

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

Case No: 2756/15

In the matter between:

SOUTH AFRICAN STUDENT CONGRESS

Applicant

And

WALTER SISULU UNIVERSITY

1st Respondent

VICE CHANCELLOR

2nd Respondent

EXECUTIVE DIRECTOR STUDENT AFFAIRS

3rd Respondent

PAN AFRICAN STUDENTS MOVEMENT OF AZANIA

4th Respondent

STUDENTS CHRISTIAN ORGANISATION

5th Respondent

AMENDED NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE THAT at the hearing of this application, the applicant will make an application for the grant of the following orders:

- 1.1 that the failure by the first, second and third respondent and/ or any of the respondents to allocate the mandatory five seats which are provided for in the SRC Constitution before proceeding to proportional representation which is

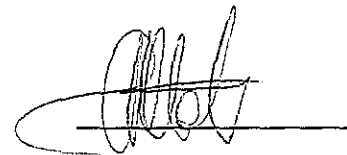
calculated on a ratio of 800 students to (1) one seat is unlawful and unconstitutional and is set aside;

- 1.2 the first, second and third respondent are hereby ordered and directed to allocate the mandatory five seats to the applicant as a majority party, alternatively, the respondents to properly allocate the mandatory five seats in compliance with the constitution and lawfully allocate them to the relevant participating political parties in a rational manner;
- 1.3 that the conduct of the first, second and third respondent to declare and/ or introduce a new seat and/ or position for Butterworth campus in the SRC structure, be and is hereby declared unconstitutional, unlawful, is set aside as a nullity;
- 1.4 that the first, second and third respondent are hereby ordered and directed to reconvene the students political structures for purposes of SRC seats allocation in a proper and/ or lawfully in line with the WSU SRC Constitution which is the supreme guiding document for student governance in Walter Sisulu University and such allocation of seats to deal with the mandatory five seats allocation;
- 1.5 that the purported SRC is hereby restrained from discharging SRC duties and / or posing themselves as SRC.
- 1.6 That the first, second and third respondent are ordered and directed to involve applicant's members in all meetings and gatherings which are convened for purposes of dealing with SRC positions allocation and / or matters relating to students affairs in which SRC participate as elected by students and deployed by student's political parties at Walter Sisulu University;

- (101)
- 1.7 That pending finalization of this application, the first, second and third respondents are hereby interdicted, restricted, restrained and / or prohibit from calling any meeting, workshop or inauguration of any SRC-Walter Sisulu University;
 - 1.8 That the first, second and third respondents are ordered to pay costs of this application jointly and severally, the one paying the others to be absolved, only in the event of them opposing the application;
 - 1.9 Further and / or alternative relief.

KINDLY TAKE NOTICE THAT the affidavit of Luzuko Buku together with annexures and other documents attached thereto shall be used in support of the application.

DATED AT MTHATHA ON THIS 07th OCTOBER 2015.



MVUZO NOTYESI INC

Applicant's Attorneys

TH- Madala Chambers

No. 14 Durham Street

MTHATHA

Ref: Mr Notyesi

TO: THE REGISTRAR

High Court

MTHATHA

AND TO: MESSRS FIKILIE NTAYIYA & ASSOCIATES

1st, 2nd & 3rd Respondent Attorneys

Suite 3rd-4th Floor

Sanlam Building

No.50 Madeira Street

MTHATHA

Ref: Mr Ntayiya/am/T.9050

FIKILIE NTAYIYA & ASSOCIATES
RECEIVED 14h 23
ON: 08/10/13
BY: A. N. N. M.
10 MADEIRA ST MTHATHA

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 2756/2015

Date heard: 16 October 2015

Date delivered: 22 October 2015

In the matter between:

SOUTH AFRICAN STUDENT CONGRESS

Applicant

And

WALTER SISULU UNIVERSITY

1st Respondent

VICE CHANCELLOR

2nd Respondent

EXECUTIVE DIRECTOR STUDENT AFFAIRS

3rd Respondent

PAN AFRICAN STUDENTS MOVEMENT OF AZANIA

4th Respondent

STUDENT CHRISTIAN ORGANISATION

5th Respondent

JUDGMENT

BROOKS AJ:

