

**IN THE STUDENT COURT OF THE UNIVERSITY OF STELLENBOSCH
(HELD IN STELLENBOSCH)**

Case number: 03/20

In the matter between:

CHAIRPERSON OF THE SOCIETIES COUNCIL

Applicant

and

TREASURER OF THE STUDENT REPRESENTATIVE COUNCIL Respondent

JUDGMENT

Carroll CJ (Hislop DCJ, Janse van Vuuren J, Motale J and Swanepoel J concurring)

INTRODUCTION

- 1 This matter draws attention to the importance of constitutional decision-making following prescribed process and conforming to the precepts of just administrative action. It is through the provisions of the Stellenbosch University Student Constitution, 2018 (“Student Constitution”) that the Student Representative Council (“SRC”) and its members are empowered to take decisions. However, this power is neither unchecked, nor unregulated. Rather, those exercising power remain accountable to their fellow students, while their actions, decisions and omissions remain subject to judicial review where falling short of the Student Constitution.
- 2 Mr Keva brings this application in his official capacity as Societies Council Chairperson (“Applicant”) against Mr Murray in his official capacity as Treasurer of the SRC (“Respondent”). The matter giving rise to this application subsists on three decisions that were taken: the decision of the Respondent to formulate a general budget cap for SRC portfolio budgets; the decision of the SRC Executive Committee (“Executive”) to finalise the Societies Council budget; and the decision of the Respondent not to transfer funds exceeding the budget cap to the Societies Council. In reviewing these decisions, the rule of law and just administrative action,

as contained in the Student Constitution, and ultimately the Constitution of the Republic of South Africa, 1996 ("Constitution"), are paramount.

FACTUAL MATRIX

- 3 The Respondent was appointed Treasurer of the SRC on 12 February 2020, shortly thereafter meeting with the Chairperson of the SRC on 19 February 2020 to discuss budget procedure. During this meeting a decision was made to implement a budget cap on SRC portfolio budgets. At this point, the quantum of this cap was left undecided.
- 4 Following his appointment as Treasurer, on 24 February 2020 the Executive tasked the Respondent with assisting all SRC portfolios with compiling their budgets, these to be presented to the Executive at a later meeting. In the period 17-23 March 2020 the Respondent conducted individual meetings with the SRC portfolio managers, submitting all draft budgets on 23 March 2020.
- 5 Early during this budget process (27 February 2020), the Respondent met with the Applicant informally to discuss the Societies Council budget which had been flagged as excessive (a proposed R215 800.00). At this meeting, the Societies Council budget was decreased to R118 090.00, this meaning that, after Societies Council income, there would be a shortfall of R88 090.00, this then constituting the budgetary allocation requested from the SRC.
- 6 On 24 March 2020, the Executive met to consider the draft budgets submitted by the Respondent. Despite the Respondent and Chairperson of the SRC not being present, this meeting still had the requisite quorum. At this point, the Executive remained unaware of the budget cap decided upon by the Respondent in consultation with the Chairperson. In light of this, the Societies Council budget was adjusted to R98 500.00 by resolution of the Executive members present.
- 7 On 29 March 2020, the Executive met again. At this meeting, the Chairperson of the SRC sought to revisit the decision of 24 March 2020 on the basis of section 22(1)(c) of the Student Constitution. This was contested by two Executive members, the Applicant being one of them, and in protest the Applicant and the other member left the meeting. Despite this, the meeting still had the requisite quorum. Both the idea of reducing the Societies Council budget to R80 000.00, and the 19 February 2020 decision of the Respondent in Consultation with the

Chairperson regarding a budget cap were presented to the remaining Executive members. Having regard to the total funds available to the SRC, the Respondent proposed this general budget cap be set at R80 000.00. The capping of the Societies Council budget at R80 000.00 was approved by the Executive, while there was no decision taken on a general SRC portfolio budget cap of R80 000.00.

