



TRANSPARENCY, ACCESSIBILITY & ACCOUNTABILITY
Stellenbosch University

STUDENT COURT OF STELLENBOSCH UNIVERSITY

REPUBLIC OF SOUTH AFRICA

IN THE *EX PARTE* APPLICATION OF

ELECTORAL COMMISSION

Applicant

Neutral Citation: *Ex parte Electoral Commission 27/08/24*

Judgment: BRYANT CJ, MUDZINGIRANWA & BESTER JJ (Steyn DCJ & Swanepoel J concurring)

Decided on: 27 August 2024

FINAL JUDGMENT

Introduction

[1] The Electoral Commission (“Commission”) approached this Court on an urgent basis on Monday, 26 August 2024, seeking to invalidate the current Student Representative Council (“SRC”) Election 2024/2025 and to grant an urgent interdict prohibiting re-election until this Court has adjudicated the matter.

[2] The remedies sought are based on complaints received by the Commission that an external account known as “Stellenbosch Staan Op” has been endorsing a select list of SRC candidates. Similarly, the Commission avers that they were also tagged in a social media communication of an organisation known as “Studenteplein”, who also endorsed a select group of SRC candidates.

[3] The Commission alleges that Part 1.1(3), 1.1(4), 1.3(2), 1.3(3), 1.3(4), 1.3(7)(a) and 1.3(8) of the Student Electoral Act (“Electoral Act”), which is contained in Schedule 1 of the Student Constitution, have been infringed, thus in turn affecting the freeness and fairness of the whole electoral process.

Locus standi

[4] The Commission is a student body within the definition of section 1(11) of the Student Constitution, being an organized group of students formally associated with the University.¹ Therefore, it has standing in terms of section 86 of the Student Constitution. In terms of section 126(1) of the Student Constitution, the Commission is the body entrusted to manage SRC elections.

Urgency

[5] In terms of section 127(4)(a) of the Student Constitution, the Court must handle any complaint dealing with the freedom and fairness of an election with necessary speed if harm may otherwise result. The complaint must be evaluated against the values that support our election season specifically free and fair elections, democracy, and transparency. The current circumstances necessitate swift action by the Court to preserve the credibility of the SRC elections.

[6] In terms of rule 3(4) of the Rules of Procedure of the Student Court, the Court may depart from its ordinary rules in two instances. First, where a party shows cause in terms of rule 8. Second, the Court has the discretion to dispense with rules on its own accord where it is in the interests of justice to do so such that foreseeable harm may be avoided. The Commission was notified of the alleged irregular campaigning on Friday the 23rd of August whereafter they conducted their investigation on Saturday the 24th of August and Sunday the 25th of August 2024. The Commission then filed its application to this Court on Monday the 26th of August knowing that the current SRC elections are due to conclude on Tuesday the 27th of August 2024.

¹ See also S3(12) and S121(1) of the Student Constitution.

[7] This timeline indicates that there would be insufficient time for the Commission to prepare for re-election, should this Court rule in its favour. Moreover, adherence to the Court's rules of procedure would result in the hearing being delayed until after the election has been concluded. Given the extreme remedy sought and the importance of ensuring free and fair elections for all students, this Court will allow a deviation from the ordinary rules of procedure and deems the matter urgent.

Election invalidation

[8] This Court has the power to, in terms of section 127(4)(d)(4) of the Student Constitution, declare an election invalid. This is an extreme remedy. As was held by the Constitutional Court of the Republic of South Africa in *Kham and Others v Electoral Commission* ("Kham"), for an election to be invalidated the irregularities must have materially affected the outcome.² The Constitutional Court in *Kham* emphasised the importance of the election's overall integrity and the necessity to balance procedural fairness with practical realities.³

[9] Similarly, in *Electoral Commission v Mhlope and Other* ("Mhlope I"),⁴ the Constitutional Court reiterated that the standard for nullifying elections is a high threshold and that there must be clear evidence that the misconduct alleged significantly impacted the election's fairness and outcome. We once again refer to the judgment of this Court in *A.S. v Electoral Commission (Urgent Interdict)*⁵ where Beukes CJ wrote that "Courts should generally be wary of intervening in the democratic process."

