EX PARTE: COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION

IN RE: RESTRAINT OF PROTEST ON OR NEAR UNIVERSITY CAMPUSES

OPINION

A INTRODUCTION

1 The Consultant is the Council for the Advancement of the South African Constitution ("CASAC"). CASAC seeks an opinion from counsel on the legality of court orders authorising the prior restraint of student protest on or near University campuses.

2 In particular, CASAC seeks advice on –

2.1 Whether, and to what extent, student protest can be restrained by interdict.

2.2 Whether, and to what extent, a University can obtain interdicts against unidentified persons or classes of person engaging in student protest.

2.3 Whether the Universities' property rights over their own campuses, and the nature of the legal relationship between registered students and University administrations, make any difference to Universities' rights to obtain interdicts in restraint of student protest.

2.4 The implications of anti-protest orders for academic freedom and institutional autonomy.

3 At the request of the Consultant, an earlier version of this opinion has been revised in light of recent judgments dealing with the right to protest.[1]

4 The legality of the prior restraint of student protest depends primarily on the scope of the protection afforded to the right to protest in the Constitution, 1996.

5 The Constitution protects a range of rights that are engaged in protest action. Most obviously, there is the right to assemble, demonstrate, picket and present petitions, so long as the protestors are peaceful and unarmed. However, student protest, and Universities' responses to it, also implicate a range of other constitutional protections, including: the right to freedom of expression, the right to freedom of association, the right to bodily integrity and the rights of arrested and detained persons.

6 Universities are under a constitutional obligation to tolerate demonstration, picket and assembly. How these rights are understood has important implications for the legality of orders granted in restraint of protest. The central question is whether permissible forms of "demonstration, picket and assembly" are limited merely to the passive advertisement of a grievance (through poster campaigns, silent protests, cosmetic assemblies etc), or whether they extend to and protect student protest that interferes with and disrupts the ordinary functioning of a University's administration (such as the interruption of classes, the blocking of University entrances, and the interference with access to University buildings). If the Constitution protects some level of disruption, a subsidiary question arises: at what point does lawful disruption become unlawful obstruction?

[1] See *Hotz and Others v University of Cape Town* (730/2016) [2016] ZASCA 159 (20 October 2016) *Rhodes University v Student Representative Council of Rhodes University and Others* (1937/2016) [2016] ZAECGHC 141 (1 December 2016); *Tlale and Others v University of Witwatersrand, Johannesburg and Another* (38337/2016) [2016] ZAGPJHC 323 (3 November 2016); and *Patricia Tsoaeli and Others v State* Unreported judgment (17 November 2016) Case No: A222/2015.

7 It is fair to characterise recent student protest as steeped in a rhetoric of disruption. Less pronounced, but still discernible, is a rhetoric of intentional damage to University property, and, sometimes, of violence against the person. University administrations have tended to criticise this rhetoric as intimidation, implicitly removing it from the realm of protected expression. The right to freedom of expression does not extend to hate speech, propaganda for war, or incitement to imminent violence. The right to freedom of expression is also, arguably, limited by statutory criminalisation of intimidation and common law protections against injurious falsehoods and injury to dignity. It remains an open question, however, to what extent, if at all, a University is entitled to prior restraints against the exercise of the right to freedom of expression in the context of political action.

8 University responses to student protest are often characterised by urgent legal proceedings for wide-ranging relief against poorly identified parties. Students seen to be “ring-leaders” or who are, in fact, reasonably suspected of having conducted themselves unlawfully, are identified and cited individually, but applications for relief against individual students often also include prayers for relief against large, ill-defined classes of protestor. The fear is that these interdicts are then used as crowd-management mechanisms, or as bases for enlisting police support in an effort to repress gatherings on University property. In addition, the statutory offence of trespass has often been used as a basis to threaten to arrest students gathering on University campuses.

9 Relief of this nature clearly implicates the right to freedom of association. Merely being present at a protest exposes a student to liability as part of a catch-all group cited in an interdict. This is arguably an infringement of the right to freedom of association, insofar as an interdict against a class of students is used to coerce students not to associate themselves with individuals or groups known to organise protest, or to punish them when they do.

10 Interdicts in restraint of protest have almost always been used as bases for permitting police and private security companies to enter University campuses to enforce them. Enforcement action ranges from mere presence at particularly sensitive points throughout a campus, to deployment of coercive crowd management techniques, such as rubber bullets, teargas, arrest and detention. Some interdicts have explicitly authorised the police to give effect to an order. Others have not.

11 The question arising in this context is: on what basis can coercive crowd management techniques, and arrest and detention, be deployed as a way of enforcing the civil remedy of an interdict in restraint of protest.

12 This opinion explores each of the questions set out above. It concludes that –

12.1 The right to assemble, picket, demonstrate and petition extends not just to passive advertisement of a grievance, but to some level of non-violent disruption and interference with University functions. The level of disruption and interference permissible is a contextual judgment to be made on the facts of each case.

12.2 The prior restraint of the exercise of a constitutional right by court order is not generally permissible.

12.3 If they are permissible at all, prior restraints of protest should only be granted sparingly against defined conduct which is indisputably unlawful. Interdicts that restrain “disruption” or “interference” with University activities generally ought not to be granted.

12.4 An interdict must set out exactly what it is that a person to whom it applies must refrain from doing. If it does not, the interdict not only breaches the specific constitutional right it interferes with,

but general requirements for the validity of a court order that are derived from the constitutional entrenchment of the rule of law.

12.5 Interdicts that apply to classes of person may be permissible, so long as the class is definite or immediately ascertainable on its face for example: “All the students residing at Smith House”. It is possible to identify the students in residence at a particular place. Interdicts against classes of person which are not definite and immediately ascertainable cannot be granted, and should not be granted, for example: "All those persons on the University's campus that intend acting unlawfully". It is not possible to identify the members of this class in any meaningful way. Even interdicts against ascertainable classes of person ought to be granted cautiously and sparingly, because confusion about the membership of a class of persons that may be ascertainable at the point the interdict was granted may easily arise in the enforcement of the order. It is also unlikely that an applicant for an order against a group of people can realistically make out a cause of action against every member of that group, and claims to have done so should be carefully scrutinised.

