

**REPORT TO THE CHAIR OF COUNCIL OF THE STELLENBOSCH UNIVERSITY
REGARDING A COMPLAINT THAT CERTAIN CONDUCT OF THE RECTOR
CONSTITUTED A SERIOUS VIOLATION OF THE LAW OR SERIOUS
MISCONDUCT**

BACKGROUND

1. On 31 October 2019, the executive committee of the Council of the Stellenbosch University resolved that I be appointed to inquire into allegations levelled against its Rector. In particular, I have been tasked to conduct an investigation and to prepare a written report to Council in time for its meeting on 2 December 2019, setting out the relevant facts and my conclusions on the issues relating to the alleged serious violation of the law or serious misconduct on the part of the Rector.
2. I have been briefed with all the relevant documentation in the possession of the University, relating to the issues to be decided herein. In addition, some of the witnesses produced documentation in their possession. I will in due course refer to such documentation insofar as it may be relevant to my findings hereunder.
3. I conducted interviews with persons identified as being able to provide relevant evidence with regard to the issues which call for determination herein. These

interviews were conducted on 12, 13 and 14 November 2019 at Stellenbosch.

The persons interviewed, in chronological order, were:

- a) Mr C A Otto, a Stellenbosch businessman;
- b) Adv J C Heunis SC of the Cape Bar;
- c) Mr DJ Rossouw of Attorneys West and Rossouw;
- d) Dr L A Schreiber, the complainant;
- e) Dr R Retief, Registrar of the University;
- f) Mr G M Steyn, chairman of the Council;
- g) Professor W J S de Villiers, Rector and Vice Chancellor of the University;
- h) Adv J Meiring of the Johannesburg Bar;
- i) Retired Justice E Cameron (via Skype).

In addition, written representations were received from Attorneys Cluver Markotter (Ms L van Niekerk) and Adv J Muller SC of the Cape Bar, in response to the interviews with Adv Heunis and Mr D J Rossouw. I should mention that Adv Heunis has subsequently provided me with a copy of his speech given at the AGM of the Convocation of the University, on 14 November 2019, as well as his comments on a chronology of events prepared by the University.

THE RELEVANT FACTS

4. Before traversing the relevant facts in chronological order, it will be of assistance to refer to the gist of the formal written complaint against the Rector. This complaint was lodged on 24 October 2019, by Dr Leon Schreiber MP, an alumnus of the University and former member of its Institutional Forum.
5. At the outset, Dr Schreiber states that the complaint '*spruit uit bewerings in die openbare domein dat De Villiers [the Rector] op 'n onreëlmatige, onetiese en moontlik onwettige wyse ingemeng het in die hofsaak tussen die US en Gelyke Kanse oor die Universiteit se taalbeleid*'. I will in due course return to this court case, but for present purposes it would suffice to say that it involved an application for direct access to the Constitutional Court by a voluntary association, 'Gelyke Kanse', and for leave to appeal a judgment of the Western Cape High Court granted in favour of the University regarding its language policy. The matter was argued in the Constitutional Court on 8 August 2019, and on 10 October 2019 judgment was unanimously granted in favour of the University, with leave to appeal being granted to Gelyke Kanse, but its appeal being dismissed. Ten Constitutional Justices heard the matter, with Justice Edwin Cameron writing the main judgment.
6. In his written complaint, Dr Schreiber provided some detail as to what he believed should be investigated by highlighting the following '*beweringe*':

- 'a) *Of De Villiers die US se reputasie, beeld en goeie naam geskaad het deur die indruk te skep dat hy 'n Grondwethof regter omgekoop het deur hom die pos van Kanselier aan te bied terwyl die saak steeds voor die hof was;*
 - b) *Of De Villiers onwettig of oneties opgetree het deur herhaaldelik persoonlik kontak te maak met die regter wat uitspraak sou lewer in 'n saak, waar die US die Respondent was;*
 - c) *Of De Villiers vir Cameron probeer omkoop het deur hom die Kanseliersamp aan te bied in ruil vir 'n gunstige hofuitspraak;*
 - d) *Of De Villiers die Grondwethof se geloofwaardigheid, sowel as die Hof se uitspraak in die betrokke saak, ondermyn het deur die indruk te skep dat hy vir Cameron probeer omkoop het met die Kanseliersamp;*
 - e) *Of De Villiers uit sy amp verwyder behoort te word weens die skade wat hy die US aangerig het'.*
7. As recorded earlier, the executive committee of council resolved that, what this inquiry should be aimed at, is whether or not the Rector is indeed guilty of a serious violation of the law or serious misconduct [my emphasis]. This would encompass an inquiry as to the relevant conduct of the Rector, including the

factual allegations that Dr Schreiber wishes to have investigated. That an inquiry as to the possible serious violation of the law by, or serious misconduct on the part of, the Rector, should form the backbone of these proceedings, is borne out by the fact that those are the two relevant grounds upon which the Statute of the University of Stellenbosch, dated 16 August 2019, as published in Government Gazette No 42636, grants council the power to dismiss the Rector from office. In passing, I should mention that clause 10(5)(c) of this Statute, confers the required power upon the council to appoint persons with relevant knowledge and experience to inquire into and report to it on any matter relevant to the University.

