IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 2648/2016

In the matter between:

UNIVERSITY OF CAPE TOWN Applicant

and

SANCHIA DAVIDS	First Respondent
KIRSTEN WHITFIELD	Second Respondent
MOGEZI MAYEPI	Third Respondent
NEO REILOE MANCAPA	Fourth Respondent
DE WAAL HUGO	Fifth Respondent
ITUMELENG NKULULEKO MOLEFE	Sixth Respondent
DUMISANI NCUBANI	Seventh Respondent
ATHABILE NONXUBA	Eighth Respondent
ALEX HOTZ	Ninth Respondent
PAM DHLAMINI	Tenth Respondent
MASIXOLE MLANDU	Eleventh Respondent
CHUMANI MAXWELE	Twelfth Respondent
SLOVO MAGIDA	Thirteenth Respondent
ZOLA SHOKANE	Fourteenth Respondent
BRIAN KAMANZI	Fifteenth Respondent
RU SLAYEN	Sixteenth Respondent
THOSE PERSONS WHO ASSOCIATE THEMSELVES WITH ANY UNLAWFUL CONDUCT AT ANY OF THE UNIVERSITY'S PREMISES	Seventeenth Respondent

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JUDGMENT: 11 MAY 2016

ALLIE, J:

1. This is an application to have the interim interdict granted against the respondents on 17 February 2016, made final. The terms of the interim interdict are as follows: respondents were interdicted and restrained from entering any of applicant's premises and from committing any acts that impede and prevent applicant's rendering of services or making decisions.

2. Applicant seeks confirmation of the Rule Nisi only against the ninth, eleventh, twelfth, thirteenth and fourteenth respondents.

3. The interim order against fifth respondent has been discharged by the Court while the interdict sought against the remaining respondents have been withdrawn.

4. Ninth, eleventh, twelfth, thirteenth and fourteenth respondents opposed this application and had legal representation.

5. Applicants allege the following.

6. On 15 February 2016, protesting students brought a shack structure onto the campus and erected it in the path of traffic flow in Residence Road and in the pedestrian path of people who wished to walk up Jameson steps.

7. Before 10 am on the morning of 15 February 2016, a student walked under the duct tape that was used to cordon off the shack. An altercation ensued when twelfth respondent physically pushed the student, on twelfth respondent's own admission, allegedly because according to twelfth respondent, the student failed to obey the cordoned off area as being off-limits.

8. Members of the executive task team [' the SETT"] approached the protesters to speak to them but the protestors were hostile and refused to engage with the SETT.

9. At approximately 14h00 some protestors moved towards Smuts Hall residence where eleventh respondent climbed on to the roof of the residence and spray painted the statue of Jan Smuts with red paint to the applause of protestors.

10. The group marched to Fuller Residence where fourteenth respondent granted two female students access to the residence's roof where the two students spray painted the Fuller statue with red paint.

11. On the morning of 16 February 2016 between 8am to 12h00, the position of the shack prevented students, people who dropped off students and staff from driving through Residence Road, a thoroughfare used to enter and exit the area.

12. Students, staff and a person who dropped off a student were assaulted and verbally abused by protestors.

13. Members of the SETT again met protestors and handed them a letter in which they were requested to move the shack onto a grass area by 17h00, failing which the university management would have the shack removed.

14. The protestors refused to move the shack and tore up the letter.

15. By 17h00, the number of protestors around the shack had increased.

16. At 18h00, a group of protestors forced their way into Residence Hall and helped themselves to food in the dining hall. The food was meant for residents.

17. A group of protestors removed portraits, painting, photographic collages and photographs from the walls in the dining hall and took them outside into Residence Road.

18. At 18h50 the protestors forced open the door of Smuts Hall Residence where they entered and removed paintings and portraits.

19. At 19h00 a group of protestors went into Jameson Hall, Molly Blackburn Hall and Beit's Building where they removed portraits and paintings from the walls. These were also taken to the area next to the shack.

20. The paintings and photographs were burnt together with a wheelie bin.

21. Police attempted to disperse the protestors.

22. A Mazda bakkie, used by the Department of Biological Sciences that was parked in University Avenue North, upper campus, was set alight and completely destroyed by a group of protestors at approximately 20h40.

23. Later a group of protestors moved to the Jammie shuttle bus stop in Baxter Road, lower campus, where they stoned a Jammie shuttle bus and set it alight, destroying it completely.

