

**In the Student Appeal Court of Stellenbosch University**  
**Republic of South Africa**

Johanna Helena le Roux

and

Roceshia Februarie

Electoral Commission

**Introduction**

[1] This is an appeal against the finding of the Student Court in the matter of *R Februarie v Electoral Commission and Another* 05/10/24. The second respondent appeals specifically against orders 6, 7 and 8, which is set out here:

‘[6] Ms Le Roux contravened item 3(7)(a) read with item 3(8) of part S1.3 of the Student Electoral Act;

[7] Ms Le Roux is retrospectively disqualified as an SRC candidate;

[8] The candidate who attained the next-highest number of votes is hereby instated in the position left vacant, subject to their assent.’

[2] There are several grounds on which this appeal is based, namely insufficient evaluation of evidentiary material; invalidation of candidature; and the amendment of section 127, which appears to be obiter; and objectiveness of the judgment.

[3] The complainant, R Februarie lodged a cross-appeal. Cut to the core, the cross-appeal does not add anything to this appeal, and we will treat it as such.

[4] The question before us is whether the court a quo was correct in finding that Ms Le Roux contravened item 3(7)(a) read with item 3(8) of part S1/3 of the Student Electoral Act. If that finding is correct, then the consequences that follow must be considered and implemented where necessary. If that finding is incorrect, it is to be set aside, and Ms Le Roux shall be reinstated as an SRC member.

**Contravention of items 3(7)(a) and 3(8)**

[5] First, we consider whether item 3(7)(a) was contravened. Item 3(7) reads as follow:

‘All persons bound by the Student Electoral Act must, during the election period: 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.’

- [6] Item 8, in turn, provides the Electoral Commission (as the tribunal of first instance dealing with alleged violations of the Student Electoral Act) no discretion in disqualifying a candidate who it finds to have violated the Act. This is clear from the use of the words ‘will be disqualified’. As the court a quo correctly pointed out,<sup>1</sup> Item 8(1)(a) holds that candidates may further be held liable if a mass communication endorses them or helps them with their campaign. A candidate avoids being held vicariously liable only if they prove they had nothing to do with such a communication. In other words, the evidentiary burden or onus shifts to the candidate once there is a factual violation has been established.<sup>2</sup>
- [7] While Item 3(7) is a good example of bad legislative drafting, the provision seeks to prevent a candidate from spending money on marketing [their campaign], and to disallow sponsorship for the purpose of marketing the candidate’s campaign. The Student Court rightly held that item 3(7)(a) seeks to prohibit the use by a candidate of sponsorship in the form of monetary contributions to further its election prospects. To answer the question about the contravention of item 3(7), the Student Court considered three aspects, namely whether the conduct promotes the campaign of the candidate, whether an expense was incurred, and whether the candidate in question is culpable.
- [8] There are two actions, separate but related, that may have triggered a violation of Item 3(7). The first is the distribution of roses and cards by the candidate in celebration of Women’s Day, where on the cards it was written, ‘Stem vir jou SR’ [Vote for your SRC]. The second is the post of this event, which was shared on Afriforum Jeug’s official Instagram account.<sup>3</sup> The post contained an image of Ms Le Roux and another person – both holding the Women’s Day cards.<sup>4</sup> The image was coupled with the following caption: ‘AfriForum Youth’s Maties branch gave a bouquet of flowers to every lady in the Neelsie on Thursday, August 8, 2024, during lunch in celebration of National Women’s Day. They also used the opportunity to remind students to vote for their [SRC] from August 19 to 27.’<sup>5</sup>

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<sup>1</sup> *Februarie v Electoral Commission and Another* 05/10/24 Para 52.

<sup>2</sup> See para 52.

<sup>3</sup> Para 2.

<sup>4</sup> Paras 1-2.

<sup>5</sup> Para 2 (translated from Afrikaans).

