

SOUTH AFRICA / JUDGMENT

Leoko and Another v North West University and Others (UM196/2020) [2020] ZANWHC 56 (12 October 2020)

[2020] ZANWHC 56

COURT

North West High Court, Mafikeng

BEFORE

Gura

CASE / FILE NUMBER

UM196/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO.:UM196/2020

In

the matter between:

TSHEPO

LEOKO

1st Applicant

ONTUETSE

TSHESEBE

2nd Applicant

and

NORTH

WEST UNIVERSITY

1st Respondent

INDEPENDENT

STUDENT'S ELECTORAL

2nd Respondent

COMMISSION

THEOPHILUS

SEEPAMORE

3rd Respondent

(CAHIRPERSON

SCC – MAHIKENG CAMPUS)

THABANG

TLALE

4th Respondent
(DEPUTY
CHAIRPERSON SCC – MAHIKENG
CAMPUS)
STUDENTS’
CAMPUS COUNCIL
5th Respondent
(MAHIKENG
CAMPUS)
CHAMONE
FOURIE
6th Respondent
TINOTENDO
MAVENGAHAMA
7th Respondent
STUDENT’S
REPRESENTATIVE
8th Respondent
COUNCIL
(NWU)
URGENT
APPLICATION
GURA
J
DATE
OF HEARING
: 8
OCTOBER 2020
DATE

OF JUDGMENT : 12 OCTOBER 2020
FOR

THE APPLICANT : ADV M SNYMAN SC
FOR

THE RESPONDENT : ADV J PRETORIUS

JUDGMENT

GURA J.

Introduction.

- [1] The applicants, who aver that they are registered students of the first respondent at Mafikeng Campus brought an urgent application seeking a declaratory order that the decision of the first respondent’s council (“the NWU Council”) on 10 September 2020 to amend Schedule 2 of the Constitution of the eighth respondent (“the SRC”) by inserting section 2.5 and 2.6 be declared unlawful and inconsistent with the Higher Education Act 101

of 1997 (“the HEA”), the SRC constitution, first respondent’s Statute and Institutional Rules (prayers 2 and 3 of the notice of motion). In addition they seek relief against the third and fourth respondents in respect of their designation of two portfolios, the same to be declared unlawful and to be set aside (prayer 4). Finally, the applicants then seek related relief that the declaration by second respondent of the eligibility for these two portfolios be declared void and be set aside and that first and second respondents be ordered to verify the nominations and eligibility of candidates for these two portfolios from the start (prayer 5 and 6).

Applicants’ case

- [2] An extraordinary meeting of the Student Representative Council (the SRC) took place on 20 July 2020 by way of video conference, followed by an urgent meeting with the Vice-Chancellor on 21 July 2020. The main focus of the meeting held on 20 July 2020 and 21 July 2020 was the SRC Constitution Review where it was expected of the SRC to adopt an amendment to its Constitution. A working draft of the SRC Constitution titled “Review of the SRC Constitution” was compiled after the University Management Committee (UMC) meeting held on 15 July 2020.
- [3] The working draft of the SRC Constitution was the subject of engagement at the meetings held on 20 July 2020 and 21 July 2020. The draft SRC Constitution was not adopted by the SRC for amendment. The outcome of the extraordinary meeting of the SRC on 20 July 202 and 21 July 2020 on the adoption of the process amendments to the SRC Constitution was as follows:
- 3.1 Members of the SRC disagreed on certain aspects of the documents and were of the view that the process was rushed, not providing sufficient time to familiarize themselves with the content and to provide constructive input.
- 3.2 It was agreed that in terms of the student governance, the Univeristy could continue with the existing document and that the item for approval by Senate and Council would be retraced.
- 3.3 It was further agreed that the process to review the document would now be reconsidered and that the finalized document would be submitted by the next generation SRC, elected to serve in the following term.
- 3.4 It was agreed that the student leaders would draft a formal document indicating their collective input, and concerns with the process followed, as well as listing the items which, in their view, were not considered during the review process.
- [4] On or about 14 September 2020, certain members of the fifth respondent received an email from the director of student life, Mr Jimmy Molautsi, in terms of which he forwarded the email received from a certain Mr Leroux Malan containing the approved schedule 2 amendments to the SRC Constitution as well as the demographic profile of student leadership. In terms of the email sent to Mr Molautsi on 14 September 2020, he was requested to indicate the two designated portfolios as per the predetermined diversity