- 8 The next Executive meeting took place on 05 May 2020, here there once again being quorum. At this meeting, the Applicant contested that he had not been party to the Executive decision of 29 March 2020 to cap the Societies Council budget at R80 000.00, requesting another vote. This vote was conducted and the Societies Council budget was increased to R88 090.00. The Respondent expressed his displeasure at this and indicated he would raise the matter at the next SRC meeting. In the interim, the Respondent submitted the finalised budgets to Student Governance, including the Societies Council budget of R88 090.00, but indicating that the matter of a budget cap was still in dispute.
- 9 At the SRC meeting of 13 May 2020, the Respondent included an item on the agenda under section 35(3) of the Student Constitution. In response the Applicant raised a point of order, arguing that this should be done under section 36(3), and not section 35(3). This point of order was sustained, and the Respondent was ruled out of order. Therefore no decision of the SRC was made regarding either a R80 000.00 budget cap for portfolio budgets, or the capping of the SRC budget at R80 000.00.
- 10 Following this succession of meetings, and despite demand from the Applicant, the Respondent refused to transfer the full R88 090.00 to the Societies Council. The Respondent argued that incorrect protocol had been observed when the SRC dealt with the matter of the budget cap, but relied on an outdated version of the Student Constitution in making this argument. Nevertheless, the Respondent still refuses to transfer the funds demanded by the Applicant. In light of this, the Applicant approached this court for relief.

PROCEDURAL ASPECTS

- 11 Neither party before this court contested the *locus standi* of the other, nor the jurisdiction of this court, however it would be prudent to have regard to these

aspects, if only briefly. Of contention between the parties was the point of urgency, and this requires some attention.

JURISDICTION

12 Under section 65(3) of the Student Constitution, this court is competent to undertake a constitutional review of any decision of a student body or member thereof. As already enumerated, three decisions are placed before this court in this matter, all of them having been taken by either the Executive or the Respondent in his capacity as SRC Treasurer. Therefore, these decisions conform to those envisaged by section 65(3), this court enjoying the competence to review the constitutionality of these decisions.

LOCUS STANDI

13 Under section 67 of the Student Constitution, all students and student bodies have *locus standi* before this court. Both the Applicant and Respondent are duly registered students, while both appear in their official capacities as members of student bodies. Therefore, both parties enjoy *locus standi* before this court.

URGENCY

14 The Applicant brought this matter on an urgent basis, citing two reasons therefor: firstly, the Societies Council term of office expired on 14 August 2020, a final financial report needing to have been tabled thereat; secondly, the term of office of the SRC comes to an end on 14 September 2020, any relief being granted after that point being ineffective as the parties will have vacated their positions on the Executive. In light thereof, the Applicant requested reduction of the *dies induciae* established in Rule 7 of the Stellenbosch University Student Court Rules of Procedure ("Court Rules").

15 This urgency was contested by the Respondent who contended that deviation from Rule 7 of the Court Rules as requested by the Applicant would still not result in the matter being heard before 14 August 2020. Further, the Respondent contended that following the prescripts of Rule 7 would allow the matter to be decided before 14 September 2020.

16 Rule 6 of the Court Rules allows for an application to be brought on an urgent basis, this court being empowered under Rule 6(2) to deviate from the Court Rules to the extent envisaged in Rule 2(4). Rule 2(4) in turn allows this court to deviate from the Court Rules (Rule 7 inclusive) upon the showing of just cause by any party, and to the extent deemed necessary by this court in the interests of justice. When read with Rule 6(1) therefore, Rule 2(4) necessitates an applicant presenting to this court just cause as to why they would be prejudiced if there is no deviation from the Court Rules.

17 In this matter, the Applicant has indeed shown that he, and the position he holds, will suffer prejudice if the matter is not decided expediently. In fact, delay in deciding this matter may even result in any relief awarded ceasing to have any effect. Despite this, the Respondent was correct in contending that the manifestation of the urgency requested by the Applicant (the deviation from Rule 7), would not have facilitated the matter being resolved before 14 August 2020. As it was the Applicant who expressly requested this deviation from Rule 7, further quantifying the number of court days by which the *dies induciae* were requested reduced, he must have known this himself. Therefore, it appears that the date of 14 September 2020 is of greater importance here. Again, however, the Respondent was correct in pointing out that adherence to Rule 7 of the Court Rules would allow the matter to be resolved before 14 September 2020.

