



**CONSTITUTIONAL TRIBUNAL (STUDENT COURT)
OF THE UNIVERSITY OF PRETORIA**

To: UP Students
ATT: UP SRC Deputy Secretary (L. Ndlovu)
Per: E-mail (src.deputysecretary@tuks.co.za)
Date: 26 June 2020

2020 / 4

In the *Ex Parte* application of the SRC Deputy Secretary :

**LERATO NDLOVU (UNIVERSITY OF PRETORIA STUDENT REPRESENTATIVE
COUNCIL DEPUTY SECRETARY)** Applicant

Judgment Type: Ruling

Neutral Citation: *Ex Parte SRC Deputy Secretary 2020 (Ruling) 4 (UPCT) (Ruling on Postponement of 2nd Quarter Student Forum 2020)*

Before: Herd CJ (Chairperson of 2nd Quarter Student Forum)

Issued on: 26 June 2020

Summary: Postponement of 2nd Quarter Student Forum 2020 – National Lockdown with Campus Closure – Coronavirus Disease (COVID-19).

ORDER/FINDING/S:

The following order is made:

1. The 2nd Quarter Student Forum as contemplated in section 43 of the University of Pretoria Constitution for Student Governance (CSG) is hereby postponed to the earliest possible date in the future when it can be scheduled and held safely in accordance with relevant law and policy as well as the CSG.
2. The SRC is directed to, by no later than Monday 29 June 2020 at 17:00:
 - (a) Notify all students of the postponement; and
 - (b) Publish this Ruling therewith.
3. Further, the SRC is directed to, by no later than Tuesday 14 July 2020 at 12:00:
 - (a) Publish the SRC 2nd Quarter Reports as contemplated in section 43 of the CSG; and
 - (b) Publish Full, written answers to any and all questions submitted to the SRC as contemplated in section 43 of the CSG.
4. The publication and notification orders at paragraphs 2 and 3 above are qualified in the following terms: publication and/or notification must occur via *all* of the SRC's mass/social media platforms, including, but not limited to, Facebook, Twitter and the SRC website; provided that such publication and/or notification is in accordance with applicable university policy.

JUDGMENT

(Ruling)

HERD CJ

(Chairperson of 1st Quarter Student Forum)

Introduction

[1] On 17 March 2020 I issued a Ruling postponing the 1st Quarter Student Forum owing to (and explaining that):¹

[T]he institutional decision of the University of Pretoria to call and effect an early recess which commenced on Monday, 16 March 2020 in response to concerns surrounding the Coronavirus disease (COVID-19); and the 1st Quarter Student Forum being scheduled for Wednesday 18 March 2020 – a date now falling within the adjusted recess period. The decision of the University to shift gears and enter recess early rendered the postponement of the Student Forum *fait accompli* ('a thing that has already happened or been decided, leaving those affected with no option but to accept it').

[2] The circumstances aforementioned remain substantially unchanged. Although a comparatively relaxed version of the nation-wide lockdown has subsequently come into effect, the conditions relevant to Student Forum have remained the same.

[3] This Ruling was prompted by an application for, *inter alia*, a postponement of the 2nd Quarter Student Forum. The application was made by the SRC Deputy Secretary on 20 June 2020 (and supplemented on 22 June 2020) in their capacity as the 'convenor' of the Forum.

¹ *Ex Parte SRC Deputy Secretary 2020 (Ruling) 3 (UPCT) (Ruling on Postponement of 1st Quarter Student Forum 2020)* (available at: <https://www.up.ac.za/media/shared/214/2019%20TRIBUNAL/judgments/ex-parte-src-deputy-secretary-2020-ruling-on-postponement-of-1st-quarter-student-forum-2020-2.zp187597.pdf>).

[4] This Ruling has the same force and effect of a Judgment of the Constitutional Tribunal issued by a Judge of the Tribunal (the Chief Justice, in this instance).²

Jurisdiction (Authority)

[5] What needs to be underscored from the outset is that there is no functionary expressly empowered to postpone or cancel a Student Forum. The University of Pretoria Constitution for Student Governance (CSG) does not even expressly contemplate such an eventuality (cancellation or postponement) becoming a reality,³ let alone who may decide to cancel or postpone the Forum. The CSG is, moreover, silent on which person or office determines the date and venue of the Student Forum. For example, the CSG allocates the SRC Deputy Secretary the responsibility to ‘*notify the members of the Student Forum... of the date, time and venue...*’.⁴ The responsibility or duty to notify does not necessarily imply a power and discretion to determine the date, time or venue.

