



TRANSPARENCY, ACCESSIBILITY & ACCOUNTABILITY
Stellenbosch University

STUDENT COURT OF STELLENBOSCH UNIVERSITY

REPUBLIC OF SOUTH AFRICA

IN THE *EX PARTE* APPLICATION OF

SPHEPHELO MHLONGO

First Applicant

ILA ALBERTS

Second Applicant

Neutral Citation: *Ex parte Mhlongo and Another 08/05/24*

Judgment: STEYN DCJ & BESTER J (Bryant CJ, Swanepoel J, and Mudzingiranwa J concurring)

Decided on: 16 May 2024

FINAL JUDGMENT

STEYN DCJ & BESTER J (Bryant CJ, Swanepoel J, and Mudzingiranwa J concurring)

Introduction

[1] The Applicants approached this Court on Monday 29 April 2024, on an urgent basis seeking a declaratory order in respect of the Rules of the Students' Imbizo ("the Rules"). In their application they requested clarity on the steps to be followed in the event that the Student Imbizo fails to adopt the recommendations of its Accountability Committee with a majority of 75%.

Factual background

[2] Earlier this year, this Court was called upon to remedy an alleged internal inconsistency within the Rules. In *Ex parte Mhlongo 21/02/24* ("*Mhlongo I*") this Court

rendered an authoritative interpretation of the Rules holding that investigations conducted by the Accountability Committee and impeachment proceedings conducted by the Student Imbizo are clearly two distinct processes.

[3] The Student Constitution endows the Student Imbizo with the formidable power and duty of impeaching student leaders who fall afoul of their constitutional obligations.¹ Before impeachment proceedings can begin, the Accountability Committee must conduct an investigation to determine whether any of the grounds for impeachment listed in rule 18(2) are present.² The Accountability Committee must conduct its investigation and compile a report detailing its findings and recommendations.³ The student leader who is under investigation is entitled to be informed of the findings in this report and must be given a hearing with an opportunity to comment on the report.⁴

[4] The Accountability Committee must consider the student leader's comment and may subsequently alter the report. Upon receipt of the report, the Chief Administrator of the Student Imbizo must convene the Student Imbizo to discuss and decide upon its contents.⁵ Here is where the crux of the matter lies. At the meeting, the Student Imbizo must decide whether to accept, reject or amend the recommendations contained within the report.⁶ Where the recommendations include remedial action, the Student Imbizo must support it with a 75% majority for it to be binding.⁷ Indeed, the Student Constitution requires that no remedial action by the Student Imbizo is binding on the listed structures unless it is supported by a 75% majority – regardless of whether such remedial action is on the basis of a report by the Accountability Committee or not.⁸

[5] The Accountability Committee had completed an investigation into a student leader and submitted their final report to the Student Imbizo, within three weeks, on 16 March. This was done in terms section 4(a) of Addendum A to the Rules. Seven

¹ S70 of the Student Constitution.

² Rule 18(2) of the Rules.

³ S4(b) of addendum B to the Rules ("Addendum B"); S1(5) of addendum A to the Rules ("Addendum A").

⁴ S4s(b) – (d) of Addendum A.

⁵ Rule 15(2) of the Rules.

⁶ Rule 15(5).

⁷ Rule 15(5).

⁸ S70(1)(c) of the Student Constitution.

days after receipt of the final report, the Student Imbizo held a meeting but failed to meet quorum.⁹ The meeting was thus postponed to 13 April. At said meeting, the individual being investigated was afforded the opportunity to address the Student Imbizo in terms of rule 15(4) of the Rules.

[6] The Student Imbizo then voted on the recommendations of the Accountability Committee in terms of rule 15(5) of the Rules. The Student Imbizo unanimously accepted the report. The result of the vote was that 66.67% of members voted for impeachment, 25% voted for suspension and 8.33% abstained. Clearly, none of the options reached the 75% threshold required for the remedial action to be binding.¹⁰ The issue is that the Student Imbizo could not come to the super majority required by for the recommendations of the Accountability Committee to be made binding. Could it be possible that where 91.67% of the Student Imbizo votes for disciplinary action of some kind - be it impeachment or suspension – but do not come to a consensus on which form of disciplinary action is to be taken that none be taken at all? Surely this smacks of injustice.

