



TRANSPARENCY, ACCESSIBILITY & ACCOUNTABILITY
Stellenbosch University

**STUDENT COURT
OF STELLENBOSCH UNIVERSITY**

REPUBLIC OF SOUTH AFRICA

**IN THE MATTER BETWEEN
ELECTORAL COMMISSION
KEVA**

**First Applicant
Second Applicant**

And

**LYDIA LADIES' RESIDENCE
LYDIA HOUSE COMMITTEE**

**First Respondent
Second Respondent**

Neutral Citation: *Electoral Commission and Another v Lydia Ladies' Residence and Another (Final Judgment) 08/23*

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

Heard on: 4 August 2023

Handed down on: 25 August 2023

FINAL JUDGMENT

BEUKES CJ, PAUW J, SIMONIS J, LOURENS J (Braaf DCJ concurring)

Introduction and factual background

[1] This matter has had a long and interesting progression before this Court. Before considering the arguments presented on the merits of the case, we find it necessary to provide a brief background and timeline of its progression. The case started on 18 October 2022, when the Applicants approached this Court to declare section 53 of Lydia Residence's Policy on Election of the House Committee during the Covid19 pandemic ("Election Policy") inconsistent with the Student Constitution of Stellenbosch University of 2021 ("Student Constitution"). The application was brought in the final week of the fourth term of 2022. Due to the proximity to the examination period and the end of Court term, the 2022 Student Court bench, with agreement of the parties and the incoming bench, decided to delay the matter to the 2023 academic year.

[2] After the orientation period at the beginning of this year, the newly appointed Court bench decided to engage with the parties in a meeting to orientate itself on the matter. Due to the complexity of the case, and the expansive arguments surrounding the merits of the matter, it was decided at the meeting that the case would be divided into two hearings: a preliminary hearing in respect of the procedural matters and another in respect of the substantial issues of the case. The preliminary hearing was held on 3 March 2023 and the Court handed down its preliminary judgment on 31 March 2023. In its preliminary judgment, this Court made the following order:

1. Precedent is applicable to this Court;
2. The amendment by the Applicants is allowed;
3. The Court is *functus officio* in respect of the point *in limine*. The decision to hear the matter before the current bench is therefore valid and enforceable until it is set aside;
4. The matter is ripe for consideration;
5. Joinder is not allowed;
6. The First Applicant does not have standing;
7. The Second Applicant has standing;

8. The First Respondent has standing;
9. The Second Respondent has standing;
10. The Court has jurisdiction to hear the matter;
11. A date for the hearing of the merits of the matter will be set by the Court in consultation with the parties.

[3] Following this, the Respondents elected to appeal the Student Court's order in the preliminary judgment to the Appeal Court, as envisaged in Chapter 7 of the Student Constitution. The Appeal Court handed down its judgement on 12 May 2023, finding that the decision of the Student Court was not appealable. The Appeal Court accordingly dismissed the appeal and the cross appeal. Again, the examination period prevented this Court from hearing the merits and the substantive hearing was delayed to the start of the third academic term. Finally, the substantive hearing on this matter was held on 4 August 2023.

[4] Before the Court turns to considering the arguments tendered before it, it would like to extend its gratitude to all parties involved for their patience in allowing the process to play out as envisaged in the Rules of Procedure, 2020 ("Rules") and the Student Constitution. We acknowledge that the length of time it took to reach the end of this matter is less than ideal, but the aim of this Court was and remains the resolution of this dispute in the interests of fairness and justice. It is not in anyone's interest to rush to resolve the matter. What remains fundamentally important is to ensure that justice and fairness prevail, and ultimately, to ensure this was the cause of the long timeline.

Interpretation of provisions in the Student Constitution

Section 128 – does it require publication of full election results?

[5] The nub of this matter is whether, in terms of the Student Constitution, the Respondents are obligated to publish the election results, inclusive of the tallies of the votes received by candidates. The Applicant relies primarily on section 128 to prove the existence of such an obligation, but also refers to the values in Clause 1 of the Student Electoral Act.

