IN THE HIGH COURT SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL 1453/2016

ECD 3553/2016

In the matter between:

THE SOUTH AFRICAN STUDENTS CONGRESS (SASCO)	First Applicant
SIFISO SIMON AMBROSE ZWEZWE	Second Applicant

and

WALTER SISULU UNIVERSITY	First Respondent
NONTANDO NGAMLAMA	Second Respondent
ZOLEKA DOTWANA	Third Respondent
VUYISEKA SIZANI-MATYA	Fourth Respondent
KHAYA MAPHINDA	Fifth Respondent

JUDGMENT

STRETCH J:

The parties

[1] The first applicant is the South African Students Congress (SASCO) being a registered student political organization which is currently the governing body of the student representative council (the SRC) at the Buffalo City campus of the Walter Sisulu University.

[2] The second applicant is Sifiso Zwezwe, a major male student at the Buffalo City campus of the Walter Sisulu University.

[3] The first respondent is the Walter Sisulu University (WSU), which is a juristic person situated in Mthatha, and whose Buffalo City campus is situated in East London.

[4] The second respondent is Nontando Ngamlana (hereinafter referred to as the head of the EA) who is the head of the electoral agency appointed as such in terms of the SRC Constitution (the Constitution) of WSU.

[5] The third respondent is Zoleka Dotwana who is the official appointed in terms of the Constitution to whom the EA reports regarding the 2016/17 SRC elections. She is also the executive director of student development and support services.

[6] The fourth respondent is Vuyiseka Sizani-Matya (Sizani) who is a member of the electoral committee appointed as such in terms of the Constitution. She is also WSU's acting student development practitioner.

[7] The fifth respondent is Khaya Maphinda who is WSU's Mthatha registrar, the secretary to the WSU council and a member of the verification committee of the 2016/17 SRC elections.

The nature of this application[1]

[8] On 9 November 2016 the applicants lodged an urgent application to interdict the respondents from:

[1] All extracts from the papers reflected in parenthesis are verbatim.

> "preventing the first applicant in its endeavour to deploy the second applicant as the elected SRC president of WSU Buffalo City Campus."

[9] In terms of the applicants' motion, it was envisaged that the interdict should operate as an interim one, pending the finalisation of the further relief sought in the application:

> " … reviewing and setting aside the decision/s of the respondents that sought to prevent the first applicant in its endeavour to deploy the second applicant as the elected President of the WSU Buffalo City Campus."

[10] The respondents are also:

> "called upon to show cause why the aforementioned decisions should not be reviewed and corrected or set aside" and are "required within 15 days after receipt hereof to dispatch to the Registrar of this Honourable Court the record of the proceedings sought to be reviewed and set aside (including all plans), correspondence, reports, memoranda, documents, evidence and other information which were before the respondents at the time when the decision in question were made) together with such reasons as the respondent is by law required to give or desires to make, and to notify the applicants that they had done so".

[11] Finally, the respondents are notified that:

> "within 10 days of receipt of the record from the Registrar, the applicants may cause to be delivered a notice and an accompanying affidavit, that seek to amend and to or vary terms of its notice of motion and supplement its founding affidavit in terms of Rule 53(4) of the Uniform Rules of Court."

[12] The notice of motion states that in the event of non-opposition to the application, the relief would be sought on 6 December 2016 at 09h00.

The background

[13] The second applicant is a member of the Buffalo City SRC of WSU. During 2015 he was charged with misconduct in terms of WSU's policy. On 5 August 2015

he was convicted as charged. The judgment pertaining to his sentence reads as follows:

> "In the light of the above set of facts and circumstances Mr Zwezwe must be expelled from the university. The expulsion is suspended for one year, provided he does not get involved in similar activities that gave rise to this decision. The expulsion also implies that Mr Zwezwe will be stripped of all leadership positions that accompany his leadership role at the university. In addition, he must also vacate the university accommodation as part of the sanction."

[14] The elections for the 2016/17 SRC committee were scheduled to take place on 29 September 2016. According to the official election timetable the candidate list was scheduled to be publicised on 24 September 2016 together with a call for objections. Student objections to candidate lists had to be raised at a meeting scheduled for 27 September 2016. The preliminary results of the elections were scheduled for announcement on the day following the elections. Written submissions of objections were scheduled to close on 3 October 2016 on which date final names were also due for submission. The newly elected SRC was scheduled to be constituted on 4 October 2016 at 12h00.

[15] It is common cause between the parties that long before this, and on 8 August 2016, WSU received a letter addressed to its vice chancellor (who is also the principal of WSU) "on behalf of" the second applicant's lawyers, Pakamani Gasela Attorneys. The letter is in the nature of a demand, advising the principal that the second applicant's suspended sentence had come to an end, and demanding that he:

> "… be allowed to participate in all University activities and be given his democratic right to be in any leadership position including the student representative council" and that "Mr Zwezwe be allocated university accommodation if he qualifies academically".

[16] On 16 September 2016 a second letter was emailed to the principal, this time by Tiya Pata Attorneys purportedly acting on the second applicant's instructions. According to the documented addressees, the letter was also copied to the "executive director student affairs, rector (Buffalo City campus), legal department WSU".

[17] *Ex facie* this letter the second applicant had instructed his attorneys that on 17 August 2015 he had lodged an appeal against his misconduct sentence to the WSU council through the office of the WSU registrar, which council had referred the appeal to the principal, who in turn confirmed the findings of the disciplinary committee and the sentence imposed. The nature and content of the letter is similar to the previous one sent by Pakamani Gazela Attorneys, stating that the penalty barring the second applicant from leadership positions and university residences had ended once his suspended expulsion sentence came to an end on 5 August 2016. The letter concludes with an appeal in bold print which reads as follows:

> **"Our position now is simple to appeal to the Vice Chancellor and Principal and persuade you to allow our client to participate in the upcoming SRC elections that are scheduled for the 29th day of September 2016, as a candidate for the South African Students Congress. Our client is an active members of the SASCO. We pray that the Vice Chancellor in making his determination to consider that our client was prejudiced when he was trying to appeal, but already chased away by University functionaries, and verdict enforced upon him."**

[18] Just shy of a week later, and on 22 September 2016, the principal emailed a response to Tiya Pata Attorneys, which reads as follows:

> "1. Mr Zwezwe was sanctioned on 5 August 2015. He appealed on 17 August 2015 and the sanction was substantially confirmed on 9 October 2015.
> 2. Please note that notwithstanding the comments that follow, the University contests a number of factual allegations that appear in your letter and will place them in dispute in the event of any formal proceedings being instituted.
> 3. It is trite law that a sanction is suspended when an appeal has been noted. Only when the appeal is dismissed does it become effective and then, only in terms of the order made on appeal, not the original order.
> 4. Mr Zwezwe was not at any stage suspended, He was expelled from the University. It was the sanction of expulsion that was suspended on 9 October in terms of the appeal order; and the advice I received is that the sanction commenced afresh from that date onwards.
> 5. In addition to the above, I wish to point out that the presiding officer in the original hearing found that
>
> "Mr Zwezwe's behaviour goes against the behaviour and ethics that the university promotes for future leaders and responsible citizens"
>
> and that
>
> "he is the type of leader that poses a danger to the well-being and security of the University".

