



TRANSPARENCY, ACCESSIBILITY & ACCOUNTABILITY
Stellenbosch University

**STUDENT COURT
OF STELLENBOSCH UNIVERSITY**

REPUBLIC OF SOUTH AFRICA

IN THE MATTER BETWEEN

HEADMAN NTLAPO

Applicant

And

ELECTORAL COMMISSION

Respondent

Neutral Citation: *Ntlapo v Electoral Commission 10/23*

Judgment: Pauw J (Braaf DCJ, Beukes CJ, Simonis J, Lourens J concurring)

Decided on: 4 October 2023

Handed down on: 5 October 2023

FINAL JUDGMENT

PAUW J (BEUKES CJ, BRAAF DCJ, LOURENS J, and SIMONIS J concurring).

Introduction

[1] This matter concerns the constitutionality and interpretation of the voting procedures of the Electoral Commission (“Respondent”). These voting procedures are set out in clause 6(2)(b) of Addendum A, read with section 23(2), of the Electoral Commission Code of Conduct. The application appears to have resulted from the Applicant’s dissatisfaction with the disqualification and appeal processes followed by the Respondent in the recent elections of the Students’ Representative Council (“SRC”).

Locus standi

[2] The Applicant in this matter is Mr Headman Ntlapo, the Director of Electoral Administration of the Electoral Commission, and a registered student at Stellenbosch University. The Respondent is a student body in terms of section 3(12) of the Student Constitution. Therefore, in terms of section 86 of the Student Constitution, both parties have standing in the present matter.

Jurisdiction

[3] The disputed voting procedures are set out in the Code of Conduct adopted by the Respondent, a student body created in the Student Constitution. The Applicant and the Respondent also consented to this Court's jurisdiction in the matter. In terms of section 84 of the Student Constitution, this Court is therefore empowered to make a final decision.

Urgency

[4] The Applicant submitted that the application should be treated as an urgent matter in terms of Rule 8(1) of this Court's Rules of Procedure, 2023 ("Rules"). Rule 8(1) requires an applicant to outline the circumstances rendering a matter urgent explicitly, as well as the reasons why the applicant would be prejudiced if no deviation from the Rules were permitted.

[5] The thrust of the Applicant's argument was that the voting procedures of the Electoral Commission could have a direct effect on the outcome of the election of the SRC. The urgency stemmed from this Court's remittal of the disqualification of a candidate in the election to the Electoral Commission.¹ Regarding prejudice, the Applicant submitted that, if the matter were not regarded as urgent, trust in the electoral process could erode.

¹ *Sityata v Electoral Commission* paras 54-57.

[6] A loss of trust in the electoral process in the broad sense would not be directly prejudicial to the Applicant for the purposes of Rule 8(2). However, without a deviation from the ordinary time frame set out in the Rules for applications, the Applicant's voting rights as an official of the Electoral Commission could indeed be undermined before this Court could grant any relief. Additionally, the constitutionality of the voting procedures could have had a bearing on the relief granted by this Court in *Sityata v Electoral Commission*, which was treated as an urgent matter.

[7] In view of the above, this Court initially regarded this application as urgent and shortened the time frame for both parties' filings. As the internal appeal ordered in *Sityata v Electoral Commission* was finalised while this matter was still ongoing, however, the matter is no longer urgent.

The constitutionality of the voting procedures of the Electoral Commission

[8] The voting procedures of the Electoral Commission are set out in its Code of Conduct ("Code"), which is its 'binding internal regulatory framework.'² The relevant provisions of the Code are outlined below (own emphasis added):

"Section 23: Electoral Commission Meetings

- (1) [...] Meetings of the Electoral Commission must comply with the general rules of engagement in Addendum A [...]
- (2) Decisions taken by the Electoral Commission are taken by way of motion, where any resolution passes if it is supported by a simple majority of the Officials of the Electoral Commission.
- (3) Voting by the Officials will occur openly unless a request by any Official would prefer a closed ballot vote. The votes and decisions must be noted.
[...]"

"Addendum A: General Meeting Procedures

Clause 6: Voting on a motion

- (1) *The presiding officer must announce the threshold before the motion is voted on.*
- (2) *The thresholds are the following –*
 - (a) *A consensus vote is when a motion is passed by unanimous consent of the Officials of the Electoral Commission present at the meeting.*
 - (b) *A simple majority vote is when 50% plus one (1) vote of the number of votes cast support a motion, subject to –*
 - (i) Abstentions count against the motion.
 - (ii) *All the Officials of the Electoral Commission who are present at the meeting may vote.*
 - (iii) *Absent Officials are regarded as having abstained[...]"*

² Preamble to the Electoral Commission Code of Conduct.

