



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Before:

The Hon Mr Justice L G Nuku

Case No: 24729/2024

In the matter between:

JOHANNA HELENA LE ROUX

Applicant

and

STELLENBOSCH UNIVERSITY

First Respondent

ROCESHIA JOANNE LIHLE FEBRUARIE

Second

Respondent

AMBER NIEUWENHYZEN

Third Respondent

Date of hearing : 12 February 2025

Date of Judgment : 3 March 2025

JUDGMENT

NUKU,

[1] The applicant approached this court seeking urgent review of decisions taken by the first respondent's functionaries to disqualify her candidature for election to the University's Student Representative Council (**SRC**) for the year 2024/2025. The first decision was taken by the University's Student Court (**Student Court**) on 5 October 2024 and the second decision was taken by University's Student Appeal Court (**Student Appeal Court**) on 11 November 2024.

[2] The applicant raised a slew of grounds of review which have all since been abandoned leaving only one ground based on section 6 (2) (h) of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) alleging that the Student Court and the Student Appeal Court were so unreasonable that no person could have so exercised the power or performed the function. The applicant alleged further that, for the reasons set out in paragraphs 94 to 105 of the founding affidavit, the Student Court and the Student Appeal Court '*could never have reasonably or rationally found that there was an endorsement of my campaign or that I was sponsored, nor was there any (nothing, not a shred) of evidence that this was so ...*'

[3] In paragraphs 94 to 105 of the founding affidavit, the applicant sets out her reasons for contending that she did not contravene the provisions of the University's Student Electoral Act (**Student Electoral Act**). For the present purposes the following are the relevant paragraphs:

'100. I submit that S3 3 (7) (a), to the extent that sense can be made thereof, prohibits the sponsoring of a candidate. On a narrow reading it would have required a call to vote for me specifically, which the cards and the post by AfriForum Jeug did not. What the two Courts did in effect was, in the face of more than one potentially reasonable interpretation, was to choose the

one that would impact the most on my rights. This is irrational and unlawful and should be reviewed and set aside. It is trite authority that in the absence of express or clear provisions to the contrary: “where a section is capable of two alternative constructions, the construction that should be adopted is the one *in favorem libertatis*”.

101. The same applies to s 8 which prohibits mass communication that endorses or helps them with their campaign, unless they can show that they had nothing to do with it. Again, the Instagram post – there was no evidence that it was mass communication and specifically that it had much traction, not nationally, but at SU – did not actually promote me. And, there was no evidence that it helped my campaign. Since there was no endorsement, and no proof of my campaign being helped there could never be an onus that shifted to me.
102. The fact that, without doubt, one of two possible interpretations was relied on in the Appeal Court in [12] finding that the Instagram post “likely constitutes an endorsement of the candidate”.
103. The Appeal Court also, incorrectly I submit, held in [13] – not that proof was required that my campaign was, as a fact, helped – but simply that “the post was designed to promote or endorse the appellant as a candidate in the upcoming SRC election, or the very least, help them with their campaign. The appellant therefore had the privilege of being promoted or endorsed by AfriForum Jeug’s Instagram page (which has not only a local but national reach) prior to an election. As the post of the Women’s Day Event, which included a picture of the appellant, was coupled with an encouragement to vote for the SRC, it was clearly intended to persuade to vote for Ms Le Roux.”

104. My campaign was not endorsed. There is no proof that it was helped or that the intention was to help it. This does away with the privilege argument because it is anything but “clear” that it was meant to persuade the electorate to vote for me – as opposed to, and just as plausibly, to vote for “Jou SR”.
105. Lastly, as to 8 (1) (a), the Appeal Court in [14] accepted it as self-evident that the Instagram post was mass communication which endorsed me or helped me (not, as it previously held, that it was not enough that it was designed to help me) with my campaign. Without any of these grounds proved or established there could be no shift of the burden to me and no merit in the finding that I was supposed to proffer evidence to show that I was not involved with the post in question. In any event, I denied it. How else am I supposed to prove a negative? There was nothing to counter this. The Appeal Court judgment is so badly reasoned, I submit with respect, that I am simply unable to determine whether in [15] – [16] it actually held me liable on this basis or not. At best I can see it did not.’

