



TRANSPARENCY, ACCESSIBILITY & ACCOUNTABILITY
Stellenbosch University

STUDENT COURT OF STELLENBOSCH UNIVERSITY

REPUBLIC OF SOUTH AFRICA

IN THE *EX PARTE* APPLICATION OF

BERNARD JACOBUS HENRY OOSTHUIZEN

Applicant

Neutral Citation: *Ex parte Oosthuizen 8/23*

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

Decided on: 25 August 2023

FINAL JUDGMENT

BEUKES CJ (Pauw J, Simonis J, Lourens J, and Braaf DCJ concurring)

Introduction

[1] The Applicant approached this Court on an urgent basis on Friday, 18 August 2023 for a declaratory order relating to section 77(2) of the Student Constitution of 2021 ('Student Constitution'). In his application, he submitted that the term 'positional student leader' should be interpreted to exclude the position of Cluster Convenor, when considering section 77(2) of the Student Constitution. Furthermore, the Applicant wants this Court to declare the right to stand for office as a fundamental part of the right to vote; and any restriction on it should be interpreted in the narrowest terms. I deal with this matter in accordance with how the Applicant outlined his submissions in his filings.

Locus standi

[2] I agree with the Applicant's submission that he has standing to approach this Court. As a registered student of Stellenbosch University, he falls within the category of 'all students' that has standing in terms of section 86 of the Student Constitution of 2021 ('Student Constitution'). I also agree that the Applicant has a 'direct and live interest in the matter'.

Urgency

[3] Firstly, the Applications submits that the matter is urgent. The onus is on an applicant to prove why their application should be regarded as urgent. The Rules of Procedure, 2023 ('Rules') in paragraph 8(1) outlines the standard of proof:

"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."

What is required is therefore to outline the circumstances creating urgency and why an applicant would be prejudiced should no deviation be made.

[4] In my view, the Applicant satisfied both requirements. He outlined the limited timeline available to apply for the Student Court bench of 2024. He correctly states that the nominations remain open from 18 August 2023 to 27 August 2023. At the time of writing the interim order, which will be briefly outlined below, there were less than seven days left of the application period. Proceedings would therefore have to be conducted speedily, albeit reasonably to ensure fairness, to ensure that judgment is delivered within this timeframe.

[5] Secondly, if this Court were to refuse urgency, the prejudice to the Applicant would be significant. If he were to be able to apply to the Student Court, the normal pace and procedure would unlikely be workable in delivering judgment before the deadline.

[6] The Applicant provides further reasons as to the urgency of this matter, such as the time it would take to undertake a constitutional amendment, and the upcoming election of the structures that would have to facilitate the amendment. While I will not delve into these reasons, as the reason he provided above is sufficient, it remains true

that these processes would take far too long and would thus make him unable to apply for the 2024 bench.

Jurisdiction

[7] The Court has jurisdiction to hear this matter. The Applicant correctly submits that this Court is empowered to grant a declaratory order, as per section 84(2) of the Student Constitution. Furthermore, this Court is also empowered to give an interpretation of the Student Constitution.¹

Interim order

[8] Before considering the substantive submissions made by the Applicant, I find it appropriate to address the interim order granted by this Court on 21 August 2023. The Court convened an urgent meeting, after deciding to hear the matter on the papers only, on Sunday 20 August 2023. Due to the urgency of this application, and the time it takes to write a judgment that does it justice, we elected to hand down an interim order outlining urgency and the finding of the Court in brief. “This was decided on to ensure the Applicant obtains relief as soon as reasonably possible while enabling us to write a judgment that is suitable, and reflective of the decision that was made.”²

Nature of the role of the Cluster Convenor

[9] The Applicant submits that the role of Cluster Convenor is not the same as other leadership positions as contained in the Student Constitution. In this regard, he points to section 10 of the Constitution of the Cluster Convenors of Stellenbosch University of 2022 (‘CCC’), which governs the functions of the Cluster Convenor and related matters. He submits that the role is different to other leadership positions in that it is ‘more akin to a functionary of the Centre for Student Communities’ (‘CSC’).³ As evidence of this differing status, he maintains that the employees of the CSC must vote for amendments to the CCC, and since the CSC is a functionary of the University, that this makes the Cluster Convenor a functionary of the CSC.

¹ S84(1)(a).

² *Ex Parte Oosthuizen (Interim order)* 21/10/23 para 3.

³ Para 26.

[10] While it may be true that the CSC is responsible for amendments to the CCC, that does not elevate the role of Cluster Convenor to a position above the ambit of the Student Constitution. Indeed, in the CCC's preamble, it emphatically states that it 'is subject to the provisions of the Student Constitution of Stellenbosch.' Therefore, while the CSC is a functionary of the University, the CCC is nevertheless subject to the Student Constitution, and thus, the Cluster Convenor is also subject to the Student Constitution.

[11] Section 6.2 of the CCC clearly sets out the role of Cluster Convenors. While I will not quote this section fully, it is my view that a Cluster Convenor fully falls within the role of a positional student leadership position. Their role is to serve the needs of the cluster community, thus, the student community, which most, if not all, student leadership structures are tasked with. Furthermore, the Student Constitution in section 1(6) explicitly includes the role of Cluster Convenor under the definition of 'positional student leader'. This definition will be considered later on in this judgment.