24. Later the police and campus security removed the shack from Residence Road.

25. Three litres of petrol were found inside the shack.

26. During the course of that evening, first to eighth respondents were arrested on charges of public violence and malicious damage to property.

27. At approximately 23h00, an incendiary device was thrown into the window of the office of the Vice-Chancellor located at Bremner Building, lower campus.

28. The device led to the office and its contents burning.

29. On behalf of respondents, the following submissions were made.

30. Respondents' Constitutional right to freedom of association, freedom to demonstrate, freedom of expression and right to dignity would all be severely restricted if the final interdict were granted.

31. This argument ignores the fact that those rights are not unlimited and they are subject to horizontal application, in that, those rights have to be exercised with due regard to those self-same rights of other persons.

32. Respondents' counsel made the astounding submission that the applicant's alleged right to control and manage access to its property is not a right but a duty.

33. If that argument were to be upheld, it must mean that property owners or lawful possessors of property do not enjoy clear rights to control access to their properties.

34. That argument must also mean then, that universities throughout this country have no clear right to manage access to university property nor do they have a right to prohibit unlawful conduct on their property.

35. If the law indeed prohibits a university from asserting a clear right to control and manage access to its property, then it is a prohibition that no court of law has made a ruling on before.

36. Mr Masuku, on behalf of respondents argued further that the doctrine of necessity is the justification for the respondents' conduct. I was implored to find that the conduct of the respondents as admitted by them, are necessary acts of civil disobedience.

37. Civil disobedience is defined in the Concise Oxford English Dictionary as follows: "*The refusal to obey a law out of a belief that the law is morally wrong*"

38. Laws prohibiting damage to the property of another, appropriating the property of another and physically assaulting another can't be said to be morally wrong.

39. The defence of necessity is only available in criminal law. I was not referred to any authority which extends the defence to civil law and elevates it to a justification for violating the rights of other people.

40. It is indeed so that student movements and their protest action has featured prominently in this country's history of liberation struggle.

41. Nonetheless, the Constitutional Court has pronounced definitively in SATAWU's case *(supra)* that the right to demonstrate and protest is subject to it being peaceful. The plain meaning of section 17 of the Constitution says as much.

42. At para 52 the Constitutional Court says the following:

"[52] This means that everyone who is unarmed has the right to go out and assemble with others to demonstrate, picket and present petitions to others for any lawful purpose. The wording is generous. It would need some particularly compelling context to interpret this provision as actually meaning less than its wording promises. There is, however, nothing, in our own history or internationally, that justifies taking away that promise."

43. The protest action to which the respondents were party, caused further financial loss to the applicant who already allegedly lack financial resources to provide accommodation to all students in need of accommodation.

Applicable Law

44. The primary requisites for the grant of a final interdict as enunciated in **Setlegelo v Setlegelo** [1] were re-affirmed by the Constitutional Court in **Pilane v Pilane and Another** [2] as follows:

"[39] The requisites for the right to claim a final interdict were articulated by Innes JA in ***Setlogelo v Setlogelo****. An applicant desirous of approaching a court for a final interdict must demonstrate: (i) a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of an alternative remedy."*

45. In the context of the undisputed facts of this case, the clear right which the applicant holds, is a right to protect its property, the duty to provide a safe and secure environment in which students and staff can attend the university, access the facilities and resources of the university and the residences, at which they were accommodated. Linked to these rights and duties, the university has a concomitant duty to facilitate the safe passage of students, staff and members of the public to and from the university premises.

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[1] 1914 AD 221

[2] 2013 (4) BCLR 431 (CC) at para 39

46. There can be no question that an injury was actually committed. In fact, some protestors had set in motion a whole series of injurious actions, which respondents now claim they had no control over.

47. Although the shack structure had already been removed by the time, the interim order was granted, applicants allege that it's apprehension of harm is reasonable, because there was an attempt, that was foiled, to erect a similar structure.

48. **Setlogelo's** case refers to "*injury actually committed or reasonably apprehended.*" Joubert's LAWSA Vol 11 para 390 describes a final interdict as a remedy not only for a past infringement and harm but also for a future violation of rights and consequent harm.

49. In **Pilane's** case, the injury is described as "*the violation of the right.*"

50. This court is required to determine whether the apprehension of the harm recurring is a reasonable one.

51. Concerning the disruptive and destructive form that the protests took, it cannot be said that the apprehension of it recurring is not reasonable given the great lengths to which some protestors went, to perpetrate the destruction. The unrepentant stance adopted by the respondents, lead the applicant to believe that the harm could recur if an interdict is not granted prohibiting the misconduct complained of.