As the presiding officer thereafter noted, it is the expulsion resulting from Mr Zwezwe's conduct that renders him unsuitable and ineligible for official student leadership positions.

6. I accordingly cannot accede to your request to allow Mr Zwezwe to participate in the upcoming SRC elections, both in terms of the validity of the sanction and his failure to meet the criteria for continued SRC office. The University has an obligation and a responsibility to ensure that responsible students are elected to leadership positions and that students are protected against persons who have been found formally to be irresponsible leaders."

[19] This response was copied to the third respondent in her capacity as executive director of student development and support services, to the WSU registrar, to the WSU director of legal services and to the rector of the WSU Buffalo City campus.

[20] In spite of the cut-off dates envisaged in the timetable, it is common cause that SASCO, having won the 2016/17 WSU Buffalo City campus SRC elections, duly deployed its delegates for positions in the new SRC on 10 October 2016, and in particular deployed the second applicant for the position of president of the SRC.

[21] On the same day Sizani (the fourth respondent), who at the time was the acting student development practitioner at WSU's Buffalo City campus, forwarded an email to a representative of SASCO by the name of Unathi Jack. The email reads as follows:

"Dear Mr Jack

We acknowledge the receipt of your deployment dated 10 October 2016. Please be advised that according to the WSU Disciplinary Code of Conduct Committee Mr Sifiso Zwezwe Student No [....] has been found guilty so he is not in a position to be eligible deployee for SRC as per the SRC Constitution Chapter 5 5.1.1 (clause (g). On your second deployee Mr Zolile Zamisa student No [....] is also not eligible as per clause chapter 5.1.1 (d) and during the CEC processes this was communicated to the SASCO representatives Mr Mava Nompandana and Vuyo Pakana.

Your utmost dedication and cooperation in the success of this will be greatly appreciated."

[22] On 19 October 2016 the aforementioned Vuyo Pakana (in his capacity as the border branch chairperson and secretary of SASCO) emailed a letter to the department of student affairs, in essence advising it that SASCO's border branch executive committee was rejecting Sizani's email. It is somewhat difficult to understand exactly what was being conveyed in this letter. It seems that the upshot

thereof was that SASCO had received legal advice that Zwezwe's suspension from participating in student leadership formed part of his expulsion sentence which had been suspended for a year as from 5 October 2015, which period of suspension came to an end on 5 October 2016.

[23] According to the applicants, the results of the election were published on 21 October 2016, somewhat later than anticipated in the timetable, apparently due to unrelated protest action which at the time was rife in all universities.

[24] On 3 November 2016 E.E. Mani Attorneys, acting on behalf of SASCO, wrote a letter to the head of the EA (the second respondent) which was copied to Dotwana (the third respondent in her capacity as executive director of student affairs and who is cited in the letter as the official to whom the EA had to present a report on the 2016/17 elections for onward transmission to the WSU), to Sizani (the fourth respondent in her capacity as the student development practitioner and who is cited in the letter as the member of the EC for the WSU campus), and to Maphinda (the fifth respondent in his capacity as the registrar of WSU and who is cited in the letter as the secretary to the WSU council and as a member of the verification committee of the 2016/17 SRC elections).

[25] In short, the letter was sent to the second, third, fourth and fifth respondents cited in the application before me. It was not sent to the principal of WSU to whom the previous correspondence which I have referred to was addressed and to which the principal had duly replied.

[26] It is necessary, for purposes of this judgment, to reproduce the entire contents of the letter. It reads as follows:

> "A. INTRODUCTION
>
> 1. We refer to the above and advise that we act on behalf of the South African Students' Congress (Eastern Cape) (SASCO) and this letter is issued at its instance.

2. Client advises that it is a registered Student Organisation with Branches operating in educational institutions including WSU BC Campus whereat it is the current governing organisation of the Student Representative Council (SRC).

B. BACKGROUND

3. Client further advises that it has participated and won the 2016/2017 WSU BC Campus SRC elections and was entitled therefore to appoint and to deploy the president and 3 members of the SRC at the WSU BC Campus from its elected candidates.

4. The 2016/2017 BC Campus SRC elections were conducted in terms of the WSU SRC Constitution and were:

4.1 conducted by Ms Nontando Ngamlana who was appointed as the Chief Electoral Agency and Head of the Electoral Agency (EA) in terms of section 9.5.1(a) read with section 9.5.3(a) of the WSU SRC Constitution;

4.2 conducted in terms of an election schedule issued and published through the campus electoral committee and same was made available to the WSU BC Campus University community. A copy of the time table is attached hereto and is marked “FA1”; and

4.3 conducted in terms of the programme referred to above which was without any difficulty, no objections, declared free and fair and results thereof were published on 21 October 2016 (*this date was different to that published on the programme which was due to a protest action that manifested itself in all South African Universities)*

C. DISPUTE RAISED BY MS SIZANI (obo WSU)

5. Client advise us further that in an unconstitutional way and outside the time frames issued by the Electoral Agency, annexure “FA1” hereof, Ms Vuyiseka Sizani-Matya (who by the way was the member of the Campus Electoral Committee) objected to Mr Sifiso Simon Ambros Zwezwe being appointed and to his being deployed by client as the SRC president for the WSU BC Campus.

6. We are instructed that the conduct of Ms Vuyiseka Sizani-Matya was unconstitutional *qua* the WSU SRC Constitution for the reason that:

6.1 She is not the functionary and official responsible for conducting and/or as the Chief Electoral Officer of the 2016/2017 SRC elections in terms of section 9.5.2(a) read with section 9.5.3(a) of the WSU SRC constitution;

6.2 She is not the functionary and/or official responsible for the Constitution of the SRC in terms of section 9.5.2(j) of the WSU SRC Constitution;

6.3 She did not raise her objections at the appropriate time when she was in a position to do so especially so that:

6.3.1 She was the official responsible for the voters roll, and for issuing of a notice calling for objections on any name of the voters roll in terms of the SRC elections time table;

6.3.2 She was one of the officials responsible for verification of the candidates' names in terms of the SRC elections time table; and

6.3.3 She was one of the officials responsible for receiving objections by students on the candidate lists for the SRC elections.

7. Further and in any event there is also no merit to her objection for the following reasons:

7.1 Ms Sizani-Matya wrote to our client advising it that its deployee "*Mr Sifiso Zwezwe No [....] has been found guilty so he is not in a position to be eligible (sic) deployee for SRC as per SRC Constitution chapter 5.5.1.1 clause (g)"*

7.2 Ms Sizani's basis for the disqualification of Mr Zwezwe is based on her mistaken understanding that Mr Zwezwe has been banned for ever from seeking election set office as a member of the SRC by the DC of the WSU University or that of the SRC;

7.3 Our client instructs us that Ms Sizani knows or ought to have known that the disciplinary process she referred to and its subsequent verdict/judgment:

7.3.1 happened in the year 2015, and the sentence of Mr Zwezwe was for his expulsion for a period of 1 year reckoned from 5 August 2015;

7.3.2 Mr Zwezwe's expulsion was never implemented as it was suspended for 1 year with conditions; and

7.3.3 As at 14 September 2016, Mr Zwezwe's suspended sentence had already prescribed by affluxion of time; and he did not violate any of its suspended conditions, thus rendering it *res judicata.*

8. Ms Sizani was on 19 October 2016 appraised of the prescription of the verdict against Mr Zwezwe in an email which she had to date opted not to and on subsequent consultations with her by client both orally and replied to.

