



TRANSPARENCY, ACCESSIBILITY & ACCOUNTABILITY
Stellenbosch University

**STUDENT COURT
OF STELLENBOSCH UNIVERSITY**

REPUBLIC OF SOUTH AFRICA

In the matter between:

JAYDEN MAISTRY

First Applicant

GABRIELLA MAY

Second Applicant

And

OSLER PSO

First Respondent

TYGERBERG ELECTORAL COMMISSION

Second Respondent

Neutral Citation: *Maistry and Another v Osler PSO and Another* 16/09/24

Judgment: MUDZINGIRANWA J (Bryant CJ, Steyn DCJ, Bester &
Swanepoel JJ concurring)

Judgment handed: 16 September 2024

FINAL JUDGMENT

MUDZINGIRANWA J

Introduction

[1] The Applicants approached this Honourable Court on an urgent basis, seeking an order setting aside the election of the Primarium (“Prim”) and Vice-Prim for Osler PSO (“Prim elections”). They alleged that the Prim elections were not procedurally correct. The Applicants also alleged undermining of the integrity of Osler’s Election processes hence calling for a new election.

The facts

[2] The dispute arose soon after the Prim elections which were held between the 5th and 7th of August 2024. The Prim elections did not follow the normal procedure prescribed by section 4.1 under chapter 3 of the Osler Constitution. This provision notes that “both incoming and outgoing house Committee Members will have voting rights to elect the Prim, Deputy Prim.” It is apparent from this provision that under normal circumstances, the Prim and Vice-Prim are elected internally, by both the incoming and outgoing committee. However, since the Prim and Vice-Prim for 2023/2024 were running for re-election, this procedure could not be followed.

[3] Faced with such unique circumstances, the Chairperson of the Osler Election Committee approached the Centre for Student Communities (“CSC”) office to get advice on the procedure to be followed. The CSC then went on to authorise that elections take place via an open caucus. Thus, the Prim and Vice-Prim were elected through an open caucus in accordance with the Residence Rules, as opposed to an internal election. The Applicants then went on to challenge the decision taken by the Election Convenor in consultation with the CSC representative to adopt this procedure on the 14th of August 2024. They did so by lodging a complaint with the Tygerberg Electoral Commission (“TEC”), which triggered an investigation into the election process. However, the efforts to resolve the matter with the CSC were unsuccessful, as the TEC’s grievance period had lapsed. The Applicants were then advised to approach this Court to seek an order invalidating the elections.

Locus standi

[4] The Applicants and Respondents both have standing to approach this Court, in terms of section 86 of the Student Constitution which awards students and student bodies *locus standi*. The Applicants are both registered students at Stellenbosch University. As for the Respondents, this Court in *Electoral Commission and Another v Lydia Lydies’ Residence and Another (Preliminary judgment)* reaffirmed that residence and House Committees are student bodies, thus Osler does have standing.¹ The TEC,

¹ 03/23 para 40. See also *Jacobs v Huis Visser Primaria and Others* [2017] para 14.

on the other hand, is constituted as a student body in terms of section 3 of the Tygerberg Student Constitution and is thus afforded *locus standi*.

Jurisdiction

[5] The Court has jurisdiction to hear this matter. Section 84(3) of the Student Constitution awards the Court power to “review any decision of a student body or a member thereof.” As established above, both the TEC and the Osler House Committee are student bodies. Therefore, this application does qualify as a review of a decision by a student body as it is aimed at reviewing Osler’s election procedure for the Prim and Vice-Prim Elections. Additionally, section 127(3) grants the Court jurisdiction to hear and solve matters arising from election disputes.

Urgency

[6] The Applicant submitted that the matter is urgent, however, this alone is not enough to establish urgency. This court in *Ex Parte Mhlongo and Another (Mhlongo II)* held that rule 8(1) of the Student Court Rules of Procedure places onus on the Applicant to prove urgency.² Rule 8(1) notes that The Applicant must “set forth the circumstances which render the matter urgent, if at all, as well as reasons why the applicant will be prejudiced if there is no deviation from the rules.” The Applicants pled urgency as they feared that an order invalidating the Prim and Vice-Prim elections, and an election re-run would prevent Osler from announcing its elected House Committee Members before the compulsory training scheduled for 6 September 2024.

