

SOUTH AFRICA / JUDGMENT

## Students Representative Council of Rhodes University and Others v Rhodes University (1937/2016) [2017] ZAECHGC 117 (24 March 2017) [2017] ZAECHGC 117

COURT

Eastern Cape High Court, Grahamstown

BEFORE

MJ Lowe

CASE / FILE NUMBER

1937/2016

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### JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. 1937/2016

DATE 24 MARCH 2017

IN THE MATTER OF

STUDENTS REPRESENTATIVE

COUNCIL OF RHODES UNIVERSITY 1st APPLICANT

STUDENTS OF RHODES

UNIVERSITY ENGAGING IN

UNLAWFUL ACTIVITIES ON

RESPONDENT'S CAMPUS 2nd APPLICANT

THOSE PERSONS ENGAGED IN

OR ASSOCIATED THEMSELVES

WITH UNLAWFUL ACTIVITIES ON

RESPONDENT'S CAMPUS 3rd APPLICANT

SIAN FERGUSON 4th APPLICANT

YOLANDA DYANTYI 5th APPLICANT  
SIMAMKELE HELENI 6th APPLICANT  
CONCERNED STAFF AT  
RODES UNIVERSITY INTERVENING APPLICANTS  
AND  
RHODES UNIVERSITY RESPONDENT  
APPLICATION LEAVE TO APPEAL

LOWE .J:

In this matter, the Applicants seek leave to appeal to the Supreme Court of Appeal against my Judgment and the Order that I granted during December, 2016. The three Applicants in the matter are the Respondents whom I visited certain interdicts upon in a limited way, somewhat more limited than the Respondent in this Application for Leave to Appeal advanced its case.

In summary at the end of my Judgment having dealt with the three Applicants at paragraphs 154 to 157, I found as follows:

"The 4th, 5th and 6th Respondents are interdicted and restrained:

1. from kidnapping, assaulting and threatening, intimidating and inciting violence in respect of any member of the Rhodes University community of the Applicant's campus and from entering any University residence for this purpose;
2. from destroying or damaging any of the Applicant's property."

In addition this in respect of the 4th and 5th Respondents, they were interdicted and restrained from disrupting lectures and tutorials at the Applicant's University and from inciting such disruption.

In respect of the 6th Respondent, in addition to her having been interdicted from the kidnapping and destroying or damaging the Applicant's property part of the Order was interdicted from interfering with access to or egress from and free movement on or off the Applicant's campus at the Rhodes University.

The remaining aspects of the Interdicts which were sought and which were many were discharged. For that reason amongst others I ordered that the parties in the matter would each pay their own costs. Undeterred by my extremely lengthy and detailed Judgment, the Applicants, as is their entitlement, approached this Court seeking leave to appeal to the Supreme Court of Appeal arguing in principle that in deciding what relief was to be granted and its extent, I had looked insufficiently carefully at amongst other things the facts and the authorities and that the Judgment in *Harts and Others versus the University of Cape Town*, 2016, 4, SA 723 was not sufficient guidance for my findings and gave no guidance at all on some of the aspects upon

which I decided the matter, and that in any event, as I will refer to later, the issues, particularly those which were argued to be Constitutional issues, required further delineation and guidance from the Courts.

In this matter the issue is not apparently simply a criticism of the breadth of the Order which I granted, but also, and apart from that argument, the very factual and legal basis for my having done so. In the Heads filed the following was submitted in summary. As to association that on the allegations made the three Applicants were not said nor could they be said to have been said to have associated themselves with the unlawful conduct complained of. In respect of the terms of the Interdict, that the Interdict interdicted them from acts with which they were not alleged and were not associated. And in respect of Sections 16 and 17 of the Constitution, the finding that the 1st and 3rd Respondents' expression, as it was put, was unlawful and warranted an Interdict may well be altered on appeal in the context of those two sections of the Constitution. That in addition there were in any event compelling reasons to grant leave, that being the need for guidance by the Courts on how to resolve the tension between the Constitutionally protected rights which were entrenched in Sections 16 and 17 of the Constitution could otherwise, that clear authority from the Supreme Court of Appeal was needed to delineate the lawful bounds of constitutionally accepted protests. Generally it was said that the Interdict could not be sustained on what was referred to as "the common cause facts" and lastly, that if I were against the Applicants, there should be no adverse Costs Order on the Biowatch principle.

In a carefully balanced address, Ms. de Vos expanded on this in argument and replied vigorously to Mr. Smuts' answer. Meeting these points in argument, Mr. Smuts pointed out that if there was compelling need for guidance by the Supreme Court of Appeal in order to balance the tension between Constitutional rights to protest and their lawful bounds, the Court was not there to grant same in the absence of having before it an appropriate matter upon which such balancing and guidance was justified by the facts and required to be dealt with in ratio therefore. He argued that this was an extraordinary Application, as he put it, inasmuch as he argued that the Applicants had been shown to have been deliberately mendacious and that there was no factual or legal basis upon which any argument could be laid or had been laid justifying the granting of the leave to appeal. He argued that on the facts, correctly determined in my Judgment, there was sufficient association established in respect of all the relief limited as it was that I had granted. He pointed out that I had at length determined the relevant facts on the appropriate test which were by no means common cause, quite the contrary. Those facts supported my Order, he said, and had not been shown to have been wrong or wrongly decided. He said in respect of costs in the matter and having regard to the background to the matter and the persistence now in an Application for Leave to Appeal in the face of my Judgment, costs should most certainly not be paid on the basis that I had ruled in the original Order, although Ms. de Vos did point out in her argument that if I were not to do so, this may have a chilling effect, as she put it, on students or others that were interdicted often in unopposed matters in circumstances in [recording fades] which they may well not be able to afford but be entitled to legal representation entitled in the context of the m being afforded this assistance by the State in the event of not being able to afford same for themselves.