[7] Therefore, the Applicants are asking this Court to interpret the Rules to ascertain what actions are available to the Student Imbizo. Specifically, the Applicants are asking whether this Court is empowered to grant them the opportunity to “redo” the vote, and if so that this Court grant such relief. In the alternative, the Applicants have requested the report detailing the investigation of the student leader be submitted to this Court to an authoritative and final judgment.

Locus standi

[8] The Applicants have standing to approach this Court. In terms of section 86 of the Student Constitution students have *locus standi* in respect of the Student Court. The Applicants are both registered students and are thus afforded standing.

Jurisdiction

[9] This Court has jurisdiction in the present matter. In terms of section 84(1)(b) of the Student Constitution, this Court has the power to give interpretation to “[A]ny empowering provision in terms of which a student body or a member of a student

⁹ Rule 25 of the Rules.

¹⁰ Rule 15(5) of the Rules; S70(1)(c) of the Student Constitution.

body exercises power.” The Student Imbizo is a branch of Student Parliament.¹¹ Section 3(3) of the Student Constitution includes the Student Parliament as a “student body” constituted by the Student Constitution.

[10] In terms of sections 70(10) and (11) as read with section 74 of the Student Constitution, the Student Imbizo must adopt measures to ensure it fulfils its functions effectively and set out procedures regulating the exercise of its powers. It is clear that the Student Imbizo adopted the Rules in order to give effect to the duties listed in the above provisions. Therefore, the Rules constitute an empowering provision in terms of which a student body exercises power.

[11] In the initial founding affidavit, the Applicants did not provide this Court with an empowering provision for this Court to interpret. Rather, the Applicants requested that this Court make a declaration as to “the possible steps the Student Imbizo must take following a vote on the recommendations not meeting the required 75% threshold...” without any reference to a provision.

[12] Rule 19(a) of the Student Court Rules of Procedure, 2024 (“Student Court Rules”) states that the applicable provisions (to be interpreted) must be contained within the founding affidavit in the case of an Advisory Opinion. Rule 19(a) reads as follows:

“A request for an Advisory Opinion shall be in the form of a Notice of Motion accompanied by a Founding Affidavit, in plain and clear language with sufficient detail set forth –

(a) the applicable provision(s)”

[13] This is not an arbitrary rule but is meant to ensure that this Court does not make assumptions as to which provisions should be interpreted or overstep by providing interpretations to rules which are not in dispute. Thus, this Court informed the Applicants of this irregularity and suggested that they make use of rule 13 of the Student Court Rules to amend their papers.

[14] On 7 May, the amended Notice of Motion as well as the amended founding affidavit was received by this Court. In their amended papers the Applicants requested that this Court make an Advisory Opinion on the Rules. Specifically, the

¹¹ Section 58(5) of the Student Constitution.

Applicants requested an Advisory Opinion based on rule 15, Addendum A, and Addendum B of the Rules.

[15] Therefore, rule 19(a) of the Student Court Rules was complied with such that jurisdiction in terms of section 84(1)(b) of the Student Constitution could be established.

Urgency

[16] It is here where we see it fit to discuss the meaning of “urgency” in the context of approaching this Court. To some extent, every matter which seizes this Court is urgent in that the Applicants seek speedy relief. However, “urgency” in the sense that it is formulated in the Student Court Rules refers to something in particular. A matter is urgent where, unless this Court dispenses with its rules, undue prejudice or injustice would occur. It falls on this Court to deal expeditiously with every matter that comes before it, balancing the desire for speedy relief with the duty to apply justice thoroughly. Thus, when Applicants pray that the matter is urgent, they must indicate why the circumstances demand a deviation from the ordinary rules of this Court.

[17] In the present matter, the Applicants approached this Court on an urgent basis. As held by this Court in *Ex parte Oosthuizen*,¹² in terms of rule 8(1) of the Student Court Rules, the onus rests on the Applicants to prove that the application is urgent. The Applicants argues that the matter is urgent due to the fact that the investigation is ongoing and, if left too late, this matter would lie dormant for the June recess period creating an unjust delay in procedure.

[18] In the 2022 judgment of *Visage v Electoral Commission (Preliminary Judgment)* this Court grappled with the issue of self-created urgency in the context of student governance. This Court held that the threshold for condoning applications for self-created urgency in the context of student governance cannot be as stringent as that held by domestic courts.¹³ This is because “the Court forms part of the greater student governance structures ... [and] seeks to resolve issues within student governance wherever possible”.¹⁴ However, the Court made it clear that such condonation must be weighed against the gravity of the matter at hand. We venture

¹² *Ex Parte Oosthuizen* 8/23 para 3.

