

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 38947/2022

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 23 MAY 2023

SIGNATURE

In the matter between:

MASHITISHI BENSON PHURUTSHI

Applicant

and

TSHWANE UNIVERSITY OF TECHNOLOGY

First Respondent

TILSON MANYONI N. O

Second Respondent

AVHASHONI MICHAEL MUSHAATHONI N. O

Third Respondent

VUSI N MGWENYA N. O

Fourth Respondent

CYRIL MNISI N. O

Fifth Respondent

MOKGWAI THATO MABOKO N. O

Sixth Respondent

ZAMIKAYA MAPUNDU N. O

Seventh Respondent

Summary: *Reasons for uplifting a suspension of a declaratory order granted by default upon a further respondent's failure to comply with a court order.*

ORDERS

24 January 2023

1. The decision taken by the Governance and Council Membership Committee of the first respondent's Council (the GMC) on or about 23 June 2022, in particular that "... *A re-run of the elections for the vacant position of the representative of non-Senate academic employees on Council be undertaken ...*" is hereby reviewed and set aside.
2. There is no order as to costs.

26 January 2023

1. The order granted on Tuesday 24 January 2023 is suspended.
2. The fifth and seventh respondents are ordered to deliver their answering affidavits within 15 days of this order.
3. The costs of this application is reserved.

9 March 2023

1. The suspension is uplifted and the order of 24 January 2023 is reinstated.
2. The fifth respondent is to pay the costs accessioned by the suspension of the order.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] On 24 January 2023 this court reviewed and set aside a decision by the Governance and Council Membership Committee (the GMC) of the Council of the Tshwane University Technology (TUT) that an election for a representative of “non-Senate academic employees” be “re-run”. The review application was unopposed. No costs order was made.

[2] Two days later, two unrepresented respondents appeared in court, complaining that they had been under the impression that the TUT would have opposed the review application. In the absence thereof, they indicated their wish to do so. These turned out to be the fifth and seventh respondents.

[3] The court granted the unrepresented fifth and seventh respondents the indulgence to oppose the application despite the fact that they had neither timeously nor at any previous occasion noted their intention to do so. The indulgence granted was on condition that these respondents deliver their answering affidavits within 15 days, a period to which they had agreed. In the meantime, the order of 24 January 2023 was suspended.

[4] Subsequent to the granting of the order, one of the unrepresented respondents (the 7th respondent) on 9 February 2023 delivered a notice to abide. The other respondent (the 5th respondent) did not do the same, yet still failed to deliver any answering affidavit.

[5] The applicant thereafter applied for the upliftment of the suspension of the order of the 24 January 2023 and the reinstatement thereof. This was granted on 9 March 2023, with costs.

[6] The fifth respondent subsequently requested reasons for the order of 9 March 2023. These are those reasons.

Summary of the case

[7] The facts appear from a chronology of events, leading up to those mentioned in the introduction.

[8] During 2022, vacancies arose on the TUT Council for a non-academic employee representative and a non-Senate academic employee representative. Elections were held on 6 April 2022.

[9] The results of the voting were released on 7 April 2022. The applicant was elected as the non-Senate academic employee representative and the fifth respondent came second.

[10] On 8 April 2022 the fifth respondent lodged objections against the election with the Registrar of the TUT. Amongst the grounds of objection, was the accusation that the applicant had violated the TUT's Policy on Electronic Communications (the Policy) in his election campaign.

[11] On 12 April 2022 the Registrar, having considered the objections and the applicant's responses thereto, published the results of the election and declared the applicant to be an elected member of the TUT council.

[12] On 25 April 2022, the fifth respondent lodged an appeal against the Registrar's decision to the GMC. Having considered the appeal and the applicant's responses thereto, the GMC on 23 June 2023 resolved to re-run the elections.

[13] After some correspondence regarding reasons for the decision, it was established on or about 10 August 2022 that the GMC's decision had been based on a perceived violation by the applicant of the Policy.

[14] In the meantime, the alleged breach or violation of the Policy had been referred to the applicant's line manager, Dr Van Wyk, for investigation. On 31 August 2022 the applicant's attorneys were informed by the Deputy Registrar that the line manager had, at the conclusion of the investigation, found no evidence that the applicant had violated the Policy.

[15] Although it was not within his remit to do so, the line manager agreed that the election should be re-run, but that election rules should be made clear about the use of electronic communication. This ex-post facto opinion cannot detract however,

from the position that the GMC's decision which was erroneously based on violation of the Policy, was thereby rendered open to review.

