IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 23182/2017

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

26/08/20 pp

SINAZO RAPHAHLELA	First Applicant
SIHLE MASIKA	Second Applicant
And	
UNIVERSITY OF THE WESTERN CAPE	First Respondent
COUNCIL: UNIVERSITY OF THE WESTERN CAPE	Second Respondent
REGISTRAR: UNIVERSITY OF THE WESTERN CAPE	Third Respondent
RECTOR: UNIVERSITY OF THE WESTERN CAPE	Fourth Respondent
JUDGE NATHAN ERASMUS	Fifth Respondent
REV. LLEWELLYN MACMASTER	Sixth Respondent
PROFESSOR BRIAN WILLIAMS	Seventh Respondent
SONGEZO MAQULA	Eighth Respondent

STEVEN CHARLES	Ninth Respondent
CLIVE HENDRICKS	Tenth Respondent

JUDGMENT

Kollapen, J

Introduction and the Parties

[1] This is an application that relates to the elections held by the Convocation of the First Respondent on the 3th of June 2017 for the purposes of electing 2 members of Convocation to serve on the Council of the First Respondent.

[2] The Applicants are members of Convocation, who are aggrieved by the process that led up to and including the elections, and wish to have those elections set aside on the basis that the process followed was in conflict with and contrary to that provided in the statute governing the First Respondent as well as on the basis that they were not free and fair.

[3] The Fifth and Sixth Respondents were the successful candidates in those elections while the Seventh to the Tenth Respondents stood as candidates but were unsuccessful.

[4] The First to the Fifth Respondents oppose the relief sought. I pause to mention that in respect of the Fifth Respondent, the opposition is largely confined to allegations made by the Applicants that the candidature of the Fifth Respondent was in violation of the Judicial Code of Conduct, and that he impermissibly used the office and stature of a Judge of the High Court to advance his candidature for election.

[5] The Seventh Respondent filed an affidavit in which he indicated that while he did not oppose the relief sought he wished to place certain facts before the Court relating to some of facts that underpinned the subject matter of the application.

The relief sought

[6] The Applicants seek the following relief:-

[a] Declaring that the UWC Convocation elections held on the 3rd of June 2017 are unlawful and accordingly set aside.

[b] Directing the Second Respondent to convene an urgent UWC Council, within two (2) weeks of this order, for the purpose of complying with the requirements of the UWC statute for the holding of UWC Convocation Elections.

[c] Directing the Second Respondent, at the said urgent Council meeting referred to above, the announce a date for holding fresh UWC Convocation elections within thirty (30) days of the Order of this Honourable Court.

[d] Directing the First, Second, Third and Fourth Respondent to publish the voters' roll and to provide copies thereof for the purposes of promoting the right to free and fair elections I respect of the Convocation Elections.

[e] Directing that an independent electoral body be appointed by resolution of the UWC Council to manage the UWC Convocation elections and that there be an elections and there be an election management meeting that includes the candidates so that there is an understanding of electoral rules and consensus on the way the election will take place. The results of the elections can be announced by the Registrar in her capacity as the Returning Officer. Such consensus to be achieved shall include, but not be limited to, the right of candidates to nominate and appoint election monitors at each voting booth.

The factual background

[7] The Second Respondent, the Council of the University of the Western Cape is the highest decision-making body of the University, and its powers and functions are as set out in the statute of the University of the Western Cape ("the statute"), published on the 4th of May 2005 in accordance with Section 33 of the Higher Education Act No 101 of 1997.

[8] Section 7 of the statute which deals with the composition of Council provides that two members of Council shall be elected from the members of Convocation

in the manner provided for in paragraphs 12.15 and 12.18 to 12.24 of the statute.

[9] Paragraph 12.15 thereof provides that subject to the provisions of paragraphs 12.18 to 1224, the convocation elect such number of members of the council as the convocation is entitled to.

[10] The provisions of paragraphs 12.18 to 12.24 then sets out in some detail, the procedure for those elections as well as the eligibility for election and participation and they lie at the heart of the Applicants complaints in this application in so far as they relate to the charge that the University failed to comply with the statute in conducting the elections of the 3th of June 2017.