18 In light of this, it is concluded that, although the present application requires resolution with the greatest possible expediency, the urgency contended by the Applicant was somewhat misplaced. It must be noted that courts are generally reticent to condone urgency manifesting in deviation from the rules of court.¹ Therefore, in the interests of substantive protection of the *audi alteram partem* principle, only as a last resort should the urgency of a matter diminish the time in which an opposing party has to reply. As such, the Applicant's argument that the urgency of this matter requires deviation from Rule 7 of the Court Rules is dismissed, while the Respondent's filing of papers within the prescripts of Rule 7, and not within the Applicant's requested reduction of the *dies induciae*, is condoned.

¹ *Luna Meubel Vervaardigers v Makin* 1977 4 SA 135 (W) 137E-G.

SUBSTANTIVE ASPECTS

19 The substantive aspect of this case comprises of three decisions taken: the decision to impose a general budget cap of R80 000.00 on the SRC portfolios; the decision to finalise the Societies Council budget; and the decision not to authorise the transfer of funds from the SRC cost centre to the Societies Council cost centre per finalised budget. In reviewing these decisions, the *dictum* of Chaskalson J in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan (“Fedsure”)* must be kept in mind – it is a fundamental rule of law that the exercise of public power is only legitimate where lawful, and thus exercised in terms of the provision empowering its exercise.² Therefore, the nature of each decision, the provisions under which each decision was taken, and the functionary by which each decision was taken fall to be examined.

20 Before this court, the Applicant posited that all three of the above decisions constituted administrative action. Despite argument on this point being invited by this court, the Respondent did not oppose this contention. Therefore, in addition to the power exercised in taking these decisions being held against the provisions in the Student Constitution empowering the exercise thereof, these decisions must be held against section 14 of the Student Constitution. Further, the preamble of the Student Constitution places the Bill of Student Rights subject to the Constitution. Therefore, section 14 of the Student Constitution must be read in light of section 33 of the Constitution. Consequently, and considering the decision in *Bato Star Fishing v Minister of Environmental Affairs and Tourism*,³ the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) is applicable to the present matter.

GENERAL BUDGET CAP

21 The decision to implement a general budget cap was made by the Respondent in consultation with the Chairperson of the SRC in their meeting of 19 February 2020. It is unclear when this cap was quantified, however it is clear that both the cap, and the R80 000.00 quantification thereof, were only communicated to the Executive at the meeting of 29 March 2020. Further at this meeting, the Executive did not

² 1999 1 SA 374 (CC) para 56.

³ 2004 4 SA 490 (CC) paras 25-26.

vote in favour of this general budget cap, and therefore the decision to implement it remains solely that of the Respondent in consultation with the Chairperson.

22 Section 22(1)(c) of the Student Constitution places the Chairperson of the SRC as ultimately responsible for the finances of the SRC, while section 22(4)(b) tasks the Treasurer of the SRC with formulating and implementing policy that ensures transparent, responsible and sustainable use of the SRC's financial resources. The Respondent's failure to argue against the Applicant's assertion that the decision regarding a general budget cap was administrative action is unfortunate as this assertion is ripe for contest. In *Grey's Marine Hout Bay v Minister of Public Works* ("*Grey's Marine*") the court characterised administrative action, as opposed to policy decisions, as daily bureaucratic function involving the application of policy (and not the formulation of policy).⁴ Therefore, whether the decision to formulate a general budget cap of R80 000.00 amounted to the formulation of policy or a decision of an administrative nature is arguable. This court, however, is restricted to what was argued before it.

