THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 730/2016

In the matter between:

ALEXANDRIA GABRIELLA HOTZ	**FIRST APPELLANT**
MASIXOLE MLANDU	**SECOND APPELLANT**
CHUMANI MAXWELE	**THIRD APPELLANT**
SLOVO MAGIDA	**FOURTH APPELLANT**
ZOLA SHOKANE	**FIFTH APPELLANT**
and	
UNIVERSITY OF CAPE TOWN	**RESPONDENT**

Neutral citation: *Hotz v UCT* (730/2016) 2016 ZASCA 159 (20 October 2016)

Coram: NAVSA, BOSIELO, THERON, WALLIS and MATHOPO JJA

Heard: 29 September 2016

Delivered: 20 October 2016

Summary: Interdict – student protests – requisites for the grant of an interdict – whether requisites satisfied – nature of relief to be granted.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Allie J sitting as a court of first instance. Judgment reported sub nom *University of Cape Town v Davids & others* [2016] 3 All SA 333 (WCC)):

(a) The order of the court below is altered to read as follows:

'1 The ninth, eleventh, twelfth, thirteenth and fourteenth respondents are interdicted and restrained from –

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

1.2 destroying, damaging or defacing any of the applicant's premises;

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

1.4 inciting violence.

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

(b) Save to that extent the appeal is dismissed with all parties to pay their own costs.

JUDGMENT

Wallis JA (Navsa, Bosielo, Theron and Mathopo JJA concurring)

[1] Since March 2015 South African universities have been engulfed by waves of student protests conducted under names such as

#RhodesMustFall and #FeesMustFall. The protests, and the actions of protestors, university administrators, campus security and the police are the subject of heated debate in the media. This appeal is not about the merits or legitimacy of those protests. It involves no judgment on the conflicting views of the students and their supporters, the university administrators, the politicians and others caught up in these events. Our task is to determine, in accordance with long-established legal principles whether the high court was correct to grant a final interdict against the five appellants, arising out of events on the campus of the University of Cape Town from 15 to 17 February 2016.

[2] At the commencement of argument, counsel for the appellants accepted that the appeal was confined to considering whether the actions of the appellants at that time were unlawful and whether there was a reasonable apprehension that they would recur. He did this while stressing that their actions must be seen against the background of their struggle for social justice. In the result, we are concerned only with the factual situation when the case came before the court below. Subsequent events, such as the current protests on various campuses, are not relevant to our decision.

[3] The appeal arises from a protest, dubbed by the participants 'Shackville', that commenced on 15 February 2016 on the campus of the respondent, the University of Cape Town (UCT or 'the university'). On 17 February 2016 and as a matter of urgency UCT obtained an interim interdict against 16 individuals, some registered students and some not, that barred them from entering the university campus, unless they had the university's consent to be there for academic purposes or to occupy student housing that had been allocated to them. It further interdicted

them from interfering with the rendering of university services and the university's decision-making processes by, amongst others, erecting unauthorised structures on the campus; destroying, damaging or defacing university property; participating in, or inciting others to participate in unlawful conduct or protest action on university premises and inciting violence. On 15 March 2016 the return day of the rule nisi issued on 17 February 2016, UCT sought a final interdict against the five appellants. On 11 May 2016 Allie J granted that order. This appeal is with her leave.

The protest

[4] The protest began on 15 February 2016, which was the first day of the first academic term in 2016. It concerned primarily two issues, namely, the difficulties experienced by many students, predominantly Black, in paying university fees, and the problems they were having in finding suitable accommodation to enable them to pursue their studies. Broader themes were the issue of transformation of the university away from what the students regarded as a colonial and Eurocentric heritage and the massive problems that affect poor people in obtaining decent housing.

[5] Fairly early on the morning of 15 February, at about 6.40 am, a group of some 20 or 30 people gathered above Residence Road next to the Maths building on the upper campus. The upper campus, is situated on the side of Devil's Peak and slopes upwards from the M3, the major road between the centre of the city and the southern suburbs. Adjacent to the M3 are rugby fields. They are bounded on their upper side by a road, Madiba Circle, which runs round the whole of the upper campus. Two halls of residence, Fuller Hall and Smuts Hall stand side by side above

Madiba Circle overlooking the rugby fields. Between them there is a broad pedestrian walk running uninterruptedly straight up the hill to Jameson Hall, the principal hall for formal functions at UCT. Residence Road runs behind Fuller and Smuts Halls and separates them from the principal buildings on the upper campus. It is a major route for vehicular traffic through the university. After crossing Residence Road at the point where the pedestrian walkway passes between the lower residences, one walks up Jameson steps. That is the principal route taken by students coming from the university residences to attend lectures in many, but not all, faculties and to obtain access to the library, the student union and certain other facilities.[1]

[6] At about 8.15 am on 15 February a bakkie arrived in Residence Road near the Jameson steps and unloaded wood, corrugated iron, a door and window and other construction materials. The group gathered at that point, together with the two men in the bakkie, used these materials to erect a shack in the middle of Residence Road obstructing traffic and pedestrians. They then marked off a large area around the shack with the red and white plastic tape used on construction sites and elsewhere to demarcate areas of danger. A photograph in the record, taken from the Jameson steps side, showed a fairly substantial wood and corrugated iron structure in the middle of the road. It was of a type commonly encountered in informal residential areas. Alongside it was a portable toilet and there were more than twenty people sitting and standing around the shack in the cordoned off area. Prominently displayed on the ground in front of the shack at the foot of Jameson steps was a sign 'RHODES

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[1] A clear and labelled map is available on the university's website at *https://www.uct.ac.za/images/uct.ac.za/contact/campusmaps/big/uctuppercampus.jpg*, accessed 18 October 2016.

MUST FALL'. On the back of the shack were the words 'UCT HOUSING CRISIS'. The shack is depicted in this photograph from the record.

[7] It is apparent from the photographs that the shack and the demarcated area constituted a substantial hindrance to traffic on Residence Road and to the ordinary movement of pedestrians in that area of the campus. The normal route for pedestrians going to and from buildings on the upper campus was significantly restricted by the presence of the shack, the protesters and the demarcated area. Evidence that pedestrians were prevented from crossing the demarcated area and that it operated as an exclusion zone was not disputed. The attitude evinced in the opposing affidavits by various respondents was that such persons were not respecting their protest and that it was therefore permissible for them to prevent them physically from entering the demarcated area.

[8] Three of the appellants, Ms Hotz, the first appellant, Mr Mlandu, the second appellant and Ms Shokane, the fifth appellant, were students[2] at the university and acknowledged that they were participants in the 'Shackville' protest. It was described in some of the affidavits (although not those of the appellants) as 'a themed protest action' that sought 'to thoughtfully create an artistic form of protest with the idea to showcase the experience of hardship of Black students and their daily pains and struggles'. Mr Maxwele, the third appellant, had previously been registered as a student and said that he intended to register again in 2016 after consulting a student adviser. He too acknowledged that he was a participant in this protest. The fourth appellant, Mr Magida, had also previously been a student at the university, but at the time of these events was employed as an opera singer and had no direct connection with UCT, or none that emerges from the papers. He did not deal with his involvement in the Shackville protest, but did not deny the allegation that he was one of the original participants.

[9] The presence of the shack caused considerable traffic congestion not only on Residence Road and the upper campus, but extending to the access points to the campus for traffic coming off the M3 and from Main Road, Rondebosch. When senior university staff approached the protesters with a view to persuading them to move the shack to a nearby, grassed area close to Smuts Hall they were rebuffed. At a little after 1.00 pm, a decision was taken not to make any further attempts at that stage to persuade the protesters to move the shack, but to monitor the situation.

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[2] Ms Shokane had not yet registered because of an issue over unpaid fees, but was accepted as a resident in Fuller Hall. Once the issue over unpaid fees had been resolved she would have been able to complete her registration.