¹³ *Visage v Electoral Commission (Preliminary Judgment)* paras 6 – 9.

¹⁴ Para 9.

to posit that the above matter also differed from the instant matter insofar as it was hemmed in by unavoidable election timelines while the present matter's timelines emanate from the Student Imbizo's own empowering Rules.

[19] The Accountability Committee submitted their final report to the Student Imbizo on 16 March. More than four weeks later, on 13 April, the Student Imbizo finally conducted a meeting on this matter. More than two weeks after the meeting the Applicants approached this Court requesting an Advisory Opinion on an urgent basis. One of the reasons proffered by the Applicants is that a delay in this Court rendering a judgment may lead to the diminution of trust in the institution of the Student Imbizo for the prolonged nature of the impeachment process at hand. That may well be true, but there is no explanation given for why the Applicants waited for more than two weeks before approaching this Court, and then expects urgent relief. In the instant matter, we are unconvinced that the urgency is not of the Applicants' own making and furthermore do not accept that the potential prejudice occasioned to the Applicants is so great so as to depart from the ordinary rules of this Court.

[20] Rule 8(1) of the Student Court Rules refers specifically to prejudice caused if there is no deviation from a rule in the Student Court Rules. Rule 8(2) then affords this Court, if the matter is deemed urgent, the ability to dispense with any of the rules in the Student Court Rules. Rule 8 reads as follows:

“An applicant must explicitly set forth the circumstances which render the matter urgent, if at all, as well as the reasons why the applicant will be prejudiced if there is no deviation from the Rules.

If the Court deems the matter urgent, it may dispense with any of the Rules to the extent that is provided for in Rule 3(5), including condoning non-compliance with the Notice requirement in Rule 6(1).”

[21] Even if the urgency had not been self-created, it is clear from the above provision that an urgent application does not bind this Court to make a hasty decision but simply allows this Court to set aside other rules. The Applicants have failed to provide sufficient reasons as to why a deviation from the Student Court Rules is necessary.

The alleged gap within the Rules

[22] The Applicants state that rule 15(5) of the Rules is unclear as to what actions

are available to the Student Imbizo in the case where the Accountability Committee recommends remedial actions, but a super majority vote was not attained. Rule 15(5) reads as follows:

“The Student Imbizo must decide whether to accept, amend, or reject recommendations from the report and where the recommendation includes remedial action, 75% of the Student Imbizo must support the recommendation to be binding.”

[23] In terms of rule 1(11) of the Rules, a super majority vote is one where 75% of the Student Imbizo are in support of the resolution, where in terms of rule 1(12) a simple majority vote is one where over 50% of the votes are required.

What constitutes a remedial action?

[24] No description as to what constitutes a remedial action is provided in either the Rules or the Student Constitution. The Rules provide that the Accountability Committee, during an investigation, has the power to make a recommendation as to appropriate remedial actions that the Student Imbizo should follow.¹⁵ It does not explicitly detail the contents and nature of the recommendations that the Accountability Committee is empowered to make.

[25] Section 70(1) of the Student Constitution provides the Student Imbizo with the power to take remedial actions which bind various student bodies. This provision is subject to section 70(1)(a) of the Student Constitution which states that there must have been an investigation, as well as section 70(1)(b) which states that the remedial action must relate to misconduct, incompetence, and/or negligence.

Section 70(1) of the Student Constitution reads as follows:

“Unless otherwise provided for in this Constitution, remedial action of the Student Imbizo binds the SRC, Academic Affairs Council, Societies Council, Prim Committee and Senior Prim Committee, Tygerberg Student Council, subject to the following –

- (a) There must have been an investigation into alleged misconduct, incompetence, and/or negligence.
- (b) The remedial action must relate to misconduct, incompetence, and/or negligence.
- (c) The remedial action must be agreed upon by 75% of the Student Imbizo”

[26] Therefore, when applying the above provisions, it is clear that a remedial

¹⁵ S7(c) of Addendum F to the Rules.

action, in the context of the Rules, is any positive action against the individual being investigated which relates to the individual's misconduct, incompetence, or negligence, or a combination of the three. Therefore, suspension and impeachment would both constitute a remedial action.