[4] The first respondent, the only respondent that opposed the application, noting that the allegations made by the applicant in paragraphs 94 to 106 were made under the heading “the merits” took the view that they were irrelevant because this is a review application and not an appeal. That notwithstanding, the first respondent disputed these allegations.

[5] The question that this application raised is whether the applicant has made out a case for the review of the first respondent’s decision on the ground that it is so unreasonable that no reasonable person could have made it or whether, as the first respondent contends, the applicant seeks to impermissibly rely on appeal grounds in a review application. Before considering this issue, it is necessary to set out the factual background.

[6] The applicant submitted her nomination to contest the SRC elections on 2 August 2024. At the time she was a member and a Chairperson of the University's AfriForum Jeug student chapter.

[7] On 8 August 2024, the applicant – along with her fellow AfriForum Jeug student chapter members were at Neelsie Student Centre handing out roses accompanied by cards on which was printed the words “**AfriForum Jeug**”, **Gelekkige Vrouedag**” and “**Stem vir jou SR I 19-27 Augustus 2024**”. On 9 August 2024 the AfriForum Jeug posted, on its Instagram page, the applicant's photograph with another young lady each holding one of these cards. The caption to the post read: “**AfriForum Youth's Maties branch gave a bouquet of flowers to every lady in the Neelsie on Thursday, 8 August 2024 during the celebration on National Women's Day. They also used the opportunity to remind students to vote for their SR from August 19 to 27.**”

[8] On 28 August 2024, the second respondent submitted a complaint concerning the applicant's SRC campaign to the Student Electoral Commission (**Commission**). The complaint referenced two instances, namely:

- ‘1. Use of Monetary Funds from a Third-Party Organisation: An allegation that the candidate utilised additional monetary funds from a third-party organisation, which is in violation of Part S1.3, clause 3 (7) (a) of the Student Electoral Act.
2. Instagram Endorsement by AfriForum Jeug: An allegation that an Instagram post by “AfriForum Jeug” on 9 August 2024 endorsed the candidate's campaign, thereby compromising the electoral process and providing the candidate with an unfair advantage.”

[9] After having investigated the complaint, the Commission rendered its report dated 4 September 2024 wherein it recorded, among others, that:

'The investigation determined that the candidate's association with AfriForum Jeug established a direct link to the campaign activities conducted by the organisation, including the distribution of marketing materials not authorized by the Electoral Commission and the potential use of third-party funds in making the card that was visible on the Instagram page

-The Electoral Commission thus confirms that the candidate's actions violated the Student Electoral Act by providing an unfair advantage, thus jeopardising the fairness of the election.'

[10] Despite its finding that the applicant had contravened the Student Electoral Act, the Commission dismissed the appeal. This was based on the view it held that it would be unconstitutional to disqualify the applicant because it (the Commission) had taken more than 24 hours to conclude its investigation, an issue that had been raised by the applicant's legal representatives when they made representations to the Commission. The second respondent was advised that she could either appeal that decision or refer the matter to the Student Court in terms of s127 (4) (d) of the University's Student Constitution (**Student Constitution**).

[11] The Commission also advised the applicant, in its communication dated 4 September 2024 that **"Your actions violated items 2 (3), 3 (7), and 4 (1) of the Student Electoral Act, as conduct provided you with an unfair advantage as an SRC candidate thereby jeopardising the fairness and freedom of the election."** The communication went on to advise that **"due to the lapsing of time to make a decision with regards to the complaint, a decision to disqualify you would be unconstitutional and thus, the Electoral Commission has decided to dismiss the complaint against you."**

[12] The second respondent referred the matter to the Student Court in terms of s127 (4) (d) of the Student Constitution seeking the following relief:

- '(a) Setting aside of the decision taken by the Electoral Commission on 4th September 2024, with regards to the complaint ...
- (b) The invalidation of the results of the SRC candidate Jolene Le Roux, due to the candidate's contravention of Part S1.3, clause 3 (7) (a) of the Student Electoral Act.'

[13] The applicant opposed the application brought by the second respondent contending that (a) the issue had already been determined by the Student Court, (b) the Commission '*incorrectly so and without any factual evidence concluded that*' she '*violated section 2 (3), 3 (7) and 4 (1) of the Student Electoral Act...*', and (c) denied that her conduct contravened any provisions of the Student Electoral Act.