[10] At about 2.15 pm a group of protesters moved towards Smuts Hall and Mr Mlandu, the second appellant, climbed up to the roof and spray-painted the bust of Jan Smuts, that stands above the entrance to the residence, with red paint. The protesters applauded this action. The group then proceeded to Fuller Hall where Ms Shokane, the fifth appellant, swiped her student card to provide two of them with access. The two so admitted then proceeded to spray paint the bust of Mrs Fuller, after whom the residence is named, with red paint to the accompaniment of applause from the watching protesters.

[11] Apart from the events already described nothing else that occurred on 15 February, in regard to the protest, was relied on by the university as forming part of the background in support of its application for an interdict. The protest continued, with singing and dancing, and by the evening the majority of the protesters dispersed, although around ten remained and spent the night in the shack.

[12] The following morning the group of protesters reassembled at the shack and continued to sing and dance and prevent people from entering the demarcated area. This again obstructed traffic in Residence Road as well as pedestrian movement to and from the upper campus and it was apparent to the university administration that it was the intention of the protesters that the shack would remain there for a protracted period. The presence of the shack and the blocking of Residence Road was causing a blockage of traffic down Woolsack Road that leads to Main Road, Rondebosch and the traffic was backed up to the M3 off-ramp. The traffic jams were one or two kilometres long. Residence Road carries about 60 percent of traffic within the campus and provides access to parking

areas. These were blocked off with rocks and burning rubbish bins, and persons trying to obtain access to them were threatened.

[13] During the course of the morning a number of altercations occurred between protesters and other students, parents and members of staff. The general allegations made in this regard by the deponent to the university's founding affidavit were not denied by any of the appellants, although the third appellant, Mr Maxwele, denied a specific allegation of aggressive and threatening conduct by him in relation to events at the P3 parking area. He did not, however, deny that he had set fire to rubbish bins that were used to block access to this area. He said that the blocking of the road 'was a necessary step in highlighting the pain of the students'.

[14] The university alleged, and this was not controverted, that during the course of the morning of 16 February a number of students, a staff member and a member of the public dropping a student off, were physically assaulted and verbally abused by the protesters. The abuse included racial insults. Senior management requested the protesters to move the shack out of Residence Road and onto the grass by Smuts Hall but this request was refused.

[15] At about 2.00 pm on 16 February the second appellant, Mr Mlandu, painted a number of slogans on the War Memorial that stands above the rugby fields and commemorates persons with a connection to UCT who had died in or were affected by the First and Second World Wars. The slogans on the front of the memorial read 'F*** WHITE PEOPLE!!' and 'F*** BLACK EXCLUSION', while those on the

reverse read '1652 MUST GO!!',[3] 'UCT IS A SITE OF CONQUEST' and 'UCT IYAKAKA MOER!'.[4] At some time that day, slogans reading 'F*** WHITE PEOPLE' and 'F*** WHITE TEARS' were painted on the pavement and at the bus stop where the Jammie shuttle bus stops to collect students from the Baxter residence on the lower campus to take them to the upper campus.

Attempts by university management to invoke the assistance of the police were unsuccessful. At 3.00 pm they caused a letter to be delivered to the protesters requesting them to move the site of their protest from the position where it was blocking Residence Road to a spot about 20 metres away on a grass lawn adjacent to Smuts Hall. The letter expressly recognised the protesters right to protest and the importance of the issues they were raising. It offered the assistance of campus security officers to move the shack and requested that they ensure that the participants in the protest acted 'within legal parameters' and refrain from interfering with 'the rights of fellow students and staff'. The protesters were told that if the shack had not been moved by 5.00 pm action would be taken to remove it. The protesters did not move the shack and instead tore up the letter in the presence of the university's management. When campus security personnel went to the site to assist in moving it they were refused permission to do so. According to the evidence, the protesters made use of social media to summon sympathisers, especially from other campuses and other social activists, to bolster numbers. They also started fires at various places, setting alight 'wheelie bins' used to collect rubbish. They also gathered rocks and stones and the deponent to the founding affidavit made the point that the mood of the group changed significantly from what it had been earlier. They became more charged and he described them as 'hostile'.

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[3] Presumably this was a reference to the arrival of the first White settlers at the Cape under Jan van Riebeeck.

[4] Roughly translated this means 'UCT is defecating on your mother', although the word used is somewhat cruder in meaning than 'defecating'.

[16] By 5.00 pm the group of protesters had grown and there were between 200 and 300 people at the site of the shack, some of whom may simply have been curious bystanders. At about 6.00 pm some 40 or 50 protesters obtained entrance to Fuller Hall, went into the kitchen and dining hall, and helped themselves to food meant for resident students. Some among them then proceeded to remove a number of portraits, photographs and paintings from the walls of the dining hall. These were taken into Residence Road and thrown on a pile and set alight. Shortly before 7.00 pm the same group pushed their way into Smuts Hall and removed portraits and paintings that were also taken and burnt. They then went into three other buildings on the upper campus and removed more paintings, photos and portraits that were likewise taken and burnt. All in all, apart from formal photographs, 25 works of art having a value of nearly R700 000 were destroyed.

[17] There was no apparent pattern to the removal and burning of portraits, paintings and photographs. Some were by well-known artists and were portraits of figures involved in the university in years gone by. Others were paintings by contemporary South African artists. These included a series of works commissioned by the Student Affairs Department and painted to commemorate political events between 1987 and 1994 in the last stages of apartheid and up to the commencement of democracy. Some of the photographs were of past house committees of the residences. Others included photographic collages of Molly Blackburn, an anti-apartheid and civil rights activist.

[18] While the paintings were burning a bakkie arrived on the campus containing building materials for the purpose of constructing a second shack. According to the first appellant, Ms Hotz, this was a ‘shack we had

ordered the previous day'. The intention was that this would be erected near the lower campus Jammie shuttle bus stop in Baxter Road. However, the intervention of campus security personnel and the police prevented the erection of the shack, despite the objections of the protesters. It appears that the intended site for the erection of the second shack was near the place where the slogans referred to in paragraph 15 were painted.

[19] After the protesters had forced their way into the halls, residences and dining halls and while the paintings were being burned, Mr Ganger laid charges against the protesters at the Rondebosch police station with a view to getting the police to act. This was at about 7.30 pm. As a result the police came to the campus to disperse the protesters. While this was effective at the site of the shack in Residence Road, the dispersing protesters broke into smaller groups and caused further damage. A bakkie used for research purposes by the Department of Biological Sciences and parked in University Avenue North on the upper campus was set alight and destroyed. That occurred at about 8.40 pm. At about 9.00 pm, at the Jammie shuttle bus stop in Baxter Road, a shuttle bus was stoned, set alight and destroyed. The value of the two destroyed vehicles was slightly less that R1.6 million. At about 8.00 pm and in view of concerns about the situation on the campus the Executive Director of Libraries was instructed to close the library, which is normally open until late at night for student study purposes.

[20] The protesters marched to the Rondebosch police station at about 10.30 pm and before and during the march eight people were arrested.[5]

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[5] These eight, some of whom were registered students at the time, were originally included in those against whom the interim interdict was sought, but the proceedings against them were withdrawn before a final interdict was sought.

At 11.00 pm an incendiary device was thrown through the window of the office of the Vice-Chancellor of the university in the Bremner building on the lower campus. While the fire was detected and extinguished by campus security personnel it caused significant damage estimated at R350 000. The identity of the perpetrators had not yet been established when the application was brought and this occurrence is relevant only to an understanding of the university's concerns leading up to the interdict.

[21] As the protesters were being dispersed from the site in Residence Road, the shack was demolished by private security personnel and police. Inside the shack campus security found a plastic can containing about three litres of petrol. A similar can, capable of carrying five litres of petrol, is to be seen in photographs taken when the paintings were being burned. At least two people were photographed in possession of that can and one is shown throwing its contents on to the fire, but not with a view to dousing it. The following morning, after the shack's removal, rocks and other objects had been placed in the road to obstruct traffic.