12.6 Prior restraints against free expression ought never to be granted in the context of student protest. The law generally sets itself against prior restraints of speech and publication, except in the clearest cases of unlawfulness. It is possible to punish injurious speech after the fact, but many of the grounds on which this can be done are constitutionally suspect.

12.7 Police powers of arrest and crowd control should never be used to enforce interdicts on University campuses, unless specifically authorised by court order. The police, if allowed onto campus at all, retain a residual power to arrest those reasonably suspected

of having committed a crime, or of being in the process of doing so. However, the police have no general power to disrupt gatherings on University campuses, or arrest those who are arguably in breach of an interdict granted in restraint of protest.

12.8 The use of trespass laws as a basis to arrest student protestors is particularly ill-advised, if only on the basis that students have an at least implied right to be on a University campus by virtue of their registration. Unless that right is lawfully terminated, the law of trespass does not apply.

13 The remainder of this opinion is structured as follows –

13.1 First, the scope and content of the rights to freedom of assembly, demonstration, picket and petition are explored;

13.2 Second, the effect of anti-protest orders on academic freedom and institutional autonomy is discussed.

13.3 Third, the permissibility of court-sanctioned restraints on the exercise of constitutional rights is discussed;

13.4 Fourth, the permissibility of interdicts that apply against classes of person, rather than individuals, is considered; and

13.5 Fifth, the power of the police to enforce interdicts in restraint of student protest is delimited.

B THE RIGHTS TO ASSEMBLY, DEMONSTRATION PICKET AND PETITION

14 Section 17 of the Constitution states that –

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

15 The scope and content of this right has not been dealt with comprehensively by the South African courts. Where it has been considered, very little definition has been provided, as the courts have tended to focus on what section 17 does not protect, rather than on the interests, needs and purposes to which it does extend.

What Section 17 is not

16 In *Acting Superintendent-General of Education of KwaZulu-Natal v Ngubo and Others*,[2] a case decided under the Interim Constitution, Hurt J restricted himself to the situations in which the rights to assemble and demonstrate did not apply. In *Ngubo*, it was held that these rights extend "no further than is necessary to convey the demonstrator's message" and that they do not extend to "harassment or clear tortuous actions or criminal actions".[3]

17 The approach in *Ngubo* is unsatisfactory for at least two reasons. The first is that it proceeds to limit the right at issue before defining its scope and content.[4] The second is that it begs the question: when does an exercise of a constitutional right become "tortuous"? Tortuous conduct is merely conduct that is unlawful because it offends public policy. Given that the Constitution is the primary source of public policy, the exercise of a constitutional right is, at least presumptively, lawful, until some other legally protected interest places limitations on it. To suggest, as Hurt J

[2] 1996 (3) BCLR 369 (N) ("*Ngubo*").
[3] *Ngubo*, p 375F-J.
[4] See, in this regard, S Woolman "Freedom of Assembly" in S Woolman et al. Constitutional Law of South Africa, pp 43-17 to 43-18.

does, that the right to assemble and demonstrate should not be exercised "tortuously" obscures rather than clarifies the scope of the right.

18 A further, similar, problem is raised by the court's approach in *Fourways Mall v South African Commercial Catering*,[5] in which Claassen J held that protestors may not intimidate the general public or interfere with their access to a shopping mall. It was also assumed that common law property rights extended to the restraint of protest in privately-owned public places, such as shopping malls.[6]

19 This "negative" approach to delimiting the scope and content of the right was followed more recently by Allie J in *University of Cape Town v Davids,*[7] in which the court went little further in defining the right than observing that "the respondent's right to protest, demonstrate, assemble, picket and petition cannot serve as justification for destroying property, threatening to harm people and physically pushing a person who disagrees with their form of protest".[8]

20 In *Garvas* the Constitutional Court said that "an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour".[9] However, the approach of the courts has often been to presume, erroneously, that an individual's participation in a protest that results in damage to persons and property is not protected by section 17 of the Constitution, even if that individual is peaceful and unarmed.

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[5] 1993 (3) SA 752 (W) ("*Fourways Mall*").
[6] *Fourways Mall*, p 759A-G.
[7] [2016] 3 All SA 333 (WCC) ("*Davids*").
[8] *Davids*, para 59.
[9] *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC) ("*Garvas*"), para 53, quoting the European Court of Human Rights with approval.

21 It has, however, recently been affirmed that protest need not be silent or unobtrusive to be constitutionally protected. Even disruptive conduct can fall within the protection of section 17 of the Constitution. In *Rhodes v SRC* the High Court held that "crowd action albeit loud, noisy and disruptive is a direct expression of popular opinion" and that "this is what is protected in S 17 of the Constitution".[10]

What Section 17 is

22 It is trite that constitutional rights must be construed generously and purposively, in light of their historical and social context.[11] In the context of section 17 of the Constitution, the Chief Justice has remarked that ours is a "never again" Constitution: meant to redress the injustices of the past, and to eliminate the conditions under which they may be repeated.[12]

23 South Africa has a long history of the suppression of protest. Section 17 of the Constitution must accordingly be broadly construed in the interests of redressing the legacy created by that suppression.[13]

24 Section 17 protects four specified forms of conduct, subject to a general condition that those forms of conduct are performed "peacefully and unarmed".

