28.1.
67 FA, p 001-45, para 121, p 001-46, para 123; SFA, p 003-9, para 18, p 003-44, para 148.

70. The current failure to do so, which, unless it is affected by this Court's order, could or would continue in future, is a violation of the rule of law.

71. In order to avoid the "floodgates scenario"[68] of applicants seeking declarators, the Court must establish that the applicants have a sufficient legal interest in the relief sought as opposed to a more general interest.[69]

72. With respect, the applicants are clearly not in this scenario. The answer to this issue lies in the constitutional principle of legality.[70]

73. It is trite that, in terms of the principle of legality, public power can only be validly exercised if it is clearly sourced in law.[71] The Minister exercises a public power and performs a public function.

74. The doctrine of legality, entrenched by the Constitution and providing the foundation for the control of public power,[72] provides that functionaries who exercise public power cannot exercise any power or perform any function beyond that which is conferred on them by law.[73]

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68 *Democratic Alliance v The Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) at para [47].

69 *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) (''*Giant Concerts*'') at para [37].

70 *Oakbay Investments* at para [54].

71 *AAA Investments (Pty) Ltd v Micro-Finance Regulatory Council and Another* 2007 (1) SA 343 (CC), at para [68]; *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC), at para [27]; *Roux v Health Professions Council of South Africa and Another* (786/2010) [2011] ZASCA 135; [2012] 1 All SA 49 (SCA) (21 September 2011), at para [32].

72 *Affordable Medicines* at para [49]; SFA, 003-21, para 61.

73 SFA, 003-21, para 59.

75. In performing his functions, the Minister must comply with the Constitution as the supreme law, as well as the empowering provisions of the FSR Act.[74] The Minister failed to do this.

76. The Constitutional Court in *Fedsure*,[75] confirmed that the principle that organs and officials of State are creatures of statute.

77. Therefore, organs and officials of State are not empowered to commit any act that falls outside the scope of the Constitution and/or the empowering legislation.[76]

78. These organs and officials of State can only act to the extent that they are empowered to do so by the powers conferred upon them by the Constitution and/or legislation.[77]

79. Any conduct on the part of the Minister, in his capacity as a member of the National Executive, and on the part of the Shortlisting Panel, who derive their powers from the FSR Act and the Minister, that goes beyond their Constitutional and/or statutory powers violates the principle of legality.[78]

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74 SFA, 003-22, para 62.

75 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) ("***Fedsure***").

76 *Fedsure* at para [29] read with [54] – [55].

77 *Fedsure* at para [55].

78 *Oakbay Investments* at para [54].

80. At the very least, this unlawful conduct on the part of the Minister and Shortlisting Panel still subsists.

81. This, with respect, is sufficient for the applicants to demonstrate that they have a sufficient legal interest regarding the current and/or any future unlawful conduct on the part of the Minister and Shortlisting Panel.

E3. SECOND LEG OF THE TEST

82. The second leg of the test performs a crucial disciplining function on applications for declaratory relief.

83. The Court is required to exercise its discretion to decide whether to grant or refuse declaratory relief with regard to all the facts and circumstances that are put before it.[79]

84. The discretion is not an open-ended one as it is limited by the purpose set out in section 21 of the Superior Courts Act, which purpose is to determine rights and obligations.

85. To assist the Court in determining whether to exercise its discretion in granting the declaratory relief the applicants place before the Court a basket of factors that ought, with respect, to result in the exercise of the Court's discretion in the applicants' favour.

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79 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para [107] to [109].

86. We address the appropriate considerations that this Court must consider in granting this application in full below.

F. FACTORS IN FAVOUR OF THE COURT EXERCISING ITS DISCRETION IN FAVOUR OF THE APPLICANTS

F1. THE PRINCIPLE OF OPENNESS AS THE DEFAULT POSITION

87. Whenever a Court is confronted with a choice between putting up a veil of secrecy or opening up information relating to shortlisted candidates who are to hold public offices, openness should always prevail. This is the primary contention of the applicants.

88. In *Detroit Free Press v John Ashcroft*, [80] the United States Court of Appeal for the Sixth Circuit held that:

> "Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately …When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."

