

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO: 609/2022

In the matter between:

**SOUTH AFRICAN STUDENTS' CONGRESS
(SASCO), UNIVERSIT OF FORT HARE BRANCH**

Applicant

and

UNIVERSITY OF FORT HARE

Respondent

REASONS FOR JUDGMENT

LAING J

[1] This was an application that was brought on an urgent basis for interdictory and other relief against the respondent. The applicant sought, *inter alia*, that the respondent be interdicted from proceeding with the 2022/2023 student representative council ('SRC') election, previously scheduled for 19 October 2022, pending an investigation into the lawfulness of a meeting convened earlier that month. The applicant also sought an order directing that the election process be commenced *de novo*.

[2] Additional relief sought by the applicant pertained to the conduct of the Dean of Student Affairs in relation to his compliance with the provisions of the Student Governance Constitution regarding the appointment of the Independent Electoral Council ('IEC') and its leadership.

[3] Finally, the applicant sought an order that the terms of both the SRC and the Institutional Student Parliament ('ISP') be extended for a period to be decided through a consultative process involving the various structures concerned.

[4] The matter came before the court on 14 October 2022, whereupon it was dismissed with costs. The applicant has requested reasons for the order handed down.

The applicant's case

[5] For the sake of convenience, the subject of the application is addressed below in accordance with the themes that emerged from the papers.

The ISP meeting of 1 October 2022

[6] The chairperson of the applicant's University of Fort Hare ('UFH') branch, Mr Somila Siphatha, deposed to the founding affidavit. He alleged that, on 29 September 2022, the ISP Organiser, a Mr Godfrey Ganya, informed the members of the ISP by email that a meeting would be held on 1 October 2022 to discuss, amongst other things, the date of the 2022/2023 SRC election. The members of the ISP comprised various societies and student political organisations.

[7] In reaction to the email, Mr Siphatha contacted the ISP Speaker, Mr Msingathi Mabhengi, who indicated that the above date had not been agreed upon collectively. An urgent ISP Secretariat meeting had been convened for 30 September 2022 to deal with the matter.

[8] Consequently, at 23h53 on 30 September 2022, after the meeting of the ISP Secretariat had been held, Mr Mabhengi sent communication to the members of the ISP to advise that the meeting had been postponed until 9 October 2022. This was to accommodate those members of the ISP who had already departed for the September recess.

[9] Notwithstanding the above, the meeting did in fact proceed on 1 October 2022. The delegates agreed on a new date for the election.

[10] The applicant was not represented at the meeting of the ISP, considering Mr Mabhengu's communication, and averred that it was prejudiced because of not having had an opportunity to participate. In particular, the applicant pointed out that it had previously conveyed its grievances regarding the election process to the respondent. These had received no attention.

[11] Subsequently, the applicant sought legal advice. In the interim, the Dean of Student Affairs, Mr Lufuno Tshikhudo, notified students and staff on 4 October 2022 that the ISP had decided upon 19 October 2022 as the date for the election. This prompted the applicant to instruct its attorneys to record its grievances and to place a set of proposals and demands before the respondent, including information regarding the credentials of the delegates at the meeting of the ISP, as well as copies of the resolutions taken. The attorneys sent a letter to that effect on 5 October 2022. This was followed by a letter from Mr Siphatha to Mr Tshikhudo on 8 October 2022, emphasising the outstanding grievances and warning that the applicant intended to take the respondent to court.

[12] Despite Mr Tshikhudo's response, sent on 9 October 2022, the applicant resolved to commence legal proceedings. By this time, it had obtained information about the delegates' credentials. The applicant alleged that several delegates complained that their signatures had been forged and that they had not in fact been present at the meeting of the ISP. This cast doubt, said Mr Siphatha, on the credibility of the meeting and the legitimacy of the election itself. The respondent had done nothing to address such allegations.

Non-compliance with the Student Governance Constitution

[13] The applicant pointed out that section 7 of the respondent's Student Governance Constitution provided that the Dean of Student Affairs was required to appoint the IEC, consisting of not more than five members. This had to be done in consultation with the ISP. The role of the IEC was to conduct the election of the SRC.

