IN THE STUDENT COURT OF THE UNIVERSITY OF STELLENBOSCH

(HELD IN STELLENBOSCH)

21 August 2017

In the matter between:

MELT HUGO	Applicant
And	
ELECTION CONVENOR	First Respondent
ELECTION COMMITTEE	Second Respondent

JUDGMENT HANDED DOWN BY THE COURT

[Macfarlane, A]

INTRODUCTORY REMARKS

[1] It is important to note the following from the outset: the Student Court ("the Court") is a structure of student governance, comprising of students that are recognised by the Student Constitution of Stellenbosch University ("Student Constitution").[1]

[2] It is furthermore necessary to note that that s 55(1)(a) specifically explains that the Student Court "functions as an administrative tribunal". The Court therefore finds it important to distinguish between the nature of review proceedings and the nature of appeal proceedings. Quinot explains that the nature of an appeal as relating to the correctness of the decision, while review proceedings relate to the manner in which the decision was taken.[2] It is important to note, therefore, that the role of this Court is not to consider the merits of the case and decide whether the decision taken by the Respondent, in this case the Election Convenor ("EC"), is correct or whether it was the best decision available to the

[1] Chapter 5 of the Constitution of Stellenbosch University, 2014. No part of this matter hinges on a discrepancy between the 2011 and 2014 version of the Student Constitution.

[2] G Quinot "Regulating Administrative Action" in G Quinot (ed) Administrative Justice in South Africa: An Introduction (2015) 107.

EC but instead to consider the manner in which the decision was taken. In the Applicant's Founding Affidavit the applicant specifically requests "a review of the Respondent's *unreasonable* decision to reject [his] candidature." Bearing this in mind the Court finds it necessary to state that we cannot, under the guise of reasonableness, as a correction question. The Court shall bear this in mind when considering the Applicant's application.

[3] Lastly, the Court determines its own procedure with due consideration of the rules of natural justice and the need for the Court to be accessible.[3] These functions are to be fulfilled objectively, transparently and in the utmost good faith.

JURISDICTION

[4] Jurisdiction of the Court is established in Item 26(2) of Schedule 1 of the Student Constitution[4] alongside section 62 of the Student Constitution[5]:

FACTS OF THE CASE

Applicant's version of the facts:

[5] The Applicant, having received his nomination form via email (26th July) set out drafting his CV, Mission and Vision, a process which he submits was relatively quick. On the contrary, it was contended by the Applicant, obtaining the required two hundred (200) signatures was challenging and took time as he submits that he was set on approaching, interacting and engaging (where

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[3] S 65(1) of the Student Constitution.

[4] (2) Any complaint about the running of the election, including any aspect that may jeopardise the freedom or fairness of the election, and any decision or failure to make a decision by the Election Convenor(s), must be lodged with the Student Court –

(a) within a reasonable time;
(b) before the third (3rd) University day (inclusive) after the announcement of the results; and
(c) in accordance with the rules of the Student Court.

[5] "The Student Court has the power to –

(a) give an interpretation, or to confirm the interpretation of a party before the Court, regarding –
(i) this Constitution; or
(ii) any empowering provision in terms of which a student body or a member of a student body exercises power;
(b) decide on the constitutionality of any action or omission of a student body or a member thereof;
(c) review any decision of a student body or a member thereof whereby the rights or legitimate expectations of a student or group of students are materially and adversely affected;
(d) make a final decision regarding any matter where the parties consent to the jurisdiction of the Court; and
(e) decide on all other matters which this Constitution places under the jurisdiction of the Student Court."

possible) with every student who put down their signature – this would naturally take time. On the 4th of August at 18h00 the Applicant received his last signature and thus the process was complete, in its entirety the application was finished and all that was left was for the Applicant to hand in the nomination.

[6] On Monday, the 7th of August the Applicant set aside the time slot of 13h00 – 14h00 to hand in the nomination form, containing the signatures, at the SRC office – this was accordingly accepted. The Applicant then returned to the Laboratory (Natural Science building IPB laboratory) and composed his email to the Election Convenor (EC) and attached his Vision, Policy Statement and CV. It is the sending of this email where the Applicant's problem arises. He alleges that he sent this email at approximately 13h41, however, the Applicant explained that upon checking his inbox for any receipt from the EC he came to the realisation that the email had in fact not been sent and was instead in his outbox. He then proceeded to convert the word documents (attached to the email in the outbox) into PDFs, walked out of the laboratory until receiving "a few bars of Maties Wi-Fi signal", reconnected his Inetkey and then, finally, clicked the "send" button – satisfying himself that his email was now in his "sent items" he noted that this email was logged as 14h26.