[6] Section 128 reads as follows:

“128. Validity of the election results

“The validity of the full election results is confirmed if no complaint about the validity of the election is lodged with the Electoral Commission or the Student Court within three (3) University days after the Electoral Commission or relevant election official has announced the election results.”

The Respondents contend that ‘election results’ does not bear the same meaning as ‘full election results.’ They argue that ‘full’ denotes more than just the outcome of an election. They also submit that the purpose of section 128 is to ensure that once the winning candidates have been announced, complainants have three days in which they can lodge complaints with the Commission or this Court.

[7] In contrast, the Applicant submits that ‘election results,’ as used at the end of the provision, refers to the same ‘full election results’ as are referred to at the beginning of the provision. According to the Applicant, using a narrower construction is untenable and would undermine the constitutional aim of establishing an electoral regime that proactively guards against irregularities and interference. The Applicant also refers to the usage of ‘results’ in section 190(1)(c) of the Constitution of the Republic of South Africa, 1996, to support such a broad interpretation.

[8] While the Applicant’s interpretation is plausible, it is not self-evident. The focus of the provision is clearly on the validity of election results rather than the publication of ‘full’ election results. The purpose of the provision is to ensure that a time limit is set for election complaints to be lodged, whereafter the full election results are deemed to be valid. It is implicit in Chapter 14 that there must be some mechanism for constituents and candidates to inspect full election results, such that there is sufficient information available to lodge a complaint effectively, but this does not require uniform publication of the full election results. For example, the same aims could be achieved if full election results could be obtained upon request by a constituent or candidate.

[9] It should also be noted that the Student Constitution sets out different procedures and requirements for the elections of the Students’ Representative Council (“SRC”) than for other student structures. For example, clause 17(4) of Schedule 2 specifically requires the full results of an SRC election to be announced in public, to

be published electronically, and to be sent to all candidates. Other aspects, such as nomination periods, academic disqualification, the format of elections, the placement of polling stations, campaign conduct, etc., are also specifically prescribed for SRC elections.¹ These aspects are not similarly regulated for the elections of House Committees and are left to the relevant communities to determine. For the same reason, little can be gleaned from the usage of ‘results’ in the Constitution of the Republic of South Africa, 1996, as the contexts are entirely different.

[10] Thus, the most logical interpretation is that the precise mechanism by which full results are made available to constituents and candidates must be determined by the relevant student structure itself. As will be discussed below, some mechanism must exist to maintain transparency and to enable the Electoral Commission to carry out its constitutional mandate. However, section 128 does not, on its own, require the publication of full election results, inclusive of vote totals.

Values of maximum accessibility, transparency and relevance, freedom, and fairness

[11] Aside from section 128, the Applicant also relied on the values in Clause 1 of the Student Electoral Act to prove the Respondents’ obligation to publish full election results. Part S1.1 of the Student Electoral Act reads as follows (own emphasis added):

Part S1.1: Values and Standards

“This Electoral Act aims to promote the following values and standards for student leadership structure elections:

1. Ensuring an election process which:

(1) Allows maximum accessibility to information regarding candidates and the election process.

(2) Allows maximum participation and engagement from the student body.

(3) Is democratic, non-discriminatory, and inclusive.

(4) Is free and fair.

(5) Is relevant and transparent.

(6) Promotes the interests of the structure and/or campus.

(7) Stimulates quality debate and dialogue with candidates.”

[12] The Applicant places particular reliance on clauses 1(1), 1(4), and 1(5), which encourage election processes that allow ‘maximum accessibility to information

¹ Schedule 2 of the Student Constitution.

regarding candidates and the election process,' that are 'free and fair,' and that are 'relevant and transparent.' Although these values are not self-standing rights, the Applicant makes a strong argument that the publication of full election results creates public confidence and promotes accountability in election management.

[13] Yet, the publication of full election results is not a silver bullet. As the Residence Head of Lydia noted, mere publication of full results would not render an election fair if the results themselves were tampered with. Separately, this is also why the Electoral Commission must always be granted full access to monitor and audit the elections managed by other structures' election committees. However, if a residence chose only to share full election results upon request by a candidate or constituent, and provided such full results were available soon after being requested, its election would still be sufficiently transparent, relevant, and free and fair. 'Maximum accessibility to information' means that a person is able to reach as much information as is feasible. It does not necessarily mean that the information must be sent without a person first asking to see it.