[11] In addition, the Applicants allege that the elections were not free and fair on account of the candidature of the Fifth Respondent, to which reference has already been made, the refusal by the University to make available the names of other candidates for election, the refusal by the University to allow the Seventh and Eight Respondents to campaign and address members of convocation on their candidature and then finally what the Applicants describe as the impermissible editing of the CVs of candidates and in particular those of the Seventh and Eight Respondents before they were placed on the website of the University.

Preliminary issue

[12] Before dealing with the merits of the application I deal briefly with a preliminary issue that the Respondents have raised – that of inordinate delay.

Inordinate delay

[13] The Respondents argued that there has been an inordinate delay in prosecuting this application after it was issued in December 2017 and that the Court should consider its dismissal based on such a delay. In this uis regard reliance was placed on the dicta in *Cassimjee v Minister of Finance 2014(3) SA 198 (SCA) where the Court expressed itself in the following terms on the question of inordinate delay :-*

" [A] Defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the Court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows:

In order for such an application to succeed the defendant must show

(i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs;

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable;

(iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself; prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

[14] The difficulty for the Respondents is that the question of inordinate delay was raised for the first time in argument, but fatally so, there is nothing in the affidavits filed by the Respondents that lays a basis for the argument. If the Court is to consider the argument it must do so against a proper ventilation of the facts that would purport to support such an argument and conclusion. No facts are advanced in support of the argument and there is therefore no need to consider the point any further.

The challenge to the legality of the elections including the freeness and fairness challenge.

[15] The relief the Applicants seek can be divided into three broad categories:-

a) That the process that led to the elections as well as the elections themselves for members of convocation to council took place in contravention of various provisions of the statute .
b) That the elections were not free and fair and
c) That in respect of the Fifth Respondent they submit that his candidature in the elections constituted the misuse of his office as a judge and as such impacted on the fairness and integrity of the elections.

[16] I proceed to deal with these challenges under the above categories.

A) Alleged contraventions of the statute

i) The election date for members of convocation was not set by council

[17] Clause 12.18 of the statute provides as follows:-

> *"Whenever the convocation has to elect a member of the council in terms of paragraph 7.29, the secretary of the convocation may by way of a notice in one national newspaper at least two months before* ***the date set by the Council for the election****, invite each member of the convocation to nominate in writing a member of the convocation for election as member of the council."*

[18] The Applicants say that the notice, which was published in terms of Clause 12.18, gave the date of the election as the 3rd of June 2017, but that this date was not set by council and the notice that then triggered the election process was invalid on account of that which in turn vitiated the entire election.

[19] In response thereto the Respondents point out that as far back as 2011 council having noted the poor turnout and participation in convocation elections, had accepted a recommendation from its Executive Committee to hold elections on the same date as the Annual General Meeting of Convocation. An extract from those minutes appears hereunder.

"Item 8: Convocation election date

[20] *Background: Over the past number of years, a practice has developed where the election date for the election of a member of the Convocation to serve on Council coincided with the Annual General Meeting (AGM) of the Convocation to ensure better participation in the election as hardly any nominations were received in response to invitations in newspapers. This means that members of the Convocation could submit their votes at the Convocation AGM. This year the AGM will be held on 11th of June 2011. It was proposed that the existing practice be upheld in and that the election date must coincide with the AGM The CExco recommended that the current practice with respect to election dates be normalised and requested Council to endorse the Practice that the elections coincide with the Convocation.*

AGM Decision: Council approved the recommendations."

[21] To this end they argue that the date for the election was in fact set – it was to be the same date as the AGM and accordingly there was compliance with the statute.

[22] The purpose of Clause 12.18 is to ensure that the election date for members of convocation to council is set by council. The resolution of 2011 clearly demonstrates that council had applied their minds to the matter and had with certainty determined the election date to be that of the date of the AGM.

[23] There was in my view compliance with the statute and there would therefore be no need for council to set the date for each election when its resolution of 2011 had in clear and unambiguous terms determined what this date would be. It was certainly capable of being ascertained with certainty by reference to the date of the AGM.