- [1] This is an urgent application in which the applicant challenges the legality of the allocation by the first, second and third respondents of an additional seat to the Students' Representative Council (the SRC) on the Butterworth campus of Walter Sisulu University (the first respondent) and the consequential allocation of the SRC seats on the Butterworth campus pursuant to the outcome of SRC elections in which the applicant participated recently.
- [2] There is no factual dispute on the issues which are central in this matter. The applicant, the fourth respondent and the fifth respondent are all student political organisations which participated recently in the SRC election. On the Butterworth campus the applicant secured 1728 votes, the fourth respondent 1410 votes and the fifth respondent 599 votes. Currently, 5470 students are registered at the first respondent's Butterworth campus.
- [3] The composition and functions of the SRC are governed by the provisions of the SRC constitution. Clause 2.3 thereof reads as follows:
- The number of SRC members shall be determined by the number of registered students in each campus using the calculation ratio of 800 students per seat.
 - Current student enrolments reflect the SRC consisting of Thirty Six (36) registered students who have been registered for at least 1 semester for

a formal programme of study approved by Senate. Due to the geographic distances between campuses and the divisional model, the seats will be allocated as follows:

- MTHATHA = 14 seats (11000 students)
- BUTTERWORTH = 8 seats (6000 students)
- BCC = 9 seats (7000 students)
- QTN = 5 seats (Mandatory seats)
- **Total = 36 SRC seats**
- These SRC's will have the following mandatory seats in each campus: President, Secretary, Treasurer, Academic & Student Services, Sports & Culture.
- Additional to the 5 seats a ratio of 800 students to 1 seat will apply. For campuses with less than 800 student population, they will remain with mandatory seats mentioned above.
- All SRC's mentioned above will operate in their respective campuses, report to the Campus Management Committees, represent students in their campus and should not involve themselves on issues not raised by students in their respective campus, at all times governed by this Constitution and all other Policies and Rules of the University;
- The SRC members from various campuses shall meet on a regular basis to oversee and advise council of behalf of all campuses. This shall be achieved by requiring and evaluating reports from campuses to formulate a common view as and when consulted to advise all Institutional Committees, Structures and Council."

[4] When SRC elections were held during the 2014 academic year, 5128 students were registered on the Butterworth campus. On an application of the provisions of clause 2.3 of the SRC constitution, the first respondent allocated 6 seats to the SRC on that campus.

[5] Prior to holding the recent SRC elections during the 2015 academic year and on 2 September 2015, a preparatory meeting was held in the first respondent's council chambers on Butterworth campus. The meeting was chaired by the third respondent, who is the executive director of student affairs. A copy of the minutes of that meeting is included in the application papers. The minutes reflect the following record under ITEM 9:

"Seat allocation

(a) The chairperson informed the meeting that the seats allocated to Butterworth campus SRC 2015/16 elections are 7 as per the number of registered students $(5470/800 = 6, 8375)$;"

[6] The minutes also record an objection to the announcement made by the third respondent which was raised on behalf of the fourth respondent. It is not necessary for present purposes to do more than to record that the objection was based upon an apparent irrationality on the part of the third respondent in the interpretation and application of the provisions of clause 2.3 of the SRC constitution to the current number of students registered on Butterworth campus.

- [7] The concomitant allocation of SRC seats on Butterworth campus after the SRC elections is directly affected by the number of seats available for allocation. Consequently, the manner of allocation of those seats between the applicant, the fourth respondent and the fifth respondent is also challenged in the present application.
- [8] A preliminary issue to be determined is whether the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) are applicable in the circumstances of this matter.
- [9] The first respondent is a comprehensive university established in terms of the provisions of the Higher Education Act 101 of 1997 (HEA). The HEA was promulgated *inter alia* to regulate higher education and to provide for the establishment, governance and funding of public higher education institutions such as the first respondent.
- [10] Chapter 10 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), which is entitled “Public Administration”, sets out the values and principles that must govern public administration and prescribes that these

principles apply to administration in every sphere of government, organs of state and public enterprises.