[16] Consequently, the review application was launched on 30 September 2022.

[17] On 21 October 2022 the TUT as the first respondent and the Chairperson of the GMC, the Registrar and Deputy Registrar, as the second to fourth respondents, delivered a notice of their intention to oppose the review application.

[18] The record was delivered on 11 November 2022.

[19] Shortly after the delivery of the record and before any further steps had been taken, the TUT and the second to fourth respondents indicated their intention to "... *no longer proceed with opposition* ..." to the application, which was done by way of a notice to abide, delivered on 23 November 2023.

[20] The applicant subsequently set the matter down on this court's unopposed roll for 24 January 2023. Neither the fifth, sixth or seventh respondents had delivered any notice to oppose nor have they filed any answering affidavit.

[21] It was only after the order of 24 January 2022 had been granted, that the fifth and seventh respondents filed such notices of opposition.

[22] Hereafter the occurrences mentioned in paragraphs 2 and 3 above took place.

[23] I interpose to state that, according to the caselines record, attorneys have come on record for the fifth and seventh respondents on 9 January 2023 according to those attorneys' own notice. Despite this, they have not featured in the proceedings before the court on 24 or 26 January 2023. Prior to the hearing on 9 March 2023 the seventh respondent delivered a notice to abide which was delivered by himself.

[24] The absence of any action by the attorneys for the fifth respondent were made more glaring by the fact that the applicant's attorneys have reminded them in writing on 9 February 2023 that the fifth respondent's answering affidavit was due on 16 February 2023. In a later letter, an extension of time was afforded for the delivery of that affidavit by 24 February 2023, to no avail.

[25] On 9 March 2023 counsel for the fifth respondent, orally requested a postponement. No substantive application for postponement nor for condonation for the failure to file an answering affidavit had been presented by either the fifth respondent or his attorneys. The only explanation was that the attorney had only been placed in funds some three weeks before and that no consultation had yet taken place but one was scheduled for the upcoming Friday.

[26] No prospects of success on the merits of any proposed opposition were furnished to the court nor was any gross injustice suggested, should the TUT elections not be re-run. It must be remembered that fifth respondent is not an incumbent in any elected position and neither is he in the same position as a successful tenderer in a tender-review. There are no monetary considerations or profit at stake and neither has it been alleged that the non-Senate academic employees would not be properly represented by the applicant. In the circumstances where the decision-maker itself (the GMC) and the TUT have resigned themselves to the fact that the election would not be re-run, the absence of any prejudice was a weighty consideration. Equally the absence of a reasonable prospect of success, was also a weighty consideration.

[27] The fifth respondent also could offer no counter to the concerns of prejudice for the governance or functioning of the TUT Council, should the filling of a vacancy on the Council again be delayed. In exercising a discretion as to whether yet a further indulgence should have been granted to the fifth respondent, the court had to act fairly to the interests of all parties. In the circumstances where the court had already granted the fifth respondent a previous indulgence and opportunity to pursue his opposition, despite it already having been delayed by months, the oral request on his behalf for yet another postponement of the matter, was refused.

[28] In the exercise of the court's discretion, it was determined that the costs occasioned by the granting of the indulgences, should be paid by the remaining party in whose favour they had been granted, namely the fifth respondent.

Orders

[29] Consequently, the following orders were made which are repeated here for sake of convenience and clarity.

24 January 2023

1. The decision taken by the Governance and Council Membership Committee of the first respondent's Council (the GMC) on or about 23 June 2022, in particular that "... *A re-run of the elections for the vacant position of the representative of non-Senate academic employees on Council be undertaken ...*" is hereby reviewed and set aside.
2. There is no order as to costs.

25 January 2023

1. The order granted on Tuesday 24 January 2023 is suspended.
2. The fifth and seventh respondents are ordered to deliver their answering affidavits within 15 days of this order.
3. The costs of this application is reserved.

9 March 2023

1. The suspension is uplifted and the order of 24 January 2023 is reinstated.
2. The fifth respondent is to pay the costs accessioned by the suspension of the order.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 9 March 2023
Order granted: 9 March 2023
Reasons furnished: 23 May 2023

APPEARANCES:

For the Applicant: Ms M. O Rambau
Attorney for the Applicant: Moeti Kanyane Inc., Centurion

For the Fifth Respondent: Adv N Sibanyoni
Attorney for the fifth Respondent: Ntsie Attorneys, Pretoria