[22] The events that precipitated the urgent application came on 17 February when a member of the campus security staff received a report from a student of a threat of further arson attacks on buildings on the campus. That occurred shortly after midday on that day and related to events the previous evening. The student said that she had been given a lift to Observatory Square, because there was no Jammie shuttle bus available, as one was on fire. She reported that the students in the car appeared to have been involved in the protests. They were very excited about the burning of the bus and one said that she had been involved in burning paintings. The one said that he would be returning to the campus the following day, that is, 17 February, and they would try to burn as

many buses as possible. On top of that she said that the student said that they intended to go to a building on upper campus with large gas bottles that they were also going to burn. (This was identified as the P D Hahn building, which houses the faculty of science.) The student making the report claimed to be terrified by the attitude of those in the car.

[23] Apart from this report the university became aware from a posting on social media of a threat to the university library to 'burn books written by white people'. In addition there was concern about the difficulty experienced the previous day in securing an intervention by the police and whether they would intervene again if such intervention were necessary.

The urgent application

[24] The urgent application was set down for hearing at 4.30 pm on 17 February 2016 before Williams AJ. A notice of motion was filed, but no supporting affidavits, and the hearing proceeded on the basis of the oral evidence of the registrar, Mr Pillay, and the university's investigations manager, Mr Ganger. The evidence covered the events described above. A number of photographs were handed in as exhibits and reference was made to video footage that was available to be viewed if need be. The videos both portrayed events on the campus and had been used to identify participants in the various events. In addition a sworn statement was produced in regard to the report referred to in paragraph 22 and a recording of the report was played.

[25] At a very late stage of the hearing after the evidence had been heard, while the judge was settling the terms of the order she was about to make, an attorney appeared on behalf of the respondents. He indicated

that his clients wished to be granted an opportunity to oppose the application. The judge said that she had already 'heard the application and I'm satisfied that a proper case has been made out for the relief sought' and indicated that she was in the process of finalising a timetable for the filing of papers. In the result a provisional order was made including an interim interdict. The return date of the rule was 15 March 2016.

[26] The order granted on 17 February made provision for dealing with the photographic and video material placed before Williams AJ or referred to and relied on in the course of the oral evidence. Paragraph 5 of the order provided that UCT was to file a founding affidavit by 22 February to which it was to attach a transcript of the evidence; the three exhibits handed in at the hearing and any further footage of the incidents forming the subject matter of the application. It provided that insofar as this evidence consisted of video footage it should be dealt with under Uniform rule 36(10). UCT complied with that order.

[27] Uniform rule 36(10) provides for the admission without the need for formal proof of plans, diagrams, models and photographs. The mechanism for doing so is to give notice of the intention to produce such items at the hearing and to require the other party to admit them. If there is no response to that notice those items may be received in evidence on their mere production without further proof thereof. There was no response to the notices delivered by the university and hence all the photographs and video footage were receivable in evidence without

further proof.[6] It was in fact tendered to Allie J but we were informed from the bar that she indicated, that she did not think it necessary to view the material. Perhaps that was because the description of the contents of the video material was, in all but one respect, not disputed. That is the approach that most favours the appellants and I accordingly adopt it.

[28] The order eventually made by Allie J read as follows:

'1 That 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 ViceChancellor or another member of the applicant's 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.

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[6] The effect of the rule is that 'if the prerequisites are established, [it] creates an admission only (i) as to the authenticity of the document, i.e. it dispenses with the need to call the author of the plan or to provide other proof of its authorship, and (ii) as to the physical features actually found by the author.' *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A) at 438F. In the case of photographic material it is an admission as to what is depicted in the photograph.

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

The law

[29] The law in regard to the grant of a final interdict is settled. An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.[7] Once the applicant has established the three requisite elements for the grant of an interdict the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief.[8] That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy. In those circumstances, were the court to withhold an interdict that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected right of access to courts for the resolution of disputes and potentially infringe the rights of security of the person enjoyed by students, staff and other persons on the campus.

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[7] *Setlogelo v Setlogelo* 1914 AD 221 at 227. These requisites have been restated countless times by this court, most recently in *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) [2014] ZASCA 169 para 26, and *Red Dunes of Africa v Masingita Property Investment Holdings* [2015] ZASCA 99 para 19. They were affirmed by the Constitutional Court. *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (*Pilane*) para 38.

[8] *Lester v Ndlambe Municipality and Another* 2015 (6) SA 283 (SCA) paras 23-24; *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) at 347F-H. The more general statement regarding discretion in *Wynberg Municipality v Dreyer* 1920 AD 439 at 447 does not reflect the approach adopted by our courts. It is different when dealing with an interim interdict, where the remedy is clearly discretionary because of the need to consider the balance of convenience. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC) para 41-47.

The university's rights

[30] There is no dispute regarding the rights that the university seeks to protect in these proceedings. It is common cause that it has the right to:

'(a) control and manage access to its property;

(b) ensure that it is allowed to properly manage and control unlawful conduct on its property;

(c) ensure that its staff are able to carry out their work in the interests of the students;

(d) ensure the safety of its students and staff and other members of the public who are legitimately on its property; and

(e) protect UCT's property.'

Four of the appellants accepted in their affidavit that UCT had certain rights that ought to be protected but denied that they posed a threat to those rights.

An infringement of rights actual or apprehended

[31] Here again there are concessions on the part of the appellants that narrow the area of dispute. In paragraph 71 of their heads of argument it was said:

'It is also accepted that the Appellants were in the midst of protest action which went beyond the boundaries of peaceful and non-violent [protest] and thus rendered themselves subject to disciplinary processes that the Respondent initiated against its students.' (My insertion.)

In view of certain denials in their affidavits I do not construe this concession as an acceptance by the appellants of their participation or complicity in all the events described above. But, it is a concession that they were participants in protest action that overstepped the bounds of peaceful and non-violent protest. That is relevant because that is the boundary set by the Constitution in s 17 of the Bill of Rights, which

guarantees the right 'peacefully and unarmed' to assemble, demonstrate, picket and present petitions.

[32] There can be no doubt that the actions of the protesters as already described infringed the university's acknowledged rights. Starting with the erection of the shack and the obstruction of Residence Road the university could no longer control or manage access to its property. Similarly, it was unable to control access to the residences and the dining halls. It was unable to prevent clearly unlawful activities such as the painting of slogans on university property and the removal of the portraits, paintings and photographs and their destruction. Staff, students and members of the public were harassed and threatened and unable to go about their ordinary business on the campus. Property was damaged, defaced and destroyed. None of the appellants denied that this had occurred, or disavowed it, or sought to distance themselves from it. On the contrary, they aligned themselves with it and sought to justify these events.

[33] The appellants invoked the defence of necessity,[9] to claim that their actions had not harmed or infringed the university's rights 'to the extent that warrants the confirmation of the interim interdict'. They said that there was no evidence that the injury was a continuing one, and that because they were pursuing a legitimate and noble objective, namely the transformation of the university and the promotion of an atmosphere that was conducive and acceptable to all, 'protestors and activists alike may

[9] In the criminal context, where it most frequently arises, Jonathan Burchell *South African Criminal Law and Procedure* - Volume I: General Principles of Criminal Law 4 ed (2011) at 9-145, says that: 'The ***defence of necessity*** arises when a person, confronted with a choice between suffering some evil and breaking the law in order to avoid it, chooses the latter alternative.'

be justified in exceeding the bounds of the law, particularly in circumstances where they seek to protect and highlight rights of others that are being infringed.' They submitted that their conduct had not been wrongful.