89. The reason being is that "*in darkness of secrecy, sinister interest and evil in every shape have full swing*."[81]

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80 *Detroit Free Press v John Ashcroft* 303 F.3d 681 at para 683.

81 *Scott v Scott* 1913 AC 417 at 466.

90. It is for that reason that the Constitutional Court has stated that openness is the default position, and it refuted an approach that proceeded from a position of secrecy.[82]

91. The principle of open justice is an incident of the values of openness, accountability, and the rule of law. Included in this is the notion of a participatory democracy.

92. These are the foundational values upon which our Constitution is based, and which are entrenched therein.

93. The preamble of the Constitution envisages "*a democratic and open society in which government is based on the will of the people*" and included in the text is the requirement that our democracy shall ensure accountability, responsiveness, and openness.

94. One of the issues in this application is the manner in which the Minister and Shortlisting Panel conducted the process of selecting and shortlisting possible candidates in the appointment process.

95. The respondents, on their own version, make it clear that the Regulations "*demand for openness and transparency.*"[83]

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82 *Independent Newspapers (Pty) ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masethla v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) ("***Independent Newspapers***").

83 SAA, p 004-11, para 20.

96. That such a requirement is included in the Regulations misses the point. The real issue is whether the respondents have given effect to this in a Constitutionally compliant manner. They have not.[84]

97. This is why the applicants ask the Court to look at substance rather than form.

98. The Minister's and/or the Shortlisting Panel's conduct is unlawful to the extent that they failed to do what is stated in Regulation 9(4)(b).

99. This failure stems from the fact that:

99.1. The process began with 90 applicants from which 5 candidates were shortlisted;[85]

99.2. From the 5 candidates shortlisted, the Shortlisting Panel invited the public to comment on 2 candidates that it intended to recommend to the Minister;[86]

99.3. No information concerning who either the original 90 applicants or the shortlisted 5 applicants were made its way into the public domain;[87]

84 SAA, p 004-1, para 19.
85 SFA, p 003-10, para 22.2.
86 SFA, p 003-11, para 22.3.
87 SFA, p 003-11, para 22.2.

99.4. The criteria used by the Shortlisting Panel to reach its decision on how it selected the final 2 candidates is also unknown to the public.[88]

100. It is clear that the entire process of selecting a head and deputy head of an organ of State was conducted behind a veil of secrecy outside of the public's view (including Parliament).

101. Allowing public comment at the eleventh hour on 2 recommended candidates is too little too late.[89]

102. Thus, the criticism from the respondents that the applicants' case is defective because the Regulations allow for openness and transparency is mistaken, to say the least.

103. Openness and transparency are embedded in the very tenets of the Constitution and in the exercise of all public power.[90]

104. This much is clear from section 16(1) of the Constitution which provides that:

"(1) Everyone has the right to freedom of expression, which includes –

(a) Freedom of the press and other media;

(b) Freedom to receive or impart information or ideas." (Our emphasis)

88 SFA, p 003-11, para 22.4.

89 SFA, p 003-10, paras 21 and 22.1

90 *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* 2014 (1) SACR 589 (GP) at para [22].

105. In addition thereto, the preamble of the Constitution commits the State to "*[l]ay the foundations for a democratic society*", and the rule of law, which requires openness and transparency, is enshrined in section 1(c) of the Constitution.[91]

106. Unwarranted secrecy in Government undermines the public faith in the political system. Secrecy perverts the system and allows a public forum to become a tool for keeping wrongdoing secret.

107. Transparency is therefore an important yardstick against which Constitutional obligations placed on a party giving effect to Constitutional rights must be measured.

108. Where an organ or official of State fails to uphold a Constitutional value, their actions fall short of this, and, in turn, such behaviour contravenes the principle of legality.

109. In the present circumstances, this is exactly what happened. The Minister excluded the public from the appointment process.[92]

110. It is unconstitutional to exclude public input or oversight by limiting the consideration of applications to the Shortlisting Panel, which subsequently recommended to the Minister who to appoint.[93]

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91 *Independent Newspapers* at para [40].
92 SFA, p 003-41, para 137.
93 SFA, p 003-41, para 137.