[24] This leg of the challenge therefore is without merit and must fail.

ii The Annual General Meeting of convocation was convened in contravention of Clause 12.5 of the statute

[25] Clause 12.5 of the statute provides as follows :-

[26] *"The convocation holds an annual meeting at the seat of the University which meeting is* ***convened by the secretary of convocation after consultation with the president.***"

[27] The Applicants say there was no consultation by the secretary with the president of convocation in setting the date for the AGM , this constituted a violation of Clause 12.5 and therefore resulted in the AGM where the elections took place not being properly constituted.

[28] The Respondents denies there was no consultation and purport to rely on an email sent by the secretary of convocation to the president of convocation on 19th of April 2017 wherein the President was informed of the date of the AGM and furnished with a copy of the agenda. They say that email specifically requests the President's approval and it was aimed at engaging with the President and to gather his views with regard to the date or any other issue in respect of the proposed meeting.

[29] In this regard the Respondents rely on the dicta in *President of the Republic of Republic of South Africa v SARFU and Others 2000 (1) SA 1(CC)* where the Constitutional Court noted the following in relation to the requirement to consult:

> *"The purpose of the section 84(3) consultation requirement was clearly to afford the Deputy President (and in particular a Deputy President from a minority political party an opportunity to object or propose variations to the President's proposal. If upon consultation the Deputy President objected a full discussion and consultation would be required. However, should the Deputy President, upon being consulted, not object, but concur with the proposed course of conduct, lengthier consultation would be futile. The details of the consultation between the President and the Deputy President, which in any event would be irrelevant, do not appear from the papers. If the Deputy President is consulted and concurs that a commission of inquiry should be appointed, as happened in this case, further consultation would have been pointless. To consult in general means to in enquire as to someone's views in regard to a proposed course of action. A consultation in this sense can range*

from a protracted and deliberate exchange of views to obtaining a swift signification of consent."

[30] In addition in *Electronic Media Network Ltd and others v e.tv (Pty) Ltd and others 2017 (9) BCLR 1108(CC),* the court noted that:

"Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise. Within the context of national policy development it must mean that a genuine effort is being made to obtain views of industry or sector role-players and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable a policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration."

[31] On the facts before me the notice of the AGM of convocation was published in the national media on the 24th of March 2017 which notice clearly informs the world at large and in particular members of convocation of the date for the AGM as the 3rd of June 2017. The email the Respondent rely on as proof of consultation with the president of convocation was sent on the 19th of April 2017, well after the notice was published.

[32] If the rationale that underpins consultation is to obtain the views of those consulted before a proposed course of action is taken, then in this case the email of the 19th of April 2017 by the secretary to the president could not be construed as an act of consultation to solicit the views of the president on the AGM. By then the course of action, being the date of the AGM had already been decided upon and communicated to external stakeholders.

[33] The argument that the president did not respond to the email and also attended and participated in the AGM does not detract from the conclusion that there was no consultation when it was required. The later conduct of the president as described cannot have the effect of converting failure to consult to something else. It may well however have implications and be relevant in dealing with the legal consequences that should follow from such a failure to consult.

iii The eligibility for participation in the elections was in contravention of the statute.

[34] Clauses 12.20 and 12.21 of the statute sets out the following procedure to be followed by the secretary:-

[35] Clause 12.20 reads: *'The secretary of the convocation may, by way of the notice contemplated in paragraph 12.18, invite members of the convocation to inform the secretary in writing, within four weeks of the date on which the notice was placed, whether they intend to, subject to the provisions of paragraph 12.19, take part in the election contemplated in paragraph 12.18.*

[36] This notice was duly published in the Mail and Guardian on the 24th of March 2017.

[37] Clause 12.21 reads: *"Members of the convocation not having informed the secretary of the convocation in terms of the provisions of paragraph 12.20 of their intention to take part in the election of a member of the council* ***are deemed as members of the convocation, electing to abstain from voting m such election."***

[38] The case for the Applicants is that the provisions of the statute are clear in determining the eligibility to vote. While the starting point is that all members of convocation have the right to vote in the elections of convocation, the provisions of Clause 12.20 and 12.21 creates on obligation on those who intend to vote to notify the secretary in writing of such intention. The consequence of failing to inform the secretary of such intention results in such members being deemed to have elected to abstain from voting.