The definition of positional student leader and section 77(2)

[12] The Applicant refers to the definition of 'positional student leader' in section 1(6) of the Student Constitution:

"a student elected or appointed to the following structures: structures established by this constitution, Faculty Committees, House Committees, Society Executive Committees, Cluster Convenors." (own emphasis)

Furthermore, the Applicant notes that the term 'positional student leader' is only used one other time, namely in section 70(3) and (4) of the Student Constitution, when it refers to the 'investigatory powers of the Student Imbizo'.⁴ He submits that the phrase is used to define and expand the powers of the Student Imbizo and their disciplinary jurisdiction. He further states that section 1 allows context to enable deviation from the definitions.

[13] He further submits that the phrase 'positional student leader' in section 77(2) of the Student Constitution must be interpreted to exclude the position of Cluster Convenor. Section 77(2) reads as follows:

⁴ Notice of Motion para 16.

“No member of the Student Court may be a positional student leader, subject to positions permitted by this constitution.”

In this regard, the Applicant submits that the position of Cluster Convenor should fall within the exception contained in this provision, namely ‘subject to positions permitted by this constitution’.

[14] The purpose of section 77(2) is to limit any potential conflicts of interest on the bench of the Student Court and to maintain the independence and impartiality thereof. The Applicant correctly submits that the section envisions a ‘carve out’, and he indeed correctly submits that all words in a section has meaning. The exception, however, requires an explicit allowance for a positional student leader to be on the Student Court, or at the very least, the context must be sufficiently clear to conclude that it is the only reasonable inference to be drawn that such a position is provided with the exception. There is no such reasonable inference of explicit exception applicable to the Cluster Convenor.

[15] By his own admission, to which I am approving, all words carry meaning. If one were to agree with the Applicant that the phrase in question is solely for the purpose of the Imbizo’s investigatory powers, then the phrase would be redundant within the context of section 77(2). Section 77(2) would effectively be rendered useless as the crux of this section is the exclusion of positional student leaders’ eligibility to stand for the Student Court. The context of section 77(2) therefore does not provide the context for deviation from the definition in section 1(6). It is true that the section is applicable under the provisions governing the Student Imbizo, however, it is just as applicable in this section.

[16] The drafters of the Student Constitution explicitly included the position of Cluster Convenor under the definition in section 1(6). They decided for this definition to be applicable in the context in section 77(2) as well, and the context does not indicate that the definition should be deviated from. Effect must therefore be given to the definition as it stands.

Conflict of interest and recusal in terms of rule 17 and separation of powers

[17] As indicated above, section 77(2) serves the purpose to avoid and limit conflicts of interest and to ensure the independence and impartiality of the bench. It is widely recognised that Court's authority emanates from its moral authority. It must not only be independent and impartial, but it must also be *seen* to be so. These characteristics of any judiciary is imperative, and any bench's independence and impartiality must be beyond reproach. All efforts must be taken to ensure that this remains true. Indeed, the Student Constitution in section 75(2) puts an obligation on all student bodies, of which the Cluster Convenor is one, 'to ensure the independence, impartiality, dignity, and accessibility of the Student Court.'

[18] The Applicant submits that, from his research, the Cluster Convenor has not yet been involved in litigation before this Court. In any case, he submits, the Rules have extensive recusal measures to prevent any conflicts. Recusal is a last resort and must not be taken lightly. While it is important for judges to recuse themselves should the need arise, it should not be seen as a normal measure; indeed, it is extraordinary. While I did not consider the litigation history of Cluster Convenors, it is not impossible that litigation may arise in future. To say therefore that because it has not happened, it will not happen, is an untenable submission.

[19] The Cluster Convenor could perhaps be seen to form part of the Executive of the student governance structures, although this grouping has not been fully defined as of yet. To have a student form part of multiple branches of student governance is a clear infringement of the separation of powers. While it may be true that a Cluster Convenor is fully capable of separating their roles, the mere fact that they could conceivably occupy positions in both the Executive and Judicial branch of student governance is untenable. This mere fact would jeopardise the independence of the Student Court.

Right to stand for office

[20] The Applicant submits that the right to stand for office is a fundamental component of the right to vote and any restriction should be interpreted narrowly. While it does form part of the right to vote, it is not absolute. Various restrictions are placed on the right to stand for office, both nationally, internationally, and within the context

of Stellenbosch University. To regard it as being absolute would lead to absurdities and would undermine the independence and impartiality of the Court. The entire premise of section 77(2) would be undermined, and any restrictions placed on the right to stand for office would be unlawful. By way of example, it would then not be inconceivable that a person who holds the position of SRC Chairperson could become a member of the Student Court as well. Evidently, this is inappropriate since the separation of powers could certainly be infringed upon.

Conclusion

[22] The Student Constitution is clear and cannot be interpreted in any other way than that Cluster Convenors form part of the grouping of 'positional student leader' and is therefore excluded from being or becoming a member of the bench in terms of section 77(2).

Order

[23] I therefore make the following order:

- [1] The matter is urgent;
- [2] The right to stand for office is not absolute due to the influence of separation of powers, the need for independence and impartiality, and *intra vires* limitations put on this right;
- [3] The purpose of section 77(2) aims to ensure the independence and impartiality of the bench;
- [4] 'Positional student leader' cannot be interpreted to exclude the Cluster Convenor as the context does not indicate otherwise, and doing such would destroy the efficacy of section 77(2).

BEUKES CJ



BEUKES CJ



LOURENS J



BRAAF DCJ



SIMONIS J



PAUW J