111. On this very basis alone, the Regulations fall to be declared as unlawful.

F2. THE DELEGATION OF THE MINISTER'S POWERS WAS *ULTRA VIRES*

112. As discussed elsewhere, the further grounds relied upon by the applicants demonstrate the fundamental breach of the principle of legality.

113. These legal defects further compound the problems created by the secrecy regime put in place by the Minister and/or the Shortlisting Panel, as complained of by the applicants.

114. The point of departure is that had the Regulations been properly promulgated, there would have been ample opportunities for the public to make appropriate intervention.

115. One of the bases upon which the applicants bring their application concerns the *ultra vires* exercise of power by both the Minister and the Shortlisting Panel.[94]

116. The powers of delegation are entrenched in the Constitution, which makes clear that an executive organ of State in any sphere of government may delegate any power or function to another executive organ, provided the delegation is consistent with the empowering legislation.

94 SFA, p 003-9, para 19.3 , p 003-22, para 63, p 003-35, para 112 inter alia.

117. Section 238 of the Constitution reads as follows:

> "an executive organ of State in any sphere of government may –
>
> (a) delegate any power or function that is to be exercised or performed in terms of the legislation to any other executive organ of State provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
>
> (b) exercise the power or perform any function for any other executive organ of State on an agency or delegation basis."(Our emphasis)

118. As has been set out above, the Court in *Fedsure* said:

> "It seems central to the conception of our Constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[95]

119. Thus, every exercise of Constitutional power is subject to Constitutional scrutiny and is justiciable.[96]

120. In considering whether the Minister of Health complied with the Constitution in making amendments to regulations under the Medicines and Related Substances Act 101 of 1965 as amended, the Constitutional Court set out the test in *Affordable Medicines* as -

> "In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the

95 *Fedsure* at para [58].

96 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) ("***SARFU***") at para [148].

> empowering provisions of the Medicines Act. If, in making regulations the Minister exceeds the powers conferred by the empowering provisions of the Medicine's Act, the Minister acts *ultra vires* (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted *ultra vires* is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. What would have been *ultra vires* under the common law by reason of a functionary exceeding his or her powers, is now invalid under the Constitution as an infringement of the principle of legality. The question, therefore, is whether the Minister acted *ultra vires* in making regulations that link a licence to compound and dispense medicines to specific premises. **The answer to this question must be sought in the empowering provisions**."[97] (references omitted, and our emphasis)

121. In considering the FSR Act as the empowering statute for present purposes, the following provisions are relevant:

121.1. Section 61(1) of the FSR Act places an obligation upon the Minister to appoint a Commissioner of the FSCA,[98] and section 61(2) obliges the Minister to appoint at least two but no more than four Deputy Commissioners.[99]

97 *SARFU* at para [50].
98 SFA, 003-30, para 93.
99 SFA, 003-31, para 94 read with p 003-32, para 100.

121.2. Regulations to facilitate the implementation of the FSR Act are required by section 288,[100] with section 61(4) requiring Regulations for the appointment process;[101]

121.3. The Regulations to cater for the transitional arrangements to facilitate the implementation of the FSR Act are required by section 304.[102]

122. The FSR Act does not contain an express provision allowing the Minister to delegate his obligations relating to the appointment of a Commissioner and Deputy Commissioner(s) of the FSCA.

123. The Minister acted *ultra vires* the FSR Act, and therefore in breach of the principle of legality, in:[103]

123.1. delegating a power to the Shortlisting Panel not provided for in the FSR Act;[104]

123.2. drafting the Regulations in a way that covers the appointment process with a veil of secrecy, contrary to Constitutional prescripts and the FSR Act,[105] and

100 SFA, 003-31, para 95.2.
101 SFA, 003-31, para 95.1.
102 SFA, 003-31, para 95.3.
103 SFA, 003-22, para 63.
104 SFA, 003-22, para 63.1.
105 SFA, 003-22, para 63.2.