[14] Furthermore, section 7 stipulated that the Dean had to designate one of the members as the Chief Electoral Officer ('CEO'), also in consultation with the ISP. The CEO was expected to coordinate the operations of the IEC.

[15] Mr Siphatha alleged that the appointment of the IEC and the designation of the CEO were considered at a meeting convened by the ISP Secretariat on 18 September 2022. The process was not finalised because the *curricula vitae* ('CVs') for the candidates still had to be verified. Notwithstanding, averred Mr Siphatha, Mr Tshikhudo unilaterally appointed the IEC and the CEO, without adhering to the applicable guidelines in relation to the composition of the IEC,¹ and without allowing for the verification of the CVs to be completed.

[16] The respondent had failed to deal with the applicant's grievances, contended Mr Siphatha. Moreover, lying at the core of many of the disputes between the parties was the respondent's failure to have facilitated the review of the Student Governance Constitution.

The respondent's opposition

[17] The Deputy Registrar: Governance and Legal Affairs, Ms Ntibi Maepa, deposed to the respondent's answering affidavit. The respondent opposed the application on four principal grounds.

¹ It was alleged that the guidelines stipulated that at least 30% of the IEC was to be comprised of women. No copy of the guidelines was attached to the papers.

[18] The first was that the urgency alleged by the applicant was self-created. The meetings that had given rise to the application took place on 18 September and 1 October 2022, respectively. The applicant had waited until 13 October 2022 before instituting proceedings.

[19] The second was that the relief sought by the applicant was contradictory. It sought, on the one hand, that the election be postponed, pending an investigation into the lawfulness of the meeting of the ISP on 1 October 2022; it sought, on the other hand, that the election process be commenced *de novo*.

[20] The third was that the relief sought in relation to the interdicting of the election had become moot because the respondent had placed the process on hold. The applicant, contended the respondent, had been aware of this likelihood prior to the launching of the application. Ms Maepa had informed the applicant's representatives of a meeting convened for 12 October 2022, at which an election status update would be presented, and the applicant's grievances would be addressed. The applicant had been represented at the meeting. The Dean of Student Affairs had indicated at the meeting that he would request the respondent's Management Executive Committee ('MEC') that the election be postponed. Early on the morning of 14 October 2022, the MEC approved Mr Tshikhudo's request.

[21] The fourth was that the applicant had failed to identify and assert the *prima facie* right that required protection. The application fell to be dismissed on this point alone.

Issues for decision

[22] The applicant set out a basis for the urgent nature of the application in Mr Siphatha's founding affidavit. To summarise, the applicant argued that the respondent had failed to respond satisfactorily to its grievances, especially those pertaining to the meeting of the ISP on 1 October 2022. Its decision to proceed with the election on 19 October 2022 would result in severe prejudice to the applicant.

[23] Notwithstanding the respondent's strenuous objections to the timeframe for the delivery of opposing affidavits and the way that the proceedings had been conducted, nothing turned on the question of urgency in the end. No more needs to be said in that regard.

[24] The applicant dealt at some length with the requirements for interdictory relief. As a member of the ISP, it had been adversely affected by the decision at the meeting on 1 October 2022, which had allegedly been characterised by irregularities. The applicant could not participate in the election scheduled for 19 October 2022 in such circumstances and for as long as the respondent continued to ignore its grievances.

[25] At the hearing itself, the applicant abandoned the following relief: an order interdicting the respondent from proceeding with the election; an order postponing the election, pending an investigation into the lawfulness of the meeting of the ISP on 1 October 2022; and an order declaring that the conduct of the Dean of Student Affairs had been unlawful. This was done, ostensibly, in reaction to the MEC's decision to postpone the election. The applicant persisted with its application to seek the remaining relief set out in its notice: an order directing the respondent, represented by the Dean of Student Affairs, to comply with the Student Governance Constitution in relation to the appointment of the IEC and designation of the CEO; an order declaring that the election process should commence *de novo*; and an order extending the terms of both the SRC and the Institutional Student Parliament ('ISP').

[26] Ordinarily, the court would have been required to determine whether the applicant had successfully demonstrated urgency. If so, then the court would have proceeded to adjudicate the merits of the matter, including a determination of whether the applicant had met the requirements for the interdictory and other relief sought. Before doing so, however, the court raised the point of non-joinder. Ultimately, this proved decisive, as shall be discussed below.

