



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE  
(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: YES

DATE  
25/10/2023

SIGNATURE

**CASE NO: 2023-103025**

DATE OF HEARING: 20<sup>TH</sup> October 2023

DATE OF JUDGMENT: 25<sup>th</sup> October 2023

In the matter between:

**ELISHA MOGALE**

Applicant

and

**VAAL UNIVERSITY OF TECHNOLOGY**

First Respondent

**VICE-CHANCELLOR AND PRINCIPAL VUT**

Second Respondent

**ED: STUDENT SUPPORT SERVICES VUT**

Third Respondent

**INDEPENDENT ELECTORATE COMMISSION**

Fourth Respondent

JUDGEMENT

1. This is an urgent application in which the Applicant seeks certain final declaratory and flowing from that certain consequential relief.
2. The declaratory relief sought by the Applicant is set out in paragraph 2 of the Notice of Motions<sup>1</sup> in the following terms:

“2. The first/second/third and/or fourth respondents’ decision to remove the applicant’s name from the list contesting the SRC election is declared unlawful”
3. The further relief sought is set out in paragraphs 3 to 5 of the Notice of Motions in the following terms:

“3. The first/second/third and/or fourth respondents’ decision to remove the applicant’s name from the list contesting the SRC elections is reviewed and set aside

4. The first/second/third and/or fourth respondents are ordered to reinstate and/or include the Applicant’s name in the list of candidates contesting the SRC elections;

5. The first/second/third and/or fourth respondents are ordered to pay the costs of the application on an attorney and client scale”
4. Most of the material facts of the case are either common cause or not disputed.
5. The Applicant is an adult male post graduate university student registered for the 2022 academic year at the Vaal University of Technology, the fourth Respondent herein. The degree he is registered for is a Post Graduate Diploma in Management by coursework with

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<sup>1</sup> The original Notice of Motion as well as the amended notice of motion

only one module having a research component<sup>2</sup>. He was last registered at the University in 2020.

6. On the 11<sup>th</sup> of September 2023 the 3<sup>rd</sup> Respondent, acting on behalf of the 1<sup>st</sup> Respondent, published a notice to the students of the university informing them that the Students Representative Council (SRC) elections would be taking place on the 26<sup>th</sup> and 27<sup>th</sup> of September 2023 via an online platform. The notification emphasized the importance of the elections for the students and that those standing for elections would have to satisfy certain academic criteria to qualify as candidates within the framework of the SRC constitution.
7. On the same day an email was sent out to the students and student organisations repeating that the elections would take place on 26<sup>th</sup> and 27<sup>th</sup> of September 2023. It called for nominations and advised that the nomination process would close at 16h00 on Monday the 18<sup>th</sup> of September 2023 and would be conducted online. It further referred the students to a website<sup>3</sup> where further details of the process are set out.
8. On the website the following is recorded:
  - 8.1. All organisational and independent candidates must pass at least 60% of all modules registered for in the preceding semester/year.
  - 8.2. All elected SRC and DSSRC members will remain subject to a 60% pass of modules/subjects registered for during the previous semester/year of registration at VUT, including all assessments after the election year/semester (all assessments during the term of office).

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<sup>2</sup> Annexure EM9 of the Founding Affidavit

<sup>3</sup> [www.vutsrcelection.co.za](http://www.vutsrcelection.co.za)

- 8.3. All candidates contesting elections must be registered students of the Vaal University and must have registered with the Vaal University of Technology for at least one (1) academic year before the date of the elections.<sup>4</sup>
- 8.4. Organisations approved for participation in elections must submit a priority list of candidates contesting elections, including portfolios contested by each candidate.
- 8.5. No changes to the list shall be allowed after the closing date published by the Electoral Commission.
- 8.6. A student who has an adverse disciplinary record or who is serving any effective sanction shall not be allowed to contest elections. All candidates shall be presumed innocent until found guilty by an appropriately established disciplinary hearing.
- 8.7. In the case of a postgraduate student who is registered for a research degree, he/she must present written confirmation by the Head of the Department in which s/he is registered that sufficient progress has been made by the student in order to complete the degree within the prescribed minimum period.<sup>5</sup>
- 8.8. Candidates should have registered for a full programme of study or at least three modules/subjects.
9. On the 18<sup>th</sup> of September 2023 the Student Christian Organisation (SCO) submitted its list of 12 electoral candidates to the 4<sup>th</sup> Respondent, with the Applicant topping the list as its presidential candidate.<sup>6</sup> This same list was resubmitted on the 19<sup>th</sup> of September

