IN THE APPEAL COURT

OF THE STUDENT COURT OF STELLENBOSCH UNIVERSITY

In the matter between:

BERNARD PIETERS	First Appellant
ASHWIN MALOY	Second Appellant
THEA BESTER	Third Appellant
FRANCOIS HENNING	Fourth Appellant
JACOBUS MAASS	Fifth Appellant
NETANJE VAN NIEKERK	Sixth Appellant
SELMIE CROUS	Seventh Appellant
and	
NEIL DU TOIT	First Respondent
ROCHELLE ELLA JACOBS	Second Respondent
MARC RUDOLPH	Third Respondent

JUDGMENT

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[1] This is an appeal against the whole of the judgment by the Student Court of Stellenbosch University handed down on 17 August 2016, with reasons provided on 22 August 2016. The appeal to this court is brought in terms of section 70 of the Stellenbosch University Student Constitution (2014 revision, final version 2.4; the 'Student Constitution').

[2] For purposes of uniformity and clarity, the seven appellants in this matter, who are also the first to seven respondents *a quo*, will be referred to as the 'candidates', and the first appellant will be referred to as 'Mr Pieters'. The three respondents, who were the first and second applicants as well as third intervening applicant *a quo*, will in turn be referred to as the 'complainants', and the first respondent will be referred to as 'Mr du Toit'. The judgment of the Student Court refers to an eighth appellant, the Election Convenor, Mr Calumet Links, who is not a party to this appeal.

[3] The judgment of the Student Court of 17 August 2016 (hereafter the 'final judgment') essentially held that the 2016/2017 Student Representative Council elections were declared void ab *initio*, and had to commence *de novo,* and that the candidates were disqualified from standing in any further Student Representative Council 2016/2017 elections.[1] The final Student Court judgment followed an earlier judgment of 1 August 2016 (the 'first Student Court judgment), of which more will be said presently.

[4] The candidates have approached this Appeal Court to substitute the order in the final Student Court judgment with an order that allows the Election Convenor to ensure that voting in the Student Representative Council election which was due to commence on 2 August 2016 re-commences, and that the candidates are reinstated as eligible candidates for the 2016/2017 Student Representative Council elections. The candidates further seek an order that the Student Court not interfere with, and be interdicted from interfering with the 2016/2017 Student Representative Council Election 'in any manner whatsoever, save as provided for in the Stellenbosch University Student Constitution'.

Background

[5] Early in the morning of 1 August 2016, Mr du Toit, lodged a complaint of 'election fraud' with the Election Convenor regarding the candidates' campaign. However, shortly thereafter he also approached the Student Court by way of a message which requested an interpretation on whether an application for invalidating the candidacy of a student in the election could be brought while investigations against such a candidate by the Election Convenor were still under way. For purposes of expediency, Mr du Toit attached founding papers in support of such an application, if the Student Court's interpretation was that such an application could indeed be brought.

[6] These founding papers contained a number of complaints against the candidates. One of these was a complaint that a decision of the Election Convenor in regard to campaigning in the Neelsie on 19 July 2016 had to be set aside. This the Student Court did not do in its first judgment, but in its final judgment it confirmed the Convenor's ruling.[2] There is no cross-appeal against this finding, and it will therefore not be considered further here.

[7] The founding papers further contained complaints regarding the alleged contravention of election rules on the use of campaign posters, adherence to expenditure limits, and attendance of caucuses. The relief requested by Mr du Toit

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[1] It reads: 'a) The 2016/2017 Student Representative Council elections pertaining to the members as referred to in section 19(a) of the Student Constitution of Stellenbosch University, is hereby declared void ab initio, and must commence de novo; and (b) Respondents 1 to 7 are disqualified from standing in any further Student Representative Council 2016/2017 elections as referred to in (a) above'.

[2] Para [43] of the final judgment of 17 August 2016.

was that it be declared that the candidates[3] contravened election rules, and that their candidatures had to be declared invalid.