[6] Thus arises the question: in such extreme circumstances – circumstances such as a national state of disaster, during the subsistence of which large gatherings are prohibited – who takes the decision to postpone Student Forum in the absence of an express constitutional empowering provision?

[7] At most, the SRC plays a role in organising Student Forum through the office and person of the SRC Deputy Secretary who is responsible for performing several logistical and co-ordinating functions.⁵ By convention, it appears that the date, time and venue of Student Fora are determined by the SRC Deputy Secretary after consultation with the relevant stakeholders, namely the Chief Justice or their designate. This convention, together with the language of section 43 of the CSG, seem

² This Ruling is not a Ruling made in the course of an Adjudication as contemplated in the Constitution of the Constitutional Tribunal; it is a Ruling made under the CSG and Rules of Student Forum.

³ University of Pretoria Constitution for Student Governance (CSG) [As amended by the SRC and approved by Council on the 26th of June 2019] (available at: <https://www.up.ac.za/media/shared/214/2019%20TRIBUNAL/2019-constitution-for-student-governance-june-2019.zp178641.pdf>).

⁴ S 43(2)(b) of the CSG provides that: ‘The SRC Deputy Secretary must notify the members of the Student Forum, including the Student Body, on ClickUP, posters and notices on all campuses of the date, time and venue two weeks before the next meeting’.

⁵ See S 43(2)(b), (c) and (d).

to imply that the SRC Deputy Secretary occupies a position akin to a convenor. However, even with the SRC Deputy Secretary playing the role of convenor, the power to convene cannot transmogrify into power/s to cancel or postpone sittings.⁶ Furthermore, once a date, time and venue has been set and communicated, a final decision is made which cannot be undone by the same authority, viz. SRC Deputy Secretary, because it will amount to an impermissible revocation or alteration.⁷

[8] In short, there are at least two inherent limitations on any implied 'convening' power/s vesting in the office of the SRC Deputy Secretary: (1) the SRC Deputy Secretary, in setting the date, time and venue, may not exercise their discretion to effect a cancellation or postponement; and (2) a decision on the date, time and venue once communicated cannot be changed unilaterally by the SRC Deputy Secretary (the original decision-maker).⁸

⁶ See the reasoning in paragraph 7. Note: The power to cancel or postpone is not an inherently political power involving the exercise of 'executive discretion or expertise'. It is an administrative power vesting – in the relevant functionary – a much narrower discretion comprising merely a choice of date prior to the pertinent cooling-off period, and possibly the balancing of logistical factors and the general student interest in – and constitutional imperatives of – accessibility and participation in Student Forum proceedings. There are no high-level policy choices involved. See *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College (PE) (Section 21)* 2001 (2) SA 1 (CC) and *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).

⁷ The Deputy SRC Secretary, would, in that instance, be *functus officio* of any question relating to the date, time or venue of a Student Forum. The *functus officio* doctrine effectively bars the same decision-maker from reversing, revoking or otherwise altering their own final decisions because they would have already exhausted their authority and relinquished their jurisdiction over the matter by making the final decision in the first place. The doctrine has further value in that it promotes certainty and stability, as well as dampens prejudice occasioned on those who innocently rely on fluctuating decisions to their own detriment. For example, when a notice is disseminated stating the particulars of a Student Forum, students ought to be able to reasonably rely upon the information provided in the notice. Were the relevant authority able to summarily change the arrangements for the meeting – even if they did indeed widely circulate notice of the change – it may endanger the ability of students who planned their lives around the original date and time and would likely cause confusion. Such endangerment and confusion could even, in the most unfortunate of circumstances, be used as a tool by a shrewd political officer attempting to decrease scrutiny over themselves and their colleagues by sowing confusion with multiple amending ('conflicting') notices with the aim of decrease attendance at a sitting. The authority to alter decisions cannot ordinarily vest in the original decision-maker; a decision finally taken and communicated can typically, save special circumstances, only be rescinded or altered by way of appeal or review to the competent authority. In any event, any change in arrangements should only be effected where, on the balance, necessity or similar important factors outweigh certainty and reliance. Thus there are substantive and principled reasons why the SRC Deputy Secretary, having made decision, cannot render that decision undone. See C Hoexter *Administrative Law in South Africa* (2012 2nd ed) 278-281.

⁸ The SRC Deputy Secretary must apply for a review of their decision in order to have it set aside and remitted or its terms varied.