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<sup>4</sup> This appears to be the wording of clause 5.1.3(d) of the SRC Constitution.

<sup>5</sup> This appears to be the wording of clause 5.1.3(i) of the SRC Constitution.

<sup>6</sup> This list was not attached to the Founding Affidavit



2023 in spreadsheet format upon the request of the 4<sup>th</sup> Respondent<sup>7</sup>, who was commissioned to conduct the elections.

10. On the 21<sup>st</sup> of September 2023 the 4<sup>th</sup> Respondent published the preliminary list of candidates (organisational and independent) contesting the elections on which the name of the Applicant appeared, indicating that he had passed their vetting process.<sup>8</sup> The Applicant's name is the ninth in a list of eleven candidates put forward by the SCO. The names of FTZ Dlodlu and TC Hlongwane appear above those of the Applicant, as the first two on the list of SCO candidates<sup>9</sup>. The name of M. Mbovane is the sixth in the list of eleven SCO candidates. There is also a list of nominated candidates who are not eligible to stand as candidates for the SRC elections. One of these is a MR Rikhotso of the SCO.
11. On the 23<sup>rd</sup> of September 2023 the SCO received WhatsApp correspondence informing them that the Applicant had been disqualified from contesting the elections. While the text of the WhatsApp message was not made available to the court the Applicant was presumably disqualified for not having been a registered student of the university for the 2022 academic year, thus not complying with clause 5.1.3(d).
12. On the same day (the 23<sup>rd</sup> of September 2023) the SCO sent a memorandum<sup>10</sup> to the 4<sup>th</sup> Respondent appealing this decision. They disagreed with the interpretation of the SRC Constitution contended for by the 4<sup>th</sup> Respondent. According to the memorandum, whilst acknowledging that the Applicant was not registered in the year preceding the election, the view was expressed that since he had in

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<sup>7</sup> The fourth respondent is actually the chief electoral officer, Kedibile Thomas of KDBS Consulting (Pty) Ltd which was tasked with setting up an Independent Electoral Commission to conduct the elections

<sup>8</sup> Annexure EM1 to Annexure EM7 of the Founding Affidavit.

<sup>9</sup> These are presumably the Felicity Dlodlu and Ntwanano Hlongwane mentioned in the Priority List

<sup>10</sup> Annexure EM3 to the founding affidavit. Annexure EM5 to the founding affidavit is a repeat of annexure EM3.

the past been a student for at least five academic years at the university, he had satisfied this requirement. It was further pointed out that a Mr. Amnesty Mohlala who was not a student of the university in 2021 was allowed to contest the elections in 2022. It is unknown who the authors of this memorandum were.

13. On the 24<sup>th</sup> of September 2023 the SCO submitted a priority list of candidates to the 4<sup>th</sup> Respondent. The name of the Applicant appears first on this list while that of a Felicity Dlodlu appears third and a Ntwanano Hlongwane appears fifth.
14. On the 26<sup>th</sup> of September the SCO received the outcomes of the 4<sup>th</sup> Respondent's Appeals Tribunal, which dismissed his appeal. According to this communication, section 5.1.3(d) of the SRC Constitution was intended to deal with the following category of students:
  - 14.1. First year students who join the university for the first time
  - 14.2. New students of other universities who had not been at VUT for more than a year;
  - 14.3. Senior VUT students who leave the institution for more than a year prior to the date of the elections, but who return in the year of the elections and want to participate as candidates.
15. It is stated in this communication that the rationale for this section was for the students who fell in these categories to familiarize themselves with their studies and student issues first before participating in SRC elections. It was further stated that while this was not expressly stated in the Constitution it did not detract from the above-mentioned intentions, failing which an undesirable situation would be created where former students could leave the university for long periods of time only to return in the year of elections just to stand as candidates. It is further stated that as the Applicant was not registered in 2022 as a student he was declared not eligible to contest the elections.

