

IN THE STUDENT COURT OF STELLENBOSCH UNIVERSITY

REPUBLIC OF SOUTH AFRICA

In the matter between:

PHILIP VISAGE

First Applicant

VIWE KOBOKANA

Second Applicant

And

ELECTORAL COMMISSION

First Respondent

PRELIMINARY DECISION AND ORDER

FACTUAL BACKGROUND

[1] On 23 June 2022, the Applicants approached this Court on an urgent basis in order to have the Respondent's decision, to close nominations for the election of the Student Representative Council ("SRC") on 10 July, set aside. The Applicant's argued that given the disruptive effect that the order sought could have on the SRC election proceedings and the fact that the proposed deadline for nominations was only 17 days away, the matter should be dealt with on an urgent basis.

[2] The Court was satisfied that a *prima facie* case for urgency had been made out by the Applicants. The relief sought was time-sensitive and potentially disruptive. In order to ensure the smooth running of the SRC elections, it was of importance to decide the matter on an urgent basis. As such, the Court elected to shorten the time periods for response provided for in terms Rule 7 of the Student Court Rules of Procedure ("Rules"), as is its right in terms of Rule 2(4) read with Rule 6 of the Rules. This departure was intended to ensure the speedy resolution of a time-sensitive issue. This consideration is set out to be the guiding principle for the application of the Rules in Rule 2(3).

[3] The Respondent then served their Notice of Intention to Oppose on 24 June 2022 and filed their Answering Affidavit on 27 June 2022. The Court is indebted to the Respondent for their swift turn-around and grateful for their willingness to work within the time constraints surrounding the issue at hand. The Applicant filed their Replying Affidavit on 29 June 2022.

[4] After considering the papers before it, the Court is of the opinion that there are two important issues of procedure that need to be resolved before the matter can continue. This judgement is intended to communicate the Court's decision regarding the alleged urgency of the application and the alleged incorrect citation of parties. It does not constitute a decision by the Court on the arguments presented by both parties regarding jurisdiction or the merits of the application.

URGENCY

[5] It is clear that the cause for urgency from the Applicant's perspective lies in the nature of the relief sought. They argue that it is both time-sensitive and potentially disruptive to a further time-sensitive process. The Respondent, however, aver that the urgency of the matter is entirely self-created given that the Applicant knew of the timelines regarding the SRC elections and nominations as early on as 12 May 2022. They elected not to challenge the nomination line earlier and they further did not attend a meeting or attempt to reschedule a meeting organised with the Respondent to discuss the timeline on 16 May 2022.

[6] In *Aparty v Minister of Home Affairs*¹ the Constitutional Court addressed the issue of urgency regarding applications pertaining to elections. The Court noted that the organisation of an election and a change to such organisation gave rise to a multitude of "practical and logistical difficulties".² The Court noted further that matters regarding elections should be brought to the attention of the court at the earliest available opportunity given the nature of such disputes.³ It was further held that without a satisfactory explanation as to why any delay in instituting proceedings occurred, an application for urgency could be denied.⁴ The Constitutional Court also established that in applications pertaining to elections, where urgency was self-created, such

¹ 2009 (3) SA 649 (CC)

² Para 57.

³ Para 66.

⁴ Para 66.

applications stand to be rejected by the court as it would be contrary to the interests of justice to come to the aid of such people.⁵

[7] Again in *New Nation Movement NPC v President of the Republic of South Africa*⁶ the issue of urgency in the context of electoral decisions came before the Constitutional Court. The Court concluded that because the Applicants in that matter had failed to make out a convincing case for why their application ought to be decided on an urgent basis prior to the 2019 Elections given that their requested relief did not seek to impugn that election specifically,⁷ the request for the matter to be decided on an urgent basis must fail. Similarly to how the Respondent in this matter argues, the Constitutional Court argued that the relief sought could still be obtained after the election had taken place.

[8] With regards to the matter of self-created urgency, the Court agrees with the Respondent that the urgency underpinning this application was self-created. The Applicants knew about the nomination timeline for longer than a month before approaching this Court. They failed to take action until a few days ago. While it is understandable in the circumstances that they failed to attend the meeting scheduled with the Respondent on 16 May 2022, it is not understandable why the meeting was not rescheduled by the Applicants or no further attempt was made to discuss the issue until recently. Furthermore, the Court is not convinced by the Applicant's assertion that the reasonable student or SRC member would not have been able to put two and two together regarding the nomination timetable presented on 12 May 2022 and when the University's semester break was scheduled. One ordinarily knows when one's holiday will start and when it will end prior to the holiday taking place. Even if that was not the case, the University's decision to postpone exams by a week in the face of the utterly regrettable events that took place on campus meant that the dates upon which the semester break would start and end were in increased circulation in communications from the University itself and in discussions amongst student leaders in the build up to the decision for exams to be postponed. To that effect, the conduct of the Applicants in leaving it so late to take action regarding the deadline for nominations is regrettable

⁵ Para 70.