23 Failing to be argued of a policy nature, but rather of an administrative nature, the decision regarding a general budget cap does not fall within the limited powers granted to the Respondent under section 22(4)(d) of the Student Constitution. Rather, this falls under the more general power granted to the Executive under section 35(2)(a) to compile the SRC budget. Additionally, there was no delegation of this power by the Executive to the Respondent, while further there is no provision in the Student Constitution allowing for delegation of this Executive power under section 35(2)(a).

24 Under section 6(2)(a) of PAJA, a decision amounting to administrative action taken by a party neither empowered to do so, nor authorised to do so through delegation, is liable to judicial review for want of lawfulness. In light thereof, and the rule of law as highlighted in *Fedsure*,⁵ as argued before this court, the Respondent was not empowered to make a decision regarding a general budget cap. Therefore the decision taken by the Respondent in this respect was unlawful.

⁴ 2005 6 SA 313 (SCA) para 24.

⁵ *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan* 1999 1 SA 374 (CC) para 56.

SOCIETIES COUNCIL BUDGET

25 Turning to the specific budget of the Societies Council, the decision to finalise this was also argued as being administrative action. Again this was not contested by the Respondent, while in any event it is difficult to argue the decision to finalise budgets as being the formulation of policy. Rather the finalisation of SRC portfolio budgets falls squarely within the concept of bureaucratic function coming from *Grey's Marine*,⁶ therefore falling under the powers of the Executive in terms of section 35(2)(a) of the Student Constitution.

26 The first decision in this regard was taken by the Executive in the meeting of 24 March 2020. Following this, in the meeting of 29 March 2020 the Executive made another decision in contradiction of that made on 24 March 2020. Later, on 05 May 2020, the Executive made a further decision contradicting both prior decisions. All of these decisions were taken with the requisite quorum, however it was only the decision of 24 March 2020 that was taken validly.

27 Under section 35(3) of the Student Constitution, all decisions taken by the Executive under section 35(2) are of full force and effect unless set aside by the SRC at a later meeting. Following this, section 36(3) stipulates that a SRC meeting can be convened to discuss Executive decisions where at least three members of SRC request this in writing from the Chairperson of the SRC. Therefore, and as vehemently argued by the Applicant in relation to the Respondent's agenda point at the SRC meeting of 13 May 2020, section 35(3) read with section 36(3) of the Student Constitution prescribe the process for setting aside a decision of the Executive – this must be done by a meeting of the SRC (not the Executive) where at least three members of the SRC have put a request in writing to the Chairperson of the SRC.

28 Clearly on the facts this did not occur with the Executive decision of 24 March 2020. Rather, subsequent and conflicting decisions were made by the Executive on the same matter. In light of section 35(3), the decision of 24 March 2020 remains in full force and effect, the subsequent decisions of 29 March 2020 and 05 May 2020 not having any effect thereupon. In fact, these subsequent decisions were taken with a view of replacing the 24 March 2020 decision. Therefore, these decisions are

⁶ *Grey's Marine Hout Bay v Minister of Public Works* 2005 6 SA 313 (SCA) para 24.

invalid for lack of compliance with the correct procedure stipulated by section 35(3) read with section 36(3) of the Student Constitution.

29 As administrative action, the Executive decision of 24 March 2020 remains subject to section 14 of the Student Constitution, and by implication the prescripts of PAJA. Therefore, this decision is required to have been both reasonable and procedurally fair.⁷

30 On the point of procedural fairness, argument was made by both parties before this court that the other party's presence on the Executive during the finalisation of budgets amounted to a conflict of interests, the Executive therefore being influenced by an element of bias and its subsequent decision making being procedurally unfair. This argument was made on the basis of each party being responsible for a portfolio that would benefit from a greater financial allocation if the other party's portfolio budget was to be finalised at a minimum. However, in establishing the Executive, section 34 of the Student Constitution must foresee the possibility of certain Executive members also being responsible for portfolios, decisions regarding such portfolios being made by the Executive as evidenced by section 36(2)(c). Therefore, any bias that may be argued to result cannot amount to an unforeseen bias.