D. URGENCY

9. We are instructed to write this letter to you as functionaries entrusted with the implementation of the SRC Constitution.

10. Client further advises us that though the decision not to accept our client's deployee was implemented on 21 October 2016, it has not delayed the writing of this letter as it;

    10.1 Still awaited a response from Ms Sizani to its email of 19 October 2016,

    10.2 There was a continuous strike at WSU University associated with the nationwide # Fees must fall and campus related issues;

    10.3 WSU Buffalo City Campus students are not satisfied with the decision of Ms Sizani, aforesaid and her decision alone might cause another violent and unnecessary strike, were Mr Zwezwe not to be appointed as their SRC President of choice (we are instructed that clients have urged WSU BC Campus student to contain themselves and to allow the process triggered by this letter);

    10.4 The appointment of the SRC is not yet final as it is still to feature for approval before scheduled the University WSU Council meeting which will consider the elections report in terms of section 9.5.2(l) of the WSU SRC Constitution; and the WSU Council is meeting on 25 November 2016 which is just upon us.

E. CONCLUSION

11. From the above, it is clear that the decision of Ms Sizani ought and should be set aside for the reasons set out above and our instructions are to seek that same to be withdrawn.
12. Clients has further instructed us to demand that you furnish us with a written undertaking delivered to our offices on/or before 12H00 (noon) on Monday 07 November 2016, such undertaking to expressly advise that Mr Zwezwe is eligible to be appointed as SRC president of WSU BC Campus and Ms Sizani's decision be withdrawn.
13. PLEASE BE ADVISED that if you fail to deliver the requested written undertaking referred to in paragraph 12 above, client shall have exhausted all remedies available to it, in which event it shall have no option but to approach the High Court on an urgent basis for an appropriate relief.
14. KINDLY BE ADVISED FURTHER that as and when it becomes necessary to approach court, costs shall be sought against the addresses to this letter jointly and severally one

paying the other to be absolved on an attorney and own client basis *de bonis propris* (to be paid by the addressee personally and not by WSU) such costs to include the preparation for and writing of this letter.

15. We await your response soonest.

Yours Faithfully
Eddie Mani (Mr)"

[27] On 7 November 2016, Drake Flemmer & Orsmond Attorneys, acting on behalf of WSU, responded to this letter as follows:

"i) The Legal Status, Composition and Powers of the Student Representative Council (SRC) are set out in the Walter Sisulu University SRC Constitution.

ii) Chapter nine (9) of the Constitution deals specifically with SRC Elections.

iii) Paragraph 9.8(a) in dealing with the eligibility of Candidates states:

"(a) To qualify as a candidate is determined by Chapter 4 of the SRC Constitution, with the emphasis on promoting academic progress."

iv) Paragraph 5.1.3(d) of the Constitution states:

"5.1.3 Termination of membership of the ISRC and CSRC

A member of the ISRC and CSRC shall cease to be a member and immediately vacate his or her position where:

(d) he is found guilty by the SRC Disciplinary Committee or University Disciplinary Committee for a transgression of the Disciplinary Code or the rules and regulations of the University, unless the SRC Disciplinary Committee or University Disciplinary Committee states in writing that the sentence does not affect his / her standing in the SRC."

v) It is common cause that your client was found guilty by a University Disciplinary Committee for misconduct on the 5th August 2015. Accordingly, your client automatically ceased to be a member of the SRC. The Disciplinary Committee expressly stripped your client of all leadership positions.

vi) The conviction has never been overturned.

vii) Your client has never applied to have the conviction expunged.

viii) Your client is furthermore ineligible for election to the SRC as he is not registered as a student at WSU.

In all the circumstances your client is ineligible for membership of the SRC.

We have noted the submissions in paragraph 7 of your letter under reply, which are totally without merit. Your client was found guilty of misconduct, which automatically excluded him from membership of the SRC. The conviction stands until it is expunged or set aside. It is simply incorrect to suggest that the conviction / sentence "prescribed" after one (1) year.

We note that your client and Mr Sifiso Zwezwe have suggested that a failure on our client's part to accede to your client's demands may result in further strikes and disruptions on campus. Our client's rights in this regard are, and remain fully reserved.

Please note that in the event of you approaching the Court as threatened in your letter under reply, our instructions are to vigorously oppose such application and to seek a punitive costs order both against your client and any of the individuals in their personal capacities.

Should your client engage in a "violent and unnecessary strike" as suggested in your letter under reply our client will not hesitate to urgently approach the High Court for an interdict or contempt of Court proceedings for the violation of the final interdict that is already in place.

Our client would urge your client to respect the SRC Constitution which makes it clear that Mr Zwezwe is not eligible. Further disruptions will be irresponsible and ill conceived.

Yours faithfully
ANGUS PRINGLE"

[28] I digress to point out that the averment that the second applicant was not registered at the university was subsequently retracted.

The chronology of this application

[29] Having been turned down in this fashion by WSU in response to its demand for a guarantee from the other respondents cited, SASCO and its co-applicant

endeavoured to launch the application before me on an urgent basis, supported by a certificate (dated 9 November 2016) purporting to set forth grounds for urgency, as required in terms of this court's rules of practice. On that same day Molony AJ, having considered the certificate, found that the matter was not sufficiently urgent and directed that it must be enrolled in the ordinary course.

[30] The application was accordingly enrolled on the next available motion court date, being 22 November 2016, on which date the matter was technically ripe for hearing in that all the affidavits had been filed, the only outstanding item being the "record of the proceedings sought to be reviewed and set aside" referred to in the applicants' notice of motion.

[31] The extent of what transpired on 22 November 2016 is not clear, but it is evident from the documents and orders in the court file, that Mbenenge J dismissed the application for interim relief with costs. The order is silent on the future conduct of the review application.

[32] Thereafter, and on 12 January 2017, the applicants launched an application to compel the record of proceedings.

[33] On the same day, the applicants delivered a second notice of motion under the same case numbers and citing the same parties as those in the application before me. Therein the applicants seek exactly the same interim relief as that which they sought in the application which was dismissed on 22 November 2016, the only differences being that:

(a) In the first application, the deponents to the founding affidavits were SASCO's Eastern Cape provincial secretary and Zwezwe himself, whereas the deponent in the second application is SASCO's attorney, Mr Mani, citing himself this time as the attorney for both applicants.

(b) In the first application, the deponents to the founding papers failed to establish the requirements for interim relief or to refer to them for that

matter, whereas in the second application the deponent to the founding affidavit lists and to some extent traverses the four requirements.

