TRANSPARENCY, ACCESSIBILITY & ACCOUNTABILITY
Stellenbosch University

STUDENT COURT
OF STELLENBOSCH UNIVERSITY

REPUBLIC OF SOUTH AFRICA

IN THE MATTER BETWEEN

Amahle Sityata **First Applicant**

And

Electoral Commission **First Respondent**

Neutral Citation:	*Sityata v Electoral Commission (Final judgment)* 17/09/23
Judgment:	Beukes CJ, Simonis J, Lourens J (Braaf DCJ, Pauw J concurring)
Decided on:	17 September 2023
Handed down on:	18 September 2023

FINAL JUDGMENT

BEUKES CJ, SIMONIS J, LOURENS J (Braaf DCJ and Pauw J concurring).

Introduction

[1] The Applicant approached this Court on an urgent basis on 7 September 2023 disputing her disqualification from running for the Student Representative Council (SRC). She followed the internal appeal process as provided for by the Electoral Commission and after being unsuccessful, approached this Court. We subsequently handed down an urgent interim interdict on 8 September 2023. The following order was made:

> *"[1] The matter is urgent;*

[2] The SRC Internal Elections are indicted and cannot take place before the election results have been confirmed by this Court, or otherwise as this Court finds in the final judgment;

[3] The Respondent is to file their Notice of Intention to Oppose by 9 September 2023 at 12:00;

[4] The Respondent is to file their Opposing Affidavit(s) by 10 September 2023 at 12:00;

[5] This matter will be heard on the papers only, as it is in the interest of administration of justice to do so and on the recommendation of the members of this Court, as per Rule 20(2) of the Rules of Procedure; and

[6] The Electoral Commission is instructed to furnish the Court with the information described in paragraph 5, no later than 10 September 2023 at 12:00."

[2] The Respondent subsequently filed all their papers on 9 September 2023 and submitted an additional affidavit pursuant to new arguments made by the Applicant on 12 September 2023. They further elected not to oppose the application and leave it to this Court to determine the merits of the matter, however, they do present various points *in limine* and other points of law. I must thank the Commission for their professionalism and transparency in their dealings with this Court. I must emphatically state that this Court is also not a forum in which political debates or rivalries are settled; we are simply occupied with the law behind the decisions that were made, and whether those decisions pass constitutional muster. Thus, irrespective of how we find in this matter, it must be emphasised that there is no preference for one particular individual or group. As further background to this matter, this Court received a total of nine affidavits from various people. We received approximately 17 pieces of documentary evidence. In total, more than 190 pages of affidavits, notices, and evidence were submitted to us for consideration.

Confidentiality

[3] One further aspect I need to address before proceeding, is our decision to regard certain information in this matter as confidential. While the exercise of our section 127(4)(c) power, authorised in terms of the Student Constitution of 2021 (Student Constitution), will be considered later, the issue of confidentiality merits its own discussion. All elections are sensitive, and they must remain free, fair, and transparent. However, the fact that we deem certain information as confidential is a justified limitation on the requirement of transparency. In order for elections to be free and fair, members of the community must be able to submit any complaints or

grievances in a manner that protects them from any possible retaliation or retribution. Indeed, this can only be achieved if they are able to submit these complaints confidentially, to the extent necessary. If their identity were to be exposed in court proceedings, it would render the entire premise of confidential complaints worthless. Thus, while we endeavour to be as open and transparent as possible, certain information, especially identifying information of complainants, simply cannot be divulged.

Locus standi

[4] Neither the Applicants nor Respondents dispute *locus standi* in the present matter. The Applicant is a registered student at Stellenbosch University and the Respondent is a student body in terms of section 3(12) of the Student Constitution. Therefore, in terms of section 86 of the Student Constitution, both parties have standing in the present matter.

Jurisdiction

[5] Neither the Applicants nor the Respondents dispute this Court's jurisdiction to hear the matter. It is trite that section 84 of the Student Constitution empowers this Court to give an interpretation regarding the Student Constitution, or any other empowering provision in terms of which a student body or a member of a student body exercises power. This Court is further empowered to decide on the constitutionality of any action or omission of a student body and to review any decision of a student body.

Points *in limine*

[5] The Respondent submits that they were prejudiced by 'defective service and pleadings' by the Applicant. In this regard, they submit that the Applicant may have intentionally used the incorrect email address in their Notice. This was done, according to them, to prohibit the participation of the Respondents. Furthermore, the Respondent submitted that this strategy succeeded as the Court already 'handed down a judgment' in the absence of their submissions.