25 We start with the provisos, and then deal with the forms of conduct.

Peacefully and unarmed

26 "Peaceful" means "without violence". "Peaceful" assembly has generally been understood to mean free of acts of physical violence against persons

[10] *Rhodes v SRC*, para 89.
[11] *S v Zuma & Others* 1995 (2) SA 642 (CC).
[12] *Garvas*, para 63.
[13] *Garvas*, paras 61 – 66.

or property.[14] However, as the Constitutional Court held in *Garvas*, a protest is not taken beyond the scope of section 17 simply because there are some incidents of violence. An individual participant in a protest which sees some violence to persons or property retains his protection so long as he remains peaceful in conduct and intent.[15]

27 Prior restraint of protest is generally only permissible where it can be shown that there is an intention to protest violently. The mere assertion that the protest may destroy property or disturb the peace is not sufficient.[16]

28 Participants in a gathering must not be armed. Even the use of defensive equipment, such as shields, has been considered to take an individual beyond the scope of assembly rights.[17]

29 However, it remains an open question whether culturally symbolic artefacts carried purely for display or with other non-violent intent, such as ceremonial weapons, or knobkerries, may be carried in a protest.

30 Section 3 of the Dangerous Weapons Act 15 of 2013 prohibits the possession of any dangerous weapon "under circumstances which may raise a reasonable suspicion that the person intends to use the dangerous weapon for an unlawful purpose". Section 1 of the Act defines "dangerous weapon" as "any object, other than a firearm, capable of causing death or serious bodily harm, if it were used for an unlawful purpose". This begs the question of whether carrying objects that could cause injury or death in the course of a protest is itself an unlawful purpose. Section 2 of the Dangerous Weapons Act excludes from its application the "possession of dangerous weapons" when participating "in any religious or cultural

[14] *Constitutional Law of South Africa*, p 43-19.
[15] *Garvas*, para 63.
[16] *Stankov and the United Macedonian Organization Ilinden v Bulgaria* [2001] ECHR 563, paras 77 to 112.
[17] *Constitutional Law of South Africa*, p 43- 20.

activities, or lawful sport, recreation, or entertainment" or when "in pursuit of any lawful employment, duty or activity".

31 It is at least arguable that carrying what would otherwise be a dangerous weapon in the course of a protest with no violent intent is a "lawful" purpose, or that it falls under the exclusions set out in section 2 of the Act.

The right to assemble and demonstrate

32 "Assembly" means gathering together in one place for a common purpose. "Demonstration" means the performative aspect of that purpose. So, for example, protestors may assemble for the purpose of demonstrating against a fee increase. The demonstration itself may take the form crowd action that is "loud, noisy, disruptive and sometimes dangerous". It ought to be viewed as "a direct expression of popular sovereignty".[18] For example, it may take the form of anything from burning a member of the University management in effigy, to singing a struggle song, germane to the purpose of protesting fee increases, which may be likened to a form of oppression.

33 The Regulation of Gatherings Act 205 of 1993 ("the Gatherings Act") defines a "gathering" as any assembly, concourse or procession of more than 15 persons on a public road. To the extent student protests take place on public roads, the Gatherings Act requires notice to be given of the protest.[19] Failure to give notice is a criminal offence,[20] except where the gathering was spontaneous.[21] "Demonstrations", which are assemblies of 15 people or less,[22] do not attract these strictures.

[18] *Constitutional Law of South Africa*, p 43-4.
[19] Section 3 (1) of the Gatherings Act.
[20] Section 12 (1) (a) of the Gatherings Act.
[21] Section 12 (2) of the Gatherings Act.
[22] Section 1 of the Gatherings Act.

34 There is no notice requirement when the gathering is spontaneous. In *Patricia Tsoaeli and Others v State*[23] the Full Bench of the Free State High Court held that the spontaneous nature of a gathering is a complete defence to a failure to give notice prior to a protest in two ways. First, section 12(2) of the Gatherings Act "obviously recognises that some protest gatherings happen spontaneously". Second, inherent in a spontaneous gathering is the absence of intention to contravene the notice requirement in the Gatherings Act. This excludes *mens rea*, which is an element of the offence.

35 However, most, if not all, student protests do not take place on public roads. They tend to take place on University campuses and are not subject to the Gatherings Act at all. While some Universities have adopted policies to regulate protest on their campuses,[24] the right to assemble is, in principle, unregulated where no such policy has been adopted.

36 It may be suggested that Universities are private proprietary spaces in which University administrators exercise the private law rights of a property owner.[25] In principle, this includes the right to prohibit assemblies. The problem with this approach is that students have a prior contractual right to be present on a campus for the purposes of teaching and learning, extra-mural activities and, in many cases, residence. In our opinion, it is an implied term of that contract that University students may exercise their constitutional rights while present on campus. This includes the right to protest within the ambit of section 17 of the Constitution.

37 Except where the student has bound herself to contractual limitations on her right to assemble and demonstrate (by, for example, agreeing to abide by a University policy on assembly and demonstration), or has been lawfully excluded from the University in terms of a disciplinary code, or

[23] Unreported judgment (17 November 2016) Case No: A222/2015.
[24] University of Johannesburg, Policy on Demonstrations and Gatherings.
[25] See *Davids*, paras 32 to 35.

other provision regulating his relationship with the University, there is no legal basis for stopping her from assembling and demonstrating on campus. The mere fact of the University's proprietary rights does not change this position.

38 The point of departure, therefore, is that student assemblies are generally permitted anywhere on campus, so long as they are "peaceful and unarmed". Violence against persons or property committed by some students does not, in itself, justify the limitation or the right of assembly of students who remain peaceful and unarmed.

39 Restrictions on this right may, however, be derived from express or implied provisions of University policies, to which students will be bound by virtue of their contractual relationship with the University. So, for example, codes of good conduct might be read as restraining assemblies that interfere with lectures or administrative functions. In each case, it will be necessary to read the specific University policy together with the right to freedom of assembly to determine where the contract and the right clash, and whether the contractual limitation on the right to assemble accords with constitutionally-informed public policy. [26]

40 In cases of assault or damage to property, no constitutional tension arises, because section 17 does not protect violent conduct during protests. However, non-violent forms of disruption caused by assembly at or near a University entrance, a lecture or an administrative building may have to be tolerated, depending on the legal context created by University policy, and the nature and extent of the disruption. It is unlikely, for example, that, in the absence of a specific prohibition in a University disciplinary code, a group of students chanting or signing outside a lecture theatre in such a way as to interrupt the lecture would constitute an unlawful exercise of the right to assemble and demonstrate.

