

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

4 August 2017

In the matter between:

MAXWELL MLANGENI

Applicant

And

CHAIR OF THE STUDENT REPRESENTATIVE COUNCIL

First Respondent

EXECUTIVE COMMITTEE OF THE STUDENT

Second Respondent

REPRESENTATIVE COUNCIL

JUDGEMENT HANDED DOWN BY THE STUDENT COURT

[Rutgers, J]:

INTRODUCTORY REMARKS

[1] It is important to note that Stellenbosch University's Student Court is a democratic structure, comprising of students that have been elected in terms of section 56 of the Stellenbosch University Student Constitution 2014 (hereafter referred to as the "Student Constitution").

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

[3] Lastly, this Court determines its own procedure, giving due consideration to the rules of natural justice and the need for the Court to be accessible. These functions are to be performed objectively, transparently and in the utmost good faith.¹

¹ S 55 of the Stellenbosch University Student Constitution 2014

FACTUAL BACKGROUND

[4] Due to the fact that the respondents have not responded to action instituted by the applicant, the applicant's notice of motion and his supporting affidavit, irrespective of the fact that it is incoherent and badly drafted, are presumed to be true. This is due to the fact that the respondents have failed to produce evidence to the contrary.

[5] On the 5th of May 2017, the SRC Executive Committee called for an emergency executive meeting. At the aforementioned meeting, at which the applicant was not present, the decision was taken, *inter alia*, to suspend the applicant from his position as vice-chairperson of the SRC. The suspension was communicated to the applicant by means of two letters. The reasons given for the aforementioned suspension were, *inter alia*: misconduct, unprofessional conduct, and the failure to fulfil his constitutional duties. The reasons set out in the letter were, however, extremely vague. The respondents alleged that they acted in terms of section 35(1)(d) of the Student Constitution, which gives the executive the power to make urgent decisions in situations where it is not possible to hold an SRC council meeting in order to make such a decision.

[6] The suspension was ended on the 9th of May 2017 at the common SRC meeting, at which the Executive Committee acknowledged that the suspension was unfair, unconstitutional and was made without any legitimate grounds. The applicant then requested written reasons for the suspension, with which the respondents have still failed to furnish him.

APPLICABLE LAW

[7] There is currently a great deal of uncertainty regarding the validity of the 2014 Student Constitution (version 2.4) and the Student Constitution of 2011 (version 2.2). The court, however, deems it unnecessary to decide on the validity of the Constitution, as there are no discrepancies between the two Constitutions regarding the sections relevant to the matter at hand. The court will thus use the numbering of the 2014 Student Constitution.

APPLICATION OF THE LAW TO THE FACTS

[8] The SRC is the highest representative and policy-making student body at Stellenbosch University that acts, or is supposed to act, in the best interests of

students.² The SRC, and the Chairperson, have a great deal of power, but with such power comes the responsibility to not abuse such power. The suspension of the applicant amounts to such an abuse of power, and has infringed various constitutionally protected rights of the applicant.

[9] The authority that the Executive Committee used for its decision, to suspend the applicant temporarily, is section 35(1)(d) of the Student Constitution, which allows the Executive Committee to make decisions in urgent matters where it is not practical to convene the SRC. Section 35(2) of the Student Constitution, however, provides that a decision taken in terms of section 35(1)(d) must be approved at a subsequent SRC meeting in order for it to come into effect. The aforementioned approval, however, never took place. The court therefore deems it appropriate to declare the Executive Committee's decision, to suspend the applicant as Vice-Chairperson of the SRC, invalid, as it is inconsistent with s 35 of the Student Constitution.

[10] Human dignity is a right that is at the core of South Africa's constitutional democracy and is entrenched in section 10 of the Constitution of the Republic of South Africa, 1996. In *S v Makwanyane*³, the court stated that recognizing the right of individuals to human dignity is an acknowledgement of the intrinsic worth of human beings.⁴ Similarly, the Student Constitution recognizes, and protects, the right of human dignity in section 6. Section 6 provides that every student has inherent human dignity, as well as having the right to have his, or her, dignity respected.⁵ The court will now turn its attention to whether the temporary suspension, as well as the letters of suspension, violated the human dignity of the applicant.