8. The following is a chronology of the main events preceding the complaint, which are, save where otherwise indicated, common cause, or at least not seriously in dispute between the relevant parties.

2 July 2019

The Rector takes steps to obtain Justice Cameron's mobile number to enable him to contact the judge.

Week of 16 July 2019

The Rector phones Justice Cameron to request whether he would accept a nomination as a candidate in the upcoming election for the position of

Chancellor of the University. Justice Cameron responded that he would think about it.

2 August 2019

Justice Cameron informs the Rector in writing that he cannot accept a nomination as a candidate for the position of Chancellor by virtue of his involvement in the litigation between the University and Gelyke Kanse, which he graphically described as follows:

'Ek sit juis omring van die dokumentasie in die saak wat ons volgende week aanhoor, en, watter kant toe ook, sal my posisie in die beregting daarvan hopeloos gekompromiteer word sou ek die nominasie aanvaar. Eweneens sou my posisie as genomineerde waarskynlik onder gebillikte bevraagtekening kom terwyl die saak nog hangende is'.

8 August 2019

The Gelyke Kanse matter is heard by the Constitutional Court.

10 August 2019

The Rector informs Justice Cameron in writing of his disappointment that the judge had declined the nomination for the position of Chancellor.

14 August 2019

The Registrar puts out the call for nominations for candidates for the election of Chancellor.

16 - 19 August 2019

Adv Meiring concludes that Justice Cameron would be the ideal candidate for appointment as the Chancellor of the University. On Friday evening 16 August 2019, Adv Meiring attended a birthday celebration of a friend in Johannesburg, to which Justice Cameron, unbeknown to Adv Meiring, had also been invited. Adv Meiring broached the topic of the chancellorship of the University with Justice Cameron, who said that he felt that he should not be a candidate. According to Adv Meiring, he got the impression that Justice Cameron was of the view that at present, a white male should not be appointed as the Chancellor of the University. Adv Meiring asked Justice Cameron whether he could continue trying to persuade him to accept such nomination, to which Justice Cameron agreed. In his evidence, Justice Cameron said that Adv Meiring had 'besought' him to change his mind. On 18 August 2019, Adv Meiring addressed an email to Professor de Villiers, as Justice Cameron had informed him of the Rector's earlier approach to the Judge in regard to the Chancellorship. Pursuant thereto the Rector phoned Adv Meiring later that evening. According to Adv Meiring he got the impression during these discussions that he (Adv Meiring) was the best equipped to persuade Justice Cameron to accept the nomination. On Monday, 19 August 2019, Adv Meiring accordingly addressed

a lengthy email to Justice Cameron, informing him why he would be an excellent, transformative choice for the position of Chancellor of the University.

20 August 2019

Justice Cameron's official retirement date.

21 August 2019

Justice Cameron informs the Rector in writing that he was approached by members of the Faculty of Law of the University, as well as Advocate Meiring, and Messrs Michiel le Roux, Chris Otto and Edwin Hertzog (businessmen of Stellenbosch) to make himself available as a candidate for the Chancellorship. The Judge added that he is reconsidering the nomination, but that as a pre-condition, they would have to get an indication from Advocate Heunis SC, the President of the Convocation and lead counsel of Gelyke Kanse in the court case against the University, as to his attitude in this regard.

Also on the 21st of August 2019, the abovementioned businessmen of Stellenbosch, together with the Rector and Mr Steyn, the Chairman of the Council of the University, formed a whatsapp discussion group which had as its aim the nomination of a suitable candidate as Chancellor of the University (with the preferred candidate of the whatsapp group being Justice Cameron).

23 August 2019

At 12:22 the Rector addressed an email to Adv Meiring in which he, *inter alia*, said the following:

'Dinge lyk inderdaad meer positief, maar die Registrateur het 'n ondertekende nominasiebrief nodig teen 12:00 op die 4de September 2019. Blykbaar vereis Edwin dat beide partye in die Gelyke Kanse-saak instem (nie noodwendig ondersteun nie) dat hy genomineer word'.