[11] Section 33 of the Constitution provides:

- “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must-
- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote an efficient administration.”

[12] Section 33 of the Constitution is designed to control the conduct of the public administration when it performs an act of public administration by the exercise of public power.¹

¹ CAPE METROPOLITAN COUNCIL v METRO INSPECTION SERVICES (WESTERN CAPE) CC AND OTHERS 2001(3) SA 1013 (SCA) para [16]; PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS 2000 (1) SA 1 (CC) para [136] and PHARMACEUTICAL

[13] Whether or not conduct is “administrative action” is determined by the nature of the power being exercised. Other considerations which may be relevant are the source of the power, the subject matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation on the one hand, which is administrative, and on the other hand to policy matters, which are not administrative. It follows that the determination of whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult.²

[14] The issue in this matter is the validity of a decision taken by the third respondent when evaluated in the context of the provisions of the SRC constitution. The SRC of the first respondent is one of the institutional governance structures established in terms of HEA. It exercises powers delegated to it by the council of the first respondent. It is not a legal person, does not have any legal rights or obligations of its own and may do all things necessary to carry out its aims and objectives in accordance with its constitution and the policies and rules of the first respondent.

[15] In these circumstances, the third respondent derives no authority from the SRC but derives authority from the first respondent, who in turn has delegated authority

MANUFACTURERS ASSOCIATION OF SA AND ANOTHER: IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2000 (2) 674 (CC) paras [20], [33], [38 – 40].

² CAPE METROPOLITAN COUNCIL v METRO INSPECTION SERVICES (WESTERN CAPE) CC AND OTHERS (*supra*) para [17]; PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS (*supra*) paras [141] and [143].

derived from the Minister of Higher Education and Training through the provisions of HEA.

[16] Although not pertinently referred to by the third respondent on chairing the meeting, the expression of the decision that the number of seats allocated to the Butterworth campus was 7 is directly connected to the provisions of clause 2.3 of the SRC constitution. The question arises whether the content of clause 2.3 of the SRC constitution involves the exercise of a public duty closely related to policy matters or whether it contains a power which is closely related to the implementation of legislation and is accordingly administrative.

[17] In my view, whilst it is so that the powers vested in the first respondent are delegated powers derived through the provisions of HEA, and that on appropriate occasions the exercise of that power constitutes administrative action for the purposes of s33 of the constitution, the subject matter of clause 2.3 of the SRC constitution, being that of student representation on the SRC, is more closely related to policy matters, which are not administrative, than to the implementation of legislation, which is.

[18] It follows that I am of the view that the provisions of PAJA are not applicable in this matter and that the applicant should not be penalised for its decision not to invoke such internal remedies as may have been available to it.

[19] Turning to the principal issue in this matter, the question of the legality of the allocation of an additional seat to the SRC on Butterworth campus, it is necessary to determine the appropriate construction to be attributed to clause 2.3 of the SRC constitution. In essence, the SRC constitution is akin to a statute. As a matter of law, the general rule in the construction of statutes is that the ordinary grammatical meaning of the words used must be adhered to.³

[20] Furthermore, it is trite that where the language of a statute is unambiguous and its meaning clear, the court may only depart from the ordinary meaning if it leads to an absurdity so glaring that it could never have been contemplated by the law giver.⁴

[21] More recently, the appropriate approach to be adopted has been stated to be a reading of the clear and unambiguous wording of a statute in the light of the subject matter with which the words are concerned in order to determine the true intention of the legislature.⁵

[22] The first four elements of clause 2.3 of the SRC constitution deal with the allocation of seats to the four campuses operated by the first respondent. In my view, the

³ UNION GOVERNMENT (MINISTER OF FINANCE) v MACK 1917 AD 731 at 739; DU PLESSIS v FOUBERT 1968 (1) SA 585 (A) at 594H-595B; EBRAHIM v MINISTER OF THE INTERIOR 1977 (1) SA 665 (A) at 678A-G; SUMMIT INDUSTRIAL CORPORATION v CLAIMANTS AGAINST THE FUND COMPRISING THE PROCEEDS OF THE SALE OF THE MV FADE TRANSPORTER 1987 (2) SA 583 (A) at 596G-597B; PUBLIC CARRIERS ASSOCIATION AND OTHERS v TOLL ROAD CONCESSIONARIES (PTY) LTD AND OTHERS 1990 (1) SA 925 (A) at 942I -943A.

