

**IN THE STUDENT COURT OF THE UNIVERSITY OF STELLENBOSCH
(HELD IN STELLENBOSCH)**

In the matter between

BERNARD PIETERS	First Applicant
ASHWIN MALOY	Second Applicant
THEA BESTER	Third Applicant
FRANCOIS HENNING	Fourth Applicant
JACOBUS MAASS	Fifth Applicant
NETANJE VAN NIEKERK	Sixth Applicant
SELMIE CROUS	Seventh Applicant

And

THE ELECTION CONVENOR 2016/2017 SRC ELECTIONS

CALUMET LINKS	First Respondent
NEIL DU TOIT	Second Respondent

JUDGMENT HANDED DOWN BY THE STUDENT COURT

JURISDICTION AND NATURE OF THE PROCEEDINGS

[1] As a point of departure, it must be noted that, according to section 55(a) of the Stellenbosch University Student Constitution (“Student Constitution”), “the Student Court functions as an administrative tribunal”.

[2] It is furthermore necessary to clarify the nature of review proceedings and to distinguish this from an appeal. Quinot explains the nature of an appeal as relating to the correctness of the decision taken, whereas review proceedings relate to the manner in which the decision was taken.¹ It is thus important to note that the role of this court is not to consider whether the decision taken by the Respondent in this case,

¹ G Quinot “Regulating Administrative Action” in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 107.

the Election Convenor (“EC”), is correct or not or the best decision or not, but rather to consider the manner in which the decision was taken.

[3] Section 62 of the Student Constitution sets out the jurisdiction of this court:

“The Student Court has the power to –

(a) give an interpretation, or to confirm the interpretation of a party before the Court, regarding –

(i) this Constitution; or

(ii) any empowering provision in terms of which a student body or a member of a student body exercises power;

(b) decide on the constitutionality of any action or omission of a student body or a member thereof;

(c) review any decision of a student body or a member thereof whereby the rights or legitimate expectations of a student or group of students are materially and adversely affected;

(d) make a final decision regarding any matter where the parties consent to the jurisdiction of the Court; and

(e) decide on all other matters which this Constitution places under the jurisdiction of the Student Court.”

[4] Notice must be taken of the fact that the jurisdiction of this court was not disputed by any of the parties to the proceedings.

LEGAL QUESTION AND RELIEF SOUGHT

[5] As stated above, this matter is a review. In light thereof, this court will utilise the principles of administrative justice.

[6] It should be noted that this review applies only to the decision as set out by the EC in the “Report to in terms of Appeal Court Judgement Handed Down on 9 September 2016” (*sic*) (hereafter referred to as “the Report”). It is important to distinguish this Report from an earlier Report by the EC as required by an interim order of this court and not by the Stellenbosch University Student Appeal Court (“Appeal Court”). The references made by the applicants in the Founding Affidavit of the First Applicant (“the affidavit”) to the prior Report, is thus not relevant for the purposes of this review.

[7] In their notion of motion, the Applicants ask this court to set aside the decision made by the EC to disqualify them as candidates in the 2016/2017 Student Representative Council Elections (“SRC Elections”). Further relief is also sought in the

form of a suspension of the disqualification pending review and for an order stating that voting shall commence forthwith in the SRC Elections.

[8] Considering the nature of a review, the question before this court is to determine whether the decision to disqualify the applicants was lawful, procedurally fair and reasonable.

COMPLAINTS BROUGHT TO THE ELECTION CONVENOR

[9] For the purposes of this review, notice should be taken of two complaints that are relevant to these proceedings as set out in points 6 and 8 of the Report. These complaints relate to the use of unauthorised campaign posters and exceeding the monetary limits imposed by the EC.

[10] In relation to the remainder of the complaints, the EC either did not express an opinion or did not find any contraventions in respect of these complaints. It is therefore not necessary for this court to deal with the other complaints.