16. According to this communication, it is further stated that the Appeals Tribunal further took note of the Applicant's failure to meet fully the nomination requirements set out in clause 5.1.3(i) which required postgraduate students to provide written communication from their Head of Department as part of their eligibility documentation. It concluded that the onus was on the Applicant to submit the required confirmation to either the 4<sup>th</sup> Respondent or Student Life and Governance Office by the closing date of nomination which the Applicant failed to adhere to.
17. On the 27<sup>th</sup> of September 2023 the Applicant's attorneys of record sent a letter of demand<sup>11</sup> to the 1<sup>st</sup> Respondent which in addition to other annexes attaches all of the communications mentioned above. According to this letter:
- 17.1. The interpretation of clause 5.1.3(d) of the SRC Constitution as contended for by the 4<sup>th</sup> Respondent is challenged. A more literal approach to the interpretation of the clause is contended for in keeping with the earlier communication by the SCO when appealing the decision. Examples are cited of other students in similar situations to the Applicant in previous years who were allowed to contest the elections.
- 17.2. The interpretation of clause 5.1.3(i) of the SRC Constitution as contended for by the 4<sup>th</sup> Respondent is challenged. In the letter it is pointed out that the clause only applies to students registered for post graduate research degrees and not those registered for degrees in coursework, as is the case with the Applicant.
18. Not having received a response, a further letter of demand dated the 29<sup>th</sup> of September 2023 was sent to the first Respondent in which the previous demand was repeated. It was also pointed out to the first

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<sup>11</sup> Annexure EM7 to the Founding Affidavit.



Respondent that the EFFSC had withdrawn a complaint it had raised about the candidacy of the Applicant, and this was attached. The Office of the Vice Chancellor and Principal Raymond Mabuza was copied into this letter.

19. On the same day, being the 29<sup>th</sup> of September 2023, but according to the Applicant unknown to him, the SCO sent a letter<sup>12</sup> to the fourth Respondent in which they withdrew the name of the Applicant as their candidate for SRC Elections due to the objection by the EFF and the fourth Respondent not deeming him fit to contest the elections. The letter however acknowledged that the EFF had subsequently withdrawn its objection but persisted with the withdrawal of the Applicant in the interests of time. The letter also withdrew their President Mpumelelo Mbovane as a candidate and substituted him with Ms. Dludlu and following her Mr. Hlongwane as their second candidate. The letter is signed by Mr. Mbovane in his capacity as President of the organization and their secretary Masindi Makungo. By this time the SRC elections had already taken place in which the SCO had secured two seats on the SRC. The EFFSC and SASCO (South African Students Congress) had secured five seats each and two independent candidates one seat each.
  
20. On Friday the 6<sup>th</sup> of October 2023 the Applicant's attorneys of record issued an urgent Notice of Motion under the above case number supported by the founding affidavit commissioned on the same date. A Notice of Intention to Oppose on behalf of the first, second and third Respondents was served and filed on the sixth of October 2023. The date of hearing on the Notice of Motion is the 10<sup>th</sup> of October 2023. I was informed at the hearing of this matter by counsel for the Applicant that the matter could not be heard in the week of the 10<sup>th</sup> of October 2023 as it was crowded out because the roll was full. This is not surprising as, save for matters of extreme urgency as set out in the Practice Manual and various directives of this Court, the urgent court

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<sup>12</sup> Annexure AA2 to the Answering Affidavit



roll would have closed on Thursday the 5<sup>th</sup> of October 2023. It should be noted at this juncture that for the most part the founding affidavit and supporting annexes are a repeat of the Applicant's first letter of demand dated the 27<sup>th</sup> of October 2023. There is no explanation why the Application was not launched earlier so that it could be accommodated on the urgent roll for the 10<sup>th</sup> of October 2023.

