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**TO: TITO TITUS MBOWENI**  
Minister of Finance  
Per: Mary Marumo  
By email: [mary.marumo@treasury.gov.za](mailto:mary.marumo@treasury.gov.za); [minreg@treasury.gov.za](mailto:minreg@treasury.gov.za)

**AND TO: ISMAIL MOMONIAT**  
Chairperson of the FSCA Shortlisting Panel  
Deputy Director General: Tax and Financial Sector Policy, Ministry of Finance  
Per: Noeline Scholtz  
By email: [Noeline.Scholtz@treasury.gov.za](mailto:Noeline.Scholtz@treasury.gov.za)

**COPIED TO: MKHACANI JOSEPH MASWANGANYI**  
Chairperson: Standing Committee on Finance, Parliament of the Republic of South Africa  
Per: Arico Kotze; Allan Wicomb  
By email: [akotze@parliament.gov.za](mailto:akotze@parliament.gov.za); [awicomb@parliament.gov.za](mailto:awicomb@parliament.gov.za)

2 October 2020

To whom this may concern

**RE: APPOINTMENT OF COMMISSIONER AND DEPUTY COMMISSIONER(S) OF THE FINANCIAL SECTOR CONDUCT AUTHORITY**

1. We act on behalf of Open Secrets and the Unpaid Benefits Campaign ("**our clients**"). Our clients both have a direct interest in the financial sector generally, and the Financial Sector Conduct Authority ("**FSCA**") specifically.
2. To this end, we refer to Open Secrets' letters dated 30 April 2019 and 23 October 2019, and our letter dated 7 September 2020, attached hereto for your convenience as annexures **CALS 1**, **CALS 2** and **CALS 3** ("**the correspondence**").



3. We record that we have received no substantive response to any of the correspondence.
4. Our clients sincerely hope that this letter, together with the correspondence attached hereto, will receive your serious and urgent attention, having regard to the importance of the FSCA as the regulator of the financial sector.
  - 4.1. The FSCA is an important public institution that exercises significant powers and oversight over the financial sector in the public interest.
  - 4.2. Self-evidently the way in which the Commissioner and/or Deputy Commissioner(s) of the FSCA are appointed to office is of significant public concern.
5. Having regard to this, and the latest Media Statement issued by National Treasury dated 25 September 2020 ("**the statement**"), we address this letter to you highlighting our clients' concerns regarding the potential unlawfulness and unconstitutionality of the process envisaged in the statement, and carried out to date.
6. Following consultations with our clients we are instructed to advise, as we hereby do, that our clients intend to challenge the Regulations promulgated on 29 March 2018 in *Government Gazette* 41550 Government Notice R 405 in terms of section 61(4) of the Financial Sector Regulation Act 9 of 2017, and which were subsequently amended by the Regulations dated 5 August 2020 in *Government Gazette* 43581 Government Notice R 850 ("**the Regulations**").
  - 6.1. Our clients' intended challenge may be preceded by an interdict to suspend any ongoing process regarding the appointment of the Commissioner and/or Deputy Commissioner(s) of the FSCA pending the outcome of the challenge contemplated above.
  - 6.2. We record that our clients have no desire to unnecessarily litigate on this matter and trust that, to the extent necessary, our clients' concerns will be met by the Minister of Finance ("**the Minister**") and/or the Chairperson of the Shortlisting Panel ("**the Chairperson**").
7. To this end our clients require direct answers from the Minister and/or the Chairperson, as the case may be, in respect of the issues addressed below.