[9] The answer to the overarching question ('who takes a decision to postpone Student Forum in the absence of an express constitutional empowering provision?') obviously cannot be: 'the SRC'. Handing the SRC such a license renders their accountability subject to themselves and not to the students whom they represent. The very purpose of Student Forum is to hold the SRC accountable. It is designed to be a meeting at which the SRC 'faces the music' in answering tough questions and engaging robustly with students. There is also no good reason to conclude that the SRC somehow wields the wand of its own destiny in the form of cancellation or postponement powers.

[10] To countenance empowering the SRC to declare a Student Forum cancelled or even postponed: (1) would be to, as noted above, support conferring upon the SRC power in the absence of any empowering provision within the University's internal legal regime;⁹ (2) would be to vest an authority in the SRC without due regard for the scope and nature of the power/s under consideration; and (3) would be to permit an irrationality to manifest – such a conferral of power runs contrary to the objects of the CSG in that it directly or indirectly vests the SRC with inordinate influence over whether Student Forum sits or not, and potentially allows the SRC to escape a Student Forum ('accountability') by cancelling or postponing it.¹⁰ The CSG demands the opposite: it demands a capable system of effective, accountability and transparent student leadership.¹¹ This matrix easily generates standards of lawfulness and rationality (and

⁹ There is no source of authority indicating that the SRC or its office bearers play a controlling role in respect of Student Forum meetings.

¹⁰ If such a position were to predominate and crystallise into a governing convention, the SRC would be able escape accountability by merely deeming that a situation is so seriously hazardous or adverse to the public or students' interest that it requires cancellation or postponement. Such a determination by the SRC alone could be rendered on false pretences and motivated by political expediency as opposed to genuine and legitimate concern and precaution. It could also be rendered through innocent error. Whatever the motivation: the position is antithetical to the constitutional design of the CSG and cannot be permitted. (No doubt, should the SRC be vested with the authority and the SRC abuse that power in, for example, acting for an improper purpose, the decision would be subject to challenge and scrutiny before the Constitutional Tribunal in terms of, *inter alia*, SS 16 and 35 of the CSG; however, this does not change the interpretative equation, nor detract from the fact that there is nothing remotely vesting the SRC with the authority to make the decision). See a similar scenario and a comparable holding in *President of the Republic of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP) paras 147-150.

¹¹ See the Preamble of the CSG ('Furthermore, the Student Governance Structures should reflect and encourage responsible student leadership which promotes equality of all opportunities through effective, accountable and transparent student leadership. In striving towards the holistic advancement and development of the student community, it will uphold and safeguard the rights of all the students of the University of Pretoria') and S 3 the CSG ('establish a platform that is open to

establishes an injunction against, *inter alia*, arbitrariness and capriciousness) which are, in any event, laid down by our law;¹² and implies a system of checks and balances as opposed to unregulated or entirely self-regulated centres of power.

[11] The purpose of having the Chief Justice (or an alternative Judge of the Constitutional Tribunal (Student Court)) chair the Student Forum is to ensure some increased degree of expertise, impartiality and independence inhering in the person of the presiding officer. These Judges are held to a high standard on all three of those fronts. It is therefore rational and appropriate to have such an independent person make ordinary and extraordinary decisions at the epicentre of democratic student governance accountability at the University. The Chairperson is empowered by section 43 of the CSG to chair Student Forum.¹³ The inherent authority to chair Student Forum vests the Chairperson with the necessary powers (to be construed and exercised reasonably) to take action.¹⁴ In the ordinary course, this translates into, namely, the managing and conducting of proceedings and maintenance of order. Further, in the constitutional sense, residual authority reposes in the Chairperson where the relevant sources of authority are silent.¹⁵

[12] Thus the responsibility over such matters falls to the Chairperson of Student Forum as a constitutional matter. At this juncture the questions naturally to be begged are: 'What do the Rules say?'

every student to participate in student governance'; 'promote a culture of academic excellence, *diligent leadership*...).

¹² S 1(c) of the Constitution of the Republic of South Africa, 1996; S 6 of the Promotion of Administrative Justice Act 3 of 2000; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (*Fedsure*) paras 56-59; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*) para 17; Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS March 2013) ch 11 2; C Hoexter *Administrative Law in South Africa* (2012 2nd ed) 122-123.

¹³ S 43(2)(f) of the CSG. See also S 43(2)(i) and (j).

