REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 55493/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 17 November 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 AUTHORITY	SEVENTH RESPONDENT

JUDGEMENT

Van der Schyff J

[1] This is an application, comprising two parts, brought on a semi-urgent basis in terms of Rule 6(12) of the Uniform Rules of Court. In Part A, an interdict is inter alia sought restraining the respondents from shortlisting, interviewing and/or recommending for appointment to the first respondent, candidates for the positions of Commissioner and Deputy Commissioners of the Financial Sector Conduct Authority (FSCA) pending the finalisation of Part B of the application. In the alternative, the applicants seek an order granting the media and civil society access to the Shortlisting Panel's proceedings where the interviews for the shortlisted candidates are conducted. In Part B of the application the applicants seek an order declaring the Regulations promulgated in terms of section 61(4) of the Financial Sector Regulation Act, 9 of 2017, as amended unlawful to the extent that it fails to provide for media and/or public access to the interviews of the shortlisted candidates for the Commissioner and Deputy Commissioner(s) of the seventh respondents, and having it set aside.

[2] The applicants are both non-profit organisations dedicated to obtaining transparency, accountability and fairness in the financial services industry and uncovering private-sector economic crimes and related human rights violations. The applicants are of the view that the appointment process of the Commissioner and Deputy Commissioner(s) of the FSCA is shrouded under a veil of secrecy, absent any public participation or oversight. In support thereof, they refer to the fact that the names of all candidates who apply for the posts are not made public, that the interviews are not conducted in the public sphere and that appointments will be made without engaging the public in respect of which the appointment criteria are kept secret.

[3] I pause at this juncture to point out that the applicants are mistaken in their view that appointment criteria are not in the public domain. The appointment criteria are statutorily determined in s 61 of the Financial Sector Regulations Act, 9 of 2017 (the 'FSRA') and Reg 11 of the Regulations.

[4] Section 61 of the FSRA provides that the Minister must appoint a person who is fit and proper and having appropriate expertise in the financial sector. A prospective applicant must ordinarily be resident in South Africa and not be a disqualified person. A disqualified person is defined in the FSRA as a person who:

> ‘(*a*) is engaged in the business of a financial institution, or has a direct material financial interest in a financial institution, except as a financial customer;
>
> (*b*) is a member of the Cabinet, a member of the Executive Council of a province, a member of the National Assembly, a permanent delegate to the National Council of Provinces, a member of a provincial legislature or a member of a municipal council;
>
> (*c*) is an office-bearer of, or is in a remunerated leadership position in, a political party;
>
> (*d*) has at any time been removed from an office or position of trust;
>
> (*e*) is or has been subject to debarment in terms of a financial sector law;
>
> (*f*) is or has at any time been sanctioned for contravening a law relating to the regulation or supervision of financial institutions, or the provision of financial products or financial services or a corresponding law of a foreign jurisdiction;
>
> (*g*) is or has at any time been convicted of—
>
> (i) theft, fraud, forgery, uttering of a forged document, perjury or an offence involving dishonesty, whether in the Republic or elsewhere; or
>
> (ii) an offence in terms of the Prevention of Corruption Act, 1958 (Act No. 6 of 1958), the Corruption Act, 1992 (Act No. 94 of 1992), Parts 1 to 4, or section 17, 20 or 21 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or a corresponding offence in terms of the law of a foreign country;
>
> (*h*) is or has been convicted of any other offence committed after the Constitution came into effect, where the penalty imposed for the offence is or was imprisonment without the option of a fine;
>
> (*i*) is subject to a provisional sequestration order or is an unrehabilitated insolvent;
>
> (*j*) is disqualified from acting as a member of a governing body of a juristic person in terms of applicable legislation; or

(*k*) is declared by the High Court to be of unsound mind or mentally disordered, or is detained in terms of the Mental Health Care Act, 2002 (Act No. 17 of 2002)'.

[5] Regulation 11 provides:

> '**Appointment criteria.**—When determining whether a candidate is suitable to be shortlisted and recommended for appointment as the Commissioner or a Deputy Commissioner, the Shortlisting Panel must, in addition to the appointment criteria in section 61 of the Act, assess whether a candidate has—
>
> (*a*) at least 10 years' experience in a senior or executive position with—
>
> (i) a regulator (preferably a financial sector regulator);
>
> (ii) a financial institution;
>
> (iii) a financial sector industry body;
>
> (iv) a government department that is responsible for overseeing the regulation of the financial sector;
>
> (v) an international financial regulatory body; or
>
> (vi) any two or more of the institutions mentioned in subparagraphs (i) to (v); and
>
> (*b*) skills, knowledge and expertise that would reasonably be expected of a person in the position of Commissioner or Deputy Commissioner.'