targets by Tuesday, 15 September 2020 at 16:30. Mr Molautsi forwarded the email as it was and requested the fifth respondent to advise his offices on the two portfolios.

- [5] The decision of the first respondent's Council of 10 September 2020 came to the attention of the fifth respondent on 14 September 2020 when they were required to indicate the two portfolios.
- [6] The fifth respondent did not indicate the two portfolios as requested by Tuesday, 15 September 2020, but on 18 September 2020, the fifth respondent and/or eighth respondent dispatched a letter (dated 18 September 2020) to the Chairperson of the first respondent's Council, Dr. Bismark Tyobeka. The fifth respondent addressed a further correspondence to the first respondent on 18 September 2020. The Vice Chancellor and the Chairperson of Council responded to the two letters.
- [7] The Vice Chancellor and Dr. Tyobeka averred, in their replies to the fifth respondent's letters, that the amendments approved by Council on 10 September 2020 were lawful.
- [8] The said view is flawed given that:

8.1 Section 32 (2) (c) of the Higher Education Act (the HEA) does not empower the first respondent to amend the composition of the SRC after consultation with the SRC, instead it empowers the first respondent's statute or rules to

determine a process for the amendment of the SRC Constitution after consultation with the SRC.

8.2 The Students' Campus Council (SCCs) in all three campuses

are regulated by the "Rules of the Student Campus Council of the Campuses of the North West University" which was approved on 25 July 2018. The rules consist of 40 pages, but do not make provision for the amendment of the SRC Constitution, save to state that each SCC consists of 15 registered students elected

annually with the portfolios.

8.3 The SCC rules do not prescribe any so-called "visible diversity" in the student-leadership corps".

8.4 The only institutional rule or document that can be found within the first respondent's policies that prescribes for the amendment of the SRC is the SRC Constitution itself read

together with section 32 (2) (c) of the Higher Education Act which prescribes that the composition of the students' representative council may not be amended or repealed except after consultation with such students' representative council. The Act does not prescribe for the amendment of the composition of the SCC, but that of the SRC.

The respondent

- [9] The first respondent is opposing this application on the following points:

9.1 The first applicant lacks locus standi to lodge the application as not being a registered student of the first respondent.

9.2 The second applicant lacks sufficient locus standi in his capacity solely as voter on one of the three campuses to

seek the required relief impacting on the entire election, alternatively fails to establish a protectable clear right and/or

irreparable harm.

- [10] On the merits of the application, the respondent proceeded along these lines: The NWU Council is in terms of section 32 (2) (c) of the HEA authorized to amend the composition of the SRC after consultation with “such representative council”. This authority by necessity includes the amendment of the composition of the SCC’, being subsidiary representatives councils from and by whom the SRC is composed. The inclusion of section 2.5 and 2.6 in the said Schedule 2 constitutes such amendment of the composition of the SRC, within the ambit of the HEA authority.
- [11] The NWU Council has since 2015 adopted a policy of minimum levels of diversity on all levels, including student leadership. Student leadership has over time been encouraged to promote and implement such diversity. First respondent has, over a period of six months, consulted with the student leadership, including the SRC and SCCs, concerning implementing diversity, also by designated nominated portfolios for such candidates. The NWU after sufficient consultation resolved to amend Schedule 2 accordingly.
- [12] Consultation with and not the consent of the SRC is required by the HEA. This authority trumps the procedures and authority of the SRC to amend their Constitution themselves, subject to approval by the NWU Council. All three SCCs have so designated portfolios for diversity candidates for upcoming election. The Potchefstroom and Vanderbijlpark SCCs have so implemented and abided the amendment. The nomination and campaigning have been implemented accordingly and the election process is at an advanced stage.
- [13] It shall not be possible or achievable to redo the entire election process and/or only for the two portfolios at the Mahikeng Campus. This shall impact on and cause an impractical postponement of the election. There are in excess 55 000 registered voters for the election with at least 130 nominated candidates, including at least 6 for designated portfolios. The relief sought shall prejudice all these interested parties, presently in the process of campaigning with the view to voting from 12 to 16 October
2020. The amendment only applies for this year as the SRC Constitution stands to be reviewed in 2021, which shall include section 2.5 and 2.6.