52. The applicant is required to establish that no other adequate alternative remedy exists.[3]

53. Criminal prosecution of perpetrators of damage to university property, does not prohibit the same individuals or other protestors from destroying university property.

54. Disciplinary action taken against respondents, similarly do not prohibit other protestors from emulating the misconduct of the respondents. Disciplinary action cannot occur as speedily and as effectively as a court interdict.

55. Applicant's right to claim damages remains but it is not a speedy remedy and it has not been established that it would act as a deterrent to prevent similar misconduct in the future. The issue of applicant obtaining satisfaction for damages is a thorny one given that the respondents are mostly unemployed students with limited financial resources. I say this because they clearly sought the reduction of fees in the Fees Must Fall campaign and elected to rely on University sponsored accommodation as opposed to their own privately funded accommodation.

56. In the circumstances there is no *adequate* alternative remedy available to applicant.

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[3] Buitendach v West Rand Proprietary Mines Ltd 1925 TPD 886 at 906

57. Respondent's freedom of assembly, to demonstrate and to picket is set out in section 17 of the Constitution as follows:

"Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

58. The Constitutional Court qualified the rights set out in section 17 in the case of **South Africa Transport and Allied Workers Union and Another v Garvas and Others** [4] as follows:

"[68] The fact that every right must be exercised with due regard to the rights of others cannot be overemphasised. The organisation always has a choice between exercising the right to assemble and cancelling the gathering in the light of the reasonably foreseeable damage. By contrast, the victims of riot damage do not have any choice in relation to what happens to them or their belongings. For this reason, the decision to exercise the right to assemble is one that only the organisation may take. This must always be done with the consciousness of any foreseeable harm that may befall others as a consequence of the gathering. The organisers must therefore always reflect on and reconcile themselves with the risk of a violation of the rights of innocent bystanders which could result from forging ahead with the gathering."

...

"[84] The limitation on the right to assemble is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."

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[4] 2013 (1) SA 83 (CC) at para 68 & 84

59. The respondent's right to protest, demonstrate, assemble, picket and petition cannot serve as justification for destroying property, threatening to harm people and physically pushing a person who disagrees with their form of protest.

60. The respondent's section 17 rights found it's way into the Constitution after a painful and brutal history caused by the unjust political, social, economic and legal system of apartheid. It was born out of the brutality visited upon peaceful and legitimate protests for equality, justice and liberation for the majority of oppressed people in South Africa. That struggle for liberation was marked by a principled approach in which voices of dissent were not quelled with gratuitous violence, arrogance and self-righteousness.

61. Section 17 rights are qualified by the requirement of peaceful and legitimate forms of protest.

62. It could not have been within the contemplation of the drafters of the Constitution that section 17 be used to justify hooliganism, vandalism or any other unlawful and illegitimate misconduct.

63. When protestors who resort to vandalism, physical and verbal abuse, seek refuge in section 17 of the Constitution, they effectively seek to erode the legitimacy of the hard won freedoms enshrined in the Constitution.

Applying the Law to the Facts

64. Applicant alleged that ninth respondent was seen walking in Residence Road after alighting from her car, carrying a tyre to the area where protestors had already made the fire that was used to burn paintings and photographs.

65. Ninth respondent's answer to the allegation is that there is nothing illegal about carrying a tyre.

66. In its replying affidavit, applicant alleges that ninth respondent drove a car that transported three tyres onto campus.

67. Another student was allegedly seen alighting from ninth respondent's car with a red Castrol can that later contained approximately 3 litres of petrol.

68. The circumstantial evidence points to ninth respondent's direct involvement in facilitating the lighting of fires and consequently the burning of artwork on campus.

69. Ninth respondent offers no plausible explanation for bringing a tyre to the fire.

70. Ninth respondent justifies the fire as follows: "*From what I saw the fire had been made to prevent the movement of cars into the vicinity of Residence Road.*" It is an astounding allegation. She attempts to legitimise the making of a fire to block vehicular traffic. The allegation demonstrates a gross failure to appreciate that a fire usually destroys the property on which it is made and has the

potential to harm nearby vehicles, persons, buildings and its contents. No explanation is given on how the protestors could unilaterally arrogate to themselves, the power to block vehicular access to a road.