[34] The university for its part argued that there had already been a substantial infringement of its rights in consequence of the actions of the protesters. It said that on the evidence the appellants had all been active participants in the protests and had not disavowed any of the conduct of the protesters. Their own participation was apparent from the eye-witness reports of what occurred and was supported by the photographic and video material. In most instances the appellants acknowledged their own actions and sought in their affidavits to justify it. The only acknowledgment of unlawfulness came in the heads of argument on their behalf and there was no undertaking by any of them not to repeat their actions. In those circumstances the university contended that it had already suffered an infringement of its rights and that it reasonably apprehended that unless an interdict was granted the appellants would continue with their protest activities in the same vein as had occurred from 15 to 17 February.

Absence of another remedy

[35] For the sake of clarity it is necessary to say something about this requisite. The appellants' submissions wavered between a contention that courts have a general jurisdiction to withhold the remedy of an interdict, and contending that various courses were open to the university to resolve its disputes with the protesters, and that these constituted alternative remedies that were to be preferred to an interdict in order to deal with the university's concerns. All of these submissions were misconceived

because they proceeded from a misconception as to the purpose of an interdict and as to the nature of this requisite for its grant.

[36] Firstly, the purpose of an interdict is to put an end to conduct in breach of the applicant's rights. The applicant invokes the aid of the court to order the respondent to desist from such conduct and, if the respondent does not comply, to enforce its order by way of the sanctions for contempt of court. Secondly, the existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended. That is why, in many cases a court will weigh up whether an award of damages will be adequate to compensate the injured party for any harm they may suffer. There may also be instances where, in the case of a statutory breach, a criminal prosecution, in appropriate circumstances, will provide an adequate remedy,[10] but there are likely to be few instances where that will be the case.[11] Thirdly, the alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court. The fact that one of the parties, or even the judge, may think that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict.

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[10] *Food and Allied Workers' Union and Others v Scandia Delicatessen CC and Another* 2001 (3) SA 613 (SCA) paras 34-41.

[11] *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) paras 47-50. There were in the past statutes in the employment field that provided not only that non-compliance by the employer with obligations in favour of employees was a criminal offence and empowering the court dealing with the criminal case to determine what amount was owing to the employees and order that it be paid. But those were special procedures and their existence does not affect the proposition that criminal proceedings are generally speaking not an alternative to the grant of an interdict restraining unlawful conduct.

[37] It is for this latter reason that the appellants' reliance on the following passage from *Pilane* was misconceived. That case dealt with a dispute over traditional leadership and an attempt to secede from a traditional community. After holding that no case had been made on traditional grounds for the grant of any of the interdicts sought, Skweyiya J remarked:

'[70] The three challenged interdicts adversely impact on the applicants' rights to freedom of expression, association and assembly. In the absence of more convincing argument from the respondents in relation to their own rights against which the applicants' interests are to be balanced, one is hard-pressed to find in the respondents' favour.

[71] The restraint on the applicants' rights is disquieting, considering the underlying dissonance within the Traditional Community and the applicants' numerous unsuccessful attempts to have this resolved. The respondents' litigious record also portrays a lack of restraint on the part of the Traditional Community's official leadership in employing legal devices to deal with challenges that should more appropriately be dealt with through engagement. This could be seen as an attempt to silence criticism and secessionist agitation and, if so, would not be a situation that the law tolerates.

[72] *This situation cries out for meaningful dialogue between the parties, undertaken with open minds and in good faith.* One hopes that this will produce harmonious relations within the Traditional Community.' (My emphasis)

[38] Counsel seized on this passage to argue that instead of an interdict the court should order the university and the protesters, including the appellants, to engage constructively with one another to resolve the issues that form the subject of the protests. But it is one thing for a judge to express the hope that parties may, by sensible engagement with one another, resolve their differences without any need for the court to intervene, and another thing altogether to refuse a litigant relief to which

they are in law entitled, on the basis of a view that constructive engagement, third party mediation or the application of common sense would be preferable means of addressing the differences between the parties. Courts sometimes suggest to parties that there are ways other than litigation to resolve grievances and redress wrongs, but all they can do is encourage the parties to explore these alternatives. They cannot impose them upon the parties. In particular they cannot deny a legal remedy to a litigant entitled thereto on the basis that they should seek a remedy through some other non-legal means.

[39] This understanding of the nature and purpose of an interdict is rooted in constitutional principles. Section 34 of the Constitution guarantees access to courts, or, where appropriate, some other independent or impartial tribunal, for the resolution of all disputes capable of being resolved by the application of law. The Constitutional Court has described the right as being of cardinal importance and 'foundational to the stability of an orderly society' as it 'ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help'. It is 'a bulwark against vigilantism, and chaos and anarchy'.[12] Not only is the Constitution the source of the university's right to approach the court for assistance, in doing so it is exercising a right that the Constitution guarantees. In granting an interdict the court is enforcing the principle of legality that obliges courts to give effect to legally recognised rights. In the same way the principle of legality precludes a court from granting legal recognition and

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[12] *Chief Lesapo v North West Agricultural Bank and Another* 1999 12 BCLR 1420; 2000 1 SA 409 (CC); [1999] ZACC 16 para 22, citing with approval *Concorde Plastics (Pty) Ltd v NUMSA* 1997 11 BCLR 1624 (LC) at 1644F - 1645A.

enforcement to unlawful conduct.[13] To do so is 'the very antithesis of the rule of law'.[14]

The individual appellants

[40] Against the background of that introduction and exposition of the applicable law, I turn to consider the factual allegations made by the university against each of the appellants and the grounds for saying that it was entitled to a final interdict against each of them.

First appellant – Ms Hotz

[41] Ms Hotz was one of the original group of protesters when the Shackville protest started. She acknowledged her participation in it and initially explained that it was 'thoughtfully created as an artistic form of protest with the idea to highlight the plight of black students and their daily pains and struggles'. It is not clear how that was to be reconciled with her later statement that an 'uprising' was the only way of inducing the university to act on the protesters' grievances. She went on to say that it was 'an exhibition of black people's poverty in what is historically and predominantly an institution catering for white privilege' and a legitimate form of protest. She bemoaned the fact that a campaign 'started with good intentions and designed to have the effect of uplifting all UCT students' had instead resulted in the grant of an interim interdict against her as well as a suspension order in terms of the university's disciplinary code.

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[13] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) paras 53 and 61. The principle is one that our courts have always observed. *Hoisain v Town Clerk, Wynberg* 1916 AD 236 at 240.

[14] *Hubbard v Cool Ideas 1186 CC* [2013] ZASCA 71; 2013 (5) SA 112 (SCA) para 15.

[42] Ms Hotz did not deal in any great detail with the factual allegations in the affidavits delivered by the university. From these it is apparent that she was part of the group of protesters who erected the shack and throughout the day on 15 February 2016 blocked Residence Road and hindered other students, staff and members of the public from going about their lawful business on the affected parts of the campus. Her evidence showed that decisions by the protesters were collective in nature and it is reasonable therefore, in the absence of any denial or act of disassociation by her, to accept that she was party to the protesters' refusal to allow the shack to be moved to a point where it would not constitute an obstruction, as well as their conduct in dealing with people who sought to enter the space demarcated around the shack and make their way up Jameson steps. She was silent about the actions of the protesters in entering both Smuts Hall and Fuller Hall and spray-painting the two busts. That occurred in the immediate proximity of the Shackville protest and was received with applause by the protesters. The necessary inference is that she approved of this.

[43] Ms Hotz's denial that she slept in the shack is accepted.[15] However, it is clear that she rejoined the protesters on 16 February and was present throughout the protests that day. It was apparent to the university that the protesters intended the shack to remain in place for a protracted period. In the afternoon the protesters entered Fuller Hall. Ms Hotz acknowledged that she entered Fuller Hall and ate a piece of chicken, but denied that she carried out any paintings or portraits. This was between 6.00 pm and 7.00 pm.

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[15] This is not to cast doubt on Mr Ganger's identification of her as having slept there, but merely because in the absence of cross-examination of the two of them the dispute cannot be resolved on the papers.