[8] As indicated, later on 1 August 2016, the Student Court handed down its first judgment in response to these complaints. The candidates were not present at the hearing which preceded this judgment, and considerable disputes exist about what exactly transpired in the processes whereby they were supposed to be notified of the hearing. For purposes of convenience, the following part of this first judgment is quoted here:

> '[6] This Court is convinced on a balance of probabilities that a number of irregularities pertaining to the processes of the impending SRC elections, and specifically the campaigns of Respondents 1 – 8, have occurred. The interim order is thus as follows:
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> [7] Firstly, the candidature of Respondents 1 – 8 is forthwith suspended, conditional on the contents of paragraph [8] of this judgment.
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> [8] Secondly, it is the view of this Court that the 2016 / 2017 SRC election process, due to commence on 2 August 2016, is postponed in the interests of fairness to all candidates. The re-commencement of the SRC election process is subject to the following:
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> > a) an investigation into the compliance of Respondents 1 – 8 with Schedule 1 of the SC by the Election Committee ("EC") referred to item 2(1) of Schedule 1 of the SC;
> >
> > b) a formal report pertaining to, inter alia, campaign posters, electioneering, monetary limits and attendance of caucuses, compliance with the Election Rules and the SC, compiled by the EC and presented to the Court for ratification within 5 (five) academic days; and
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> > c) ratification of this report, to be made public by the Court.
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> [9] Thirdly, all SRC election campaign posters not satisfying the requirements prescribed by election rules must be removed by 17:00 on Tuesday, 2 August 2016.
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> [10] Non-compliance with this interim order will result in the Court invoking item 26(3)(d)(iv) of the SC, with the implication that the election process as a whole will be invalidated.'

[9] The order above indicates that the Student Court made certain findings 'on a balance of probabilities' of irregular conduct by the candidates, and then suspended their candidatures and postponed the elections. However, it further made the suspension and the re-commencement of the elections conditional on the Student Court ultimately 'ratifying' a report which the Election Convenor had to compile after investigating compliance by the candidates of Schedule 1 of the Student Constitution, which deals with the Student Representative Council general election. The Student Court in its final judgment explained that 'the reason for ordering this investigation by the Election Convenor is due to the fact that the EC is in a better

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[3] A complaint was also directed against a Roderick Leonard, who was listed as the seventh respondent in the founding papers, but he is not a party to these proceedings.

position to investigate, due to his integral knowledge of the election process. A further aim of this investigation was to give the Respondents 1-7 the opportunity to state their case.'[4]

[10] In interpreting the order, it must be understood that it was formulated under some time pressure. But unfortunately the import of the order, and especially the meaning of 'ratification' in this context is not clear. Presumably the implication was that if the Election Convenor's report confirmed the irregularities, and the Student Court agreed with the report, the candidacies would be permanently suspended, and the elections would continue without them. Conversely, if the candidates were exonerated, and the Student Court agreed with this finding, their candidacies would be restored, and elections could continue with them.

[11] A few days later, on 5 August 2016, the Election Convenor provided a report in which it declined to conduct the investigation ordered by the Student Court. The Election Convenor's explanation was that the complainants should have exhausted the internal remedy of allowing him to conduct and complete an investigation, before approaching the Student Court. He further stated that:

> 'no finding made by the EC at this stage will be deemed as objective in the light of the court [the Student Court] having already been convinced "on a balance of probabilities" and without the Convenor being adequately informed, as he was not provided with an opportunity to hear the other side …'[5]

[12] Subsequent to the Student Court's first judgment, Mr du Toit became concerned about further alleged contraventions by the candidates, i.e. after the election had been suspended. Mr du Toit lodged further complaints in this regard directly with the Student Court. This is understandable, as he had been given the interpretation by the Student Court that it would indeed be willing to receive complaints and grant orders (even if they are only of an interim nature), without these complaints first having to be decided on by the Election Convenor. This second group of complaints related to alleged insults to the Rector's managerial team, a failure to remove contraband posters, continued campaigning and contempt for the Student Court and Election Convenor.[6]

[13] Not having received the report from the Election Convenor, and facing these further complaints, the Student Court made attempts to arrange a second hearing. This second hearing took place on 16 August 2016, and the Student Court gave the second judgment with the order set out above. The candidates did not attend this hearing. Their position, also argued on appeal, was that a taint attached to the first judgment, and that they were not willing to appear before the Student Court. However, the candidates had resorted to other avenues of relief. They lodged an

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[4] Para [18] of the Student Court's final judgment.