(c) In the second application, the attorney points out that the respondents had not yet furnished the record of proceedings which delay was prejudicing the applicants in their pursuit of the main relief sought.

[34] On 16 January 2017 WSU delivered a bundle of documents described as "a record of the decision" purporting to be a record of the hearing. The bundle consists of a letter from SASCO's provincial secretary (which the fourth respondent replied to on the same day) nominating Sifiso Zwezwe for the position of president, Xolelwa Sopangisa as treasurer, Zolile Zamisa as sport officer and Luyanda Mgobo for student services. Also incorporated in the bundle is a second deployment letter from SASCO's branch secretary. An exact reproduction thereof reads as follows:

"TO : WSU BUFFALO CITY CAMPUS
DATE : 17 OCTOBER 2016
RE : SASCO DEPOLYMENT

Receive warm greeting,
We hope that this letter finds you in perfect health. The South African Student congress wishes to communicate its decision in relation to SRC seats as obtained after the recent SRC elections in Walter Sisulu University Buffalo City Campus. The Branch executive recommended Sfiso Zwezwe for president but due to verdict of him it then recommended Thulandi Landu.

Names are as follows:

1. President -Thulani Landu
2. Treasurer -Xolelwa Sopangisa
3. Sport Officer -Siphesande Matoni
4. Student Services -Luyanda Mgobo

We hope you find the above in order and that we will be contacted for any query or any concerns.

Regards
Nathi Jack
SASCO Border
Branch Secretary"

[35] The letter not only acknowledges the advices set forth in Sizani's email to Jack on 10 October 2016, but serves to communicate compliance and agreement with them.

[36] Lastly, the bundle contains a further letter, also dated 17 October 2016, but this time from SASCO's provincial secretary who is also the deponent to SASCO's founding affidavit. Verbatim and in full, it reads thus:

> "TO: WSU BUFFALO CITY CAMPUS
> FROM: SASCO PROVINCIAL SECRETARY
> DATE: 17 OCTOBER 2016
> RE: SASCO DEPOLYMENT
>
> Receive warm greeting,
> We hope that this letter finds you in perfect health. The South African Student congress wishes to communicate its decision in relation to SRC seats as obtained after the recent SRC elections in Walter Sisulu University Buffalo City Campus.
>
> Names are as follows:
> 1. President - Luyanda Mgobo
> 2. Treasurer - Xolelwa Sopangisa
> 3. Sport Officer - Siphesande Matoni
> 4. Students Services - Samkele Mqai
>
> We hope you find the above in order and that we will be contacted for any query or any concerns."

[37] The only difference between the letter from the branch secretary and this one, is that the nominee for student services has now been elevated to deployment as president (which seat I am advised she still occupies at the instance of SASCO) and a new candidate has been deployed in respect of student services.

[38] On 17 January 2017 Mbenenge J made an order removing the application to compel from the roll, with the issue of costs reserved, coupled with an order directing WSU to deliver an affidavit explaining the delayed delivery of the record. On the same day Mbenege J made a further order reserving the costs of the day, and postponing the application for interim relief (which can only be the second one as the

same judge had already dismissed the first) to a date to be arranged with the registrar, with the respondents to answer by 2 February and the applicants to reply by 6 February 2017.

[39] The applicants indeed delivered their reply on 6 February and after an unexplained delay of more than a month arranged with the registrar for the "matter" to be heard on the opposed roll on 16 March 2017. The notice of set down makes no distinction between the second application for interim relief and the review application. Indeed, on a plain meaning interpretation of the documents filed which I have herein referred to chronologically, the only logical inference to be drawn is that the second application for interim relief had been set down in compliance with the order of Mbenenge J on 17 January 2017.

[40] That is certainly what this court deduced and by all accounts is what respondents' counsel prepared for in the main in her 15 page heads of argument, 12 of which are devoted to the second application for interim relief.

[41] At the hearing of this matter however, the applicants' counsel advised me that it was intended for the review application only to be heard, and, as I understood it, that the applicants elected to reserve their rights to argue the second urgent application for interim relief either pending the outcome of the review application or, if this court delays the handing down of its review judgment.

The urgent application for interim relief

[42] As already mentioned, the applicants' first application for interim relief was dismissed with costs on 22 November 2016 and rightly so in my view.

[43] On 12 January 2017 the same applicants launched the same application against the same respondents for the same interim relief, contending that they are entitled to do so based, as I understand it, on changed circumstances. These circumstances (as alleged by the applicants) are that the respondents were unduly delaying the finalisation of the review application by their failure to deliver the record of the hearing timeously.

[44] Whether that was indeed so is neither here nor there. To my mind however the second applicant was (in the first application for interim relief which was dismissed) and remains non-suited in his prayer for interim relief, which, if granted, would allow the second applicant to occupy the very seat, the occupation of which is the subject matter of the review application.

[45] This is so for a number of reasons:

(a) The interim relief sought is simply incompetent and ill-conceived. Effectively it amounts to removing the successful incumbent of a vacant position and replacing that person with an unsuccessful applicant, pending the review of substantive and/or procedural steps which the respondents took in filling the position in the first place.

(b) It is not as if the SRC was rendered a rudderless ship by the first applicant's recalling of the second applicant. The first applicant took diligent steps to substitute the second applicant with its own candidate within one week of it having been advised in writing that the second applicant was not eligible for the position.

(c) Even if I am not correct, a further question which the applicants have failed to answer is what criteria were used to determine when it was appropriate to launch the second application, wherein the applicants not only withheld the crucial information that the first application had been dismissed, but failed to establish, with any degree of persuasion, that the circumstances had changed to such an extent that the second application justified substantial departure from the use of form 2(a) of the first schedule as referred to in rule 6(5) of the uniform rules of this court.

(d) Indeed, whilst the applicants' attorney attempted to pay lip-service to the requisites for an interim interdict, the attorney simply failed to set forth explicitly the circumstances which he avers rendered the matter urgent (so as to justify the application having been brought on two court days' notice to the respondents), and the reasons why he claims that the

applicants cannot be afforded substantial redress at a hearing in due course as envisaged in rule 6(12)(b).

(e) As such the relief sought in the second application is not only *res iudicata,* but it has simply not been established that this second application is urgent.

(f) Respondents' counsel has also raised in argument the question of the issue of the non-joinder of the present SRC president, Ms Luyanda Mgobo, and contends that on this ground alone, both the interim application and the review application are fatally defective essentially for the same reasons, in that Mgobo has a direct and substantial interest in the outcome of both applications.

(g) It is so that the issue of non-joinder was not raised in the application papers. However, by virtue of the single fact that all parties who have a direct and substantial interest in a matter are entitled to be heard, this court is empowered to, and in fact is duty-bound to *mero motu* raise the issue (see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637(A) at 649-653).

(h) Indeed, under the common law this court has an inherent power and the discretion to order joinder, and it is entitled to determine issues of joinder in accordance with the requirements of convenience and common sense (see *Marais v Pongola Sugar Milling* 1961 (2) SA 698(N) at 702F*; Harding v Basson* 1995 (4) SA 499(C) at 501 H-I).