[44] The contract manager for campus security at the university said in an affidavit that Ms Hotz was part of the group that burned the paintings. She was recorded on the residence north camera carrying a tyre in the vicinity of the protest and next to a fire. Her response to this was to say that she did carry the tyre 'and there is nothing illegal about this' and she dropped it where students were singing and dancing. But she refrained from explaining why she was a carrying a tyre at that time and place. Her lack of an explanation prompted the university to respond that the video footage showed her arriving in her car on Residence Road with at least one other student. There were three tyres taken from the car, including the one she was carrying. One of the students who alighted from the car was also carrying a red Castrol plastic can. This can was found in the shack and contained petrol. One of the photographs shows a student throwing what appears to be petrol or some other accelerant from that can onto the burning paintings and portraits. In the absence of any reason to think otherwise it is probable that this was the plastic can found later that evening in the shack. Ms Hotz did not seek to deliver a further affidavit to deal with these matters.

[45] Ms Hotz denied that she had participated in the burning of paintings, portraits and photographs. She said in her affidavit that:

'I did not take part in any burning of the art. I was in the vicinity along with many other students having a conversation about the wisdom of burning the art. I had grave reservations about this form of protest but [was] in no position to prevent it.'(My insertion.)

Two photographs in the record belied this explanation. The first of these showed Ms Hotz close to and seemingly moving towards where paintings, portraits and photographs were being thrown on a pile adjacent

to the portable toilet. The second showed her standing immediately adjacent to the pile of paintings, portraits and photographs. She was gesticulating towards someone behind the people standing immediately in front of her. The three people standing immediately in front of her in the second photograph were the fifth appellant, and two young men, one in a blue shirt and cap and the other wearing a yellow shirt. Both were carrying backpacks. The one in a yellow shirt is seen in another photograph carrying the red can of petrol. Both of these young men are shown in the photographs taken inside Fuller Hall participating in the removal of paintings and portraits from the walls of the hall. Although the paintings were moved a little further into Residence Road to a point at the rear of the shack before being set alight, it is difficult to reconcile these photographs, and the fact that the petrol can was brought to campus in her car, with her non-participation in or disavowal of the destruction of the art works.

[46] Ms Hotz said that ‘we’ had ordered the shack to be erected on the lower campus and that, shortly after the burning of paintings, portraits and photographs commenced, she left the shack protest and went to the middle campus where campus security and the police had stopped the vehicle carrying building materials for the erection of a second shack. She said that there was a heated exchange about the erection of the second shack. This was to no avail and the vehicle with the building material was turned away. She said that she then went home to join the celebrations of her mother’s birthday.

[47] To summarise therefore Ms Hotz was actively engaged in the erection of the shack and attempted to cause a second shack to be erected. She was involved in bringing tyres and petrol to the campus and this was

used in making fires and, in the case of the petrol, used in burning the art works. Her claim to have disassociated herself from the latter actions is flimsy and can be rejected on the papers. She clearly encouraged others to participate generally in the protest action.

Second appellant – Mr Mlandu

[48] Mr Mlandu was one of the original group of protesters who erected the shack on Residence Road. On 15 February he gained access to Smuts Hall and spray-painted the bust of Jan Smuts with red paint. The following day he painted the slogans set out in paragraph 14 above on the War Memorial. He said that he defaced the statue of Jan Smuts because it represented colonial oppression, white supremacist views and racial hatred. He accordingly regarded his actions as constituting legitimate forms of protest. As regards the slogans on the War Memorial he said that they were political terms and intended to debate racism both within and outside the university. His view was that he was 'entitled to a political speech intended to trigger legitimate political debates about racism and the university's tolerance of it'. The university, for its part, regarded his conduct in painting the bust as exceeding the permissible limits of legitimate protest and the slogans as 'racist, hateful and inflammatory language'. It drew attention to the fact that Mr Mlandu sought to defend his actions as legitimate forms of protest.

[49] Apart from these activities Mr Mlandu was one of the people who entered Fuller Hall and helped themselves to food intended for the students who were resident there. He did not dispute the evidence that he was one of the leaders who urged the crowd of protesters to enter Fuller Hall and demand food. In summary he was actively engaged in the erection of the shack and the conduct of the Shackville protest. He was

responsible for defacing the bust of Jan Smuts and the War Memorial. He encouraged others to enter Fuller Hall and help themselves to food intended for resident students.

Third appellant – Mr Maxwele

[50] Mr Maxwele was one of the original protesters. He was involved in the erection of the shack in Residence Road, the demarcation of a 'no go' area with danger tape and preventing people from crossing into that area. He testified that the blocking of the road was 'a necessary step in highlighting the pain of the students'. He was involved in the altercation with a student who wanted to cross the area demarcated by tape and who was assaulted after he 'cut the corner' of the demarcated area. Mr Maxwele's explanation was that the student was being provocative. He accepted that he pushed him, but said that it was 'an inflated view' that there was an assault. The description by another student was that his friend was grabbed, hit, pushed and scratched and that the principal protesters involved in the incident were Mr Maxwele and Mr Magida, the fourth appellant. This was accompanied by racial abuse – a charge not denied. The incident was recorded on video footage. It seems improbable that it was simply a small scuffle of no importance as suggested by Mr Maxwele. Had there been a substantial challenge to the accuracy of the description of this incident no doubt the appellants' counsel would have asked the judge to view the footage.

[51] Apart from this instance Mr Maxwele did not dispute the university's allegation that at least five other incidents occurred involving physical and verbal altercations between protesters and students, staff and members of the public. He said that he understood that the university would not want to disclose the identity of these individuals, but took the

view that this was all part and parcel of the protest. If protesters were provoked there would be a response that 'may well have included pushing around the persons'. While he denied any involvement in any incidents of violent protest, he did not respond when the university said that he was clearly identifiable as being present when the Jammie shuttle bus was set alight and was part of the group that had rolled large cans into the road to block the passage of the bus before it was set on fire. Earlier that day he had been identified by Mr Witbooi, the traffic manager of the university, as the person who accosted him when he was attempting to remove dirt bins and rocks that were blocking Residence Road and diverting traffic through the P3 parking area in order to clear Residence Road. Mr Witbooi said that Mr Maxwele threatened him with physical assault and was involved in altercations with parents. He also lit bins that had been placed to block the entrance to P3 parking area and warned that anyone who came close to the area would be dealt with by him. According to Mr Witbooi his manner was aggressive and threatened violence.

[52] One would have expected a detailed response by Mr Maxwele to these allegations, but he said nothing about being identified as having been on the scene at the time the Jammie shuttle bus was set on fire. As regard the earlier incidents involving Mr Witbooi his response was the following:

'There is again nothing illegal or in conflict with the rules against protests. This was not a violent protest. The blocking of the road was a necessary step in highlighting the pain of students. It is denied that I ever threatened someone with violence and this statement is made irresponsibly. I deny having involved myself in anything illegal.'

It appears from this response that Mr Maxwele thought that the protesters were entitled to block roads and hamper the free movement of traffic and

could not be prevented from doing so. He did not deal with or challenge the statement that he had lit bins placed in the parking area to block traffic. His approach throughout his affidavit was that the protesters were entitled to do what they did. He said that he was not a party to either the burning of artworks or the burning of the Vice-Chancellor's office, which he described as 'unfortunate incidents', which he would not condone.