[39] Proceeding from this basis the Applicants say there was non- compliance with the statute in that:-

a) The notice published in terms of Clause 12.20 beyond requesting members of convocation to inform the secretary of their intention of vote also has the effect of inviting members who do not do so, to vote on the day of the AGM.
b) That on the day of the AGM those who did not in advance inform the secretary of their intention to vote were allowed to vote in the election.

[40] It is not in dispute that the notice of the 24th of March 2017 did in fact suggest that members of convocation who did not inform the secretary of their intention to vote were invited to vote and that indeed on the day of the AGM such members of convocation did in fact vote. The relevant section of the notice reads as follows:-

> *"Convocation members who do not wish to nominate a candidate but wish to participate in the election are required to inform the Registrar in writing, via letter or e-mail,* ***or alternatively register their vote in person at the Convocation AGM."***

[41] The Respondents take the position that Council as well as Exco were concerned with the low levels of participation in the elections and that the decision by Council to have the elections and AGM coincide was aimed at remedying the low levels of participation in the elections.

[42] They say further that in terms of clause 12.12 of the statute, 100 members are required in order to reach a quorum and that the danger of limiting eligibility to participate in the elections to members who have responded to the notice and to whom ballot papers have been posted is that this may result in a failure to reach a quorum.

[43] Finally they say that upon a proper construction, this is not what the statute requires, and it has never been so interpreted or applied, i.e. that voting is limited to postal votes.

[44] The provisions of the statute appear to be clear and unambiguous in limiting participation in the elections of convocation to those who had responded to the notice published by the secretary inviting them to do so. Whether this is desirable or not or unduly limits participation in the elections is not for determination in these proceedings. There was no attack on the statute nor was it seriously suggested that the statute is capable of any other interpretation than that it limits voting to those who informed the secretary beforehand of their intention to vote.

[45] It must follow that there was a deviation from the terms of the statute and the Respondents to some extent concede such a deviation but attempt to justify it

on the basis that it was in line with the resolutions of council and was also directed towards the objective of achieving greater participation in the elections which were characterised historically by low turnout of voters.

[46] To that extent the Repondents sought to place reliance on *New National Party of South Africa v Government of the Republic of South Africa and Others (1999) (3) SA 191 (CC)* that it is necessary for a scheme to be flexible in order to achieve the goal of ensuring that everyone who wants to vote is able to do so.

> *"Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so. I conclude therefore that the Act would infringe the right to vote if it is shown that as at the date of the adoption of the measure its probable consequence would be that those who want to vote would not have been able to do so even though they acted reasonably in pursuit of the right. Any scheme which is not sufficiently flexible to be reasonably capable of achieving the goal of ensuring that people who want to vote will be able to do so if they act reasonably in pursuit of the right, has the potential of infringing the right."*

[47] I am not certain if the reliance on the above case is warranted and I say so for a number of reasons:-

a) In New National Party there was a constitutional challenge to the legislative scheme and the Court was dealing with that. Here there is no such challenge nor was it suggested that the statute infringed the right to vote.
b) In New National Party the court was concerned about ensuring that those who wished to vote and reasonably pursued the right were able to do so. In this matter the statute and the notice published incorporating the invitation to respond, would have allowed everyone who wished to vote the opportunity to do so if they acted reasonably.

[48] In addition given that Council was of the view that the limitation on the eligibility to vote as contained in the statute of the university was a factor that contributed to the low turnout at elections, it was open to them in the years before 2017 to

have effected an amendment to the statute as opposed to deviating from its terms as the Respondents did. They did not do this and do not say why.

[49] While it may be so that the deviation was intended to achieve greater participation, that in itself cannot serve as a justification for it given the alternatives open to council in particular amending the statute.