¹⁴ See C Hoexter *Administrative Law in South Africa* (2012 2nd ed) 44-46. In this case, the implied power of the chairperson is both an implied power under the CSG, and an implied power vested by the relevant Institutional Rule and decision of the University to restrict campus access and activity under the national lockdown.

¹⁵ See generally *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC).

[13] Rule 33(1) and (2) of the Rules for Student Forum respectively vest the presiding officer (Chairperson) with the authority to 'interrupt, adjourn and suspend or close the proceedings' and to 'after consultation with the SRC Deputy Secretary, suspend and adjourn the meeting to another day...'.¹⁶ Specifically, Rule 5 empowers the presiding officer (Chairperson) to 'give a ruling in respect of any eventuality for which [the] Rules do not provide'.¹⁷ The national state of disaster, continued restrictions on gatherings, closure of university campuses and consequent need to postpone Student Forum plainly amount to such a unforeseen eventuality. Moreover, Rule 33 read together with Rule 5 puts it beyond doubt that:¹⁸ (1) it is the Chairperson of the Student Forum who must ultimately make this type of extraordinary decision; and (2) that the Chairperson is within their rights to order a postponement under such extreme circumstances. *Ergo*, it is clear that the Rules authorise the presiding officer (Chairperson) to make the determination in question.

Constitutionality of the Postponement

[14] The CSG at section 43 stipulates in no uncertain terms that '[t]he Student Forum *must* meet *quarterly* to receive reports from the President of the SRC...'.¹⁹

[15] As I have already noted above, the primary purpose of the Student Forum is to facilitate robust engagement between the SRC and students and to provide a mechanism for accountability and responsible (student) government:²⁰ (1) There are

¹⁶ See Rule 33 of the Rules for Student Forum at the University of Pretoria (Promulgated by the Chief Justice of the Constitutional Tribunal: 15 March 2020) (available at: <https://www.up.ac.za/media/shared/452/rules-for-student-forum-at-the-university-of-pretoria-15-march-2020.zp187506.pdf>) (Student Forum Rules). It is noted that none of the powers conferred amount to the power to, prior to the commencement of the proceedings, postpone; however, the powers together indicate that the presiding officer is meant to exercise control and has authority to take certain steps to handle situations as they arise.

¹⁷ See Rule 5 of the Rules: 'The presiding officer may give a ruling or frame a rule in respect of any eventuality for which these Rules do not provide, having regard for the provisions of the CSG and other applicable authorities, as well as the principles of justice, fairness and the rule of law'.

¹⁸ Especially when taken in the constitutional context and system of accountability and checks and balances outlined above.

¹⁹ S 43(2)(a) of the CSG ('The Student Forum must meet quarterly to receive reports from the President of the SRC, as per Section 23(2)(b)(iii) and (iv). These quarterly reports must be made available on clickUP and notice boards on all campuses two weeks before the next quarterly meeting').

²⁰ See the Preamble of the CSG ('Furthermore, the Student Governance Structures should reflect and encourage responsible student leadership which promotes equality of all opportunities through effective, accountable and transparent student leadership. In striving towards the holistic advancement and development of the student community, it will uphold and safeguard the rights of

no alternatives available to a physical sitting that could qualify as a substitute;²¹ (2) follow-up questions cannot be asked, or where they can be asked, there will be great difficulty – if any possibility at all – ensuring that the questions are posed and answered in a controlled and proper manner and where the Chairperson can direct a member to fully or properly answer a question;²² (3) online proceedings *might* be exclusionary and indirectly discriminatory.²³

[16] Total cancellation is equally unjustifiable. Firstly, it would deprive students of the meaningful opportunity to engage with their student leaders; to mandate them; and to hold them accountable. Secondly, it would also mean that the SRC would escape scrutiny until the following Quarter Student Forum. This would be inconsistent with the objects of the CSG as outlined above. Lastly, cancellation is a drastic response. It is comparatively disproportionate where there are less restrictive means available, such as a postponement and interim measures.