[10] The court is also of the view that the matter does not seem to be ripe for adjudication, this is because the Commission does not seem to have followed the procedure set out under section 127 which informs the resolution of election disputes. It is important to highlight that the Commission and Student Court do have concurrent jurisdiction when it comes to election disputes, however, the Commission is better placed and specifically empowered for the task of investigating complaints. Section

² 2016 2 BCLR 157 (CC) para 90.

³ Para 91.

⁴ 2016 5 SA 1 (CC) para 92.

⁵ 03/09/23 para 2.

127(2) of the Student Constitution notes that any complaint relating to student leadership elections must be lodged with and investigated by the Commission. Section 127(3) of the Student Constitution highlights that any unresolved complaint under subsection (2) must be lodged with the Student Court. It therefore appears that when a complaint is lodged, the Commission cannot merely approach the Student Court without carrying out a proper investigation first and trying to resolve the matter.

[11] However, in the current matter, it does not seem that the Commission carried out a proper investigation or even tried to resolve the matter before approaching the court. This is evident in the failure of the commission to produce any evidence which proves these allegations brought forward in this matter. No evidence was brought forward to show how the actions of "Stellenbosch Staan Op" and "Studenteplein" impacted the freeness and fairness of the election process and how the other candidates were hampered in their participation in the election. All that is apparent from this application is that there was a post made on Instagram, and an endorsement on a WhatsApp group. However, the Commission's investigation at the very least fails to establish the link between these accounts and the candidates. Additionally, the investigation does not show how the election process was hampered.

[12] We, therefore, consider the rules which the Commission asserted have been breached. It is noted that the Commission merely made bald allegations of breach without tendering evidence as to how, on the facts, such breaches occurred. This is disappointing as there may well be veracity to the possibility of contraventions, however, as this Court held in *A.S. v Electoral Commission (Final judgment)*⁶ "it is entirely unfeasible for this Court to go on a proverbial fishing expedition" to determine which provisions have been breached and how.

[13] The Commission avers that the following provisions of the Electoral Act have been violated:

"3. All persons bound by the Student Electoral Act must, during the election period:

...

⁶ 17/09/23 para 15.

- (2) Avoid language or any kind of action that could lead to violence or intimidation.
- (3) Refrain from action or practices that discriminate unfairly or are aimed at humiliating someone on the grounds of race, gender, sexual orientation, ethnicity, class, or religion with respect to the election.
- (4) Do nothing that would impede the right of anyone to gain reasonable access to voters for the sake of recruiting support.
- ...
- (7) Spend no money on marketing
 - (a) As a candidate cannot use their own money, this includes Facebook, Instagram, Twitter sponsored pages, any sponsorship cannot be utilised.
- (8) Refrain from any attempt at misusing power or resorting to privileges or influence or using any form of coercion intended to persuade someone to vote for any candidate.”⁷

[14] There was no evidence tendered as to how the endorsements by these third-parties constituted conduct that could lead to violence or intimidation, nor of how the conduct was aimed at humiliating some candidates on the grounds of race, gender, sexual orientation, or ethnicity. There is further no evidence of the candidates using any money to procure endorsements by the accounts on social media nor that the conduct amounts to an abuse of power or form of coercion. As to subsection (4), marketing a candidate or group of candidates does not necessarily impede the access of other candidates to voters. The converse would mean any form of campaigning would be seen to impede the rights of other candidates to be elected, which would be patently absurd. Once again, the glaring hole in the Commission’s application is that the rules govern the conduct of candidates and not third-parties. Unless the Commission can establish a *nexus* between the candidates and the accounts in question, no finding of wrongdoing can be attributed to any candidate.