[7] On the same day, at 22h56 the Applicant received an email from the EC whereby it was detailed that his nomination would be rejected should he fail to provide any proof that the email had indeed been sent before the stipulated deadline (14h00 7th August) – (see Annexure 1). The Applicant replied to such email on Tuesday at 12h51 explaining that he was unable to provide electronic proof for the email being sent prior to the deadline (due to his lack of computer literacy) and requested that someone of their picking assist him in obtaining such proof by inspecting his computer, offering to bring his computer to such person if necessary. He further enquired whether they knew of any means that he could use himself to find the proof required.

[8] At 13h08 the Applicant received a call from the Respondent where he was again requested to provide the proof requested of him. Once more the Applicant asked if an IT competent technician could assist him or to be "pointed in the right direction" to obtain this evidence. The call ended with him telling the EC that he shall once more attempt to find such evidence. He however admits that he was positive he would be unable to do so due to his lack of IT skills. At 13h54

the same day the Applicant once more requested a competent technician and invited the EC to 'test the Wi-Fi in the laboratory'. That was the last form of communication between the Applicant and the Respondent.

[9] On Friday the 11th August 2017 an email was sent to entire student body with all the names of the other candidates – it was this email which confirmed that the Respondent's nomination had indeed been rejected.

Respondents' version of the facts

[10] The Respondents version is not drastically different from the Applicant's version of the facts. There are, however, the following differences between which the Court recognises as being substantial and material and which resulted in both parties being invited present oral arguments before the Court. Firstly, the Respondent (in paragraph six (6) of its Replying Affidavit) that the Applicant told him that he did not know that he had to submit a CV and a manifesto, thus disputing the Applicant's allegation in paragraph two (2) of his Founding Affidavit that he had immediately started drafting his CV, Mission and Vision upon receiving his nomination. Secondly the Respondent submits that during the correspondence between the parties, that being phone calls and emails, the Applicant did not state that he had sent his application at 13h41. The Respondent goes further to say that upon asking him (the Applicant) when he had sent the email, he (Applicant) did not reply. Accordingly, the Respondent alleges that this is the first time he has been made aware of the claim that the nomination and application had been sent at 13h41.

[11] While there are certain other discrepancies between the two parties' versions of the event none of them are significant and therefore there is no need to address such.

URGENCY

[12] The urgency of this issue is significant, SRC caucusing and campaigning ends on 21st August (Monday). Thus, in terms of item 26(3)(a) of the First Schedule of the Student Constitution the Court must handle this matter with the necessary speed if harm will otherwise result. Here, without doubt, there is a risk of harm arising, firstly for the Applicant – as his opportunity to caucus and campaign for election, if his application/nomination is to be accepted, would

have and will still be drastically reduced. Secondly, there is an interest that all eligible parties be able to stand for election, this is in the interest of the student body, and in the interest of the SRC. Put differently, it is in the interests of the SRC to have as many as possible candidates as this would give the election process and its results more credibility in the eyes of the student, and in the interests of the student body to have as many possible choices when choosing their representatives.

[13] Accepting that Item 26(3)(a) has been 'triggered' the Court, in terms of Rule 6(4), has accepted the Applicant's request to dispense with the normal rules of procedure and is accordingly hearing the matter on an urgent basis.

[14] Here the argument that due to the fact that the prejudice, to be suffered by the Applicant if the matter was not treated with urgency, was a result of his own negligence in the late application to this Court the urgent application should not be accepted is rejected. The cause of the urgency is not the focus here, instead what needs to be the decisive factor is the risk of harm arising if such an urgent application is not granted. The normal rules of creating one's own urgency are over-ridden by Item 26(3)(a) which specifically addresses the situation.

APPLICATION OF THE LAW TO THE FACTS

[15] As stated above, this court serves strictly as an *administrative* tribunal, thus the Court does not have the jurisdiction to look into the merits of the decision taken (that decision being the rejection of the Applicant's nomination and application to stand for SRC).

[16] Before the court sets out this enquiry it is important to understand that it is common cause that the application of the Applicant was incomplete at the known deadline, 14h00 on the 7th day of August, 2017. Furthermore, in the absence of any proof to the contrary by the Applicant, the Student Court accepts that the full application with the required supporting documents was filed and completed at 14h26 on the 7th day of August, 2017, twenty-six minutes late.