[6] While we agree that the use of the wrong email address is less than ideal, and would under normal circumstances be a significant mistake, the current matter is extraordinary. Rule 8 of the Rules of Procedure, 2023, allows this Court to deviate

from the rules if the matter is urgent. Express allowance for deviation from Rule 6(1) is allowed. As we have found this matter to be urgent, as per the Urgent Interim Interdict, we are within our power to condone non-compliance. Indeed, the Respondent submitted that this matter is urgent as well. As such, due to the circumstances surrounding the context and nature of the application, we deem it appropriate to allow such deviation.

Nature of proceedings and applicability of the Promotion of Administrative Justice Act 3 of 2000

[7] The Respondent requested that we determine the nature of these proceedings in light of our discretion to exercise our section 127(4)(c) powers. They further requested us to determine whether their decisions are of an administrative nature, thus, whether the Promotion of Administrative Justice Act 3 of 2000 (PAJA) finds application.

[8] It is our view that this particular matter should be considered through review procedures. While, theoretically, it could be possible to conduct appeal proceedings for a fact pattern similar to this one, courts should generally be wary of creating the perception of interference with democratic elections. The result of appeal proceedings would be the direct determination of whether the Applicant is elected to the SRC or not. On a practical and theoretical level under review proceedings substitution however remains a possibility. Substitution is an exceptional remedy under such proceedings, where we are able to set aside and alter the decision of the Electoral Commission. It is therefore much more appropriate to conduct review proceedings in order to respect the separation of powers through the higher standard required to substitute a decision. Following this route enables us to minimise our influence on the outcome of democratic elections since there should be a justification for utilising the exceptional remedy that is substitution, which would determine who is elected to the SRC. Thus, we are only considering the process followed and will not make a determination of whether the candidate is elected to the SRC, unless the standard for substitution has been met and the facts point toward the need for substitution.

[9] The use of our section 127(4)(c) powers do not impact or alter the nature of these proceedings. This discretion was utilised for the purpose of providing this Court

with as much information as possible to properly review this matter. Furthermore, it was utilised to speed up the resolution of the matter by ensuring that no gaps would result from the speedy turnaround time of filings.

[10] The next question relates to the applicability of PAJA. If PAJA were not applicable, we are only able to review the Electoral Commission's decisions on the basis of legality. For PAJA to apply, the decisions must comply with the definition of administrative action in section 1 of the statute. The Constitutional Court's finding in *Minister of Defence and Military Veterans v Motau and Others (Motau)* is authoritative for determining this question. The Constitutional Court outlines seven elements for consideration:

[11] When considering the nature of a decision, one must consider the nature of the function, and not necessarily that of the functionary, according to the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union (SAFRU).* Further in *Permanent Secretary, Department of Education, Eastern Cape and Another v Ed-U-College (PE) Inc (Ed-U-College)*, the Court determined that the implementation of policy would generally be of an administrative nature. The Electoral Commission, through its investigate process, findings, and subsequent appeal proceedings were implementing the Student Constitution, Student Electoral Act, and the Electoral Regulations of 2023. The Commission was thereby fulfilling its normal functions through managing the elections and resolving the disputes that arose. The Commission also relied on PAJA at various stages of their enquiries. Thus, their decision in this regard is of an administrative nature.

[12] It is common cause that the University is an organ of state as defined in the Constitution of the Republic of South Africa, 1996. Through adopting the Student Constitution as a Policy of the University, Council delegated the duty of managing the SRC election to the Electoral Commission in section 126. In any event, within the context of the university itself, the Electoral Commission can be regarded as an organ of state for the same reasons that the Independent Electoral Commission is regarded as one nationally.

[13] The Constitutional Court in *AMCU v Chamber of Mines* confirmed the factors for considering whether a power being exercised is public in nature, as determined by Langa CJ for the minority in *Chriwa.* One must consider the source, nature, subject matter and the exercise of a public duty in the determination. The power exercised by the Electoral Commission is rooted in the Student Constitution and its limits is outlined in terms thereof. The decisions made by the Commission are 'mandatory on non-parties and coercive'. Furthermore, these decisions result in 'binding consequences' and it is exercised to ensure a free, fair, and democratic election. Thus, the Commission was exercising a public power.