[26] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

The right to picket

41 The practice of picketing is usually associated with labour disputes. A picket involves a person or group of people standing outside a workplace trying to persuade others not to go inside. Beyond the labour context, the right to picket clearly extends to any gathering outside a building with the intent of persuading others not to enter, in solidarity with a specific purpose or grievance.

42 The Constitution accordingly protects, to some extent, students who attempt to persuade other students not to enter a University campus, building, or lecture hall. The picket must be "peaceful and unarmed". Section 17 of the Constitution does not protect violence, or the threat of it, where used to discourage a person from entering a specific place. Physically restraining a person from entering a venue would obviously be unlawful.

43 Non-violent threats are more difficult. For example, labelling of those who cross picket-lines as "scabs", implies a threat to a person's reputation, but is not obviously unlawful. Indeed, the whole point of a picket is the exercise of some level of social shaming or non-physical coercion which does not involve a threat to a person's well-being or property. The question is where lawful persuasion becomes unlawful obstruction.

44 In the context of labour relations, the National Economic Development and Labour Council has adopted a Code of Good Practice on Picketing.[27] Unfortunately, it is not of much assistance in the context of pickets of University campuses, and is, in any event, non-binding.

45 However, section 6 of the Code permits picketers to "carry placards", "chant slogans" and "sing and dance". It prohibits picketers from "physically preventing members of the public, including customers, other

[27] Code of Good Practice on Picketing GN 765 GG 18887 (15 May 1998).

employees and service providers, from gaining access to or leaving the employer's premises".

46 The line drawn in the Code is, therefore, at physical coercion. Non-violent threats appear to be permitted. For example, threatening to ostracise someone who crosses a picket line would be lawful.

The right to present petitions

47 Petitioning is inherently non-violent. Generally speaking, University administrations should acknowledge receipt of petitions and offer a response.[28]

Conclusion: Section 17 of the Constitution

48 The dictum in *Ngubo* that the right to assemble and demonstrate extends "no further than is necessary to convey the demonstrator's message" cannot be sustained. The Constitution protects a range of conduct which extends substantially beyond the mere passive advertisement of grievance. Violence, destruction of property and threats or physical harm against persons or property are not constitutionally protected forms of protest. However, protestors may conduct themselves in a range of other ways necessary to draw attention to their grievances. These include picketing buildings, chanting slogans, marches and so on. Some level of peaceful disruption to everyday life is inherent in the idea of protest rights.

49 Student protestors may not physically obstruct or threaten those to whom they are demonstrating their grievances, but they need not go out of their way to make life easy for University administrators. Where peaceful disruption crosses into unlawful obstruction has to be defined on a case-

[28] *Constitutional Law of South Africa*, pp 43-25 and 43-26.

by-case basis, having regard to the context in which a particular protest takes place.

50 We were asked to comment specifically on whether protesters blocking access to university entrances or lecture rooms, entering exam venues and tearing up exam papers and instructing staff members to leave their offices or stop lecturing could constitute lawful forms of protest.

51 All of these forms of protest are disruptive. But that does not mean that they are unlawful. The question is whether they fall outside the constitutional injunction that protestors must be "peaceful and unarmed" and whether these forms of conduct are otherwise lawful.

52 Generally speaking we would suggest that any peaceful, unarmed and temporary expression of a *bona fide* grievance that is not specifically prohibited by law would constitute lawful protest.

53 In *Hotz*, the Supreme Court of Appeal held that blocking a public road is unlawful.[29] It should be emphasised, however, that this decision was confined to an interpretation of local regulations and bylaws defining what constitutes a "public road". The temporary blocking of some private roads might, however constitute lawful protest, depending on the circumstances.

54 However, any action which has the effect of preventing teaching, learning or some other academic or associated activity from going ahead would not be lawful, unless the disruption was temporary, and its purpose was to draw attention to the grievance in question.

55 Accordingly, ripping up exam scripts, permanently stopping lectures and attempting to exclude academic or administrative staff from their offices would not be lawful.

[29] *Hotz*, para 64 and 65.

C ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY

56 Academic freedom is explicitly protected in the freedom of expression clause.[30] Even under apartheid, universities enjoyed some protection from state interference with the way they chose to manage protest.[31]

57 Case law in which the right is relied on is scarce with little content given to the right.[32] It was only recently in *Rhodes v SRC*[33] that the right was directly engaged in the context of an anti-protest order.

58 In *Rhodes v SRC* the University obtained a broadly defined interdict against certain named students and "those persons engaging in or associating themselves with unlawful activities on the applicant's campus".

59 The interdict was obtained in the context of protests concerning rape culture on campus. After the interdict was obtained a professor said to a group of students "Put up their hands and ask questions. Disrupt." in the context of discussions of rape culture. The University responded with a cease and desist letter. The University's letter said that the professor had breached the interdict; that she was a person "engaging" in "unlawful activities" and threatened her with contempt proceedings. The anti-protest order was being used not only against students but also to limit academic freedom of the staff of the University.

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[30] See also the Preamble of the Higher Education Act 107 of 1997 which includes respect for academic freedom" and section 11(1)(h) which provides one of the functions of the Council is to protect "the institutional autonomy of the University and the academic freedom of its employees, and deliberates on the nature and role of the University".

[31] Section 25 of the Universities Act 61 of 1995 empowered the Minister to impose conditions on the granting of university subsidies. Regulations published in 1987 pursuant to s 25 required universities to take steps directed towards the prevention and punishment of certain detailed student activities, aimed mainly at suppression of student political activity and what the responsible Minister had termed the suppression of 'the revolutionary onslaught'. The universities succeeded in having a number of these regulations set aside as being void for vagueness. See, for example, *University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives)* 1988 (3) SA 203 (C).