[7] It is nonetheless evident from the facts that the Applicants were advised to approach this Court by the TEC on the 15th of August 2024 but elected to approach the Court on the 21st of August 2024. No valid reasons were provided as to why the Applicants did not approach this Court immediately after being advised to do so if they were indeed under the impression that the matter was urgent. It is therefore apparent that the urgency in this matter appears to be self-created to some extent.

² 08/05/24 para 5.

[8] However, as highlighted by this court in *Ex Parte Application of Electoral Commission*, the Court may depart from its ordinary rules either in terms of rule 8(1) or in terms of rule 3(4) of the Rules of Procedure of the Student Court. In this case, the Applicants failed to properly argue urgency under rule 8, but nonetheless, the Court did rely on rule 3(4) to depart from its rules in the interests of speedy relief. Rule 3(4) grants the Court discretion to dispense with its rules if it is in the interest of justice to do so to avoid foreseeable harm. The Court acknowledges that this is an election matter and according to section 127(4)(a) of the Student Constitution election matters must be handled with necessary speed if harm will otherwise result. The Court used its discretion to shorten the timeframe for filing documents as it considered the training due to take place on the 6th of September 2024 to ensure that the matter was addressed swiftly. That being so, the Court deems the matter urgent.

Eligibility requirements to run for Primarium and Vice-Primarium

[9] Before delving into the election process, it is important to determine candidacy requirements for re-election for the position of Prim and Vice-Prim. The fact that the outgoing Prim and Vice-Prim must participate in the internal elections for the incoming Prim might be misconstrued to mean that the outgoing members are prohibited from running for re-election. The Osler Constitution makes provisions for two main requirements for one to stand as a candidate for a position on the House Committee, these are outlined in section 2 of the Osler Constitution which states that:

“A candidate for a position on the House Committee must be a registered member of Osler PSO and must have been so for at least the full year in which the election in which he/she is a candidate, takes place. First-year students are not eligible for election as Members of the House Committee.”

[10] Additionally, section 2.1 of the Osler Constitution notes that "a candidate for the House Committee must have the required HEMIS." Therefore, it is clear on the face of it that the Osler Constitution does not prohibit running for re-election, it merely does not make provision for the procedure to be followed in the election process in such cases.

[11] The residence Rules echo the same sentiments when it comes to the candidacy requirements for the House Committee, under section 2.2 Members of the House Committee must qualify for readmission to the residence, must meet the academic criteria for leadership eligibility, and must not be subject to a disciplinary sanction precluding them from student leadership. It is therefore clear that running for re-election is also not prohibited under these rules. Consequently, this implies that the Prim and Vice-Prim who ran for re-election met the above requirements otherwise they would not have been able to run in the first place. Therefore, their previous office did not disqualify their candidacy in any way.

The election process for Prim and Vice-Prim

[12] It is crucial to highlight that the decision of the 2023/2024 Prim and Vice-Prim to run for re-election created a complex situation when it came to the election procedure. As highlighted above, the Osler Constitution makes no provision for the procedure to be followed in such circumstances. Under normal circumstances, the Prim and Vice-Prim are elected through an internal caucus as highlighted under section 4.1 of the Osler Constitution which notes down the following:

“Both the incoming and outgoing House Committee Members will have voting rights to elect the Prim, Deputy Prim, Secretary General, and Financial Manager after the candidates have made their requisite speeches and answered stated questions.”

[13] As already highlighted the above circumstances were unique, which in turn meant that there was a need to deviate from the normal ordinary rules, for had these rules been applied they would have resulted in an unfair and unjust outcome. It would have been a conflict of interest to allow candidates running for office to determine their fate and that of other candidates. Overall, this would have been against the principles of democracy, and free and fair elections. Considering that the Osler constitution is silent in this case, the Osler Election Committee was correct in its decision to turn to the Residence Rules. Section 2.1.3 of the Residence Rules states the following:

“In extraordinary circumstances, default election rules apply where the constitution of the PSO/Residence student community is insufficient to ensure an election.”