Appropriate relief

[27] The Student Imbizo plays a vital role in the constitutional architecture of student governance at our institution. Section 67(3) of the Student Constitution behoves all structures of student governance, including this Court, to “assist and protect” it and “ensure its independence, impartiality, dignity, and effectiveness.” The independence, impartiality, dignity, and effectiveness of the structure which is imbued with the institutional authority to ensure accountability within student bodies can never be undermined. The Student Imbizo is to be commended for the readiness with which it has always approached this Court. This clearly demonstrates its fidelity to proper procedure and the principle of the rule of law.

[28] The point of departure is that the Student Imbizo is a creature of the Student Constitution. Any power vested in the Student Imbizo ultimately finds its genesis in the Student Constitution. Moreover, any empowering provision devised by the structure, including the Rules, must be subject to the Student Constitution. In terms of the Student Constitution, for any remedial action to be binding on the listed student bodies, the 75% of the Student Imbizo must agree upon such remedial action.¹⁶

[29] Rule 15(5) of the Rules must be read as subsidiary to section 70(1)(c) of the Student Constitution. The Student Constitution holds that *any* remedial action taken by the Student Imbizo requires a 75% majority support, while Rule 15(5) deals with the threshold required to make a recommendation by the Accountability Committee binding – which is also 75%. This verges on tautology in that any remedial action taken on the basis of the Accountability Committee report would constitutionally require 75% support in the Student Imbizo, not on the basis of it being a recommendation by the Accountability Committee but on the basis that it is a remedial action.

¹⁶ S70(1)(c).

[30] Therefore, the effect of rule 15(5) is that it emphasises that although the Accountability Committee is a structure within the Student Imbizo, only the Student Imbizo acting as a whole has the constitutional authority to deliver binding remedial action. The Accountability Committee has an investigative function, but the Student Imbizo has a quasi-judicial function in this particular instance insofar as it can sanction recalcitrant student leaders. Therefore, although the Accountability Committee is certainly well-placed to make recommendations to the Student Imbizo on the remedial action, which is most appropriate, given that it is the structure most intimately familiar with the details of the matter being investigated, the Accountability Committee does not have the authority to render binding remedial action. Its function is purely investigative. We belabour this point at the risk of repetition to emphasise that this is the purpose of rule 15(5). It clarifies that no investigative power of the Accountability Committee ousts the constitutional authority accorded to the Student Imbizo.

[31] In *Mhlongo I*, this Court emphasised that an investigation and an impeachment are two distinct procedures. While an impeachment must always be preceded by an investigation, an investigation need not always result in an impeachment. Indeed, section 70(1)(a) of the Student Constitution holds that for any remedial action to be binding, it must also be preceded by an investigation. This holds true for less onerous forms of remedial action such as suspension as well.

[32] Therefore, the Student Imbizo is the body with the authoritative power to deliver binding remedial action. This is subject to the proviso that in order to be binding, there must have been a prior investigation and 75% of the Student Imbizo must support it.¹⁷ It is clear on the facts that there was an investigation which culminated in a report whereby the Student Imbizo recommended impeachment or, in the alternative, suspension. This is where rule 15(5) comes into play. The Student Imbizo accepted the report unanimously and proceeded to vote on whether to accept, amend, or reject the remedial action. It is noted that an opportunity was given for members to propose amendments the recommendations which no member utilised.

[33] At the meeting convened by the Chief Administrator, the primary question

¹⁷ S70(1) of the Student Constitution.

which ought to have seized the Student Imbizo is “*what remedial action is appropriate in this instance?*” The question of whether to implement, amend or reject the recommendations of the Accountability Committee ought truly to have been subsidiary to this question. It is apparent that there was a prior investigation into alleged misconduct, incompetence, or negligence. Therefore, the Student Imbizo had the power, in terms of section 70 of the Constitution to deliver *any* remedial action it deemed fit. Nothing in the Rules nor the Student Constitution binds the Student Imbizo to the recommendations of the Accountability Committee. There need merely be a prior investigation before binding remedial action is delivered. This requirement was satisfied on the facts. The only special instance relates to impeachment, where in order for the Student Imbizo to impeach a student leader, there must have been an investigation which specifically looked into the justification for impeachment.¹⁸ Aside from this, the Student Imbizo is empowered to grant any remedial action provided there had been an investigation into misconduct, incompetence or negligence.