[14] The other elements of the enquiry are self-evident. As indicated, their powers were exercised in terms of an empowering provision. It further has the capacity to adversely affect rights and have a direct, external legal effect.[1] The Commission's decisions are determinative of whether a candidate is elected after a complaint was lodged against them. These decisions impact the composition of the SRC, which is the body tasked with representing the students at the university. Thus, since all the elements have been met, PAJA is applicable and the decision is administrative action.

Constitutionality of the Electoral Regulations, and appropriate standards for decisions

[15] The Applicant's submissions allege that certain parts of the Student Leadership Election Rules (Resolution No.23 of 2023) (Electoral Regulations) are unconstitutional. However, no explicit mention was made in respect of which regulations are being challenged. In this regard, we agree with the Respondent that this particular aspect of the application is vague. It is entirely unfeasible for this Court to go on a proverbial fishing expedition to determine which particular provisions are being challenged. It would further negatively impact the foundational principle of *audi alteram partem* since the Respondent cannot adequately respond to such challenges and would have to rely on mere inference to determine which sections are being challenged. As such, any constitutional challenge of the Electoral Regulations in this application is dismissed. As a result, this application only concerned with the process followed and not the validity of any regulations or rules.

[1] *New Clicks.*

[16] Furthermore, the Applicant calls into question the burden of proof utilised by the Commission in making their decisions: a balance of probabilities. In South African law there are only two types of burdens of proof, namely a balance of probabilities and beyond a reasonable doubt. The latter is reserved for criminal matters only. As the investigation, processes of the Commission and these proceedings are without a doubt not criminal in nature, it follows that the only appropriate standard is a balance of probabilities. Furthermore, no functionary of the university is entitled to conduct criminal proceedings as this is reserved for certain structures of the State only. The Commission is therefore correct in employing this standard.

Interpretation of relevant sections

[17] The majority of this case dealt with section 127 of the Student Constitution. Section 127(1) is very strict about the timelines in which a complaint must be investigated and announced. The peremptory phrases specifically indicate that the complaint *must* be lodged with the Electoral Commission and the Commission *must* investigate and announce their decision within 24 hours. [*own emphasis added*]

[18] Section 127(2) requires “any complaint relating to any student leadership election, including any aspect that may jeopardise the freedom or fairness of the election...” *must* be lodged with the Electoral Commission. The Court interprets this section to include a complaint about the process described in section 127(1).

[19] The Respondents queried whether section 127(3) and section 127(4) relate to the same “complaint” and whether section 127(4) is the process the court must follow in a section 127(3) matter. Subsection (3) refers to an “unresolved complaint” in terms of subsection (2). Subsection (4) only refers to a “complaint”. The Court interprets this to mean two different things. Therefore the Court retains the ability to hear an appeal regarding any complaint during the election procedure, if it were appropriate. As indicated, in this instance the appropriate type of proceedings is review, with the normal power and theoretical ability to substitute proceedings.

[20] Clause 8 of the Student Electoral Act states that: “Any infringement of these rules will render the perpetrator liable for an investigation by the Electoral Commission and if found guilty, will be disqualified.” From the plain reading of Clause 8, once a

candidate is found guilty of an infringement of the Student Electoral Act, the commission has no discretion and must disqualify the candidate. Clause 15(2) of Schedule 2, however, makes use of the discretionary term *may* and allows the Commission a slight discretion on the sanctions against the complainant. These clauses are not completely inconsistent with each other and should as far as possible be read together. The clauses remain coherent as long as the Commission uses its discretion, in the case where a candidate's conduct constitutes a misdemeanour, to disqualify the candidate. If the Commission chooses to order a less serious sanction, it will conflict with Clause 8. Clause 15 is specifically focused on the campaigning portion of the election. This includes everything the candidate does to market themselves. Clause 15(1) notes that a candidate may not do anything which is not in line with *inter alia* the Student Electoral Act. Based on the focus of clause 15, it should be interpreted to refer to any rule in the Student Electoral act that relates to campaigning. Clause 8 refers to possible infringements listed in Clause 3 of the Student Electoral Act, which also includes certain campaigning rules. Thus, if the offence committed by a candidate relates to campaigning, specifically, and the rule they contravened is *not* in the Student Electoral Act, but it is in Schedule 2, the Commission does have a discretion. If, however, the rule contravened is found in the Student Electoral Act, clause 8 must be followed and the candidate must be disqualified. After disqualification, the candidate still has the opportunity to appeal the decision by lodging a grievance with the Electoral Commission or alternatively the Student Court.