[11] In *Khumalo v Holomisa*,⁶ the court stated that, in order to be successful with a claim for defamation, the plaintiff must prove:

- “(a) the wrongful and
- (b) intentional

² S 19 & 21 of the Student Constitution.

³ 1995 (3) SA (CC)

⁴ *S v Makwanyane* para 328; M Loubser & R Midgley *The Law of Delict in South Africa* (2012) 320.

⁵ S 6.

⁶ 2002 (5) SA 401 (CC).

- (c) publication of
- (d) a defamatory statement
- (e) concerning the plaintiff⁷

In order for the publication element to be satisfied, it must be proven that, firstly, there has been communication of information to at least one person, other than the individual allegedly being defamed and, secondly, that the person to whom the defamatory information was conveyed appreciates the meaning of the material in question.⁸ The letter sent by the SRC executive, to the SRC body, states that the applicant, amongst other things, failed to perform his duties, was guilty of unprofessional and hostile conduct, and was, as a result suspended. It is therefore clear that there was communication, and there cannot be any doubt that the recipients understood the meaning that the aforementioned letter conveyed. The letter that the Executive Committee sent to members of the SRC body thus constitutes publication.

[12] The next aspect that the court needs to consider is whether the publication in question was defamatory. This involves a two-step inquiry. Firstly, the court must look at the meaning of the words, and secondly, whether such meaning is defamatory.⁹ To determine the meaning of the words, the reasonable reader test is used. A reasonable reader of the letter will understand the letter, and specifically the paragraphs referring to the applicant's failure to perform his duties, as well as his unprofessional conduct, to mean that the applicant is incapable of discharging the duties of his elected office. The test that courts use in order to determine whether the meaning of the words is defamatory is whether the words, or statement, lower the plaintiff's esteem in the opinion of right-thinking members of society, i.e. that a reasonable person would no longer view the applicant a suitable student leader in the campus community. The letter would have lowered his reputation as a student leader, and would have brought into question whether he conducts himself in a professional manner, in the opinion of right-thinking members of society, and is thus defamatory.

⁷ *Khumalo v Holomisa* para 18.

⁸ Loubser & Midgley *The Law of Delict* (2012) 20-21.

⁹ 21.

[13] Finally, there can be no doubt that the letter, and more specifically the allegations contained in the letter, are directed at, and concern, the applicant. As a result of the publication of the defamatory material concerning the plaintiff, wrongfulness and intention on the part of the respondents is presumed. Due to the respondent's failure to produce any evidence to the contrary, the presumption stands, and the publication is deemed to be wrongful and to have been made with the requisite *animus iniuriandi*. The court finds that the respondents defamed the applicant, and infringed his constitutional right to have his human dignity respected.

[14] The court will now turn its attention to the constitutionally entrenched right to administrative action. Section 14 of the Student Constitution states as follows:

“Every student whose rights or legitimate expectations are materially and adversely affected by any decision taken by a student body or a member of a student body, has the right to –

(d) request reasons for the decision and to be furnished with written reasons”¹⁰

[15] The SRC Executive Committee forms the core leadership of a powerful student body, namely the SRC. As such, the Executive Committee has the responsibility to justify the actions that it takes. The temporary suspension of the applicant materially and adversely affected his right to perform his constitutionally entrenched functions. The reasons given for the temporary suspension, in the letter that the Executive Committee sent the applicant, can, at best, be described as vague. Furthermore, the Executive Committee has failed to provide evidence of the applicant's alleged misconduct, the failure to perform his constitutional duties and his unprofessional and hostile behaviour. The applicant was thus justified in requesting further reasons for his suspension, and his subsequent reinstatement, in the letter he sent to the first respondent on 17 May 2017. Therefore, although the temporary suspension of the applicant was ended, it is the opinion of the court that, in order for the applicant, and the respondents, to move on from this debacle, the applicant be furnished with the information he requested in the aforementioned letter. This will enable the relevant parties to 'clear the air' and may also foster reconciliation. The court thus grants the applicant's request to be furnished with the reasons for his temporary suspension, as well as his subsequent reinstatement.