[34] On the facts, a single vote was held in which no remedial action received the 75% majority required. The Court again recognises the Student Imbizo’s constitutional authority to regulate and maintain its own procedures.¹⁹ However, it is baffling that the deliberation was conducted in such a manner. There is nothing in the Student Constitution nor the Rules which specifies that the Student Imbizo may vote only once. In an instance where there is a single vote and a multiplicity of options it is ever more unlikely that a super majority be attained. The Student Imbizo has provided no explanation as to why it followed such an inexplicable course. The Student Constitution merely requires that the remedial action “be agreed upon by 75% of the Student Imbizo.”²⁰ Should the Student Imbizo have held two separate votes, one dealing with impeachment and another with suspension, it is unlikely that this Court would be seized with the present matter.

[35] Yet, here we sit. After weeks of investigation, the Accountability Committee has recommended that a student leader be impeached, or in the alternative, be suspended. However, the Student Imbizo has failed to reach a super majority, and

¹⁸ Rule 18(2) of the Rules.

¹⁹ Ss67(1) & 74(1) of the Student Constitution.

²⁰ S70(1)(c).

the student leader faces no remedial action despite not a single member of the Student Imbizo explicitly voting against there being some form of remedial action. The Student Imbizo initially requested clarity on what is to occur should they fail to reach a 75% majority. First, it is noted that the Student Imbizo was empowered to amend any recommendation by the Accountability Committee when it voted. From the facts averred in the founding affidavit, the members of the Student Imbizo were made alive to this fact and opted not to amend the recommendations but accept the report unanimously. The answer appears clear from the Student Constitution that should the Student Imbizo fail to reach the 75% threshold, it is *cadit quaestio* – there is no binding recommendation.

[36] The Applicants prayed that this Court direct them to “redo” the vote. However, the Applicants did not aver how conducting the vote again would render a different result. The Student Imbizo may indeed adopt a voting procedure akin to the one imagined above, but this raises the question of why the Student Imbizo did not follow such a procedure in the first place. There was nothing preventing the Student Imbizo from deliberating until 75% of its members came to some accord.

[37] The Rules do not limit that the decision of an investigation into misconduct, negligence or incompetence be made at the meeting in which the report is introduced, nor does it provide for any prescription period following the introduction of the report. Therefore, the Student Imbizo is entitled to convene and decide whether to take any remedial action based on such findings.

[38] The snag is that impeachment proceedings may last no longer than 14 days after it is initiated.²¹ This date has long passed. The question is whether this Court ought, in the circumstances, to extend this period. Section 85(4) of the Student Constitution clothes this Court with the immense power to grant “any order” that is “fair and equitable.” This is analogous to the powerful section 172(1)(b) of the Constitution of the Republic of South Africa, 1996. In theory, this Court may, where it is fair and equitable, extend the timeline provided in Rule 18(3) of the Rules. This is because the power being exercised emanates from an empowering provision in terms of which the Student Court is the only institution empower by the Student

²¹ Rule 18(3).

Constitution to render an authoritative interpretation.²²

[39] The Student Imbizo provided no explanation as to why it waited over two weeks after the vote conducted on 13 April to first approach this Court. In that period, the Student Imbizo, on its own accord, allowed the impeachment period to lapse. Surely, the conundrum it faced was apparent the moment the votes were tallied?

[40] Impeachment of an elected or otherwise appointed student leader is no small matter. Given that the entire issue has arisen solely due to the Student Imbizo's inability to comply with its own timelines and procedures, for which there has been no adequate explanation, this Court declines to extend the prescription period for impeachment proceedings as stipulated by rule 18(3) of the Rules.

[41] In this respect, this Court refers to the landmark judgment of *Barkhuizen v Napier* delivered by the Constitutional Court.²³ The Student Court has long applied the precedent of domestic courts, especially that of the apex court, in matters where it is appropriate. In the above judgment, the Constitutional Court declined to refuse to enforce a time limitation clause in a contract, *inter alia* because the Applicant failed to explain why he had allowed the prescribed period to lapse. Ngcobo J held that it was inappropriate to speculate on what such facts may be, and in the absence of reasons for noncompliance, the Court declined to refuse to enforce a provision in the contract.²⁴ It is noted that there are important similarities with the present matter, although this Court was not asked to deal with the validity of rule 18(3) and the present matter deals with an empowering provision and not a clause in a contract.