31 Beyond the Student Constitution, and despite section 6(2)(a)(iii) of PAJA setting the bar for bias very low at reasonable suspicion of bias, the allegations of bias advanced by the parties against each other amount to no more than mere mudslinging. Rather, the conflict of interests can only be argued as between the portfolio over which each party presides and the SRC itself, while even this is tenuous. Through their portfolios receiving greater funding, neither party receives any personal benefit, while their portfolios fall part of the greater scheme of the SRC, there in fact being no conflict between the SRC and the portfolios. Therefore the allegations of bias do not impinge on the procedural fairness of Executive decision making. If anything, this is can be argued an issue of fiduciary duties owed to the SRC over individual portfolio, but in the absence of allegations of either party contravening these duties, this court shall not delve into that matter.

⁷ Section 33 of the Constitution.

- 32 On the point of reasonableness, however, an issue arises with the 24 March 2020 decision. At the very least, under section 6(2)(f)(ii)(cc) of PAJA an administrative decision must be rationally connected to the information before the administrator. This implies, and is affirmed by section 6(2)(e)(iii) of PAJA, that administrative decisions must be taken only after due regard is had to relevant considerations.
- 33 The Respondent contended that he was tasked by the Executive with assisting portfolios with their budgets before these budgets were to be submitted to the Executive for finalisation. Therefore it fell to the Respondent to present all the portfolio budgets to the Executive so that these could be finalised. In light thereof, the Respondent was the member of the Executive who held the information necessary for consideration by all members of the Executive before the Societies Council budget was finalised.
- 34 Despite the centrality of the Respondent to the budget finalisation process, the budget finalisation meeting of 24 March 2020 proceeded with neither the Respondent present, nor his insights shared for consideration by the rest of the Executive. Indeed argument could be made that the onus rested on the Respondent to publish his insights into the portfolio budgets submitted, this mitigating the need for his attendance at the meeting of 24 March 2020. However, it remains that the decision taken at that meeting was taken in the absence of this insight, while the minutes reflect an unfortunate general disregard of the Respondent's role in the budgeting process.
- 35 In light of this, the 24 March 2020 Executive finalisation decision of the Societies Council budget falls short of the requirements of just administrative action enumerated under PAJA which give effect to section 33 of the Constitution, and by implication section 14 of the Student Constitution. However, as affirmed in *Oudekraal Estates v City of Cape Town*,⁸ defective administrative action, and its consequences, remain valid until set aside by a competent court. Therefore, the decision taken by the Executive on 24 March 2020, despite falling short of the rationality requirement for just administrative action, has remained valid. Consequently, the subsequent decisions of 29 March 2020 and 05 May 2020 that

⁸ 2004 6 SA 222 (SCA) para 26.

conflict with, and purport to set aside, the decision of 24 March 2020, but follow the incorrect procedure, remain *ab initio* void.

BUDGET TRANSFERS

36 The final decision requiring attention is that of whether or not to transfer funds between the SRC cost centre and portfolio cost centres. As with the previous two decisions, this too was posited as administrative action by both parties. It was common cause between the parties that the Executive is empowered to make this decision under section 35(1)(b) of the Student Constitution, but this had been delegated to the Respondent. Although no provision is made for delegation of this decision, when read in context, a tacit power to delegate can be inferred from section 35.

37 In determining a tacit power to delegate, a number of factors from *Minister of Trade and Industry v Nieuwoudt* are applicable, namely: the degree of devolution of power; the importance of the original person empowered; the complexity and breath of discretion; and the impact of the power and practical necessities.⁹ With due consideration thereto, the practical necessity of the present delegation is self-evident as the Executive, as a body, will necessarily exercise this power through a single member, while consequently this does not constitute an extensive devolution of power as the Respondent is a member of the Executive. Further, there is not much discretion attached to the delegation as it involves giving effect to the budgetary decisions of the Executive. Therefore, there is tacit empowerment of this delegation to the Respondent.