26 August 2019

The Rector contacted Adv Heunis telephonically and, according to the former, he essentially conveyed the request of Justice Cameron to Adv Heunis. According to Prof de Villiers, it was a brief telephone call during which he informed Adv Heunis that there are many interested parties who wish to have Justice Cameron nominated for the position of Chancellor. He says that he then conveyed the request as follows:

'Cameron vra dat – hy sê dit 'n voorvereiste is dat Jan en Gelyke Kanse moet sê dat julle instem daartoe, maar nie ondersteun noodwendig nie. Dit is net instem daartoe.'

Adv Heunis differs as to the content of this telephone conversation. According to him, the Rector did mention that there were many prominent people who were of the view that Justice Cameron would be an excellent candidate for the position of Chancellor, but that the conversation was non-specific as to the purpose of the call. He emphatically denies that the Rector had asked him whether he would agree to Justice Cameron being nominated as a candidate for the position of Chancellor. According to Adv Heunis, he told the Rector that a number of Gelyke Kanse affiliated alumni, including himself, had come to the conclusion that Justice Cameron would be a good Chancellor, but that they

refrained from approaching him because they thought it would be inappropriate to raise such a suggestion with him whilst he was one of the presiding judges in the matter between Gelyke Kanse and the University. Adv Heunis says that he gained the impression that the Rector had rather called to ask him to pave the way for the withdrawal of the candidate proposed by Gelyke Kanse, to enhance Justice Cameron's nomination (although this was not articulated by the Rector). I should add that, according to Adv Heunis, he also asked the Rector whether he had approached Justice Cameron in this regard, to which the Rector replied that he had spoken to Justice Cameron '*n hele paar keer gedurende die afgelope twee weke*'.

Adv Heunis says that shortly after this call, he met with Adv Muller SC, the lead counsel for the University in the litigation, and advised him of the call received from the Rector. According to Adv Heunis, it was Adv Muller who first informed him later that day or maybe even the next day, that Justice Cameron had asked the Rector to ask Adv Heunis to agree to his nomination as Chancellor.

27 August 2019

Attorneys West and Rossouw, acting on behalf of Gelyke Kanse, addressed a letter to Cluver Markotter, attorneys for the University, in which, *inter alia*, it was recorded that the Rector and other unidentified persons (who may or may not be attached to the University) have contacted Justice Cameron regarding his nomination for the position of Chancellor. This approach of the Rector is described as '*utterly inappropriate and irresponsible*' and particulars were

sought of the persons who had approached Justice Cameron, what was said to him, and the outcome thereof.

29 August 2019

Adv Heunis addressed Justice Cameron in writing, stating that Gelyke Kanse and the other parties he represented, would not object should Justice Cameron accept a nomination as a candidate for the position of the Chancellor of the University. In addition, Adv Heunis reiterated that although a number of alumni, who have links with Gelyke Kanse, considered nominating Justice Cameron as a candidate for that position, they decided against it *'..... because we concluded that it would not be appropriate to approach you in that regard in view of the fact that you are a member of the court who is seized of the matter involving Gelyke Kanse, on the one hand, and the University, on the other'*.

30 August 2019

Justice Cameron writes an email to the Rector informing him that he had now become available to accept a nomination for the position of Chancellor. He asked whether they could meet on 12 September 2019 in Stellenbosch, as Justice Cameron had another appointment in town. This meeting did not materialise, but Justice Cameron and the Rector subsequently met on 17 September 2019, at the Intercontinental Hotel at OR Tambo Airport. The Rector was accompanied by his wife.

2 September 2019

The Registrar of the Constitutional Court, acting upon the request of Justice Cameron, addressed correspondence to the parties to advise them that, while the litigation was pending and before the hearing of the Gelyke Kanse matter on 8 August 2019, Justice Cameron was approached by various persons to accept the nomination of Chancellor, which he declined because of the pending litigation and other reasons. The letter further states that the approaches continued and, after the hearing of the Gelyke Kanse matter in the Constitutional Court, Justice Cameron indicated that he might reconsider his decision subject to an indication from Gelyke Kanse and its senior counsel, Adv Heunis, that there would be no objection. Adv Heunis so indicated on behalf of Gelyke Kanse by letter dated 29 August 2019. The letter of 2nd September 2019 concludes by inviting the parties to examine and consider:

- i) the email correspondence between Justice Cameron and the Rector of the University, Prof de Villiers, and between Justice Cameron and a member of its council, Adv Jean Meiring, and;*
- ii) The names of the persons who approached Justice Cameron, which will be furnished on request'.*

It is interesting to note that it was only after the delivery of the Gelyke Kanse judgment on 10 October 2019, that Gelyke Kanse's attorneys requested the information tendered in this letter.

4 September 2019

The nominations for candidates for the position of Chancellor closed.