[14] At the very least, therefore, section 128 requires a mechanism for constituents to access the election results, inclusive of vote totals. It does not require the publication of those totals to the entire constituency or student body directly. Constituents must be able to gain access to this information easily so they may pursue further avenues, should they wish to do so. It is incumbent on each constituency to develop their own mechanism to achieve this, which must pass constitutional muster.

[15] Thus, neither section 128 of the Student Constitution, nor the values in Clause 1 of the Student Electoral Act, obligate the Respondents to publish full election results, inclusive of vote totals, to constituents without prompting. Accordingly, one must turn to the Student Leadership Election Regulations (the "Regulations"), which do purport to create such an obligation.

Regulations under Section 118(3) – what is the meaning of proper conduct?

[16] The Regulations were written and adopted by the Electoral Commission in terms of section 118(3) of the Student Constitution. This provision states that, aside

from the Student Electoral Act, the Electoral Commission may “write additional rules to ensure *proper conduct* during elections.” (Own emphasis added.)

[17] The limiting factors to this power are the phrases ‘proper conduct’ and ‘during elections.’ Interpreting the latter is simpler and counsel for the Applicant noted the correct approach: ‘during elections’ refers to the entire period from when the application/nomination window is opened, to when voters can cast their ballots, to when the results are announced, and to when complaints can be lodged with the Electoral Commission or Student Court. This meaning is evident from Chapter 14 of the Student Constitution as a whole, and specifically section 125, which tasks the Election Committee of a structure with managing and facilitating the election of the structure. A narrower interpretation of ‘election’ would create ambiguity as it would not be clear who bears this responsibility.

[18] The meaning of ‘proper conduct’ is slightly more difficult to determine. The Respondents allege that, insofar as the Regulations “require publication of results in a particular matter to a particular group,” they exceed the scope of their empowering provision, i.e. section 118(3).² Conversely, the Applicant contends that ‘proper conduct’ includes and requires the publication of full election results, as constituents would not otherwise be “able to scrutinise the results and establish, for themselves, whether, quite practically, the votes add up.” Furthermore, the Applicant states that “by mandating the manner in which results must be published, the Electoral Commission is able to ensure uniformity and consistency in elections across campus.”

[19] Proper statutory interpretation involves reading the language and context of a provision together from the outset.³ The duties and powers of the Electoral Commission are set out in section 118 of the Student Constitution. It is clear from S118(1) that the Commission’s powers extend only as far as they are expressed in this Constitution. It is also clear that the publication of election results is a matter that is central to the management and facilitation of an election. The relevant election committee or convenor of a structure is therefore responsible for sharing the election

² RHOA para 24.

³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) paras 18-19.

results according to the policy of the particular structure (whether the policy requires the publication of full election results or simply the winning candidates).

[20] Thus, insofar as the Regulations prescribe the exact manner and form in which election results should be published, they seek to supplant the discretion of the relevant student structure and election committee to manage and facilitate an election. Requiring all student structures to have *some mechanism* by which all candidates and constituents can gain access to full election results does ensure proper conduct and enables the Electoral Commission to fulfil its constitutional mandate. However, in requiring the publication of full election results in a uniform format, where such publication is not constitutionally required, the Electoral Commission acts outside of the authority granted to it in section 118(3). Accordingly, regulation 9(2) is not constitutionally valid.

Section 125 and 126

[21] We agree with the submission by Counsel for the Respondent that the Student Constitution creates a decentralised, differentiated, model for the election of the various student bodies. Central to the finding is the construction of section 126 of the Student Constitution, which reads as follows:

“(1) The Electoral Commission must manage the elections of the SRC and may monitor, audit, and investigate any complaint(s) related to the elections of the Academic Affairs Council, Prim Committee, Senior Prim Committee, Societies Council, Faculty Student Committees, Societies, House Committees, and Tygerberg Student Council and its constituent bodies.” (own emphasis)

Section 126 imposes different duties on the Electoral Commission for the election of the SRC *viz-a-viz* the election of house committees and the other listed bodies as outlined. The Electoral Commission has a peremptory duty to facilitate the election of the SRC elections, and has a discretionary duty to ‘monitor, audit, and investigate’ complaints regarding the other elections. Evidently, the clear delineation between the peremptory and discretionary duties along with the differentiation between the SRC and other structures establishes such a decentralised and differentiated model. The Electoral Commission is not entitled to manage the election of House Committees and may only perform an oversight role.