71. Ninth respondent does not explain why she "*dropped the tyre where students were singing and dancing*" yet she alleged that it was not used to burn anything.

72. She is silent on what later happened to the tyre that she left near the fire.

73. Ninth respondent's denial of involvement in the burning of artwork rings hollow in the light of her patently uncredible disavowing of involvement in damaging applicant's property.

74. Applicant repeatedly alleged that it is not the shack as a means of protest that it objects to but rather where it was positioned together with the conduct of the protestors who actively prevented vehicles from passing through a thoroughfare road, causing disruption to the movement of people who were entitled to exercise their right of access to the university.

75. Eleventh respondent admits defacing the statue of Jan Smuts and alleges that he did so because it represents colonial oppression and white supremacist views, as did the statue of Cecil John Rhodes.

76. The Rhodes Must Fall (RMF) campaign to which the respondents subscribe, achieved the removal of the statue of Cecil John Rhodes in 2015. It is indeed myopic if that campaign focussed on one offensive statue and did not engage the university on the other allegedly offensive material. If however, the university was engaged on the removal of other offensive material, then the respondents clearly failed to indicate which channels they pursued and exhausted in having that material removed prior to resorting to drastic, violent and destructive action.

77. While the removal of the Rhodes statue was preceded by extensive engagement between the protestors and the university, the campaign against other offending statues and works of art appear to have not followed a similar course.

78. The protest against the remaining offending statues and artwork appears to have been opportunistically tacked onto the protest against the lack of student housing for black students.

79. Eleventh respondent admits entering Fuller Hall and eating food designated for residents. Eating food paid for by residents or their sponsors, amounts to appropriating for oneself, the property of another. I make the assumption that the respondents at some stage, were university students and therefore they were studying to improve their knowledge and skill so that they could become productive members of society. Theft is not acceptable and justifiable conduct for a responsible and productive member of society

80. There is a clear disconnect between a protestor who states that he or she is protesting for the benefit of other black students so that those students would be granted accommodation and food, but then appropriates for himself or herself, the food of other students.

81. Twelfth respondent describes the burning of artworks and the Vice-Chancellor's office as "*unfortunate*" and "*delegitimising*" the RMF and Fees Must Fall campaign.

82. Twelfth respondent denies that he suggested that the protestors should burn the artwork and Vice- Chancellor's office.

83. Twelfth respondent justifies the occupation of buildings as necessary to spur the university into action concerning the demands of the protestors.

84. Twelfth respondent admits pushing a student who walked through a cordoned off area near the shack because the student allegedly sought to provoke the protestors by ignoring the command to avoid the cordoned off area.

85. Twelfth respondent clearly does not appreciate, despite having legal representation, that when one person pushes another, it is most likely common assault. He also denies the student, in question, the right to counter protest without causing physical harm or danger to the 'Shackville' protestors.

86. Applicant alleged that twelfth respondent was present when the bus was torched and he rolled drums into the road shortly before the bus was burned.

87. Twelfth respondent denies this allegation but applicants rely on video footage to support its allegation.

88. Twelfth respondent dismisses altercations between protestors and other students as "*small scuffles of no significance.*" In adopting this cavalier approach to physical altercations, twelfth respondent is treating with disdain, the right of students not allied to his cause to protest.

89. Twelfth respondent admits eating meals at Tugwell residence while applicant alleged that he was not entitled to do so.

90. Thirteenth respondent became legally represented at the hearing and his answering affidavit was handed up in court.

91. Thirteenth respondent alleged that Anwar Mall gave him permission to eat food at University House residence even though he is not a student.

92. Applicant denies that anyone granted thirteenth respondent permission to eat at University House and alleges that only first year students were granted that permission as an interim measure by Grant Willis, the director of student housing.

93. Thirteenth respondent is accused of wearing a t-shirt with the following words written on it: "Kill All Whites."

94. Thirteenth respondent alleges that the words were preceded by a small almost illegible "s", thereby denoting the following words ostensibly: " sKill All Whites."

95. Firstly, there is no known campaign being waged by protestors to have all white persons skilled. Secondly, there is no logical reason why the "s" would be written much smaller than the rest of the words if such a campaign indeed existed. Thirdly, thirteenth respondent ought to take responsibility for his actions in an open and transparent manner instead of disingenuously attempting to cast doubt on his intention when he chose to wear a sweater with the said words on it, in the midst of protest action.