In my closely typed 50 page, 160 paragraph Judgment, and I accept immediately there is no merit in length of its own, I nevertheless

dealt extensively with all the arguments that had been placed before me and in my view effectively with the arguments that have been advanced to day, although those arguments might be said to be somewhat more focused than they were for obvious reasons at the time of the Application. That is the nature of these things. In my Judgment I took considerable time and effort to carefully analyse the papers which were extremely lengthy and to determine the facts relevant on the appropriate tests. The crux of my finding in respect of the Respondents in this matter came at paragraphs 112 to 115. Having regard to the argument, I'm going to quote from that Judgment:

"Having carefully analysed the facts are concluded as follows. My [inaudible] is clear that in respect of the 4th Respondent she certainly posted on Facebook the [inaudible] Facebook message concerning the peaceful disruption of a lecture. There is no evidence that the particular lecture was in fact disrupted, but the context of her Facebook messages in my opinion was perfectly clear, and that was to call for the lecture to be disrupted (albeit it peacefully) and according in a manner that interfered with its continuing. That this interfered with the students and the lecturer's entitlement to education that they had earned and paid for and deserved is clear. There is also in my view no doubt that she played a substantial role at least in the first spontaneous gathering and associated herself directly at the gathering with the gatherings of unlawful kidnapping activities. Her proven involvement is no more than that, and I will later return to whether or not this is sufficient or in fact unlawful such as to justify the relief sought or some lesser relief, if any at all.

In respect of the 5th Respondent it seems to be the position is more aggravated. There can be no doubt that the two men referred to were indeed kidnapped and forced from their residence and held against their will in a volatile crowd situation for a considerable time in fear of what may happen to them. That this occurred is perfectly clear from the video of them sitting on the ground amongst the crowd and from the Affidavits of the University which fall clearly to be accepted on this aspect. I'm also completely satisfied on a proper approach of the papers that the 5th Respondent was involved in this as a participant if not a leader and associated herself closely with the kidnapping concerned. In respect of the disruption of academic process, this is admitted although sanitised in an attempt to avoid its consequence, she interrupting the lecture to engage the participants concerning rape culture. Again I will later consider such relief as is justified in this context.

In respect of the 6th Respondent again on a proper approach to the papers she was part of a volatile and threatening crowd that forced their way into a residence at the University uttering highly unfortunate words referring to Mr. Benyon which were frightening and certainly not said "in jest". This cannot be categorised as an idle threat as suggested by Mr. Wilson and exceeded the latitude given to political speech and protest settings. This was legitimately perceived as a real and credible threat in the context in which it was said. I accept that for the remainder the 5th Respondent was not shown to have been involved in any unlawful conduct save the blockading of

Prince Alfred Street. Again I will return in due course to such relief as this may justify."

And I did so, having considered the evidence again at the paragraphs I had previously referred to which resulted in the Order which I made having considered the approach that was adopted in the Harts matter. In this regard I do not consider that there is merit in the argument advanced that that Association which I considered in respect of each of them was unduly attributed to them, or that the limited nature of the Order which I granted, although said to be too broad, does not have as its foundation the facts that I found applicable to those involved. [recording fades] I have carefully [inaudible] after having heard Ms. de Vos' argument reconsidered my approach and re-read my Judgment and I have taken note of all the allegations and submissions made in the Heads of Argument. It is necessary, however, to once again say that leave to appeal must not be granted unless there are truly reasonable prospects of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given when the Judge concerned is of the opinion that the appeal would have a reasonable prospect of success. Or there's some other compelling reason why it should be heard. An Application for Leave to Appeal must convince the Court on proper grounds that there is a reasonable prospect of a realistic chance of success on appeal. The mere possibility of success and arguable case, for one, that is not hopeless, is insufficient for leave to be granted. There must be a sound rational basis to conclude that there is a reasonable prospect of success on appeal and I refer to *S versus Smith*, 2012, 1, SA C R 5 67 SCA at paragraph 7.

In this matter, having considered the categories of arguments relied upon by Ms. De Vos, I am thoroughly unpersuaded that there is any prospect of appeal success in this matter at all, let alone even arguments that might persuade another Court that I was wrong, or that this is a matter which requires an elucidation of the balancing act to be achieved between Sections 16 and 17 of the Constitution on the one hand, and the line to be drawn where this crosses into unlawfulness on the other. In my view the factual basis in this matter is not laid for the proper elucidation of such an argument, although it must be said that there will no doubt in the future be the need for our Courts and the higher Courts to pronounce upon the subject.

That is not reason in this particular matter on these facts and circumstances to grant leave when I have little doubt that a Court of Appeal would say on the facts this need not be traversed in any detail.

In respect of costs, as I intend to dismiss the appeal, the Application for Leave to Appeal, I am unpersuaded that the Applicants should on the relevant facts of the matter at this stage, and having regard to their Application for Leave to Appeal, be benefited by the *Biowatch* principle having regard to the findings that I made in my Judgment, and the Application must be dealt with cost wise then on the usual basis.

In the circumstances, the Application for Leave to Appeal is dismissed. The Applicants are jointly and severally, the one paying the other to be absolved, to pay the Respondent's costs thereon.

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MJ LOWE

JUDGE OF THE HIGH COURT

CASE NO. 1937/2016

BEFORE THE HONOURABLE MR. JUSTICE LOWE

FOR APPLICANTS MS. DE VOS

FOR RESPONDENT MR. SMUTS

INTERPRETER NOT REQUIRED

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