- [14] The applicants have failed to establish the lack of authority, delegated or otherwise of the third and fourth respondents to designate portfolios. The second applicant has failed to establish a clear right to the relief sought and that he, as an individual voter will suffer irreparable harm.
- [15] First applicant is presently not registered student of first respondent, as his registration was terminated on 24 February 2020, as confirmed on his academic record which is Annexure MV2 to the answering affidavit. On page 7 of the latter annexure, it is reflected that the first applicant's registration as student was terminated after he forged the signature of the Faculty Manager to enroll for post graduate studies for which he did not qualify because he had an outstanding module for his under graduate studies. For obvious reasons, his name does not appear on the current list of voters of the upcoming elections scheduled for 12 to 16 October 2020. The first applicant therefore lacks locus standi and the application should be dismissed with costs as far as he is concerned. This renders the contents of his founding affidavit inadmissible and irrelevant in respect of the relief sought.

Locus standi

- [16] Before I deal with the merits of this application, let me pay attention to the issue of locus standi of the first applicant. It is common cause that on 21 February 2020, the first applicant was registered as a student of the first respondent for the current academic year for a Bachelor of Social Sciences Honours in International Relations, on a full time basis. However, on 24 February 2020 his registration was cancelled on allegations of misconduct.
- [17] He is currently not a registered student of this University and therefore lacks locus standi to litigate against the University in this matter. His application falls to be dismissed with costs.
- [18] In relation to the second applicant, he is a registered student of the first respondent and as such has locus standi in this matter. As a student of this center for learning, he has a direct and substantial interest in the election process and therefore in this case.

The issue

- [19] The question which the Court is called upon to resolve is whether or not the University Council has power to amend the composition of the SRC.

Legal principles

- [20] The NWU, as all other Higher Education Institutions, is governed and established by the Higher Education Act (HEA). A Higher Education Institution is defined in terms of the HEA as:

“higher education institution” means any institution that provides higher education on a full time, part-time or distance basis and which is-

- (a) established or deemed to be established as a public higher education institution under this Act;
- (b) declared as a public higher education under this Act; or
- (c) registered or conditionally registered as a private higher education institution under this Act; (xi).”

[21] It is common cause that the NWU is such a Higher Education Institution defined in the HEA. It is further common cause that the HEA is applicable to the dispute. The HEA further defines:

“(xviii) institutional rules” means any rules made by the council of a public higher education institution under section 32”

And

“institutional statute” means any statute made by the council of a public higher education under section 32”

[22] The relevant part of section 32 of the HEA states that:

“32.

- (1) The council of a public higher education institution may make-
 - (a) an instructional statute, subject to section 33, to give effect to any law relating to the public higher education institution and to promote the effective management of the institution in respect of matters not expressly prescribed by any law; and
 - (b) institutional rules to give effect to the institutional statute.
- (2) An institutional statute or institutional rules in connection with –
 - (a) the composition of the senate may not be amended or repealed except after consultation with such senate;
 - (b) the academic functions of the public higher education institution concerned, including the studies, instructions and examinations of students and research, may not be made, amended or repealed except with the concurrence of the senate of such institution;
 - (c) the composition of the students’ representative council may not be amended or repealed except after consultation with such students’ representative council; and
 - (d) the disciplinary measures and disciplinary procedures relating to students, may not be made except after

consultation with the senate and the students' representative council of the public higher education institution concerned."