[42] It is noted that the Applicants did not specifically pray for the extension of this period, but rather for an opportunity to "redo" the vote. As noted above, the Student Imbizo remains unencumbered in its authority to deliver any remedial action on the basis of the report it received from the Accountability Committee because the Rules stipulate no prescription period for the report and the Student Constitution merely requires that a prior investigation be conducted.²⁵ However, such remedial action may not amount to impeachment as the period has since lapsed.

²² S84(1) of the Student Constitution.

²³ 2007 5 SA 323 (CC).

²⁴ 2007 5 SA 323 (CC) para 84.

²⁵ S70(1) of the Student Constitution.

[43] The question arises as to whether the Student Imbizo may still impeach the student leader in a manner other than through the current investigation. The matter of impeachment is no trifling thing. That being said, when students assume positions of leadership, they submit themselves to a certain level of scrutiny in the interests of accountability. Although investigations may be cumbersome and inconvenient for the individual, they play an integral role in the democratic process. In *Mhlongo I*, this Court noted the importance of the Student Imbizo in discharging its duties in a manner not dissimilar to the Public Protector in the national context.

[44] For the abovementioned reasons, should the Student Imbizo fail to impeach a student leader based on particular facts, it is not prevented from rendering remedial action in respect of the same facts or some other facts which may arise in future or any combination of the two. However, any future impeachment proceeding must be preceded by a fresh investigation and report by the Accountability Committee.

The constitutionality of rule 18(4)

[45] As an aside, this Court notes an apparent discrepancy in the Rules, where rule 18(4) holds that the outcome of an impeachment is determined by a simple majority vote by the Student Imbizo. This appears inconsistent with section 70(1)(c) of the Student Constitution on the face of it. Because the Applicants did not plead to its invalidity, this Court will not declare the section unconstitutional *mero motu*, but directs the Student Imbizo to, with the authority vested in it to determine its own rules and procedures by sections 70(10) and 70(11) of the Student Constitution, to draw their attention to this seemingly problematic rule.

Alternative relief

[46] In the alternative, the Student Imbizo sought a directive that that the investigation be brought to this Court to determine the final outcome. This would be a radical remedy. For the present matter, we decline to decide authoritatively as to whether it falls within the remedies this Court is entitled to grant under section 85(4) of the Student Constitution. Given that other remedies are available, it would not be in the interests of justice to grant such an extreme remedy. The power to hold student leaders accountable, and where necessary, suspend or impeach them, is one which the Student Constitution confers on the Student Imbizo and not on the

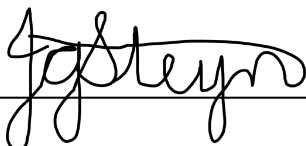
Student Court (though the Student Court must review any remedial action).²⁶ However, since section 84(4) of the Student Constitution empowers the Student Court to grant a final decision regarding any matter where both parties consent to the jurisdiction of this Court, should the implicated student leader consent to this Court's jurisdiction, there is no reason *prima facie* why this Court would refuse hearing such a matter.

Order

The Court therefore makes the following order:

- [1] This Court has jurisdiction;
- [2] The matter is not urgent;
- [3] Student Imbizo has the power to prescribe their own rules in terms of section 74(1) of the Student Constitution, subject to section 74(2) of the Student Constitution;
- [4] The Court declines to extend the impeachment proceedings prescribed in terms of rule 18(3) of the Rules of the Student Imbizo;
- [5] The Student Imbizo remains empowered to render any other remedial action insofar as it is in compliance with section 70(1) of the Student Constitution;
- [6] The Student Imbizo is directed to remedy any apparent unconstitutionality of rule 18(4) of its Rules.


STEYN DCJ



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²⁶ Section 70(7) of the Student Constitution.

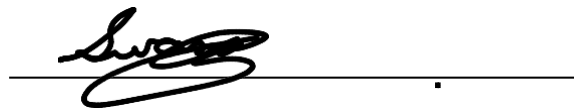
BESTER J

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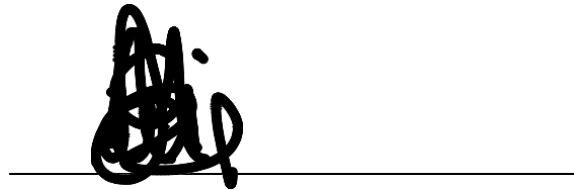
BRYANT CJ

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SWANEPOEL J

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MUDZINGIRANWA J

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