Non-joinder

[27] The test for joinder was clearly stated in *Henri Viljoen (Pty) Ltd v Awerbuch Bros.*² The court in that regard affirmed earlier authority to hold that a person is a necessary party and should be joined if such person has a direct and substantial interest in any order that the court might make; alternatively, if such an order cannot be sustained or carried into effect without prejudicing such person, unless he or she has waived the right to be joined.³

[28] Where many parties are involved, the matter can become complicated from a practical point of view. In *Road Accident Fund v Legal Practice Council*,⁴ the parties took steps to notify a multitude of (potentially) necessary parties about the relief that was sought. The court held as follows:

‘[t]his matter, in my view, is one where the joinder of the many thousands of parties, that could be affected by the order of this court, is unnecessary in the light of the steps taken by the RAF to notify as many parties of its application as possible. The steps taken are adequate. The number of affected parties is substantial, and the steps taken by the RAF to notify the sheer volume of parties that could be affected were sufficient to effect their joinder. Only the seventeenth to twenty-third respondents responded and were joined in these proceedings. The failure to respond by those who were notified can be taken to equate to a waiver of the right to be joined.’⁵

² 1953 (2) SA 151 (O).

³ *Kethel v Kethel's Estate* 1949 (3) SA 598 (A), at 610; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) 637 (A), at 659. The principle continues to be followed as apparent from, more recently, *Watson NO v Ngonyama* 2021 (5) SA 559 (SCA), at paragraph [52]. See, too, the discussion in DE van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat, RS 16, 2021), at D1-124.

⁴ 2021 (6) SA 230 (GP).

⁵ At paragraph [10].

[29] It has been held that informal notification of a necessary party may well suffice in circumstances where the party has indicated, unequivocally, that it will abide by the decision of the court.⁶ The overriding principle, however, is that notification must be provided. As this court remarked in *Shine Africa Financial Services (Pty) Ltd v Buffalo City Metropolitan Municipality*:⁷

‘A necessary party has a right to participate in the proceedings and must be permitted to exercise such right by making submissions before the court adjudicates the dispute. Notwithstanding the fact that numerous parties may be involved, if a person has a direct and substantial interest in an order that may be given by a court or that cannot be implemented without causing prejudice to such person, then he or she must be joined unless he or she has clearly communicated his or her intention to abide by the order to be given or otherwise waived the right to participate in the proceedings.’⁸

[30] The question of whether a court may, *mero motu*, raise the issue of non-joinder has long since been settled. The court may indeed do so to protect the interests of third parties.⁹

Application of the law

[31] In the present matter, the applicant sought relief that impugned both the current IEC and its CEO. The allegation was made that the Dean of Student Affairs had failed to apply the guidelines in relation to the composition of the IEC and had made the appointments and designation while the candidates’ CVs still had to be verified. The order, however, would have had a prejudicial effect on the incumbent members and

⁶ *In re BOE Trust Ltd and others NNO* 2013 (3) SA 236 (SCA), at 242A-C.

⁷ [2022] JOL 56216 (ECLD, East London).

⁸ At paragraph [18].

⁹ *Amalgamated Engineering Union v Minister of Labour* (see n 3, *supra*); *Selborne Furniture Store (Pty) Ltd v Steyn NO* 1970 (3) SA 774 (A); *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A), at 39I-40B; and see, more recently, the decision of the Court of Appeal for Lesotho in *Phakisi v Tlapana* (unreported, case no C of A (Civ)/50/2014, dated 21 April 2016), at paragraph [2].

individual concerned. Clearly, they had a direct and substantial interest in the matter. They were simply never joined.

[32] Similarly, an order directing the election process to commence *de novo* would have detrimentally affected the interests of any number of societies, student political organisations and individuals who had intended to participate in the election. Whether it was essential for the applicant to have joined them in these proceedings was not entirely evident from the papers.