21. On the 10<sup>th</sup> of October 2023 the Applicant's attorneys of record served an amended Notice of Motion dated the same date with a new set down date of the 17<sup>th</sup> of October 2023. The relief sought is exactly the same as that contained in the first Notice of Motion. A Notice of Intention to Oppose on behalf of the first, second and third Respondents was served and filed on the 10<sup>th</sup> of October 2023. An answering affidavit by the second Respondent was served and filed on the 13<sup>th</sup> of October 2023.
22. Meanwhile, on the 12<sup>th</sup> of October 2023, a meeting was held where the SRC was constituted and various portfolios were assigned. TC Hlongwane of the SCO was elected as President and FTZ Dludlu assigned the Housing and Catering Portfolio. Five portfolios still remained to be allocated but these belong to SASCO, who were not present at the meeting.
23. In the answering affidavit the factual averments made in the founding affidavit are for the most part not challenged. The submission is however made that the Applicant lacked locus standi to bring the application in his own name but rather that it was for the SCO to do so. Alternatively, it was submitted that the Applicant should have cited the SCO as a Respondent and his failure to do so was fatal to his case. It is also submitted that since the SRC had already been constituted, the granting of the relief sought by the Applicant would be of academic interest only. In addition, the interpretation of clauses 5.1.3(d) and 5.1.3(i) of the SRC constitution as contended for by the fourth Applicant were correct.

24. In his replying affidavit dated the 17<sup>th</sup> of October 2023 the Applicant contends that the SCO is not a juristic person which could sue or be sued in its own name and thus could not be cited in the application. According to him the SCO merely exists to mobilise Christian students towards its religious and ideological posture, and like any other students organization its recognition is at the hands of the SRC which itself was not a juristic person as it did not enjoy a personality separate from the university. It was further submitted in the affidavit that it was not open to the SCO to withdraw the Applicant's name because in terms of clause 5.1.3(f) of the Constitution did not allow changes to be made to the list of candidates after the 18<sup>th</sup> of September 2023, and that in terms of clause 5.1.4 changes to the priority list of candidates could only be effected in writing and signed by the chairperson and secretary of the SCO before the list was published.
25. On the 19<sup>th</sup> of October 2023 a duplication in response to the replying affidavit was served and filed on behalf of the Respondents in which they dispute the interpretations contended for by the Applicant in the replying affidavit.
26. The Applicant thereafter served and filed a supplementary founding affidavit in which he seeks to introduce new facts according to which SASCO had successfully appealed the constituting of the SRC, a process that was now only due to be finalized on the 19<sup>th</sup> of October 2023. At the hearing of this matter on the 20<sup>th</sup> of October 2023 it was unclear if the meeting had actually occurred and what the outcome of it was.
27. At the hearing of this matter I raised my concerns at the fact that the SCO was not joined to the Application. I asked the Applicant's counsel why, even if the SCO had no locus standi as contended by him, at least the office bearers of the organization, in particular at least the SCO President Mpumelelo Mbovane and the Secretary General

Masindi Makungo were not cited as Respondents as they were the authors of the letter withdrawing his nomination. I also asked if I could grant the relief he sought in the absence of the two SCO candidates on the SRC, as either Mr. Hlongwane or Ms. Dlodlu would have to vacate their seats, and whether it wasn't necessary to have cited them as well as their rights and interests may be affected.