[22] Section 125 of the Student Constitution, in turn, provides further elaboration on the Electoral Commission's responsibilities and duties relating to the election of these other structures, and further supports the decentralised model of elections. It reads as follows:

“The governing structures of the Academic Affairs Council, Prim Committee, Societies Council, Faculty Student Committees, Societies, and House Committees must appoint Election Committees/Convenor(s) to conduct their Elections, and allow the Electoral Commission full access to monitor, audit, and receive & investigate complaints relating to the election process concerned.

(1) The Election Committee(s)/Convenor(s) of these structures shall manage and facilitate the election of their respective structure.

(2) The Electoral Commission will perform an oversight role in this process and may only intervene in an election process when –

(a) Consequential irregularities have been noted with the Election process.

(b) There is prima facie evidence of electoral misconduct.

(c) When a complaint alleges electoral fraud.

(d) When the respective Election Committee(s)/ Convenor(s) fail to comply with election regulations.”

Firstly, section 125(1) of the Student Constitution holds that the election committees of the respective structures, which include house committees, manages their respective elections and not the Electoral Commission. The Electoral Commission is granted supervisory powers in terms of section 125(2). They are, however, as stated above, not granted with the power to manage those elections. Importantly, for the Electoral Commission to be able to perform their oversight role properly, there must be a mechanism for them to access or receive the election results. The alternative, being unable to access or receive the election results, creates an untenable situation which would disempower them, and which would go against the Student Constitution.

[23] As indicated, section 128 envisages a mechanism for access or release of election results, whether it includes vote totals or not. However, the Electoral Commission must be furnished with the results which include the vote totals for them to properly perform their duties in terms of sections 125 and 126. We do not believe that for them to perform their duties, the election results including vote totals must be released to the entire campus. For this standard to be met, all that is required, is that the Commission must be provided with these totals and results, even if this were in a confidential manner.

[24] Thus, when considering sections 125 and 126, the Electoral Commission only enjoys oversight powers as it relates to the structures contained therein and which are not the SRC. However, inasmuch as they have a duty of oversight, those structures have a corresponding duty not to frustrate the performance thereof.

Are the Regulations ultra vires?

[25] Since the scope of the duties of the Commission have been outlined above, albeit for these limited sections and in relations to this specific situation, this inquiry now turns to whether the Election Regulations, 2022 (“Election Regulations’) are *ultra vires*. The impugned paragraphs of the Election Regulations read as follows:

“(2) Results of elections for student structures –

(a) The following structures must ensure that their election results are announced in public as soon as possible after all the votes have been counted and the full written results, in accordance with Annexure 2, must be published electronically and sent to all the members of the structure concerned –

(i) Faculty Committees

(ii) House Committees

(iii) Society Executive Committees

(3) All student leadership structures must ensure that their election results, prepared in accordance with Annexure 2, are readily available to their constituents and at the request of the Electoral Commission. “ (own emphasis)

[26] Instead of these sections furthering the Commission’s duty of oversight, we find that these amount to the managing elections. The Election Regulations prescribe the extent to which results must be published, to whom, and how it must be published. Part and parcel of managing elections include these aspects of publication and it is solely within the ambit of residences to determine. Nevertheless, the mechanism employed by residences must still withstand constitutional scrutiny.

[27] The Commission is, however, not entitled to prescribe to the respective structures the extent to which results must be published, to whom, and how it must be published. They are only entitled to determine the mechanism that it must be provided to them to perform their duty of oversight. For them to perform these functions, the results inclusive of vote totals need not be released in public.

[28] The Election Regulations, therefore, go beyond what would enable the Commission to perform their oversight role, as noted above, and is therefore, beyond their powers. We therefore conclude that the Electoral Regulations, paragraph 9(2), is *ultra vires* and unconstitutional. It is also set aside.