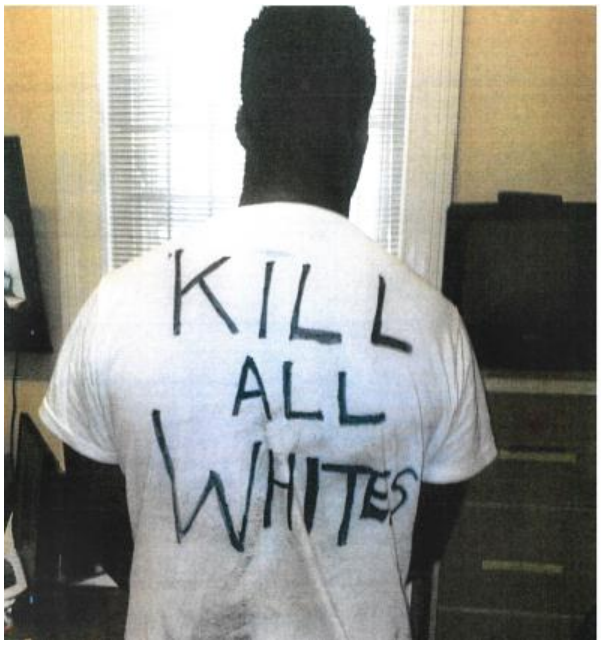
[53] In summary, Mr Maxwele was actively engaged in the erection of the shack and the conduct of the Shackville protest. In particular he was responsible for burning rubbish bins and blocking the entrance to the P3 parking area. He was involved in a physical confrontation with threats of violence with Mr Witbooi and further confrontation and some actual violence in dealing with the student who crossed into the exclusion zone. He was also present when the Jammie shuttle bus was set alight and helped to barricade the road prior to that occurring.

Fourth appellant – Mr Magida

[54] Mr Magida was not a registered student, but unlike others he did not claim any intention to return to studies at the university. It appears that he was pursuing a career as an opera singer. However, from the outset of the protest he was a participant as he had been in earlier protests. His participation appears, however, to have been general along with a number of others. He was not identified as having entered the residences or participated in the removal and burning of art works. Nor was he identified as a participant in the other incidents, such as the burning of the bakkie, or the Jammie shuttle bus, or the fire bombing of the Vice-Chancellor's office. The only incident in which he was identified as a participant going beyond merely being one of the protesters was the confrontation between Mr Maxwele and the student

who despite the protesters' objections crossed into the demarcated exclusion zone. He was identified as having made comments such as 'you are a white racist' and 'leave … we have no time for white tears'. He also 'wielded' a large piece of wood in a threatening way and used it to indicate to students that they should walk round the exclusion zone. None of this was denied in an affidavit he filed shortly before the hearing before Allie J.

[55] The university's complaint related more to an earlier incident on 10 February 2016 when some students were in a dining hall on the campus and it came to the university's attention, as a result of postings on social media, that Mr Magida was there wearing a T-shirt with the slogan 'KILL ALL WHITES' written in large letters with a marker pen on the back. In response to these reports Mr Ganger left a message for Mr Magida to come and see him and when he did so told him that he had received complaints about the message on the shirt and that it constituted hate speech and incitement to violence. Nothing seems to have come of this save that Mr Magida allowed Mr Ganger to take a photograph of him wearing the shirt. An insert of that picture is as follows:



There is no evidence that Mr Magida was seen wearing the shirt during the Shackville protest.

[56] Mr Magida's affidavit said that he had told Mr Ganger that the slogan on the shirt in fact read 'sKILL ALL WHITES' and that this was an artistic form of expression. He said that what was intended was that if anyone came closer they would have realised that this was the wording of the slogan and in coming closer and seeing this 'the opportunity for dialogue and/or debate about the living standards of marginalised people and the constant fear of black people by white people is realised'. Mr Ganger's response was that even from extremely close the 's' was barely visible. It is certainly completely invisible on the photograph taken by Mr Ganger.

[57] Mr Magida was accordingly actively engaged in the erection of the shack and the conduct of the Shackville protest. He was involved in one incident of violent confrontation and threatened others. He wore the T-shirt with its slogan a few days prior to the commencement of the protest.

Fifth appellant – Ms Shokane

[58] Ms Shokane was also one of the original protesters. Apart from her participation in the protest she was identified as being involved in three particular matters. First, she was the person who used her card to provide access to Fuller Hall to the two women who spray-painted the bust of Mrs Fuller. In her affidavit she said that when she did this she genuinely believed that it was the right thing to do, but had come to realise that she erred in that regard. She was also the person who urged the crowd of protesters to go into Fuller Hall to take food from the kitchens. She claimed that this was in accordance with advice given to the

students by the housing director and that she thought ‘it was wrong to deprive students of food under the circumstances’. The precise circumstances that led her to this view were unclear and unexplained. The university pointed out that there had been no authorisation permitting students, even those such as Ms Shokane, who lived in residences, to choose where they would eat or to allow non-residents to consume food intended for resident students.

[59] The third matter arose in the context of the burning of art works. A photograph clearly showed Ms Shokane carrying a large painting and throwing it into a fire where other art works were already burning. She accepted that she did this, but said that there was a spontaneous crowd response to the removal of art works, on the basis that they represented colonial interests and that she was part of the crowd and swayed by crowd pressure. She claimed that her actions were a spontaneous reaction in the middle of student protests. She denied playing any part in the removal of paintings from the dining room of Fuller Hall.

[60] Again, the photographs add something to this narrative. The first two show Ms Shokane stooping over the pile of pictures and photographs adjacent to the portable toilet and then show her in apparent discussion with the first appellant and the two young men already mentioned. At this stage the pile of paintings, portraits and photographs is adjacent to the toilet. What the photos then show is that some of the larger portraits were moved to a point at the back of the shack, that is, on the side of the residences and away from Jameson steps. Here they were stacked upright, defaced and set on fire. The photograph shows someone about to throw a

large stone at them. In the background is the young man in a yellow shirt carrying the red petrol can.[16] The large portrait that Ms Shokane threw onto the fire can be seen in the background. The next photo in the sequence shows that the fire had started and protesters were bringing photographs and other material to add to the pyre. It is not wholly clear at what stage Ms Shokane added the portrait that she was shown throwing onto the fire. The photograph in the record tends to suggest that darkness had already fallen but this may be misleading. However, looking at the one showing Ms Shokane, it is apparent that some of the original upright stack was still in place, whereas a photograph showing petrol being thrown from the red can onto the blaze was taken in daylight and by that stage the upright stack had completely collapsed. It seems more probable therefore that Ms Shokane's actions occurred at an earlier, rather than a later, stage of events.

[61] Ms Shokane was accordingly actively engaged in the erection of the shack and the conduct of the Shackville protest. She assisted in the entry to Fuller Hall both for the purpose of spray-painting the bust of Mrs Fuller and to obtain food. She was also actively involved in the burning of art works.

Discussion

[62] Protest action is not itself unlawful. As pointed out by Skweyiya J in the passage already quoted from *Pilane* the right to protest against injustice is one that is protected under our Constitution, not only specifically in section 17, by way of the right to assemble, demonstrate

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[16] It must be borne in mind that in one of the early photographs he was in conversation with both the first and fifth appellants.

and present petitions, but also by other constitutionally protected rights, such as the right of freedom of opinion (s 15(1)); the right of freedom of expression (s 16(1)); the right of freedom of association (s 18) and the right to make political choices and campaign for a political cause (s 19(1)). But the mode of exercise of those rights is also the subject of constitutional regulation. Thus the right of freedom of speech does not extend to the advocacy of hatred that is based on race or ethnicity and that constitutes incitement to cause harm (s 16(2)*(c)*). The right of demonstration is to be exercised peacefully and unarmed (s 17). And all rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people (s 10) and the rights other people enjoy under the Constitution. In a democracy the recognition of rights vested in one person or group necessitates the recognition of the rights of other people and groups and people must recognise this when exercising their own constitutional rights. As Mogoeng CJ said in *SATAWU v Garvis*,[17] 'every right must be exercised with due regard to the rights of others'. Finally the fact that South Africa is a society founded on the rule of law demands that the right is exercised in a manner that respects the law.