Procedural and substantive fairness

[21] The Applicant bases the application on procedural and substantive unfairness in the procedure followed throughout the investigative and appeals process. This process will be considered below. I find it appropriate to provide an overview of the process up until the current proceedings before us:

> [1] The Applicant was informed of the first complaint via her institutional email, referred to in this judgment as 'Complaint A' on 25 August 2023 at 10:06. The alleged transgression occurred on 24 August 2023 near Dagbreek at or around 10:00. The Applicant was requested to submit a statement no later than 16:00 on 25 August 2023.

[2] The Applicant was informed of the second complaint via her institutional email, referred to in this judgment as 'Complaint B' on 25 August 2023 at 21:50. The alleged transgression occurred on 24 August 2023 near Jan Mouton at or around 15:50. The Applicant was requested to submit a statement no later than 10:00 on 26 August 2023. The Applicant however alleges that she was unable to access this email address and first had sight of the complaint when Mr. Keva (the Director of Compliance and Oversight) sent it to her via WhatsApp on 26 August 2023 at 18:49. From the evidence submitted, I was unable to ascertain whether the deadline was extended to submit a representation. However, the Applicant did submit such representation to Mr. Keva. This particular complaint was first reported to the Student Imbizo but was thereafter lodged with the Commission by them.

[3] Mr. Keva notified the Applicant the he decided to consolidate Complaint A and Complaint B into a single complaint when he informed her of Complaint B.

[4] The outcome, not inclusive of the reasons, were sent to the Applicant via her institutional email on 27 August 2023 at 13:03.

[5] On 1 September 00:17 Mr. Keva furnished the Applicant with the reasons for his finding and informed her of the availability of an internal appeal which must be exercised within two days.

[5] The Applicant, according to the Respondent, submitted an appeal on 2 September at 22:47.

[6] Thereafter, on 4 September 09:23 the Respondent notified the Applicant of the Appeal taking place at 15:00 on the same day at the Library Auditorium. The Applicant was notified that she had the opportunity to make a ten-minute representation at that meeting. Notably, it is here where the accounts and individual points of view of the parties diverge. The Applicant in her affidavit indicated that "[t]he existence of such a forum of appeal was not communicated to [her] until th[e] email was received."

[7] Without delving into the minutiae of the discussions between the Respondent and Applicant during the time leading up to the appeal, it is sufficient to outline the broad details. After the Applicant notified the Respondent of her unavailability and expressed her dissatisfaction, she was notified that all candidates were requested to be present at the Auditorium for

> the announcement of the SRC results later that day. Furthermore, she was informed that she was able to make a written representation or to have a representative. The Respondent provided guidance on what they foresaw could be asked during such a hearing and the Applicant provided a written representation thereafter.
>
> [8] During the appeal meeting, the Respondent read out the representation made by the Applicant, whereafter they went into deliberations. The voting requirements were explained and ultimately voted; four in favour of overturning the disqualification and three abstaining. There were no votes against overturning the disqualification.

[22] Firstly, the Applicant disputes whether complaints were actually lodged with the Commission. They argue that the Respondent "proffered complaints that have not actually been lodged". The Applicant continues to say that both Complaint A and Complaint B were third party communication whereafter the Respondent "took it upon themselves to go out and proffer more evidence to substantiate supposed complaints." I disagree with this submission. I will outline my reasoning by referring to two elements that arise from the Applicant's submissions: the lodging of a complaint and searching for evidence.

[23] Section 127(2) was briefly considered above in respect of what types of complaints may be lodged. In this regard, a complaint may be considered as 'lodged' when the Commission is made aware thereof through communication to them. How and by whom the complaint is communicated to them, as long as it is on record, is not entirely relevant. What they may not do, however, is go on a fishing expedition to search for complaints. The Commission's power to investigate is predicated on them being made aware of a complaint directly. Both complaints were communicated, and thus lodged, with the Commission. Although Complaint B was initially not submitted directly to the Commission, but rather the Student Imbizo, it was nevertheless appropriately referred to the Commission by the Imbizo. The Commission nevertheless remains empowered to determine specific procedures to lodge a complaint. For purposes of section 127(2) of the Student Constitution, the complaint was lodged with the Commission, although it was done in a roundabout manner.

[24] The second element that emanates from the Applicant's submission is the searching for evidence. Once a complaint has appropriately been lodged with the Commission, they must be able to investigate. Any investigation involves the gathering of evidence, statements, and other relevant materials for them to make an appropriate decision. It is entirely unfeasible to expect of a complainant to furnish the Commission with all the evidence relating to their complaint. A complainant need only provide a *prima facie* allegation whereafter the Commission have the duty to investigate further should they agree that there is a *prima facie* case to be made.