- [9] It is clear that the appellant did not utilise her own money to purchase the roses and cards<sup>6</sup> and this finding has not been challenged on appeal. The direct question is therefore whether Le Roux utilized sponsorship to market or promote their campaign. It is clear that the conduct (that of handing out cards in celebration of Women's Day also indicated vote for your SRC)<sup>7</sup> and the picture with Le Roux's visage that followed, promoted the campaign of Le Roux.
- [10] It therefore needs to be established whether an expense was incurred to trigger the prohibition on the utilization of sponsorship. Had it not been for the cards and roses that was handed out and which subsequently appeared on Instagram showing the words, which both featured a call to action to 'vote for your SRC', it would have been impossible to establish a nexus between the utilization of funds and promotion of Le Roux's campaign. Although the Student Court could benefit from lessons in brevity, its decision in as far as Le Roux violated Item 3(7) cannot be faulted. Le Roux distributed cards and roses with a message to vote for your SRC that promoted her campaign for which sponsorship was used. As no evidence was adduced that money was used for the posting of the Instagram post, no violation of Item 3(7) in respect of the post is established.
- [11] The appellant also appeals against the finding that she violated Item 3(8). Item 3(8) prohibits candidates 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'.
- [12] It must be stressed, however, that Ms Le Roux was the Chairperson of the Stellenbosch Chapter of Afriforum Jeug. This position cannot be uncoupled from her SRC candidature and the Women's Day event involving the handing out of roses and cards (reminding students to vote for your SRC), which was followed by an Instagram post memorialising said event (also reminding students to vote for your SRC). As no evidence was provided to dispute this connection, the candidate's position at AfriForum Jeug was employed as a campaigning tool to distribute flowers and cards with her visage. This event was captured, and then distributed on Afriforum Jeug's Instagram page. No evidence was tendered that the Instagram post was paid for, which would have lead it to fall within the ambit of a sponsorship. The post, however, likely constitutes an endorsement of the candidate.
- [13] The court a quo correctly pointed out that Women's Day and the SRC election are wholly unrelated events.<sup>8</sup> The Instagram post, however, simultaneously celebrates Women's Day and encourages students to vote in the upcoming SRC

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<sup>6</sup> Para 49.

<sup>7</sup> Para 1.

<sup>8</sup> See para 36 where the court a quo holds that 'there is no obvious *nexus* between these events'.

Election. The fact that the appellant is the Chairperson of Afriforum Jeug, who appears on the post in question, and the post in question, which encourages students to vote in the upcoming SRC Election, leads to the natural conclusion that the post was designed to promote or endorse the appellant as a candidate in the upcoming SRC Election, or at the very least, help them with their campaign. The appellant therefore had the privilege of being promoted or endorsed on AfriForum Jeug's Instagram page (which has not only a local but national reach)<sup>9</sup> 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 the electorate to vote for Ms Le Roux. Therefore, it is held that Ms Le Roux violated Item 3(8).

### **Contravention of Item 8(1)(a)**

[14] We now turn Item 8(1)(a). Candidates are held liable for mass communication that violates the act if this were to endorse or help them with their campaign. A candidate will escape liability if they prove 'that they had nothing to do with such violation'. The Instagram post can be considered a mass communication. The onus consequently shifts to Ms Le Roux to prove that she had 'nothing to do with' the violation. The court a quo vigorously engaged with what the relevant form of fault required when the appellant's conduct is evaluated. The phrase 'nothing to do with' implies that there is some form of active engagement or deliberate conduct involved. This means that one of the three recognised forms of intent is required, in other words, *dolus directus*, *dolus indirectus* or *dolus eventualis*. Whatever form of *dolus* is applied, Ms Le Roux proffered no evidence to show that she was not involved with the post in question – especially the caption. Ms Le Roux therefore failed to discharge her onus under Item 8(1)(a) and therefore is found to have contravened Item 8(1)(a).

[15] Unfortunately, in the court a quo, too much consideration was given to establishing the relevant form of fault and not to the evidentiary burden that the appellant carries in discharging said burden. Whatever form of fault was applied, Ms Le Roux carried the evidentiary burden in proving that she had nothing to do with the post. Even in the event that she was negligent, it must be shown that she knew about the contents and the scope of the post and that she had failed to act to prevent it.

[16] In that regard, the interpretation that Item 8(1)(a) can be read to incorporate a negligence standard cannot be agreed with. As stated, the relevant provision

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<sup>9</sup> Para 45.

employs the term ‘had nothing to do with’ when describing the requisite conduct and fault. That provision cannot be read to impute liability for an omission. It is uncertain whether this restrictive interpretation would permit ‘grossly unreasonable’ conduct to flourish as the court a quo suggested.<sup>10</sup> That however does not justify an unduly strained reading of Item 8(1)(a). Item 8(1)(a) would have employed such a negligence as an acceptable form of fault if it had contained a phrase to the effect of ‘...[u]nless a candidate can prove that they had nothing to do with such violation [, **reasonably knew of the violation and permitted such violation to occur**]’.

### **Invalidation of the appellant’s candidacy**

[17] The appellant argues that the appropriate remedy in this case is to be found under Item 15 of Schedule 2 of the Student Constitution. Item 15(2) specifically states that

‘If a candidate or the helpers or supporters of a candidate act in violation of subsection (1), the Electoral Commission may instruct said candidate to remove or destroy election material or to abandon the activities in question, or, where the conduct constitutes a misdemeanour or is seriously detrimental to another candidate(s), declare the candidature of said candidate invalid.’