[63] This court had occasion to deal with the right to demonstrate in *SATAWU v Garvis*.[18] It said:

'Our Constitution saw South Africa making a clean break with the past. The Constitution is focused on ensuring human dignity, the achievement of equality and the advancement of human rights and freedoms. It is calculated to ensure accountability, responsiveness and openness. Public demonstrations and marches are a regular feature of present day South Africa. I accept that assemblies, pickets,

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[17] *SATAWU and Another v Garvis and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC) para 68.
[18] *SATAWU v Garvis and Others* [2011] ZASCA 152; 2011 (6) SA 382 (SCA) paras 47-49.

marches and *demonstrations* are an essential feature of a democratic society and that they are essential instruments of dialogue in society. The [Regulation of Gatherings] Act was designed to ensure that public protests and demonstrations are confined within legally recognised limits with due regard for the rights of others.

I agree with the court below that the rights set out in s 17 of the Constitution, namely, the right to assemble and demonstrate, are not implicated because persons engaging in those activities have the right to do so only if they are peaceful and unarmed. It is that kind of demonstration and assembly that is protected. Causing and participating in riots are the antithesis of constitutional values. Liability in terms of s 11 follows on the unlawful behaviour of those participating in a march. The court below rightly had regard to similar wording in the Constitution of the United States, where people are given the right to assemble peacefully. Such provisions in constitutions such as ours are deliberate. They preclude challenges to statutes that restrict unlawful behaviour in relation to gatherings and demonstrations that impinge on the rights of others.

It was submitted on behalf of the Union that damage to public property caused by a gathering that degenerated into a riot was a small price to pay to preserve and protect the precious right to public assembly and protest, which is integral to a democratic state. I agree with the court below that members of the public are entitled to protection against behaviour that militates against the rule of law and the rights of others.'

[64] The blocking of Residence Road and the creation of the exclusion zone interfered with traffic and the ordinary comings and goings of students, parents, staff and members of the public. It was not intended to be temporary. No doubt many people sympathised with the protest and were content to suffer any inconvenience that it caused. Others may have adopted the approach that discretion was the better part of valour. To some it was a source of greater inconvenience and others may have been actively hostile. This would have contributed to confrontations arising. There is little doubt that some threatening behaviour and limited acts of violence accompanied the enforcement of the exclusion zone.

[65] The approach of the protesters was that they were entitled in furtherance of their protest to erect the shack and maintain it for an indefinite period. In the case of the first appellant she was an active participant in attempts to erect a second shack elsewhere on the campus. The third appellant asserted that the erection of the shack and the protest surrounding it was not illegal and counsel maintained that position. In that they were wrong. Under the relevant by-laws[19] Residence Road is a public road[20] and the university property is therefore a public place.[21] In terms of by-law 2(1) it is a criminal offence for any person in a public place intentionally to block or interfere with the safe or free passage of a pedestrian or a motor vehicle. It is also a criminal offence to use abusive or threatening language in a public place (by-law 2(3)(a)) or to start or keep a fire (by-law 2(3)(l)). So in a number of respects the manner in which the Shackville protest was conducted was unlawful.

[66] The university sought to address the problems by requesting the protesters to move the shack to a nearby spot and to continue their protest in a manner that respected the right to protest but without the associated unlawful conduct and interference with the rights of others. The appellants and their co-protesters refused and this eventually compelled the university, after the occurrence of the events of 16 February to obtain the assistance of the SAPS and to remove the shack. That occurred after the third appellant had ben involved in burning rubbish bins to prevent

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[19] Cape Town Municipal By-laws Relating to Streets, Public Places and the Prevention of Noise Nuisances approved by the Council on 24 May 2007 and promulgated on 28 September 2007 (*PG* 6469; LA 44559)

[20] In terms of the definition of 'public road' in the by-laws a public road is defined as 'any road, street or thoroughfare … which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access'. There are a number of cases in which this or similarly worded definitions have been considered in relation to roads situated on private property in which it has been held that they are nonetheless public roads. See the cases collected in *R v Papenfus* 1970 (1) SA 371 (R).

[21] See the definition of 'public place' as including a public road.

vehicles from using the P3 parking area and the second appellant had defaced university property, by spray-painting the bust of Jan Smuts and painting slogans on the War Memorial with the support of the other protesters. It also occurred after the removal of paintings, portraits and photographs from Fuller Hall and other university buildings and their being burnt. That all of this constituted the criminal offence of malicious injury to property was not disputed.

[67] The issue of the content of the slogans, whether painted on the War Memorial and the bus stop or worn on a T-shirt, as well as statements, such as those made by the third appellant in the confrontation with a student, is a delicate one. Freedom of speech must be robust and the ability to express hurt, pain and anger is vital, if the voices of those who see themselves as oppressed or disempowered are to be heard. It was rightly said in *Mamabolo*[22] that:

'… freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by ss 15 - 19 of the Bill of Rights'.

But in guaranteeing freedom of speech the Constitution also places limits upon its exercise. Where it goes beyond a passionate expression of feelings and views and becomes the advocacy of hatred based on race or ethnicity and constituting incitement to cause harm, it oversteps those limits and loses its constitutional protection. In *Islamic Unity Convention*[23] Langa CJ explained the reason for this:

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[22] *S v Mamabolo (E TV and Others intervening)* [2011] ZACC 11; 2001 (3) SA 409 (CC) para 28; *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC) paras 99-100.

[23] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) para 32.

'Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.'

[68] A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity. The message on Mr Magida's T-shirt said unequivocally to anyone who was more than a metre or two away that they should kill all whites.[24] The reaction to that message by people who saw it, as communicated to Mr Ganger, was that this was an incitement to violence against white people. The fact that Mr Magida sought to explain away the slogan and suggest that it said something other than what it clearly appeared to say, is itself a clear indication that he recognised its racist and hostile nature. Whether it in fact bore a tiny letter 's' before the word 'KILL' is neither here nor there. The vast majority of people who saw it would not have ventured closer to ascertain whether, imperceptibly to normal eyesight, the message was something other than it appeared to be. They would have taken it at face value as a message being conveyed by the wearer that all white people should be killed. There was no context that would have served to ameliorate that message. It was advocacy of hatred based on race alone and it constituted incitement to harm whites. It was not speech protected by s 16(1) of the Constitution.

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[24] This could not possibly be construed as parody, unlike the slogan in issue in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* [2005] ZACC 7; 2006 (1) SA 144 (CC).

[69] Mr Mlandu's slogans on the War Memorial did not in my view fall outside the protection of s 16(1) of the Constitution. Whatever 'F*** WHITE PEOPLE' was intended to mean it is nothing more than a crudely worded slogan indicating that the writer dislikes or rejects white people. It may express hatred for white people, based on their race or ethnicity, but it does not operate as an inducement to cause them harm unless one reads into the words an unexpressed meaning. It is regrettably not uncommon for people to use strong language in which, as Van den Heever J once delicately expressed it, 'a word signifying the sexual act [is] substituted for a verb of motion'.[25] Without more, which may emerge either from the context in which the expression is used or its combination with other words or actions, the use of that word does not ordinarily involve a threat of physical harm.

[70] The evidence summarised above in respect of each of the appellants discloses that they were all engaged in the erection of the shack; they were all either involved in or parties to the destruction, damage or defacing of university property; they all participated in unlawful conduct and encouraged others to do the same. In the cases of Mr Maxwele and Mr Magida that involved actual violence and incitement to violence. These actions had the effect of interfering with the acknowledged rights of the university as set out in paragraph 30.

[71] The appellants invoked necessity as a defence to the university's contention that this conduct was unlawful and a breach of its rights. In the court below the judge held that this defence is confined to the criminal

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[25] *Marruchi v Harris* 1943 OPD 15 at 19.

law. That is incorrect. There are instances in relation to civil wrongs where necessity will rebut an inference of unlawfulness. Thus it would be a defence to a claim based on trespass that one was fleeing a forest fire and there was no other route to escape the flames. Extending the example, it would also be a defence to a contention that taking one's neighbour's water in order to fight the fire was unlawful. Here the appellants contend in argument that their conduct was necessary in the light of the university's failure to address their concerns and the lack of transformation of which they complained.