[32] See for example *Chetty v Adesian* ZAECHC 98 (2 November 2007)

[33] *Rhodes University v Student Representative Council of Rhodes University and Others* (1937/2016) [2016] ZAECGHC 141 (1 December 2016) ("*Rhodes v SRC*").

60 The University maintained that the anti-protest order could be used against staff if they were engaging in "unlawful" activity. The court dismissed this argument and discharged the interdict.

61 The Court does not indicate in which circumstances a university may lawfully limit academic freedom through an anti-protest order. The Court is however critical of the use of the anti-protest order against the professor. The Court calls the cease and desist letter "unwise" and characterises the accusation that her conduct amounted to a breach of the interdict as "extraordinary".[34]

62 In addition, the Court is acutely sensitive to the right to academic freedom. It holds that:

> "academia has in the history of our country, first pre- and then post-1994, a proud tradition of academic excellence and academic freedom, and have, at least amongst the enlightened, always jealously guarded the entitlement to express their academic views in the best traditions thereof. This academic, professional history is a constructive element in presenting issues relevant to decisions affecting University students and academia."[35]

63 The Rhodes v SRC judgment indicates a jealous guarding of academic freedom and an unwillingness to apply an anti-protest order against academic staff.

[34] *Rhodes v SRC*, para 29.
[35] *Rhodes v SRC*, para 32.

D ANTI-PROTEST ORDERS

64 We now turn to consider the permissibility of prior restraints on the exercise of the rights associated with protest.

65 Generally, where a University seeks to enjoin conduct which is unlawful on its own terms, no constitutional issues are raised. Section 17 of the Constitution does not extend to violent conduct, so an interdict in restraint of, for example, pelting a car with stones, setting fire to University property, or assaulting University administrators raises no issues of constitutional principle. This conduct is always unlawful, and there is no constitutional defence to an interdict in restraint of it.

66 The University would still have to meet all the requirements for an interdict, however. These are, in the case of an interim interdict: a *prima facie* right to restrain specific conduct by a specific person or group of people, real harm reasonably apprehended or suffered, the balance of convenience being in favour of the University (in other words, the University must show that it would suffer greater hardship if the interdict were refused than the person bound by the interdict would suffer if it were granted), and the absence of any other effective remedy.[36] In the case of a final interdict, the requirements are the same, except that the University has to show a clear, rather than a *prima facie* right, and the balance of convenience is irrelevant.[37]

67 The constitutional issues arise where the conduct sought to be restrained may amount to the exercise of a constitutional right. In these circumstances, courts should generally be reluctant to grant relief.

68 For example, courts are reluctant to grant interdicts in restraint of media publication, where it has not been demonstrated that the publication in

[36] *Setlogelo v Setlogelo* 1914 AD 221.
[37] *Webster v Mitchell* 1948 (1) SA 1186 (W).

question is unlawful. This issue tends to arise where a plaintiff in a defamation action applies for an order restraining a media defendant from making allegedly defamatory statements pending the outcome of a trial. On the one hand, the plaintiff has a right not to be defamed. On the other, the defendant has a constitutional right to freedom of expression, and there is a strong public interest in freedom of the media. Since it has yet to be proved that the defendant's expression amounts to defamation, an interim interdict runs the risk of breaching the defendant's constitutional rights if the action for defamation fails or is withdrawn. Cases such as these must be approached with caution, especially since a temporary interdict restraining publication is likely to be final in effect, as public interest in the material to be published will likely wane by the time trial proceedings conclude.[38]

69 Similar difficulties arise with interdicts in restraint of protest. Many University administrations tend to seek and obtain wide-ranging interdicts on an urgent basis. While, in part, these interdicts do restrain some unlawful conduct (usually assault, vandalism or intimidation), their scope is often cast deliberately broadly to include much less obviously unlawful conduct such as "interfering with access to a campus"[39] or "calling for the academic programme" to be disrupted.[40]

70 In the case of "interfering with access to a campus", the interdict clearly encompasses a wide range of conduct, some of which is unlawful (for example, pelting a car coming onto campus with stones, or physically obstructing a student who wanted to enter campus from doing so).

[38] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) para 44: "The case law recognises that an effective ban or restriction on a publication by a court order even before it has "seen the light of day" is something to be approached with circumspection and should be permitted in narrow circumstances only". See also *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A), p 402C-G.
[39] See the interim interdict granted in *Rhodes University v Student Representative Council of Rhodes University and Others*, Eastern Cape Division, Grahamstown (case no. 1937/2016).
[40] *Durban University of Technology v Zulu and Others* [2016] ZAKZPHC 58 (27 June 2016), para 2.

However, the interdict, on its face, also applies to picketing, which is presumptively lawful.

71 Merely "calling" for an academic programme to be disrupted is not unlawful, chiefly because it is an exercise in free expression, which does nothing, in itself, to disrupt anything. In addition, "disruption" of an academic programme may not, in itself, be unlawful, depending on the manner and context in which it is done. For example, picketing, peacefully and unarmed, a particular lecture may indeed disrupt the academic programme, if it succeeded in discouraging most or all of the class from attending the lecture. This is perfectly lawful, but is enjoined by the language of the interdict.

72 Whether, and to what extent, these vaguely drawn interdicts actually restrain unlawful conduct is a matter that is normally debated when the interdict comes to be finalised. In the interim, the lawful exercise of constitutional rights is obviously, and unjustifiably, impaired. By the time the application comes to be finalised, the moment at which protest can be effective will, in all likelihood, have passed. The restraint of the exercise of the right to protest will, in effect, have become permanent.

73 For these reasons, courts should be slow to grant wide-ranging interdicts that are reasonably capable of an interpretation that invades constitutional rights.[41]

74 Prior restraint against speech should never be granted, unless the interdict specifies the exact statements to be enjoined, and makes out a strong *prima facie* case that they are unlawful.

