

**IN THE STUDENT COURT OF THE UNIVERSITY OF STELLENBOSCH (HELD IN
STELLENBOSCH) ON 7 MAY 2018**

In the matter between:

TIVAN LEAK (AS MANAGING EDITOR OF *DIE MATIE*)

Applicant

and

INGRID HEÏDENRÏCH (AS EDITOR IN CHIEF OF *DIE MATIE*)

Respondent

**SUMMARY OF
JUDGMENT HANDED DOWN BY THE STUDENT COURT**

THE COURT:

INTRODUCTORY REMARKS

[1] It is important to note from the outset that the Stellenbosch University Student Court (“the Court”) is a democratic structure, comprising of students who have been elected in terms of section 56 of the Stellenbosch University Student Constitution 2014 (“the Student Constitution”).

[2] The Student Constitution, in section 55, states that the Court functions as an administrative tribunal, which is independent and subject only to the Student Constitution. Section 55 further provides that the Court must apply the Student Constitution impartially, and without fear, favour or prejudice.

URGENCY

[3] Due to technical difficulties the urgency of the matter is no longer of relevance.

SUMMARY OF JUDGEMENT

- [4] Both the Applicant and the Respondent submit that granting privileges to write and submit articles to *Die Matie* is a regular and customary practice completed in an informal manner that hinges on the Respondent's discretion. The purpose of this practise is to ensure a constant flow of written pieces for publication in the newspaper as *Die Matie* relies on these submissions, being a student-driven publication.
- [5] On the facts, the court finds the existence of two kinds of privileges that the Respondent is capable of granting. First, there is the privilege available to all students of Stellenbosch University enabling them to submit articles for consideration on an *ad hoc* basis, judged on their fitness on a case-by-case basis. The second, is a privilege of a similar nature to the above, with the differentiating distinction being the allowance of the holder to publish articles on a *continuous basis*. The difference between the two being that persons with the second type of privilege have a more qualified expectation to have their articles considered for publication, although still subject to the Respondent's power to refuse publication based on the content thereof.
- [6] The Court finds that the Applicant has the second type of privilege.
- [7] Both on the papers and during the oral hearing, the Applicant maintained that the decision taken by the Respondent should have followed the disciplinary procedures set out in *Die Matie's* Code of Conduct.
- [8] The Court does not agree. The Code of Conduct does not provide that the duties of the Applicant include writing articles for *Die Matie*. The disciplinary procedures set out in the Code of Conduct is used to enforce the content contained in the Code of Conduct. The court accordingly finds that if this function is not one of the Applicant's duties, then the mechanisms in the Code of Conduct cannot be used to enforce his privilege.

- [9] Because there is no procedure in the Code of Conduct to be followed by the Respondent when decisions are made to suspend a “continuous privilege”, the Applicant must rely on section 14 of the Student Constitution.
- [10] The court finds that whenever a void exists in a governing document, the Student Constitution will be applicable. In this instance, this warrants the application of section 14.
- [11] Section 14 of the Student Constitution provides that where a student’s rights or legitimate expectations are materially or adversely affected by a decision taken by a student body or a member thereof, that student has the right to certain procedures being followed before that decision is made.
- [12] The Court accordingly finds that this matter, in essence, comes down to whether the Applicant has either a right or a legitimate expectation that could afford him the protection of fair procedures set out in section 14 of the Student Constitution.
- [13] In the interpretation of section 14, the Court finds that it must be given the same interpretation as is given to section 3 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).
- [14] From the affidavits, oral submissions, and the duties of the parties as set out in the Code of Conduct of *Die Matie*, it is clear that there is no existing right in favour of the Applicant to submit articles in *Die Matie*. However, section 14 of the Student Constitution does not only protect the rights but also the legitimate expectations of students.¹
- [15] The essential question before the court is thus accordingly, whether the Applicant has a legitimate expectation as recognised by section 14 of the Student Constitution.

¹ Stellenbosch University Student Constitution 2014, Section 14.

[16] On the question of whether the Applicant has a legitimate expectation, the court finds that the doctrine of legitimate expectation is applicable where a person enjoys a privilege or benefit which it would be unfair to deny that person without giving him or her a hearing.²

[17] The test formulated by the court in *Walele v City of Cape Town* (“*Walele*”) to determine whether a legitimate expectation exists involves a two-step enquiry. The first stage entails an objective factual enquiry in determining whether the Applicant had a legitimate expectation. In the second stage, it must be determined whether, in the circumstances of that case, procedural fairness necessitates a fair hearing prior to a decision denying a person the privilege or benefit.³

[18] In the first stage of the enquiry, the question before the court is whether there is a legitimate expectation for the privilege or benefit to be retained. The requirements for the legitimacy of an expectation are set out in *National Director of Public Prosecutions v Phillips*.⁴ The first requirement is that the expectation must be reasonable. To this end, the reasonable person standard applies, namely whether a reasonable person in the same circumstances as the Applicant, would have the expectation to submit articles in future and at the very least have their articles considered for publication. The court finds that this requirement is met.