⁶ [2019] ZACC 27.

⁷ Para 11.

and places the Court, the Respondents, and the student community in general in a difficult situation.

[9] However, the enquiry into urgency cannot stop here. While it is established practice in domestic courts to reject urgent applications where the cause for urgency was self-created, that same practice is not carried out by this Court. It is important to note that while this is a judicial body which takes its leave from usual judicial practice, this Court forms part of the greater student governance structures. It seeks to resolve issues within student governance wherever possible. As much was made clear in the 2020 judgement in the matter of the *Student Representative Council Election Convenor*. The Court there held that the urgency underpinning that application was self-made given the Applicant in that matter's failure to seek judicial relief from this Court earlier.⁸ However, the Court went on to hold that given the gravity of the matter at hand and the difficulty relating to the scheduling of SRC elections, the matter could still be heard on an urgent basis so as not to further jeopardise the SRC elections.⁹

[10] This Court finds itself today in a similar situation. The matter before it is a product of self-created urgency. Nonetheless, the relief requested relates to a time-sensitive process. As much is admitted by the Respondent in their Answering Affidavit.¹⁰ To address this matter within the timeline outlined in the Rules would mean that this Court would only potentially be in a position to be able to decide this matter on the merits on 8 July 2022, two days prior to when the first nomination period is set to close. The Respondent themselves acknowledge the need to ensure that the nomination period closes no later than 24 July 2022 according to them and that there is a significant number of processes that they must ensure take place once nominations have been received.¹¹ It is clear that there is an urgency to this matter as the Applicant's requested relief may cause a significant disruption to the processes required leading up to the SRC election. As such, a speedy resolution to the matter is not just clearly in the interests of justice, but of the utmost importance to ensuring the elections that follow take place in an environment of certainty.

⁸ Para 11.

⁹ Para 12.

¹⁰ Para 115.

¹¹ Para 115.

[11] The Respondent's further allege that the relief sought is not necessary to be granted prior to the elections and as such, the matter cannot be considered urgent. While the declaratory order sought by the Applicants is general and impugns all elections in a way similar to what was before the court in *New Nation Movement*, the second order sought relates to the particular decision taken by the Respondent regarding this year's SRC nomination period. While it can theoretically be decided after the fact, such a decision would potentially endanger the certainty of the SRC election even further and potentially thus endanger the ability for the elections themselves to be considered free and fair. This ought to be avoided. Section 85(3)(a) of the Student Constitution also makes it clear that as far as possible, this Court should avoid granting orders with a strong retroactive effect. As such, this Court is of the opinion that the relief sought cannot entirely be granted after the effect and to the extent that it can be it is undesirable to attempt to do so.

[12] As such, this Court is of the opinion that the matter before it is indeed urgent and that it is within in the interests of justice and the broader student community to decide the matter on an urgent basis.

NON-CITATION

[13] The Respondent's further alleged that this application cannot be considered on the basis of the Applicants' failure to cite other student leaders as the effect of the judgement would impact on other leadership structures and their elections.

[14] This Court acknowledges that the decision taken on this matter has the potential to impact on other elections, as is the nature of any decision that has the potential to set precedent on an issue. However, it is clear that the Applicants' application relates specifically to the SRC elections. The considerations underpinning such elections would be different to other elections given the particular nature of the SRC election and the procedures that accompany it. The Respondent has not named any structure in particular that would be immediately impacted by such a decision and as such is difficult to grant this argument much weight.

[15] However, the Court is willing to restrict the scope of any declaratory orders (should any such orders be granted) to only SRC elections given the failure to cite other leadership structures in this application.

CONCLUSION

[16] This Court is thus of the opinion that it is necessary to consider this application on an urgent basis. As such, this Court will forgo holding a hearing for the matter. In place of holding a hearing to provide this Court will the opportunity to direct questions at the parties, the Court instead issues a directive to the parties to provide written submissions pertaining to the following issues:

1. How has the nomination period been announced to the student population and to what extent, if any, has the announcement catered for the fact that nomination period opened and will close outside of the usual term times.
2. How was the nomination period affected, if at all, by the decision to postpone exams by a week, thus shortening the recess period.
3. How have the concessions regarding the nomination process been communicated to students.

[17] The Court requires that the parties file their responses to these questions with the Secretary of the Court by 8:00 on 4 July 2022. The Court is aware that this matter required the parties to act with great haste in preparing their papers and is grateful to both parties for their support. This Court will also act to ensure that its own judgement is returned promptly to both parties given the urgency of the matter.

ORDER

1. This matter will be considered on an urgent basis, forgoing the usual timelines provided for in the Rules.
2. The Applicants and Respondent are directed to provide written submissions regarding the questions outlined above to this Court by 4 July 2022.