¹⁰ S 14

ORDER

[16] The court thus orders as follows:

[16.1] The decision to suspend the applicant temporarily from his elected position as vice-chairperson of the SRC is declared invalid, as it is inconsistent with the Student Constitution.

[16.2] The letter sent by the Executive Committee to members of the SRC body, in which it was alleged that the applicant was guilty of misconduct, unprofessional behaviour and failing to perform his constitutional duties, amounts to defamation by the respondents. The defamation infringes on the applicant's constitutionally entrenched right to human dignity. In order to restore the applicant's reputation amongst the SRC, and student body, the court orders the Executive Committee to issue a public apology to the applicant for defaming, and unconstitutionally suspending, him. This public apology should be made on at least one of the SRC's social media platforms, as well as an email to the SRC body. It is, however, not within the court's power to grant the applicant's wish that such apology be published in the campus newspaper, *Die Matie*.

[16.3] Lastly, in order to ensure that the applicant's right to just administrative action is protected, the court orders the respondents to furnish the applicant with full reasons as to why he was temporarily suspended and subsequently reinstated.

[Concurring: Macfarlane, A; Naidu, S; and van Hagt, S]

[Pagel, A]:

[17] I have had the benefit of reading the judgment prepared by Rutgers, J. I support the order reached, but differ on the interpretation of the law regarding s35(1)(d), and must address other matters left undecided in that judgment.

APPLICABLE LAW

[18] There is not a great deal of uncertainty about which version of the Student Constitution is valid. The Court must address this, albeit briefly. It is not directly relevant to this case, but is essential to restoring faith in the student governance structures at the University, especially considering the upcoming SRC elections.

[19] It has been suggested that the valid constitution is the 2011 Revision, version 2.2, and that the amendments in the 2014 Revision, version 2.4. are invalid. The supposed ground for invalidity is that the University's Council did not approve the 2014 Revision, as they did the 2011 Revision. Even if Council was required to approve the Student Constitution (which is not mentioned expressly in the Statute of Stellenbosch University),¹¹ Council approved the amendment process outlined in the 2011 version. The question simply becomes whether that process – which was endorsed by Council – was complied with.

[20] Chapter 12 of the 2011 Revision set out in sections 96 and 98. In order for the proposed amendments¹² to be valid, they had to be passed by ten members of the SRC and be accepted in a referendum.¹³ Documents reveal that the SRC adopted such a motion on 7 August 2014.¹⁴ These amendments were accepted, 1141 votes to 240, in a referendum held in 2014.¹⁵

[21] It is evident that the requisite votes were obtained, and that the students were in favour of the amendments. The amendment process was complied with, and the amendments are valid, as set out in the 2014 Revision.

¹¹ Government Gazette 34576, 31 August 2011.

¹² "Proposed Fundamental Student Constitution Amendments" available at <http://www.sun.ac.za/english/management/src/Documents/Archive/Referendum%20Proposed%20Fundamental%20Student%20Constitution%20Amendments.pdf>.

¹³ Sections 96(2) and 98(1) of the 2011 Revision.

¹⁴ "Minutes of the SRC – 7 August 2014, item 9.

<http://www.sun.ac.za/english/students/student-court/Documents/7%20Aug%202014%20SRC%20Minutes.pdf>.

¹⁵ <http://www.sun.ac.za/english/students/student-court/Documents/SR2014%20Final%20Results.pdf>.

URGENCY

[22] The applicant provided no reasons whatsoever as set out why the application was urgent. Merely stating that the application is urgent does not make it so.