[5] Para 7 of the Convenor's Report to the Student Court Related to the Interim Court Order handed down on 1 August 2016.

[6] See paragraphs [24] and [53] to [63] of the final Student Court judgment

appeal against the first judgment, but this appeal was dismissed by our colleagues Professors Quinot and Liebenberg due to its interlocutory nature. They further launched a High Court application, inter alia seeking to have the order in the first judgment set aside and the candidates reinstated, but this matter was subsequently postponed by agreement, pending the hearing of this appeal.

Right to legal representation

[14] Before proceeding further, a preliminary question has to be addressed. The agreement entered into by the parties in the High Court application, which was made an order of the High Court on 19 August 2016, states that this Appeal Court shall determine, "whether if the Applicants [i.e. the candidates] request so, the Applicants are permitted to be represented by external lawyers at any appeal hearing". Such a request has indeed been made,[7] and the complainants have indicated that they do not oppose this request. This Court has in the circumstances allowed all parties to make use of legal representation.

Locus standi

[15] According to section 64(1) of the Student Constitution, students and student bodies can bring cases before the Student Court.[8] It has not been placed in dispute that the complainants are indeed students. However, the candidates have argued that the Student Court erred in affording the complainants *locus standi*, since, according to the candidates, the complainants failed to exhaust an internal remedy of first approaching the Election Convenor.[9] The question whether there was indeed such a failure has also been raised by the candidates as a problem relating to jurisdiction and as one of the main grounds of appeal, and will be considered in more detail below.

Jurisdiction

[16] According to section 69(1) of the Student Constitution, the Appeal Court hears appeals against the decisions of the Student Court. The jurisdiction of the Student Court, according to section 62, in turn includes the power to

> (a) give an interpretation, or to confirm the interpretation of a party before the Court, regarding –
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> (i) this Constitution; or
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> (ii) any empowering provision in terms of which a student body or a member of a student body exercises power;
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> (b) decide on the constitutionality of any action or omission of a student body or a member thereof;

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[7] Para [3] of the Supporting Affidavit of Pieters to the notice of appeal.

[8] Para [5] of the Du Toit founding papers states that the applicants have *locus standi* in terms of section 62, but this provision is more concerned with jurisdiction, which is dealt with below.

[9] Para [39] of the Supporting Affidavit of Pieters to the notice of appeal.

(c) review any decision of a student body or a member thereof whereby the rights or legitimate expectations of a student or group of students are materially and adversely affected;
(d) make a final decision regarding any matter where the parties consent to the jurisdiction of the Court; and
(e) decide on all other matters which this Constitution places under the jurisdiction of the Student Court.

[17] As far as section 62(e) is concerned, one of the specific matters which the Student Constitution places under the jurisdiction of the Student Court is dealt with in Schedule 1 item 26(2) of the Student Constitution. Since item 26 is central to the appeal, its first two paragraphs are set out in full:

'26 Complaints
(1) A complaint about the campaign of a specific candidate must be lodged with the Election Convenor(s), who must properly investigate the complaint and must announce his or her decision within twenty-four (24) hours after the complaint was lodged.
(2) Any complaint about the running of the election, including any aspect that may jeopardise the freedom or fairness of the election, and any decision or failure to make a decision by the Election Convenor(s), must be lodged with the Student Court –
(a) within a reasonable time;
(b) before the third (3rd) University day (inclusive) after the announcement of the results; and
(c) in accordance with the rules of the Student Court.