(i) It is contended on behalf of the applicants, that Mgobo is not really entitled to be a party to these proceedings. As I understand the submission, these proceedings are political and party driven (by SOSCA) and the incumbents of positions are simply pawns, capable of and being quite willing, in a manner of speaking, to be withdrawn and substituted unilaterally, at the sole instance and discretion of the party. Even if this

were the position (which sounds somewhat draconian to me) the attitude of the courts in matters such as these was settled as far back as 1949 in *Amalgamated Engineering (supra)* where Fagan AJA said the following (at 660):

> "It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard, for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them both."

(j) As correctly pointed out by the respondents' counsel, Mgobo has been elected and appointed as the SRC president by SASCO. She thus occupies the position which SASCO, having deployed her, now seeks to secure for its recalled candidate, Zwezwe. The position is simple. Should the applicants succeed, either in the application for interim relief or in the review application, Mgobo would lose her position as SRC president, and on that ground alone has she, as an affected party, has a direct and substantial interest in the relief sought.

(k) Having made their respective submissions, neither counsel for the applicants, nor counsel for the respondents prevailed upon me to join Mgobo as a party. The respondents' counsel was reluctant to do so on the basis that such a procedure would be time-consuming, that there comes a time that "the egg cannot be unscrambled", that "too much water has passed under the bridge", and finally, that by virtue of the 2017/18 elections having been scheduled for September this year, such an order may well be nothing more than a *brutem fulmen*. In the premises the respondents stand by their contention that I should dismiss the interim relief sought on the grounds which they raised *in limine* (which include absence of urgency, *res iudicata,* issue estoppel and inadmissible hearsay), as well as on the merits of the application.

(l) As I have said, counsel for the applicants did not avail himself of the opportunity to argue the issue of the interim relief, or of accepting my invitation to join Mgobo. On a circumspect evaluation of the application

papers and the argument presented at the hearing of this application, this election on the part of the applicants' counsel was, by all accounts not recklessly made. I say so for two reasons: firstly, the second application for interim relief has, from its inception, been doomed to failure, not only on the respondents' *in limine* argument which I have already dealt with, but also on its merits, which I shall traverse presently. Secondly, and because the application is doomed to failure, to order the joinder of Mgobo with respect to the interim relief would have been an exercise in futility.

(m) There is simply no sense to be made regarding the delivery of a second application for an urgent interim interdict, preventing in particular the university itself from upholding the Constitution of its own SRC, pending the review of the manner in which the university repeated its previously declared stance to the applicants.

[46] Turning to the merits, in order to obtain an interim or interlocutory interdict, an applicant is required to establish:

(a) a prima facie right;
(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is;
(c) that the balance of convenience favours the granting of an interim interdict; and
(d) that the applicant has no other satisfactory remedy.

[47] As contended for by the respondents, the very existence of this review application establishes another satisfactory remedy. So too would attempts to invoke the provisions of the SRC Constitution which inter alia provide for the university disciplinary committee to state in writing that the sentence following a guilty verdict at a misconduct inquiry does not affect the member's standing in the SRC.

[48] Nor can it be said that the balance of convenience favours the granting of interim relief, the effect of which would be for SASCO to recall its own candidate and substitute her with another at the risk of the review application failing, which would mean that SASCO would be constrained to publish a fourth list of nominees for the 2016/17 SRC. To my mind this would be in conflict with the object of item 5.1.4(e) of the Constitution which states that the recalling and replacement of members of the SRC must be done in a manner that does not impede or disturb the functioning and smooth running of the SRC. With this object in mind the balance of convenience must favour the preservation of the status quo pending the outcome of the review application.

[49] In the premises the applicants' attempts to revive a dismissed interim application by attempting to substitute it with another doomed one, are spurious and opportunistic to say the least. The second application is described as one for "interim relief" pending the determination of this review application. The review application has been heard and this judgment determines its fate. The respondents, who have been constrained to deal with the second "interim" application, are now entitled to a verdict. The second application cannot simply be ignored or saved for a rainy day. The second interim application, like the first one, falls to be dismissed with costs.

The review application

[50] The relief which the applicants seek in the main application is for this court to review and set aside "the decision/s of the respondents" which sought to prevent the first applicant in its endeavour to deploy the second applicant as the elected president of the WSU BC campus.

[51] In this regard, the applicants have submitted and contended that the crisp issue for determination is whether Sizani (the fourth respondent) in her capacity as a member of the EC, was entitled in terms of the Constitution, to disqualify the second applicant from being deployed by SASCO as the SRC president of the WSU Buffalo City campus.

[52] The respondents deny that Sizani disqualified the second applicant, either in her capacity as a member of the EC, or at all.

[53] It goes without saying, that if this court finds that the impugned conduct did not take place, that would be the end of the matter. There would be nothing for this court to review.

[54] The following has become common cause; alternatively, has not been disputed on the papers:

(a) That during 2015 the second applicant was a member of the WSU SRC.

(b) That he was charged with misconduct.

(c) Acts of misconduct are traversed in article 3 of the WSU student disciplinary code of conduct (the Code) and include being under the influence of liquor on university premises, and/or consuming and possessing liquor on these premises without the requisite approval as well as assaulting or causing physical harm to an employee of the university.

(d) The second applicant was charged with the aforesaid misdemeanours.

(e) He appeared at a disciplinary hearing and was found guilty by the WSU disciplinary committee for transgressions of the Code.

(f) He was sentenced by the presiding officer on 5 August 2015.

(g) He appealed against sentence on 17 August 2015 on the grounds that his expulsion from WSU accommodation and the order stripping him of all the leadership positions was holding by virtue of his leadership role at WSU were unduly harsh.

(h) The appeal was referred to the WSU principal who upheld the sentences imposed, and dismissed the appeal on 9 October 2015.

(i) On 8 August 2016 WSU received a letter of demand from the second applicant's lawyers, Pakamani Gasela Attorneys. The letter is addressed to WSU's vice chancellor. The letter states that the second applicant has served his sentence, and that the one year period of suspension "lapsed" on 5 August 2016, by virtue of which the second applicant was entitled to participate in university activities and to be in any student leadership position including one on the SRC.

(j) On 16 September 2016 the second applicant's lawyers (this time Tiya Pata Attorneys), addressed an "appeal" to WSU's vice chancellor and principal (copied to the "executive director student affairs, rector (Buffalo City campus), legal department", reiterating that the sentence conditions had "lapsed" and attempting to persuade the principal to allow the second applicant to participate in the upcoming SRC elections on 29 September 2016.

(k) On 22 September 2016 WSU's principal replied to this letter, inter alia stating that the presiding officer at the second applicant's misconduct hearing had found that his behaviour contradicted the conduct and the ethics which WSU sought to promote for future leaders and responsible citizens, and that Second Applicant was the type of leader that "poses a danger to the well-being and security of the university." The final paragraph of the response reads as follows:

> "I accordingly cannot accede to your request to allow Mr Zwezwe to participate in the upcoming SRC elections, both in terms of the validity of the sanction and his failure to meet the criteria for continued SRC office. The University has an obligation and a responsibility to ensure that responsible students are elected to leadership positions and that students are protected against persons who have been found formally to be irresponsible leaders."