[50] The deviation was material as it radically altered the voting system and had the effect of extending the eligibility to vote to all without the process that statute provided for. It extended it to include those who failed to respond to the invitation by the secretary to signal their intention to vote.

[51] Finally it must be pointed out that notwithstanding the stated intention of council to open the elections to all who were in attendance at the AGM, the notice of the 24th of March 2017 still made reference to the statute by expressly stating that those who did not indicate a desire to vote would be excluded and then in stark contradiction to that invited all to vote at the AGM. This could only have created confusion to those the notice was directed at as it could hardly have been clear whether they were required to indicate in advance their intention to vote or ignore that and simply arrive on the day of elections to vote.

[52] The conducting and managing of elections must of course seek to ensure maximum participation but the rule of law also requires all conduct to be consistent with and in accordance with the law. It would lead to unpredictability and uncertainty if those managing elections, despite being motivated by good intentions, were simply able to depart from the law that sets the perimeters for their powers.

[53] This was the essence of what the court said in *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC).*

> *"[I] State functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the*

principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law."

[54] In conclusion I find that the Respondents acted in violation of the principle of legality by failing to adhere to the statute of the university in the manner in which they dealt with the eligibility to vote on the part of members of convocation.

[55] In the result it must follow that the elections of the 3rd of June 2017 stand to be reviewed and declared unlawful on that basis. This is a matter I will return to.

B) The elections were not free and fair

[56] The Applicants challenge the outcome of the elections as not being free and fair and in this regard they say that the CVs of the candidate , including those of the Seventh and the Eighth Respondents were edited by the secretary of convocation before they were placed on the website of the university together with the full version of the CVs. I understand the complaint of the Applicants is that the mere editing was irregular and tainted the freeness and fairness of the elections.

[57] I take a different view and there is no basis to conclude that the editing was done with any motive to visit the Seventh and Eighth Respondents with any disadvantage and nor can it be said that it had any negative influence on their candidacy.

[58] The Applicants also say that the inability of the Seventh and Eighth Respondents to address members of convocation and campaign on campus was a violation of their rights and led to the election being tainted and not free and fair.

[59] The Seventh and Eight Respondents were members of council at the time of the 2017 elections. Council had in the light of the high level of conflict associated with the 2014 elections taken a decision not to allow members of Council on campus and their exclusion was thus not targeted at them but was in accordance with a decision of council that was not repealed. I can only imagine that there must have been good reason for council to have taken the decision that it did and therefore cannot accept that the exclusion of the Seventh and Eight Respondents rendered the election unfair.

[60] In the modern communication era, there must have been other more effective ways to reach potential voters than the physical presence of a candidate on campus.

[61] I am of the view that the allegations that the elections were not free and fair are not sustainable and must be dismissed.

C) The Applicants objection to the candidacy of the Fifth Respondent as being irregular and impacting on the freeness and fairness of the elections

[62] The Applicants say that it was inappropriate and possibly unlawful for the university to permit and approve the participation of the Fifth Respondent in the convocation elections. It is not clear on what basis they say that his participation as a candidate would have been unlawful as there is nothing in the statute or elsewhere that would have disqualified the Fifth Respondent from participating in the election and being elected to council.

[63] In addition they say it was inappropriate for the Fifth Respondent to have used his standing as a judge and his office as a judge to seek election and advance his candidacy. They say that as the office of judge demands the highest levels of impartiality and neutrality, his participation in the convocation elections of 2017 where the issues involved were controversial could also bring the office of judge into disrepute.

[64] In this regard the Applicants also place reliance on a letter dated the 30th of May 2017 from the President of PASMA addressed to the Fifth Respondent questioning his decision to participate in the elections and accusing the Fifth Respondent of seeking to get elected on the basis of his position as judge which in their view would also constitute the improper use of the office of judge. The Applicants characterise that as a serious ethical concern on their part and conclude by saying that the conduct of the Fifth Respondent may well have been a contravention of the Judicial Code of Conduct.