[9] The primary dispute in this matter is about clause 6(2)(b)(i) of Addendum A to the Code, which states that when Electoral Commission officials vote on a motion, abstentions *count* against the motion. The Applicant argues that this provision is unconstitutional because it “essentially [forces] commissioners to vote when they wish to abstain and possibly [compels] them to express a viewpoint they do not hold.” In support of this argument, the Applicant refers to the individual’s right to freedom of expression, as found in section 16 of the Constitution of the Republic of South Africa, 1996 (“Constitution”).³

[10] Aside from the freedom of expression argument, the Applicant also emphasises the importance of the values and principles of representation and free and fair elections, as found in the Code, the Student Bill of Rights, the Student Electoral Act, the broader Student Constitution, and the Constitution. The nub of the Applicant’s contention is that, in failing to provide for a true vote of neutrality, the abstention clause limits voting officials’ freedom of expression and “fails to represent the true will of the electorate.”⁴ The Applicant also warns that this voting process may erode the confidence of candidates and the public in the electoral process and the Respondent.⁵

[11] To remedy this ostensible defect, the Applicant suggests that the Code must provide for a ‘neutral abstain option’ which would not count against the motion, and which would respect the voters’ intent not to participate in the process by indicating their neutrality, uncertainty, or any other valid reason for not participating in the vote.⁶

[12] The Respondent agreed with the Applicant “that clause 6(2)(b) of the Code is defective and requires a remedy in the form of reading-down or reading-up, pending the adoption of amendments to the Code by the Commission,” but disagreed with everything else stated by the Applicant.⁷ Additionally, the Respondent sought to redirect the Court’s focus from clause 6(2)(b) of Addendum A to section 23 of the Code, in line with the *generalia specialibus non derogant* maxim,⁸ as it is the latter

³ Para 35 of the Founding Affidavit.

⁴ Para 37.

⁵ Para 40.

⁶ Para 46

⁷ Para 9.

⁸ Para 19 of the Answering Affidavit.

which determines the applicable threshold for decisions of the Commission, whereas the former “simply enumerates the consequences of section 23(2) of the Code.”⁹

[13] The Respondent also took issue with the remedy sought by the Applicant, i.e., that this Court must choose the voting threshold applicable to the Electoral Commission. The Respondent argued that this determination is beyond the Court’s remit, as the Student Constitution does not prescribe a specific threshold, and this Court has previously found that the Electoral Commission is entitled to regulate its own processes.¹⁰

[14] The Applicant and the Respondent seem to have argued at cross purposes about voting procedures and thresholds, as the Applicant did not dispute the constitutionality of a simple majority vote,¹¹ but rather the interpretation and impact of an abstention. Nevertheless, the Respondent’s arguments regarding the voting threshold are useful and provide context for the interpretation of the abstention clause.

[15] For the sake of clarity, this Court reaffirms its finding in *Ex parte Electoral Commission* that the Electoral Commission is empowered to regulate its own processes, within the confines of the Student Constitution. It is not for this Court to dictate to the Respondent precisely what form its processes must take. Naturally, if the Respondent’s Code does not pass constitutional muster, this Court must set the offending provisions aside. However, seeing as the Student Constitution does not set any specific requirements in terms of voting thresholds, the general rule applies, i.e. the Respondent is “the master of its own procedures.”¹²

[16] Section 23(2) of the Code is hardly irregular, and, as noted by the Respondent, interpretive guidance can be gleaned from section 178(6) of the Constitution and relevant case law.¹³ It would be impractical and counter-productive to require the Respondent to pass all matters by consensus, but dangerous to require a simple majority vote of only the members present at a meeting. The mechanism adopted by

⁹ Para 16.

¹⁰ Paras 24-28.

¹¹ Para 6 of the Replying Affidavit.

¹² *Minister of Health and Another v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 171.

¹³ *Acting Chairperson: Judicial Service Commission and others v Premier of the Western Cape Province* 2011 3 SA 538 (SCA) para 20.

the Respondent is an acceptable middle ground; hence section 23(2) of the Code is constitutionally valid.

[17] With the above as context, one can turn to the actual issue in dispute, i.e., the abstention clause. The Applicant believes that this clause has dire implications for the right to freedom of expression and the values of free, fair, and credible elections. In contrast, the Respondent regards the clause as merely enumerating the consequences of section 23(2), rather than creating an abnormal voting procedure.

[18] Clause 6(2)(b)(i) states that abstentions *count* against a motion. Officials are not deprived of the option to abstain, and the clause does not transform an abstention into a negative vote. Thus, the Respondent is correct that the abstention clause does not infringe on an official's right to freedom of expression. Aside from the fact that the Applicant's interpretation of this right is overbroad in these circumstances, it should be noted that the clause merely clarifies the effect of abstaining on the outcome of a motion, rather than limiting the nature in which officials can express themselves.