[14] It is clear therefore that the Resident Rules do provide for the election process in the event that the Osler Constitution has proven insufficient to ensure an election. The Residence Rules acknowledge under section 1.2.4 that "house rules remain subordinate to the Resident Rules," which is a testament that the Resident Rules take precedence over the Osler Constitution.

[15] It is important to highlight the meaning of extraordinary circumstances before going further. These are defined under section 2.3 of the Residence Rules as "circumstances over which Stellenbosch University has no control", these include "any situation determined as such by the CSC." The circumstances in this case thus qualify as extraordinary. The definition in the Residence Rules is broad and gives the CSC the discretion to declare a situation as extraordinary. Section 2.3.2 goes further to highlight the following:

"The RH/PSO coordinator, in consultation with the CSC and election committee, may implement all necessary steps to ensure that a fair election takes place."

[16] On the facts, the Chairperson of the Osler Election Committee approached the CSC for advice on the matter, and the CSC in accordance with the powers vested in them did allow for the election to take place through an open caucus as the circumstances were exceptional. Nothing under section 2.3.2 calls for public participation or the involvement of other stakeholders in the decision to implement all necessary steps to ensure that a fair election takes place. Thus, the fact that the broader Osler community was not consulted is irrelevant in this matter. The procedure here, for the sake of effectiveness, efficiency, and practical considerations, is not a democratic one requiring the vote of the Osler community. It is therefore without any dispute that the proper procedure that resulted in a fair election was followed, hence the applicants' allegations that there were procedural irregularities in the election are unfounded.

Election invalidation

[17] Since the elections followed the prescribed procedure in terms of the Residence rules, they cannot be declared invalid, unless the Applicant can prove that the

elections were affected in a material way as highlighted by the Constitutional Court (“CC”) in *Kham v Electoral Commission of South Africa* (“*Kham*”).³ This denotes that one cannot just call for the invalidation of an election without bringing forth evidence showing that the integrity of the election was undermined resulting in an unjust outcome that the election cannot be regarded as free and fair. A similar position was echoed by this Court in *Ex parte Electoral Commission* where it held that the invalidation of an election is “an extreme remedy.”⁴ This Court is also mindful of the oft-quoted *dictum* of Beukes CJ in *A.S. v Electoral Commission (Urgent Interdict)* that “Courts should generally be wary of intervening in the democratic process.”⁵

[18] Given the vast number of cases before this Court seeking similar remedies, this Court must remind the student body that mere dissatisfaction with an election outcome is no ground for approaching this Court and seeking the invalidation of an election. The prescribed test for election invalidation set out in *Kham* involves a value judgment that measures the nature of irregularity and its impact on the conduct and result of the election against the constitutional standard.⁶ To embark on this value judgment the court must therefore be presented with evidence to evaluate. In this case, the Applicants have not proven how the alleged “procedural irregularity” affected the freeness and fairness of the election process. They have done the bare minimum by providing this court with evidence that there was a departure from the normal way of holding an election. This is not to mention that the said departure which was lawful in terms of the Residence Rules.

[19] The general rule for proof is that “he who alleges must prove” on a balance of probabilities. The Applicants did not discharge this burden. Without such evidence, the Court cannot rule that the election was invalid.

TEC mandate and jurisdiction in decisions taken by the CSLL

[20] Neither party challenged the jurisdiction, scope, and mandate of the TEC. Nonetheless, there is a need to clarify this for future purposes, especially in cases that

³ 2016 2 BCLR 157 (CC) para 56.

⁴ 27/08/24 para 8.

⁵ 03/09/23 para 2.

⁶ 2016 2 BCLR 157 (CC) para 90.

involve decisions taken by the CSLL. To begin with, it is essential to highlight that the TEC under section 115 of the Tygerberg Student Representative Council Constitution (“Tygerberg Constitution”) “is an independent body that is not under the authority of any student organisation or University management.” Therefore, in simple terms, this denotes that TEC does not take orders from anyone for lack of a better phrase, and this includes the CSLL for purposes of maintaining the impartiality of the structure.