[18] In the present matter, the complainants *inter alia* requested the Student Court to rule on the interpretation of the above-mentioned provision. This suggests that the Student Court at least had jurisdiction in terms of section 62(a), which allows for it to give interpretations. However, in the expectation that such a ruling would also allow them to lodge a complaint with the Student Court under item 26(2), the complainants lodged such a complaint with the Student Court. According to the candidates, on their interpretation of item 26, the Student Court did not have jurisdiction to hear such a complaint. This key ground of appeal will enjoy more detailed consideration below.

[19] But before doing so, one further issue relating to whether the Student Court and this Appeal Court have the power to hear the matter has to be addressed. Section 65 of the Student Constitution essentially states that the Student Court determines its own procedure and that it must, after following certain procedures, adopt rules that set out its procedure. Section 71 in turns states that the procedure of the Appeal Court is the same as that of the Student Court, with the necessary adjustment. It is common cause that no such rules of procedure have been adopted. Apparently, rules are in the process of being drafted, but there is no indication by when this will be finalised. The most recent version of the Student Constitution was adopted some time in 2014. It is unfortunate that over at least more than one and a half years there

still are no rules of procedure. The candidates have on the papers maintained that the absence of the rules is fatal to the Student Court's jurisdiction (and presumably also the Appeal Court's jurisdiction) to hear this matter. However, at the hearing of this appeal, counsel for the candidates indicated that, as unfortunate as it may be that the rules have not been adopted, it is not their case that the Student Court and this Court therefore do not have the jurisdiction or power to hear the current matter. In the circumstances, it need not be determined whether the fact that rules have not yet been adopted disqualifies the Student Court and the Appeal Court from hearing the matter.

The objection that the complainants failed to exhaust their internal remedies, or that the Student Court acted ultra vires by 'usurping' the powers of the Election Convenor

[20] We now turn to a ground for appeal, which has featured prominently in the matter. The objection is in essence that the complainants failed to exhaust their internal remedies, in other words that they should first have awaited a decision of their complaint by the Election Convenor, and only if they had been dissatisfied with such a decision, should they have taken this objection to the Student Court. The associated objection is that the Student Court in turn acted *ultra vires* when it did not first allow the Election Convenor to investigate a complaint and reach a decision. In other words, the objection is that the Student Court assumed concurrent jurisdiction, or, to put it more strongly, 'usurped' the powers of the Election Convenor.

[21] Understanding this complaint requires a closer examination of the wording of item 26(1) and (2), quoted above. To the candidates, the interpretation is straight-forward: parties with complaints about the campaign of a specific candidate must first direct these complaints to the Election Convenor (under item 26(1)). This is the internal remedy. And if they are not satisfied with a decision or failure to make a decision by the Election Convenor(s), they must in turn lodge a complaint to the Student Court.

[22] The Student Court in para [29] focused on the broad wording of the first part of item 26(2), which states that 'any complaint about the running of the election, including any aspect that may jeopardise the freedom or fairness of the election … must be lodged with the Student Court'. It then held that the complaint before it dealt with issues that are against the 'freedom and fairness' of an election, which implies that the Student Court should have concurrent jurisdiction over such a complaint.[10] The difficulty, though, is that certain considerations call into question whether the wording of item 26 makes such a broad interpretation tenable.

[23] The first consideration relates to the use of the word 'must' in item 26. In item 26(1) its use indicates that a complainant does not have a choice to approach either the Election Convenor or some other entity. All complaints must be lodged with the

[10] See para [31] of the final Student Court judgment.

Election Convenor. But the first part of item 26(2) also states that complaints which fall within its ambit 'must' be lodged with the Student Court. If it is correct that the first part of item 26(2) should be interpreted broadly also to cover complaints about the campaign of a specific candidate (i.e. if it also covers the terrain of item 26(1)), the logical, but untenable consequence would be that persons with such complaints 'must' lodge them with *both* the Election Convenor and the Student Court. This consequence is not only highly impractical, but difficult to reconcile with the second part of item 26(2), which states that 'any decision or failure to make a decision by the Election Convenor(s), must be lodged with the Student Court …'.