[72] The contention must fail at the first hurdle. Necessity was not raised as a defence in the affidavits and was therefore not one that the university was called upon to address. None of the appellants alleged that they had acted out of necessity or sought to explain their conduct in terms of necessity. The history of civil disobedience by outstanding historical figures such as Mahatma Ghandi, Martin Luther King, and Archbishop Desmond Tutu, to mention but a few, is an honourable one. At times it involved breaches of the law, such as Rosa Parks' dignified and steadfast refusal to sit on the bus in the seats reserved for Black people, or the thousands in this country who burnt the hated dompas in protest against the Pass Laws, that were imposed by an undemocratic government on an oppressed majority, and lacked any moral content. Civil disobedience by those inidividuals was a challenge to an unjust or oppressive political and legal system, which is not present in our constitutional dispensation.

[73] Consideration of a defence of necessity in the present circumstances would have to take into account that in our legal system government action or inaction that is unlawful is subject to judicial scrutiny. That avenue and the right to peaceful protest guaranteed by our

Constitution are open to the students. Their grievances against the university, if legitimate, could also be the subject of litigation. In the present case, the court is required to adjudicate on actions, such as those of the protesters, in the light of constitutional principles and the protection afforded by a Bill of Rights, where an order was sought interdicting such conduct on the grounds of its unlawfulness. We were not asked to consider a development of the common law in terms of s 39(2) of the Constitution and, as the issue of necessity was not properly raised on the papers, it would be inappropriate for us to do so *mero motu*.

[74] The attitude that all of the appellants adopted in their affidavits was that they had done nothing wrong. There was no expression of contrition or any undertaking not to engage in such conduct again. I stress that they were not being asked by the university not to engage in protest action. That the university was always willing to accept as legitimate. It was the manner in which the right to protest was exercised that gave rise to the university's application. Counsel for the appellants indicated that he was unable on behalf of his clients to give an undertaking that they would not engage in further conduct of the type complained of by the university and held in this judgment to be in breach of the university's rights.

[75] Given the vehemence with which the appellants expressed their complaints against the university and its management it was probable that they would have continued their protest and the actions related to it if able to do so. (The interim interdict excluded them from the campus, which precluded that.) In the absence of any undertaking from the appellants not to repeat the conduct described above, the university had a reasonable apprehension that unless an interdict was granted the students

would continue with conduct of the same type in breach of its rights. Accordingly the first two requisites for a final interdict were established.

[76] That left only the question whether the university had available to it an alternative remedy that would afford it the same protection as an interdict. Various possibilities were mooted in that regard. In the heads of argument it was suggested that it should implement internal disciplinary action over the appellants. Alternatively it was said that the university should press criminal charges against the appellants. Thirdly, it was suggested that it should pursue a mediation process.

[77] All of these suggestions were advanced in heads of argument without any substantiation in the affidavits of the appellants. Save for the fourth appellant's affidavit, which was extremely terse and dealt mainly with the slogan on his T-shirt, they all said (in identical terms) that it was the second requirement for an interdict, namely a reasonable apprehension of harm, that was absent. Their case was not that any of these alternatives was an adequate alternative remedy to an interdict. Their case was that:

'Insofar as the second requirement is concerned, it is not correct that there is a continuing injury or that it is reasonable to apprehend that the injury will be repeated. I am advised that an applicant is not entitled to an interdict restraining an act already committed.'

[78] In any event the suggested alternatives were not a proper or effective alternative to the grant of an interdict. Disciplinary proceedings would not have prevented the appellants from continuing their actions and those who were not registered students and not subject to the university's disciplinary procedures. Criminal charges would have been

protracted and not have affected matters while pending. Mediation, useful and desirable though it frequently is in resolving disputes, would not, in the absence of any undertakings from the appellants, have served the purposes of an interdict. Furthermore, the students had rejected out of hand overtures from the university to seek a negotiated solution to the issues and adopted an intractable attitude that their demands should be met. Mediation has little prospect of succeeding in that environment. It was not an effective alternative remedy.

The order

[79] It follows that the university was entitled to a final interdict. However, in my view it was not entitled to an order in the broad terms that it sought and was granted by the high court. The core problem with that order, as I see it, was that it effectively excluded the appellants from the university campus, which is, as I have pointed out, traversed by public roads and constitutes a public place, unless they had written consent from the Vice-Chancellor or his delegate to be there.

[80] That order plainly infringed their right of freedom of movement guaranteed in s 21(1) of the Constitution. It also restricted their right to exercise their right of freedom of association with others who shared their view of the problems facing the university in particular, but more generally all universities in South Africa as well as broader social issues. And it constituted a substantial intervention in their social lives. If permission were given for one of them to attend a lecture, they would not be able to join their fellow students for coffee afterwards without obtaining express permission. They could not decide on the spur of the moment to attend an interesting talk or event on campus. Without permission they could not attend a sporting function or meet a friend or

collect someone from a residence before going out on a social occasion. The fifth appellant, who had made complaints about sexual abuse she had suffered on campus, unconnected with the protests, would be unable to ascertain directly whether anything was being done in regard to her complaints.

[81] It is unnecessary to multiply examples. When these problems were put to counsel for the university he readily accepted that the order made would need to be crafted more narrowly. In the light of this the court afforded the parties an opportunity to see whether they could bridge the gap between them by agreeing upon a more limited order. We were thereafter informed that while the parties were able to agree the terms of a more limited interdict, the appellants would only do so on the basis that it had attached to it a number of other conditions. These were then placed before us for the purpose, as it was said, of being considered in the formulation of a just and equitable order. They included the abandonment of all disciplinary proceedings against the appellants and the establishment of an independent commission on student protests, with certain ancillary provisions.

[82] For the reasons already given in paragraphs 35 to 39 above it is not open to us to attach to the legal remedy of an interdict conditions of the type suggested on behalf of the appellants. It is not for a court to instruct the university whether to pursue or abandon disciplinary proceedings in terms of its student code of conduct. Nor can a court instruct the university to establish a commission of enquiry, much less dictate the remit and mode of functioning of such a commission. The court's function is essentially adjudicative. While there are times when it must engage in a measure of judicial creativity in formulating a remedy in a

particular case it does not have carte blanche to do whatever it wishes or deems appropriate. There are two principal reasons for this. The first is that the nature of judicial proceedings, presented as they are as a dispute between the litigants, is ill-suited to understanding the full implications and underlying nuances that would affect the terms of such broad and general orders. The second is that the court's role under our Constitution is not to provide the solution to every social problem, but to make orders arising from an adjudication on the merits of the particular dispute with which it is confronted on the basis of the evidence led and the submissions of the parties. The courts are also bound by the principle of legality.

[83] Reverting then to the order made by the court below, in my view the evidence establishes a right to an interdict in the terms set out in paragraphs 1.3.2 to 1.3.5 of that order. Such an order would focus upon preventing the appellants, on pain of facing contempt of court charges, from repeating the conduct that justified the grant of an interdict in the first place. In those circumstances the university would have succeeded in vindicating its rights and obtained the protection it sought from the court, while the appellants would have succeeded in having certain of the restrictions imposed upon them removed. Fairness suggests that in that situation all parties should pay their own costs in this court.

[84] In the result the following order is made:

(a) The order of the court below is altered to read as follows:

'1 The ninth, eleventh, twelfth, thirteenth and fourteenth respondents are interdicted and restrained from –

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

1.2 destroying, damaging or defacing any of the applicant's premises;

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

1.4 inciting violence.

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

(b) Save to that extent the appeal is dismissed with all parties to pay their own costs.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	T Masuku (with him T Sidaki)
Instructed by:	Godla and Partners Inc, Cape Town;
	Matsepes Inc, Bloemfontein
For respondent:	A Katz SC (with him M Maddison)
Instructed by:	Fairbridges Wertheim Becker, Cape Town;
	McIntyre & Van der Post, Bloemfontein.