[25] The question around the fact that the Applicant was unable to access her institutional email is not within the Commission's control. Students are expected to have access to their email accounts, thus the Applicant's technical difficulties did not affect the Applicant's notice of the complaint lodged against her. The third problematic aspect of this fact pattern relates to the consolidation of complaints. This will however be dealt with below under 'lawfulness'.

[26] The Applicant further submits that there was an improper delegation of power in that the Director of Compliance and Oversight was the only person who investigated the complaint. They submit that Clause 8 of Student Electoral Act requires the Commission to investigate and not only one person within the Commission. Notably, the delegation of the investigative power was done through clause 10(1) of the Electoral Regulations. Clause 31 of the Electoral Commission Code of Conduct Resolution No.4 (2022 Version 1.2) (Code) empowers the Commission to promulgate Electoral Regulations. In order for the Electoral Regulations to be published, a draft must be circulated throughout the Commission for comment, whereafter the Rules Committee may promulgate it. As such, the Commission made the decision to delegate the investigative power to a single person within the Commission. The Director of Compliance of Oversight therefore did not 'improperly seize' investigative powers as the Applicant submits, rather, he was acting within the confines of the Electoral Regulations which empowers him to investigate. In this regard, the Commission authorised him to act on behalf of the Commission within that investigatory role.

[27] Mr. Keva furnished the Applicant with his reasons for disqualifying her later than the 48 hour deadline set in terms of paragraph 12(2) of the Electoral Regulations. The Regulations requires that a full report must be submitted within 48 hours after the outcome was announced. The reasons were provided almost 48 hours late. It was submitted on behalf of the Respondent that other complaints were being considered and time constraints were therefore faced by them, which resulted in the delay. Although the Applicant was provided the full 48 hours to lodge her subsequent appeal, the delay in providing the reasons nevertheless remains an incurable procedural irregularity.

[28] I now turn to the allegation by the Applicant that she did not know of a forum of appeal until the email by the Respondent on 4 September 2023. The Applicant contends that 'the existence of […] a forum of appeal was not communicated to [her] until the email [from the Electoral Commissioner on 4 September 2023] was received'.[2] Her assertion is, simply put, wholly untrue. When the Commission delivered the outcome of their investigation on 27 August 2023, the email included the following:

> *"TAKE FURTHER NOTICE that <u>any student is entitled to an internal appeal</u> of this decision. <u>The Student may lodge an appeal with the Electoral Commission by submitting an appeal to the Chief Electoral Officer</u>. The deadline for this appeal shall be 2 days after the announcement of this decision. If a student still be unsatisfied with the outcome of the internal appeal they may lodge a review of the decision at the Student Court, should they be unsatisfied with the decision of the Student Court they are entitled to appeal that decision to the Appeal Court."* (own emphasis)

The Applicant further lodged her appeal, according to the Respondent, on 2 September 2023 at 22:47. While one could perhaps interpret the Applicant's statement as referring to the particular appeal hearing on 4 September 2023, the statement still generally refers to a 'forum of appeal'. However, we draw no conclusions from this singular statement by the Applicant on her submissions generally. It is however important to emphatically state that she did know about the availability of a forum of appeal. In any event, as she submitted her appeal on 2 September 2023, one could conclude that a reasonable person would have started to prepare for such a hearing shortly thereafter. This particular aspect will be further canvassed shortly.

[2] Para 35 and 36 Founding Affidavt

[29] Clause 12(3) of the Electoral Regulations requires an appeal's decision to be announced within 48 hours after the appeal was lodged. As the appeal was lodged on 2 September 2023 at 22:47, and the appeal took place on 4 September 15:00, the timeline has been complied with. The Applicant, however, contends that she was pressured and given insufficient time to properly prepare, find a representative or draft a written representation. As indicated above, the reasonable person would have begun their appeal preparations once they submitted their appeal, in anticipation of the actual appeal hearing. Yet, it remains true that the Applicant was only notified of the possibility to provide a written representation or to appoint a representative on the day of the appeal itself. Notice of the hearing was also only provided to the Applicant on the morning of the appeal proceedings. Prior to this notice, she did not know when the appeal would take place although she should have known that it would take place within the 48 hours after her appeal was lodged.