[65] The Fifth Respondent has filed an answering affidavit where he deals in the main with the issues that the Applicants have raised relating to his participation in the election as well as the allegations that such participation was unethical

and violation of the Judicial Code of Conduct. He also deals with the circumstances under which the consent of the Judge President of the High Court was sought and obtained in order to cite the Fifth Respondent in these proceedings.

[66] The Fifth Respondent says, and it is not in dispute, that when the Applicants sought the permission of the Judge President to cite the Respondent in these proceedings they only advised the Judge President that they intended to challenge the outcome of the elections on the basis that there was not compliance with the statute and that the elections were not free and fair on account of that and other alleged irregularities, none of which related to the Fifth Respondent. He says that he responded to the Judge President on the basis of those assertions and indicated he had no objection to the necessary consent being granted.

[68] It was only when he received a copy of the application issued that it then appeared that the Applicants sought relief also on the basis of the allegations of the conduct of the Fifth Respondent in improperly standing for elections ; of the allegations of the misuse of judicial office and the conclusion of the Applicants that this also rendered the election not free and fair. He says that if those issues were mentioned in the letter to the Judge President, as they should have, he would not have consented to being cited and would have taken the stance that to that extent the application as against him was not competent in law and was vexatious.

[69] It is clear on what is before the Court that the consent of the Judge President was solicited and granted on a particular set of facts and allegations which did not in any manner implicate the Fifth Respondent but that the application launched by the Applicants went beyond what was conveyed to the Judge President and therefore it could hardly be said that the consent that was granted to the Applicants to cite the Fifth Respondent was done on the basis of the application which was issued.

[70] This conduct on the part of the Applicants is certainly not in accordance with what Section 47 of the Superior Court Act 10 of 2013 contemplates. It is simply not acceptable pre- litigation to seek consent on the basis of a particular set of

facts and allegations and then having succeeded in doing so, litigate on another basis.

[71] The Fifth Respondent correctly then concludes that the conduct of the Applicants would serve as a basis to set aside the consent that was improperly obtained but has elected not to pursue that in the interests of finalising the litigation but requests that the court considers such conduct when the matter of costs is determined.

[72] With regard to the allegations that his candidacy was irregular, possibly in conflict with the Judges Code of Conduct and that he impermissibly used the stature and office of judge to campaign and seek election, the Fifth Respondent points out that that Article 14 of the Code far from prohibiting judges from serving on university councils , expressly provides for that .

[73] The relevant section provides that :-

> *"Serving on university councils or governing bodies or boards of trustees of charitable institutions and the like is acceptable."*

[74] The Fifth Respondent further says that the Code of Conduct not only allows judges to serve on council of universities but it also encourages judges to use their judicial skills and impartiality to further the public interest and that serving on the council of an institution of higher education has the potential to advance the interests of that institution.

[75] He denies that he campaigned for office and there is with respect no evidence offered that he did do so and finally to the extent that his CV describes him as a judge there is nothing factually incorrect about that and is an accurate description of his occupation and the office he holds. That in itself can hardly constitute the improper use of the office of judge nor can it have any impact on the standing and the integrity of the judiciary as a whole.

[76] There is no substance to the complaints of the Applicants or the allegations they advance against the Fifth Respondent. It is also noteworthy that when the matter was argued Counsel for the Applicants indicated that no oral submissions were being advanced against the Fifth Respondent but at the

same time did not indicate that the allegations made against the Fifth Respondent were being withdrawn.

[77] As a final word on this matter, it should be recalled that judges are not beyond the law and that just as they are guaranteed their independence, they also are accountable for their actions and conduct. On the other hand when baseless allegations without substance or foundation are levelled against them and which has the effect of questioning their integrity and commitment to ethical behaviour, they are entitled to challenge that and to seek vindication from the courts.

[78] This is precisely such a case and it is indeed both incomprehensible and unacceptable for the Applicants to have advanced the case against the Fifth Respondent so lacking in factual or legal force and then elect not to pursue it when they finally have their day in court.

The relief

[79] In conclusion and following my findings on the eligibility to participate, the Applicants have made out a case that the departure by the Respondents was material and that such a departure had the effect of materially affecting the outcome of the elections. On that basis and given the centrality of the principle of legality in our constitutional dispensation it must follow that the conduct of the Respondents and in particular the unwarranted and material departure from the statute of the university, must have as its consequence that the court concludes that those elections were unlawful.