[19] The second requirement is that the representation giving rise to the expectation must be clear, unambiguous, and devoid of any relevant qualification. The court considered the continuous nature of the Applicant’s privilege, the fact that it was an established practice at *Die Matie*, and that the entire editorial team also had such privilege to submit articles for consideration. Accordingly, the court finds that the Respondent’s representation to the Applicant that he had a privilege to submit

² *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 35.

³ Para 38.

⁴ 2002 (4) SA 60 (W) para 28.

articles for consideration on a continuous basis was clear, unambiguous, and devoid of any relevant qualification.

[20] The third requirement is whether the representation is induced by a competent decision-maker. It is clear that the Respondent, by granting the privilege as a continuous one to the Applicant, has induced the expectation that the Applicant would be allowed to, at the very least, submit articles for consideration to *Die Matie*, subject to the Respondent's right to reject such submissions based on their content.

[21] The final requirement is that the representation must have been one which it was competent and lawful for the decision-maker to make. Looking at the facts before the court, it is clear that the representation made by the Respondent flows from the nature of her position as the editor in chief, and it is an established custom in *Die Matie* for the editor in chief to make such decisions. Accordingly, the representation was one which the Respondent was competent to make and which it was lawful for her to make.

[22] The second stage of the test for a legitimate expectation is considered, and relates to the interests of a proper balance being struck between the expectations of the Applicant on the one hand, and on the other hand, avoiding unfair judicial interference into the functions of *Die Matie*.

[23] Finding a balance is of essence to this matter as the imposition of a procedure on the Respondent should not lead to the frustration of *Die Matie*'s internal workings and should similarly not leave the Applicant vulnerable to adverse decision-making.

[24] The second stage of this test thus asks whether there is a reasonable belief that the aggrieved party would be given a hearing before the decision is made?⁵

⁵ *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 39.

[25] This stage enquires into whether the duty to act *fairly* necessitates, in this context, a hearing or the following of a proper procedure. The consideration of fairness in this context takes into account whether or not it would be unduly burdensome on the Respondent to require a procedure and or hearing.

[26] On the facts, the court finds that due to the serious nature of the allegations in this case and the consequences attributed to them, it would be reasonable to conclude that fairness in this context warrants and necessitates the following of a proper procedure.

[27] Furthermore, the Court does not find that requiring a proper procedure to be followed by the Respondent would, in this specific instance, frustrate the internal workings of *Die Matie* beyond what is necessary to maintain a balance between the rights of the parties and ensuring protection for the Applicant from adverse decision-making.

[28] At the conclusion of this test, it is the Court's finding that the Applicant has a legitimate expectation for the purposes of section 14.

[29] Section 14 of the Student Constitution sets out certain rights that the Applicant would be entitled to in the present case, considering that the decision taken by the Respondent did indeed have an adverse effect on the Applicant's legitimate expectation.

[30] Whether the Applicant was afforded the entitlements flowing from such rights are considered in a flexible manner and their weight would depend upon the facts of the case.

[31] Section 14(a) entitles the Applicant to be notified of the nature and purpose of the proposed action. The Applicant was only informed of the decision after it had already been taken by the Respondent. The letter sent to the Applicant is nothing more than an exposition of the decision taken, and therefore the steps taken by the Respondent does not comply with this provision.

[32] Section 14(b) entitles the Applicant to a reasonable opportunity to make representations. The Respondent did not offer the Applicant such an opportunity before the decision was taken. Even though there was a meeting held between the members of the editorial team, it was not meant to be a forum for the Applicant to make representations, but rather for the Respondent to inform them of the decision which was already taken. This is clear from paragraphs 13 to 15 of the Respondent's answering affidavits.

[33] Section 14(c) grants the Applicant the right to adequate notice of any right of review or internal appeal where applicable. In the present case, the Applicant was not given notice of his right to a review by the Student Court. Since there is no internal procedure for appeal in *Die Matie's* Code of Conduct, it is not applicable in this case.

[34] Section 14(d) grants the Applicant the right to request reasons for the decision and to be furnished with written reasons within a reasonable time. The Applicant did not request reasons and there is therefore no duty on the Respondent to furnish such reasons until they are requested.

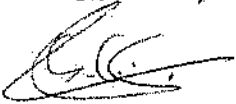
[35] In conclusion, the Court finds that the Applicant had a legitimate expectation for purposes of section 14, and that this expectation was adversely and materially affected by the Respondent's decision to suspend the Applicant's privilege. The Applicant is accordingly entitled to the processes of section 14.

[36] The Applicant had the right to be notified of the nature and purpose of the proposed action and a reasonable opportunity to make representations. On the facts however, the Respondent failed to adhere to these provisions of section 14(a) and (b).

[37] The Applicant must therefore succeed in his motion.

[38] The letter of the Respondent and the sanctions contained in it are set aside with immediate effect.

SOGULA, S



MANAGA, K



JANSEN VAN VUUREN, C



GOETSCH, J