[30] Nevertheless, the fact that she was only made aware of being able to make a written representation or appoint a representative on the day of the appeal is both procedurally and substantively unfair. It is unreasonable to expect of an appellant to prepare a written representation or find someone to represent them within such short notice. It further infringes on the principle of *audi alteram partem* in that she, through the short notice, was unable to make a proper representation.

[31] The appeal hearing itself was also not without irregularity. From viewing the recording of the appeal hearing, as graciously volunteered to us by the Commission, there was significant uncertainty around voting procedures on the part of the attendees. Through their own admission, the Respondent noted that they were under significant time pressure to conclude the appeal. Although the voting procedures were explained, the manner in which it was conducted portrays significant uncertainty on the part of the attendees. One cannot expect a vote to be procedurally fair if those voting on the motion are uncertain as to how the vote will be conducted or determined.

[32] Furthermore, although Mr. Keva did not participate in the vote itself, he was nevertheless included in the number needed for the motion to carry. During the meeting, an indication was given that a simple majority was needed for the motion to carry; practically, it was communicated that five positive votes were required. Thus,

eight people were included in the vote but ultimately only seven participated, whether positively or abstaining. Due to the manner in which the Commission's voting is constructed, an abstention constitutes a negative vote and those not present are deemed to have abstained, according to Clause 5 of the Code. Clause 12 of the Code provides for eight Officials in which the Director of Compliance and Oversight is included. As a result of Mr. Keva not voting, it was effectively construed as an abstention, which counts as a negative vote. While we are not considering the constitutionality of the voting procedures, it is nevertheless highly irregular for an official who is *functus officio* to effectively reconsider their own decision.

The disqualification decision

[33] Another significant part of the Applicant's submissions relates to the fairness of the decision to disqualify her. I agree with the Applicant that evidence and the process were provided and described but that no connection was drawn to the clauses that were contravened. The Director of Compliance and Oversight outlined the clauses of the Electoral Act that were contravened but failed to describe exactly how each particular provision was in fact contravened. Rather, he outlined procedure and evidence. While providing the process followed and evidence is important, it is nevertheless fundamental to reasons that a connection must be drawn or explanation must be given as to how certain provisions or principles were contravened. The reasons provided to the Applicant were therefore insufficient and unfair as she did not know how she contravened each particular provision.

[34] Furthermore, the Director referred to a 'pattern of events' which informed his decision. Thus, he used the fact that he combined both complaints into one to inform his ultimate decision and allowed each particular set of facts to influence one another. For reasons that are outlined under 'lawfulness', it is imperative that each complaint is treated on its own basis, separately, and that complaints do not become proof for one another. Indeed, as is discussed below, this is what section 127(1) of the Student Constitution requires.

Bias

[35] A further issue which must be considered under procedural fairness is any alleged bias or reasonable apprehension of bias of the decisionmaker in question. The

issue of bias was first raised in the Applicant's replying affidavit. The Applicant asserts that Mr. Keva as the primary investigator, prosecutor, and adjudicator for the Respondent acted with bias, or in the alternative, that a reasonable suspicion of bias is present. To substantiate this averment, the Applicant refers to paragraph 49.5 of Mr. Keva's affidavit. Paragraph 49.5 reads: "Further, it is common knowledge that the Applicant enjoys the support of SASCO which is an influential political organisation on campus, thus the students involved in these complaints may be subjected to intimidation and or harassment if their identity is not protected."

[36] The Applicant is indeed associated with SASCO and regularly partakes in their programs. The Applicant takes issue with this characterisation of SASCO and argues that Mr. Keva holds strong views on the organisation. The Applicant asserts that this view of SASCO has tainted the entire procedure as Mr. Keva viewed her in same light as he views the organisation.

[37] Furthermore, the Applicant makes reference to paragraph 9.1.4 of Mr. Keva's affidavit. Paragraph 9.1.4 reads: "Therefore, the Commission is apprehensive about the Applicant's sudden resort to the old email address, and the Commission suspects that the only purpose of serving the incorrect email address was to inhibit the participation of the Commission in these proceedings. In this regard the strategy has succeeded, as this Honourable Court has already handed down a judgment in this matter in the absence of the Commission's submissions. Accordingly, the Applicant's conduct requires nothing short of strong admonishment by this Court – for abusing its processes."

[38] The Applicant contends that this reference to her failure to send the application to the correct email address showcases bias on the part of the Respondent, as "without adequately investigating the applicant's side, the Respondent assumes malicious intent."