38 In exercising this delegated power, however, the Respondent made an error in law and failed to follow the precepts of procedural fairness. When the Applicant request transfer of the full complement of the R88 090.00 to the Societies Council cost centre, the Respondent failed to rely on the invalidity of the 05 May 2020 decision to motivate his decision. Rather, the Respondent refused on an interpretation of an outdated version of the Student Constitution. Further, when taking this decision, the Respondent neither communicated this to the Applicant, nor awarded the Applicant opportunity to make representations. Instead, it took the Applicant's pestering of the Respondent to solicit an indication of the latter's refusal to transfer

⁹ 1985 2 SA 1 (C) 13C-F.

the full complement of the funds. This positions the Respondent's decision as falling short of sections 14(1) and (2) of the Student Constitution, section 33 of the Constitution and sections 3(2)(b) and 6(2)(d) of PAJA giving effect thereto.

CONCLUSION

39 Given the above, it can be concluded that this application rests on a multifaceted matter, each facet requiring address. The three decisions central to this were located within the framework of administrative law by both parties, and therefore required examination in light of the precept thereof.

40 With regard to the decision to formulate a general SRC portfolio budget cap, the Respondent was not empowered to make this decision, this decision therefore being unlawful. As such, this decision does not constitute just administrative action.

41 With regard to the decision to finalise the Societies Council budget, the Executive decision of 24 March 2020 remained valid, the subsequent decisions of 29 March 2020 and 05 May 2020 being *ab initio* void for lack of compliance with section 35(3), read with section 36(3), of the Student Constitution. This 24 March 2020 decision, however, was taken without due regard to the information available to the Executive in the form of the Respondent's insights into the SRC portfolio budgets submitted for finalisation. Therefore the 24 March 2020 decision of the Executive to finalise the Societies Council budget is defective when held to the precepts of just administrative action.

42 With regard to the decision not to transfer the full complement of the requested funds to the Societies Council cost centre, there was lawful delegation of this decision to the Respondent. However, in exercising this delegated power, the Respondent relied on a mistake of law, while failing to adhere to the principles of procedural fairness, this decision therefore falling short of just administrative action.

ORDER

43 Under sections 66(3) of the Student Constitution, this court may set aside any decision or action that is inconsistent with the Student Constitution. This ability to set aside unconstitutional decisions replicates section 172(1) of the Constitution,

which, in the administrative law context, is given effect to by section 8(1)(c) of PAJA.

44 Once having set aside a decision, however, a court is further empowered to remit the matter back to the decision maker for reconsideration under section 8(1)(c)(i) of PAJA. Whether this court shares that power to remit a decision is arguable, however, section 66(3)(b) of the Student Constitution does envisage the rectification of a decision declared unconstitutional by this court, albeit in the context of an order being suspended for the purpose of rectification. Following this, section 66(4) allows this court to grant any order that is fair and equitable.

45 In the circumstances, it would serve the interests of justice if the defective administrative action arising from the decision to finalise the Societies Council budget were set aside and remitted to the Executive. A suspension of the order setting aside that decision so that rectification could occur would be unnecessarily cumbersome as the 24 March 2020 decision would continue to remain valid, this then needing to be overturned by the SRC under section 35(3) read with section 36(3) of the Student Constitution. Rather, an order setting aside the decision, coupled with remittal, would allow the Executive to retake this decision in a manner that conforms to the prescripts of just administrative action.

46 In light of this, and given the foregoing reasoning, this court grants the following:

46 1 The urgency of this application is dismissed, the Respondent's filing of papers outside of the timeframe requested by the Applicant being condoned.

46 2 An order setting aside the decision taken by the Respondent to impose a general budget cap on SRC portfolios.

46 3 An order declaring the 29 March 2020 and 05 May 2020 Societies Council budget finalisation decisions of the Executive void.

46 4 An order setting aside the 24 March 2020 decision of the Executive to finalise the Societies Council budget, and remitting this decision back to the Executive to be made with due regard to the insights of the Respondent.

46 5 An order setting aside the decision taken by the Respondent not to transfer the requested funds to the Societies Council cost centre, and remitting this decision back to the Respondent to be made following the Executive decision to finalise the Societies Council budget as per the above order.