[24] But the difficulties with the broad interpretation do not stop there. If the Student Court could embark on its own parallel investigation, and make its own determinations on complaints this may, even if only provisionally, open the doors for the Student Court to indicate how it views complaints prior to any decision being made by the Election Convenor. In the present matter, for example, the Student Court stated that it is convinced that certain irregularities had occurred 'on the balance of probabilities'. Once such a determination is made by the Student Court, this could potentially undermine the Election Convenor's ability to investigate complaints freely, and without the apprehension that its findings will in due course (inevitably) be overturned by a Student Court which already has indicated, again even if only provisionally, how it views the merits of the complaint.

[25] The broad interpretation does not only place the Election Convenor in a difficult situation. It also subjects candidates whose conduct is being investigated to the practical difficulty of having to face the same complaint on two different fronts at the same time, a jeopardy which is exacerbated when, as in the present matter, the complaints are treated as urgent.

[26] The wording of the first part of item 26(2) can be interpreted in a way which resists such a broad interpretation, as it refers to 'any complaint about the running of the election', and not to any complaint relating to the election. The word 'running' appears to refer to the management of the election by the Election Committee, together with and under the supervision of the Election Convenor.[11] In terms of this narrower interpretation, the Student Court may not, ordinarily, be seized of a complaint about the campaign of a specific candidate. However, its jurisdiction in terms of the first part of item 26(2) is triggered if a complaint relates to any aspect of the running of the election by the Election Committee and/or the Election Convenor. Such a complaint could relate to the exercise of any of their duties under Schedule 1 to the Student Constitution, including, for example, the duties to organise polling stations[12] or presentation meetings,[13] or to ensure that candidates do not campaign

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[11] Item 2(2) provides: 'The Election Committee, in cooperation with and under the supervision of the Election Convenor(s), must ensure that the Student Representative Council election runs smoothly.'

[12] Item 20.

[13] Item 23.

in a way that violates any applicable law, the Student Constitution or the rules laid down by the Election Convenor.[14]

Exceptional circumstances justifying not exhausting internal remedies

[27] In the light of these considerations item 26 has to be interpreted to mean that a party who wishes to complain about the campaign of a specific candidate must first lodge a complaint with the Election Convenor, and that once this decision has been made, or the Election Convenor failed to make a decision, such a party may in turn lodge a complaint against such a decision or failure with the Student Court.

[28] However, in his Heads of Argument, Mr Du Toit raised a further interesting argument, which, if successful would warrant the conclusion that the Student Court may decide a complaint, even if the internal remedy of approaching the Election Convenor has not been exhausted. Mr Du Toit pointed to a principle of administrative law that in exceptional circumstances parties may be excused from exhausting internal remedies.[15] In this regard he referred[16] to *Nicol v Registrar of Pension Funds*[17] in support of the proposition that the standard for departure from the internal remedy is that there should have been exceptional circumstances which are 'such as to require the immediate intervention of the courts rather than to resort to the applicable internal remedy.'[18] The Constitutional Court has also confirmed in *Koyabe v Minister of Home Affairs*[19] that internal remedies need not be exhausted when, for example, it would be ineffective or futile to pursue, or when an internal tribunal developed a rigid policy.