[39] In response, the Respondent asserts that these allegations of bias are based on a mischaracterisation of its pleadings and that the arguments raised by the Applicant in this regard fail to meet the legal test for bias.

[40] As mentioned, this Court is guided by the provisions of PAJA. Section 6(2)(a)(iii) of PAJA states that "a court or tribunal has the power to judicially review an administrative action if the administrator who took it was biased or reasonably suspected of bias." Therefore, where actual or a reasonable suspicion of bias has been established, the action in question will be rendered procedurally unfair. An applicant does not need to prove that the decisionmaker in question was biased - a reasonable suspicion or apprehension of bias will be sufficient to meet this test. The question therefore is whether a reasonable, objective, and informed person would on the correct facts reasonably apprehend that the decisionmaker in question was biased or acted with bias.

[41] This Court agrees with the Respondent that the allegations set out above are insufficient to conclude that Mr. Keva or the Respondent as a whole acted with actual bias. There is no clear evidence from these pleadings that Mr. Keva actually acted with an inclination or prejudice against the Applicant, in a way that renders the process unfair as a whole.

[42] However, in light of the Respondent's pleadings, this Court must conclude that a reasonable suspicion of bias does indeed exist. In the Court's view, the reference to the Applicant's involvement with SASCO and its activities on campus was an unnecessary, and, perhaps, inflammatory remark. The Respondent's involvement with SASCO bears little to no relevance to these proceedings.

[43] Mr. Keva's strong views regarding SASCO were evident from his affidavit. From his own affidavit, Mr. Keva shows that some of his decision-making was indeed influenced by the fact that the Applicant is involved with the organisation. Mr. Keva states that the decision to keep the details of the complainants anonymous was influenced by the possibility that the students may be subjected to intimidation or harassment. Although this reasoning does not indicate that Mr. Keva acted with actual bias and prejudice towards the Applicant, it does create a suspicion that the Applicant's involvement with SASCO may have influenced other aspects of the process. Further, it is clear Mr. Keva was aware of the Applicant's association with SASCO from the beginning, which raises a further suspicion of whether the steps followed, as set out above, were also influenced by this fact.

[44] As a result, this Court must conclude that a reasonable apprehension of bias is present, as contemplated in section 6(2)(a)(iii) of PAJA.

Lawfulness

[45] Section 6(2)(f)(i) of PAJA states that "a court or tribunal has the power to judicially review an administrative action if the action itself contravenes a law or is not authorised by the empowering provision." Therefore, a Court may review a decision if the action in question was not authorised in law.

[46] Section 127(1) of the Student Constitution states that "a complaint about the campaign of a specific candidate must be lodged with the Electoral Commission, who must properly investigate the complaint and must announce their decisions within twenty-four (24) hours after the complaint was lodged." It is clear from this section that the Student Constitution envisages a speedy resolution of a charge within the prescribed timelines. As held earlier, Mr. Keva's reasons for disqualifying the Applicant were delivered late. However, a further issue is whether the consolidation of the complaints is permissible under the Student Constitution.

[47] From a simple reading of section 127(1) this Court must find that such consolidation of complaints is not what is envisaged by the Student Constitution. It is clear that the Electoral Commission must, upon receiving a complaint, investigate it on its own merits and announce its decision. No mention or allusion to the consolidation of complaints can be found in this section.

[48] Furthermore, it is clear from section 127 that the spirit of the provision promotes the speedy and fair resolution of electoral complaints. This cannot be achieved if the Respondent is able to consolidate complaints and consider them together. A candidate is entitled, by virtue of section 127(1), to have a complaint against them considered on its own merits and only in light of that one singular complaint. As mentioned earlier, for a decision by the Electoral Commission to be fair, each complaint must be resolved on its own basis, and not be allowed to influence the Commission's decision in relation to another complaint.

[49] Although the Court understands, on a practical level, why Mr. Keva elected to follow this course of action, any decision made by the Electoral Commission must be authorised by the Student Constitution. This Court cannot find such authorisation in section 127 or the Election Regulations. Therefore, we must find that the Respondent acted unlawfully in consolidating the complaints before it.

[50] The investigation, finding, and subsequent appeal are therefore subject to significant irregularities and cannot stand. The entire process is therefore declared invalid from the point at which the first irregularity occurred, namely, the consolidation of complaints.