[19] The ordinary meaning of an abstention is that a person expresses their neutrality on a proposal or motion, i.e., they vote neither for nor against it. The Respondent is mistaken in suggesting that with both a nay-vote and an 'abstention,' the voter "clearly [does not] want the motion to succeed."¹⁴ Abstentions and negative votes differ fundamentally in nature and can have different consequences in law, although no such differences apply here. In any case, the Respondent is correct that, as section 23(2) requires a simple majority vote to pass a motion, the effects of nay-votes and abstentions are the same. If there are eight members whose votes or abstentions will be counted, five affirmative votes are required to pass a motion with a simple majority. Four affirmative votes and four abstentions do not suffice.

[20] Accordingly, in stating that "[a]bstentions count against the motion,"¹⁵ the clause merely explains that an abstention does not lower the number of affirmative votes necessary to pass the motion, i.e., the person abstaining is still included in the quorum. The distinction remains useful, precisely to enable a voter to express their

¹⁴ Para 37 of the Answering Affidavit.

¹⁵ Clause 6(2)(b)(i) of Addendum A.

neutrality or uncertainty about a matter, instead of opposition to it. To enable such free expression, an accurate record of a vote should ideally note abstentions and negative votes separately, but these choices lead to the same outcomes.

[21] The Applicant's argument about free, fair, and credible elections and the value of representation is also overbroad and suffers the same fate as the argument based on freedom of expression. A better argument could perhaps be made about the merit of granting the Director of Compliance and Oversight a vote in upholding or overturning their own decision to disqualify a candidate, as this Court alluded to previously.¹⁶ Nevertheless, this is not the question before us in the current matter; as such, we leave the question open. In any case, the Respondent's 'Rules Committee' already seems to be revising the structure of the appeal process.¹⁷ Thus, the Applicant's attack on the constitutionality of clause 6(2)(b)(i) must fail.

The Respondent's counter-application

[22] In its answering affidavit, the Respondent also sought special leave to file a counterapplication. The Rules do not expressly permit counterapplications, but the Court allowed it in this instance, in view of its relevance and the short time frame granted to the Respondent for filings. The Applicant was also given an opportunity to respond to the counter-application.

[23] The counterapplication seeks to remedy the apparent defect in clause 6(2)(b)(ii), which states that "[all] the Officials of the Electoral Commission who are present at the meeting may vote." Addendum A clearly refers to the Electoral Commission as a whole, as well as its various subcommittees, which have distinct powers and responsibilities, generally exercised at meetings. However, the ambiguity in clause 6(2)(b)(ii) could make it seem as though Electoral Commission officials who do not form part of a particular sub-committee are nevertheless entitled to vote on a sub-committee matter if they are present at a sub-committee meeting. This would obviously lead to absurdity, especially when read with clause 6(2)(b)(iii), which states that absent officials are regarded as having abstained."

¹⁶ *Sityata v Electoral Commission (Final judgment)* 17/09/23 para 32.

¹⁷ Para 42 of the Answering Affidavit.

[24] From a cursory reading of the Code, the relevant provisions outlining the roles of some sub-committees also expressly indicate their respective voting thresholds. For the sake of clarity, however, insofar as clause 6(2)(b) may apply to a sub-committee, this Court interprets it as stating that only members of the particular sub-committee may vote on whether that sub-committee makes a certain decision.

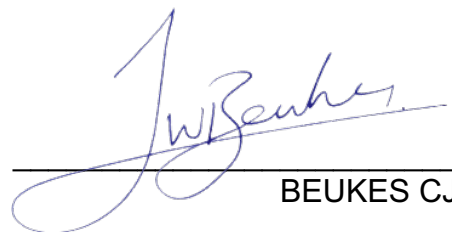
Order

[25] The following order is therefore made:

- [1] This matter is not urgent;
- [2] The main application (brought by the Applicant) is dismissed;
- [3] The Respondent is granted leave to file a counter-application;
- [4] Section 23(2) of the Electoral Commission Code of Conduct is constitutionally valid; and
- [5] Clause 6(2)(b) of Addendum A to the Electoral Commission Code of Conduct means that a decision by the Electoral Commission must be supported by the majority of the members of the Electoral Commission, whereas decisions by a sub-committee established in terms of the Code of Conduct must be supported by a majority of the members of that subcommittee.



PAUW J



BEUKES CJ



BRAAF DCJ

PAUW J

SIMONIS J

Alourens

LOURENS J