[14] The Student Court delivered its judgment on 5 October 2024 finding that the applicant had contravened item 3 (7) (a) read with item 3 (8) of part S1.3 of the Student Electoral Act. As a sanction, the applicant was disqualified from participating in the SRC elections.

[15] The Student Court gave a detailed judgment that dealt with all the defences that had been raised by the applicant. The judgment engaged with the interpretation of the provisions of the Student Electoral Act that the applicant was alleged to have contravened (Items 3 (7) (a) and 3 (8)), the evidence that the applicant participated in an event organised by the University's AfriForum Jeug chapter where roses and cards wishing female students a happy women's day and reminding them to vote for their SRC were handed out as well as an AfriForum Jeug Instagram post on 9 August 2024 which displayed the applicant together with an unknown female person holding out the cards that were handed out on 8 August 2024.

[16] The applicant appealed the judgment of the Student Court on the grounds that the Student Court had failed to properly evaluate the evidence and that her disqualification was not justified in the circumstances.

[17] The Student Appeal Court dismissed the applicant's appeal on 11 November 2024 holding that the conduct of handing out cards in celebration of Women's Day that also reminded recipients to vote for your SRC and the applicant's photo on the AfriForum Jeug Instagram account promoted the applicant's campaign. Aggrieved by this outcome, the applicant turned to this court by way of an urgent application that was issued on 19 November 2024 and set down for hearing on 22 November 2024. The respondents were given until 12h00 on 20 November 2024 to deliver their notices of opposition, if any and until 12h00 the following day on 21 November 2024 to deliver their answering affidavits.

[18] The first respondent delivered its notice of opposition on 20 November 2024, and on 21 November 2024 it delivered an affidavit deposed to by its attorney of record requesting that the first respondent be afforded a reasonable opportunity to respond to the application as the timeframes imposed by the applicant were impossible. The matter came before Slingers J on 22 November 2022 who struck it off from the roll for lack of urgency with no order as to costs.

[19] The first respondent delivered its answering affidavit on 4 December 2024 raising, as one of the issues, the applicant's failure to seek the relief under PAJA as the decisions she sought to review constitute administrative action. The first respondent further raised the issue of the applicant's failure to identify the grounds of review relied upon and to link them to the facts.

[20] On 6 December 2024, the applicant delivered an application for leave to file a supplementary affidavit, the purpose of which was to respond to the issues raised by the first respondent in its answering affidavit, namely, to seek the relief under PAJA as well as identifying the grounds of review relied upon and to link them to the facts. In the supplementary affidavit sought to be admitted, the applicant raised six grounds of review based on various provisions of PAJA. In addition, the applicant also delivered her replying affidavit.

[21] The matter was re-enrolled for hearing on 10 December 2024 when it came before Savage J who, again struck it from the roll for lack of urgency and ordered costs to stand over for later determination. The matter was re-enrolled again for hearing on 12 February 2025 when it came before me.

[22] In argument before me, Mr Burke, who appeared for the applicant submitted that the applicant's grounds of review are based on the provisions of section 6 (2) (h) of PAJA and that in the alternative the applicant relies on a legality review, an alternative which he abandoned at some stage. The nub of the submissions made on behalf of the applicant, based as they were on the paragraphs from the applicant's founding affidavit quoted above, were all directed at attacking the correctness of the decisions by the Student Court and the Student Appeal Court. At some point it was argued that there was no evidence on the basis of which the applicant was found to have contravened the provisions of the Student Electoral Act.

[23] It was submitted on behalf of the first respondent that the review application has no merit for the reason that the grounds relied upon by the applicant, in her papers, are not review grounds but appeal grounds. As to the submission that there was no evidence on the basis of which the applicant could be found to have contravened the provisions of the Student Electoral Act, it was submitted that there was, indeed, evidence (a) about the handing out of cards, (b) the Instagram post, (c) the applicant being the Chairperson of the University's AfriForum Jeug chapter and (d) the applicant being a candidate in the SRC elections. From this evidence, it was submitted, the Student Court and the Student Appeal Court drew an inference of fact that established the contravention.