25 September 2019

The Electoral College of the SU (consisting of 42 members) gathered to elect the new Chancellor. Justice Cameron was elected by an outright majority – in fact, he received all the votes cast except for two.

10 October 2019

The Constitutional Court delivers judgment in the Gelyke Kanse matter.

11 October 2019

Attorneys West and Rossouw request the Constitutional Court in writing to provide to it the information offered by the Constitutional Court in its aforesaid letter of 2 September 2019. A difference of opinion arose as to the entitlement of Gelyke Kanse to this information after the date of the judgment of the Constitutional Court, but, after some wrangling, the relevant information was made available.

18 October 2019

Attorneys West and Rossouw wrote to the Chief Justice, referring to the information received and pointing out the alleged *'irregular and inappropriate*

conduct on the part of the judge who wrote the court's judgment in the Gelyke Kanse matter (not to speak of a litigant himself) the outcome of which is now irrevocably tainted'. The letter concluded with the request that the Chief Justice indicates what he intends to do about the matter at his earliest convenience.

29 October 2019

Attorneys West and Rossouw received a response signed by the Chief Justice, which reads as follows:

This is a response to your letter concerning communication from Justice Cameron to the parties.

The procedure to be followed whenever a judge finds himself or herself in a potential conflict of interest situation were complied with in this matter'.

6 November 2019

Attorneys West and Rossouw request details from the Chief Justice as to the procedure that was allegedly followed in compliance of the potential conflict of interest situation, referred to in the Chief Justice's letter of 29 October 2019. To date no response has yet been received.

THE APPLICATION OF THE LAW TO THE FACTS

9. The question whether the Rector seriously misconducted himself or committed a serious violation of the law, must, of necessity, be answered against the background of our law relating to bias. Put differently, what has to be determined as an antecedent question is whether the evidence shows that the Rector offered Justice Cameron an appointment as Chancellor, as a bribe for a decision in favour of the University in the Gelyke Kanse court case. Alternatively, it has to be determined whether the conduct of the Rector (seen with the conduct of Justice Cameron) created a reasonable apprehension that Justice Cameron was biased in favour of the University.
10. The impartiality of judicial officers is an essential requirement of our constitutional democracy and is closely linked to the independence of our courts. Section 165(2) of the Constitution states:

'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'.

Section 165(3) provides that:

'No person or organ of state may interfere with the functioning of the courts'.

In fact, it has been emphasised by our courts that not only is there a presumption in favour of the impartiality of the courts, but it is a presumption

that is not easily dislodged. Cogent and convincing evidence is necessary in order to do so.

11. In Article 13 of the Code of Judicial Conduct adopted in terms of the Judicial Service Commission Act, 1994, it is stated that:

'A Judge must recuse him- or herself from a case if there is a real or reasonably perceived conflict of interest, or reasonable suspicion of bias based upon objective facts, and shall not recuse him- or herself on insubstantial grounds'.

12. It is generally accepted that the threshold for a finding of real bias on the part of a judicial officer, is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. In the result, our courts have frequently emphasised that, not only actual bias, but also the appearance of bias, disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred, renders the further proceedings a nullity. See *Take and Save Trading CC and Others v Standard Bank of SA Ltd 2004(4) SA(1) SCA at para 5*. Thus, as explained by Gorven J in *Wishart v Blieden NO and Others, 2013(6) SA 59(KZN)*, a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, he or she is either actually biased or there exists a reasonable apprehension that he or she might be biased, acts in a manner that is inconsistent with the Constitution.

13. In determining the reasonableness or not of the apprehension of bias, the test of the informed and reasonable observer is applied, namely '*would the informed and reasonable observer, in the knowledge of all the relevant facts, (reasonably) conclude that the judicial officer is actually biased or that it may be reasonably apprehended that he or she is biased*'. In such event, the judicial officer, without further ado, has to recuse him- or herself as his or her presence after recusal should have occurred, renders the remainder of the proceedings a nullity.
14. In the light of these legal principles, one has to ask yourself, having regard to all the relevant facts and circumstances, whether or not a reasonable observer would have concluded that, in these peculiar circumstances, Justice Cameron was either actually biased, or that there existed a reasonable apprehension that he might have been biased towards the case presented by the University in the Gelyke Kanse court action, to the extent that he ought to have recused himself from the matter and not proceeded to sit as a member of the court and delivering the main judgment.
15. When one analyses the evidence, it is abundantly clear that there is simply no basis upon which it can be held that there was actual bias on the part of Justice Cameron in his adjudication of the Gelyke Kanse court action. Proof of actual bias would call for the determination of the judge's subjective state of mind when rendering the judgment. This is often, as in this case, extremely difficult, if not impossible, to prove. Therefore, litigants inevitably seek to make out a case of reasonable apprehension of bias, i.e. proof that 'a reasonable, objective

and informed person would on the correct facts reasonably apprehend that the judge has not and will not bring an impartial mind to bear on the adjudication of the case ...'. See *President of the Republic of South Africa v South African Rugby Football Union 1999(4) SA 147 (CC) para 35-36*.