[29] In this regard Mr du Toit, apart from indicating in argument a general dissatisfaction with the way in which past complaints were dealt with by the Election Convenor, expressed a concern that the Election Convenor would not be able to act sufficiently swiftly to deal with the complaint prior to voting commencing, whereas the Student Court would be able to provide urgent relief, such as order a postponement of the election process. In his answering affidavit, Mr du Toit also pointed out that the 'primary motivation' for approaching the Student Court prior to the finalisation of the complaint was the apprehension that the matter would have to be finalised before the initiation of voting, 'or at least that such finalisation would be preferable and in the interest of justice …'.[20]

[30] It is not apparent, though that the internal remedy of approaching the Election Convenor was so lacking or insufficient that the immediate intervention of the Student Court was called for. In his report, the Election Convenor maintained that he

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[14] Item 22(1).
[15] See para [74] of Respondents' Heads of Argument.
[16] See para [75] of Respondents' Heads of Argument.
[17] 2008 (1) SA 383 (SCA).
[18] Para [16] (per Van Heerden JA).
[19] 2010 (4) SA 327 (CC) para [39].
[20] See para 32(e).

had the powers to delay commencement of the elections, pending the finalisation of the investigation into the complaint received from Mr du Toit on 1 August 2016.[21] It is not essential for purposes of this appeal to determine whether the Election Convenor does indeed enjoy such powers, but there can be no doubt that, under Schedule I item 22(3), he is at least empowered to declare a candidate's candidature invalid in the case of a misdemeanour, or where conduct is seriously detrimental to another candidate. This drastic form of relief could potentially have been provided in response to the complainants' allegations of transgressions of the election rules, irrespective of whether voting had started. It was not essential for voting to be postponed to provide the complainants with the very remedy they sought, namely the disqualification or removal of the candidates from the election.

[31] In this regard it is also not without significance that the founding papers do not contain any express request that the Student Court *had to* make an order postponing voting pending such a finalisation of the complaint. The relief expressly requested was disqualification of the candidates.

[32] Ultimately, it is therefore not apparent that sufficient grounds existed for an exceptional departure from the principle that internal remedies have to be exhausted. This is also illustrated by the *Nicol* case, which Mr du Toit referred us to.[22] Here the reason why the aggrieved party did not want to resort to an internal remedy was that it believed that the body which was supposed to provide the internal remedy (the FSB Appeal Board) was unable to fulfil its functions. However, the court in *Nicol* disagreed with this assessment, and hence dismissed this reason for failing to approach this body first. In the present matter there is also no indication that the Election Convenor was unable to deal with the complaint. The mere fact that the voting process was imminent did not deprive the Election Convenor of any of his powers to act against a contravening candidate. And, one may add, there is also no indication that other exceptional grounds referred to in the *Koyabe* decision above exist, such as that it would be futile to pursue a complaint with the Election Convenor, or that he developed a rigid policy.[23]

[33] There is also a further difficulty with the urgency exception. Even if urgency was present, it is not conclusive. The court in *Koyabe* confirmed that it may be beneficial to require internal remedies to be exhausted where the bodies that have to be approached first are well-situated to investigate and gather information. These investigations could in turn benefit the decision-making of the bodies that may subsequently be approached for relief.[24] This benefit was in fact recognised in the final judgment of the Student Court, which expressly confirmed the practical desirability of having the Election Convenor first investigate complaints, given his

[21] Para [6] of the Convenor's Report of 5 August 2016.
[22] See para [75] of the Respondents' Heads of Argument.
[23] *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) para [39].
[24] *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) para [37].

greater ability to do so.[25] In this regard the present matter also differs from the *Nicol* case, where a decision was already made by an official (the executive officer of the FSB), and the aggrieved party did not want to resort to the internal remedy of lodging an appeal to an appeal board (the FSB Board of Appeal), preferring instead to approach the courts. In the present matter, no initial decision was made by the Election Convenor, against which an application for an internal appeal or review could have been brought.

Procedural fairness

[34] The candidates argued that the Student Court failed to adhere to the principles of natural justice, in that it did not afford them a proper chance to state their case and on two separate occasions made findings in their absence which adversely affected them. Against this, Mr du Toit pointed out that, prior to both hearings, the candidates were invited to make representations but declined to do so. He argued, first, that they were given a sufficient opportunity to appear at the initial hearing, where the Student Court in any event only made a provisional order. Secondly, they were given ample opportunity to prepare their case ahead of the final hearing. In his view, this opportunity was enough on its own to satisfy the requirements of natural justice.