[24] It was further submitted that the inference that both Courts drew is one of reasonable inferences that can be drawn from the facts. That being the case it was submitted, that should be the end of the matter. The applicant was also criticised for the matter she has litigated starting from the two days' notice she gave the respondents

when she launched the application, the failure to properly plead her case in the founding affidavit resulting in the need for her to apply for leave to file a supplementary affidavit and the slew of grounds that she raised in her supplementary affidavit most of which she subsequently abandoned except for one. It was submitted that the applicant, by her conduct, has forfeited the so-called Bio Watch¹ shield because viewed objectively she has put the first respondent to unnecessary trouble and expense which it ought not to bear.²

[25] The Student Court found the applicant to have contravened the provisions of item 3 (7) (a) read with item 3 (8) of part S1.3 of the Student Electoral Act. These items provide that:

‘3. All persons bound by the Student Electoral Act must, during the electoral period:

(7) spend no money on any marketing.

(a) As a candidate cannot use their own money, this includes Facebook, Instagram, Twitter sponsored pages, any sponsorship cannot be utilised.

(8) Refrain from any attempt at misusing power or resorting to privileges or influence or using any form of coercion intended to persuade someone to vote for any candidate.’

[26] The applicant, in her own papers, admits that the provisions of item 3 (7) (a) are capable of two alternative constructions, namely a narrow construction that requires a call to vote for a particular named candidate and a broader construction that would be satisfied without naming a particular candidate. She prefers the narrow construction in

¹ Biowatch Trust v Registrar, Generic Resources 2009 (6) SA 232 (CC)

² In re: Alluvial Creek Ltd 1929 CPD 532

that she was not named in any of the marketing material and her case is that both the Student Court and the Student Appeal Court should have preferred the narrow construction.

[27] The above admission, in my view is destructive of the applicant's case and in fact supportive of the first respondent's argument that this is not a review ground but an appeal ground. If anything, this admission points to the reasonableness of the decisions sought to be impugned in that they are based on a plausible interpretation of the provisions of the Student Electoral Court. It can never be that preferring one plausible interpretation over the other can result in that decision being so unreasonable that no reasonable decisions maker could have made. If anything, it points to the fact that the decision-makers had reasonable options and the preference of one of those options is a matter that should be left to the decision-maker. The plausibility of the interpretation that was preferred by the Student Court and the Student Appeal Court.

[28] The other point that was made on behalf of the first respondent was that the judicial review court is not concerned with the merits of the decision under review, it does not ask itself the question "is this question right or wrong"?³ This court must thus refuse the applicant's invitation to enter the merits of the decisions of the Student Court and the Student Appeal Court under the guise of a review.

[29] The applicant, whether by omission or by design, did not deal at all with the finding relative to the contravention of item 8 and thus there can be no basis to disturb that finding. The review thus cannot succeed.

[30] Turning to the issue of costs, there is much to be said about the manner in which the applicant has conducted these proceedings. The application was served on the first respondent on 19 November 2024 at 13:40 the first respondent was required to deliver its notice of opposition less than 24 hours later and its answering papers in less than 48

³ Bo-Kaap Civic and Ratepayers Association v City of Cape Town [2020] 2 All SA 330 (SCA) at para [72]

hours of service of papers on it. The founding affidavit, with the annexures ran to more than 300 pages.

[31] To add to the above, the applicant had not properly pleaded her case when it was in court on 22 November 2024 which prompted the first respondent to raise the issue in its reply. That, in turn, resulted in the applicant having to apply for leave to supplement her founding affidavit by raising a laundry list of review grounds which were subsequently abandoned on 10 December 2024.

[32] Had this been litigation between private parties that had nothing to do with pursuit of constitutional rights, I would have had no hesitation in granting punitive costs order against the applicant. The first respondent's reliance on the decision of this court in *In re: Alluvial Creek Ltd* is, in my view an acknowledgment that the applicant entered this litigation with the most upright of purpose and most firm belief in the justice of her cause.

[33] It was not suggested that the application is frivolous or manifestly inappropriate and as Biowatch tells us it is only in circumstances where the application is frivolous or vexatious or in any other way manifestly inappropriate that an applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. In my view each party should bear its own costs.

Order:

[34] In the result the following order shall issue:

The application is dismissed with each party to bear its own costs

L G NUKU

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant : Adv. C L Burke
Instructed by : Hurter Spies Inc, Centurion
C/O : MMH Attorneys, Cape Town

For the First Respondent : Adv. R G Patrick SC
Instructed by : Cluver Markotter Inc, Stellenbosch
C/O : Walkers Inc, Cape Town

For the Second and
Third Respondents : No appearance