Only existing facts may be alleged. It is improper to allege facts in anticipation of an event.

[167] The following authorities demonstrate that the general principle against making out a new case in reply has indeed hardened in recent times. In **Pilane and Another** 2013 (4) BCLR 431 (CC), the majority of the Constitutional Court held, without any qualification, that it is impermissible for an applicant in motion proceedings to make out a new case in reply. An applicant must stand or fall by what is contained in his founding affidavit. The majority consequently disregarded the issues raised in the relevant parties' replying papers in the court *a quo* when deciding the matter on appeal. In this regard, the Court said the following in a lengthy footnote:

*'In Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H–636B, the Appellate Division held:*

*"When ... proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases: '... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'.*

*Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application*

*in the replying affidavit' (per Van Winsen J in* **SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board** *1953 (3) SA 256 (C) at 260)."*

[168] In **South African Transport and Allied Workers Union and another v Garvas and others** *[2012] ZACC 13, 2013 (1) SA 83 (CC), 2012 (8) BCLR 840 (CC) (Garvas) at para [114], this Court held as follows:*

*"Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'"*

The rule against allowing new matter in reply was held in **Shephard v Tuckers Land and Development Corporation (Pty) Ltd** 1978 (1) SA 173 (W) 178A; **and in Poseidon Ships Agency (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another** 1980 (1) SA 313 (D) at 315F-316A, to be capable of being departed from only in special or exceptional circumstances. The latter decisions are, however, old and they predate the stance adopted by the Constitutional Court. Even if one were to rely on **Shephard and Poisedon Ships Agency** *supra,* one will be unable to find that such exceptional circumstances have been shown to exist in this matter.

[169] Quite apart from the new matter in reply, the hearsay evidence which is challenged comprises mainly – (a) uncorroborated press clippings; and (b) references to the representations, comments etc. of third parties without identifying them or providing confirmatory affidavits from them and the further replying affidavit of Mr Rossouw (dated 4 July 2017) consisting of references to social media pages and comments of and belonging to various third parties. The obvious needs to be mentioned. The prejudice to SU is clear inasmuch as the admission of such matter unnecessarily broadens the issues for determination and requires time and resources to answer. Of course SU does not enjoy the right to answer. In any event, I accept that, to do so would be wasteful in circumstances where it is unnecessary for purposes of determining the relief sought. The second striking out application is well grounded and stands to be granted.

Having regard to the issue of costs in respect of the main application, I can find no reason as to why costs, including in respect of the use of two counsel, should not follow the result. It was not in any event contended differently by counsel for either party.

**ORDER**

[170] In the result, the following orders are made in this matter:

(a) The application for condonation launched by the respondents seeking condonation for the late filing of the answering papers is hereby granted; the respondents are liable to pay the applicants' costs in this regard as tendered.

(b) The application by the applicants for the admission of further affidavit deposed to by Mr Daniel Rossouw ('Rossouw') and for Mr Johan Theron to be subpoenaed and to testify to the content of his statement of defence, Annexure "DJR5" to Rossouw's affidavit, is hereby dismissed with costs.

(c) The two striking out applications launched by the respondents are hereby granted; the applicants shall pay costs in this regard.

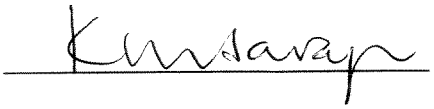
(d) The main application (in which orders are sought reviewing and setting aside the decisions of the Senate and Council of Stellenbosch University taken on 9 and 22 June 2016 respectively to adopt a new language policy for the Stellenbosch University in terms of Section 27 (2) of the Higher Education Act 101 of 1997 as well as the setting aside the 2016 Policy itself) is hereby dismissed with costs.

(e) The costs mentioned in (b), (c) and (d) above shall include the costs occasioned by the employment of two counsel and shall be paid by the applicants jointly and severally.

**D V DLODLO**

**Judge of the High Court**

I agree.



**K M SAVAGE**

**Judge of the High Court**

**APPEARANCES:**

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|---|---|
| For the Applicants: | Adv. J Heunis (SC) |
| | Instructed by DJ Rossouw of West & Rossouw |
| For the First to Third Respondents: | Adv. J Muller (SC) |
| | Adv. N De Jager |
| | Instructed by L Van Niekerk of Cluver Markotter Inc. |