[41] See in the context of unlawful land occupation, and eviction, *MEC for Human Settlements & Public Works of the Province of Kwazulu-Natal v Ethekwini Municipality and others; Abahlali baseMjondolo and others v Ethekwini Municipality and another* 2015 (4) All SA 190 (KZD), para 24. See also *Zulu and Others v Ethekwini Municipality and Others* 2014 (4) SA 590 (CC).

75 In addition, orders which do not specify with precision the conduct they enjoin violate the rule of law. This is both because they are likely to be ineffective in bringing litigation to an end,[42] and because they leave the manner of their implementation to the subjective discretion of one of the parties, which creates clear scope for abuse in the form of self-help.[43]

76 Accordingly, orders that might restrain lawful acts of protest ought never to be granted, even on an unopposed basis. Courts should carefully scrutinise anti-protest orders in order to ensure that they are sufficiently tightly drawn to restrain only unlawful conduct.

E INTERDICTS AGAINST GROUPS OF STUDENTS

77 Court orders, including interdicts, only operate between the particular parties to whom they are addressed.[44] Courts may not grant orders against the public at large, enjoining them to obey the law.[45]

78 For this reason, court orders should not, generally, be granted against groups of people, unless the members of the group have been identified or are readily ascertainable, and a cause of action has been made out against every member of the group.[46]

79 Many anti-protest interdicts are granted against classes of person that cannot readily be identified, including "Other Students of the Durban

[42] *Eke v Parsons* 2016 (3) SA 37 (CC), paras 73 to 75.
[43] *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC), para 18: "Th[e] rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary."
[44] *Kayamandi Town Committee v Mkhwaso* 1991 (2) SA 630 (C), p 634F-635F.
[45] *City of Cape Town v Yawa and Others* [2004] 2 All SA 281 (C).
[46] *Ex parte Consolidated Fine Spinners & Weavers Ltd & Another in re Consolidated Fine Spinners & Weavers Ltd & Another v Govender and Others* (1987) 8 ILJ 97 (D).

University of Technology"[47] or "Those Persons Engaging In Or Associating Themselves With Unlawful Activities On The Applicant's Campus".[48]

80 The citation of these parties breaches both the principle that parties to a court order should be properly identified, and the principle that a cause of action must be made out against particular defendants and respondents. Because it is impossible, for example, to identify who is "identifying" themselves with "unlawful" activities – or what counts as "identification" and "unlawfulness" – a cause of action cannot be made out against a specific person or conduct.

81 The effect of granting relief against such poorly defined parties is to leave students uncertain about who the order applies to, and tends to leave the Universities to whom the interdict has been granted to decide for themselves to whom the interdict applies, and how it is enforced. For the reasons set out above, this is in breach of the rule of law.

82 Interdicts against vaguely defined groups have obvious consequences for the right to freedom of association,[49] if individuals and formations of students cannot associate with each other for fear of falling into the vaguely defined group. For example, a student that is part of a crowd in which another student assaults a security guard is arguably a "person associating with unlawful activities," but is obviously not to be held liable for the conduct of another member of the crowd whose conduct he did not enable or actively encourage.

83 *Rhodes v SRC* holds that interdicts against unascertainable groups of people are problematic as they:

[47] *Durban University of Technology v Zulu and Others* [2016] ZAKZPHC 58 (27 June 2016), para 2.
[48] *Rhodes University v Student Representative Council of Rhodes University and Others*, Eastern Cape Division, Grahamstown (case no. 1937/2016).
[49] Section 18 of the Constitution.

83.1 Allow granting of vague relief against unidentified respondents. The implementation of such vague relief "effectively amounts to self-help" which violates section 1(c) of the Constitution.[50]

83.2 Breach the principle that parties in legal proceedings must be clearly identified.[51]

83.3 Breach the "well-established principle in our law" that a litigant is not entitled to an order against which "no cause of action is being made calling upon that person to desist from some 'unlawful action'."[52]

83.4 Breach the principle that courts do not grant relief in circumstances that there is not reasonable certainty about what that order means; or to whom it applies.[53]

83.5 Create a reversal of onus at the stage of contempt proceedings which runs "counter to every notion of criminal justice and the onus of proof".[54] There is a line of case law[55] which points out that in subsequent criminal proceedings for contempt of court, the court would presume that the earlier order was correctly granted and any innocent non-participant would have to establish that the original court order ought not to have been granted against him/her. This flips the onus in criminal proceedings. It is plainly unconstitutional.

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[50] *Abahlali Basemjondolo and Others v Ethekwini Municipality and Another* 2015 (4) All SA 190 (KZN); *Rhodes v SRC*, 135.
[51] *Illegal Occupiers of Various Erven, Phillip v Monwood Investment Trust Company* [2002] 1 All SA 115 (C): *Rhodes v SRC*, para 130.
[52] *Rhodes v SRC*, para 117.
[53] *Eke v Parsons*, paras 73 – 75; *Rhodes v SRC*, para 134.
[54] *MONDI Paper v Paper Printing Workers Union and Others* (1997) 18 IL 84 (D) ("*Mondi Paper")*.
[55] See *Consolidated Fine Spinners*; *Mondi Paper* and *Rhodes v SRC*, para 124.

83.6 Have the generalised effect typical of legislation. Again there is now a line of case law[56] that holds an order against respondents not identified by name is a decree and not a court order at all.

83.7 Properly invoke a "sharp reaction of indignation" if the "commonality of being students" is the basis for collective responsibility.[57]

83.8 Allow Universities to police protests.[58]

83.9 Undermines the "Garvis [sic] exception". The Garvis exception is that a protest or demonstration which includes some who act unlawfully, does not "inevitably taint the involvement of others, also part of the protest", if they do not participate or directly involve themselves in that unlawful action. This makes it "obvious that a blanket order against all at the protest regardless of their intention and participation in unlawful conduct is unsupportable".[59]

84 The weight of jurisprudence is therefore against interdicts against vague, broadly defined groups of person who cannot be ascertained.