It is clear that this provision empowers the Electoral Commission to issue certain orders including the removal of offending material or invalidating someone’s candidature. This provision must be read in conjunction with sections 127(1) and (3) of the Student Constitution:

- ‘(1) A complaint about the campaign of a specific candidate must be lodged with the Electoral Commission, who must properly investigate the complaint and must announce their decisions within twenty-four (24) hours after the complaint was lodged.
- (2) Any complaint relating to any student leadership election, including any aspect that may jeopardise the freedom or fairness of the election, and any decision or failure to make a decision by an Electoral Commissioner or respective Election Committee(s)/Convenor(s), must be lodged with the Electoral Commission.
- (3) Any unresolved complaint under subsection (2) about the running of any student leadership election and any decision or failure to make a decision by the Electoral Commission or respective Election

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<sup>10</sup> Para 53.

Committee(s)/Convenor(s), must be lodged with the Student Court

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- (a) Within a reasonable time.
- (b) Before the third University day (inclusive) after the announcement of the results.
- (c) In accordance with the rules of the Student Court.’

[18] These provisions must be read holistically. As the Electoral Commission failed to announce their decision within 24 hours of receiving the complaint, the court a quo reasoned that the Electoral Commission could no longer deliver binding orders but not that it no longer had jurisdiction to investigate the matter.<sup>11</sup> Whatever the exact nature of the Electoral Commission’s jurisdictional competence was, it is clear that the Student Court’s jurisdiction is triggered under s 127(3) due to the Electoral Commission’s failure to make and announce a finding within 24 hours after the lodgement of the complaint. The Electoral Commission could therefore had no jurisdictional competence to make an order under Item 15(2).

[19] Based on the above, the appeal on the disqualification of the appellant is dismissed.

### **Amendment of s 127 of the Student Constitution**

[20] The appellant further complains of the purported dissonance of the Student Court by, on the one hand, questioning the validity of s 127 of the Student Constitution but, on the other hand, still applying that very section. The appellant asserts that this is a ‘shining example of judicial overreach’ by the Student Court and is indicative of the ‘subjective and irrational manner’ in which the it dealt with the complaint.

[21] It is not immediately apparent whether these grounds of appeal are cogent. Although the court a quo does highlight the difficulties of the Electoral Commission to investigate and decide on matters within a relatively short timeframe and does order the Student’ Imbizo and Student Assembly to consider s 127 amendment, it did not find it unconstitutional or non-applicable to the facts at hand. It would have perhaps constituted judicial overreach if the court a quo had found the provision unconstitutional and refused to apply the provision to the Ms Le Roux factual matrix.

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<sup>11</sup> Para 22.

[22] This ground of appeal is dismissed.

### **Objectiveness of the judgment**

[23] The final ground of appeal relates to the objectiveness of the judgment.<sup>12</sup> The appellant specifically asserts that the court a quo's 'own subjective reasonableness tests' were applied without substantiation. Ms Le Roux does not provide much further detail but does assert that the case should have been decided on its own merits and if the court applied 'the correct approach' it would have found that the order was not just.<sup>13</sup> This, the appellant alleges, makes the order 'highly suspect', 'excessive' and contrary to the interest of justice'.<sup>14</sup>

[24] The proper and relevant test was already dealt with above.

[25] It appears that the appellant is alleging that the Student Court was biased in deciding her case. The appellant does not provide evidence to support this ground of appeal. The fact that she considers the outcome 'excessive' is and disagrees with the test applied by the court does not mean that the court was biased. The legislative matrix does not provide a discretion in instances where a student is found guilty of the complained of violations. Therefore, it cannot be said that the court a quo was excessive in the order it made. Furthermore, a misinterpretation or misapplication of a test (of 'subjective reasonableness') does not in itself mean that the Student Court was biased. This must be coupled with substantiating evidence that the court a quo, in applying this test, acted with some form of bias or malice in order to make an adverse finding against the appellant.

[26] This ground of appeal is dismissed.

### **Order**

[27] As a result, the following order is made:

- [1] The appeal is dismissed;
- [2] Ms Le Roux remains retrospectively disqualified as an SRC candidate
- [3] The candidate who attained the next-highest number of votes is hereby instated in the position left vacant on the SRC, subject to their assent.

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<sup>12</sup> Notice of Appeal paras 26-21.

<sup>13</sup> Notice of Appeal paras 26-27.

<sup>14</sup> Notice of Appeal paras 28-29.

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BV Slade

11 November 2024

A handwritten signature in black ink, appearing to read 'DC van der Linde', with a stylized, cursive script.

DC van der Linde