[6] It is trite that an applicant in an urgent application must comply with the requirements of rule 6(12)(a) of the Uniform Rules of court. The reasons why substantial redress cannot be obtained in due course, and the circumstances which render the matter urgent, must be set out. The applicants allege that the promulgation of the amended Regulations on 5 August 2020, and the Minister's failure to respond to their written queries, prompted this application. In the result, they view the appointment process and the proceedings of the Shortlisting Panel as secretive. The respondents' uncontested answer is that there has never been a request in terms of the Promotion of Access to Information Act, 2 of 2000 ('PAIA') for any information regarding the Shortlisting Panel or the appointment process. They also state that the Shortlisting Panel has published a press release in respect

of the appointment process. In addition, the respondents point out that the impugned regulations were promulgated in March 2018 and amended in March 2019 and again in August 2020. The applicants did not avail themselves of the opportunity to submit any comments on the draft versions of the Regulations or the proposed amendments to the Regulations, which were published for public comment. The 2020 amendments did not bring about any material changes to the appointment process that would justify the delay in bringing the review application. In the result, any urgency that might exist, the respondents contend, is self-created.

[7] As regards urgency, it needs to be determined is whether the court should entertain an application brought on an urgent basis if there was sufficient time to utilise alternative remedies, which the applicants failed to do. Not only did the applicants fail to become involved in the public participation process by providing input and comments prior to the amendment of the Regulations, they moreover failed to, in terms of PAIA, request the information they sought, before approaching the court on an urgent basis. The applicants' argument is that they cannot be expected to employ PAIA in order to obtain information as to who applied for the posts, the candidates that were interviewed, and what was said during the interviews. The applicants contend that the Constitutional value of transparency requires the appointment process *ipso facto* should provide for the publication of the information in the public domain and more dynamic public participation.

[8] Transparency, it needs hardly to be stated, is indispensable for accountability, openness, and efficiency. However, on a continuum of transparency, different degrees of transparency are distinguishable. Transparency should not be regarded as a one-size-fits-all concept. It varies depending on the circumstances, from a full-blown public participatory concept to the 'mere' entitlement to know how a requirement is being fulfilled.

[9] Whatever the outcome of Part B might be, I am unable to find any cogent reasons for urgency. The applicants only have to blame themselves for the procedural mishap: they, after all, as I have alluded to, could have alleviated the pressure they experienced in ensuring transparency.

[10] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) 223 (CC) para [26], the Constitutional Court held:

> 'A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe other branches of government, provided that they act lawfully.'

[11] The court continued in paragraph 44:

> 'The common law annotations to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for the relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.'

[12] *In casu,* the criteria for appointments are set out in s 61 of the FSRA and Regulation 11. National Treasury published a media statement announcing the commencement of the shortlisting process and indicated that they intend to hold interviews after the Medium-Term Budget Policy Statement. It is stated in the media statement that the recommendations of the Shortlisting Panel will be made public, together with a comprehensive report. The respondents explained that

candidates might be hesitant to apply if they know that their identities will be revealed prior to final recommendations being made due to the competitiveness of the industry and the fact that candidates are employed in senior positions. In circumstances where the degree of transparency provided for in the appointment process could have been challenged earlier, and cognisant of the Constitutional Court's admonishment that interim relief should only be granted in exceptional cases and when a strong case for the relief has been made out, I am not satisfied that the applicants are entitled to the interdictory relief sought.

[13] I am of the view that the applicants have failed to satisfy the requirements relating to urgency. The applicants have not met the threshold for interim relief. The circumstances of this case do not justify the court to step into the executive's domain to suspend or regulate the interview process in the interim. I am of the view that, at least, the minimum level of transparency that is necessary to fend off a claim of unconstitutionality due to lack of transparency have been met. Shortlisting candidates for any position is a sensitive and confidential process that exposes individuals to public scrutiny. This invasion of privacy should not occur without a strong case been made out justifying it. *In* casu, the identity and track record of shortlisted candidates will be made public, and a comprehensive report will be published. The Shortlisting Panel is empowered in Reg 9(4)(a) to determine its procedures, subject to the applicable requirements of the Regulations on condition that the procedure must be fair, impartial and transparent. The Shortlisting Panel stated in the media statement dated 25 September 2020 that the shortlisting process is in line with the recommendations that were made by Judge Nugent when he chaired the Commission of Inquiry into Tax Administration and Governance by SARS.

[14] The applicants failed to indicate a well-grounded apprehension of irreparable harm should the interim relief not be obtained, but they are successful with the ultimate relief. In the event that the applicants fear that a candidate or candidates will be appointed who have failed to meet the criteria set out in the FSRA and Regulations, the nominations in issue can be challenged once the names of the candidates

proposed to the Minister by the Shortlisting Panel and the comprehensive report are published.

[15] The respondents indicated that they acknowledge that the applicants are non-governmental civil society organisations and that they do not seek a cost order against the applicants in the event that they are successful in the application.

[16] In the result, the following order is made:

1. The application for interim relief is dismissed.
2. No order as to costs.

E van der Schyff

Judge of the High Court

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 November 2020.

Counsel for the applicant:	Adv. K Premhid
With	Adv. A Louw
Instructed by:	CENTRE FOR APPLIED LEGAL STUDIES
Counsel for the 1st and 2nd respondents:	Adv. H Maenetje SC
With:	Adv. R Tshetlo
Instructed by:	STATE ATTORNEY
Date of the hearing:	11 November 2020
Date of judgment:	17 November 2020