- 7.1. In the statement, reference is made to “*greater flexibility [having been introduced] into the recruitment process*” by means of “*new Regulations*”.
- 7.1.1. Is reference to the “*new Regulations*” meant to be a reference to the amendment to the original Regulations?
- 7.1.2. If not, what are the “*new Regulations*” referred to? For the sake of clarity, as far as our clients are aware the only Regulations and amendments thereto regarding the appointment of the Commissioner and/or Deputy Commissioner(s) of the FSCA are those referred to above.
- 7.1.3. Other than what can be ascertained from the amendment to the Regulations, what is the “*greater flexibility*” in the requirement process referred to in the statement?
- 7.2. Other than the Regulations, on what statutory basis has the Minister purported to direct the Shortlisting Panel to conduct its process in a “*credible, fair, impartial and transparent way*”?
- 7.2.1. Was this directive reduced to writing? If so, will the Minister disclose such directive in full to our clients?
- 7.2.2. If the directive was not in writing, how was the directive communicated to the Shortlisting Panel? Please provide full details.
- 7.2.3. How is the Minister’s directive, regardless of its form, reconcilable with Regulation 9(4)(a) which provides that the Shortlisting Panel determines its own procedure?
- 7.3. On what basis did the Minister determine that the recommendations of Judge Nugent regarding the appointment of the Commissioner for the South Africa Revenue Service (“**SARS**”) should apply to the appointment process of the Commissioner and/or Deputy Commissioner(s) of the FSCA? Please provide full reasons and in particular, address the following:
- 7.3.1. Was any consideration given to the differences between SARS and the FSCA?



- 7.3.2. If so, why has the Minister chosen to treat SARS and the FSCA on an equal footing regarding the need, if any, for such appointment processes to be conducted *in camera*?
- 7.3.3. If not, why has the Minister chosen to treat SARS and the FSCA comparably as set out above?
- 7.4. What reporting obligations, if any, does the Minister have to Parliament in respect of any and all activities related to the appointment of a Commissioner and/or Deputy Commissioner(s) of the FSCA?
- 7.5. The statement refers to a "*long list of candidates*" who applied for the Commissioner position in answer to "*the second advert*".
- 7.5.1. Please provide a copy of the list of candidates.
- 7.5.2. If the Minister and/or the Chairperson do not provide our clients with the list:
- 7.5.2.1. Please provide reasons as to why such a list has not been made available.
- 7.5.2.2. How many people are listed therein?
- 7.5.2.3. How many applicants did not meet the minimum qualifying criteria?
- 7.5.2.4. Please detail how and/or when applicants were excluded from proceeding in the process on the basis that they failed to meet the minimum qualifying criteria.
- 7.6. The statement refers to the Commissioner position having been "*re-advertised for a two-week period given the delay due to COVID19*". Please provide full particulars regarding:
- 7.6.1. Such re-advertisement.
- 7.6.2. The list of persons who applied in response to such a re-advertisement.
- 7.6.3. If no such list is provided:



7.6.3.1. Reasons in respect of why the list is not made available; and

7.6.3.2. The relevant information identified above.

7.7. Regarding the Shortlisting Panel's resolution regarding the headhunting process:

7.7.1. Who has been appointed to carry out the headhunting process?

7.7.2. How were they appointed? If in accordance with a tender, please provide full particulars.

7.7.3. What were the terms of reference, if any, applicable to the person(s) or entity appointed to conduct the headhunting process? Please provide full particulars.

7.8. In respect of the headhunting process please provide full particulars regarding:

7.8.1. How were the persons "*headhunted*" identified?

7.8.2. The list of persons who were "*headhunted*".

7.8.3. If no such list is provided:

7.8.3.1. Reasons in respect of why the list is not made available.

7.8.3.2. The relevant information identified above.

7.9. Regarding the candidates who were interviewed on 2 February 2019:

7.9.1. The list of persons who were interviewed.

7.9.2. If no such list is provided:

7.9.2.1. Reasons in respect of why the list is not made available.

7.9.2.2. The relevant information identified above.

7.10. Regarding the shortlisting process for the Deputy Commissioner position(s) please provide:

7.10.1. A list of the applicants.



7.10.2. If no such list is provided:

7.10.2.1. Reasons in respect of why the list is not made available.

7.10.2.2. The relevant information identified above.

8. Although the statement indicates that “*the recommendations of the Shortlisting Panel will be made public, together with a comprehensive report*”, both the statement and the Regulations do not stipulate the minimum content of the information that will be made known.