⁴ VENTER v R 1907 TS 910 at 913-915.

⁵ UNIVERSITY OF CAPE TOWN v CAPE BAR COUNCIL 1986 (4) SA 903 (A) at 914 D-E.

primary principle is expressed in the first element. It's meaning is clear and unambiguous. The number of SRC members, or seats, shall be determined by the number of registered students on each campus utilising as a means of calculation the ratio of 800 students per seat. The same principle is expressed in the fourth element of clause 2.3 of the SRC constitution which provides that campuses with a student enrolment that is less than 800 will be allocated the 5 mandatory seats common to all the campuses i.e a president, a secretary, a treasurer, an academic and student services representative and a sports and culture representative.

[23] It is significant that in the expression of the ratio to be employed in the calculation of the number of SRC seats on each campus, clause 2.3 of the SRC constitution makes no reference to any mechanism by which cognisance must be taken of any remainder in student numbers once the ratio of 800 students per seat has been applied to the relevant total.

[24] In argument, MR BODLANI, who appeared on behalf of the first, second and third respondents, submitted that the court must be guided by the content of the second element of clause 2.3 of the SRC constitution in which the number of seats to be allocated to each campus finds expression against a notional student enrolment total. According to the argument, an application of the ratio of 800:1 to the notional total expressed in respect of the Mthatha and Buffalo City campuses results in a numerical value which is then "rounded upwards" to eliminate the remainder

created by the calculation. In other words, the allocation of 14 seats to Mthatha campus with a notional total of 11 000 students shows that the natural mathematical result of an application of the ratio, which is 13,7, has been “rounded upwards” to the figure 14. The same mechanism is evident in the allocation of 9 seats to Buffalo City campus where the application of the ratio 800:1 to the notional total of 7000 produces the natural result of 8.75.

[25] Dealing specifically with the illustrative calculation pertaining to Butterworth campus included in the second element of clause 2.3 of the SRC constitution, MR BODLANI submitted that an error is obvious in the calculation. 8 seats are allocated to the notional total of 6000 students. An application of the ratio of 800:1 to that total produces a natural result of 7,5. MR BODLANI submits that an error has occurred in the “rounding off” process whereby the natural result has been “rounded upwards” to 8 whereas it ought to have been “rounded downwards” to 7.

[26] Notwithstanding the error claimed by MR BODLANI to be demonstrated in the examples set out in the second element of clause 2.3 of the SRC constitution, he submitted that this element of the clause demonstrates clearly that the residual number of students remaining after an application of the ratio of 800:1 must be taken into account and do not simply fall away as disregarded. When this principle is applied to the actual total number of students registered on Butterworth campus in 2015, which is 5470, the natural result of 6,8375 must be “rounded upwards” to 7,

which is the number of seats allocated to Butterworth campus by the third respondent at the preparatory meeting held on 2 September 2015.

[27] In my view, the argument presents a number of difficulties which militate against its acceptance. Firstly, clause 2.3 of the SRC constitution makes no clear and unambiguous reference to the manner in which any residual number of students must be taken into account once a remainder is created by the application of the ratio 800:1 to the total number of students enrolled on any particular campus. Secondly reliance upon the illustrative examples set out in clause 2.3 of the SRC constitution appears to me to be highly speculative and fraught with difficulty. Not only is there no expression of any mathematical formula by which the illustrative numbers of seats for each campus have been calculated, but an application of the mathematical formula recommended by MR BODLANI demonstrates, according to him, an error in the example for Butterworth campus. Nothing emerges from clause 2.3 of the SRC constitution to state that MR BODLANI's mathematical approach is to be preferred against an approach which simply creates an additional seat on the SRC to represent any residual number of students which emerges as a remainder after an application of the ratio 800:1 to the total number of students on any particular campus. In my view, both approaches would be arbitrary in the absence of clear and unambiguous wording in support thereof and neither can be imported in the circumstances.