[35] The case for the candidates appears to rest on two arguments. The first is that it is sometimes not enough to afford a person a hearing before a final decision is taken. Sometimes, the rules of natural justice must also be complied with where a preliminary decision is taken which affects the person's rights, or lays the necessary foundation for a final decision which may have adverse results.[26] It was argued that the first hearing had grave consequences for the candidates, as it resulted in the suspension of their candidatures, and that they were not given enough time to prepare for the hearing, which was held on the same day that they were notified of the charges.

[36] The second argument is that the fairness of the entire process was tainted by the procedural irregularities which allegedly occurred at the time of the first hearing, and which rendered the candidates' participation in any further proceedings meaningless. In this regard, reliance was placed on the fact that procedural rules had not been adopted, and that in the absence of such rules, the Student Court made up its own procedures as it thought fit. It was further argued that the procedures that were adopted in this case were indicative of an improper motive on the part of the Student Court.

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[25] See para [18] of the final Student Court judgment.

[26] In this regard, we were referred to the judgments in *Nortje and Another v Minister of Correctional Services and Others* 2001 (3) SA 472 (SCA) para [19] and *Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters Mpumalanga and Others* 2008 (2) SA 570 (T) paras [24] and [25].

[37] In view of our finding above that the Student Court should have awaited the Election Convenor's report, and should not have assumed jurisdiction to hear the complaint in terms of item 26(2), it is not necessary for us to decide whether the rules of natural justice have been complied with. It is nevertheless important to respond to the allegations that the Student Court had improper motives or manipulated its procedures in order to reach a certain political outcome. In our view, these allegations are unfounded. The candidates were given an opportunity to present their case during both hearings, and the fact that they declined to do so is not indicative of a lack of impartiality on the part of the Student Court. Although there may be certain concerns about the short notice that was given prior to the initial hearing of 1 August, this is understandable in view of the perceived urgency of the matter, as the elections were scheduled to start on the next day. Moreover, the Student Court postponed its final hearing from 12 August to 16 August to secure the candidates' participation. We have no reason to believe that this was done for any other reason than a genuine concern to afford the candidates a fair chance to present their case before a final decision was reached.

The decision to disqualify the candidates

[38] The candidates argued that the Student Court exceeded its powers, first by suspending their candidature in its interim order of 1 August, and then, in its final order, by disqualifying them from further participation in the 2016/2017 Student Representative Council elections. In the view of the candidates, the Student Court does not have such powers, as it is only the Election Convenor who is given the authority to declare any candidature invalid.

[39] It is clear from item 26(3)(d) that the Student Court has far-reaching remedial powers relating to elections. The Court may 'grant any remedy that is fair and equitable in the circumstances and will ensure the freeness and fairness of the election'. Such remedies may include, but are not limited to: '(i) setting aside a decision by the Election Convenor(s); (ii) the invalidation of the results with regard to a specific candidate(s); (iii) the invalidation or allowance of ballots; or (iv) the invalidation of the election as a whole.' Given the breadth of its remedial powers, it is likely that the Student Court may also declare the candidature of a candidate invalid. However, in view of our finding above concerning the relationship between items 26(1) and (2), the Court can exercise that power only after the Election Convenor has had the opportunity to consider the matter.

The decision to declare the election void

[40] The candidates argued that the Student Court has no authority to suspend voting or to declare that an election must commence *de novo*. However, item 26(3)(d)(iv) expressly provides that the Student Court may invalidate an election in its entirety ('as a whole'). Moreover, given the Court's wide remedial powers, it also seems likely that the Court has the power to suspend voting temporarily. However, in

view of our finding that the Court should have awaited the Election Convenor's report, the decision that the election must start *de novo* or afresh must be set aside together with the rest of the Court's order.