(l) This reply was copied to the executive director: student development and support services, the WSU registrar, the director: legal services and the Buffalo City campus rector.

(m) During or about September 2016 SASCO contested and won the 2016/17 SRC elections.

(n) On 10 October 2016 SASCO addressed a letter to the "WSU Buffalo City Campus" nominating four of its members for seats on the SRC. Therein Zwezwe (the second applicant) is nominated for the position of president, and Luyanda Mgobo (the present incumbent of the president's seat) is nominated for the position of student services. One Zamisa is deployed for the position of sports officer. The letter ends with the words: "We hope you find the above in order and that we will be contacted for any query or any concerns."

(o) On the same day Sizani (the fourth respondent who is cited in these proceedings in her capacity as the student development member of the electoral committee, acknowledged receipt of SASCO's letter of deployment, and advised it that according to the WSU "disciplinary code of conduct committee", the second applicant (as a consequence of his conviction) was not eligible for deployment by virtue of the provisions of clause 5.1.1(g) of the Constitution, and that this had been communicated to two SASCO representatives during the campus electoral committee processes.

(p) On 17 October 2016 SASCO wrote back twice (first under the auspices of its branch secretary to whom Sizani had emailed her letter, and thereafter under the auspices of its provincial secretary who is also the deponent to SASCO's affidavit in this application), initially substituting Zwezwe with Thulandi Landu, and finally substituting Landu with the present incumbent of the president's seat. The first letter states that despite SASCO's branch executive having recommended the second applicant, "due to verdict of him" Landu (whom SASCO finally substituted with Mgobo) is recommended for president in his stead. Both letters are again signed off with the expression of hope that the addressee finds this in order and inviting WSU Buffalo City campus to contact SASCO in the event of any queries or concerns.

(q) There is nothing before me to suggest that WSU or anyone else for that matter, raised any "queries or concerns" about SASCO's final list of nominees and deployees, and the results of the elections were duly published on 21 October 2016.

(r) On 4 November 2016, and by all accounts quite out of the blue, WSU received a letter from SASCO's lawyers, E.E. Mani Attorneys. The letter states that the SRC elections, which were conducted in terms of the Constitution were conducted without difficulty in line with an election schedule, with the exception that the election results were published some three weeks later than anticipated (on 21 October 2016) due to protest action. The letter further states that the elections were declared free and fair. The letter then complains that Sizani had, outside of the time frames of the timetable, "objected" to the second applicant being appointed and deployed as the SRC president, that her conduct is unconstitutional, and that there is no merit in her "objection". It further states that the students at the WSU Buffalo City campus are not satisfied with her "decision" and that her "decision" must be set aside, failing which this court would be approached.

(s) It goes without saying that the tone of this letter and the contents thereof, is totally inconsistent with the friendly and agreeable approach apparent from the letter written two weeks previously, when the second applicant had the opportunity at the very least, to reveal its final list of deployees on a without prejudice basis, and to point out why.

(t) On 7 November 2016 WSU's attorneys responded to this letter, which response has already been incorporated in this judgment. In particular, the response draws attention to item 5.1.3(d) of the Constitution, points out that a member of the SRC may remain so if the committee which disciplined him states in writing that his sentence does not affect his standing in the SRC, that the second applicant's conviction has not been set aside and that he has not applied for it to be expunged, and that he is accordingly ineligible for membership of the SRC.

(u) The applicants launched this application two days later.

(v) Zwezwe, as the second applicant, deposed to a written statement on oath, confirming that the facts that he was deposing to were within his personal knowledge and belief, and were to the best of his knowledge and belief both true and correct, unless the context of the affidavit indicated otherwise, and in particular confirming that his deployment by SASCO for the position of SRC president of the WSU Buffalo City campus was prevented by WSU's officials (more particularly Sizani) who believed that he was prevented from ever being appointed as a member of WSU student leadership bodies, when in fact, although he had been convicted and sentenced in 2015 for misconduct, the "conviction" was suspended, and that the suspended period had "lapsed" without the necessity for the sentence to be implemented.

[55] Having undertaken this somewhat cumbersome exercise to outline that which is common cause, I now return to address the applicants' crisp issue for determination, namely whether Sizani did, alternatively, was entitled, to "disqualify" the second applicant from being deployed by SASCO as president of the SRC.

[56] As the identity of the party who "disqualified" the second applicant is disputed, it is necessary for me to decide whether the respondents have, in so doing, raised a material dispute of fact which is incapable of resolution on the papers. It is to this end that I deemed it prudent to list facts which are not in dispute on the papers. It then becomes surprisingly easy to arrive at the inevitable conclusion that it was not Sizani who "disqualified" the second applicant. I say so for the following reasons:

(a) The second applicant admits that he was convicted and sentenced for misconduct subsequent to a hearing conducted by the WSU disciplinary committee.
(b) By virtue of the provisions of article 3.2 read with articles 3.4 and 3.7 of the Code, misconduct amounts to a contravention of the Code.
(c) In terms of the provisions of item 5.1.3(d) of the Constitution, dealing with issues of termination of membership of the SRC, a member of the SRC

shall cease to be such and must forthwith vacate this position when he is found guilty by the SRC disciplinary committee or the university disciplinary committee for a transgression of the disciplinary code, *unless* the relevant committee states in writing that the sentence imposed does not affect his standing in the SRC. Item 5.1.1(g) of the Constitution, which Sizani referred to in her letter to SASCO, states that a person shall not be eligible for election to the SRC if he has been barred from seeking election by the disciplinary committee of the university or that of the SRC.

(d) To my mind, it matters not that the sentence imposed may be open to more than one interpretation, as is evident from the opposing views held by the applicants on the one side, and the university on the other. Nor does it matter what the effect thereof is. To put it plainly, the second applicant's membership of the SRC was terminated when he was found guilty (irrespective of the sentence). He has also been sentenced. If the applicants hold the view (as they appear to do), that the second applicant is re-eligible just to be a member of the SRC, he must approach the university disciplinary committee to state in writing that the sentence (whatever it may have been) "does not affect his standing in the SRC". The SRC's Constitution which is paramount, is abundantly clear on this point and nothing which may or may not have happened before, during or after the elections can override this mandatory provision.

(e) In short then, it is not Sizani who "disqualified" the second applicant from standing. The second applicant (on the facts which are common cause, read together with items 1.5(a) and (e), 5.1.1(g) of the Constitution and article 1.3 of the Code[2]), was in a state of disqualification by virtue of the rider set forth at item 5.1.3(d) of the Constitution, in that the disciplinary committee has not stated in writing that the sentence does not affect his

[2] Item 1.5(a) of the Constitution declares the Constitution to be the supreme policy document governing all matters of student governance, subject only to the provisions of the Higher Education Act, the WSU Statute and the authority of the WSU council.
Item 1.5(e) states that the Constitution shall bind the SRC student parliament, all recognised student structures affiliated to the SRC and all WSU students, and that any act or conduct which is contrary to the provisions of the Constitution is a contravention of the Constitution.
Article 1.3 of the Code states that WSU students are subject to the Code and are obliged to acquaint themselves with the Code and its rules and regulations.

standing. This was already the position when the fourth respondent merely reminded SASCO thereof.