LAWFULNESS

[11] The point of departure in this respect is the order handed down by the Appeal Court in *Pieters and Others v Du Toit and Others*.² This court accordingly refers to the order as handed down by the Appeal Court:

“[44] The decision of the Student Court of 17 August 2016 is set aside and replaced with the following order:

- 1. The Respondents [i.e. the seven appellants on appeal] are reinstated as eligible candidates for the 2016/2017 Student Representative Council elections;*
- 2. The Election Convenor [the Eighth Respondent a quo] is to commence forthwith with investigating the complaints lodged by the applicants on 1 August 2016, with the exclusion of the complaint relating to campaigning in the Neelsie on 19 July 2016;*
- 3. The Applicants [i.e. the three respondents on appeal] are given the opportunity to lodge the complaints which they addressed to the Student Court after 1 August 2016 [i.e. the complaints referred to in paragraphs [53] to [63] of the final Student Court judgment], with the Election Convenor by 17:00 on Monday, 12 September 2016;*

² 09/09/2016.

4. *The Election Convenor is to complete a report on his investigations by Wednesday, 14 September 2016. The report should clearly indicate the following:*

a. His findings on the complaints referred to in 2 and 3 above;

b. If he finds that any irregularities have occurred, how this is to be dealt with, especially in terms of his powers in item 22(3);

c. Any other issues raised by the complaints that are in his view important to the integrity of the election.

5. *The Election Convenor is to continue forthwith with the 2016/2017 Student Representative Council Election process, for which voting was due to commence on 2 August 2016. For purposes of clarity it is indicated that this order to continue with the election process does not limit the Election Convenor's powers when dealing with the complaints referred to in 2 - 4 above."*

[12] Lawfulness is an important principle of administrative justice, which at its core deals with authorisation. As the EC is acting in terms of the order handed down by the Appeal Court, it is the order which serves as the empowering provision. It must accordingly be considered whether the actions taken by the EC aligns with what he was authorised and required to do by the Appeal Court in order for his actions to be lawful and not *ultra vires*.

[13] The EC did in fact complete the Report as required of which the purpose was to investigate the complaints as referred to in the order above. In paragraph 2 of the Report, the EC refers to an application to extend the deadline of 14 September 2016. The extension was not raised in argument by the Applicants.

[14] Although the authorisation of the EC was not disputed, this court deems it necessary to refer to an argument raised by the Applicants. The Applicants referred to Item 26(1) of Schedule 1 of the Student Constitution during oral submissions before the Student Court on 30 September 2016. The Applicants argued that complaints may only be laid against individual candidates and not against a group, which includes the Applicants. It should be noted that this was the first time that this argument was raised. Item 26(1) states as follows:

"A complaint about the campaign of a specific candidate must be lodged with the Election Convenor(s), who must properly investigate the complaint and must announce his or her decision within twenty-four (24) hours after the complaint was lodged."

[15] In this regard, the judgment of the Constitutional Court in *Minister of Education v Harris* (“*Harris*”)³ explains that an action taken by an administrator may not be rescued by reference to an alternative empowering provision. The decision in *Harris* thus makes it clear that parties may not refer to different empowering provisions in order to render an action lawful or unlawful. In paragraph 1 of the Report the EC explicitly relies the order by the Appeal Court as empowering provision. It is thus important to understand that the question before this court relates to the Report and review thereof, which was authorised and required by the order of the Appeal Court, and not item 26(1).

[16] It is held that the EC acted within the scope of the empowering provision and that his actions are lawful.

PROCEDURAL FAIRNESS

[17] Importantly, procedural fairness encapsulates the principle of *audi alteram partem*. This court will exercise restraint in this regard, as the risk exists that the court will get subsumed by the merits and rather treat this review as an appeal by focusing on the correctness of the decision by the EC. It should, however, be noted that even if this court could express an opinion in this regard, it was placed in a difficult position as the Applicants did not present any evidence to rebut the allegations, but rather appeared to rely extensively on the onus of proof (he who alleges must prove).

[18] It appears that the issue in this matter is not the lack of an opportunity to make representations, but rather the way in which the EC dealt with the case put forward by the Applicants. In essence, the Applicants argued that the EC’s finding in relation to the contravention of budgetary limits amounts to speculation and that they were not required to present evidence relating to their budget until the end of the election. The Applicants were also at pains to point out that “he who alleges must prove”.

[19] It should also be noted that the First Applicant agreed to furnish this court with a copy of an agreement for the “pooling” of funds concluded between the Applicants and AfriForum. The argument is that the Applicants, in terms of this agreement, are unable to present budgetary evidence until the “end of the election”. It should further be noted that this court has not been furnished with such an agreement at the time of writing

³ 2001 4 SA 1297 (CC) para 18.

the judgment. This court is thus not in a position to consider this argument and it appears that the situation is governed by inferences drawn on both sides: the Applicants argue that it is only speculation that the budgetary limit was exceeded, but they also only alleged that they did remain within these imposed limits.