[21] The main role of TEC according to section 119 of the Tygerberg Constitution is as follows:

“The Tygerberg Electoral Commission must manage the elections of the TSR and monitor, audit, and investigate any complaint(s) related to the elections of the Tygerberg Academic Affairs Council, Tygerberg Prim Committee, Tygerberg Postgraduate Council, Societies Council, Societies and House Committees.”

[22] Section 120 of the Tygerberg Constitution further expands on what the investigative procedure of the TEC entails and it highlights the following:

“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 a Tygerberg Electoral Commissioner or respective Election Committee(s)/Commissioner(s), must be lodged with the Tygerberg Electoral Commission.”

[23] The scope of sections 119 and 120 of the Tygerberg Constitution is broad, the use of the word “any” denotes that there is no limitation for investigation in terms of election disputes. The CC in *Kham* citing *R v Hugo* noted the following when it comes to the use of the word “any”:

“‘Any’ is, upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject matter or the context, but prima facie it is unlimited.”⁷

[24] In *Kham*, the CC noted that the use of “any” meant that the Electoral Court could review each and every decision of the Electoral Commission unless there existed something in context that justified a more restrictive meaning.⁸ Therefore,

⁷ Para 39.

⁸ Para 39.

borrowing from the jurisprudence of the CC, it is clear from sections 119 and 120 of the Tygerberg Constitution that the only restriction to the TEC's power is that the matter must relate to elections, meaning the TEC is only restricted from investigating matters outside elections.

[25] There is therefore nothing under sections 119 and 120 preventing the TEC from investigating Electoral matters that involve decisions taken by the CSLL. The TEC ought not to confuse investigating an election with investigating the CSLL, it is obvious that the TEC does not have any power to review the general decisions of the CSLL. However, if the decision is related to elections, then they have the power to investigate and get answers from the CSLL. This does not undermine or overlook the powers of the CSLL as a university structure that oversees all student bodies falling under student governance. The TEC owes it to the general public to execute its investigative duties without fear, favour, or prejudices and whether the electoral disputes in question involve decisions taken by the CSLL is irrelevant.

[26] However, there is need to navigate such situations with caution to ensure that the TEC does not merely overlook the decision of the CSLL without seeking to understand its rationality simply because they are an independent body. There is need to ensure proper communication from both sides to avoid any confusion as is the case in the present matter. If the TEC and CSLL had communicated better throughout the TEC's investigation, the matter would not have come to the Court in the first place. This is not the first case where better communication would have resolved the matter without approaching the Court. Therefore, the Court notes that improvement in communication between the TEC, Electoral Commission more generally, and CSLL would greatly mitigate the risk of disputes arising, and in the event that they do arise, would likewise increase the likelihood that they are settled amicably before parties need to litigate in this Court. This would also go a long way to strengthening respect for the electoral process and the legitimacy of campus elections more generally. Such an aim falls squarely in the mandate of the TEC and Electoral Commission.

Conclusion

[27] For reasons discussed above, the Court concludes that given the extraordinary circumstances in this matter, the Election Committee in consultation with the CSC took the necessary steps to ensure that the election was fair. They followed the correct procedure as outlined under section 2.3.2 of the Residence Rules, which entailed consulting the CSC and obtaining permission to hold the election via an open caucus as opposed to an internal election. Thus, despite departing from the normal election procedure outlined in section 4.1 of the Osler Constitution, the election procedure did not in any way undermine the integrity of Osler's Election process.

Order

The Court therefore makes the following order:

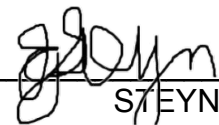
- [1] This Court has jurisdiction;
- [2] The matter is urgent;
- [3] The Osler elections for the 2024/2025 Prim and Vice-Prim are valid;
- [4] The TEC has jurisdiction over and can investigate all election-related matters within Tygerberg including those that involve decisions taken by the CSLL.



MUDZINGIRANWA J



BRYANT CJ



STEYN DCJ

MUDZINGIRANWA J



BESTER J



SWANEPOEL J