Relief

[41] We have indicated above that the Student Court should not have assumed jurisdiction to hear the complaint in terms of item 26(2) prior to a decision by the Election Convenor. However, the problem remains that potentially legitimate complaints about transgressions of election rules still have not been investigated by the body that constitutionally bears this duty, namely the Election Convenor. That the Convenor was unwilling to continue with the investigation in the light of the Student Court's first judgment, which indicated that the latter assumed concurrent jurisdiction, is understandable, but at the same time regrettable. This situation has to be set right. Requiring the Election Convenor to consider the complaints that have been lodged with him will enable both sides to be heard. The Election Convenor can also now investigate in the knowledge that the orders of the Student Court no longer stand, and decide on appropriate relief. It is further necessary that the Election Convenor provides a sufficiently detailed report justifying his decision. If there is dissatisfaction with his decision, the Student Court can still be approached under the second part of item 26(2). Without its previous rulings in place, and with a report from the Election Convenor, the Student Court in turn can properly apply its mind to considering these complaints.

[42] In the previous paragraph, reference was made to complaints which the complainants already lodged with the Election Convenor (i.e. on 1 August 2016). However, as stated earlier, the complainants also lodged a number of subsequent complaints with the Student Court and not, as far as we are aware, with the Election Convenor. These complaints are referred to in paragraphs [53] to [63] of the final Student Court judgment. It has been held above that the complainants were not entitled to lodge complaints with the Student Court, and first had to approach the Election Convenor. However, the complainants have been under the *bona fide* but incorrect impression, created by the first Student Court judgment, that they could lodge further complaints directly with the Student Court. In the circumstances, the complainants should be provided the opportunity to lodge these complaints with the Election Convenor, if they so desire. However, as far as the complaints of continued campaigning are concerned, it must be borne in mind that, due to the Student Court's lack of jurisdiction or authority to hear complaints in terms of item 26(2), it could not validly have made the initial order to postpone the election, or the final order that it must start *de novo.*

Order of non-interference

[43] As stated earlier, the candidates have also requested the Appeal Court to make an order that the Student Court should not interfere with the 2016/2017 Student

Representative Council Election, save as provided for in the Stellenbosch University Student Constitution. It is not apparent, though, that such an order is warranted. The Student Court had to make difficult decisions under limited time constraints. Although these decisions may have been prejudicial to the candidates, this Court has not made any findings of irregular conduct, such as bias towards the complainants, which potentially could have been a basis for such relief. Consequently no such order is granted.

Order

[44] The decision of the Student Court of 17 August 2016 is set aside and replaced with the following order:

1. The Respondents [i.e. the seven appellants on appeal] are reinstated as eligible candidates for the 2016/2017 Student Representative Council elections;

2. The Election Convenor [the Eighth Respondent *a quo*] is to commence forthwith with investigating the complaints lodged by the applicants on 1 August 2016, with the exclusion of the complaint relating to campaigning in the Neelsie on 19 July 2016;

3. The Applicants [i.e. the three respondents on appeal] are given the opportunity to lodge the complaints which they addressed to the Student Court after 1 August 2016 [i.e. the complaints referred to in paragraphs [53] to [63] of the final Student Court judgment], with the Election Convenor by 17:00 on Monday, 12 September 2016;

4. The Election Convenor is to complete a report on his investigations by Wednesday, 14 September 2016. The report should clearly indicate the following:

   a. His findings on the complaints referred to in 2 and 3 above;

   b. If he finds that any irregularities have occurred, how this is to be dealt with, especially in terms of his powers in item 22(3);

   c. Any other issues raised by the complaints that are in his view important to the integrity of the election.

5. The Election Convenor is to continue forthwith with the 2016/2017 Student Representative Council Election process, for which voting was due to commence on 2 August 2016. For purposes of clarity it is indicated that this order to continue with the election process does not limit the Election Convenor's powers when dealing with the complaints referred to in 2 - 4 above.

Prof H Botha Prof JE du Plessis

09 September 2016