[20] The same risk of being subsumed by the merits exists in relation to the complaint about the posters. The arguments raised by the Applicants relate to negative publicity, the public interest of the EC's decision and testing "unfair advantage" at the polls by testing the electorate's opinion. However, as stated repetitively, this is not an appeal and the question is not whether the finding by the EC was correct or not, but rather whether it was lawful, procedurally fair and reasonable.

[21] It is held that the Applicants were afforded a reasonable opportunity to state their case, as is shown in paragraphs 7.2 and 8.2 of the Report.

REASONABLENESS

[22] In light of the reasonableness of the decision by the EC the question is whether the decision taken is one that a reasonable decision maker could make.

[23] In a consideration of the reasonableness of the decision taken by the EC, it is necessary to consider the factors laid down by the South African Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* ("*Bato Star*").⁴ This court will draw on these factors to consider the reasonableness of the findings in the Report. These factors are: the nature of the decision; the identity and expertise of the decision maker; the range of factors relevant to the decision; reasons given for the decision; the nature of competing interests and the impact of the decision on those affected.

[24] It should firstly be noted that the nature of the decision relating to the organisation, setting of rules, enforcement of rules, campaigning and general logistical aspects of a SRC election fall outside the scope of the usual experience of a court or an administrative tribunal. The result thereof is that the EC is in a better position than this court to make findings relating to the general enforcement of rules in a SRC election. The complexity of factors to be taken into account in a matter such as the one before this court, further highlights the difficulty of an administrative tribunal in reviewing the

⁴ 2004 4 SA 490 (CC).

decision. These include complex factors such as not only the discretion of the EC to determine the best way to ensure free and fair elections, but also the deprivation of an opportunity for the Applicants to stand as candidates in a Student Representative Council Election.

[25] In *Bato Star*, it was held that a court should show respect to a decision taken by someone with expertise where such a decision requires an equilibrium to be struck between a range of competing interests.⁵

[26] In order for the decision of the EC to be reasonable, it is furthermore required that the reasons given for the decision must support the finding made. It is also clear that the impact of the disqualification on the Applicants is great as they are deprived of an opportunity to be elected to a position of student governance.

[27] This court is, however, at pains to point out that the matter before it is not an appeal, but a review. In *Bato Star*, it was also emphasised that a court should not consider whether or not the decision was correct, nor whether or not it was the best decision.⁶ It should at all times be kept in mind that the questions remains whether the decision was lawful, procedurally fair and reasonable.

[28] The Report lists reasons in paragraphs 7 and 8 for the finding that rules were contravened. The reasons given support the outcome of a contravention as the EC firstly lists the applicable rule, then explains the contravening conduct of the Applicants, lists the Applicants' responses and finally draws a conclusion. This court can thus not point to any irregularity in this regard.

[29] Dealing with the sanction of disqualification, the nature of a review again does not require of this court to decide whether disqualification was the correct sanction, but rather whether a reasonable decision maker could make this decision. It is important to note that there exists a variety of reasonable decisions in the spectrum of reasonableness. The decision of the EC is thus only required to be on this spectrum of reasonableness. In paragraph 12.6 of the Report, the EC explains not only one, but more disqualifiable offences to reach the conclusion. This court cannot hold that the decision of the EC is unreasonable, as the decision falls on the spectrum of reasonable decisions, irrespective of the appropriateness of correctness thereof.

⁵ Para 48.

⁶ Para 54.

FINDING AND ORDER

[30] This court finds that the decision of the EC to disqualify the candidates is lawful, procedurally fair and reasonable. The following is ordered:

- 1) The application to set aside the decision of the Election Convenor to disqualify the Applicants as candidates for the 2016/2017 Student Representative Council Elections is dismissed;
- 2) Voting for the 2016/ 2017 Student Representative Council Election is to commence forthwith; and
- 3) It is accordingly not necessary to make a finding relating to the suspension of the disqualification pending the review by this court.

OOSTHUIZEN A with COLEMAN E, De VILLIERS K, GOUWS C and ZEVENBERGEN I concurring.