[80] While a declaration of unlawfulness is generally followed by a setting aside, this is always not the case and need not always be the case. Setting aside is a discretionary remedy and there may be facts and circumstances that may require such a remedy to be withheld in certain circumstances.

[81] Prof Hoexter in Administrative Law in South Africa (2nd Edition) at page 550 makes the following observation:-

> *"This is a proposition that has been illustrated in several recent cases relating to procurement. A prominent example is Chairperson, Standing Tender Committee v JFE Sapela*

Electronics, (Pty) Ltd 2008 (2) SA 638, in which the Supreme Court of Appeal confirmed that the award of certain tenders had been unlawful and invalid, but nevertheless declined to set them aside. The court reasoned that much of the work had already been performed and that it would be impractical and disruptive to start the tender process over again for the completion of the remaining work. As Scott JA explained, this was a case in which an invalid administrative action must be allowed to stand in the interests of finality, pragmatism and practicality."

[82] In these proceedings I have given careful consideration to whether I should, in the proper exercise of my discretion, also set aside the elections held on the 3rd of June 2017. More than three years have passed since that election and any setting aside should not be unduly disruptive to the functioning of the university and its council. It is for that reason that any setting aside should be prospective and not have retrospective effect to the 3 June 2017.

[83] I am also mindful that in the event of setting aside, what the statute describes as casual vacancies, may arise that may require an election to fill such vacancies for the unexpired period of office (even though the three period contemplated in the statute has expired). To that end and given the elections for convocation planned for October this year, it would be impractical and inefficient to hold elections as contemplated in Clause 7.6 and I therefore intend to order that the university be exempt from compliance with the provisions of Clause 7.6 following the vacancies that this order will create.

[84] Finally and given the size of council as well as the very short period of time between this order and the next election date in October this year and an order of setting aside is unlikely to have any effect on the functioning of council between the date of this order and the next election of convocation.

[85] It is for these reasons that the order of unlawfulness should be accompanied by the order of setting aside as it would advance both, the principles of legality as well as certainty.

[86] There is also no need to grant the other relief sought that relates to the calling of fresh elections and the procedures that should be put in place for those elections in the light of the date for those elections already having been decided and in addition the reluctance of the court to prescribe in advance what those procedures should be given the statute of the university and its autonomy as an institution.

Costs

[87] The Applicants have enjoyed substantial success and there is no reason why the ordinary principle that costs should follow the result should not apply . On the other hand as this judgment has concluded there was also little merit in many of the challenges the Applicants advanced which had the effect of expanding the nature and the number of the disputed issues. Given that the question of costs always remains within the discretion of the Court and is a discretion that must be exercised judicially, my view is that a fair order would require the Respondents to pay 75% of the Applicants costs.

[88] However for the reasons already given, the Applicants should pay the costs of the Fifth Respondent in opposing the application. The case advanced against the 5th Respondent was without merit from the outset and was also not pursued in argument .

Order

I accordingly make the following order:-

1) The UWC Convocation elections held on the 3rd of June 2017 are declared to be unlawful and set aside.
2) This order shall be prospective and not have any retrospective effect and shall not in any manner affect the workings and the validity of any decisions of the council of the university taken before the date of this order.
3) The First to the Fourth Respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay 75% of the Applicants costs of the application
4) The Applicants are ordered jointly and severally, the one paying the other to be absolved, to pay the Fifth Respondents costs of opposing the application.

pp

N.J KOLLAPEN

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Applicant:	Adv S Dzakwa
Instructed by:	MacDonald Attorneys
First to Fifth Respondent:	Adv I Jamie SC
	Adv M Mokhoaetsi
Instructed by:	Webber Wentzel Attorneys
Seventh Respondent:	Adv N Williams
Instructed by:	Lynn Swartz Attorneys
DATE OF HEARING:	**11 AUGUST 2020**
DATE OF JUDGMENT:	**26 AUGUST 2020**