96. It is apposite to remind the respondents of the sentiments expressed by the late State President, Nelson Rolihlahla Mandela on 20 April 1964 in his opening address in the dock:

"...I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons will live together in harmony with equal opportunities ..."

97. The former State President made clear the objectionable and heinous nature of both white domination and black domination in that speech.

98. To the same extent that a sweater with words expressing a desire to kill all blacks is objectionable and an incitement to violence and racial hatred, the sweater worn by thirteenth respondent is an incitement to violence and racial hatred.

99. Fourteenth respondent admits that she allowed two students who were not residents, into Fuller House, for the purpose of spray painting a statue. She said that she exceeded the boundaries of acceptable protest.

100. She admits that she allowed students that were not residents to eat the food. That food was clearly prepared for residents.

101. She admits participating in removal and burning of artworks that are regarded as symbols of oppression. She alleges that she was swayed by the crowd.

102. Applicant denies that all the artworks burned were symbols of oppression.

103. Students are entitled to protest within the boundaries of legal protest. Destruction of University property, blocking access to and from the University, physical violence towards people who disagree with protests and express or implied threats to harm people by displaying words to that effect during protests clearly exceed those boundaries.

104. While it has been said that an interdict is not a remedy for a past invasion of rights, but for present & future rights, in **Philip Morris Inc v Marlboro Shirt**

Co. S.A Ltd 1991(2) SA 720 (A) at 735 B-C, the court said: " *An interdict, however, is not a remedy for the past invasion of rights: Stauffer Chemicals Chemical Products Division of Cheseborough-Ponds (Pty) Ltd v Monsanto Company 1988 (1) SA 805 (T) at 809 F. In order to have been granted the relief claimed by it, Philip Morris was obliged to have established that at the time it instituted these proceedings in 1987 Marlboro Shirt was still representing that its merchandise was associated with Marlboro cigarettes and that there was a reasonable likelihood that members of the public may then have been confused into believing that the merchandise of Marlboro Shirt was connected with Philip Morris.*"

105. The misconduct complained of *in casu*, occurred contemporaneously with application for the interim order, hence there was insufficient time to depose to a founding affidavit and the applicant relied on oral evidence in support of the application.

106. In determining whether a final interdict should be granted, a court, will invariably be confronted with a situation where the offending conduct has ceased, mostly, as a result of the interim interdict.

107. That does not however, make the misconduct a past invasion of rights.

108. The requirement of a reasonable apprehension of harm or harm actually committed would be rendered nugatory if final interdicts were to be refused because the harm has ceased as a consequence of an interim interdict.

109. In my view, the interim interdict is somewhat overbroad. I would accordingly reduce its scope in making it final.

110. Since applicant is only seeking relief against ninth, eleventh, twelfth, thirteenth and fourteenth respondents, it follows that the rule nisi granted against respondents 1 to 4, 6 to 8, 10 and 15 – 17 must be discharged.

111. I am not persuaded that applicant has made out a case for relief against unnamed persons who are meant to constitute the seventeenth respondent and I will discharge the rule against that respondent because the description of that respondent is also too broad, vague and ill-defined.

112. In the result, the following order is granted:

1. The rule *nisi* issued on 17 February 2016 is confirmed in the following varied terms:

1.1 The ninth, eleventh, twelfth, thirteenth and fourteenth respondents are interdicted and restrained from entering, or remaining on, any of the applicant's premises except with the applicant's express prior written consent to do so;

1.2 The written consent referred to in paragraph 1.1 means written consent given after the date of this order by the applicant's vice-chancellor or another member of the applicants' staff nominated by the vice-chancellor for that purpose with reference to this order following receipt of a written request from the relevant respondent;

1.3 Any one of the ninth, eleventh, twelfth, thirteenth and fourteenth respondents who attends or remains on any of the applicant's

premises with the written consent referred to in 1.1 is interdicted and restrained from –

1.3.1 entering or remaining on the applicant's premises for any purpose not expressly set out in the written consent;

1.3.2 erecting any unauthorised structures on the applicant's premises;

1.3.3 destroying, damaging or defacing any of the applicant's property;

1.3.4 participating in, or inciting others to participate in any unlawful conduct and/or unlawful protest action at any of the applicant's premises; and

1.3.5 inciting violence.

2. The ninth and eleventh to fourteenth respondents are to pay the applicant's costs, jointly and severally, including the costs of two counsel.

Allie

R. ALLIE