[23] The NWU interprets section 32 (2) (c) as granting authority to the NWU Council to amend the constitution of the SRC after consultation with the SRC. Other relevant provisions have to be considered in order to determine whether this view has substance. Section 32 (1) gives the Higher Education Institution the authority to make an Institutional Statute and Institutional Rules. In 2017, the Council of the NWU made the Institutional Statute to give effect to any law and promote the effective management of the University. The NWU never made any institutional rules provided for in terms of section 32 (1) (b) and does not rely on any such rules.

[24] In the Institutional Statute: North West University, promulgated on 24 March 2017 the Council of the NWU establishes and regulates the SRC in section 26 to 29. The process of making the Institutional Statute is prescribed in the HEA. In terms of section 33 the Institutional Statute must be submitted to the Minister of Higher Education for approval and comes into operation on the date stated in the publication of the Government Gazette, whereafter the institutional Statute must be tabled before parliament by the Minister of Higher Education.

[25] The Institutional Statute provides for the following:

25.1 In section 2 of the Institutional Statute it is stated that it must be interpreted and applied in the spirit of and subject to the Constitution and the Act.

25. 2 The "Act" is defined as the Higher Education Act (HEA) .

25.3 "rules" means the rules made by the council in terms of section 32 (1) (b) of the Act to give effect to the statute.

25.4 Section 26 (1) provides for the establishment of the SRC in accordance with section 26 (2) (e) of the HEA.

The statute provides further in section 26:

"(2) The SRC is composed of fifteen members designated in accordance with the rules.

(3) The rules must provide for the election of a Students' Campus Council (SCC) on each campus.

(4) The SCCs are accountable to the SRC.

(5) The SCCs are represented in the SRC in proportion to the number of students qualified to elect SCC.

(6) The formula for the determination of the proportion referred to in subparagraph (5) must be provided for in the rules"

[26] As already stated, it is common cause that the NWU did not make rules in this respect. In section 28 of the Institutional Statute, the NWU regulates the Constitution of the SRC. It provides for the following:

“(1) Within the framework of the rules, the SRC must adopt a constitution in terms of which the functions and duties of the office-bearers of the SRC and the SCCs, and the procedures,

accountability and operation of the SRC and the SCCs are laid down.

(2) The constitution of the SRC must be approved by the council after consultation with the senate.”

[27] The SRC made such a consultation which was approved by the senate and council. It is common cause that the constitution was approved in 2017. The constitution so approved by the NWU Council, makes explicit provisions for the procedure and process of amendment of the constitution and more specifically the portfolios of the SRC members. Paragraph 7 of the SRC Constitution incorporates the schedule as part of the constitution and provides as follows:

“The following schedules are incorporated in this consultation as binding rules that are subject to the amendment procedures provided for in section 9;

.....

Schedule 2 Rules of procedure for election of SCCs and designation of members to the SRC

.....”

[28] Section 9 of the constitution as approved by the Council of NWU prescribes the procedure to amend the Constitution of the SRC, including the schedules and reads as follows:

“9. AMENDMENT

9.1 Amendment of this constitution may be proposed by an SCC.

9.2 A proposal for an amendment must be written and submitted at the office of the SRC during office hours at least fourteen days before a meeting of the SRC.

9.3 An ordinary or extraordinary meeting of the SRC may adopt an amendment to the constitution with the support of twelve members of the SRC.