(f) This is not the only reason why I say that the second applicant was already in a state of disqualification when the fourth respondent reminded the applicants of this. He was and is also disqualified by the admitted fact that the university's principal dismissed his appeal against the sentence imposed and cautioned him, that he is not eligible for a position on the SRC and is thus not entitled to make himself available for nomination. Insofar as it may have been necessary (which it was not in my view), the nature and extent of this disqualification was conveyed to him on at least two occasions by WSU: firstly on 9 October 2015 when his appeal was dismissed, and thereafter again in a letter addressed to his attorneys on 22 September 2016, almost three weeks before the fact of the disqualification was repeated to the first applicant by a functionary of the university on at least two occasions.

[57] Indeed, when the letter of 22 September confirmed his disqualified status, it was pointed out that he had also failed to meet the criteria for continued SRC office. These, as I have said are set forth in the Constitution as being the following:

(a) a successful appeal;
(b) a letter from the disciplinary committee stating that his sentence does not affect his standing;
(c) an application to the registrar for his conviction and sentence to be expunged from his academic record in terms of article 16.1 of the code of conduct.

[58] To my mind it is abundantly clear that the second applicant's disqualification existed and was known to him before he gave out and pretended that he was eligible to stand, leaving the respondents no choice but to remind the second applicant thereof. The fact that it was the fourth respondent who did so, is in my view irrelevant.

[59] The university was constrained, by virtue of this non-disclosure, to convey the *fait accompli* of the second applicant's disqualification to the first applicant which it did, immediately upon its receipt of the second applicant's deployment letter addressed to its Buffalo City campus.

[60] The applicants seem to suggest that the electoral agency had created a legitimate expectation of success with at least the second applicant by failing to detect and/or disclose and declare at an earlier stage of the election proceedings that which the second applicant had known all along and had himself failed to disclose. This suggestion is absurd and amounts to nothing more than projection. There is nothing before me to suggest that the letter of 10 October 2016 amounts to, or is capable of being interpreted as an out of time "objection" (as described by the applicants) which took them by surprise. On the contrary, it is the somewhat belated stance adopted in the second applicant's attorney's letter of 4 November, which introduces an element of surprise. In any event, if the fourth respondent's reminder is to be interpreted as a mere "objection" this application for review is either premature and/or totally unnecessary, and serves to be dismissed with costs on those grounds alone.

[61] In my view, the continued attempts on the part of the applicants to have the second applicant's de facto disqualification set aside via the back door (when no substantive grounds presently exist for doing so), based on the invention of curious and imaginative causes of action and alleged procedural irregularities which have no factual basis, are ill-founded and frivolous.

[62] The applicants' counsel contends that this matter is before me because of the actions of the fourth respondent. This accusation is simply wrong. This matter is before me because the second applicant made himself available for nomination, and the first applicant nominated him, when he was in an unredeemed state of disqualification of which state he (and in all probability also the first applicant) was fully aware. It is this type of conduct which serves to be impugned, not the fourth respondents disclosure thereof. The second applicant remains disqualified, even if the fourth respondents conduct were to be set aside.

[63] Indeed, as pointed out by the respondents' counsel, it is difficult to imagine what else the respondents (and particularly those cited under the auspices of the EA) should have done.

[64] The applicants in my view, may consider themselves fortunate that the respondents have not sought (or given notice that they intend to seek) a punitive costs order against the respondents, an order which I would seriously have considered granting.

[65] The applicants have, in any event, either deliberately refused, or simply neglected to exhaust internal remedies available to them in order to attempt securing the reversal of the second applicant's disqualification. Having failed to do so, they cannot expect the court to set aside the fact of his disqualification by shooting the proverbial messenger, more particularly in that she was, in any event (acting in her capacity as both student development practitioner and as a member of the electoral committee) quite entitled and in fact obliged to convey factual information to the first applicant.

[66] Even if Sizani's letter of 10 October 2016 is capable of construction other than that which I have just attributed to it, the applicants' contention (that Sizani "usurped" the function of the second respondent) is fallacious. Item 9.5.1(a) of the Constitution states that SRC elections shall be supervised and conducted by an impartial electoral agency. There is nothing before me to suggest that this impartiality was compromised when the fourth respondent reminded the first applicant of the pre-determined status of its nominee. In any event, as pointed out by the respondents' counsel, item 9.5.1(e) of the Constitution states that the electoral agency must work hand-in-hand with the department of student affairs for administrative purposes.

[67] Sizani's letter to SASCO constitutes an administrative process. Sizani is not only a member of the electoral committee, but also WSU's acting student development practitioner. It is clear that when she wrote the letter on behalf of the EA she was also working hand-in-hand with student affairs.

[68] As I have already pointed out, it is in any event so, that the review application also serves to be dismissed on the basis of non-joinder alone, for the same reasons which I have mentioned with respect to the interim application. Ms Mgobo, in her capacity as the present incumbent of the position of president of the SRC, not only has a direct and substantial interest in the outcome of the review application. It is clear that if the applicants succeed in the review application, she is bound to be "an affected party". Rule 53(1) makes it compulsory for the applicant to also notify all other parties affected by the application.

[69] I find it particularly curious that the first applicant (on whose behalf it has been argued that this is SASCO's litigation and that its members have no *locus standi),* nevertheless elected to join as a second applicant its own non-successful member, but not its own successful member. What is good for the goose is also good for the gander, or more appropriately in these circumstances, what is good for the gander is good for the goose.

The reserved costs of the application to compel

[70] The applicants have elected to proceed by way of review. According to the papers and the argument presented, the conduct sought to be reviewed and set aside, is in the nature of a decision. It is alleged that this decision was made by Sizani (the fourth respondent) based on an incorrect interpretation of the sentence which WSU had imposed on the second applicant during the previous year.

[71] Rule 53(1) of the uniform rules of this court, provides as follows:

> "(1) Save where any law otherwise provides, all proceedings to bring under review a *decision* (my emphasis) or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, *and to all other parties affected* (my emphasis) -
>
> (a) Calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and

(b) Calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such *proceedings* (my emphasis) sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so…..

(3) The registrar shall make available to the applicant the record dispatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made…"

[72] The applicants, in their notice of motion delivered on 9 November 2016, modified the relief sought under rule 53 to provide for the production of inter alia, all correspondence, reports, memoranda, documents, evidence and other information which was before the respondent *(sic)* at the time when the "decision" was made, together with "such reasons as the respondent *(sic)* is by law required to give or desires to make, and to notify the applicants that they had done so.

[73] The period within which the respondents were requested to comply expired on 30 November 2016. The respondents opposed the application and delivered an answering affidavit on 18 November 2016. Therein is stated the following:

"28.3 The deponent and Second Applicant have not made full disclosure of the facts surrounding the *objection* (emphasis added) raised to his eligibility to hold a position within the Student Representative Council as they are required to do."