[17] The Applicant's main contention is that the Respondent's decision to reject his candidature is unreasonable. Here it is worthwhile noting that the Student Constitution does not explicitly confer students with a right to 'reasonable administrative actions', in contrast to the Constitution of the Republic of South

Africa, 1996 ("the Constitution) which specifically states in s 33(1) that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair". While this is indeed worth noting, the Court shall not place to much significance on it due to the fact that the Constitution is the supreme law of the country.

[18] The Respondent's main contention on the other hand is that the issue here is rather that of lawfulness – the Respondent put forward the contention that if the application of the Applicant was to be accepted, despite of its incompleteness and late submission, that decision to accept the application despite the flaws in it would constitute an unlawful decision. The argument is that accepting the late application would indeed be reasonably fair to the Applicant in this regard but the requirement of reasonableness of a decision cannot and does not stand alone, the decision, in addition to being reasonable, needs to be lawful and procedurally fair. These requirements all need to be met.

[19] The question to be decided on is whether the Respondents had a discretion to accept a late application. If the Court was to find that there was a discretion available to the EC to accept a late application then the lawfulness enquiry would not prove to be an obstacle to the Applicant. This is the crux of the issue before the Court. In terms of Item 12 of the Student Constitution, which states:

a. "*12 Completion of nomination forms*
b. *The Election Convenor(s) must reject the nomination of a candidate if it does not contain at least the following:*
    (a) the full name of the candidate;
    (b) the signature of the candidate;
    (c) the signature of the nominator;
    (d) the signatures of at least two hundred (200) students who second the nomination;
    (e) a typed manifesto of no more than 300 words;
    (f) a list of the candidate's relevant experience; and
    (g) *the candidate's University student number*",

[20] The Court finds that the EC did not have a discretion to accept the Applicant's candidature. The use of the word "must" by the drafters of the Student Constitution is indicative of a mandatory provision. Therefore, the EC's decision to disqualify the Applicant's application is found to be lawful. It needs to be further stated that upon this reading and interpretation of Item 12 of Schedule 1 of the Student Constitution this was the only decision available to the EC, and a decision to accept the Applicant's application despite its flaws would have resulted in the EC exercising a power which it does not have, thus it would have been an unlawful exercise of power, resulting in an unlawful decision.

[21] In terms of reasonableness, the Court is referred to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*.[6] What is reasonable in the circumstances may merely be rational, or may be proportional. In determining which is more appropriate, the court must consider, *inter alia*, the nature of the decision, the nature of the competing interests, and the impact of the decision on the lives and well-being of those affected.[7] The interests advanced for the Applicant were: right of the Applicant to stand for SRC election which is granted in Section 13(2) of the Student Constitution. This right is expressly limited. These limitations are expressed as fair and relevant eligibility requirements. Furthermore, this right is subject to the Student Constitution. It therefore needs to be understood that this right to stand for SRC election which the Applicant looks to is not absolute. Due to non-compliance with the requirements and provisions set out in the Student Constitution the Applicant cannot rely on this right alone in his submission of unreasonableness. The Applicant goes on to point to the rights of the student body. This was elaborated on by the Applicant explaining that his 200 signatures are sufficient proof to show that the student body has an interest in favour of this applicant. The Applicant also points to the interest that the SRC elections are fair and representative. Here, it seems that the Applicant argues that the SRC election process needs to be fair to the individual. While this is an accurate statement the Applicant seems to turn its back on the need for the process to be fair the candidates as a whole. As the Respondent submits, if this application was to be granted it would be prejudicial

[6] 2004 4 SA 490 (CC).
[7] Para 45.

to those successful candidates as well as to those candidates who had been rejected due to non-compliance. Therefore the Court comes to the conclusion that the condoning of one individual's late application would undermine the integrity of the election process. This is most obviously not in the interests of the student body. The court therefore comes to the conclusion that the Respondent's decision was both lawful and reasonable.

[22] In terms of the requirement of the decision being procedurally fair – neither party addressed this requirement and on the face of it the decision is held to be procedurally fair

FINDING:

[23] The Court therefore finds in favour of the Respondents and dismisses the application before it.

By Order of the Court,

[Concurring: van Haght, S; Pagel, A; Naidu, S; and Rutgers, J]