[15] Now, it is foreseeable that there would be a good reason to prevent third-parties from intervening in campus elections. However, it is not the duty of this Court to

⁷ S1.3 of the Electoral Act.

legislate rules *ex post facto*. In the absence of any rule in the Student Constitution, university rules, Electoral Act, or directive by the Commission, it is difficult to justify the removal of candidates based on a rule that was not communicated to them beforehand. There are conceptual hurdles in imagining the application of this rule. If a student with a significant social media following, who is not themselves a candidate, endorsed a friend in the election, would it violate such a hypothetical rule? If an alumnus of the University encouraged current students to vote for a particular candidate, would it render the election unfree and unfair? The Commission tendered evidence as to what was communicated with candidates prior to campaigning, and this Court is not of the opinion that there was any warning of the existence of some contravention relating to having a third-party endorse a candidate on social media. It is remembered that the Commission has the power to instruct candidates to remove and destroy campaigning material.⁸

[16] Moreover, there is nothing to say the conduct is of so egregious a nature, rendering the elections so manifestly unfree and unfair, to grant its invalidation. It is noted that at the time of writing this judgment, one of the social media accounts, “Stellenbosch Staan Op” has a mere *thirty-seven* followers, and its last post is from 2022. Granted, although “Studenteplein” appears to be a more active and influential account, the Commission has not shown which rules have been breached, how the conduct renders the election so unfree and unfair to justify invalidating it in its entirety, nor any culpability on the parts of the candidates themselves.

[17] In the present matter, the Commission did not approach the Court seeking a lesser remedy, for example, that the candidates in question direct the said social media accounts to remove their endorsements. Instead, the Commission concluded that the election is manifestly unfair requiring an outright invalidation. This is an extreme remedy. Further, it tendered no evidence of communication with the impugned candidates to ascertain whether they were guilty of any misconduct or even aware of these endorsements. Part 1.3 of the Electoral Act, dealing with infringement, applies to “all persons bound by the Student Electoral Act”, which does not include outside persons such as those identified by the Commission.

⁸ S15(2) of Schedule 2 of the Student Constitution.

Fault

[18] In order for there to be a finding of wrongdoing on the part of the candidates, it must be established that there was requisite fault. Fault manifests in the form of intention (*dolus*) or negligence (*culpa*). The question of whether there was intention on the part of the candidates asks whether the candidates were subjectively directed their will to the wrongful act and were conscious of said wrongfulness. It is accepted that in our context, the standard of proof is on a balance of probabilities, as was held in this Court in *A.S. v Electoral Commission (Final judgment)*.⁹ In the present matter, the Commission has failed to provide any evidence suggesting that there was either the direction of will or consciousness of wrongfulness on the part of the candidates.

[19] As concerns direction of will, the major hurdle faced by the Commission is that it was not the students who distributed the impugned posts but two social media accounts with which no other association has been established. There is no evidence of any action on the part of the candidates themselves directing these platforms to endorse the candidates.

[20] Now, section 15(1) of Schedule 2 of the Student Constitution holds that where supporters of a candidate campaign in a way which is contrary to the law, university rules, SRC regulations, or rules laid down by the Commission, that the Electoral Commission may instruct the candidates in question to remove or destroy the material. Further, where the conduct constitutes a misdemeanor or is seriously detrimental to other candidates, the candidate may be disqualified. First, as has been shown, it is not abundantly clear whether any rule was in fact violated. Second, even if the candidate had been aware, there is no evidence that the Electoral Commission instructed the candidates to see to it that the material was removed and destroyed. There is no *a priori* duty found in section 15(1) on the candidates to seek out material or activities which promote their candidacy in a manner contrary to the rules absent a direction made at the discretion of the Electoral Commission. We again refer to the *Mhlope I* decision in which the Court held:

⁹ 17/09/23 para 16.

