IN THE STUDENT COURT OF THE UNIVERSITY OF STELLENBOSCH

(HELD IN STELLENBOSCH)

In the matter:

STELLIESFEESMUSTFALL	Applicant
and	
MYNHARDT KRUGER	First Respondent
AXOLILE QINA	Second Respondent

JUDGEMENT HANDED DOWN BY THE STUDENT COURT

The facts giving rise to the present dispute

[1] As per the applicant's founding affidavit: "On 19 October 2015 at around 2.58pm, students began an occupation of the Administration B building [in relation to protests about proposed fee increases at the University]. At 6.57pm several occupants of the building were sent a notice of motion in the High Court, Western Cape Division. At 9.08pm same occupants were sent a court order. These messages were only received later in the evening, the first somewhere around 10.30pm, and the second around 11.30pm. Shortly after receiving the court order, occupiers of the building became aware of a letter written by the Respondents and addressed to the university management. The letter requested that management obtain a court order to remove the occupiers of the building. During an earlier address to the students, the Respondents had not alluded to the existence of the letter."

[2] In writing this letter, the applicants allege that the respondents (as named above), two members of the Student Representative Council, firstly failed to consider the procedures of the police, which led to serious harm, and secondly failed to take into consideration their obligations in terms of the Student Constitution and as such have also caused a clear and credible and risk to various rights of the applicants.

[3] Accordingly, the applicant has brought an application to the Student Court. Both the applicants and the respondents do not dispute the jurisdiction of the Student Court, and so the matter requires no further inquiry. As for the dispute regarding *locus standi*, the applicants have the right, in terms of the Student Constitution, to bring the application both in a personal capacity and on behalf

of a group, and the distinction will have no bearing on any potential remedies, the contrary contention not having been substantiated by the respondent.

The relief the applicant seeks

[4] The relief that the applicant has applied for is three-fold. Firstly, they have applied for an interdict in respect of the first and second respondent until Student Parliament can have a sitting. Secondly, they have applied for section 54(3) of the Student Constitution to be declared invalid. Thirdly, they have applied for the draft Student Parliament Constitution to be considered to be of full force and effect until it is accepted by a sitting of Student Parliament. In the alternative to this third application, to direct that Student Parliament may determine its own procedures for exercising its powers under section 54(2) of the Student Constitution, subject to review by this Student Court. Each of these parts will be dealt with below.

The interdict

[5] It is trite law that the requirements for the granting of an interdict are (i) a clear right (ii) injury or damage has been caused and a reasonable apprehension of an injury or harm and (iii) no alternative remedy available.

[6] The nature of the interdict sought by the applicants reads as follows:

> *1) Interdicting the First and Second Respondents, subject to any other national or provincial law or order of a court or directive from a peace officer, from providing information to, or requesting intervention or assistance with intervention from, the management of Stellenbosch University, any member of staff, campus security, any private security organisation or the South African Police Service in regard to any protest action that is being carried out by the Applicant or any other student protest action not organised by the SRC, in which the protesters in question have not factually and legally caused non-trivial physical harm to the corporeal property or person of another,*
>
> *1.1) without obtaining the prior consent of the organisers of the protest. In the alternative,*
>
> *1.2) in an unreasonable manner. In the alternative,*
>
> *1.3) without notifying the Applicant or other student group, as the case may be, of such communication.*
>
> *Until such time as Student Parliament holds its next meeting.*
>
> *2) Directing that the consent referred to in 1.1 above is to be obtained orally or in writing,*

2.1) from a member of the working committee of the Applicant if the Applicant is involved in the protest. The First or Second Respondent must determine whether the Applicant is involved in the protest by asking a member of the working committee of the Applicant.

2.2) from a member of the working committee of Open Stellenbosch if Open Stellenbosch is involved in the protest. The First or Second Respondent must determine whether Open Stellenbosch is involved in the protest by asking a member of the working committee of Open Stellenbosch.

2.3) from at least 10 registered students who are protesting, or in such manner as the court deems appropriate, in all other cases.

[7] The rights that the applicant contends are threatened are the right to assemble and demonstrate on campus peacefully and unarmed and that every student has the right to an enabling environment in which student success and academic excellence are encouraged and pursued. It is not disputed that these rights exist in terms of the Student Constitution. The question, however, arises as to whether the actions of the respondent's (in writing the letter) infringed these rights and provide an indication that these rights may be threatened in the future so as to make it appropriate to grant the requested interdict. The harm and injury referred to by the applicants throughout the application is that allegedly caused by the actions of the South African Police Services acting outside of their established procedures (as evidenced by the numerous addendums submitted with the applicant's papers). These actions were initiated by virtue of a court order ordering eviction of the Administration B building having been granted. The question then is whether the respondents' actions caused this harm and could do so again in the future. We cannot establish a link between the two so as to constitute direct harm/ injury against the applicants or the students that they claim to represent. The applicants have been unable to show that by writing a letter which they did not consent to, the respondents caused serious and irreparable harm and will do so again in the future. The respondents were not the decision makers in respect of the application to the High Court and indeed, the letter so often referred to by the applicants contained repeated references for peacefulness and requests for sensitivity and non-violence. The respondents did not request an infringement of the right to demonstrate, nor did the letter in and of itself cause a violation of an environment conducive to an impaired learning environment. The respondents did not request, as per the applicants contention, that the "police…use force to break up peacefully demonstrating students". Given this lack of evidence of how the conduct of the respondents caused the harm alleged, it is not appropriate to grant the interdict as worded above. It should also be noted that the concern raised by the respondents that to require permission for any of the listed actions from

the organisers of the protest themselves would be to allow such protestors to act as the judge in any disputes between the two groups, which is an extremely untenable position. Thus, the interdict as above cannot be granted.