8.1. While this undertaking is commendable, as should be evident from the series of concerns listed above, there is an overarching concern regarding the lack of accountability of the Minister and/or the Shortlisting Panel to (a) Parliament, and (b) the public-at-large.

8.2. As the Minister and/or Chairperson may be aware, in *Glenister v The President of the Republic of South and others 2011 (3) SA 347 (CC)* the Constitutional Court has already criticized Executive dominance over the appointment and control of public bodies that are supposed to operate independently in the discharge of their constitutional function.

8.3. While the Constitutional Court accepted that Parliament, as the representative of the people, may be an appropriate body to exercise adequate public oversight over such processes, it is significant that the process undertaken by the Minister and/or the Shortlisting Panel makes no provision for parliamentary oversight at all.

8.4. Self-evidently, if Parliament, as the people’s representative, has no meaningful role to play in exercising oversight and accountability over such processes, then the people themselves must be given adequate means and opportunity to not only comment on the candidates in question, but also to participate, even if by mere observance, in such a process.

9. We record that the precedent set by the President of the Republic of South Africa in respect of his powers to appoint the National Director of Public Prosecutions provided for an adequate process that permitted public participation as foreshadowed above. This was



triggered by legal proceedings by another non-profit organisation acting in the public interest to compel the President to provide same.

10. We further record that the Judicial Service Commission ("**JSC**") has a similar process to deal with the appointment of Judges. Candidates who are shortlisted for judicial appointments are interviewed in public. Furthermore, such candidates are subject to robust public scrutiny as is evidenced by, for example, the Johannesburg Society of Advocates providing detailed feedback in respect of each candidate for consideration by the JSC.
11. There is no evidence that public oversight in these processes render them any less effective. On the contrary, public participation serves as a vital check and balance on the integrity of the process as a whole. This ensures the highest degree of probity on the part of candidates and interviewers.
12. Our clients would like to see either the Minister cause an amendment to the Regulations and/or the Shortlisting Panel in terms of Regulation 9(4)(a) to set up its own processes to facilitate public participation in two specific ways.
  - 12.1. Firstly, our clients demand media access to the interview of the shortlisted candidates. There exists sufficient precedent in granting media access to such events. For example, the protocols contained in annexure A12 of the Practice Manual of the Gauteng Division of the High Court provide a suitable template for the Minister and/or the Shortlisting Panel. A copy of this document is attached hereto as **CALS 4**.
  - 12.2. Secondly, to facilitate interested persons being able to comment on individual candidates and their suitability for office, including the publication of the *curricula vitae* of all shortlisted candidates.
13. We record that public perception is a constitutionally recognized doctrine that applies to processes such as this. The legitimacy of the office bearer ultimately appointed is directly implicated by the degree of public confidence in the candidate themselves as well as the process leading up to their appointment.
14. We record that both the Minister and the Chairperson are individually and collectively empowered to make amendments to the Regulations and/or to determine the Shortlisting Panel's processes (as set out above) so as to accommodate our client's concerns.



15. Our clients hope that the Minister and/or the Chairperson will give our clients appropriate undertakings that the concerns highlighted above, and the specific demands made in paragraphs 12 to 14 herein, will be meaningfully addressed.
16. We are therefore instructed to demand, as we hereby do, that the Minister and/or the Chairperson provide us with the information requested in paragraph 7 above, as well as answers to the specific issues raised in paragraphs 12 to 14 above, by close of business on Friday 9 October 2020.
17. Furthermore, we are instructed to request that this communication be brought to the attention of all members of the Shortlisting Panel, as named in the statement.
18. Please do not hesitate to contact the author on the email address below if you have any queries.
19. All our clients' rights remain reserved.

Yours faithfully,

Ariella Scher  
**Attorney: Centre for Applied Legal Studies**  
*[Unsigned due to electronic communication]*

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