[56] *City of Cape Town v Yawa* [2004] 2 All SA 281 (C); *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C); *Rhodes v SRC*, para 127.
[57] *DUT v Zulu* referred to with approval in *Rhodes v SRC*, para 122.
[58] *Rhodes v SRC*, para 136.
[59] *Rhodes v SRC*, para 144.

F POLICE POWERS

Arrest Generally

85 Some interdicts have purported to grant powers to police officers to arrest students who breach their substantive provisions.[60]

86 Court orders that direct the police to arrest people who transgress the order are inappropriate for two reasons. The first is that ordering an arrest in advance interferes with the exercise of authority granted to the Police to decide on the facts before them whether or not to arrest a person. The second is that the Police's substantive powers of arrest must be sourced from statute and cannot be granted by court order. In other words, unless a police officer has a pre-existing power to arrest in terms of legislation, such a power cannot be created in a court order.

87 For these reasons, court orders should never purport to grant the Police powers of arrest to enforce interdicts on University campuses. The most the Police are entitled to do in managing student protest is to exercise the statutory powers of arrest they already have.

88 These powers are circumscribed by legislation and broadly empower the Police to arrest those reasonably suspected of having committed a crime, or of being in the process of doing so. However, the police have no general power to disrupt gatherings on University campuses, or arrest those who are arguably in breach of an interdict granted in restraint of protest.

89 The appropriate method to enforce a court order is not to authorise the Police to arrest someone in breach of it, but to institute contempt proceedings. Where the breach of the order is also a crime (in the sense that the breach is committed knowing what the court order says, wilfully and in bad faith, or the act constituting the breach itself amounts to a

[60] See, for example, *Cape Peninsula University of Technology v Central Student Representative Councils of CPUT*, case no. 201313/15, Western Cape High Court, 17 November 2015.

crime), the police have the discretion to arrest the person in breach of the order.

90 Where it appears that the person concerned might not answer the summons to appear at the relevant contempt proceedings, the Police have the discretion to arrest that person to secure their attendance. In those circumstances only, a court probably also has a common law power to order a person's arrest to answer a charge of contempt.

91 The Police, on the other hand, can only act in terms of empowering legislation. They have no "inherent power" to arrest. The rule of law demands that organs of state, the Police Service included, are not empowered to act, unless legislation specifically authorises them to do so.[61] In addition, the Constitution specifically mandates that the Police's powers are to be established in legislation.[62] In other words, the powers of the Police – including their powers of arrest – are limited to those found in legislation.

92 There are several pieces of legislation that provide for the Police's power to arrest.[63] The widest power of arrest is given in the Criminal Procedure Act, 56 of 1955.[64] Although the Criminal Procedure Act does not limit any

[61] Section 1(c) of the Constitution.
[62] Section 205(2) of the Constitution provides that national legislation "must establish the powers and functions of the police service".
[63] Section 40 of the South African Police Service Act 68 of 1995. Section 100 of the Correctional Services Act 111 of 1998.
[64] Section 39 provides:

> Manner and effect of arrest
> (1) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body.
> (2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.
> (3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody. (2) If a person may be arrested under any law without warrant and subject to conditions or the existence of circumstances set out in that law, any peace officer may without warrant arrest such person subject to such conditions or circumstances.

"authority expressly conferred by any other law to arrest",[65] the premise of the Criminal Procedure Act, in line with the principle of the rule of law, and section 205 of the Constitution, remains that the power to arrest must be expressly conferred by law.

93 Unlike the Criminal Procedure Act or similar legislation, a court order does not make substantive law. A court order cannot grant the Police powers they do not have in terms of legislation. A court order that orders the Police to arrest for a reason or in a manner other than is already provided for in law is therefore invalid.

94 In addition, as arrest infringes fundamental rights – for example, the right to freedom and security of the person – an arrest needs to be authorised by a law of general application[66] for it to be constitutionally sound. A court order is not a law of general application. A police officer cannot justify an arrest merely by reference to a court order, unless that order gives effect to an underlying legal power the police officer already has to arrest.

95 In other words, a court cannot vest an organ of state with more powers than it has in terms of legislation. Our courts have in the past nullified orders that grant to the Sheriff[67] or a liquidator[68] powers and functions not given to those functionaries in terms of legislation. Similarly, an interdict in restraint of student protest cannot give police officers powers of arrest they do not already have in terms of legislation.

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[65] Section 52 provides:

> Saving of other powers of arrest
> No provision of this Chapter relating to arrest shall be construed as removing or diminishing any authority expressly conferred by any other law to arrest, detain or put any restraint upon any person.

[66] Section 36 of the Constitution.

[67] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA); [2013] 1 All SA 8 (SCA) at para 8.

[68] *Motala v The Master* 2012 (3) SA 325 (SCA) paras 11-14.

96 In *Ramphal v Minister of Safety and Security*[69] the appellant was arrested by an investigating officer on the instructions of a prosecutor in order to induce the appellant to make a warning statement which, up until that stage, he had refused to do. The Court found that neither section 40 of the Criminal Procedure Act nor any other legislation authorised an arrest on the basis of instructions from a prosecutor. The Court further found that the investigating officer exercised his powers of arrest on the basis of following the directions of the prosecutor and not in terms of the power that was vested in him by relevant legislation and therefore did not apply his mind to the circumstances of the arrest. It is for this reason that the court found the arrest to be unlawful and hence awarded damages to the appellant. Whilst courts have more powers than prosecutors, they do not have a general power to order an arrest. [70]

97 Police officers are generally under a duty to decide for themselves when whether and when to arrest someone.[71] Although reviewable by a court, the decision-making power vests in the police officer concerned. The constitutional guarantees of dignity and liberty mandate at the very least that police officers apply their minds to the specific circumstances of each person.