16. In fact, in his evidence, Dr Schreiber disavowed any reliance on the existence of actual bias on the part of Justice Cameron. In the alternative, however, he contended that, having regard to the prestigious and powerful position occupied by the Rector, his conduct would have led the reasonable observer to reasonably conclude that Justice Cameron would not have been able to bring an impartial mind to bear on the adjudication of the Gelyke Kanse matter.

17. It is therefore necessary to analyse the facts that would have been at the disposal of a reasonable observer, in order to decide whether a reasonable perception of bias would, objectively seen, have existed at the relevant time. In summary, the relevant information appears to be the following:
 - a) As early as 2018, informal discussions about possible suitable candidates for Chancellor commenced. Several candidates, including Justice Cameron, were mentioned by opinion makers. By all accounts Justice Cameron was the leading candidate by a country mile. The outcome of the votes cast in the Electoral College underscores this. It seems that, on the evidence before me, the identity of whoever persuaded Justice Cameron to enter the race, was of no great moment – he would have been elected in any event.

- b) During the period February 2019 - middle July 2019, the administrative process for the election took shape and culminated in an e-invitation to members of the Electoral College for the election of the Chancellor, at a meeting on 25 September 2019. The Rector, as is expected of him as the 'chief executive officer' of the University, was actively involved in the process, and in particular in finding suitable candidates for the post. It should be noted that the closing date for nominations of candidates for the position of Chancellor, was set for 4 September 2019, a date which could not be changed or postponed. According to Prof de Villiers, Justice Cameron was regarded by most as the best candidate by far – as he put it, *'niemand het gedink hy is nie 'n fantastiese kandidaat nie'*. As he understood his role, the Rector was the person representing the University, who had to make contact with Justice Cameron as a potential candidate, as was the case with several other potential candidates whom he had contacted in the build-up to the election. In his evidence Prof de Villiers put it thus:

'.... dit was soort-van algemeen aanvaar. Ek sal hom kontak soos ek ook ander mense gekontak het in hierdie [verband]'.

- c) As recorded in the above chronology, the Rector first made telephonic contact with Justice Cameron during the week of 16 July 2019. He informed the Judge that the process in finding suitable candidates for the position of Chancellor would soon be underway and that several interested persons had contacted him (the Rector) to advise that Justice Cameron was regarded as an excellent candidate. The latter appeared to be surprised and rather flattered by this news. At that stage there was no mention of the

Gelyke Kanse litigation and it did not even register with him that it could play any role in the decision to be taken by Justice Cameron. In fact, the Rector at this stage had no inkling of any role to be played by Justice Cameron in this litigation, particularly as he (the Rector) was aware that Justice Cameron was due to retire soon, on 20 August 2019. I should add that, at this stage, the Western Cape High Court had already made its decision in the Gelyke Kanse litigation, but as far as the Rector was aware, the matter had not yet wound its way to the Constitutional Court. It will be recalled that it was only heard in the Constitutional Court on 8 August 2019. As further recorded in the chronology, Justice Cameron undertook to consider the request of the Rector and to respond to it in due course.

- d) On 2 August 2019, Justice Cameron informed the Rector in writing that he could not accept a nomination as a candidate for the position of Chancellor, by virtue of his involvement in the Gelyke Kanse hearing. The Rector accepted this decision of Justice Cameron, but he was contacted by a number of people who raised the question whether the conflict of interest experienced by Justice Cameron, could not be resolved. Amongst these were prominent figures such as Dr Johan Rupert, the incumbent Chancellor, Edwin Hertzog, Michiel le Roux, Chris Otto, Koos Bekker, members of the Faculty of Law of the University, and others.
- e) As a consequence of the overwhelming support expressed for Justice Cameron and the numerous requests that he should make himself available as a candidate for the Chancellorship, he (Justice Cameron) advised the Rector in his email of 21 August 2019, that he was reconsidering the

nomination, but *'as onontbeerlike voorvereiste ons van Jan Heunis 'n aanduiding sou moes kry nie noodwendig van steun nie, maar ten minste nie van teensetting nie'*. He added that Michiel le Roux *'werk daaraan – Ons het tot 4 September'*;