123.3. conferring powers to the Shortlisting Panel, assuming it is validly created, which it does not have.[106]

124. It is a trite principle that State functionaries, "*no matter how well intentioned, may only do what the law empowers them to do*." The Constitutional Court describes this as the "*essence of the principle of legality [and] the bedrock of our Constitutional dispensation*" and something that "*has long been enshrined in our law*."[107]

125. This is in line with the common law prohibition on the improper delegation of powers contained in the maxim *delegatus delegare non potest*.

126. The maxim can be summarised as follows:[108]

> "The maxim *delegatus delegare non potest* is based upon the assumption that, where the legislature has delegated powers and functions to a sub-ordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that power delegated does not therefore include the power to delegate. It is not every delegation of delegated power that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."

106 SFA, 003-22, para 63.3.

107 *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) para [1].

108 *Chairman, Board on Tariffs and Trade v Teltron (Pty) Ltd* 1997 (2) SA 25 (AN) at 34 E – F.

127. And in keeping with the foregoing, it has been held:[109]

> "It is well established that a discretionary power vested in one official must be exercised by that official (or is lawful delegate) and that although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else; he must not … 'pass the buck' or act under the dictation of another and, if he does, the decision that flows therefrom is unlawful and a nullity."

128. In this regard, a final decision must be taken by a properly empowered administrator.

129. A decision-maker must not be reduced to rubber-stamping that which ought to have been taken by himself/herself.

130. In the matter of *Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd*,[110] the Supreme Court of Appeal held as follows:

> "As to the reliance on advice of another, ... it does not follow that a functionary such as the [Deputy Director-General] in the present case would have to read every word of every application and may not rely on the systems of others. Indeed given the circumstances, Parliament could hardly have intended otherwise. What the functionary may not do of course, is adopt a rubber stamp and so rely on the advice of others that it cannot be said that it was he who exercised the power. If in making a decision he was simply to rely on the advice of another without knowing the grounds on which the advice was given the decision is clearly not his. But, by the same token, merely because he

109 *Hofmeyer v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117 E – F. See also *Leach v Secretary for Justice, Transkeian Government* 1965 (3) SA 1 (E) 12H – 13B.

110 *Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) at para [20].

> was not acquainted with every fact on which the advice was based would not mean that he would have failed properly to exercise his discretion." (references omitted)

131. The abovementioned is, of course, premised on a case where a delegatee (the Shortlisting Panel in this case) has the lawful authority to further subdelegate the relevant functions in the first place.

132. However, in *Ehlers v MEC: Department of Environmental Affairs & Development Planning*,[111] the Court confirmed that a decision-maker exercising public power is permitted to rely on the expertise and advice of the officials in his department, provided that the final decision is that of the decision-maker.[112]

133. This was not the case in the present matter as what the Minister has delegated to the Shortlisting Panel is not a support function, but rather actual powers of conducting the appointment process.

134. This is because when the Shortlisting Panel makes its recommendation to the Minister, the Minister is limited to choosing from only those recommendations.

135. If the Minister wishes to ignore those recommendations, he cannot do so unilaterally because –

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111 *Ehlers v MEC: Department of Environmental Affairs & Development Planning* 2007 JDR 0746 (C) ("***Ehlers***").

112 Ehlers at para [16].

135.1. he delegated away that power to the Shortlisting Panel and cannot revoke such a delegation without a further amendment to the Regulations;[113] and

135.2. he becomes the subject of a reverse onus of rationality in order for him to do so.[114]

136. This is not the same as the Shortlisting Panel simply giving the Minister its views as an interested stakeholder.

137. Instead, the Shortlisting Panel has effectively made a preliminary decision that has a direct and material impact on the exercise of powers explicitly preserved for the Minister alone.

138. In other words, the Shortlisting Panel takes a decision that has legal effect and which cannot be ignored by the Minister; the overall effect being that the Shortlisting Panel exercises powers that do not belong to it.[115]

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113 *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para [27]; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC).