9.4 Amendments to this constitution must be tabled promptly for approval by the senate and the council.

9.5 Amendments to this constitution do not come into effect before approval by the council.

[29] Section 28 of the Institutional Statute provides for the amendment of the Constitution and reads as follows:

“28

- (1) Within the framework of the rules, the SRC must adopt a constitution in terms of which the functions and duties of the office-bearers of the SRC and the SCCs, and the procedures, accountability and operation of the SRC and the SCCs are laid down.
- (2) The constitution of the SRC must be approved by the council after consultation with the senate.”

It is clear that the schedules to the Constitution form part of the Constitution and can be amended by the SRC.

[30] In the answering affidavit, the NWU is of the view that it has the right to amend the Constitution and determine the predetermined diversity targets. However this cannot be done by ignoring the provisions of the Institutional Statute and the Constitution of the SRC. Section 32 of the HEA reads:

“(2) *An institutional statute or institutional rules in connection with- ...*

- (c) the composition of the students’ representative council may not be amended or repealed except after consultation with such students’ representative council”
- [31] I agree with Counsel for the applicant in his setting and analysis of the legal position that Council is empowered to make Institutional Rules. Such rules, once made, may not be amended without consulting the SRC. This Court finds that the Council of NWU has no power to amend the SRC constitution as it would undermine the very status, integrity and wisdom of the SRC.
- [32] The NWU’s current problem is a direct result of failure to make and/or implement rules.
- [33] The respondent has urged this Court to keep in mind the dramatical impact on the entire election process involving 55 123 voters a possible court order declaring the whole process invalid. Counsel for the respondent continued along these lines in his heads of argument:

“With voting already underway, it is respectfully submitted that any harm has already been suffered, with further irreparable harm no longer applicable. This direction may be likened to the discretion in the administrative law, where a court may refuse to grant a remedy if inappropriate and/or ineffective and/or cause injustice. Otherwise put, the proverbial horse has bolted with the relief sought no longer enforceable or practical, with the issue having become moot.” [Footnotes omitted]

- [34] We are dealing here with a violation of the principle of legality by a reputable institution of learning like a university. The first respondent council exercised power which it did not have and in so doing tempered with the power of the SRC. If I allow the voting to proceed despite the finding aforesaid, it means practically that people are going to vote and people will be put in a position of power through the ballot, they will govern and take decisions affecting the community of the university, yet all these decisions have their foundation cemented on illegality. This, in my view, does not augur well in a constitutional democracy. The issue of

elections in our society is an emotive one and a flawed election process needs to get a flagging forthwith. What is worthy to note is that the voting has not yet started.

- [35] Besides, the second applicant has shown satisfactorily that he has a clear right and that if the Court does not come to his assistance he will suffer irreparable loss. To allow elections to proceed will be tantamount to giving the applicant with the right hand whilst taking same with the left hand from him.

Order

- [36] Consequently, the following order is issued:

A First Applicant

The application is dismissed with costs.

B Second Applicant

1. The application is heard as an urgent application in accordance with Rule 6 (12) of the Uniform Rules of this Honourable Court, read with Practice Direction 5 of this Honourable Court and that the Second Applicant's failure to comply with the rules relating to forms and service are condoned.
2. The decision taken by the First Respondent's Council on 10 September 2020 to amend schedule 2 of the Eighth Respondent's Constitution by inserting section 2.5 and 2.6 is declared unlawful and inconsistent with the provisions of the Higher Education Act.
4. The decision taken by the Third and Fourth Respondents to indicate and/or elect the portfolios of "Marketing and Public Relations Officer" and "Community and Stakeholders Engagement Officer" as portfolios designated for candidates forming part of the predetermined diversity targets is declared unlawful and set aside.
5. The Second Respondent's declaration of eligibility and/or ineligibility for the portfolios mentioned in paragraph 3 above is declared void ab initio and is set aside.
6. The First and Second Respondents are ordered to verify from start the nominations and eligibility of

candidates for the portfolios mentioned in paragraph 3 above.

7. The First Respondent is ordered to pay costs of this application.

SAMKELO GURA

JUDGE OF THE HIGH COURT

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