- f) There is no reason to disbelieve the Rector that, when he first phoned Justice Cameron during the week of 16 July 2019, he did not even contemplate whether his request to the Judge could have, or may have been seen to have, any influence on the Gelyke Kanse litigation. What was uppermost in the Rector's mind, was to obtain the best candidate for the soon to be vacated chair of the Chancellor. As confirmed by Justice Cameron, there was no mention at all of the Gelyke Kanse court case during this brief telephone call made by the Rector. In fact, there is nothing to gainsay the evidence of Prof de Villiers that, as far as he was aware, Justice Cameron was retiring on 20 August 2019, and therefore, at the time the Rector had made the initial call, he had no inkling that the Judge was or may become involved in the Gelyke Kanse matter. On the contrary, the Rector says that he only became aware of this fact on 2 August 2019 upon receipt of the email of Justice Cameron advising that he could not accept a nomination as a candidate for the position of Chancellor due to his involvement in the Gelyke Kanse litigation.

- g) Adv Heunis sought to suggest that the judgment penned by Justice Cameron in Gelyke Kanse, was not of the quality that the Judge usually produced. Therefore, *'the penny dropped'* with him that the contact between the Judge and the Rector had resulted in this judgment, which, according to

Adv Heunis, is clearly wrong. It is not part of my mandate to furnish an opinion as to whether or not the judgment of Justice Cameron is correct. All that I wish to say in this regard, is that the ten judges unanimously reached the same conclusion, i.e. that the appeal of Gelyke Kanse should fail. Their unanimous conclusion is recorded in three separate judgments. Also, I find it difficult to accept, although Justice Cameron was known as a 'strong' and influential judge, that he would have been able to sway nine judges of the highest court in the land to assent to his main judgment which was so clearly wrong, as suggested by Adv Heunis.

- h) It should also be borne in mind that the evidence shows that the Rector's role in these proceedings was more in the nature of a facilitator, i.e. to assist in finding suitable candidates who would be prepared to accept nomination as candidates for the position of Chancellor. As explained by the Rector, he does not in any way have the power to appoint the Chancellor (or for that matter to promise anybody that he or she will be appointed as such). This choice was to be made by the 42 experts of the Electoral College, consisting of the members of the Council, the Executive Committee of the Senate, ten heads of Faculties and the President and Vice-President of the Convocation. To this I should add that each nomination has to be supported in writing by at least 20 members of the Convocation (alumni of the University).
- i) When Justice Cameron announced on 2 August 2019, that he could not accept a nomination, he was beseeched by, not only Adv Meiring, but several prominent citizens of Stellenbosch, as mentioned before. In view

thereof, Justice Cameron was persuaded to reconsider the nomination, but he stated as a pre-condition that an indication had to be obtained from Adv Heunis on behalf of Gelyke Kanse, as to whether they would agree thereto. As Prof de Villiers put it in his evidence, he used the precise words of Justice Cameron when he (the Rector) spoke to Adv Heunis on the telephone on 26 August 2019, namely:

'Cameron vra dat – hy sê dit 'n voorvereiste is dat Jan [Heunis] en Gelyke Kanse moet sê dat julle instem daartoe, maar nie ondersteun noodwendig nie. Dit is net instem daartoe'.

- j) There is a dispute of fact between the Rector and Adv Heunis as to the content of this telephone call. It is impossible in these proceedings of an inquisitorial nature, to finally resolve this dispute. However, what strikes me as odd is that, if Adv Heunis is correct in his version of what was said during this telephone call on 26 August 2019, there does not seem to have been any reason for Prof de Villiers to have made the call in the first instance. On Adv Heunis' version, it was a non-specific, rather innocuous conversation, with Prof de Villiers mentioning that Justice Cameron appears to be a popular candidate, from which Adv Heunis sought to deduce that the purpose of the call may have been to facilitate the withdrawal of the Gelyke Kanse candidate for the nomination. This tends to show that it was a rather pointless exercise for the Rector to have phoned Adv Heunis.
- k) It rather seems to me that the probabilities favour the Rector's version (although I make no finding in this regard), that the purpose of the telephone

call to Adv Heunis was to convey Justice Cameron's request that Adv Heunis, on behalf of Gelyke Kanse, should indicate whether they have any objection to his nomination. It has to be borne in mind that, at this stage, the members of the whatsapp group, referred to above, were trying their level best to find someone to approach Adv Heunis regarding this request of Justice Cameron. There seems to have been a general reticence on the part of the members of the whatsapp group to take the plunge to phone Adv Heunis - my distinct impression is that there is a rather strained relationship between them and Adv Heunis. Be that as it may, the Rector then undertook to make the phone call to convey the request of Justice Cameron. This call was made by the Rector on 26 August 2019, and it is interesting to note that at 19:38 on 25 August 2019, Edwin Hertzog had sent the following whatsapp message to the other members of the group:

'Wim gaan more vir Jan bel. As dit nie werk nie het gelukkig al ook aan enkele ander kandidate gedink. Hy sal laat weet'.