[74] Thereafter, the respondents point out that the second applicant was not only convicted and sentenced on 5 August 2015, but that he lodged an appeal on 17 August 2015 which the principal of WSU dismissed on 9 October 2015. In support of these averments, the respondents annexed to their answering affidavit a letter of demand addressed to WSU's principal dated 5 August 2016, a letter from the second applicant's erstwhile attorneys dated 16 September 2016 (upon his instructions, appealing the dismissed appeal), and also, most importantly, WSU's principal's emailed response dated 22 September 2016 which quite categorically states:

"I accordingly cannot accede to your request to allow Mr Zwezwe to participate in the upcoming SRC elections".

[75] Significantly, these averments were admitted by SASCO under its reply dated 21 November 2016. No reasons were given for the exclusion (in the founding papers) of the information relating to the failed appeal.

[76] The second applicant did not even deliver a replying affidavit in the review application. In the context of the aforesaid, it may safely be concluded that both applicants were not only aware of the fact that the second applicant had been excluded from participating in the SRC elections when they launched the review application, but also that such decision was in force when the application was launched: an application not only to have the steps taken by Fourth Respondent to communicate this decision reviewed and set aside, but for this court to sanction the nomination and deployment of a candidate who has been declared illegible in terms of WSU's Constitution and its code of conduct.

[77] The respondents did not reply to the applicants' request by 30 November 2016.

[78] Almost six weeks after this due date, the applicants brought an application to compel the provision of the "record" claiming that the respondents' failure to "timeously" do so as provided for in the rules, was prejudicial to the applicants and delayed the completion of these proceedings.

[79] Four days later, the respondents presented the applicants with:

(a) SASCO's letter dated 10 October 2016, informing WSU's Buffalo City campus that it had deployed the second applicant, another (disqualified) candidate, and two other candidates to fill four seats in the SRC. It is significant that this letter was not addressed to the head of the EC, despite the criticism levelled at her failure to reply in person.
(b) The response by "Buffalo City Campus, Walter Sisulu University" dated 10 October 2016, in the form of an email sent by the fourth respondent in her capacity as acting student development practitioner, re-stating what the applicants already knew: namely that the second applicant had been

convicted, that in the premises he was not an eligible deployee, and that this had been conveyed to SASCO members previously.

(c) A further letter from SASCO's branch secretary, dated 17 October 2016 and addressed to WSU, indicating that there had been a reshuffle to exclude the second applicant due to his conviction for misconduct, and that he had been substituted with Thulani Landu for president.

(d) A third letter, dated the same day, from SASCO's provincial secretary, stating that SASCO wished to "communicate its decision in relation to SRC seats", and that it was now deploying Luyanda Mgobo for the position of president.

[80] In the result, the applicants removed their application to compel from the roll on 17 January 2017, with costs reserved.

[81] In an affidavit deposed to by WSU's director of legal services the respondents explain their failure to deliver the record timeously as follows:

(a) That the applicants had not favoured them with a courtesy letter, the reply to which would have been that WSU was closed for the academic year and the staff members in possession of the documents were on leave;

(b) The documents ultimately made available were already in the applicants' possession, two of the three (this should read three of the four) being the first applicant's own letters.

(c) A reasonable period of time had not elapsed since the application for review and the filing of the documents.

(d) The relevant period coincided with WSU's annual shutdown and the staff who had dealt with the matter were on leave.

[82] I am of the view that the time which elapsed between the application for review and the filing of the documents is lengthy, and in the circumstances it does not really assist WSU, who was legally represented as early as 18 November 2016, to say that if the applicants had only asked, a reasonable explanation would have been forthcoming. To my mind it would have been simple for WSU in its answering affidavit deposed to on 18 November 2016, to traverse what it understood from the

request for documents and the availability of these. What concerns me however, is that the applicants' papers and the form of argument before me, make it plain that what the applicants were seeking to be reviewed and set aside is the "decision" made by the fourth respondent that sought to prevent the first applicant in its endeavour to deploy the second applicant as the elected president of WSU Buffalo City campus.

[83] It is difficult, in the light of the applicants' claim, to imagine what else the applicants were looking for. It is trite that the provision of rule 53(1)(b) is primarily intended to operate in favour of and to the benefit of an applicant in review proceedings, and an applicant is likewise entitled to waive the requirements of the subrule. It is also trite that the keeping of a record is not a prerequisite for the applicability of the rule; in other words, proceedings may be brought under review despite the fact that no record of the proceedings sought to be corrected or set aside has been kept.

[84] The only document which comes close to falling into the category of a record of the decision made by the respondents (which I have already found to be, at best, to convey to the applicants what they already knew), is the fourth respondents letter to the first applicant, which letter the applicants themselves annexed to their founding papers. Any other information which they may have considered to be of relevance to this application, was either in their possession at the time this application was founded, or was made available to them when the answering papers were delivered on 18 November 2016. Indeed, it was open to the applicants in their reply to attempt to make some sense of what they intended the record of the decision to be; alternatively, to waive any further compliance with the provisions relating to the making available of some sort of record.

[85] During argument, the applicants' counsel contended that, had the respondents made available (as part of the record in terms of rule 53(1)(b)), the letter of 22 September 2016 addressed by the principle to the second applicant's attorneys, the applicants' stance with respect to the future conduct of these proceedings (presumably in terms of rule 53(1)(4)) may have been different.

[86] However, as I have said, this letter, together with Sizani's letter of 10 October 2016, were made available to the respondents on oath (and not just as part of a record) as early as 18 November 2016 (12 days before the *dies* allowed for the dispatching of the decision and any record relevant thereto).

[87] Indeed, the applicants' counsel at the hearing of this matter, conceded that the applicants, had they been granted the opportunity to argue the merits of the review application on 22 November 2016 (when the interim relief was dismissed), they would have been in a position to do so.

[88] In the circumstances, whilst I am of the view that there is little merit in the respondents' contentions defending the delay, I am by the same token of the view that the applicants' demand for something which they already had in their possession and which was incapable of further substitution, was not only excessive and unnecessary, but that there is also no evidence before me to suggest that the applicants were prejudiced by the delay.

[89] In the circumstances I am of the view that the application to compel is a neutral factor in these proceedings and should not attract a costs order either way.

[90] I make the following order:

Order

(a) The second application for interim relief, delivered on 12 January 2017, is dismissed with costs, which costs are to be paid by the applicants jointly and severally, the one paying the other to be absolved.

(b) The review application is dismissed with costs (excluding the wasted costs of the application to compel), which costs are to be paid by the applicants jointly and severally, the one paying the other to be absolved.

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I T STRETCH
Judge of the High Court

Date heard: 16 March 2017

Judgment handed down: 30 March 2017

For the applicants: Mr M.H. Sishuba
Instructed by E E Mani Attorneys
East London

For the respondents: Ms M.L. Beard
Instructed by Drake Flemmer & Orsmond Inc.
East London