[29] Regarding paragraph 9(3), it is *ultra vires* and unconstitutional insofar that it prescribes the form election results must take. While this paragraph furthers section 128 of the Student Constitution, by emphasising that the mechanism for constituents to access the results, including vote totals, must be easily accessible, the Commission is not entitled to prescribe the form of the mechanism. We therefore strike ‘, prepared in accordance with Annexure 2,’ out of the paragraph, to now read as follows:

(3) All student leadership structures must ensure that their election results are readily available to their constituents and at the request of the Electoral Commission.

Hindering access to the Court

[30] The Applicant raised the argument that the ban on the publication of the full election results, deters voters who may want to scrutinise and challenge the election. It was argued that Lydia’s policy fails to provide for a mechanism through which a candidate can challenge the election. The Applicant referred to section 75(2) of the Student Constitution, which requires “[a]ll student bodies must cooperate to ensure the independence, impartiality, dignity, and accessibility of the Student Court.”

[31] The Court finds that this argument regarding access to the Court is conflated with the lack of an exception for bodies to scrutinise and assess results. The Respondent correctly notes that section 53 of the Lydia Election Policy, does not prohibit access to the Court. Any student in Lydia may approach the Court, whether the full election totals were published or not. Despite the results not being published the Electoral Commission was able to initiate this very case, and Lydia’s Policy had no power to stop the Court proceedings. Consequently, Lydia’s Election Policy does not hinder access to the Court.

Lack of an exception for bodies to scrutinise and assess results

[32] Lydia's Election Policy is alleged to not have an exception where bodies may scrutinise and assess the results of the elections. The Applicant referred to Sections 118(2) and 119(2) of the Student Constitution and concluded that it is the Commission's responsibility to oversee elections. This includes auditing the elections, which requires the release of the full election totals to the Commission. This can be read with section 23(1), 125 and 126(1) of the Student Constitution.

[33] The Respondents incorrectly argued that the Commission was not allowed to audit the results unless one of the provisions in section 125(1) of the Student Constitution is met. As mentioned, this falls short of the correct interpretation of "intervene" and "oversight". Auditing the results is part of the Commission's role as oversight body. In the same spirit that the Respondents argue that the Residence Head controls the manner in which results are released, as they have control over the election process – from beginning to the final publication of results; the Court must remain consistent to the fact that "elections" includes everything before and after (including auditing) the physical act of voting and vote counting.

[34] Although section 53 of the Lydia Election Policy does not provide for exceptions to when a student body may access the results, the Electoral Commission and this Court will be able to request the full results, should the need arise, based on the powers granted to them in the Student Constitution. As noted above, the Student Constitution, requires that the full results be provided to the Commission, whether in a confidential manner or otherwise, for them to perform their oversight duties. Nonetheless, the Applicants are correct in noting that no student will be able to demand the results totals from the Residence Head, without approaching the Court. This is due to a lack of an exception in the Lydia Election Policy and as the Respondent stated – the Residence Head is the custodian of the result totals and will decide when, how and if it is released.

Residence Rules

[35] The question of which constitution supersedes certain rules can get quite complex if attention is paid to which document gives power to the other, and

subsequently whether students or staff are responsible for adhering or enacting the various provisions. To simplify the matter, it must be determined what the limit is of this Court's powers regarding certain people/bodies.

[36] The Respondents argued that the Electoral Regulations are invalid as they conflict with the Residence Rules. They are correct in listing the following rules which empower the Residence head to regulate and be custodian of the House Committee elections. The powers are granted to the residence head in Rule 2.2.3, which makes the Residence Head responsible for "the final sign-off that validates the election"; Rule 3.1.7, which states that the Residence Head controls the procedure for election of the House Committee, in terms of the residence constitution, "before, during and after the election."; and lastly Rule 3.2, which allows the Residence Head to delegate powers to students in the residence, however the power remains that of the Residence Head.