[28] It follows that I am of the view that the plain, ordinary unambiguous meaning of the words used in clause 2.3 of the SRC constitution must result in any residual number of students remaining after the application of the ratio 800:1 to the total number of students registered on any particular campus being disregarded in the calculation of the number of seats to be allocated. This would remain the position until that residue grows and reaches a figure of 800, thereby qualifying for the allocation of an additional seat.

[29] Not only is the construction set out in the preceding paragraph the result of the plain, ordinary and unambiguous meaning of the words used in clause 2.3 of the SRC constitution, it is consistent with the principles and policy of necessary qualification for representation which find expression therein.

[30] In my view, there can be no room in the construction which I have found to be apposite to clause 2.3 of the SRC constitution for the approach and decision expressed by the third respondent in the minutes of the meeting held on 2 September 2015. There was no numerical justification for the increase in the number of seats allocated to Butterworth campus in 2014, which was 6 seats, to 7 seats in 2015. The residual number of students represented by the remainder, “8375” resulting from an application of the ratio 800:1 to the total number of students registered on Butterworth campus, 5470, should have been disregarded. In accordance with clause 2.3 of the SRC constitution, this would remain the position

until the total number of students registered on Butterworth campus rises to 5600, justifying the allocation of an additional SRC seat upon an application of the prescribed ratio of 800:1.

[31] The applicant also contends that from the content of clause 2.3 of the SRC constitution it also emerges clearly that the application of the ratio of 800:1 is only to be invoked in respect of additional seats on the SRC and not in connection with the calculation of entitlement to the 5 mandatory seats. This argument is amplified into a submission in the founding affidavit that as the victorious participant in the recent SRC elections, the applicant was entitled to the allocation of the 5 mandatory seats by the first, second and third respondents before the latter gave consideration to the allocation of the additional seat on the Butterworth campus SRC. In my view, nothing in the plain, ordinary and unambiguous meaning of the words used in clause 2.3 of the SRC constitution supports this construction. Indeed, that the application of the ratio to the total number of students registered on any particular campus for the purpose of the calculation of the total number of SRC seats to be allocated to each campus emerges as the clear and unambiguous meaning of the wording used.

[32] However, it is plain from a reading of both the founding affidavit and the answering affidavit that the post-election allocation of the SRC seats on Butterworth campus as between the applicant, the fourth respondent and the fifth respondent is fundamentally flawed by the importation of the number 7 as reflecting the total

[35] When the matter first appeared on the motion court roll for 1 October 2015 it was inchoate. The matter was postponed to 16 October 2015 and the parties were given leave to file additional affidavits. All the parties active in the application made use of this opportunity. In my view, the costs which were reserved on 1 October 2015 should also follow the result.

[36] The following order will issue:

- “
1. The conduct of the first, second and / or third respondents in the allocation of an additional (7th) seat to the Students' Representative Council of the first respondent on Butterworth campus is hereby declared to be inconsistent with the provisions of the Students' Representative Council constitution, unlawful and set aside;
 2. The first, second and third respondents are hereby directed to proceed with the allocation of the 6 Students' Representative Council seats on the Butterworth campus of the first respondent in accordance with the provisions of clause 9.19 of the Students' Representative Council constitution;
 3. The first, second and third respondents are hereby directed to pay the costs of this application jointly and severally, the one paying the others to be absolved, such costs to include the wasted costs reserved on 1 October 2015 and interest thereon to be calculated at the prescribed rate of interest from a date 14 days after allocatur to date of payment.”



RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

For the applicant: MR M. NOTYESI of
 MVUZO NOTYESI INC.,
 MTHATHA

For the first, second and third respondents:

 ADV A. M. BODLANI
 Instructed by FIKILE NTAYIYA AND ASSOCIATES.
 MTHATHA.