114 See, for example, *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) at para [65]-[72]. Although the decision of Schippers J (as he was then) has subsequently been overturned vis-a-vis the binding nature of the remedial action of the Public Protector, his discussion regarding when an organ of State may rationally reject the findings of another in the absence of judicial review, is, with respect, helpful. See also R (on the application of *Bradley and Others) v Secretary of State for Work and Pensions* [2008] 3 All ER 116 (CA) at para [71].

115 Compare and contract, for example: *Helen Suzman Foundation v Robert McBride and Others* (1065/2019) [2021] ZASCA 36 (7 April 2021).

139. These powers require the Shortlisting Panel to perform a function that in terms of the FSR Act is the Minister's function to perform, which, it is submitted, is an impermissible delegation of the power.

140. Additionally, the Minister has failed to delegate this power with a clear set of parameters.

141. Thus, the delegation is vague, and the Shortlisting Panel is unable to determine the nature and scope of the delegation.[116]

142. This principle has been reiterated in the recent judgment of *Smit,*[117] where the Constitutional Court held that -

> "Section 63 confers on the Minister plenary legislative power to amend Schedules. As the Schedules are essentially part and parcel of the Act, it in effect delegates original power to amend the Act itself. This is a complete delegation of original legislative power to the Executive and **there is no clear and binding framework for the exercise of the powers. This is Constitutionally impermissible**.[118] (footnotes omitted, our emphasis)

143. And previously, the Constitutional Court in *President of South Africa v South African Rugby Football Union*,[119] expressed itself as follows:

> "The first category of 'abdication' referred to by Baxter occurs where a functionary in whom the power has been vested delegates the power to someone else. Whether such delegation is valid depends on

116 SFA, p 003-33, para 106.
117 *Smit v Minister of Justice and Correctional Services* 2020 JDR 2793 (CC) ("***Smit***").
118 *Smit* at para [36].
119 *SARFU* at para [40].

> whether the recipient of the power is lawfully entitled to delegate that power to someone else. There can be no doubt that when the Constitution vests the power to appoint commissions of inquiry in the President, the President may not delegate the authority to a third party. The President himself must exercise that power. Any delegation to a third party would be invalid. The second category referred to by Baxter deals with cases where functionary vested with power does not of his or her own accord decide to exercise the power, but does so on the instructions of another. The third category, 'passing the buck', contemplates a situation in which the functionary may refer the decision to someone else."

144. The Regulations cannot confer any powers not conferred by the FSR Act. The delegation purported to be effected in the Regulations, in turn allowing the Shortlisting Panel to determine its own processes, cannot pass legal muster.

145. This would be axiomatic to "*a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid*."[120]

146. Given that all legal instruments must be construed in a manner which renders them Constitutionally compliant,[121] the Regulations cannot confer a power not provided for in the FSR Act.

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120 *Affordable Medicines* at para [50].

121 *Rahube v Rahube* 2019 (2) SA 54 (CC) at para [34]; *Investigative Directorate: Serious Economic Offences v Hyundai Motor Distributors* (Pty) Ltd 2001 (1) SA 545 (CC) at para [23]. Although these cases dealt with legislation, the principle has been applied in relation to the interpretation of regulations. See *Naki v Director General of Home Affairs* 2018 3 All SA 802 (ECG).

F3. *ULTRA VIRES* AS A RESULT OF VAGUENESS

147. If the Court is against the applicants on the question of the unlawfulness of the delegation, the applicants nonetheless rely on the grounds highlighted in the delegation for the purposes of the secondary attack, being vagueness.[122]

148. The vagueness stems from the absence of qualifying criteria on the constraint of the power either from primary to secondary level (the Minister to the Shortlisting Panel) or from secondary to tertiary level (the Shortlisting Panel to the recruitment agencies).

149. It is a general principle of the rule of law that legislation cannot be unduly vague.

150. When confronted with legislation which includes wording not capable of sustaining an interpretation that would render it Constitutionally compliant, Courts are required to declare the legislation unconstitutional and invalid.[123]

151. In *Affordable Medicines*,[124] the Constitutional Court held:

> "The doctrine of vagueness … requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require

122 *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) (6 Sept 2016) at footnote 25.