“It is one thing for the IEC to take all necessary steps to exclude or minimize the possibility of unfairness in elections. It is quite another to say unfairness actually eventuated as a result of a failure by the IEC to take all necessary steps.”¹⁰

[21] We accept that it is no doubt plausible that the candidates in question were aware. Nonetheless, there is no evidence to establish this on a balance of probabilities, especially given the fact that the candidates themselves have been given no opportunity to be heard before the Court, nor is there evidence that they were given a hearing before the Commission before it arrived at its conclusion. The principle of *audi alteram partem* is one which this Court has reaffirmed time and time again – and will do so again in this matter.¹¹

[22] Turning to the issue of consciousness of wrongfulness, *dolus* requires that the candidates know that the conduct was prohibited. That is to say, even if the candidates directed the platforms to endorse them or knew of these campaigns and did nothing to prevent it, *dolus* will not be established unless the candidates knew that the conduct contravened the provisions. Now, even if it is accepted that *dolus* in the form of *dolus eventualis* is sufficient (that is, mere foresight of the possibility of the wrongfulness with reconciliation to said possibility of wrongfulness) it is not clear on the face of it that the rules prohibited the impugned conduct.

[23] Fault may also be established, in the absence of subjective knowledge, in the form of negligence (*culpa*). This is an objective test. Given that no information has been provided for the extent of the candidates' knowledge of the endorsements on the aforesaid platforms, it is difficult to tailor the test for negligence appropriately for the situation. Suffice it to say, the question would entail whether a reasonable candidate would have known that directing the platforms to endorse them or failing to remove such endorsements, was prohibited. Then, beyond this, whether the reasonable candidate would have taken steps to prevent such conduct and whether the candidates themselves took such steps. Again, there is insufficient evidence before

¹⁰ *Electoral Commission v Mhlope and Others* (2016) 5 SA 1 (CC) para 19.

¹¹ *Du Toit v Links (Final Order)* 2016 (Student Court) paras 32-33; *Speaker: Tygerberg Students Assembly v Tygerberg Electoral Commission & Another* 22/06/24 para 45.

the Court to establish *culpa*. Moreover, here once again we face the question of whether the conduct was indeed in contravention of any rules.

[24] The Commission is seemingly aware that the evidence is insufficient. Indeed, it states “not all candidates named in allegations may be guilty of misconduct, and thus a blanket disqualification would be unjust and potentially harm innocent candidates.” This is why it did not seek the disqualification of the individual candidates but the invalidation of the entire election. However, the remedy of outright invalidation sought by the Commission is far more serious than the disqualification of individual candidates. The contention on the part of the Commission is that the election has been rendered manifestly unfair. However, as pointed out above, the Commission in its submissions to the Court made out no case as to *which* provisions were violated, and *how* they were violated.

Conclusion

[25] For the abovementioned reasons, this Court cannot grant the remedy sought by the Commission. This Court finds it pertinent to remind the Commission of its powers regarding election disputes and complaints contained in chapter 4 of the Student Electoral Commission Election Rules (“Election Rules”). Specifically, the Court emphasises that rule 10(2), which empowers the Commission to investigate any complaint relating to the freedom and fairness of any student leadership election and allows them to announce a decision on the matter within 24 hours of the complaint being lodged. Moreover, the Court reminds the Commission of the unique functions and powers of the Student Imbizo as set out in section 70 of the Student Constitution. These powers include investigating any conduct by a positional leader that is alleged or suspected to be a breach of the relevant internal policies, rules, or the Student Constitution.¹²

Order

[26] The following order is made:

[1] The matter is urgent;

[2] The application is dismissed;

¹² S70(3)-(4) of the Student Constitution.

BRYANT CJ, MUDZINGIRANWA & BESTER JJ

[3] The current SRC Election 2024/2025 will continue as planned;

[4] The current SRC Elections 2024/2025 is not invalidated by this Court.




BRYANT CJ



MUDZINGIRANWA J



BESTER J



SWANEPOEL J



STEYN DCJ