On 26 August 2019 at 10:51 the Rector sent the following whatsapp message:

'Wim de Villiers: het met Jan Heunis gepraat. Hy sê sy groep het ook aan EC (Edwin Cameron) gedink en was bekommerd oor moontlike konflik van belange – hy sal oorleg pleeg en na my terugkom so vining moontlik. Wim'.

Why, would the reasonable person rhetorically ask, would Adv Heunis have undertaken to call the Rector back as soon as possible if, on Adv Heunis' version, there was no pressing reason to do so?

All of this tends to show that it was a crucial call made by the Rector to Adv Heunis and not a mere non-specific, innocuous discussion.

- l) What is of obvious importance is the response of Adv Heunis by means of his letter addressed to Justice Cameron, dated 29 August 2019. In paragraph 3 thereof, Adv Heunis recorded that there will be no objection from the parties represented by him, to Justice Cameron's acceptance of a nomination as a candidate for the position of Chancellor of the University. According to Adv Heunis, Adv Muller told him that this letter was required by Justice Cameron, who said that he would declare himself available as a candidate if Gelyke Kanse had no objection thereto. In his evidence Adv Heunis explained that this letter merely served to inform Justice Cameron that Gelyke Kanse would not have any objection to his acceptance of a nomination, but it did not convey agreement on the part of Gelyke Kanse to Justice Cameron accepting the nomination at the behest of the University. However, on the plain wording of paragraph 3 of the letter, it is recorded that there would be no objection from Gelyke Kanse to Justice Cameron's acceptance of a nomination [my emphasis] as a candidate for the position of Chancellor. Surely, this would include any nomination, whether prompted by someone from the University or anybody else? In any event, this letter conveys that the other party to the litigation, namely Gelyke Kanse, does

not have any objection to the acceptance by Justice Cameron, a member of the bench in the Gelyke Kanse matter, of a nomination as a candidate. This seems to me to have been the right thing to be done by Justice Cameron, i.e. to approach the other party to the litigation by informing it of his possible nomination and enquiring whether it would consent thereto, or at least would not have any objection thereto. As explained by Justice Cameron, had there been an objection by Gelyke Kanse to him accepting the nomination in the circumstances, i.e. while sitting as a judge in the Gelyke Kanse matter, he (Justice Cameron) would definitely have declined the nomination.

m) It should be borne in mind that, at this stage, the judgment in the Gelyke Kanse matter had been reserved, but not yet delivered by the Constitutional Court. Justice Cameron then took the further precaution of requesting the Registrar of the Constitutional Court to address the letter of 2 September 2019, to the parties advising them of the circumstances in which he had accepted the nomination and tendering information relating thereto.

18. When one now steps into the shoes of a reasonable person who is privy to the relevant facts and circumstances set out above, one should guard against the evaluation of only certain snippets of the evidence, but consider the whole body of evidence holistically. Further, it is useful to bear in mind how our courts have regarded the concept of a reasonable person. In *Herschel v Mrupe* 1954(3) SA 464 (AD) at 419, the following was said:

'The concept of the [reasonable person] is not that of a timorous faint-heart always in trepidation lest he or others suffers some injury; on the contrary he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise'.

19. In so doing, the reasonable person would firstly take into account the nature of the role played by the Rector in the election of a new Chancellor. As explained earlier, he is a facilitator who has to engage in the process of finding suitable candidates for the post. As recorded above, it became clear early-on that Justice Cameron was the preferred candidate of most of those actively involved in the process of finding a suitable candidate. Against this background, the Rector phoned Justice Cameron during the week of 16 July 2019, enquiring whether he would accept a nomination as a candidate for the position of Chancellor. Further, it has to be accepted on the available evidence, that at this stage, the Gelyke Kanse matter and in particular, the involvement of Justice Cameron therein, had not even entered the Rector's mind. One may, with hindsight, ask whether the Rector was not rather naïve with the timing of his call to Justice Cameron, but there is simply no basis for a finding that he telephoned Justice Cameron, with any malice aforethought, as Dr Schreiber and Gelyke Kanse wish to ascribe to him.