SUSPENSION IN TERMS OF SECTION 35(1)(D)

[23] The applicant has sought an order against the incumbent Chair of the SRC. It is appropriate to distinguish a person who holds an office from that office. All the letters concerning the suspension were signed by the Executive Committee collectively, not the Chairperson alone. Accordingly, the claim must be understood as a claim against the Executive Committee.

[24] In *Minister of Education v Harris* a unanimous Constitutional Court held that when an administrator relies specifically on an empowering provision, the unlawfulness of that act cannot be rescued by reference to another empowering provision.¹⁶ On page two of the suspension letter sent to the applicant by the Executive Committee, reference was made to “Section 35:3:3”. The letter then continues to quote Section 35(1)(d), which reads “The Executive Committee makes important decisions in urgent cases where it is not practically feasible to convene the Student Representative Council”. On a reasonable understanding of the letter, it is clear that the authority on which the respondents rely is in fact s35(1)(d).

[25] Does s35(1)(d) empower the Executive Committee to suspend a member of the SRC? I think not. Section 35(2) requires that a decision made in terms of s35(1)(d) must be approved by the SRC to come into effect. This means that a decision made in terms of s35(1)(d) must within the power of *the SRC* to begin with. The section cannot be understood to allow the SRC to approve decisions it was not capable of making itself. This would allow the SRC to usurp powers not otherwise in its mandate, simply by reason that the Executive Committee made such a decision. Indeed, that is why s35(1)(d) says “where it is not practically feasible to convene the Student Representative Council”. It is implied – if not stated expressly, yet indirectly - that the scope of “important decisions” in s35(1)(d) can only extend to important decisions which the SRC is capable of making.

¹⁶ 2001 4 SA 1297 (CC) para 18.

[26] Section 23(2) of the Constitution contemplates a failure of a member to comply with the provisions of the Constitution. It provides that if a member of the SRC fails to comply with the Constitution, the Student Court may “discharge” the member from office. A “suspension” – as phrased by the respondents – amounts to a discharging of the members duties. This can only be done by the Student Court, if an order of the Court is not complied with. It does not help the respondents’ case that Section 25, which deals with the termination of membership, makes no mention of the dismissal by the SRC. If the intention was that the SRC, or the SRC Executive Committee was also empowered to do so, the Constitution would have made express provision therefore. Thus, the SRC does not have the power to suspend its members. Accordingly, the SRC Executive Committee does not have the power to suspend its members. It is inconsequential whether or not the SRC later approved the decision or not, and a lack of such approval is not the reason for the decision’s invalidity.

[27] It is unnecessary to decide whether the applicant did or did not fail to fulfil his duties in terms of the Constitution. It was never within the Executive Committee’s power to discharge him of his duties. The appropriate steps would have been to approach the Student Court in terms of s23(2)(a). The suspension of the applicant is thus invalid and must be set aside. The effect of this is that the member was never suspended.

DEDUCTION OF HONOURARIUM

[28] The Student Court may, upon application by a student, grant an order to be complied with and discharge a member if they fail to comply with the order.¹⁷ This may be considered by the Evaluation Panel when deciding on honorarium.¹⁸ A careful reading of s23(2)(a) will show that the Student Court does not have the power to discharge members upon application, but will only have such a power *if that order is not complied with*. Furthermore, the Court does not have the power to direct the Evaluation Committee’s meetings.¹⁹ The applicant’s claim must therefore fail.

¹⁷ Section 23(2)(a).

¹⁸ Section 23(2)(b).

¹⁹ Section 44 confers this right to the Director of the Centre of Student Structures and Communities.

[29] If any member of the Executive Committee does not comply with *this* order, and an order is granted in terms of s23(2)(a), the Evaluation Committee would be free consider that in deciding on the member's honorarium.

RIGHT TO JUST ADMINISTRATIVE ACTION AND DEFAMATION

[30] I concur with Rutgers, J's analysis of the points of defamation and right to just administrative action. The order granted in this regard is accordingly fair and equitable.