Remittal versus substitution

[51] The Commission submitted that remittal is inappropriate in the circumstances and cited time and procedural constraints. This, however, is not the test to be applied when substitution is being considered. As indicated above, remittal is the default remedy and substitution is only appropriate in exceptional circumstances. In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*, the Constitutional Court outlined the test for determining whether it is appropriate to substitute a decision. First, the Court must be in 'as good a position as the decision-maker'. This element requires this Court to have all the relevant information and expertise to make the decision. Second, the decision must be a 'foregone conclusion'. These two elements are the foundational requirements for determining whether substitution is a possibility. Once both requirements have been met, one considers delay, bias, or incompetence as factors for determining whether the power to substitute should be exercised, as per *Trencon*.

[52] While we theoretically may have all the information necessary to make a decision, there are nevertheless certain factual disputes which are unresolved and would require further investigation. Resolving these factual disputes would require us to call witnesses and it would ultimately result in further delays. This Court does indeed have investigative powers in such election disputes, as authorised by section 127(4)(c) of the Student Constitution. However, the extent of our investigative powers are yet to be outlined and the Rules of Procedure do not make provision for such investigations. Without considering how such a hypothetical scenario would evolve if we were to call

witnesses, it could require us to issue a summons, another power which the Rules of Procedure is silent on.

[53] Rule 22 of the Rules of Procedure empowers us to issue directives to fill gaps in the Rules on a temporary basis. However, reliance on this Rule would in this case defeat the very purpose of the Rule itself. The Rule is designed to ensure that prejudice or protracted legal proceedings will not ensue. However, the time that it would take to draft and issue such a directive would be substantial in light of the complex nature of the directive that would have to be drafted and the urgency of this matter itself.

[54] Furthermore, the Commission is much better placed to make the determination. They have an intimate knowledge of the facts of the matter, and their investigative procedures, and are easily able to approach the complainants and witnesses. Due to the factual contradictions, the decision is by no means a foregone conclusion as we are of the view that it would require further investigation. Substitution is therefore not available to us. Therefore, the only option left open to us, is to remit this decision to the Commission.

Conclusion

[55] Due to the substantial number of submissions made to this Court, the urgency of the matter, and the complex nuances behind the submissions made, we are especially thankful for the manner in which both parties dealt with each other and with us as the members of the Court. Ultimately, this finding is one of the longest judgments produced by this Court, and it is indeed reflective of the nature of this matter.

[56] To offer the Commission some guidance as to the way forward, I find it useful to provide guidance as to the timelines to be followed in light of this judgment. The Commission must commence their proceedings from the point where the first irregularity tainted the process, i.e. the consolidation of complaints. They must follow the timelines as outlined in the Electoral Regulations with due regard for the urgency of the matter. Practically, this could feasibly result in redoing the investigations, providing the outcomes and reasons, providing an opportunity for appeal and then considering the appeal should the Applicant be dissatisfied with the outcome of the investigation.

Order

[57] The following order is therefore made:

[1] The matter is urgent;

[2] These are review proceedings subject to the Promotion of Administrative Justice Act 3 of 2000;

[3] The decision to combine the two complaints is found to be unlawful due to noncompliance with section 127(1) of the Student Constitution;

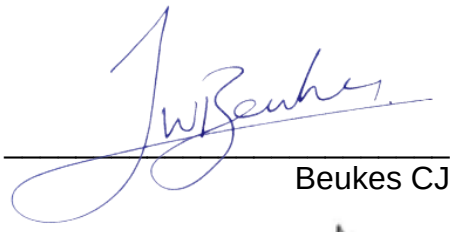
[4] Each complaint filed, irrespective of how similar and close in time, must be considered separately on its own merits.

[5] The decision by the Electoral Commission is set aside due to significant procedural irregularity and unlawfulness.

[6] The question of disqualification is remitted back to the Electoral Commission who must commence their proceedings from the point where the initial decision was tainted by irregularity and unlawfulness, namely the combination of complaints;

[7] The Electoral Commission must conduct their proceedings, as instructed in terms of order [6], in accordance with the timelines and requirements stipulated in terms of the Electoral Regulations of 2023 with due regard for the urgency of this matter; and

[8] The interdict against the SRC Internal Elections shall stand until such a time that the Electoral Commission finalises its proceedings.



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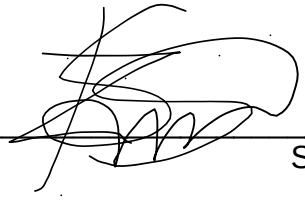

Simonis J

Lourens J