[37] Further, the Student Court is empowered by section 85(3) of the Student Constitution to "[s]et aside any decision or action that is inconsistent with this Constitution, or a constitution, policy, regulation or any empowering provision *of a student body...*". The Residence Rules are rules attached to Stellenbosch University as an institution *not* to a student body. (Own emphasis added) This Court has no power to deliver a judgment on University- staff, regulations, policies etc. As the Respondents noted the Residence Rules envision that the Residence Head controls the election process – which includes the extent and manner of the publication of results. There is no specific reference in the Residence Rules as to whether the result totals for each candidate should be published; thus, the matter must be regulated by the specific communities, in consultation with the Residence Head.

[38] Although the Applicants are correct in arguing that the Student Constitution supersedes the Electoral Act, which gives effect to the Electoral Regulations, which in turn must be complied with by all the residences during their elections; this Court does not have the authority to direct how and what a Residence Head, a member of the Stellenbosch University Staff, can do during the House Committee election.

Lydia Constitution

[39] Lydia's Election Policy states the following in section 53:

“The announcement of the new House Committee will take place as soon as possible after the election. The list with the number of votes, will not be published but will be kept by the Resident Head to use to fill a vacancy should it occur later.”

[40] To summarise the conclusions about the above section thus far: This section does not hinder access to this Court; the Court and the Commission have the power to request the full election results if required. From the previous sections, it is also clear that the full results should be provided to the Electoral Commission, whether confidentially or otherwise. Furthermore, there is no exception made for students in Lydia who wish to access the full results; and this Court has no power to direct how, and what a member of the University staff should do.

[41] Besides the issue regarding the publication of the full election results, it must be noted that section 52 of the Lydia Election Policy allows 12 hours for *procedural* complaints, after which the elections will be deemed valid. There appears to be no provision for when a party wants to dispute a substantive aspect of the results. The Applicant is further correct in noting that if no result totals are published, a candidate or student could not know whether the votes are tallied correctly. The Applicant demonstrated this in the following manner: If she were to be a candidate and after elections say that she received 0 votes, she will be able to dispute the validity and accuracy of the results, as she knows for a fact that she voted for herself.

[42] As an *obiter* remark: from the arguments of the Respondents there seems to be no substantial reason why the result totals should be ultimately hidden from the students. The Electoral Commission cannot be faulted for striving to make elections as transparent as possible. There are numerous elections taking place on campus during election season, and it is unreasonable to expect from the Commission to go through all of them with a fine-tooth comb, to ensure they were free and fair. The release of the result totals empowers students to assist the Commission in raising issues that would have slipped past them.

[43] Yet, as section 53 of the Lydia Election Policy puts an absolute barrier on the publication of vote totals, even to an interested party, it is constitutionally invalid and must be set aside.

Order

[44] Judgment is handed down and the following order is made:

[1] Section 128 of the Student Constitution does not require publication of full election results, inclusive of vote totals. It does, however, require each residence to develop their own internal mechanism to enable constituents to access such results.

[2] Section 53 of the Lydia Election Policy is constitutionally invalid insofar as it puts an absolute barrier on the publication of vote totals and is therefore set aside.

[3] The Lydia Election Policy is constitutionally invalid insofar that it does not make provision for a section 128 mechanism through which residence members may access the results, inclusive of vote totals.

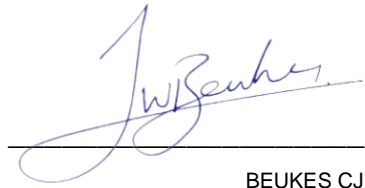
[3] Paragraph 9(2) of the Electoral Regulations is *ultra vires* and is wholly set aside.

[4] Paragraph 9(3) of the Electoral Regulations is *ultra vires* and is read down to now read as follows:

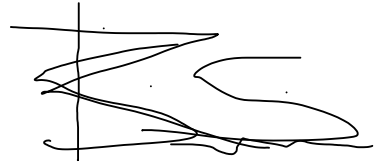
“All student leadership structures must ensure that their election results are readily available to their constituents and at the request of the Electoral Commission.”

[5] The Electoral Commission must be provided with the election results of residences, inclusive of vote totals, whether confidentially or otherwise.

BEUKES CJ, PAUW J, SIMONIS J, LOURENS J



BEUKES CJ



SIMONIS J



PAUW J



LOURENS J



BRAAF DCJ