28. Mr. Moela for the Applicant then submitted that I should grant the declaratory relief sought, which if granted would form the basis on which the Applicant would launch a further urgent application in which these parties are joined.
29. In support of his submission Mr. Moela sought to rely on paragraphs [32] and [34] of the Constitutional Court decision in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (10) BCLR 1179 (CC).
30. Paragraph [32] of the judgment read as follows:

“What may lead some readers of what I have paraphrased from *Oudekraal* astray is reading it in isolation. Later *Oudekraal* makes it clear that where a consequential act could be valid only as a result of the factual existence – not legal validity – of the earlier act, the consequential act would be valid only for so long as the earlier act had not been set aside. In *Seale Cloete* JA for a unanimous Court put this beyond question. He held:

“Counsel for both Seale and the TYC sought to rely in argument on passages in the decision of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town* which adopted the analysis by Christopher Forsyth of why an act which is invalid



may nevertheless have valid consequences and concluded:

‘Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect *for so long as the initial act is not set aside by a competent court.*’

...  
[T]he reliance by counsel on the decision in *Oudekraal*, [is] misplaced. As appears from the italicised part of the judgment just quoted, the analysis was accepted by this court as being limited to a consideration of the validity of a second act performed consequent upon a first invalid act, pending a decision whether the first act is to be set aside or permitted to stand. This court did not in *Oudekraal* suggest that the analysis was relevant to that latter decision.”

31. Paragraph [34] reads as follows:

In *Kirland* this Court accepted what was decided in *Seale*. Writing for the majority, Cameron J had this to say:

“In *Seale* . . . the Court, applying *Oudekraal*, held that acts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set

aside. . . . [T]he Court rightly rejected an argument, in misconceived reliance on *Oudekraal*, that the later (second) act could remain valid despite the setting aside of the first.

32. This argument by Mr. Moela presupposes that the SCO, its office bearers and nominees to the SRC had no interest and are not in a position to make meaningful submissions regarding the declaratory relief sought. It may well be so, but this is not something I can take for granted. In my opinion a court should be reluctant to grant any orders, be they declaratory or consequential or of whatever other nature, in the absence of parties who may be adversely affected by them unless a proper basis is set out for why this should be so. I further find that urgent litigation should not be conducted in a piecemeal fashion as proposed by Mr. Moela. In urgent applications it would be the urgent nature of the consequential relief sought that would in almost all cases justify the granting of the preceding declaratory relief. In the present case the consequential relief sought in paragraph 4 of the Notice of Motions has become of academic interest only, as not only have the SRC elections already taken place, but the names of the people serving on the structure have already been determined.
33. While I find that the legal arguments contended for by Mr. Moela regarding the interpretation of clauses 5.1.3(d) and 5.1.3(i) are compelling, I decline to grant the declaratory relief sought due to the non-joinder of the SCO, or its office bearers and its current nominees to the SRC and the academic nature of the consequential relief sought in paragraph 4 of the Notice of Motion.
34. I agree with the submissions of Mr. Reyneke as set out in paragraphs 1 to 18 of his heads of argument. I do not necessarily agree with his submissions in paragraphs 19 to 24. I also find that this application could have been brought earlier, by the 4<sup>th</sup> of October 2023 at the latest. I am however not inclined to grant costs against the Applicant,

based on the Biowatch<sup>13</sup> principle mentioned by Mr. Moela during argument. The Applicant was exercising a right, perhaps even an important civic duty, by making himself available for SRC elections on behalf of the SCO and asserting his rights to seek legal redress in respect of a decision that he felt infringed on this right and duty. I find that despite the defects in his application that he shouldn't be mulcted for costs.

35. I therefore make the following order:

1. The Application is dismissed;
2. There shall be no order as to costs



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CAJEE AJ  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION  
JOHANNESBURG

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<sup>13</sup> Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC) (2009 (10) BCLR 1014; [2009] ZACC 14) at para [60].



APPEARANCES:  
COUNSEL FOR THE APPLICANT: Adv. L. Moela  
INSTRUCTED BY: J & Z Incorporated Limited  
COUNSEL FOR THE DEFENDANT: Adv. M. Reyneke  
INSTRUCTED BY: O'Connell Attorneys  
DATES OF HEARING: 20<sup>th</sup> October 2023  
DATE OF JUDGMENT: 25<sup>th</sup> October 2023