

IN THE STUDENT COURT OF STELLENBOSCH UNIVERSITY

REPUBLIC OF SOUTH AFRICA

In the ex parte application of:

The Electoral Commission

Applicant

ADVISORY OPINION

BACKGROUND

The Applicant approached this Court on an urgent ex parte basis to obtain an advisory opinion pertaining to the correct interpretation of various provisions of the Student Constitution, which relate to the activities of the Electoral Commission. The relief sought by the Applicant was two-fold. Firstly, the Applicant sought the opinion of the Court on how to correctly interpret various constitutional provisions. Secondly, the Applicant sought an order of condonation for non-compliance with section 124(1) of the Student Constitution.

PRELIMINARY ISSUES

Relief requested under paragraph two of the Notice of Motion

The Court was convinced that the Applicant had the required standing to approach the court under section 86 of the Student Constitution. The Applicant acted on behalf of a body which constituted a student body. Student bodies are granted standing before the Court by section 86, and there was nothing in the Student Constitution to suggest that either grounds contemplated in section 86(1) or (2) which allow for the vesting of standing in another person or structure were present.

The Court was further convinced that the matter fell within the jurisdiction of the Court in terms of section 84 of the Student Constitution. Section 84(1) explicitly authorises the Court to give an interpretation or confirm an interpretation of the Student Constitution which was in part what the Applicant approached the Court to do.

The Court was also convinced that suitable reasons were laid out by the Applicant to justify hearing the matter on an urgent basis. The need to clarify the scope of the Applicant's power was rendered urgent by the SRC's decision to have a by-election for one of their vacancies, which the Applicant would need to organise. The need for such an election to occur swiftly is self-evident to ensure that the SRC can function at full-capacity and cater to the student population to the best of its ability.

Relief requested under paragraph three of the Notice of Motion

The Court viewed the Applicant's request for condonation as an order that could not be granted under an advisory opinion as it was not of an advisory nature. As such, it needed to be heard as part of normal application proceedings.

However, the Court was of the opinion that the relief requested would affect the interests of Tygerberg SRC. As such, it would be undesirable to hear the matter prior to notice being given to Tygerberg SRC of the application before the Court.

The Court resolved to split the two requests given the urgency of the situation. The Applicant was informed of a need to provide notice to Tygerberg SRC and to request a response from them regarding their involvement in the matter within an expedited timeframe giving the urgency of the matter. In the interim, the Court would decide on the correct interpretation of the provisions of the Student Constitution highlighted by the Applicant.

INTERPRETATION OF STUDENT CONSTITUTION

The interpretation of statutory provisions involves determining the correct meaning of these provisions to be applied in whatever practical situations may arise. The process of attaching meaning to statutory provisions is one that draws from a variety of factors. It needs to take cognisance of the plain meaning of the text itself as well as the statutory context a particular provision is placed in. It must also give regard to the broader context that the provision operates in. This broader consideration of context includes giving regard to the historical context a particular statute operates in. The purpose of the statutory provision must also be considered during the process. The need to view statutory provisions holistically within their greater context has been

confirmed in the authoritative case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹

This is the approach that this Court adopts in its interpretation of the sections the Applicant has requested an interpretation of.

Section 118(3)

The Applicant argued that section 118(3) be interpreted to mean that it may promulgate binding election regulations for any structure that falls within its jurisdiction which can only be set aside by the Student Court, and that it may promulgate rules regulating its own organisation which are binding unless set aside by the Student Court.

The Court agrees with this interpretation of section 118(3). On a plain reading of the section, the use of the word 'rules' denotes that the regulations promulgated by the Electoral Commission ought to be binding. Such is the definition of the term. Furthermore, this understanding is supported by a purposive understanding of the role of the Electoral Commission. It seeks to ensure the elections on Campus are carried out in a manner that upholds the values listed in Part 1 of Schedule 1 of the Student Constitution. To hold that its rules are not binding would significantly detract from its ability to fulfil this mandate.

It would also render the independence of the Electoral Commission vulnerable. To guarantee the independence of the Commission, its powers need to be understood as binding to ensure it is not dependent on the goodwill of the students to achieve free and fair elections. Similarly, the independence of the Electoral Commission would be hindered if the power to regulate its processes lay with another body instead of the Electoral Commission itself.

The binding nature is also re-enforced within the statutory context of the Student Constitution which grants the Student Court the power to review the constitutionality of rules and regulations and set them aside.² This power would be rendered redundant if other student bodies are afforded the ability to decide themselves whether they are bound by the rules of the Electoral Commission. Deference to the courts to set aside

¹ [2010] ZAKZPHC 63 para 15.

² Section 84(1) read with section 85(3).

that which is unconstitutional (be it statute, policy, decisions or remedial orders) has been confirmed previously in the cases of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*³ as well as in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* (“EFF”).⁴

Section 121(3)

The Applicant requested that section 121(3) be understood to mean that its members are only precluded from running in elections that the Commission itself is tasked with organising.

The Court respectfully disagrees with this interpretation. Section 125 of the Student Constitution makes it clear that the Electoral Commission plays an oversight role in all other elections that take place on campus which are not organised by the Commission itself. The purpose served by the Electoral Commission to ensure free and fair elections would be significantly impaired if they oversee elections that they participate in themselves. The role of electoral oversight served by the Electoral Commission is as important as the role of electoral organisation that they serve.