[33] However, what was clear was that the existing members of the ISP ought to have been joined. This was so for at least two reasons. Firstly, a key component of the applicant's case was that the meeting of 1 October 2022 had been unlawful. It was common cause that there were many delegates at the meeting, including representatives of several well-known organisations, such as the Congress of the People Student Movement ('COPESM'), the Democratic Alliance Student Organisation ('DASO'), the Economic Freedom Fighters Student Command ('EFFSC'), and the Pan Africanist Youth Congress of Azania ('PAYCO'). The above representatives constituted the decision-makers regarding the selection of a date for the election. They had, undoubtedly, a direct and substantial interest in any order that effectively nullified such a decision by directing that the election process commence afresh. Secondly, the applicant sought an order extending the term of the ISP for a period that would have been decided upon by the relevant parties in terms of a consultative process. No fixed timeframe was set, meaning that existing members were bound to remain whether they chose to do so or otherwise. The potential prejudice of such an order to the affected societies, student organisations or individuals was patently apparent.

[34] The same reasoning applied to the non-joinder of the SRC and its members. No opportunity was provided to them to participate in proceedings where the applicant had made application for an order that had the effect of indefinitely extending their term. Once again, the prejudice was obvious.

[35] It cannot be disputed that the remaining relief sought by the applicant would have had far-reaching consequences. At a practical level, it would have meant that the course of the election process would have been altered in a way that would have had a profound impact on the incumbent members of the IEC, the ISP and the SRC itself. None of the parties in question was invited to participate in the resolution of a legal dispute regarding which they had a direct and substantial interest.

Relief and order

[36] The issue of non-joinder was sufficient on its own to have persuaded the court that the applicant was not entitled to the relief sought. The court, nevertheless, could not ignore the deficiencies in the application itself.

[37] The allegations made by the applicant were vague and sweeping in nature, often based on hearsay, and unsupported by evidence. For example, no record was filed for the decisions taken at the meetings of 18 and 30 September, and 1 October 2022. It would have assisted to have seen the notices, agendas, reports, and minutes that formed part of the decision-making process. No guidelines in relation to the composition of the IEC were filed. No details were supplied about how, by whom, and by when the verification of the CVs of the candidates for appointment to the IEC was to have been conducted. No averment was made to the effect that the Dean of Student Affairs had failed to consult with the ISP, as required by section 7 of the Student Governance Constitution regarding the appointment of members to the IEC and the designation of the CEO. No indication was given about the respective roles and powers of the ISP Secretariat and ISP Speaker in relation to the convening of meetings. No confirmatory affidavits from the delegates who had complained that their signatures had been forged were filed.

[38] The applicant's correspondence to the respondent, attached to Mr Siphatha's founding affidavit, did not cure the above deficiencies. It was, in any event, not the task of the court to wade through the accompanying emails and letters in the vain hope of

finding answers to questions inadvertently created by papers that, overall, seem to have been prepared in haste and without proper regard for the evidentiary burden carried by the applicant. In the end, the court was not convinced that the applicant's case, as presented on the papers and in argument, warranted the possible postponement of the matter to permit the joinder of the numerous parties who had a direct and substantial interest in the order that the court was invited to make.

[39] Regarding costs, the usual rule applied; the respondent was entitled to recover the expenses incurred to oppose the application. Whereas the respondent sought an order on a punitive scale, the court was not of the view that the applicant's conduct had reached the point where a mark of disapproval would have been appropriate.¹⁰ The conduct of the applicant was, notwithstanding, far from satisfactory. The applicant's urgent institution of legal proceedings on papers that were not up to the task, compelling the respondent to seek legal assistance in immense haste to protect its interests, notwithstanding every indication that the election was likely to have been postponed and that the applicant's grievances had not been totally ignored, ought to have attracted the criticism of the court, as it did.

[40] In the circumstances, the court ordered that the application be dismissed and that the applicant be directed to pay the respondent's costs on a party and party scale.

JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCE

For the applicant: Adv Sotenjwa, instructed by, Sotenjwa Attorneys,
East London.

¹⁰ An order for the payment of costs on an attorney and client scale has long been held as a mark of disapproval regarding the conduct of the unsuccessful party. See the decision in *Orr v Schoeman* 1907 TS 281, endorsed recently by the Constitutional Court in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), at 318C-319A.

For the respondent: Adv Kotzé, instructed by Smith Tabata Attorneys,
King Williams Town.

Date of hearing: 14 October 2022.

Date of delivery of judgment: 03 February 2023.