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- all the students of the University of Pretoria') and S 3 the CSG ('establish a platform that is open to every student to participate in student governance'; 'promote a culture of academic excellence, *diligent leadership...*'). Student Forum directly furthers those ends set out in the Preamble and S 3.
- ²¹ Or at least none were offered by the SRC Deputy Secretary in response to my enquiries. Further, it would be inappropriate for me to unilaterally decide on a particular platform or mode of sitting because it is not my function to survey the options and make a selection – that function is, on my assessment, reserved for the executive functionary being the SRC Deputy Secretary. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48. I believe the explanation given by the Constitutional Court at the stated paragraph – being seized with a similar issue – to be apposite. ('In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.')
- ²² There are a host of logistical questions and concerns arising out of the single issue of how the Rules are to be enforced in a fair manner.
- ²³ *Pero v Chairperson 2018/2019, Law House 2019 (Adj) 2 (UPCT) (Reasons)* para 20. I make no finding and no comment beyond recognizing the *possible* danger of proceeding online. This recognizance is appropriate as such possibilities formed part of the reasons proffered by the SRC Deputy Secretary. Although the prophylactic reasoning by the SRC Deputy Secretary on this point was neither substantial nor in-depth, it was facially credible and facially reasonable.

[17] What matters is substantial compliance with the CSG's requirement insofar as possible. The language of section 43 appears peremptory, allowing no deviation.²⁴ However, even certain language can become uncertain, and peremptory language can default to being directory in some contexts.²⁵ It is necessary to point out that the CSG is not the highest governance authority at the University. Far from it. The CSG itself sets out that it is subject to, *inter alia*, the Institutional Rules of the University.²⁶ And thus the CSG is abridged or varied when the Institutional Rules 'kick in', such as when the University – presumably in terms of the Institutional Rules – declares an early recess and maintains campus-wide access restrictions. In such an instance, the CSG does not operate absolutely and must give way to some degree.

[18] Thus, if the CSG is not to operate absolutely because it is itself partially overridden, and is therefore only directory under such circumstances, all that should be required is substantial compliance with the terms of the CSG in section 43(2)(a).²⁷

[19] A substantive approach to interpretation requires an examination of the logic underlying the CSG. The CSG specifies a specific interval for meetings: one meeting per quarter resulting in at least four meetings per year. Ultimately, the obvious purpose of the provision boils down to the SRC being called to account at regular or frequent intervals. Thus postponement with interim measures serve as the appropriate and proportionate course of action which will substantially comply with section 43.

Interim Measures Ordered

[20] As a further attempt to be faithful to the CSG, I have again ordered interim measures in this matter, namely: a standard two week period in which students may

²⁴ C Hoexter *Administrative Law in South Africa* (2012 2nd ed) 49.

²⁵ C Hoexter *Administrative Law in South Africa* (2012 2nd ed) 49. See also *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd* 2004 (1) SA 308 (SCA) para 32 ('[L]anguage of a predominantly imperative nature such as "must" is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction').

²⁶ *Pero v Chairperson 2018/2019, Law House; Piëst v Chairperson 2018/2019, Law House* 2019 (Adj) 5 (UPCT) (Rescission) paras 8-14.

²⁷ The doctrine of substantial compliance was introduced into South African Constitutional Law by O'Regan J in *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) paras 24 and 25.

submit questions to the SRC must be provided to students, with such a period being triggered by way of due notice to the student population by the SRC Deputy Secretary; the SRC must answer all questions submitted for their attention in writing and in full and publish all answers; the SRC must compile and publish the 2nd Quarter SRC Reports.

[21] The interim measures will still allow students to receive information on the activities and operations of the SRC; to scrutinise the SRC's fulfilment (or non-fulfilment) of its mandate by measuring its performance against the milestones reflected in plans of action etc; and will ensure that they get answers to their questions. That is the best that can be done to ensure accountability, openness and transparency from the SRC under the circumstances.

[22] The SRC Reports and answers can be in any format or structure provided that: (1) they are published widely and are accessible;²⁸ (2) remain accessible for the remainder of the SRC's term at minimum; (3) are up-to-date and contain all relevant information; (4) are written in plain and understandable language; and (5) are formatted and structured in a coherent and understandable way.

HERD CJ

(Chairperson of 2nd Quarter Student Forum)

...END OF JUDGMENT/S...

²⁸ Such publication and/or notification must occur via *all* of the SRC's mass/social media platforms, including, but not limited to, Facebook, Twitter and the SRC website; provided that such publication and/or notification is in accordance with applicable university policy. This is to ensure that the information is adequately disseminated in the absence of the ability of physical publication and/or notification on campus/es.

Notice

1. The parties may apply for leave to appeal this Ruling in an adjudication. The adjudication panel may:
 - (1) Confirm (uphold) this Ruling; or
 - (2) Vary (adjust) this Ruling; or
 - (3) Set aside (invalidate) and substitute (replace) this Ruling.
 2. Parties are referred to the Registrar of the Constitutional Tribunal for guidance on the terms, conditions and procedures on how to apply for an appeal of this Ruling.
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