98 If it is possible to grant a court order that enforces itself through arrest at all, such an order would have to preserve the police officer's general discretion not to arrest a person, if, on the facts, this would not be justified. Simply authorising the arrest of any student on breach of the order is not sufficient, especially since acting in breach of a court order is not, in itself, a crime. The conduct in breach of the court order must also be wilful and

[69] 2009 (1) SACR 211 (E).
[70] A court may be able to order a specific person is to be arrested after a finding that the Police Service failed to give effect to a legislative duty to arrest. See for example: *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (2016 (3) SA 317 (SCA).
[71] Section 40 of the Criminal Procedure Act.

in bad faith, and the student must have had notice of the court order in the first place.[72]

99 Accordingly, whether or not a person is to be arrested is a matter which has to be decided by the police officer based on circumstances in which he may be called upon to act. For example, a police officer may decide not to arrest because conduct in breach of the court order is not, in itself, a crime, or because the breach was in good faith. A court cannot deprive a police officer of this power to decide based on these specific facts. In this regard the Constitutional Court has warned that:

"it would not be desirable for this court to attempt in an abstract way from the facts of this case, to articulate a blanket, all-purpose test for constitutionally acceptable arrests. As the guidelines themselves underline, the lawfulness of an arrest will be closely connected to the facts of the situation."[73]

100 Accordingly, police powers of arrest and crowd control should never be used to enforce interdicts on University campuses, because courts cannot grant such powers unless they are already granted by legislation, and because directing the police to arrest in the event of breach of court order is an inappropriate interference with a police officer's authority.

101 It is important to emphasise that, like the Police, private security companies cannot be authorised to carry out arrests to enforce court orders. A private person's powers of arrest are delimited in section 42 of the Criminal Procedure Act.[74] Section 42 does not authorise an arrest to procure compliance with court orders.

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[72] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).
[73] *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) at para 20.
[74] Section 42 of the Criminal Procedure Act states that -
(1) Any private person may without warrant arrest any person-

102 The appropriate mechanism for enforcing a court order is to launch contempt proceedings. That may or may not entail an arrest, but the mechanism of enforcement is a summons for contempt, not an arrest. Empowering police officers or private security officers to "arrest" persons in breach of court orders, or to take steps to "enforce" orders simply encourages low-level officials, who may often be poorly trained, to overstep their statutory powers of arrest and detention. This should be avoided.

Trespass

103 The use of trespass laws as a basis to arrest student protestors is particularly ill-advised, if only on the basis that students have an at least implied right to be on a University campus by virtue of their registration. Unless that right is lawfully terminated, the law of trespass does not apply.

104 The right to be on University property may also be given tacitly if a person for some period regularly enters the property and the University fails to object. That failure may be interpreted as tacit consent.

(a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;
(b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;
(c) whom he is by any law authorized to arrest without warrant in respect of any offence specified in that law;
(d) whom he sees engaged in an affray.

(2) Any private person who may without warrant arrest any person under subsection (1) (a) may forthwith pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein.

(3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorized thereto by such owner, occupier or person in charge, may without warrant arrest the person so found.

105 In addition, a person must know or foresee that he is entering property belonging to somebody else and that he has no lawful reason for entering or remaining on the property. If he honestly thinks that he has a right to be on University property, he lacks the necessary awareness of unlawfulness and therefore the intention to trespass.[75] Ordinarily, a University will only be able to withdraw a student's right to be on campus if it suspends or expels him, or excludes him on some other lawful basis.

Gatherings Act

106 The Gatherings Act requires that notice be given prior to a gathering as defined in the Act. Police frequently arrest protestors for not obtaining such a notice. A full bench of the Free State High Court has decisively addressed this inappropriate use of the Gatherings Act as a basis for criminal prosecution and undermining protestors' rights.

107 The Court affirms that the Gatherings Act does not provide for a summary prohibition of a gathering.[76] Nor does it require "that consent be granted"[77] before a gathering proceeds. Only a convenor of a gathering where no prior notice was given is subject to criminal prosecution, not the attendees.[78]

108 The decision strengthens the right to protest and correctly criticises the inappropriate use of the Gatherings Act.

[75] *S v Peter Joseph Davids* 1966 1 PH H26 (N) 52.
[76] *Tsoaeli v State*, para 26
[77] *Tsoaeli v State*, para 42
[78] *Tsoaeli v State*, para 38

Use of Curfews

109 The University of the Witwatersrand's response to protest has included the deployment of a police and private security presence on campus.

110 As the protests and confrontations with the security measures intensified the University introduced and implemented a curfew which amongst other things led to significantly reduced library hours, and significantly reduced freedom of movement across the university and its residences. In some instances private security guards broke up meetings of students where 3 or more students appeared to be congregating.

111 The University expected students to continue writing semester tests and submitting assignments under these conditions. In some instances students were then called upon to start their final year oral examinations. The applicants in *Tlale* found this problematic and argued that the situation on campus had been too volatile for any teaching and learning to take place, let alone exam preparation.[79]

112 In the *Tlale* judgment, Van der Linde J characterised the atmosphere at the campus as one that "was generally not conducive to learning, but particularly not to examination."[80] The Court noted, however, that the University had lifted the curfew following engagement with the legal representatives of the students.

113 It is possible that curfews of this nature could be held to interfere with the right to freedom of movement in section 21 of the Constitution. In *Hotz* it was held that an interdict which excluded students from a university

[79] *Tlale and Others v University of Witwatersrand, Johannesburg and Another* (38337/2016) [2016] ZAGPJHC 323 (3 November 2016).
[80] *Tlale*, para 3.

campus infringed this right.[81] By the same token, interfering with students' movements around campus and in their residence could arguably be considered an infringement of section 21.

G CONCLUSION

114 We are of the opinion that Universities' practices in obtaining and enforcing interdicts in restraint of protest are constitutionally suspect or clearly unlawful in the respects set out above.

STUART WILSON

IRENE DE VOS

Chambers, Johannesburg, 22 December 2016

[81] *Hotz*, para 80.