123 "[A] construction [of a statute] is not a reasonable one . . . when it can be reached only by distorting the meaning of the expression being considered." See *National Coalition for Gay and Lesbian Equality* 2000 (2) SA 1 (CC) at para [23].

124 *Affordable Medicines* at para [108].

> absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."

152. The effect of this was explained in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency,*[125] where the Constitutional Court held:

> "[V]agueness can render a procurement process, or an administrative action, procedurally unfair under section 6(2)(c) of PAJA. After all, an element of procedural fairness – which applies to the decision-making process – is that persons are entitled to know the case they must meet.
>
> …
>
> In the context of a tender process, the tender documents give notice of the proposed administrative action, while the responding bids in effect constitute representations before the decision is made. Adequate notice would require sufficient information to enable prospective tenderers to make bids that cover all the requirements expected for the successful award of the tender. Given the confusion over the requirements of the tender on the part of both bidders and members of the Bid Evaluation Committee, the notice given by the tender documents in this case was inadequate. It did not specify with sufficient clarity what was required of bidders…." (our emphasis)

153. Although dealing with a review of a tender under the Promotion of the Administration of Justice Act,[126] the principle emanating from *Allpay* remains relevant to this application.

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125 *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) at para [88] – [90]. ("***Allpay***").

126 Promotion of the Administration of Justice Act 3 of 2000 ("***PAJA***").

153.1. The principle is clear – applicants must know in advance how their applications will be decided, and decision-makers must be given sufficient guidance so that they can fairly and consistently decide applications.

153.2. Vagueness in application criteria is an invitation for arbitrariness and procedural unfairness.

154. It is an important principle of the rule of law that rules be articulated clearly and in a manner accessible to those governed by the rules.[127]

155. In *Dawood,* the Court put the point as follows:[128]

> "It is … not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the Constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given." (our emphasis)

156. The same principle applies when making Regulations.

157. What is apparent from the Regulations is that it provides the Shortlisting Panel with broad discretionary powers, which provide no guidelines on

127 *Dawood and Another v Minister for Home Affairs and Others* 2000 (3) SA 936 (CC) ("***Dawood***") at para [47].

128 *Dawood* at para [54].

the exercise of that power. Given how broad these powers are, it is imperative for them to be constrained in some way.[129]

158. As a result of the absence of guidelines on the power afforded to the Shortlisting Panel, the actions of the Shortlisting Panel have gone unchecked, and are therefore *ultra vires*.

159. All of this serves to compound the problems created by an absence of openness, transparency and accountability. The exclusion of public participation limits the opportunity for these defects to otherwise be cured.

G. COSTS

160. Given the Constitutional nature of this litigation, the applicants should be granted costs if successful, with costs following the result.[130]

161. However, the applicants should be immunised from costs in the event that they are unsuccessful.

162. This is in line with the rule in *Biowatch,*[131] which applies within the realm of public interest litigation such as this.

163. As stated in Part A, although the applicants will "benefit" from this Court coming to their assistance in Part A and Part B of these proceedings, it

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129 SFA, p 003-34, paras 106 – 106.2.

130 See, for example, *Gavric v Refugee Status Determination Officer and Others* 2019 (1) SA 21 (CC) at para [121].

131 *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) ("***Biowatch***").

cannot be disputed that the applicants are advancing important public law principle.

164. A costs order against the applicants would hinder, and not promote, the advancement of Constitutional justice, particularly for those applicants who come before this Court to vindicate important principles of Constitutional law.

165. These principles are directly related to Executive accountability.

166. The true test, then, even if the applicants are unsuccessful, as the Constitutional Court recently reiterated in *Gordhan*, is that:-

> "Regardless of the EFF's motivation to involve itself in these proceedings, as a private party acting seemingly in the public interest, it pursued arguments of genuine Constitutional concern. Although those arguments have been unsuccessful in both the High Court and on appeal before this Court, it would be parsimonious to contend that the Constitutional arguments the EFF raised were of a specious or opportunistic calibre. The EFF therefore should have received the benefit of the *Biowatch* principle and should not have had costs awarded against it."[132]

167. The applicants, too, fall within the ambit of *Biowatch* and should be immunised from a costs order in the event they are unsuccessful.