[8] However, given that protests are often tense situations, we do feel it appropriate that all SRC members, the respondents included, be ordered, where they are able to do so and it is practical, to consult with, at minimum, the whole executive of the SRC before making decisions relating to student protests. This will ensure that the SRC as a whole is engaged in making decisions which could have potentially serious impacts on the students whom they represent. This will also allow section 25(g) of the Student Constitution to be triggered, which will allow the Student Court, on application, to remove a member of the SRC should they not comply with an order of the Student Court. This order will stand until the next formal sitting of Student Parliament held in 2016.

Student Parliament

[9] The nature of the remedy sought by the applicants as it relates to Student Parliament is as follows:

> 3) *Declaring section 54(3) of the Student Constitution to be invalid.*
>
> *4) Declaring that the draft Student Parliament Constitution which was approved by Student Court in October of 2015 be of full force and effect until such time as a Student Parliament constitution is accepted or not accepted by Student Parliament in a vote.*
>
> *5) In the alternative to (4) above, directing that Student Parliament may determine its own procedures for exercising its powers under section 54(2) of the Student Constitution, subject to review by the Student Court, until such time as a Student Parliament constitution is accepted or not accepted by Student Parliament in a vote.*

[10] It should be noted that the respondent's did not engage on this matter, as they feel that Student Parliament would have been the more appropriate party to deal with this issue. This leaves us with the submissions made by the applicant and Student Parliament (in their capacity as self-referred *amicus curiae*)in order to make a decision, although it should be noted that Student Parliament's failure to attend the hearing on the 2nd of December was detrimental in that it did not allow the Student Court to clarify and ask questions as it was able to do in respect of the other matters before it.

[11] The applicants contend, firstly, that the Student Constitution was brought into force without the appropriate regulatory infrastructure. However this is not the reason that Student Parliament is not entitled to hold extraordinary meetings. There was an accepted and voted in constitution for Student

Parliament in 2014, which was subsequently repealed with the view to the newly amended constitution being voted in, which has, inexplicably, not yet been voted in at a Student Parliament meeting. This has created a very serious gap, which has, in our view, actually led to the present issues having had to be brought to Student Court in the first place given that the repealed constitution in fact had procedures for motions of no-confidence as well as extraordinary meetings.

[12] To invalidate section 54(3), as has been requested, would only serve to further legislative gaps which currently exists and we cannot see that it would remedy the present situation as to carry out the powers listed in section 54(2) as there would still need to be a constitution which regulates how those powers are carried out.

[13] While we are admittedly reluctant to do so, serious consideration has been given to the applicant's request, and Student Parliament's support for, for Student Court to declare the draft constitution of Student Parliament to be of force and effect. The reluctance stems from the fact that the Student Constitution clearly envisages a two-step process whereby Student Court approves the document and students then vote it in at a Student Parliament meeting. While we accept that Student Parliament does indeed have an important and particular mandate, it also needs to make sure that it is capable of performing this mandate and a failure to adopt a constitution timeously, and allowing the previous one to be repealed with nothing to replace it is a grievous oversight which will continue to cause serious problems and leave any and all actions by Student Parliament open to attack. This failure has also left a serious gap where students are unable to hold their student leaders accountable; an untenable position at the least. Thus Student Court feels that it is appropriate to empower the current draft constitution of Student Parliament and declare it to be of force and effect until the first formal sitting of Student Parliament in the 2016 academic year, at which sitting the constitution must be put to the house for a vote as a matter of utmost importance and seriousness.

[14] As a last point, it should be noted that empowering the draft constitution of Student Parliament does still mean that due process must be followed in terms of it. So if a motion of no-confidence were to be called, the proper processes must be followed in terms of the newly empowered constitution.

Final order

[15] All Student Representative Council members for the year 2015-2016, the respondents included, are ordered to consult with, at minimum, the whole executive of the SRC before making decisions relating to student protests:

(i) Where it is objectively possible for them to do so

(ii) Where it is practical to do so

(iii) Until the next formal sitting of Student Parliament in 2016, at which time this order will lapse.

[16] The draft constitution of Student Parliament, as approved by the Student Court, is to be considered to be of full force and effect until it is put to the house at the first formal Student Parliament sitting of 2016, where it will either be adopted with finality or rejected. The importance of this process taking place is once again heavily emphasised.

Herbig, D with Fischer, K; Potgieter J and Gasela AO concurring