20. The Rector obviously became aware of the difficulty posed by the pending Gelyke Kanse matter, upon receipt of Justice Cameron's email of 2 August 2019. It is important to note that the leading role in obtaining the nomination of

Justice Cameron, was undertaken by Adv Meiring. He was in contact with the Rector but considered himself the best equipped to persuade Justice Cameron to accept the nomination. To this end he addressed a lengthy email to Justice Cameron on 19 August 2019. Further, the efforts of members of the Faculty of Law of the University and prominent businessmen referred to above, played an important role, together with the efforts of Adv Meiring, to persuade Justice Cameron to reconsider his decision. This led to Justice Cameron informing the Rector in writing on 21 August 2019, of his reconsideration of the nomination, with the pre-condition that an indication had to be obtained from Adv Heunis as to Gelyke Kanse's attitude in regard thereto. On 26 August 2019, the Rector phoned Adv Heunis and on that day, or latest the next day, on Adv Heunis' version, it was conveyed to him that Justice Cameron was considering the nomination subject to agreement by Gelyke Kanse. As mentioned earlier, this was, with respect, the correct approach followed by Justice Cameron, in seeking the other party to the litigation's consent prior to accepting the nomination.

21. This resulted in the letter of Adv Heunis of 29 August 2019, in which he indicated that Gelyke Kanse would not object should Justice Cameron accept the nomination. This letter was widely accepted as providing the go-ahead for the nomination of Justice Cameron for the position of Chancellor. As the Rector put it in an email to Adv Meiring, *'ek glo dit gee die groen lig vir die nominasieproses ...'*. Also, the joyous messages sent by the members of the aforementioned whatsapp group, underscore the reasonableness of the belief that the green light had now been given. On its plain wording, I believe that the

reasonable inference to be drawn from paragraph 3 of this letter of Adv Heunis, is that Gelyke Kanse has no objection to the nomination of Justice Cameron as a candidate for the chancellorship. That is the meaning that a reasonable person would ascribe to paragraph 3 of the letter.

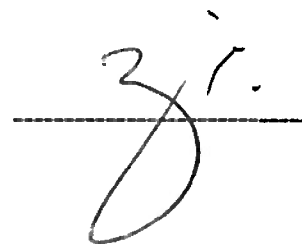
22. A reasonable person would also, no doubt, take into account that Prof de Villiers, a layman as far as the law is concerned, would subsequent to his first telephone call to Justice Cameron, have taken his lead from the judge. This is what his evidence amounted to, particularly in regard to the letter written by Adv Heunis, which Justice Cameron regarded as sufficient consent on the part of Gelyke Kanse for him to put his nomination forward. The Rector confirmed the evidence of Justice Cameron, that had the green light in paragraph 3 of the letter of Adv Heunis, not been given, they would have implemented Plan B, which would have entailed the seeking-out of a new candidate for nomination.
23. Further comfort would also be found by the reasonable person in the letter of 2 September 2019, addressed to the parties by the Registrar of the Constitutional Court, upon the request of Justice Cameron. This was some five weeks before the judgment in Gelyke Kanse was handed down and it contained an invitation to the parties to examine and consider all relevant email correspondence and to obtain the names of the persons who had approached Justice Cameron regarding his nomination for the position of Chancellor.
24. As the above chronology shows, there was a subsequent meeting between the Rector and Justice Cameron on 17 September 2019 at a hotel at the OR Tambo

Airport, Johannesburg. This was after the nominations for candidates for the position had closed on 4 September 2019. It was a brief, social meeting at which the Rector's wife was present. According to the Rector nothing of importance was discussed. I do not believe that a reasonable person will conclude that this later meeting could have had any influence on the issue of the prior nomination of Justice Cameron.

25. In my view, the above facts and circumstances, and in particular the conduct of the Rector, do not, when viewed holistically, give rise to a reasonable apprehension of bias on the part of Justice Cameron due to influence brought to bear upon him by Prof de Villiers. At best the evidence shows that the Rector, as he was duty-bound to do, assisted – probably even taking the lead in identifying suitable candidates for the nomination of a new Chancellor. Justice Cameron, on the other hand, only put his name forward for nomination when the green light was received from Adv Heunis on behalf of Gelyke Kanse. A conspectus of the evidence as a whole does not, in my opinion, point to improper conduct on the part of either of them in regard to the process of the nomination of Justice Cameron, nor that they had conducted themselves at any stage in a manner that reasonably conveyed that Justice Cameron was biased in the Gelyke Kanse litigation.
26. There is, in my view, simply no evidence which points to any serious violation of the law or serious misconduct on the part of the Rector. To qualify as a serious violation or misconduct, the conduct concerned obviously has to be of such gravity that it justifies a label of this nature. The present is not, by any stretch of the imagination, a case where a label of this nature is justified.

CONCLUSION

27. I find that, on the strength of the interviews and the documentation made available to me, there is no evidence to support a finding that the conduct of the Rector in regard to the nomination of Justice Cameron for the position of Chancellor of the Stellenbosch University, constituted a serious violation of the law or serious misconduct.

A handwritten signature in black ink, appearing to read 'B. Fourie', is written over a horizontal dashed line.

Judge Burton Fourie

26th November 2019