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132 *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* (CCT 232/19; CCT 233/19) [2020] ZACC 10 (29 May 2020) at para [83].

H. CONCLUSION

168. In the premises, it is virtually unarguable that the appointment process has been conducted in secret. This, without more, is a sufficient breach of the rule of law justifying this Court's intervention.

169. What makes the respondents' conduct worse, however, is that the applicants have been able to demonstrate that the other breaches of the rule of law, in the context of what the Regulations provide, serve to make the exclusion of public participation worse.

170. As such, the applicants submit that a case has been made out for the Court to exercise its discretion in their favour by declaring the Regulations unlawful as set out in the Notice of Motion.

KAMEEL PREMHID

AAKIFAH LOUW

Counsel for the applicants
(Open Secrets & UBC)

Chambers, Sandton
14 April 2021

CHRONOLOGICAL LIST OF AUTHORITIES

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2. *Rail Commuters Action Group and Others v Transnet Ltd* 2005 (2) SA 359 (CC)
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4. *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC).
5. *State Information Technology Agency CC SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).
6. *Mohamed & Another v President of the Republic of South Africa & Others* 2001 (3) SA 893 (CC).
7. *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).
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9. *Montesse Township and Investment Corporation (Pty) Ltd v Gouws N.O.* 1965 (4) SA 373 (A).
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13. *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A).
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19. *Durban City Council v Association of Building Societies* 1942 AD 27.
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23. *AAA Investments (Pty) Ltd v Micro-Finance Regulatory Council and Another* 2007 (1) SA 343 (CC).
24. *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC).

25. *Roux v Health Professions Council of South Africa and Another* (786/2010) [2011] ZASCA 135; [2012] 1 All SA 49 (SCA) (21 September 2011).
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27. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC).
28. *Detroit Free Press v John Ashcroft* 303 F.3d 681 (Foreign case).
29. *Scott v Scott* 1913 AC 417 at 466 (Foreign case).
30. *Independent Newspapers (Pty) ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masethla v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC).
31. *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another, In Re; S v Pistorius, In Re; Media 24 Limited and Others v Director of Public Prosecutions North Gauteng and Others* 2014 (1) SACR 589 (GP).
32. *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).
33. *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC).
34. *Chairman, Board on Tariffs and Trade v Teltron (Pty) Ltd* 1997 (2) SA 25 (A).
35. *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C).
36. *Leach v Secretary for Justice, Transkeian Government* 1965 (3) SA 1 (E) 12H – 13B.
37. *Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA).
38. *Ehlers v MEC: Department of Environmental Affairs & Development Planning* 2007 JDR 0746 (C).
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43. *Helen Suzman Foundation v Robert McBride and Others* (1065/2019) [2021] ZASCA 36 (7 April 2021).
44. *Smit v Minister of Justice and Correctional Services* 2020 JDR 2793 (CC).
45. *Rahube v Rahube* 2019 (2) SA 54 (CC)
46. *Investigative Directorate: Serious Economic Offences v Hyundai Motor Distributors* (Pty) Ltd 2001 (1) SA 545 (CC).
47. *Naki v Director General of Home Affairs* 2018 3 All SA 802 (ECG).
48. *McBride v Minister of Police and Another* 2016 (11) BCLR 1398 (CC) (6 Sept 2016).
49. *National Coalition for Gay and Lesbian Equality* 2000 (2) SA 1 (CC).

50. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC).
51. *Dawood and Another v Minister for Home Affairs and Others* 2000 (3) SA 936 (CC).
52. *Gavric v Refugee Status Determination Officer and Others* 2019 (1) SA 21 (CC).
53. *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).
54. *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* (CCT 232/19; CCT 233/19) [2020] ZACC 10 (29 May 2020).

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1. *Detroit Free Press v John Ashcroft* 303 F.3d 681.
2. *Scott v Scott* 1913 AC 417.
3. R (on the application of *Bradley and Others) v Secretary of State for Work and Pensions* [2008] 3 All ER 116 (CA) (Foreign case).