Section 124(1)

The Applicant argued that section 124(1) should be interpreted to mean that the Tygerberg Student Council may only appoint a student who has been nominated by the Electoral Commission from a list of names provided by the Tygerberg Student Council after it has received applications from the student body.

The Court notes the Applicant’s concern that the section is phrased broadly. However, it is of the opinion that this broadness means that the section cannot be interpreted to prescribe a particular process. It would be an undue strain on the deliberate choice of general language within the provision to hold that only one procedure can be followed by the Electoral Commission in providing advice to the Tygerberg SRC in selecting an Election Convener.

³ [2004] ZASCA 48.

⁴ [2016] ZACC 11.

Furthermore, the Court is of the opinion that the procedure proposed by the Applicant is unsustainable given the nature of the interaction between the Election Commission and the Tygerberg SRC as envisioned in the Student Constitution.

The ordinary syntax of section 124(1) suggests that the Election Commission should advise and consent to the process Tygerberg SRC elects to follow in selecting an Election Convener, not the outcome of that selection. The structure of the sentence clearly paints the Tygerberg SRC as the actor vested with primary authority in selecting an Election Convener for the Tygerberg Campus.

This understanding of the provision is supported by other provisions in the Student Constitution. Should the Election Commission be tasked with consenting to the candidate elected by Tygerberg SRC, their ratification powers in section 124(2) would in effect be rendered redundant. Furthermore, section 126 is clear that the Election Commission may monitor and not manage the election of the Tygerberg SRC. This understanding of the interaction between the Election Commission and the Tygerberg SRC illustrates that the Election Commission is not as closely involved in elections pertaining to the Tygerberg SRC as the Applicant understands it to be. As such, the Applicant's interpretation of their role in the process of selecting Tygerberg's Election convener is not supported by a holistic reading of the provision.

Section 125(2)

The Applicant argued that section 125(2) be understood to afford it binding remedial powers. The Court agrees with this interpretation for similar reasons to those outlined in relation to the interpretation of section 118(3).

Ultimately, for the Electoral Commission to fulfil its mandate and ensure its own independence, the remedial steps it takes have to be binding on all affected parties. This view is specifically supported by the facts of *EFF* which held that the remedial action ordered by the Public Protector would be binding until set aside by an order of the court. The Office of the Public Protector was another institution that was afforded constitutional independence and the court held that to ensure that this independence was respected, the remedial action it ordered had to be considered binding.

Section 127(1)

The Applicant requested that section 127(1) be interpreted to mean that the Electoral Commission must within 24 hours decide whether the complaint warrants further investigation or intervention. However, a final decision on the validity of the election need not be concluded within 24 hours.

The court respectfully disagrees with this interpretation. On a plain reading of the provision, it is clear that the Electoral Commission must resolve the complaint within 24 hours, given the use of the word 'decision'. This is further supported within the wording of section 127 itself. Given that there is a 3-day limit within which the Student Court can be approached to decide on a complaint relating to the outcome of an election in terms of section 127(3), to require that the Electoral Commission reach a decision within 24 hours fits into this timeline.

Furthermore, the Electoral Commission is given the power to regulate its own processes. This affords it the ability to institute structures that could alleviate the investigative burden imposed by section 127(1). Similarly, their ability to monitor elections allows them to remain up to date with what happens during elections as they unfold to allow them to investigate the matter swiftly.

Finally, the purpose served by the short timelines provided for in section 127 is to ensure that elections are held in a way that affords them a degree of certainty. Leaving complaints unresolved when they could be time-sensitive undermines this. A shorter timeframe helps ensure that the election system is afforded greater respect from the student population.

Section 128

The Applicant requested that the Court confirm that section 128 affords them the ability to set aside the outcome of an election if a complaint is lodged with them. The Court agrees that the Electoral Commission has the power to set aside the result of an election.

However, the source of this power is rather inferred from the provisions of section 127, which vests the Electoral Commission with the power to reach a decision as to the outcome of a complaint lodged with them in terms of section 127(1). Section 128

provides the statutory context that supports this understanding of the Electoral Commission's powers under section 127.

Clause 3(11) of Schedule 1

The Applicant requested that the reference to 'enticement' in clause 3(11) of Schedule 1 of the Student Constitution be understood only to refer to monetary enticements.

The Court disagrees. The relevant clause refers to 'enticement or remuneration'. The plain meaning of remuneration refers to monetary payment, which would imply that 'enticement' in that clause holds a different meaning, or its inclusion would be rendered redundant.

The purpose of the clause is clearly to prevent the buying of votes. The buying of votes could occur even when money does not exchange hands, but some other form of property does. To limit this clause only to monetary payments would mean that candidates are free to entice voters through the provision of anything else in a quid pro quo fashion. There is no reason why someone's vote could not be bought through the offer of services or the exchange of some form of property other than money. Enticement in this sense would not include the promises a candidate may make on the campaign trail, that would be their vision or manifesto. As such, the concerns raised by Applicant in their Founding Affidavit would be mitigated on our interpretation of 'enticement' as well.

RANKIN CJ (KRITZINGER DCJ, SCHONEGEVEL J, NAICKER J, LOURENS J
CONCURRING)